

Opinion of the Court.

FRENCH *v.* HOPKINS.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Submitted January 30, 1888. — Decided February 6, 1888.

The case is dismissed for want of jurisdiction as the record fails to show, expressly or by implication, that any right, title, privilege, or immunity under the Constitution or laws of the United States was specially set up or claimed in either of the courts below.

The jurisdiction of this court under Rev. Stat. § 709, for the review of the decision of the highest court of a State is not dependent upon the citizenship of the parties.

MOTION TO DISMISS. The case is stated in the opinion of the court.

*Mr. W. M. Stewart* for the motion.

*Mr. J. W. Douglass* and *Mr. C. M. Jennings* opposing.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This motion is granted. The record fails to show, either expressly or by implication, that any "right, title, privilege, or immunity," under the Constitution or laws of the United States, was "specially set up or claimed" in either of the courts below. This is fatal to our jurisdiction. *Spies v. Illinois*, 123 U. S. 131, 181. The only question below was, whether a sale of mortgaged property under a decree of foreclosure should be set aside because the property had been sold "as a whole and in one parcel," when it was capable of division into parts. The court of original jurisdiction set aside the sale, but the Supreme Court, on appeal, confirmed it, and gave judgment accordingly. In doing this, it was held to be "within the jurisdiction of the court by its judgment to direct that the property should be sold in one or several parcels," and that there was nothing in the statutes of the State to the contrary of this. That was the only decision in the case, and it certainly involved no question of federal law.

## Statement of the Case.

Counsel are in error in supposing that our jurisdiction, under § 709 of the Revised Statutes, for the review of a decision of the highest court of a State is dependent at all on the citizenship of the parties. In such cases we look only to the questions involved.

*Dismissed.*

## UNITED STATES v. SMITH.

CERTIFICATE OF DIVISION OF OPINION FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Argued January 16, 1888. — Decided February 6, 1888.

Section 3639 of the Revised Statutes does not apply to clerks of a collector of customs.

Clerks of a collector of customs are not appointed by the head of a department, and are not officers of the United States in the sense of the Constitution.

THE court stated the case as follows :

This case comes from the Circuit Court for the Southern District of New York, on a certificate of division of opinion between its judges. The defendant was a clerk in the office of the collector of customs for the collection district of the city of New York, and in 1886 was indicted for the unlawful conversion to his own use of public money, an offence designated in the Revised Statutes as embezzlement of such money. The indictment contains seventy-five counts, each charging the defendant with a separate act of embezzlement. The counts were all in the same form, and the objections to one are equally applicable to the whole of them. The first one is as follows :

“The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that Douglas Smith, late of the city and county of New York, in the district and circuit aforesaid, heretofore, to wit, on the eleventh day of October, in the year of our Lord one thousand eight hundred and eighty-three, at the southern district of New York, and within the jurisdiction of this court, he, the said Douglas Smith, being then and there a person charged by an