IN THE SENATE OF THE UNITED STATES.

JANUARY 17, 1859.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

To the honorable the Senate and House of Representatives of the United States in Congress assembled:

The Court of Claims respectfully presents the following documents as the report in the case of

HENRY W. MORRIS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Statement of facts agreed upon in the case.
3. Brief of claimant's counsel.
4. United States Solicitor's brief.
5. Opinions of Judges Blackford and Scarburgh adverse to the claim.
6. Dissenting opinion of Judge Loring.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 17th day of January, A. D. 1859.

[L. S.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Henry W. Morris respectfully represents: That he is a captain in the navy of the United States; that he was promoted to his present rank on March 13, 1857, to fill a vacancy which had occurred in the active list on December 26, 1856, by the death of Captain Bladen Dulany; and that his commission as a captain bears date December 27, 1856, as is shown by the letter of the honorable Secretary of the Navy to him, dated March 21, 1857, which is hereunto appended;

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

and that he has received pay as a captain from the date of his commission to November 1, 1857, at the rate of $2,800 a year, as prescribed by the act of February 28, 1855.

Your petitioner further represents: That under the act of 1835, which regulates the pay of officers of the navy, his pay from December 27, 1856, to November 1, 1857, is..... $2,960 97
That he has received..... 2,368 38

And that there is still due and unpaid..... 592 59
all of which will more particularly appear by reference to an account herewith filed and prayed to be taken as a part of this petition.

Your petitioner further shows: That this balance is refused by the Navy Department, (as will appear by the letter of the Fourth Auditor to your petitioner, dated August 5, 1857, and herewith appended,) on the construction which has been given to the "act" approved February 28, 1855, entitled "An act to promote the efficiency of the navy." That act organized the late naval board, and authorized it to create a reserved list, and then provided: "That the vacancies created in the active list by placing officers on the reserved list shall be filled by regular promotion in the order of rank and seniority," and officers who may be promoted to fill the vacancies created by the reserved list shall, while so unemployed, receive only the leave of absence or waiting orders pay to which they would have been entitled if such promotion had not been made; but when employed at sea or other duty they should receive, in addition to such leave of absence or waiting orders pay, the difference between the "waiting orders" and "leave of absence pay" and the lowest sea-service pay of the grade to which they may be so promoted.

Your petitioner alleges that this act neither repealed or modified the act of 1835 in reference to the pay of officers, except as to the pay of those who were "promoted to fill the vacancies created by the reserved list. And he denies that he was so promoted, but, on the contrary, alleges that his promotion was long subsequent to the time when all the vacancies "created by the reserved list" were filled, and that his pay cannot be included within the provisions of the act of February 28, 1855, without a violation of the plainest rules for the construction of statutes.

Your petitioner further alleges that the adoption of the rule contended for at the Navy Department would decrease the aggregate pay of the navy, while the allowance of the pay contended for to himself and others standing in the same relation would not increase "the aggregate pay of said grades or of the naval service," as allowed by law at the time of the passage of said act of 1855.

Your petitioner alleges that he is the sole owner of said claim, having parted with no interest therein, and prays that a bill may be reported to Congress for the payment of the amount found due to him on the hearing of the case.

HENRY W. MORRIS.

P. PHILLIPS,
Solicitor for Claimant.

Pay received as a captain on duty, at the rate of $2,800 per annum:

From December 27 to December 31, 1856, 5 days, is.....		$28 76
From January 1 to March 31, 1857, 1st quarter, is.....		699 38
From April 1 to June 30, 1857, 2d quarter, is.....		697 48
From July 1 to September 30, 1857, 3d quarter, is.....		705 16
From October 1 to October 31, 1 month, is.....		237 60
Amount received.....		2,368 38
Amount claimed as captain on duty, at the rate of $3,500 per annum—		
From the 20th December to 31st December, 1856, 5 days.....	$47 94	
From the 1st January to 31st March, 1857.....	863 01	
From the 1st April to 30th June, 1857.....	872 60	
From the 1st July to 30th September, 1857....	882 19	
From the 1st October to 31st October, 1857....	297 26	
	2,963 00	
Deduct hospital fund, at 20 cents per month....	2 03	
		2,960 97
Difference to 1st November, 1857.....		592 59

HENRY W. MORRIS.

NAVY DEPARTMENT,
March 21, 1857.

SIR: The President of the United States, by and with the advice and consent of the Senate, having appointed you a captain in the navy, from the 28th of December, 1856, I have the pleasure to enclose herewith your commission, dated the 16th instant, the receipt of which you will acknowledge to the department.

I am, respectfully, your obedient servant,

I. TOUCEY.

Captain HENRY W. MORRIS,
United States Navy, New York.

TREASURY DEPARTMENT,
Fourth Auditor's Office, August 5, 1857.

SIR: I have received an answer from the Secretary of the Navy to the letter I addressed him in regard to your pay. The following is an extract: "It is the opinion of the department that Captain Morris is promoted to the rank of captain by the operation of the act of February 28, 1855, and is, therefore, entitled only to the modified pay prescribed by that act."

I am, sir, very respectfully, your obedient servant,

A. O. DAYTON.

Captain HENRY W. MORRIS,
United States Navy, New York.

Agreed statement of facts.

1. Captain Bladen Dulany was commissioned on the 8th September, 1841, and died on the 26th December, 1856.

2. The petitioner, Commander Henry W. Morris, was nominated to the Senate as captain, vice Bladen Dulany, deceased, and this nomination was confirmed on the 13th of March, 1857, to date from the 27th of December, 1856.

3. The amount claimed in the petition is due by the government if the petitioner is not included in the 2d section of the act of 28th February, 1855, entitled "an act to promote the efficiency of the navy."

4. On the 14th September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, and 157 lieutenants, 264 in all; of these 63 were promoted to fill pre-existing vacancies, and 20 to fill vacancies created by the retiring board.

5. The aggregate pay of the navy will not be increased by paying the petitioner, and those who stand in the same position, the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the 2d section of the act of 28th of February, 1855.

6. The petitioner would not have been entitled to promotion on the death of Captain Dulany had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retired list.

7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

8. If the petitioner be paid the aggregate pay of the navy will be increased, unless full pay be denied to some captain who is senior to the petitioner.

9. The department pays full pay to the officers promoted to fill vacancies created, so far as it does not exceed the aggregate pay of the several grades or of the service.

JOHN D. McPHERSON,
Deputy Solicitor.
H. PHILLIPS,
Solicitor for Petitioner.

Brief of argument as to the construction of the second section of the act of 28th February, 1855, modifying the pay of certain officers of the navy. Court of Claims. Henry W. Morris vs. United States. By P. Phillips, solicitor for petitioner.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS *vs.* UNITED STATES.

By the act of March 3, 1835, entitled "An act to regulate the pay of the navy of the United States," (4 Stat., p. 755,) it is provided,

that "from and after the passage of this act the annual pay of the officers of the navy of the United States shall be as follows:

"The senior captains, at all times when on service..... $4,500
"When on leave of absence or waiting orders..... 3,500
"All other captains, when in command of squadrons on foreign stations..... 4,000
"When on other duty..... 3,500
"When off duty..... 2,500"

By the third article of the agreed statement of facts, herewith filed, it is admitted, "that the amount claimed in the petition is due by the government, if the petitioner is not included in the second section of the act of February 28, 1855, entitled 'An act to promote the efficiency of the navy.'"

The first section of the act of 1855 created a naval board for the purpose of examining into "the efficiency of the officers."

The second section provided that "those officers found incapable of performing the duties of their respective ranks shall be dropped from the rolls or placed in the order of their rank upon the reserved list." That "those so placed on the reserved list shall receive the leave of absence or furlough pay to which they may be entitled when so placed according to the report of the board and the approval of the President, and shall be ineligible to further promotion." It then declares that "all vacancies created in the active service list, by placing officers on the reserved list, shall be filled by regular promotion in the order of rank or seniority. *And officers who may be promoted to fill the vacancies created by the reserved list*, shall, while unemployed, receive only the 'leave of absence' or 'waiting orders' pay, to which they would have been entitled if such promotion had not been made; but when employed at sea or on other duty, they shall receive in addition to such 'leave of absence' or 'waiting orders' pay, the difference between the 'leave of absence' or 'waiting orders' pay and the lowest sea service pay of the grade to which they may be so promoted."—(10 Statutes, page 617.)

The question presented is, whether Captain Morris is entitled to receive his pay under the provisions of the act of 1835, or whether he is to be included in the provision of the act of 1855, and so entitled only to the modified pay provided by the second section of that act.

The fourth section of the act of 1855 declares "that all laws or clauses of laws, *so far as they conflict* with the provisions of this act, are hereby repealed."

The act of 1835 is therefore in full force, and regulates the pay to which the petitioner is entitled, without such pay would be in conflict with the provisions of the act of 1855.

On the 14th September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, 157 lieutenants—in all 264. Of these, 63 were promoted to fill pre-existing vacancies, *and* 201 *to fill the vacancies created by the retiring board.*—(See 4th article of agreed statement.)

The vacancies created by the retiring board under the act of 1855 having been thus filled, on the 13th of March, 1857, the petitioner was

nominated to the Senate as captain, and confirmed, vice Bladen Dulany, who died on the 26th of December, 1856.

It is thus seen that Captain Morris' nomination took place eighteen months subsequently to the time when all the vacancies created by the naval retiring board had been filled, and was made in consequence of a vacancy created by the death of Captain Dulany, which also occurred subsequently to this period.

To maintain, therefore, that Captain Morris was promoted to fill a vacancy "created" by the naval board, it would be necessary to prove that Captain Dulany's death was caused by that board, and that having so caused his death, they had "created" the vacancy.

The board "created" the vacancies, and the law filled them. When thus filled, there never could be another vacancy "created" by the board, for the board itself had ceased to exist.

In the letter of the Fourth Auditor to the Solicitor of the Court, under date of January 12, 1858, herewith filed, he says: "The ground upon which Captain Morris was determined by the Secretary of the Navy to be entitled only to the modified compensation allowed by the act of February 28, 1855, is stated in the letter of the Secretary to this office of 5th August last. It is, that although he was not promoted immediately to a place vacated by an officer put upon the reserved list, he was nevertheless promoted '*by the operation of the act*' which prescribed the modified pay."

Now the words by the operation of this act thus marked in quotation, and thus italicised, *are nowhere to be found in the act!* Even if these words had been used, the construction would be that the proximate not the *remote* operation of the act was intended. "*In jure, non remota causa, sed proxima, spectatur.*" The construction which extends the remote operation of the act to Captain Morris will include every promotion made in the navy subsequent to the action of the board.

But it is not necessary to discuss the effect and operation of terms not to be found in the statute. If the words used have one meaning, we cannot interpret words not used in order to reach a construction deemed more equitable by those whose duty it is only to administer the law as they find it written.

We admit that if the statute be followed according to its terms, Captain Morris will receive a larger pay than a captain his senior, who was promoted to fill the vacancy created by the board. If this is anomalous or inequitable, it is because the law has made it so. Captain Morris cannot under any such plea be deprived of his pay given by the act of 1835, because the act of 1855 modifies the pay of some one else.

The rule for the construction of statutes is a very plain one. The intention of the legislature must govern, it is true, "but it must be such an intention as the legislature have used for words to express." (Dwarris, 561.)

When a law is plain and unambiguous, whether expressed in general or limited terms, the legislature must be understood to mean what they have clearly expressed, and there is consequently no room

left for construction.—(United States *vs.* Fisher, 2 Cranch 385; United States *vs.* Morris, 14 Pet., 46.)

We can only judge of the import and intention of a statute by its terms, any other rule would lead us into endless and fruitless conjecture and hopeless confusion.—(Barker *vs.* Estry, 19 Vermt., 131.)

"I cannot tell," said Paterson J., "what consequences may result from the construction which we must put upon the statute, but if mischievous they must be remedied by the legislature."—(Regina *vs.* Justices Lancashire, 11 A. & E. 157.)

"Our construction may operate to defeat the object of the statute, but it is better to abide by the consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to be the intention of the legislature."—(Rex *vs.* Barham, 8 B. & C., 104.)

These rules which control the judiciary apply with increased force to the executive departments of the government.

One of the consequences of this departure from the plain terms of the law is seen in the facts stated in the 9th article of the agreement. "The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades of the service."

Thus it is seen that not only is the law violated in excluding Captain Morris from his full pay, but that a further violation is made in giving full pay to officers who, it is admitted, were "promoted to fill the vacancies created by the reserved list." The law says that officers thus promoted shall receive modified pay. The Secretary of the Navy says they shall have full pay.

The object of the act of 1855 was not to *decrease* the aggregate pay of the navy, it provided that "nothing in this act contained should be held or construed to authorize any *increase* of the aggregate pay," &c.

The aggregate pay was to remain as it was prior to that act. But the departmental construction, which refuses full pay to Captain Morris, would have *decreased* the aggregate pay of the navy. In order to avoid a result not contemplated by the act it was necessary to give that pay to some one else. This has been effected by denying to Morris, and those in *consimili casu*, the pay they were entitled to, and giving it to others who the law says shall not receive it.

In the letter of the Auditor, heretofore referred to, he says: "I have to state that it will make no difference in the aggregate pay of the navy, so far as I can perceive, whether the rule prescribed by the Secretary of the Navy, in regard to the rate of compensation of Captain Henry W. Morris and other officers similarly situated be observed, or that insisted on by Captain Morris; since the same number in the several grades, agreeably to the practice of the department, would receive the full pay, and the only difference would be as to the grounds of selection of the persons to whom it should be allowed. When Captain Dulany died the full pay which he had been receiving, and which was claimed by Captain Morris, though not granted to him, was awarded to another officer who had been in receipt of inferior pay."

It is submitted that this is not a question of "selection," or the

power of the secretary to "award." The pay of officers does not depend upon any discretionary power of the executive, but upon the fixed and ascertained will of the legislative department, as found in the statutes of Congress.

There is, then, not only a violation of law in granting officers who were "promoted to fill vacancies created by the retired list" full pay, but the law is further violated in the *discrimination* which is made in the pay of officers of the same rank.

About one-half of the officers, as we understand, who were thus promoted now receive full pay, while the balance who were promoted in the same manner receive but the modified pay. The law recognizes no distinction between seniors and juniors of the same rank as to their pay, with but the single exception of the senior captain of the navy; as to "all other captains" the rate of compensation is made uniform.

The department, proceeding on the assumption of a power of "selection," has distributed the surplus created by withholding from Captain Morris and those similarly situated the pay their rank entitles them to, under the act of 1835, and which is understood to exceed one hundred thousand dollars among the senior officers thus promoted. If this power of selection exist, we may admit that it has been exercised equitably, but we deny that it has any warrant in law.

We maintain therefore that the rule adopted by the department involves three violations of law:

First. It refuses to Captain Morris pay which is guarantied to him by the act of 1835, and which is not in "conflict with the provisions" of the act of 1855.

Second. It gives full pay to some of the officers promoted to fill the vacancies created by the "reserved list," in express contradiction of the provisions of the act of 1855.

Third. It discriminates among officers of the *same rank* who were "promoted to fill the vacancies created by the reserved list," giving full pay to some and modified pay to others, in opposition to the provisions of the act of 1835, which, with the exception of the senior captain, places all officers of the same rank on one equal footing as to pay.

It is insisted by the solicitor that this departmental decision derives some support from the third section of the act, which is as follows:

"That nothing in this act contained shall be construed to restrict, apply to, or impair, the *regular promotion* of officers in the same list of the navy who may be at any time entitled to promotion—consequent upon deaths, dismissals, or resignations in the naval service—nor in any manner to abridge or impair the right of the Secretary of the Navy to place any officer upon furlough."

The solicitor contends that the *pay* of an officer is included in his *promotion*, and as the statute declares that the act should not be considered as restricting, applying to, or impairing that promotion, so neither does it restrict, apply to, or impair his pay; and he further contends that the officers named in the second section as "officers who may be promoted to fill the vacancies created by the reserved list," are within the influence of the third section as construed by him.

The answer to this is obvious.

First. That pay and promotion are distinct things. That they are both regulated by law, and therefore one may exist without the other.

Second. Assuming that pay as well as promotion was included in the third section. Yet to hold that it extended to "officers who may be promoted to fill the vacancies created by the reserved list" would make the third section irreconcileable with the second section, and thus operate its repeal in opposition to the cardinal rule of construction, that full effect will be given to all parts of a statute when its terms will permit it.

Third. If the third section extended to officers thus promoted, it extends to the *whole* class and not a *portion* of them, and yet the agreed statement of facts shows that but a *portion* receives their full pay.

Fourth. The term "regular promotion of officers" in case of "deaths, dismissals, or resignations," was used in apposition to the *unusual* or *irregular* promotions to vacancies created by the reserved list, and not as synonymous with them.

Fifth. If the pay, as is contended, inevitably accompanies the promotion referred to in the third section, it establishes conclusively the right of Captain Morris, for he is within the precise description of the section, being an officer "on the service list of the navy," "entitled to promotion," and actually promoted in consequence of a vacancy created by "death."

We submit, in conclusion, that there is no view that can be taken of this case by a tribunal organized to construe or enforce the law, which will deprive Captain Morris of his claim under the act of 1835. That act was a general one, passed for the purpose of regulating permanently the pay of the navy. The act of 1855 was a special one, passed for another purpose. The pay of officers who received a particular promotion only is regulated by it. Those officers are referred to in a class. That class is well defined. There can be no more doubt as to the persons who are included in it than if those who compose the class had been designated by their proper names. All other persons are therefore unaffected by it, and remain under the influence of the act of 1835. Whether the law is equal or unequal, whether just or inequitable, are questions not for the courts, nor for executive officers, but for that department upon which the Federal Constitution has conferred its legislative powers.

P. PHILLIPS,
Solicitor for petitioner.

WASHINGTON, *February* 28, 1858.

Agreed statement of facts.

1. Captain Bladen Dulany was commissioned on the 8th of September, 1841, and died on the 26th of December, 1856.

2. The petitioner, Commander Henry W. Morris, was nominated to the Senate as captain, vice Bladen Dulany, deceased, and this nomination was confirmed on the 13th of March, 1857, to date from the 28th of December, 1856.

3. The amount claimed in the petition as due by the government,

if the petitioner is not included in the second section of the act of February 28, 1855, entitled "An act to promote the efficiency of the navy."

4. On the 14th of September, 1855, there were promoted to fill vacancies on the active list 34 captains, 73 commanders, and 157 lietenants—264 in all. Of these 63 were promoted to fill pre-existing vacancies, and 201 to fill vacancies created by the retiring board.

5. The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855.

6. The petitioner would not have been entitled to promotion on the death of Captain Dulany, had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retiring list.

7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

8. If the petitioner be paid, the aggregate pay of the navy will be increased, unless full pay be denied to some captain, who is senior to the petitioner.

9. The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades or of the service.

J. D. McPHERSON,
Deputy Solicitor.
P. PHILIPS,
Solicitor for Petitioner.

TREASURY DEPARTMENT,
Fourth Auditor's Office, January 12, 1858.

SIR: In reply to your letter of the 5th instant, I have to state that it will make no difference in the aggregate pay of the navy, so far as I can perceive, whether the rule prescribed by the Secretary of the Navy, in regard to the rate of compensation of Captain Henry W. Morris, and other officers similarly situated, be observed, or that insisted on by Captain Morris; since the same number in the several grades, agreeably to the practice of the department, would receive the full pay, and the only difference would be as to the grounds of selection of the persons to whom it should be allowed. When Captain Dulany died, the full pay which he had been receiving, and which was claimed by Captain Morris, though not granted to him, was awarded to another officer who had been in receipt of inferior pay.

The ground upon which Captain Morris was determined by the Secretary of the Navy to be entitled only to the modified compensation allowed by the act of February 28, 1855, is stated in the letter of the Secretary to this office of the 5th of August last. It is, that, although

he was not promoted immediately to a place vacated by an officer put upon the reserved list, he was nevertheless promoted "*by the operation of the act,*" which prescribed the modified pay.

This office has not received from the Secretary any further information as to the reasons upon which his decision was founded, though I can easily conceive that he would be disposed to give such a construction to the law as would avoid the allowance of higher pay to junior officers than that received by their seniors of the same grades who were filling the places vacated by those put upon the reserved list, and who, according to Captain Morris' idea, must be confined perpetually to the modified compensation prescribed by the act of February 28, 1855.

I am, sir, very respectfully, yours, &c.,

A. O. DAYTON.

J. D. McPHERSON,
Deputy Solicitor Court of Claims.

IN THE COURT OF CLAIMS.

No. 1596.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Solicitor's brief.

Henry W. Morris was a commander in the navy when the retiring board sat under the act of February 28, 1855, "to promote the efficiency of the navy."

There were at that time sixty-eight captains in the navy, the number being limited by law.

Under the provisions of that act these captains were distributed into two classes, an "active service list" and a "reserved list."

Although these lists were in fact created by the act, yet the act assumes that the officers placed upon the reserved list had been taken from the active service list, and directs that "vacancies created in the active service list by placing officers on the reserved list shall be filled by regular promotion in the order of rank or seniority."

This being done, the active service list alone contained as many captains as there had previously been in the navy, being the full number limited by previous laws; and besides these there were a number of captains upon the reserved list. So that the entire number of captains in the navy after the 28th of February, 1855, and on the 23d of December, 1856, exceeded the number authorized and in service on the 28th of February, 1855, by the number on the reserved list.

On the 26th of December, 1856, Captain Dulany died. He was one of the older captains commissioned before the 28th of February, 1855, and the act of this date had had no operation upon him.

Henry W. Morris, being the senior commander, and as such next entitled to promotion, was promoted to be a captain

What authority had the President to make this promotion?

What authority had the President, on the 27th of December, 1856, to appoint Morris a captain in the navy?

His authority must be found in the statutes.

It was under no acts prior to the efficiency act of February 28, 1855. All acts up to that date authorized only sixty-eight captains in the navy, and after Dulany's death there were still ninety-eight captains in the navy, viz: sixty-seven on the active service list, and thirty-one on the reserved list.

Those on the reserved list were captains in the navy, and must be counted in the statute number.

1st. Because, if they were not, no special provision would have been needed to enable the President to fill the vacancies on the active list. If these captains were out of the statute number the President could have filled it up without legislation.

2d. Because their pay is counted as a part of the pay of the grade, in making up the aggregate, which, by the act, is not to be increased.

3d. Because they are counted in the aggregate number of officers of the navy, which, by the act, must not be increased.

They are then officers of the navy, and, being captains, are part of the number limited by law. Counting them, there were ninety-eight captains in the navy after Dulany's death; where did the President get authority to appoint the ninety-ninth captain?

The death of an officer does not necessarily create a vacancy. The office may expire with him. A provision of this kind is one mode of reducing the number of officers without dismissing any. Thus, by the act of August 4, 1842, (5 Stat., 502,) the midshipmen in the navy were diminished, and by the act of July 19, 1848, certain supernumerary officers of the army were provided for without permanently increasing the army.

A mere death then does not necessarily leave an office vacant. We must look to see whether, after that event, an office exists by law which is not filled.

Such was the question on the 27th of December, 1856.

The decision of this question depended entirely on the construction of the act of February 28, 1855; whether the power to fill vacancies in the active list was a temporary authority to be exercised but once, or whether it was a continuing authority to be so exercised as to keep the active list full. The power was to fill vacancies created by placing officers on the reserved list. This was the only power the President had or has to appoint a captain while sixty-eight other captains are in service.

The President promoted Morris, thus deciding that the clause above cited in the act of 1855 authorized him to keep the active list full.

It is indifferent to the decision of this claim whether the President acted in conformity with law or not. If wrong, Morris is not legally a captain, and cannot recover the pay. If right, he was appointed by virtue of the authority given the President to fill "vacancies created by placing officers on the reserved list." He has received the pay allowed by law to such officers.

That he was nominated to the Senate to be appointed a captain, "vice Bladen Dulany, deceased," was a mere mode of advising the

Senate that the authorized number of captains had been diminished by death; the Senate usually consents to the appointment in the precise words of the nomination, and did so, I presume, in the present case. But this did not put Morris in Dulany's place. He took place at the foot of the list, whereas Dulany was high up on the list.

On the ground that Morris was one of the "officers promoted to fill vacancies created by the reserved list," he had been denied full pay by the Navy Department, and allowed only the modified pay provided for that class of officers by the act cited. I think I have shown that Morris answered this description.

But it is said only a limited number of officers can answer that description at any one time, and there were already among the captains this number of individuals, being the very individuals who had been promoted to fill the vacancies created by the reserved list, *i. e.*, the first appointees to the vacancies; that they certainly answered the description, and if they did, none others could.

The captains here spoken of are senior to Morris. One of them, Victor M. Randolph, has, on the death of Dulany, succeeded to full pay. The position contended for by the petitioner would condemn Randolph to the lower rate of pay, while Morris, his junior, would take the higher rate.

It cannot be supposed to have been the intention of Congress to take away from any officer retained in active service, and advanced in rank by that act, any right which he would have enjoyed had the act not been passed. The officers found inefficient were to be displaced, and the efficient ones advanced. But the doctrine contended for would deprive Randolph, one of these efficient officers, of the pay which he would now be entitled to if he had not been promoted under the act.

If he had been left on the list of commanders instead of being promoted to fill one of the vacancies created by the reserve list, he, and not Morris, would have been entitled to Dulany's vacancy, and, according to the doctrine contended for, to Dulany's pay. His promotion under the act is insisted on as the ground, and the only ground, for refusing him full pay, and giving it to his junior.

The idea of the petitioner is, that the officers first promoted to fill the vacancies created by the reserve list always thereafter do, and no others ever do, answer that description; that it attaches to them as individuals, not as a class. If this be true, a master promoted to be a lieutenant in place of a lieutenant placed on the reserved list would not outgrow the distinctive mark, even if he should live to be a commodore. It would still be said of him, with truth, he was promoted to fill a vacancy created by the reserve list, and being unemployed can receive only the leave of absence pay to which he would have been entitled if such promotion had not been made. It is evident that the construction contended for would bar any future increase of the proposed officer's pay, and fix it thereafter at the rate which he would have received if the promotion had not taken place. This consequence is so absurd as imperatively to forbid the construction which involves it.

The third section of the act was intended to guard the rights of officers. It forbids any construction which would impair the regular

promotion of officers. I contend this means not only the right to be promoted, but all the rights consequent upon promotion—pay and command. As protecting simply the right to be promoted, it was utterly vain and useless. The act necessarily increased the number of officers in every grade except the lowest, and it accelerated promotion everywhere and retarded it nowhere.

See Attorney General Cushing's opinion, of February 14, 1856, on this question.

Again, it was not the design of the act to *lessen* the pay of the several grades. The provision that the aggregate pay is not to be increased, implies that it may remain the same. If, then, an officer on the reserved list dies, who, according to the petitioner's construction, would succeed to his pay? None of the old captains, for they have full pay already; none of the new captains, for they are "promoted to fill vacancies;" and there is no other person to take it, as nobody is promoted, for promotions only take place to keep full the active list. Nobody, then, can receive the pay, and the aggregate pay of grade is by so much diminished, and if all the captains on the reserved list should die, the aggregate amount paid to officers of that grade would be diminished by the amount of the pay of thirty-one captains.

The doctrine that none but the first appointees answer the description of the act leads to another consequence violative of the act. The act declares that none of its provisions shall be so construed as to increase the aggregate pay of the several grades. Hence all the new captains, in excess of the original limited number, have modified pay—not that of captains. If one of these die, and a commander be promoted to fill the vacancy, such commander, when promoted, would, according to the petitioner's construction, be entitled to full pay, the vacancy not being created by the reserved list. Then the new appointee would receive more than his predecessor, and the aggregate pay of the grade, which was up to the limit before, would necessarily be increased beyond the limit, which is contrary to the act.

I maintain, therefore, that the decision of the Secretary of the Navy upon this claim is correct.

1. Because Morris was promoted by virtue of the authority given the President by the act of February 28, 1855, to promote officers to fill vacancies created by the reserved list, and must, therefore, be considered as one of the officers so promoted.

2. Because any other construction of the act will violate the rights of senior officers, which are intended to be protected by the 3d section of the act.

3. Because the construction of the act contended for by the petitioner would, in some cases, lessen the aggregate pay of the several grades.

4. Because the same construction would, in certain cases, increase the pay of the several grades.

The true construction of the act must be such as will not involve consequences which the act itself prohibits.

J. D. McPHERSON,
Deputy Solicitor.

MORRIS *vs.* THE UNITED STATES.

Opinion of Judge BLACKFORD adverse to the claim.

This suit is brought to recover a certain balance of pay which the claimant alleges to be due to him as a captain in the navy of the United States.

The act of Congress of the 28th of February, 1855, entitled "An act to promote the efficiency of the navy," provides, among other things, that the officers of the navy in the grades of captain, commander, lieutenant, masters, and passed midshipmen, found incapable of performing their duties, should be dropped from the rolls or placed on a reserved list; that those officers thus placed on the reserved list should receive certain reduced pay; that the vacancies created in the active service list, by placing officers on the reserved list, should be filled by regular promotion in the order of rank or seniority; and that officers who might be promoted to fill the vacancies created by the reserved list should receive certain reduced pay.—(10 Stat. at Large, 616.)

In consequence of that act there were a large number of captains placed on the reserved list, and the vacancies thereby created in the active service list were filled, in September, 1855, by the promotion of commanders in the order of their rank or seniority. Among the officers so promoted from the grade of commanders to that of captains, and who accordingly received the reduced pay, was Victor M. Randolph. That officer, at the time of his promotion, stood, on the navy register, thirty numbers above Commander Morris, the present claimant. There being on the service list of commanders, at the time said vacancies were filled, a greater number of officers above Commander Morris than were required to fill those vacancies, he remained, after those vacancies were filled, in the grade of commanders. Afterwards, on the 26th of December, 1856, Captain Bladen Dulany, one of the captains receiving full pay, died; and said Captain Randolph, passing, according to the established order of promotion, into the place left vacant by Captain Dulany's death, was considered, by the Secretary of the Navy, to be entitled to full pay, and the same was paid to him accordingly. On the 13th of March, 1857, the present claimant, Morris, then a commander, was (according to a statement in the agreed case) nominated to the Senate as a captain *vice* said Bladen Dulany, deceased, and the nomination was confirmed on the 13th of March, 1857, to date from the 28th of December, 1856.

The claimant, Morris, has received, since the date of his commission as captain, the reduced pay allowed by said act of 1855 to captains promoted to fill the vacancies created by the reserved list. He now brings this suit to recover the difference between the reduced pay thus received and the full pay prescribed by the act of the 3d of March, 1835.—(4 Stat. at Large, 755.) That difference is stated by the petition to have amounted, on the 1st of November, 1857, to the sum of $592 59.

We are of opinion that the decision of the Secretary of the Navy is correct. The full pay vacancy created by the death of Captain Dulany

was filled by the advance in regular order of promotion of Captain Randolph. This advance of Captain Randolph, and the consequent advance of the captains standing below him, occasioned a vacancy at the end of the active service list of captains. That would have been the course previously to said act of 1855, on the death of one of the captains; and that act expressly provides against any change in such proceeding. It enacts that nothing in it "shall be construed to restrict, apply to, or impair, the regular promotion of officers in the service list of the navy who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations, in the naval service." The said vacancy at the end of the active service list of captains was a reduced pay vacancy, and was to be filled by the promotion of a commander. The commander entitled to fill that vacancy was Morris, and he was promoted accordingly. It is true that Morris does not fill a vacancy immediately created by the reserved list, but he stands in the place of one who did fill such vacancy, and we consider him entitled to the same rank and command, and to the same pay of the officer whose place he occupies. The two captains, Randolph and Morris, cannot both receive the full pay, for the reason, were there no other, that such pay to both would increase the aggregate pay of the grade of captains, which said act of 1855 expressly forbids. Hence, if Morris be allowed full pay, his senior officer, Randolph, can only have the reduced pay. We do not believe that Congress intended, by the act of 1855, that any junior officer should have higher pay than his seniors of the same grade.

The case before us seems to be the same in principle as if a vacancy had been created by the death of one of the reduced pay captains. Such a vacancy would be filled by the promotion of the senior commander; and it is clear that he could not receive full pay, because that would increase the pay of the grade, which, as before said, is forbidden by the act of 1855. The vacancy in such case, as in the one before us, would not be immediately created by the reserved list.

Our opinion is that the claimant has no cause of action.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

Opinion of SCARBURGH, J., adverse to the claim.

Bladen Dulany was commissioned a captain in the navy of the United States on the 8th day of September, A. D. 1841. He died on the 26th day of December, A. D. 1856. At the time of his death he was on the active service list, and in the receipt of the regular pay of a captain.

The petitioner was nominated to the Senate as captain, *vice* Bladen Dulany, deceased, and his nomination was confirmed on the 13th day of March, 1857, to bear date from the 28th of December, 1856. He has received pay as a captain to the 1st day of November, A. D. 1857,

at the rate of $2,800 a year, as prescribed by the act of February 28, A. D. 1855. He further states as follows: That under the act of 1835, which regulates the pay of officers of the navy, his pay from December 27, A. D. 1856, to November 1, 1857, is..... $2,960 97
That he has received..... 2,368 38

And that there is still due and unpaid..... $592 59

In an "agreed statement of facts," signed by the counsel for the petitioner and the deputy solicitor, it is further stated as follows:

"3. The amount claimed in the petition is due by the government, if the petitioner is not included in the second section of the act of February 28, 1855, entitled 'An act to promote the efficiency of the navy.'

"4. On the 4th of September, 1855, there were promoted, to fill vacancies on the active service list, 34 captains, 73 commanders, and 157 lieutenants—264 in all. Of these 63 were promoted to fill pre-existing vacancies, and 201 to fill vacancies created by the retiring board.

"5. The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position, the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855.

"6. The petitioner would not have been entitled to promotion on the death of Captain Dulany had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy created by the retired list.

"7. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

"8. If the petitioner be paid, the aggregate pay of the navy will be increased, unless full pay be denied to some captain who is senior to the petitioner.

"9. The department pays full pay to the officers promoted to fill vacancies created by the retiring board, so far as it does not exceed the aggregate pay of the several grades, or of the service."

The petitioner claims the above-mentioned sum of *five hundred and ninety-two dollars fifty-nine cents.*

In the construction of the act of February 18, A. D. 1855, (10 Stat. at Large, p. 616,) there are several prominent points contemplated by it which must not be disregarded:

1. That the active-service list shall not be reduced.

2. That, in view of this object, promotions are directed to fill vacancies, created in the active-service list, by placing officers on the reserved list.

3. That officers promoted to fill the vacancies created by the reserved list shall receive the modified pay prescribed by the act.

4. That the aggregate pay of the several grades embraced by the

act or of the naval service, as then allowed by law, was not to be increased.

5. That nothing in the act contained shall be construed to restrict, apply to, or impair the regular promotion of officers in the service list of the navy, who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations in the naval service.

These several objects are so plainly contemplated by the act, that if the words be susceptible of it, such a construction must be adopted as will not defeat any of them. This, I think, can be done without difficulty, at least as regards the petitioner's case.

V. M. Randolph was promoted to fill a vacancy created by the reserved list. This was a special promotion, authorized by the act of 1855. It gave him the office, but not the pay of a captain ; it entitled him only to the modified pay allowed by that act. It was not full promotion, but a promotion for the purposes of the act of 1855. No vacancy had occurred in the office of captain in the navy, but only in the active service list of the grade of captain. No officer of that grade in the navy had died, been dismissed, or resigned ; the promotion, therefore, was peculiar and imperfect. It was something entirely distinct and separate from the promotion which was previously known in the navy, and which was to continue, and does continue, unimpaired and unrestricted by the act of 1855, because that act shall not be construed to apply to such promotion. Although it was a "regular promotion, in the order of rank and seniority," in the sense of the second section of the act of 1855, yet it plainly was not "the regular promotion" mentioned in the third section of the act. To the latter promotion, it must be borne in mind, the act does not apply. Hence, upon the death of Dulany, Randolph became entitled to "the regular promotion" referred to in the third section of the act. This is obviously true, for otherwise the act of 1855 would *apply* to such promotions, and *restrict* and *impair* them, which is expressly forbidden. By that promotion he would become entitled to the regular pay of a captain ; but he was already commissioned as a captain, and enjoyed the office and rank of a captain. To complete his promotion, to make it what it would have been if the act of 1855 had not been passed ; in a word, to give him "the regular promotion" mentioned in the third section of that act, to which he had become entitled, it was only necessary to allow him the regular pay of a captain. This being done, he was no longer an officer promoted to fill a vacancy created by the reserved list, but enjoyed a promotion consequent upon the death of his senior officer.

The effect of V. M. Randolph's promotion to fill the vacancy occasioned by the death of Dulany, was to leave a vacancy created by the reserved list unfilled. The petitioner was entitled to this, and it was given to him ; and thus it was again "filled by regular promotion in the order of rank or senority," in pursuance of the provisions of the act of 1855. He was promoted to the office of captain, with the modified pay allowed by that act, and fills a vacancy created in the active-service list, by placing officers on the reserved list. A similar promotion must occur whenever a captain, who was promoted to fill a vacancy created by the reserved list, dies, for otherwise the active-

service list could not be kept full; but it is a special promotion under the act of 1855, and entitles the officer promoted only to the modified pay of that act. It cannot be "the regular promotion" to which the act does not apply, for if it were, the aggregate pay of the grade would be increased. It is emphatically a promotion to fill a vacancy on the active-service list created by the reserved list.

The captains on the reserved list are out of the line of promotion, and receive leave of absence pay, or furlough pay, but they are not out of office. When one of them dies, there is a vacancy in the office of captain in the navy, and a regular promotion consequent upon his death must take place. His office, however, has already been filled, but *sub modo* only. He continued to hold it till his death, but his place on the active-service list, made vacant by his being placed on the reserved list, was filled by one who has the office and rank, but not the pay of a captain. Upon the death of the retired officer, the senior officer upon the list of those promoted to fill vacancies created by the reserved list, becomes entitled to regular promotion—the promotion consequent upon the death of his superior officer—and to regular pay. He has already the office and rank of captain; to consummate his promotion, to make it the regular promotion to which he is entitled, and to which the act of 1855 does not apply, it is only necessary to give him in addition the regular pay of a captain. He is then no longer an officer promoted to fill a vacancy created by the reserved list; and the aggregate pay of his grade, or of the naval service, is not increased. Thus the number of those promoted to fill vacancies created by the reserved list will on each successive death, resignation, or removal of the officers on the reserved list be reduced, until upon the death, resignation, or removal of the last survivor, all the officers on the active-service list will be entitled to and enjoy full promotion and regular pay.

Such, it seems to me, is the proper construction, and the true spirit and operation of the act of 1855. This construction interferes as little as practicable with the previously established principles governing the naval service, especially as regards grade and seniority. It is consistent alike with the words and spirit of the act; it contemplates the act as a whole, regarding the dependence and connexion of the several parts, and giving due effect to each. But the construction contended for by the petitioner gives undue weight to one portion of the act at the expense of another portion. It disturbs the order of rank and seniority in the navy, by giving to a younger officer higher pay than it gives to his senior and superior in rank, whilst it was obviously the intention of the act to guard against such a disturbance. It restricts and impairs regular promotions in the navy, in direct conflict with the express provisions of the third section of the act. It disregards the principle that one part of a statute must be so construed by another, that the whole may if possible stand. In a word, it is, it seems to me, inconsistent with both the language and spirit of the act considered as a whole.

My opinion is that the petitioner is not entitled to relief.

IN THE COURT OF CLAIMS.

HENRY W. MORRIS *vs.* THE UNITED STATES.

LORING, Justice.

As I dissent from the opinion of the majority of the Court, I am to state my reasons for my dissent:

The petitioner was promoted to be a captain in the navy by a commission "to date from the 28th of December, 1856," and to which he became entitled in the order of rank or seniority on the death of Captain Dulany, which took place on the 26th of December, 1856. The petitioner alleges that by such promotion he became entitled to the full pay prescribed for officers of his grade by the "Act to regulate the pay of the navy of the United States" of March 3, 1835; (4 Stat. at Large, 755;) that he has been paid only the modified pay which, by the "Act to promote the efficiency of the navy" of February 28, 1855, (10 Stat. at Large, 616,) is prescribed for officers promoted to fill "the vacancies created by the reserved list," and he claims a balance of pay to be due to him.

The act of 1855, section 2, enacts as follows: "And officers who may be promoted to fill the vacancies created by the reserved list shall, while unemployed, receive only 'the leave of absence' or 'waiting orders' pay, to which they would have been entitled if such promotion had not been made; but when employed at sea, or on other service, they shall receive in addition to such 'leave of absence' or 'waiting orders' pay, the difference between 'the waiting orders' or 'leave of absence' pay and the lowest sea pay of the grade to which they may be promoted."

It is claimed by the United States that Captain Morris is one of the officers "promoted to fill the vacancies created by the reserved list," and is therefore within the provisions of the statute cited above; and the position is rested on the sixth and seventh propositions of the agreed statement of facts, which are as follows:

6th. The petitioner would not have been entitled to promotion on the death of Captain Dulany, had not a senior commander, V. M. Randolph, been previously promoted to fill a vacancy in the rank of captain created by the retired list.

7th. Had not Commander V. M. Randolph been previously promoted to fill a vacancy created by the retired list, he would have been entitled to promotion to the vacancy occasioned by Captain Dulany's death.

It seems to me that the result of these propositions is, that the petitioner was not, and Captain V. M. Randolph was, promoted to fill a vacancy created by the reserved list; and that the consequence is, that the former is not, and the latter is, within the provisions of the 2d section of the act of 1855, c. 127, cited above. The description of the officers to whom those provisions are applicable is as specific and precise as it could be made. The words of the act are, "officers who may be promoted to fill the '*vacancies*' created by the reserved list." The only "*vacancies*" referred to, are those created by the reserved list,

and *by that alone*, or without more; and the only officers referred to, are those promoted for the purpose of filling such vacancies, and for *no other reason*, and other officers are not within the terms of the statute description.

The act of 1855, c. 127, "to promote the efficiency of the navy," was an expedient without precedent and without rule, other than its own text; it was made and used for the occasion, and ceased with it. Its provisions, therefore, are not to be extended by construction beyond the plain reach of their terms. Its contemplated action was to create at once and altogether a great number of vacancies in every grade within its scope, and at once to fill these vacancies by promotions, and thus to advance many officers in each grade, sooner than they would have been advanced by the laws for the organization of the navy. This was the general consequence of the act, and its advantage occurred directly and especially to those officers in each grade promoted to fill the vacancies created by the reserved list. There might be a reason and an equity, therefore, in qualifying this advantage by the provisions in the 2d section modifying the pay of such officers, and in confining those provisions to them.

And if the provisions of the statute, construed according to the ordinary meaning of their terms, meet the general consequence of the act, it is no reason against such construction or for transcending the letter of the statute, that, in the peculiar circumstances of a particular case, it works a hardship or a result not contemplated; for every statute does that, and it is unavoidable, for the variety of circumstances of particular cases is beyond the compass of human forecast.

And whatever may have been the reasons of the legislature for the provisions of the 2d section referred to, if the description of the class of officers to whom those provisions are there applied is clear and unambiguous, then those provisions cannot be extended by judicial construction to other officers not within the letter of that description; for it cannot be shown that such other officers are within the reasons which induced those provisions, and by the general rule the specification of *one class* in a statute excludes all other classes. Now, on the facts, Captain Morris is not within the letter of that description, for he was promoted to fill a vacancy in the complement of a grade created by the death of Captain Dulany; and upon the argument of the solicitor, he was promoted to fill such a vacancy created by the reserved list *and* the death of Captain Dulany, and that does not bring him within the letter of the statute description; while Captain Randolph, when he was promoted from a commander to be a captain, was, as is admitted, promoted to fill a vacancy created by the reserved list, and since then he has not been promoted at all.

The argument for the United States assumes as its basis that by Captain Dulany's death some change took place in the position of Captain Randolph which entitled him to full pay. This proposition is necessary to sustain the defence, but those who adduce it must put their finger on the change and show just what it was, and they then must produce the laws which authorize the increase of an officer's pay for the change in position shown. It seems to me that Captain

Dulany's death produced two, and only two changes, in the position of any and all of the officers below him.

First it created a *vacancy* in the complement of the grade of captains, and it did not and could not create any other *vacancy*, for, as used in the statutes, the word *vacancy*, refers to the complement of a grade, and is predicable of nothing else; and this vacancy can be filled only by *promotion*, and that means, in the statute, *advance in grade;* of its own force it involves a change of grade—a single act, from its nature complete at once, and not subject to degrees in its maturity.

Now it is certain that Captain Randolph did not succeed to this *vacancy* in the complement of the grade of captain, and that Captain Morris did; and that Captain Randolph was not "promoted," and that Captain Morris was; so that this first consequence of Captain Dulany's death made no change in the position of Captain Randolph.

The second consequence of Captain Dulany's death was, that all the captains below him were advanced in "the order of rank or seniority, and that Captain Randolph being next in that order to Captain Dulany, succeeded to the seniority he had held. This was undoubtedly a change in Captain Randolph's position; but mere seniority in the same grade has nothing to do with pay, and there is no law which authorizes the increase of the pay of an officer for an advance in mere seniority in his grade. Captain Dulany's seniority did not make or enter into his title to his full pay, and it cannot of its own force make such title for his successor in that seniority, and in nothing else.

The result that gave to Captain Randolph full pay upon Captain Dulany's death seems to have been reached by assuming that Captain Dulany's death made *a vacancy in the full pay list*, to which Captain Randolph, as next in order of rank or seniority, succeeded, and that thereby he was removed from the class of officers "promoted to fill vacancies created by the reserve list;" and his promotion, imperfec- before, was completed. Such an arrangement may be efficient to prevent the alleged anomaly of a junior officer receiving higher pay than his senior in the same grade; but the question in the case is, where is the law which authorizes such an arrangement or furnishes the machinery for it? which recognizes such things as *a vacancy in the full pay list*, or "*a promotion*" of gradual growth and maturity, imperfect when made, and completed by subsequent contingencies?

The only "*vacancies*" recognized by the statutes are vacancies in the complement of a grade, and these are filled only, and at once completely, by that advance in the grade which, by the statutes, is "*promotion.*" On this fixed meaning of the words "*vacancies*" and "*promotion*" the statutes have organized the navy, and to assume other "*vacancies,*" and then, on succession in them, to graduate the pay of officers and predicate the completion of their "*promotion,*" seems to me to alter the statutes and the organization they make.

Nor can Captain Randolph's position be affected by the 3d section of the statute of 1855. That section by its terms refers only to officers whose promotions are "consequent upon deaths, dismissals, and resignations." And if, as I have contended, Captain Randolph was by Captain Dulany's death, advanced only in seniority of rank, and thereby received no *promotion*, in the statute meaning of that word,

then he in no way comes within the terms or scope of that 3d section; and, in my opinion, the 3d section of the act of 1855 removes from the operation of that act the promotion of all officers whose promotion was "consequent upon deaths, dismissals, or resignations." The words of that section are as follows: Sec. 3. *And be it further enacted,* That nothing in this act contained shall be construed to restrict, apply to, or impair, the regular promotion of officers in the service list of the navy who may be at any time entitled to promotion, consequent upon deaths, dismissals, or resignations in the naval service." Captain Morris is directly within that description if any officer can be; and if his "promotion" is removed from the act of 1855 I can find no authority for separating from his promotion its consequences, the pay and emoluments fixed for his grade by the act of 1835.

It was argued for the United States that the construction of the act of 1855 must be such as will fulfil its enactment in the 2d section, "that nothing in this act contained shall be held or construed to authorize any increase of the aggregate pay of the said grades, or of the naval service as now allowed by law" But it is observable that this clause is expressly confined to the provisions contained in the act of 1855, itself, and can, therefore, operate on nothing else. It stands as a condition annexed to those provisions, and its utmost effect can only be that the provisions for the payment of officers contained in that act of 1855 shall not be carried out to increase the aggregate pay referred to. The clause does not refer to, and gives no authority to alter or reduce the pay, provided for in the act of 1835, ch. 27, and belonging to the officers within it, and the act of 1835 must be carried out as it stands, unless it has been repealed altogether or in part.

The 4th section of the act of 1855, ch. 127, enacts that "all laws and clauses of laws, so far as they conflict with the provisions of this act, are hereby repealed." Under such a clause, the conflict between the statutes of 1835 and 1855, to effect any repeal of the former, must appear as they stand together on the statute book, and there is no such conflict shown here. On the contrary, the 5th proposition in the agreed statement of facts, states thus: "The aggregate pay of the navy will not be increased by paying the petitioner and those who stand in the same position the full pay claimed, if those who were promoted to fill the vacancies occasioned by the retiring board are confined to the modified pay provided by the second section of the act of February 28, 1855." So that it is clear and agreed that both statutes may be administered together, and each according to its very letter. In such case, I think there is no authority for departing from the letter of either; and as, in my opinion, Captain Morris is within the provision of the statute of 1835, ch. 27, and is not within the second section of the statute of 1855, ch. 127, I am of opinion that he is entitled to the relief he prays for.