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REPORTS

OF

CASES

ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF THE

UNITED STATES.

February Term, 1824.

BY HENRY WHEATON,
Counsellor at Law.

VOLUME IX.

NEW-YORK:
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1824.

Southern District of New-York, ss.

BE IT REMEMBERED, That on the 21st day of September, A. D. 1824, in the forty-ninth year of the Independence of the United States of America, Henry Wheaton, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"*Reports of Cases argued and adjudged in the Supreme Court of the United States, February Term, 1824.* By Henry Wheaton, Counsellor at Law. Volume IX."

In conformity to the act of Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the time therein mentioned." And also to an act, entitled, "An act supplementary to an act, entitled, an act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

JAMES DILL,
Clerk of the Southern District of New-York.

JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. THOMAS TODD, Associate Justice.
The Hon. GABRIEL DUVALL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.

WILLIAM WIRT, Esq. Attorney-General.

Memorandum.—Mr. Justice THOMPSON was appointed the 9th of December, 1823, and took his seat on the bench the 10th of February of the present term. He took no part in the decision of causes argued before that day.

RULES OF COURT.

February Term, 1824.

1. No certiorari for diminution of the record shall be hereafter awarded, in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari shall be made at the first term of the entry of the cause; otherwise the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay.

2. In all cases of equity and admiralty jurisdiction heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record, as evidence, unless objection was taken thereto in the Court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

3. On Saturday of each week during the sitting of the Court, motions, in cases not required by the rules of Court to be put upon the docket, shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket.

TABLE

OF

THE NAMES OF THE CASES

REPORTED IN THIS VOLUME.

A.

The Apollon, [Instance Court.] 362

B.

Bank of Columbia, (Renner *v.*) [Promissory Note. Evidence. Pleading.] 581
Bank of Washington, (M'Gruder *v.*) [Promissory Note.] 598
Bank of the United States, (Osborn *v.*) [Constitutional Law. Chancery.] 738
Bank of the United States *v.* Planters' Bank of Georgia, [Constitutional Law.] 904
Burr, (*Ex parte*) [Practice.] 529
Brodie, (Catlett *v.*) [Practice.] 553
Baits *v.* Peters, [Extinguishment.] 556

C.

Catlett *v.* Brodie, [Practice.] 553
Craig, (Walden *v.*) [Practice.] 576

D.

Doddridge *v.* Thompson, [Local Law.] 469
Dorr, (Sebree *v.*) [Local Law. Promissory Note.] . 558
Danforth *v.* Wear, [Local Law.] 673

E.

The Emily and the Caroline, [Instance Court. Slave Trade Acts.] 381
Edwards, (Hughes *v.*) [Chancery. Mortgage.] . 489
Ex parte Burr, [Practice.] 529
Ex parte Wood, [Patent. Practice.] 603

F.

The Fanny, [Prize.] 658

G.

Gibbons *v.* Ogden, [Constitutional Law.] . . . 1

H.

Hughes v. Edwards, [Chancery. Mortgage.] . . 489

I.

Ingle, (Stuart v.) [Practice.] 526

K.

Kirk v. Smith, [Local Law.] 241
Kerr v. Moon, [Lex Loci.] 565
Kirkpatrick, (United States v.) [Surety.] . . . 720

L.

Love v. Simms, [Local Law.] 515

M.

Meredith v. Picket, [Local Law.] 573
The Monte Allegre, [Prize. Judicial Sale.] . . 616
Mollan v. Torrance, [Practice. Jurisdiction.] . . 537
M'Grtider v. Bank of Washington, [Promissory Note.] 598
M'Iver, (Smith v.) [Chancery. Jurisdiction.] . . 532
Mason, (Taylor v.) [Devise.] 325
M'Creery v. Somerville, [Local Law. Construction of Statute.] 354
The Merino *et al.* [Instance Court. Slave Trade Acts.] 391
The Margaret *alias* Carlos Fernando, [Instance Court. Ship Registry Act.] 421
Mason v. Muncaster, [Local Law.] 445
M'Cargo, (Stephens v.) [Local Law.] 502
Moon, (Kerr v.) [Lex Loci.] 565
M'Iver v. Wattles, [Practice.] 650
Miller v. Stewart, [Surety.] 680

O.

Ogden, (Gibbons v.) [Constitutional Law.] . . 1
Osborn v. Bank of the United States, [Constitutional Law. Chancery.] 738

P.

Peyton v. Robertson, [Jurisdiction.] 527
Peters, (Baits v.) [Extinguishment.] 556
Picket, (Meredith v.) [Local Law.] 573
Perez, (United States v.) [Practice.] 579
Planters' Bank of Georgia, (Bank of the United States v.) [Constitutional Law.] 904

R.

Riggs v. Tayloe, [Evidence.] 483
Robertson, (Peyton v.) [Jurisdiction.] . . . 527
Renner v. Bank of Columbia, [Promissory Note. Evidence. Pleading.] 581

S.

Sebree v. Dorr, [Local Law. Promissory Note.] . 558

Stewart, (Miller *v.*) [Surety.] 680
Stewart *v.* Ingle, [Practice.] 526
Smith *v.* M'Iver, [Chancery. Jurisdiction.] . . 532
Simms, (Love *v.*) [Local Law.] 515
Smith, (Kirk *v.*) [Local Law.] 241
Somerville, (M'Creery *v.*) [Local Law. Construction of Statute.] 354
The St. Jago de Cuba, [Instance Court. Slave Trade Acts. Lien of Material Men.] . . . 409
Stephens *v.* M'Cargo, [Local Law.] 502

T.

Taylor *v.* Mason, [Devise.] 325
Tea, (200 chests of,) [Instance Court.] . . . 430
Thompson, (Doddridge *v.*) [Local Law.] . . . 469
Tayloe, (Riggs. *v.*) [Evidence.] 483
Torrance, (Mollan *v.*) [Practice. Jurisdiction.] . 537
Turner, (Walker *v.*) [Local Law.] 541

U.

United States *v.* Perez, [Practice.] 579
United States, (Walton *v.*) [Construction of Statute.] 651
United States *v.* Kirkpatrick, [Surety.] . . . 720

W.

Walker *v.* Turner, [Local Law.] 541
Walden *v.* Craig, [Practice.] 576
Wood, (*Ex parte*) [Patent. Practice.] 603
Wattles, (M'Iver *v.*) [Practice.] 650
Walton *v.* United States, [Construction of Statute. Practice.] 651
Wear, (Danforth *v.*) [Local Law.] 673

MEMORANDUM.

The case of *Ogden v. Saunders*, and the causes involving the question of the validity of the State bankrupt or insolvent laws, which were argued at the present term, by Mr. *Clay*, Mr. *D. B. Ogden*, and Mr. *Haines*, for the validity, and by Mr. *Webster* and Mr. *Wheaton*, against it, were continued to the next term, for advisement. It is the intention of the Editor to publish a separate account of these cases, on the rising of the Court at the next term, and in anticipation of the annual publication of the Reports.

It is also his intention to commence with the next term a new series of the Reports, and to reduce the size of the type, so as to give room for the matter produced by the increased business of the Court, without swelling the volume to an inconvenient bulk.

REPORTS

OF

THE DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1824.

[Constitutional Law.]

Gibbons, *Appellant*, v. Ogden, *Respondent*.

The acts of the Legislature of the State of New-York, granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam.

APPEAL from the Court for the Trial of Impeachments and Correction of Errors of the State of New-York. Aaron Ogden filed his bill in the Court of Chancery of that State, against Thomas Gibbons, setting forth the several acts of the Legislature thereof, enacted for the purpose of securing to Robert R. Livingston and Robert Fulton, the

1824.

Gibbons v. Ogden.

exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years which has not yet expired; and authorizing the Chancellor to award an injunction, restraining any person whatever from navigating those waters with boats of that description. The bill stated an assignment from Livingston and Fulton to one John R. Livingston, and from him to the complainant, Ogden, of the right to navigate the waters between Elizabethtown, and other places in New-Jersey, and the city of New-York; and that Gibbons, the defendant below, was in possession of two steam boats, called the Stoudinger and the Bellona, which were actually employed in running between New-York and Elizabethtown, in violation of the exclusive privilege conferred on the complainant, and praying an injunction to restrain the said Gibbons from using the said boats, or any other propelled by fire or steam, in navigating the waters within the territory of New-York. The injunction having been awarded, the answer of Gibbons was filed, in which he stated, that the boats employed by him were duly enrolled and licensed, to be employed in carrying on the coasting trade, under the act of Congress, passed the 18th of February, 1793, c. 8. entitled, "An act for enrolling and licensing ships and vessels to be employed in the coasting trade and fisheries, and for regulating the same." And the defendant insisted on his right, in virtue of such licenses, to navigate the waters between Elizabethtown and the city of New-York, the said acts of the Legislature of the

State of New-York to the contrary notwithstanding. At the hearing, the Chancellor perpetuated the injunction, being of the opinion, that the said acts were not repugnant to the constitution and laws of the United States, and were valid. This decree was affirmed in the Court for the Trial of Impeachments and Correction of Errors, which is the highest Court of law and equity in the State, before which the cause could be carried, and it was thereupon brought to this Court by appeal.

1824.

Gibbons v. Ogden.

Mr. *Webster*, for the appellant, admitted, that there was a very respectable weight of authority in favour of the decision, which was sought to be reversed. The laws in question, he knew, had been deliberately re-enacted by the Legislature of New-York; and they had also received the sanction, at different times, of all her judicial tribunals, than which there were few, if any, in the country, more justly entitled to respect and deference. The disposition of the Court would be, undoubtedly, to support, if it could, laws so passed and so sanctioned. He admitted, therefore, that it was justly expected of him that he should make out a clear case; and unless he did so, he did not hope for a reversal. It should be remembered, however, that the whole of this branch of power, as exercised by this Court, was a power of revision. The question must be decided by the State Courts, and decided in a particular manner, before it could be brought here at all. Such decisions alone gave the Court jurisdiction; and therefore, while they are to be re-

Feb. 4th, 5th, and 6th.

1824.

Gibbons v. Ogden.

spected as the judgments of learned Judges, they are yet in the condition of all decisions from which the law allows an appeal.

It would not be a waste of time to advert to the existing state of the *facts* connected with the subject of this litigation. The use of steam boats, on the coasts, and in the bays and rivers of the country, had become very general. The intercourse of its different parts essentially depended upon this mode of conveyance and transportation. Rivers and bays, in many cases, form the divisions between States; and thence it was obvious, that if the States should make regulations for the navigation of these waters, and such regulations should be repugnant and hostile, embarrassment would necessarily happen to the general intercourse of the community. Such events had actually occurred, and had created the existing state of things.

By the law of New-York, no one can navigate the bay of New-York, the North River, the Sound, the lakes, or any of the waters of that State, by steam vessels, *without a license from the grantees of New-York*, under penalty of forfeiture of the vessel.

By the law of the neighbouring State of Connecticut, no one can enter her waters with a steam vessel *having such license.*

By the law of New-Jersey, if any citizen of that State shall be *restrained*, under the New-York law, from using steam boats between the ancient shores of New-Jersey and New-York, he shall be entitled to an action for damages, *in*

New-Jersey, with treble costs against the party who thus restrains or impedes him *under the law of New-York!* This act of New-Jersey is called an act of *retortion* against the illegal and oppressive legislation of New-York; and seems to be defended on those grounds of public law which justify *reprisals* between independent States.

It would hardly be contended, that *all* these acts were consistent with the laws and constitution of the United States. If there were no power in the general government, to control this extreme belligerent legislation of the States, the powers of the government were essentially deficient, in a most important and interesting particular. The present controversy respected the earliest of these State laws, those of New-York. On those, this Court was now to pronounce; and if they should be declared to be valid and operative, he hoped somebody would point out *where* the State right stopped, and on what grounds the acts of other States were to be held inoperative and void.

It would be necessary to advert more particularly to the laws of New-York, as they were stated in the record. The first was passed March 19th, 1787. By this act, a sole and exclusive right was granted to *John Fitch*, of making and using every kind of boat or vessel impelled by steam, in all creeks, rivers, bays, and waters, within the territory and jurisdiction of New-York, for fourteen years.

On the 27th of March, 1798, an act was passed, on the suggestion that Fitch was dead, or had withdrawn from the State, without having made

1824.

Gibbons v. Ogden.

any attempt to use his privilege, repealing the grant to him, and conferring similar privileges on *Robert R. Livingston*, for the term of twenty years, on a suggestion, made by him, *that he was possessor of a mode of applying the steam engine to propel a boat, on new and advantageous principles.* On the 5th of April, 1803, another act was passed, by which it was declared, that the rights and privileges granted to *R. R. Livingston*, by the last act, should be extended to him and *Robert Fulton, for twenty years, from the passing of this act.* Then there is the act of April 11, 1808, purporting to extend the monopoly, in point of time, five years for every additional boat, the whole duration, however, not to exceed thirty years; and forbidding any and all persons to navigate the waters of the State, with any steam boat or vessel, without the license of *Livingston and Fulton*, under penalty of forfeiture of the boat or vessel. And, lastly, comes the act of April 9, 1811, for enforcing the provisions of the last mentioned act, and declaring, that the forfeiture of the boat or vessel, found navigating against the provisions of the previous acts, shall be deemed to accrue on the day on which such boat or vessel should navigate the waters of the State; and that *Livingston and Fulton* might immediately have an action for such boat or vessel, in like manner as if they themselves had been dispossessed thereof by force; and that on bringing any such suit, the defendant therein should be prohibited, by injunction, from removing the boat or vessel out of the State, or using it within the State. There were

one or two other acts mentioned in the pleadings, which principally respected the time allowed for complying with the condition of the grant, and were not material to the discussion of the case.

By these acts, then, an exclusive right is given to *Livingston and Fulton*, to use *steam navigation* on all the waters of New-York, for thirty years from 1808.

It is not necessary to recite the several conveyances and agreements, stated in the record, by which *Ogden*, the plaintiff below, derives title under *Livingston and Fulton*, to the exclusive use of part of these waters.

The appellant being owner of a steam-boat, and being found navigating the waters between New-Jersey and the city of New-York, over which waters *Ogden*, the plaintiff below, claimed an exclusive right, under *Livingston and Fulton*, this bill was filed against him by *Ogden*, in October, 1818, and an injunction granted, restraining him from such use of his boat. This injunction was made perpetual, on the final hearing of the cause, in the Court of Chancery; and the decree of the Chancellor has been duly affirmed in the Court of Errors. The right, therefore, which the plaintiff below asserts to have and maintain his injunction, depends obviously on the general validity of the New-York laws, and, especially, on their force and operation as against the right set up by the defendant. This right he states, in his answer, to be, that he is a citizen of New-Jersey, and owner of the steam-boat in question; that the boat was a *vessel* of more than twenty

1824.

Gibbons v. Ogden.

tons burden, *duly enrolled and licensed for carrying on the coasting trade*, and intended to be employed by him, in that trade, between Elizabethtown, in New-Jersey, and the city of New-York; and was actually employed in navigating between those places, at the time of, and until notice of the injunction from the Court of Chancery was served on him.

On these pleadings the substantial question is raised: Are these laws such as the Legislature of New-York had a right to pass? If so, do they, secondly, in their operation, interfere with any right enjoyed under the constitution and laws of the United States, and are they, therefore, void, as far as such interference extends?

It may be well to state again their general purport and effect, and the purport and effect of the other State laws, which have been enacted by way of retaliation.

A steam vessel, of any description, going to New-York, is forfeited to the representatives of *Livingston and Fulton, unless she have their license.*

Going from New-York, or elsewhere, to Connecticut, she is prohibited from entering the waters of that State, *if she have such license.*

If the representatives of *Livingston and Fulton, in New-York*, carry into effect, by judicial process, the provision of the New-York laws, against any citizen of New-Jersey, they expose themselves to a statute action, *in New-Jersey*, for all damages, and treble costs.

The New-York laws extend to all steam vessels;

1824.

Gibbons v. Ogden.

to steam frigates, steam ferry-boats, and all intermediate classes.

They extend to public as well as private ships; and to vessels employed in foreign commerce, as well as to those employed in the coasting trade.

The remedy is as summary as the grant itself is ample; for immediate confiscation, without seizure, trial, or judgment, is the penalty of infringement.

In regard to these acts, he should contend, in the first place, that they exceeded the power of the Legislature; and, secondly, that if they could be considered valid, for any purpose, they were void, still, as against any right enjoyed under the laws of the United States, with which they came in collision; and that, in this case, they were found interfering with such rights.

He should contend, that the power of Congress to regulate commerce, was complete and entire, and, to a certain extent, necessarily exclusive; that the acts in question were regulations of commerce, in a most important particular; and affecting it in those respects, in which it was under the exclusive authority of Congress. He stated this first proposition guardedly. He did not mean to say that *all* regulations which might, in their operation, affect commerce, were exclusively in the power of Congress; but that *such power* as had been exercised in this case, did not remain with the States. Nothing was more complex than commerce; and in such an age as this, no words embraced a wider field than *commercial regulation*. Almost all the business and intercourse of

1824. Gibbons v. Ogden.

life may be connected, incidentally, more or less, with *commercial regulations*. But it was only necessary to apply to this part of the constitution the well settled rules of construction. Some powers are holden to be exclusive in Congress, from the use of exclusive words in the grant; others, from the prohibitions on the States to exercise similar powers; and others, again, from the nature of the powers themselves. It has been by this mode of reasoning that the Court has adjudicated on many important questions; and the same mode is proper here. And, as some powers have been holden exclusive, and others not so, under the same form of expression, from the nature of the different powers respectively; so, where the power, on any one subject, is given in general words, like the power to regulate commerce, the true method of construction would be, to consider of what parts the grant is composed, and which of those, from the nature of the thing, ought to be considered exclusive. The right set up in this case, under the laws of New-York, is a *monopoly*. Now, he thought it very reasonable to say, that the constitution never intended to leave with the States the power of granting monopolies, either of trade or of navigation; and, therefore, that as to this, the commercial power was exclusive in Congress.

It was in vain to look for a precise and exact *definition* of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In conferring powers, it proceeded in the way of *enumera-*

tion, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.

Few things were better known, than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer, than that the prevailing motive was *to regulate commerce*; to rescue it from the embarrassing and destructive consequences, resulting from the legislation of so many different States, and to place it under the protection of a uniform law. The great objects were commerce and revenue; and they were objects indissolubly connected. By the confederation, divers restrictions had been imposed on the States; but these had not been found sufficient. No State, it was true, could send or receive an embassy; nor make any treaty; nor enter into any compact with another State, or with a foreign power; nor lay duties, interfering with treaties which had been entered into by Congress. But all these were found to be far short of what the actual condition of the country required. The States could still, each for itself, regulate commerce, and the consequence was, a perpetual jarring and hostility of commercial regulation.

In the history of the times, it was accordingly found, that the great topic, urged on all occasions, as showing the necessity of a new and different government, was the state of trade and commerce. To benefit and improve these, was a great object in itself; and it became greater when it was re-

1824.

Gibbons v. Ogden.

garded as the only means of enabling the country to pay the public debt, and to do justice to those who had most effectually laboured for its independence. The leading state papers of the time are full of this topic. The New-Jersey resolutions[a] complain, that the regulation of trade was in the power of the several States, within their separate jurisdiction, in such a degree as to involve many difficulties and embarrassments; and they express an earnest opinion, that *the sole and exclusive power* of regulating trade with foreign States, ought to be in Congress. Mr. Witherspoon's motion in Congress, in 1781, is of the same general character; and the report of a committee of that body, in 1785, is still more emphatic. It declares that Congress ought to possess the *sole and exclusive* power of regulating trade, as well with foreign nations, as between the States.[b] The resolutions of Virginia, in January, 1786, which were the immediate cause of the convention, put forth this same great object. Indeed, it is the *only* object stated in those resolutions. There is not another idea in the whole document. The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits, and its blessings, it

a 1 *Laws U. S. p.* 28.
b Id. 50.

1824.

Gibbons v. Ogden.

will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a *uniform* and steady system. It would be easy to show, by reference to the discussions in the several State conventions, the prevalence of the same general topics; and if any one would look to the proceedings of several of the States, especially to those of Massachusetts and New-York, he would see, very plainly, by the recorded lists of votes, that wherever this commercial necessity was most strongly felt, there the proposed new constitution had most friends. In the New-York convention, the argument arising from this consideration was strongly pressed, by the distinguished person whose name is connected with the present question.

We do not find, in the history of the formation and adoption of the constitution, that any man speaks of a general *concurrent power*, in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the constitution would not have been worth accepting.

He contended, therefore, that the people intended, in establishing the constitution, to transfer, from the several States to a general government, those high and important powers over commerce, which, in their exercise, were to maintain an uniform and general system. From the very nature of the case, these powers must be *exclu-*

1824.

Gibbons v. Ogden.

sive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several States, respectively, but the commerce of the United States. Henceforth, the commerce of the States was to be an *unit;* and the system by which it was to exist and be governed, must necessarily be complete, entire, and uniform. Its character was to be described in the flag which waved over it, E PLURIBUS UNUM. Now, how could individual States assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the constitution, "to regulate commerce," are so very general and extensive, that they might be construed to cover a vast field of legislation, part of which has always been occupied by State laws; and, therefore, the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress, so far, and so far only, as the nature of the power requires. And he insisted, that the nature of the case, and of the power, did imperiously require, that such important authority as that of granting monopolies of trade and navigation, should not be considered as still retained by the States.

It is apparent, from the prohibitions on the power of the States, that the *general* concurrent power was not supposed to be left with them. And the exception, out of these prohibitions, of the *inspection laws*, proves this still more clearly. Which most concerns the commerce of this coun-

try, that New-York and Virginia should have an uncontrolled power to establish their inspection for flour and tobacco, or that they should have an uncontrolled power of granting either a monopoly of trade in their own ports, or a monopoly of navigation over all the waters leading to those ports? Yet, the argument on the other side must be, that, although the constitution has sedulously guarded and limited the first of these powers, it has left the last wholly unlimited and uncontrolled.

But, although much had been said, in the discussion on former occasions, about this supposed *concurrent* power in the States, he found great difficulty in understanding what was meant by it. It was generally qualified, by saying, that it was a power, by which the States could pass laws on the subjects of commercial regulation, which would be valid, until Congress should pass other laws controlling them, or inconsistent with them, and that *then* the State laws must yield. What sort of *concurrent* powers were these, which could not exist together? Indeed, the very reading of the clause in the constitution must put to flight this notion of a general concurrent power. The constitution was formed for all the States; and Congress was to have power to regulate commerce. Now, what is the import of this, but that Congress is to give the rule—to establish the system—to exercise the control over the subject? And, can more than one power, in cases of this sort, give the rule, establish the system, or exercise the control? As it is not contended that the power of Congress is to be exercised by a *supervision*

1824.

Gibbons v. Ogden.

of State legislation; and, as it is clear, that Congress is to give the general rule, he contended, that this power of giving the general rule was transferred, by the constitution, from the States to Congress, to be exercised as that body might see fit. And, consequently, that all those high exercises of power, which might be considered as giving the rule, or establishing the system, in regard to great commercial interests, were necessarily left with Congress alone. Of this character he considered monopolies of trade or navigation; embargoes; the system of navigation laws; the countervailing laws, as against foreign states; and other important enactments respecting our connexion with such states. It appeared to him a most reasonable construction, to say, that in these respects, the power of Congress is exclusive, from the nature of the power. If it be not so, where is the limit, or who shall fix a boundary for the exercise of the power of the States? Can a State grant a monopoly of trade? Can New-York shut her ports to all but her own citizens? Can she refuse admission to ships of particular nations? The argument on the other side is, and must be, that she might do all these things, until Congress should revoke her enactments. And this is called *concurrent* legislation. What confusion such notions lead to, is obvious enough. A power in the States to do any thing, and every thing, in regard to commerce, till Congress shall undo it, would suppose a state of things, at least as bad as that which existed before the present constitution. It is the true wisdom of these go-

vernments to keep their action as distinct as possible. The general government should not seek to operate where the States can operate with more advantage to the community; nor should the States encroach on ground, which the public good, as well as the constitution, refers to the exclusive control of Congress.

If the present state of things—these laws of New-York, the laws of Connecticut, and the laws of New-Jersey, had been all presented, in the convention of New-York, to the eminent person whose name is on this record, and who acted, on that occasion, so important a part; if he had been told, that, after all he had said in favour of the new government, and of its salutary effects on commercial regulations, the time should yet come, when the North River would be shut up by a monopoly from New-York; the Sound interdicted by a penal law of Connecticut; *reprisals* authorized by New-Jersey, against citizens of New-York; and when one could not cross a ferry, without transhipment; does any one suppose he would have admitted all this, as compatible with the government which he was recommending?

This doctrine of a *general* concurrent power in the States, is insidious and dangerous. If it be admitted, no one can say where it will stop. The States may legislate, it is said, wherever Congress has not made a *plenary* exercise of its power. But who is to judge whether Congress has made this *plenary* exercise of power? Congress has acted on this power; it has done all that it deemed wise; and are the States now to do whatever

1824. Gibbons v. Ogden.

Congress has left undone? Congress makes such rules as, in its judgment, the case requires; and those rules, whatever they are, constitute the *system*.

All useful regulation does not consist in restraint; and that which Congress sees fit to leave free, is a part of its regulation, as much as the rest.

He thought the practice under the constitution sufficiently evinced, that this portion of the commercial power was exclusive in Congress. When, before this instance, have the States granted monopolies? When, until now, have they interfered with the navigation of the country? The pilot laws, the health laws, or quarantine laws, and various regulations of that class, which have been recognised by Congress, are no arguments to prove, even if they are to be called commercial regulations, (which they are not,) that other regulations, more directly and strictly commercial, are not solely within the power of Congress. There was a singular fallacy, as he humbly ventured to think, in the argument of very learned and most respectable persons, on this subject. That argument alleges, that the States have a concurrent power with Congress, of regulating commerce; and its proof of this position is, that the States have, without any question of their right, passed acts respecting turnpike roads, toll bridges, and ferries. These are declared to be acts of commercial regulation, affecting not only the interior commerce of the State itself, but also commerce between different States. Therefore,

as all these are *commercial regulations*, and are yet acknowledged to be rightfully established by the States, it follows, as is supposed, that the States must have a concurrent power to regulate commerce.

Now, what was the inevitable consequence of this mode of reasoning? Does it not admit the power of Congress, at once, upon all these minor objects of legislation? If all these be regulations of commerce, within the meaning of the constitution, then, certainly, Congress having a concurrent power to regulate commerce, may establish ferries, turnpikes, bridges, &c. and provide for all this detail of interior legislation. To sustain the interference of the State, in a high concern of maritime commerce, the argument adopts a principle which acknowledges the right of Congress, over a vast scope of internal legislation, which no one has heretofore supposed to be within its powers. But this is not all; for it is admitted, that when Congress and the States have power to legislate over the same subject, the power of Congress, when exercised, controls or extinguishes the State power; and, therefore, the consequence would seem to follow, from the argument, that all State legislation, over such subjects as have been mentioned, is, at all times, liable to the superior power of Congress; a consequence, which no one would admit for a moment. The truth was, he thought, that all these things were, in their general character, rather regulations of police than of commerce, in the constitutional understanding of that term. A road, indeed,

1824.

Gibbons v. Ogden.

might be a matter of great commercial concern. In many cases it is so; and when it is so, he thought there was no doubt of the power of Congress to make it. But, generally speaking, roads, and bridges, and ferries, though, of course, they affect commerce and intercourse, do not obtain that importance and elevation, as to be deemed *commercial regulations.* A reasonable construction must be given to the constitution; and such construction is as necessary to the just power of the States, as to the authority of Congress. Quarantine laws, for example, may be considered as affecting commerce; yet they are, in their nature, *health laws.* In England, we speak of the power of regulating commerce, as in Parliament, or the King, as arbiter of commerce; yet the city of London enacts health laws. Would any one infer from that circumstance, that the city of London had concurrent power with Parliament or the Crown to *regulate commerce?* or, that it might grant a monopoly of the navigation of the Thames? While a health law is reasonable, it is a health law; but if, under colour of it, enactments should be made for other purposes, such enactments might be void.

In the discussion in the New-York Courts, no small reliance was placed on the law of that State prohibiting the importation of slaves, as an example of a commercial regulation, enacted by State authority. That law may or may not be constitutional and valid. It has been referred to generally, but its particular provisions have not

been stated. When they are more clearly seen, its character may be better determined.

It might further be argued, that the power of Congress over these high branches of commerce was exclusive, from the consideration that Congress possessed an exclusive admiralty jurisdiction. That it did possess such exclusive jurisdiction, would hardly be contested. No State pretended to exercise any jurisdiction of that kind. The States had abolished their Courts of Admiralty, when the constitution went into operation. Over these waters, therefore, or, at least, some of them, which are the subject of this monopoly, New-York has no jurisdiction whatever. They are a part of the high sea, and not within the body of any county. The authorities of that State could not punish for a murder, committed on board one of these boats, in some places within the range of this exclusive grant. This restraining of the States from all jurisdiction, out of the bodies of their own counties, shows plainly enough, that navigation on the high seas, was understood to be a matter to be regulated only by Congress. It is not unreasonable to say, that what are called the waters of New-York, are, to purposes of navigation and commercial regulation, the waters of the United States. There is no cession, indeed, of the waters themselves, but their *use*, for those purposes, seemed to be entrusted to the exclusive power of Congress. Several States have enacted laws, which would appear to imply their conviction of the power of Congress, over navigable waters, to a greater extent.

1824.

Gibbons v. Ogden.

If there be a concurrent power of regulating commerce on the high seas, there must be a concurrent admiralty jurisdiction, and a concurrent control of the waters. It is a common principle, that arms of the sea, including navigable rivers, belong to the sovereign, *so far as navigation is concerned.* Their *use* is navigation. The United States possess the general power over navigation, and, of course, ought to control, in general, the use of navigable waters. If it be admitted, that *for purposes of trade and navigation,* the North River, and its bay, are the river and bay of New-York, and the Chesapeake the bay of Virginia, very great inconveniences and much confusion might be the result.

It might now be well to take a nearer view of these laws, to see more exactly what their provisions were, what consequences have followed from them, and what would and might follow from other similar laws.

The first grant to *John Fitch,* gave him the sole and exclusive right of making, employing, and navigating, all boats impelled by fire or steam, "*in all creeks, rivers, bays, and waters, within the territory and jurisdiction of the State.*" Any other person, navigating such boat, was to forfeit it, and to pay a penalty of a hundred pounds. The subsequent acts repeal this, and grant similar privileges to *Livingston and Fulton:* and the act of 1811 provides the extraordinary and summary *remedy,* which has been already stated. The river, the bay, and the marine league along the shore, are all within the scope of this grant.

1824.

Gibbons v. Ogden.

Any vessel, therefore, of this description, coming into any of those waters, without a license, whether from another State, or from abroad, whether it be a public or private vessel, is instantly forfeited to the grantees of the monopoly.

Now, it must be remembered, that this grant is made as an exercise of *sovereign political power*. It is not an inspection law, nor a health law, nor passed by any derivative authority; it is professedly an act of sovereign power. Of course, there is no limit to the power, to be derived from the *purpose* for which it is exercised. If exercised for one purpose, it may be also for another. No one can inquire into the *motives* which influence sovereign authority. It is enough, that such power manifests its will. The motive alleged in this case is, to remunerate the grantees for a benefit conferred by them on the public. But there is no necessary connexion between that benefit and this mode of rewarding it; and if the State could grant this monopoly for that purpose, it could also grant it for any other purpose. It could make the grant for money; and so make the monopoly of navigation over those waters a direct source of revenue. When this monopoly shall expire, in 1838, the State may continue it, for any pecuniary consideration which the holders may see fit to offer, and the State to receive.

If the State may grant this monopoly, it may also grant another, for other descriptions of vessels; for instance, for all *sloops*.

If it can grant these exclusive privileges to a few, it may grant them to many; that is, it may

1824.

Gibbons v. Ogden.

grant them to all its own citizens, to the exclusion of every body else.

But the waters of New-York are no more the subject of exclusive grants by that State, than the waters of other States are subjects of such grants by those other States. Virginia may well exercise, over the entrance of the Chesapeake, all the power that New-York can exercise over the bay of New-York, and the waters on the shore. The Chesapeake, therefore, upon the principle of these laws, may be the subject of State monopoly; and so may the bay of Massachusetts. But this is not all. It requires no greater power, to grant a monopoly of *trade*, than a monopoly of navigation. Of course, New-York, if these acts can be maintained, may give an exclusive right of entry of vessels into her ports. And the other States may do the same. These are not extreme cases. We have only to suppose that other States should do what New-York has already done, and that the power should be carried to its full extent.

To all this, there is no answer to be given except this, that the *concurrent* power of the States, concurrent though it be, is yet *subordinate* to the legislation of Congress; and that, therefore, Congress may, when it pleases, annul the State legislation; but, until it does so annul it, the State legislation is valid and effectual. What is there to recommend a construction which leads to a result like this? Here would be a perpetual hostility; one Legislature enacting laws, till another Legislature should repeal them; one sovereign power giving the rule, till another sovereign power should

1824.

Gibbons v. Ogden.

abrogate it; and all this under the idea of *concurrent* legislation!

But further; under this *concurrent power*, the State does that which Congress cannot do; that is, it gives preferences to the citizens of some States over those of others. I do not mean here the advantages conferred by the grant on the grantees; but the *disadvantages* to which it subjects all the other citizens of New-York. To impose an extraordinary tax on steam navigation visiting the ports of New-York, and leaving it free every where else, is giving a preference to the citizens of other States over those of New-York. This Congress could not do; and yet the State does it: so that this power, at first subordinate, then concurrent, now becomes paramount.

The people of New-York have a right to be protected against this monopoly. It is one of the objects for which they agreed to this constitution, that they should stand on an equality in commercial regulations; and if the government should not insure them that, the promises made to them, in its behalf, would not be performed.

He contended, therefore, in conclusion on this point, that the power of Congress over these high branches of commercial regulation, was shown to be exclusive, by considering what was wished and intended to be done, when the convention, for forming the constitution, was called; by what was understood, in the State conventions, to have been accomplished by the instrument; by the prohibitions on the States, and the express exception relative to inspection laws; by the nature of the

1824.

Gibbons v. Ogden.

power itself; by the terms used, as connected with the nature of the power; by the subsequent understanding and practice, both of Congress and the States; by the grant of exclusive admiralty jurisdiction to the federal government; by the manifest danger of the opposite doctrine, and the ruinous consequences to which it directly leads.

It required little now to be said, to prove that this exclusive grant is a law regulating commerce; although, in some of the discussions elsewhere, it had been called a law of *police*. If it be not a *regulation of commerce*, then it follows, against the constant admission on the other side, that Congress, even by an express act, could not annul or control it. For if it be not a regulation of commerce, Congress has no concern with it. But the granting of monopolies of this kind is always referred to the power over commerce. It was as arbiter of commerce that the King formerly granted such monopolies.[a] This is a law regulating commerce, inasmuch as it imposes new conditions and terms on the coasting trade, on foreign trade generally, and on foreign trade as regulated by treaties; and inasmuch as it interferes with the free navigation of navigable waters.

If, then, the power of commercial regulation, possessed by Congress, be, in regard to the great branches of it, exclusive; and if this grant of New-York be a commercial regulation, affecting commerce, in respect to these great branches, then

[a] 1 *Bl. Com.* 273. 4 *Bl. Com.* 160.

the grant is void, whether any case of actual collision had happened or not.

But, he contended, in the second place, that whether the grant were to be regarded as wholly void or not, it must, at least, be inoperative, when the rights claimed under it came in collision with other rights, enjoyed and secured under the laws of the United States; and such collision, he maintained, clearly existed in this case. It would not be denied that the law of Congress was paramount. The constitution has expressly provided for that. So that the only question in this part of the case is, whether the two rights be inconsistent with each other. The appellant had a *right* to go from New-Jersey to New-York, in a vessel, owned by himself, of the proper legal description, and enrolled and licensed according to law. This *right* belonged to him as a citizen of the United States. It was derived under the laws of the United States, and no act of the Legislature of New-York can deprive him of it, any more than such act could deprive him of the right of holding lands in that State, or of suing in its Courts. It appears from the record, that the boat in question was regularly enrolled, at Perth Amboy, and properly licensed for carrying on the coasting trade. Under this enrolment, and with this license, she was proceeding to New-York, when she was stopped by the injunction of the Chancellor, on the application of the New-York grantees. There can be no doubt that here is a collision, in fact; that which the appellant claimed as a right, the respondent resisted; and there remains nothing

1824.

Gibbons v. Ogden.

now but to determine, whether the appellant had, as he contends, a *right* to navigate these waters; because, if he had such *right*, it must prevail. Now, this right was expressly conferred by the laws of the United States. The first section of the act of February, 1793, c. 8. regulating the coasting trade and fisheries, declares, that all ships and vessels, enrolled and licensed as that act provides, " and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries." The fourth section of the same declares, " that in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries," bond shall be given, &c. according to the provisions of the act. And the same section declares, that the owner having complied with the requisites of the law, " it shall be the duty of the Collector to grant a license for carrying on the coasting trade;" and the act proceeds to give the form and words of the license, which is, therefore, of course, to be received as a part of the act; and the words of the license, after the necessary recitals, are, " license is hereby granted for the said vessel to be employed in carrying on the coasting trade."

Words could not make this authority more express.

The Court below seemed to him, with great deference, to have mistaken the object and nature of the *license*. It seemed to have been of opinion that the *license* had no other intent or effect than to ascertain the ownership and character of the

vessel. But this was the peculiar office and object of the *enrolment*. That document ascertains that the regular proof of ownership and character has been given; and the *license* is given, to confer the *right*, to which the party has shown himself entitled. It is the authority which the master carries with him, to prove his right to navigate freely the waters of the United States, and to carry on the coasting trade.

In some of the discussions which had been had on this question, it had been said, that Congress had only provided for ascertaining the ownership and property of vessels, but had not prescribed to what *use* they might be applied. But this he thought an obvious error; the whole object of the act regulating the coasting trade, was to declare what vessels shall enjoy the benefit *of being used* in the coasting trade. To secure this *use* to certain vessels, and to deny it to others, was precisely the purpose for which the act was passed. The error, or what he humbly supposed to be the error, in the judgment of the Court below, consisted in that Court's having thought, that although Congress *might act*, it had *not yet acted*, in such a way as to confer a *right* on the appellant: whereas, if a right was not given by this law, it never could be given; no law could be more express. It had been admitted, that supposing there was a provision in the act of Congress, that all vessels duly licensed should be at liberty to navigate, for the purpose of trade and commerce, over all the navigable harbours, bays, rivers and lakes, within the several States, any

1824.

Gibbons v. Ogden.

law of the States, creating particular privileges as to any particular class of vessels, to the contrary notwithstanding, the only question that could arise, in such a case, would be, whether the law was constitutional; and that if that was to be granted or decided, it would certainly, in all Courts and places, overrule and set aside the State grant.

Now, he did not see that such supposed case could be distinguished from the present. We show a provision in an act of Congress, that all vessels, duly licensed, may carry on the coasting trade; nobody doubts the constitutional validity of that law; and we show that this vessel was duly licensed according to its provisions. This is all that is *essential* in the case supposed. The presence or absence of a *non obstante* clause, cannot affect the extent or operation of the act of Congress. Congress has no power of revoking State laws, as a distinct power. It legislates over *subjects;* and over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If Congress were to pass an act expressly revoking or annulling, in whole or in part, this New-York grant, such an act would be wholly useless and inoperative. If the New-York grant be opposed to, or inconsistent with, any constitutional power which Congress has exercised, then, so far as the incompatibility exists, the grant is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. But if the grant be not inconsistent with any exercise of the powers of Congress, then, certainly, Con-

gress has no authority to revoke or annul it. Such an act of Congress, therefore, would be either unconstitutional or supererogatory. The laws of Congress need no *non obstante* clause. The constitution makes them supreme, when State laws come into opposition to them; so that in these cases there is no question except this, whether there be, or be not, a repugnancy or hostility between the law of Congress and the law of the State. Nor is it at all material, in this view, whether the law of the State be a law regulating commerce, or a law of police, or by whatever other name or character it may be designated. If its provisions be inconsistent with an act of Congress, they are void, so far as that inconsistency extends. The whole argument, therefore, is substantially and effectually given up, when it is admitted, that Congress might, by express terms, abrogate the State grant, or declare that it should not stand in the way of its own legislation; because, such express terms would add nothing to the effect and operation of an act of Congress.

He contended, therefore, upon the whole of this point, that a case of actual collision had been made out, in this case, between the State grant and the act of Congress; and as the act of Congress was entirely unexceptionable, and clearly in pursuance of its constitutional powers, the State grant must yield.

There were other provisions of the constitution of the United States, which had more or less bearing on this question: "No State shall, without the consent of Congress, lay any duty of ton-

1824.

Gibbons v. Ogden.

nage." Under colour of grants like this, that prohibition might be wholly evaded. This grant authorizes Messrs. Livingston and Fulton *to license* navigation in the waters of New-York. They, of course, license it on their own terms. They may require a pecuniary consideration, ascertained by the tonnage of the vessel, or in any other manner. Probably, in fact, they govern themselves, in this respect, by the size or tonnage of the vessels, to which they grant licenses. Now, what is this but substantially a *tonnage* duty, under the law of the State? Or does it make any difference, whether the receipts go directly to her own treasury, or to the hands of those to whom she has made the grant?

There was, lastly, that provision of the constitution which gives Congress power to promote the progress of science and the useful arts, by securing to authors and inventors, for a limited time, an exclusive right to their own writings and discoveries. Congress had exercised this power, and made all the provisions which it deemed useful or necessary. The States might, indeed, like munificent individuals, exercise their own bounty towards authors and inventors, at their own discretion. But to confer reward by exclusive grants, even if it were but a part of the use of the writing or invention, was not supposed to be a power properly to be exercised by the States. Much less could they, under the notion of conferring rewards in such cases, grant monopolies, the enjoyment of which should be essentially incompatible with the exercise of rights holden under the laws

of the United States. He should insist, however, the less on these points, as they were open to counsel, who would come after him, on the same side, and as he had said so much upon what appeared to him the more important and interesting part of the argument.

Mr. *Oakley*, for the respondent, stated, that there were some general principles applicable to this subject, which might be assumed, or which had been settled by the decisions of this Court, and which had acquired the force of maxims of political law. Among these was the principle, that the States do not derive their independence and sovereignty from the grant or concession of the British crown, but from their own act in the declaration of independence. By this act, they became "free and independent States," and as such, "have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do." The State of New-York, having thus become sovereign and independent, formed a constitution, by which the "supreme legislative power" was vested in its Legislature: and there are no restrictions on that power, which in any manner relate to the present controversy. On the other hand, the constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.[a] This prin-

[a] M'Culloch v. Maryland, 4 *Wheat. Rep.* 405. Per Marshall, C. J. Houston v. Moore, 5 *Wheat. Rep.* 48. Per Story, J.

1824. Gibbons v. Ogden.

ciple, which distinguishes the national from the State governments, is derived from the nature of the constitution itself, as being a delegation of power, and not a restriction of power previously possessed; and from the express stipulation in the 10th amendment, that "the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The national constitution must, therefore, be construed strictly, as regards the powers *expressly granted*, and the objects to which those powers are to be applied. As it is a grant of power in derogation of State sovereignty, every portion of power, not granted, must remain in the State Legislature.[a]

These principles are all founded on the doctrine, that a strict rule of construction must be applied, in ascertaining the extent and object of those powers which are *expressly* delegated. The powers delegated are of two classes: such as are *expressly granted*, and such as are *implied*, as "necessary and proper" to carry into execution the powers expressly enumerated. As to these implied powers, the constitution must be construed liberally, as respects their nature and extent: because the constitution implies that rule, by not undertaking to enumerate these powers, and because the grant of these powers is general and unlimited. But this rule has one exception: When the means of executing any expressly grant-

a *The Federalist*, No. 82. Houston v. Moore, 5 *Wheat. Rep.* 48. Per Story, J.

ed power are particularly enumerated, then no other mode of executing that power can be implied or used by Congress, since the constitution itself determines what powers are "necessary and proper" in that given case.

These delegated powers, whether express or implied, are, (1.) those which are *exclusively* vested in the United States; and, (2.) those which are *concurrent* in the United States and the respective States.

It is perfectly settled, that an affirmative grant of power to the United States does not, of itself, devest the States of a like power.[a] The authorities cited settle this question, and it is no longer open for discussion in this Court.

The powers vested exclusively in Congress are, (1.) Those which are granted in express terms. (2.) Those which are granted to the United States, and expressly prohibited to the States. (3.) Those which are exclusive in their nature.

All powers, *exclusive in their nature*, may be included under two heads: (1.) Those which have their origin in the constitution, and where the object of them did not exist previous to the Union. These may be called strictly *national* powers. (2.) Those powers which, by other provisions in the constitution, have an effect and operation, when exercised by a State, without or beyond the territorial limits of the State.

a Sturges v. Crowninshield, 4 *Wheat. Rep.* 193. Per Marshall, C. J. Houston v. Moore, 5 *Wheat. Rep.* 15. 17. Per Washington, J. *Id.* 45. Per Johnson, J. *Id.* 48. Per Story, J.

1824.

Gibbons v. Ogden.

As examples of the first class, may be mentioned, the "power to borrow money on the credit of the United States." Here the object of the power, (to borrow money for the use of the United States,) and the means of executing it, (by pledging their credit,) have their origin in the Union, and did not previously exist. So as to the power "to establish tribunals inferior to the Supreme Court," the same remark will apply.

Of the second class, the power "to establish an uniform rule of naturalization," is an instance. This power was originally in the States, and was extensively exercised by them, and would now be concurrent, except for another provision in the constitution, that "citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."[a] It is not held to be exclusive, from the use of the term "*uniform* rule." This Court has held, that the use of an analogous term, "uniform laws," in respect to the associated subject of bankruptcy, does not imply an exclusive power in Congress over that subject.[b] The true reason why the power of establishing an uniform rule of naturalization is exclusive, must be, that a person becoming a citizen in one State, would thereby become a citizen of another, perhaps even contrary to its laws, and the power thus exercised would operate beyond the limits of the State.

As to *concurrent* powers: it is highly important

[a] Chirac v. Chirac, 2 *Wheat. Rep.* 268, 269.

[b] Sturges v. Crowninshield, 4 *Wheat. Rep.* 193.

1824.

Gibbons v. Ogden.

to hold all powers concurrent, where it can be done without violating the plain letter of the constitution. All these powers are essential to State sovereignty, and are constantly exercised for the good of the State. These powers can be best exercised by the State, in relation to all its internal concerns, connected with the objects of the power. All powers, therefore, not expressly exclusive, or clearly exclusive in their nature, ought to be deemed concurrent. All *implied* powers are, of course, concurrent. It has never yet been contended, that powers implied as necessary and proper to carry into effect an exclusive power, are themselves exclusive. Such a doctrine would deprive the States almost entirely of sovereignty, as these implied powers must inevitably be very numerous, and must embrace a wide field of legislation. So also, all *enumerated* powers are to be considered *concurrent*, unless they clearly fall under the head of *exclusive:* either as being granted, in terms, exclusively to the United States, or as expressly prohibited to the States, or as being exclusive in their nature, as before explained.

A power exclusive in its nature, is said to be *repugnant* and contradictory to a like power in the States. This repugnancy exists only in cases where a State cannot legislate, in any manner, or under any circumstances, under a given power, without conflicting with some existing act of Congress, or with some provision of the constitution. Thus, it is laid down by the commentators on the constitution, that "the power granted to the Union is exclusive, when the existence of a similar power

1824. Gibbons v. Ogden.

in the States would be *absolutely and totally contradictory and repugnant.*"[a] "Or where an authority is granted to the Union, with which a similar authority in the State would be *utterly incompatible.*"[b] And again: "It is not a mere possibility of *inconvenience* in the exercise of powers, but an *immediate constitutional repugnancy*, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."[c] These strong expressions show that the repugnancy of power to power must be such, as to produce actual interference and conflict, under all circumstances, and in all cases, in which the power is exercised by the two governments: or, in other words, must be such that the States can pass no law on the subject matter of the power, without contravening the express provisions of the constitution; or without actually interfering with the operation of some statute of Congress. These terms are used by the author of the papers from which they are quoted, to distinguish those cases of *absolute* repugnancy from others, "where the exercise of a concurrent jurisdiction might be productive of *occasional* interference in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy in point of constitutional authority."[d] The same principle has been adopted by this Court on several occasions.[e]

a *The Federalist*, No. 32.
b *Id.* No. 82.
c *Id.* No. 32.
d *Id.* No. 32.
e M'Culloch v. Maryland, 4 *Wheat. Rep.* 425. Per Marshall, C. J. Houston v. Moore, 5 *Wheat. Rep.* 49. Per Story, J.

1824.

Gibbons v. Ogden.

It appears, then, that the repugnancy which makes a power exclusive, must be clear, direct, positive, and entire. It cannot be a matter of speculation or theory, but must be practical: not a repugnancy that *may* arise in some exercise of the power by both governments; but one that *must* arise, in any exercise of such power, which is attempted by the States. To ascertain, then, whether any given power be concurrent, we must inquire, (1.) Whether it was possessed by the States, previous to the constitution, as appertaining to their sovereignty? (2.) Whether it is granted, in exclusive terms, to the Union? (3.) Whether it is granted to the Union, and prohibited in express terms to the States? (4.) Whether it is exclusive in its nature, either as operating, when exercised by the States, without their territorial limits, and upon other parts of the Union; *or* as having its origin and creation in the Union itself; *or* as being so entirely repugnant, that no exercise of it can take place by the States, without actual conflict with the constitution of the Union, in its practical operation and effects.

All concurrent powers may be divided into two classes: (1.) Those where, from their nature, when Congress has acted on the subject matter, the States cannot legislate at all in any degree. (2.) Those where the States may legislate, though Congress has previously legislated on the same subject matter.

The *first* class includes those instances where any act of Congress covers the whole ground of legislation, and exhausts the subjects on which it

1824.

Gibbons v. Ogden.

acts. Such is the power to fix the standard of weights and measures. Here, when the standard of any particular weight or measure is fixed by Congress, the whole power is executed as to that particular; and so far the power of the States is at an end. But, until Congress does this, it cannot be doubted that a State may act on the subject; and if the laws of Congress apply only to some weights and measures, all others are subject to State regulation. Thus, New-York has long had a law to regulate weights and measures, which establishes the English standard for that State, "until Congress shall establish the standard for the United States."[a] So, also, the power to regulate the value of foreign coin. An act fixing the value of any species of coin, necessarily disposes of the whole power as to that species. They are both instances in which, when Congress has acted at all, there immediately arises that entire and absolute repugnancy, and that utter incompatibility, which exclude the States from all power over the subject.

The *second* class of concurrent powers contains those in which, from their nature, various regulations may be made, without any actual collision in practice. These are, those where the power may be exercised on different subjects; *or* on the same subject, in different modes; *or* where the object of the power admits of various independent regulations, which may operate together. In all these cases, the State may legislate, though Congress

[a] 1 *R. L.* c. 30. s. 36.

1824.

Gibbons v. Ogden.

has legislated under the same power. This results from the very nature of concurrent power. Each party possessing the power, may of course use it. Each being sovereign as to the power, may use it in any form, and in relation to any subject; and to guard against a conflict in practice, the law of Congress is made supreme.

The provision, that the law of Congress shall be the supreme law in such cases, is the ground of a conclusive inference, not only that there are concurrent powers, but that those powers may be exercised by both governments at the same time. One law cannot be said to be superior to another, and to control it, unless it acts in a manner inconsistent with and repugnant to that other. The question of supremacy, therefore, can never arise, unless in cases of actual conflict or interference. If the mere exercise of a power by Congress takes away all right from the State to act under that power, then any State law, under such a power, would be void; not as conflicting with the supreme law of Congress, but as being repugnant to the provisions of the constitution itself, and as being passed by the State, in the first instance, without authority. If this doctrine were true, then the provision that the laws of Congress should be supreme, was entirely idle. It would have been sufficient to have said merely, that the constitution should be supreme.[a] These positions

[a] Sturges v. Crowninshield, 4 *Wheat. Rep.* 195, 196. Per Marshall, C. J. Houston v. Moore, 5 *Wheat. Rep.* 34. 45. Per Johnson, J. *Id.* 49, 50. 55. Per Story, J. Livingston v. Van Ingen, 9 *Johns. Rep.* 575, 576. Per Thompson, J.

1824.

Gibbons v. Ogden.

are all supported by the judgments of this Court, and of other Courts whose authority deserves to be respected.

From this mass of authority, and the reasons on which it is founded, it results, (1.) That a State may legislate in all cases of concurrent power, though Congress has acted under the same power and upon the same subject matter. (2.) That the question of supremacy cannot arise, except in the case of actual and practical collision. (3.) That such collision must be direct and positive, and the State law must operate to limit, restrict, or defeat, the effect of a statute of Congress. (4.) That in such case, the State law yields in those particulars, in which such actual collision arises, but remains valid in all other respects.

The States have, accordingly, acted upon this construction to a great extent. Thus, the power to lay and collect *taxes*, is admitted on all hands to be concurrent. It is constantly exercised by the States, in every form, and both real and personal estate have frequently been taxed by the national and local governments, at the same time. So, under the power to lay and collect *excises*, the same article has frequently been taxed by both governments. And the power to lay imposts, or duties on exports, and imports, and tonnage, is also concurrent, except that no State can lay any duty on imports and exports, or duty of tonnage, unless such as are absolutely necessary for executing its inspection laws. So, also, the power to provide for the punishment of counterfeiting the securities and current coin of the United States, is a power

which may be exercised by the States. A State may make it an offence to counterfeit the coin of any foreign country within its territory. Thus, New-York has provided for the punishment of counterfeiting "any of the species of gold or silver coins, now current, or hereafter to be current in this State."[a] And Congress has provided for the punishment of counterfeiting "any gold or silver coin of the United States," or of any "foreign gold or silver coins, which, by law, now are, or hereafter shall be made current, or be in actual use and circulation as money, within the United States."[b] New-York has punished the counterfeiting of "any promissory note, for the payment of money," including notes made by any body corporate;[c] and under this the counterfeiting of the notes of the bank of the United States is punished. Congress has punished the same offence in the law incorporating the bank of the United States.[d] In all these acts of Congress, relating to coins and bank notes, it is provided, "that nothing in them contained shall be so construed as to deprive the Courts of the individual States of jurisdiction, under the laws of the several States, over any offence made punishable by these acts." This shows that Congress considered the power to punish these offences as concurrent, and that it could be exercised by the States on the

a 1 *R. L.* p. 406. s. 5. 6.
b 4 *L. U. S.* 67.
c 1 *R. L.* 404.
d 4 *L. U. S.* 91. 6 *Id.* 47.

1824.

Gibbons v. Ogden.

ground of their own inherent authority, as it is held that Congress cannot delegate any part of the criminal jurisdiction of the United States to the State tribunals.[a] Again: the power to provide for organizing, arming, and disciplining the militia, is a concurrent power, according to the same principles.[b] But the States have been in the constant habit of superadding to the regulations of Congress, additional provisions, suited to their own views and local circumstances.[c] These instances, which might be greatly multiplied, show the practical construction put, both by Congress and the State Legislatures, upon these concurrent powers.

The learned counsel here recapitulated the principles laid down, and proceeded to apply them to the discussion of the cause, which he divided into two branches. (1.) The supposed repugnancy of the laws of New-York to the power of Congress on the subject of patents and copy-rights. (2.) Their supposed conflict with the power of Congress to regulate commerce.

As to the first, the words of the constitution are, "Congress shall have power to promote the progress of science and the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

a Houston v. Moore, 5 *Wheat. Rep.* 69. Per Story, J.

b *Id.* 51.

c 1 *R. L. of N. Y.* 216. *Laws of Georgia*, 468. 6 *Laws of Pennsylvania*, 320.

1824.

Gibbons v. Ogden.

This power is *concurrent*, according to all the principles before laid down. It is clearly a power appertaining to sovereignty, and, as such, vested in the Legislature of New-York, before the formation of the United States' constitution. A power to promote science and the useful arts, is highly important to every civilized society. It embraces all the means of education, and all kinds of mechanical labour and improvements. It is constantly exercised by all governments, as a sovereign authority, by laws for the promotion of education in all its branches, by bounties for the encouragement of discoveries and new methods of business, and by the grant of exclusive rights and privileges for the same end. It has frequently been exercised by the State of New-York, and by other States, before the adoption of the constitution. It is not granted exclusively to Congress. No exclusive terms are used. The grant is affirmative and general, like all the other powers. There is no express prohibition upon the States against the exercise of it. Nor is it exclusive in its nature. It does not owe its existence or creation to the Union. When exercised by a State, it does not operate in any manner beyond the territorial jurisdiction of that State. From its nature, it admits of a great variety of regulations, both by local and general laws, which may exist harmoniously together. Being thus a concurrent power, it follows, according to the principles already established, that the State may exercise it at all times, and in every mode, until an actual and practical conflict arises between a right exer-

1824. Gibbons v. Ogden.

cised under a statute of Congress, and the same right claimed to be exercised under the State.

The power, as granted in the constitution, is a limited power. It is a clear principle, that when the means of executing any given power are specified in the grant, Congress cannot take, by implication, any other means, as being necessary and proper to carry that power into execution. This power, then, is limited: (1.) As to the persons and the objects in regard to which it may be exercised: these are, "authors and inventors, writings and discoveries." This enumeration excludes all right in Congress to legislate on the subject of any *improvement*, which is not an "invention," either domestic or foreign. It excludes also all right to legislate for the benefit of any person who is not himself the "inventor." (2.) As to the means of executing the power, and the time during which those means may be exercised. They are by "*securing* the exclusive right *for limited times.*"

The power, considered in itself, is supreme, unlimited, and plenary. No part of any sovereign power can be annihilated. Whatever portion, then, of this power, was not granted to Congress, remains in the States. Consequently, the States have exclusive authority to promote science and the arts, by all other modes than those specified in the constitution, without limitation as to time, person, or object; and the Legislature is the sole judge of the expediency of any law on the subject.

But this power, though limited in Congress,

1824.

Gibbons v. Ogden.

is still (as has been seen) concurrent in the States. It follows, then, from all the principles before laid down relative to the exercise of concurrent powers, that a State may exercise it by the same means, and towards the same persons and objects with Congress. A State may, therefore, grant patents and copy-rights, which would secure to the inventors and authors, the benefit of their discoveries and writings, within the limits of the State. In such cases, the citizens of other States might use the invention, or publish the book at pleasure. But if a patent or copy-right should be obtained under the law of Congress, the right under the State grant would cease as against that of the United States. Suppose the author or inventor does not apply for a patent or copy-right from the United States, or is willing to secure the exclusive right within any one State only, and leave the invention common in every other part of the Union; may not that one State secure the right within its own territory? This question may be answered by seeing how far Congress has exercised the power. An examination of the different patent laws will show, that Congress has, in various particulars, omitted to exercise the entire power given to them by the constitution. Thus, by several of these laws, the right of obtaining a patent is confined to *citizens*, and, consequently, the power of granting patents to *aliens*, is left to the States. The whole power is inoperative, until Congress acts under it by legislating: and the law itself is inoperative until some person obtains a patent. In every case, therefore, the power is

1824.

Gibbons v. Ogden.

unexecuted until a patent is actually granted. The State may consequently act in all cases.

But Congress has confined its statutes to cases of invention, as the constitution directs. Where then is the power to reward or encourage the introduction of useful machines or inventions from abroad? or, the establishment of any art, when invented at home, and the discoverer does not apply for a patent? or, where the invention is given to the public, and great expense must be incurred to put it into use? All these things appertain to sovereignty. Congress has no power over them. The power, being sovereign, must exist somewhere, and is, therefore, exclusively in the States. If the nature of the power which is given to Congress be examined, it will be found that it confers no authority to create or grant any right or property. It is clearly founded on the presumption, that the right or property may exist, independent of the power. Thus, one of the commentators on the constitution says, "The copy-right of authors has been solemnly adjudged, in Great Britain, to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventor."[a] The adjudication here referred to, is that of *Millar v. Taylor*,[b] where it was held, that the author of any book has the sole right of first printing and publishing it, but that the right was controlled by the provisions of the stat. 8 Ann, relative to copy-rights.

a *The Federalist*, No. 43.

b 4 *Burr.* 2408.

1824.

Gibbons v. Ogden.

But, the common law of England was the law of New-York, at the adoption of the national constitution. There was no statute of New-York similar to that of Ann, and, of course, the right existed there, without the security for its enjoyment, provided by that statute. The right, also, was local, and confined to the territorial jurisdiction of the State. The policy and object of the constitution was, to secure the right co-extensively with the Union. Its exercise in any one State, might be affected in its operation by the pirating of books and inventions in the adjoining States, and that evil could only be corrected by the national Legislature. The right, therefore, in any one State, was imperfect only as to the security and the means of enjoyment.

It appears, then, that the power is founded on the basis of a pre-existing right of property, from the nature and origin of the right, as before stated, and from the terms in which the power itself is granted. The word "secure," implies the existence of something *to be secured*. It does not purport to create or give any new right, but only to secure and provide remedies to enforce a pre-existing right throughout the Union. This power differs essentially from the sovereign power to create and grant an exclusive right. It has been adjudged, under the English stat. 21 Jac. I. c. 3. that a grant may be made for any invention which is new in England, though known abroad.[a] That statute, therefore, authorizes the creation of a right

[a] 3 *Wheat. Rep. App.* p. 15.

1824.

Gibbons v. Ogden.

of property in a thing imported, in which no right of property, under the laws of England, before existed. But the patent laws of the United States merely extend to inventions actually made in the United States, and not to any imported invention. The whole extent of the sovereign power, exercised by the British Parliament, on this subject, was vested in the Legislature of New-York. A part only was given to Congress, and all the residue remains in the State exclusively.

What then is the effect of a patent? It creates no new right. It secures the patentee, for a limited time, the exclusive right to his invention; so that he has the same exclusive right in it, that he has in any other kind of property. His right, however, is secured more extensively than any State law could secure it. But, within the limits of the State, a patent under the local law would be just as effectual. What is the situation of the right, after the expiration of a patent? The right under the common law of the State, may be considered as perpetual. It was so ruled by the Judges in *Millar v. Taylor;* but it was determined in the House of Lords, that the perpetuity of the right was controlled and limited by the statute of Ann. There is no such statute in New-York, and, therefore, the right remains as at common law. The act of Congress cannot destroy the perpetuity of a right held under the law of New-York, and which the act of Congress has only secured for a certain time, to a greater extent, and by means of more effectual remedies. The right, then, remains, at the expiration of the

patent, in the same condition as at its commencement, so far as regards the laws of New-York, and within the territorial limits of that State, but cannot be asserted in other States. Even if this were not so, and it should be considered that the right becomes common, at the expiration of the patent, then it is like all other common rights, subject to the control of the municipal laws of the State. It is of the essence of sovereignty to control and regulate all common rights. The Legislature, possessing "supreme legislative power," may destroy a common right, either by abolishing it, and prohibiting the use of it altogether, or by converting it into an exclusive right. Thus, a right of way may be common, either by land or water, and it may be shut up by law, and the use of it prohibited. So, a right of fishery, in navigable waters, is common, and it may be prohibited altogether, or converted into a several fishery. In the same manner, as to patent rights and literary productions: if, after a patent or copy-right has expired, the right to use or publish becomes common, it may be controlled by law, and turned into a private right. So that a State law may continue or extend a patent-right at pleasure.

Thus, it follows, that whether the right of the patentee remains in him, after the expiration of his patent, at common law, or whether its use becomes common to all, it is subject to the State law, in the same manner, and to the same extent, as all other rights, and may, consequently, be controlled, limited, extended, or prohibited, at the pleasure of the Legislature.

1824.

Gibbons v. Ogden.

But the State may control or prohibit the use of any patented thing, during the existence of the patent. If an inventor do not apply for a patent for the invention, no other man can. The right of the inventor, in such a case, remains as at common law. Every right or kind of property, created by the laws of the State, is subject to be controlled and regulated by the supreme legislative power of the State. It cannot then be doubted, that before a patent is obtained, the State may prohibit the use of the thing invented; either on the ground that it is mischievous in itself, or from motives of general policy, that it is inexpedient to permit it. As, if it interferes with any general interest, as a labour saving machine, which might deprive great numbers of their ordinary means of subsistence: or, if it should effect any great change in the course of business, which the Legislature might deem injurious, as it relates to the community. Of these questions of general policy, and of the expediency of any such prohibition, the Legislature must, of course, be the sole judge. Thus, in the act of New-York, to incorporate the North River Steam-boat Company, the corporation is prohibited from using any of its boats for the purpose of carrying freight. This was done to protect the great shipping interest employed in the navigation of the Hudson River. Would this exercise of power be affected by the obtaining of a patent? The object and effect of a patent is, (as we have seen,) to secure a pre-existing right, imperfect as to its means of enjoyment and its extent. The patentee obtains nothing by his grant, except an

exclusive right, as it relates to the Union, instead of a right limited to the State, together with more complete and certain remedies to protect and enforce that right. If, therefore, he could not use the thing invented, against the State law, before it is patented, neither can he thus use it after it is patented, for his grant conveys no greater right than before existed. It is the undoubted attribute of all sovereignty, to regulate and control the use of all property. A thing patented, when made and put in use, is nothing more than property; and, like all other property, is subject to the control of the sovereign power, as to the right to use it. There can be no doubt that it may sometimes become important or necessary to the welfare of society, to regulate or prohibit the use of a thing patented. Congress cannot do this, or, at least, it has not done it. After the patent is granted, the power of Congress over the subject matter is exhausted. Patented things may be dangerous or noxious, either universally so in every part of the country, or locally; or, they may be useful at one time, and mischievous and noxious at another. Patented manufactures may be injurious to the public health, though highly useful as manufactures; or they may be nuisances to private individuals and neighbourhoods, though extremely useful to the public. Can Congress provide by its laws for the abatement of a public nuisance? or give a right of action to an individual for a private nuisance? If not, these powers must reside in the States. The right to use all property, must be subject to modification by municipal law. *Sic*

1824.

Gibbons v. Ogden.

1824.

Gibbons v. Ogden.

utere tuo ut alienum non lædas, is a fundamental maxim. It belongs exclusively to the local State Legislatures, to determine how a man may use his own, without injuring his neighbour. Can a patent give rights, by which a patentee may infringe the vested rights of others? Can a patented boat be used on a ferry, the exclusive use of which has been granted by a State law?

This argument may be illustrated by the power to secure to authors the exclusive right to their works. This power is founded on the same reasons with the other, and gives the author the same rights as the inventor. Can the author, by virtue of his copy-right, publish against the prohibition of State law? A book may be libellous, or blasphemous, or obscene. Cannot the author be indicted and punished for it? May not a citizen maintain an action for the libel? If so, it cannot be lawful by virtue of the copy-right. If the State can punish the act of publishing, it may entirely prohibit the publication. It may regulate and restrain the press, so far as it is not prohibited by its own constitution.

The laws of Congress are framed on the supposition that the power to prohibit remains in the States. By the existing statute, they have not provided that any inquiry shall be made as to the *utility* of the supposed invention, when the patent is applied for. There is no authority to refuse a patent, on the ground of the inutility of the invention, and in practice, no inquiry is ever made, and patents issue, of course, on making the oaths and paying the fees, even for things the most

trifling, absurd, and injurious. There is no provision for the repeal of a patent, on the ground of its noxious or useless character. The law does not purport, in its terms, to give a right to use the thing patented, against the provisions of any State law. The act provides, (s. 1.) that if any person shall present a petition, "signifying a desire of *obtaining an exclusive property*," &c. then a patent shall issue, granting to the petitioner "the full and exclusive right and liberty of making, constructing, using, and vending to others to be used," the thing patented. The "exclusive property" spoken of, is only the same property that exists in any thing else, and, of itself, gives no right to use the thing against the State law, any more than in the case of any other property. The words "using, and vending to others to be used," are inserted to make the description of that "exclusive property" complete. The words "making, constructing, and vending," would not have constituted entire property in the thing, as one might make and vend, and all the world might use. The patentee's right of property might thus be greatly invaded, and he would be left without remedy, except against the "maker." The word "using," in the act, must receive this limited construction, or the law of Congress goes beyond the power in the constitution. That was only to "secure" a right, and meant nothing more than that a patentee should enjoy it alone, if any body was permitted to enjoy it. But it was never intended that the patentee should set the State laws at defiance. The acts relative to copy-rights, strongly

1824.

Gibbons v. Ogden.

support this position. These acts contain no provision to ascertain the character of the books or engravings to be published, and whether they be such as may be safely permitted, consistently with the good order of society and public morals. They grant the same right to the author, as the patent grants to the inventor. In both cases, they depend on the same constitutional right, and only convey a right to prevent others from using or publishing without his consent, but not to enable him to use or publish without restraint.

If a State can thus control a right to use a thing patented, directly, it may do it indirectly. If by a positive law, then, through the agency of the Courts, by injunction or otherwise. Or, the right to prohibit the use of it may be delegated to individuals, either acting as public agents, or in their own behalf, to protect some other right vested in them; and may forbid the use of the thing patented, or the publication of the book, the copy-right of which has been secured, without their license. So that if an exclusive grant be made by a State law to an individual, with a provision that the thing granted shall not be used in the State, without license of the grantee, and there be a patent under the act of Congress for the same thing, the consequence would be, that the State grantee could not use it, because it would be a violation of the patent, and the patentee could not, without the license of the State grantee, because the State law prohibited him. Thus, the State law would be inoperative, so far as it granted the exclusive right; but valid, so far as it prohibited the use of the thing patented.

These principles may be applied to the law now in question, which gives an exclusive right, and forbids any person to use the thing which is the subject of the right, without the license of the persons in whom it is vested. It contains a granting clause, and a prohibiting clause. The injunction is founded on the prohibition, and may be enforced, though the grantees might not use their right. Let it be supposed that, from reasons of public policy, the laws of New-York had prohibited the use of steam boats entirely, and had directed the Court of Chancery to restrain them by injunction, would not the prohibition have been a valid one? and if so, may not the State determine that it is against the public interest, that steam boats should be built or navigated, unless under the direction, or with the license, of an individual, who may be thought particularly skilful in that business? It might, therefore, be contended, that this injunction is to be sustained, whatever might become of the respondent's exclusive right.

A State may prohibit the use of a thing patented, by virtue of its power over the public domain. A patented thing cannot be used on the private property of an individual, without his consent. The power of the State over the public property, is, at least, equal to that of an individual over his own; and particularly so, as to the navigable rivers in the State, which are, emphatically, the property of the people of the State, and subject to their authority, acting through the local Legislature.

The question has hitherto been discussed, as if

1824.

Gibbons v. Ogden.

the exclusive right claimed by the respondents, was the right to an invention, for which a patent may have been, or may yet be obtained. But in truth, his right is not to the use of any invention, or of any thing for which a patent can be granted. Livingston and Fulton do not, on the face of the acts granting or securing the right, claim to be the inventors of any thing. In the act of 1798, c. 55. s. 21. it is recited, that R. R. L. "is the *possessor* of a mode of applying the steam engine to the propelling of vessels, on new and advantageous principles." It is not alleged or pretended, that he was the discoverer of that mode, or of the principles of its application; or that the mode, or the principles, were secret or unknown to the rest of the world. His right, therefore, is to the use of an improvement, introduced (perhaps) from a foreign country, and, consequently, not the subject of a patent, and in respect to which Congress has no power to legislate at all. On the other hand, it does not appear, that the appellant has a patent for any thing connected with the subject of steam boats, or for any thing belonging to the steam engine, which can be used in navigation by steam. He can, therefore, claim no right, in this case, under the patent laws; and there is no question as to any actual conflict between the State right and a patent right. He is, consequently, compelled to rely upon the broad ground, that the State has no power to legislate at all, for the encouragement of any art or science, or for any improvement connected therewith, because Congress has legislated under a power which is partial in its extent, both as to objects and time.

1824.

Gibbons v. Ogden.

The result of all that has been said, tends to establish, that the power in the constitution is strictly a concurrent power. That it is also a limited power in Congress to promote science and the arts, by particular means, and in regard to particular objects, and for limited times. That all the residue of the power, to promote science and the arts, by all other means, and towards all persons and objects, and for unlimited times, remains exclusively in the States. That the States may legislate, in pursuance of this concurrent power, in all cases, and can grant exclusive rights to any thing which may be the subject of a patent, which will be valid within their own territory until a patent is actually issued under the authority of the Union. That when a patent issues, the State has full power to prohibit or control the use of it within its territory, though it cannot grant the right to use the patented thing to others. That it may exercise the power of prohibition, partially or totally, by direct legislative acts, or through the medium of its Courts, and may delegate the right to prohibit to any of its citizens. That in the present case, the right of prohibition has been delegated to Livingston and Fulton; and the mode of exercising that right, is by injunction out of Chancery. That this right of prohibition may be valid, even though the grant of the exclusive right to use, &c., might be invalid. That the State laws are, therefore, valid, even on the supposition that the right granted by them, was to an invention which might be patented; and that they would be valid, as to their prohibitions, even were a patent issued for the same

1824.

Gibbons v. Ogden.

object. But that, in truth, the right in question, has no connection with any thing that can be the subject of a patent; and if it has, that no patent has, in fact, issued to the appellant, nor does he, in any mode, claim a right under a patent. That the question, therefore, on this branch of the cause, is reduced to the inquiry, whether the State may legislate under a power, confessedly concurrent, when Congress has not acted at all, or when no person sets up a right under any act of Congress.

But the laws of New-York, now in question, are supposed to be in conflict with the constitutional power of Congress, "to regulate commerce with foreign nations, among the several States, and with the Indian tribes."

This is a concurrent power, according to all the principles before laid down. It was fully possessed by the States, after the declaration of independence, and constantly exercised. It is one of the attributes of sovereignty, specially designated in that instrument, "to establish commerce." It is not granted, in exclusive terms, to Congress. It is not prohibited, generally, to the States. The only express restraints upon the power of the States, in this respect, are against laying any impost or duty on imports or exports, (except for the execution of their own inspection laws,) or of tonnage; against making any agreement or compact with a foreign power; and against entering into any treaty. All these prohibitions, being partial, are founded on the supposition, that the whole power resided in the States. They are, accordingly, all in restraint of State power. It is a clear

principle of interpretation, that where a general power is given, but not in exclusive terms, and the States are restrained, in express terms, from exercising that power in particular cases, that in all other cases, the power remains in the States as a concurrent power. Thus, the commentators on the constitution, speaking of the taxing power, say, "this restriction implies an admission that, if it were not inserted, the States would possess the power it excludes. And it implies a further admission, that, as to all other taxes, the authority of the States remains undiminished."[a] And, again: "In all cases in which the restriction does not apply, the States would have a concurrent power with the Union." This doctrine applies precisely to the power to regulate commerce. Laying imposts or duties of tonnage, is a part of the power to regulate commerce; and the making of a compact or agreement with other States or nations, is the only method by which a State could make any commercial regulation, which, as it regards its own citizens, would operate beyond its territorial limits. These restrictions imply, that the general power to regulate commerce, is concurrently in the States, and that it may be exercised by the States in all cases to which these prohibitions do not extend. But, the same implication is still stronger from the nature and terms of those prohibitory clauses. The State may lay duties on imports and exports, to execute its *inspection laws*. That class of laws

[a] *The Federalist*, No. 32.

1824.

Gibbons v. Ogden.

are, or may be, essential regulations of commerce, and they derive their authority altogether from State power. The existence of a power to pass them, is, therefore, expressly recognised by the constitution. So, also, a State may lay any duty upon imports or exports, or of tonnage, with the consent of Congress. This provision implies, that the power to lay all duties remains essentially in the States; that the exercise of the power is suspended, until Congress consent; and that, when the consent is given, the State law acts of itself, and by State authority alone. The States no where derive any powers from the constitution. All its provisions are in restraint of their authority, and the consent of Congress, in this instance only removes the restraint. A State may not enter into any treaty; but, with the consent of Congress, may enter into an agreement or compact with another State, or with a foreign power. A treaty is made with a view to the public welfare, either in perpetuity, or for a considerable length of time, and binds the whole Union. A compact or agreement is generally temporary in its nature and operation, and is executed by a single act, and binds only the State that makes it. In this sense the constitution must be understood, when it speaks of *treaties* as distinguished from *compacts*. It follows, that general and permanent commercial regulations with foreign powers, must be made by treaty, but that particular and temporary regulations of commerce may be made by an agreement of a State with another, or with a foreign power, by the consent of Congress. But,

in this case, the compact would derive all its efficacy from the original inherent power of the State, not from the act of consent by Congress, which would merely remove an existing restraint.

There is nothing in the nature of this power, which renders it exclusive in Congress. The power itself does not grow out of the Union, like the power "to borrow money on the credit of the United States." It does not operate, when exercised by a State beyond its territorial limits, like the power of naturalization. There is no necessary repugnancy between the acts of the two governments under this power, since it clearly admits of a great variety of regulations, which may operate together, without direct interference. The restraints specially imposed on the power of the State, relating to commerce, would have been unnecessary, if it were not considered as a concurrent power.

The practice of the States shows that the power has always been considered as concurrent. Thus, the State of New-York has passed numerous laws, which are regulations of commerce with foreign nations, with other States, and with the Indian tribes.[a] As to that part of the power which relates to trade with the Indian tribes, the people here referred to may be within the limits of a State. Thus, the commentators on the constitution consider it in that light, and contrast the power with that relating to the same subject in the

[a] These laws will be found specifically enumerated and stated in a note at the end of Chancellor Kent's argument.

1824. Gibbons v. Ogden.

old confederation, which was qualified so as "not to infringe the legislative rights of any State within its own limits."[a] Thus, Congress has legislated on that basis. By the act to regulate trade and intercourse with the Indian tribes, it is provided, s. 19, "that nothing contained in the act shall be so construed as to prevent any trade with Indians, on lands surrounded by settlements of citizens, and being within the ordinary jurisdiction of any of the individual States." But the State of New-York has also legislated on the same subject, and by the "act relative to the different tribes and nations of Indians within this State," prohibits the purchase of land from any Indian, without the authority of the Legislature; prohibits the sale of various articles to any Indian or tribe; makes numerous other regulations, as to trade and intercourse with them, by the citizens who surround them, so as to cover the whole ground over which Congress has declared its act should not extend. An examination of the laws of other States, will show that many of them have legislated, under every part of this power, to the same extent, and, in some cases, to a greater extent than New-York; and will show the havoc which must be made in the State laws, if this power is not to be considered concurrent.

This power is not only concurrent, but is *limited* in Congress. It does not extend to the regulation of the internal commerce of any State. This results from the terms used in the grant of power,

a *The Federalist*, No. 42.

"among the several States." It results also from the effects of a contrary doctrine, on the whole mass of State power. Internal commerce must be that which is wholly carried on within the limits of a State: as where the commencement, progress, and termination of the voyage, are wholly confined to the territory of the State. This branch of power includes a vast range of State legislation, such as turnpike roads, toll bridges, exclusive rights to run stage wagons, auction licenses, licenses to retailers, and to hawkers and pedlers, ferries over navigable rivers and lakes, and all exclusive rights to carry goods and passengers, by land or water. All such laws must necessarily affect, to a great extent, the foreign trade, and that between the States, as well as the trade among the citizens of the same State. But, although these laws do thus affect trade and commerce with other States, Congress cannot interfere, as its power does not reach the regulation of internal trade, which resides exclusively in the States.

It has thus been seen, that this power is concurrent; and as such, may be exercised by the States, subject, like all other concurrent powers, to the power of Congress, when actually exercised; and that it is limited, not extending to the internal trade of a State. We contend, that the exclusive right claimed by the respondent is valid, considered either as a regulation of intercourse and trade among the several States, or as a regulation of the internal navigation of the State.

Considering it, then, as a regulatoin of trade

1824.

Gibbons v. Ogden.

among the States, it becomes necessary to inquire into the foundation of the right of intercourse among the States, either for the purposes of commerce, or residence and travelling. From the declaration of independence, in 1776, until the establishment of the confederation, in 1781, the States were entirely and absolutely sovereign, and foreign to each other, as regarded their respective rights and powers as separate societies of men. During that period, the right of intercourse among them rested solely on the *jus commune* of nations. By the law of nations, the right of commerce has its foundation in the obligation resting upon all men, mutually to assist each other, and to contribute to the happiness of their fellow creatures. Right on one side, springs from obligation on the other. The right to purchase, springs from the obligation to sell. "One nation has, therefore, a natural right to purchase of another the things which it wants, and which the other does not need." The law of nations being only the application of the law of nature, as regulating the rights and obligations of individuals, to nations and sovereign States, this is the foundation of the right of buying. But the right of selling does not impose any obligation on another nation to buy, as that other may not want, and must be the sole judge of its own necessities.[a] It follows, then, that any State has a natural right to purchase of any other the articles which it needs, and to open a commercial intercourse for that purpose; but that every

[a] *Vattel, Droit des Gens, liv.* 1. c. 8. l. 2. c. 2.

1824.

Gibbons v. Ogden.

State, being under no obligation to purchase of another, may, at its pleasure, prohibit the introduction of any foreign merchandise. These rights of purchasing are not perfect rights, and of course cannot be enforced by one nation against another; and, being thus imperfect, it depends upon the will of each nation, whether it will carry on any commerce with another, or upon what terms and under what regulations. These imperfect rights, like all other imperfect rights between nations, can become perfect only by treaty; the effect of which, is to *secure* to a nation rights of commerce or intercourse, which it before enjoyed at the will of another. The right of travelling, or of entering into and residing in one nation by the citizens or subjects of another, depends on the same principles of international law. But the sovereign may forbid the entrance into his territory, either to foreigners in general, or in particular cases, and under particular circumstances, or as to particular individuals, and for particular purposes.[a] And as he may prohibit the entrance altogether, he may annex what conditions he pleases to the permission to enter. In the absence of any treaty stipulation, and of any prohibitory regulations, the natural right would exist, and might be exercised and enjoyed.

This being the relation subsisting between sovereign States, it follows, that before the confederation, each State enjoyed the right of intercourse with all the others, at the will of those others, both as respects the transit and residence of persons,

[a] *Vattel*, l. 2. c. 8. s. 180.

1824.

Gibbons v. Ogden.

and the introduction and sale of property. The confederation was a *treaty* between sovereign States, and "the better to secure and perpetuate mutual friendship and intercourse among the people of the different States," stipulated, that the free inhabitants of each State should have "free ingress and egress to and from any other State," and should enjoy in each State "all the privileges of trade and commerce; subject to the same duties, impositions, and restrictions, as the inhabitants thereof respectively: provided, that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State, of which the owner is an inhabitant." This article, then, *secured* the right of passing from one State to another, but gave no new right of commerce as to the introduction of any goods, and not even the right of removing from the State any property purchased in it. The rights of commerce, therefore, as between the States, remained as before, subject to all the municipal laws of the State, except that those laws must be general and impartial in their application. Under the confederation, then, the States retained the whole power of regulating foreign commerce, and that between the States, except as stipulated in the treaty of confederation itself. Under it, all the trade and intercourse between any State and any foreign nation, was carried on by the law of nature and nations alone. All trade between any State and another State, as to the right of importation, &c., was carried on in the same manner. No State could make any treaty of com-

merce with a foreign power, or with another State. 1824.

Gibbons v. Ogden.

The inconveniences resulting from these powers of the States, gave rise to the new constitution. These inconveniences consisted principally in the impositions and taxes levied on property imported and exported by one State through another. There was no inconvenience as to the right of passing from State to State, as that was secured by the articles of confederation. The constitution applied the remedy to these evils in two ways: (1.) By express prohibitions on the States, in those particulars in which the evils had been most sensibly felt, preventing them from levying any impost or duty of tonnage, without the consent of Congress. (2.) By vesting Congress with a general power to regulate commerce with foreign nations and among the States. The constitution does not profess to give, in terms, the right of ingress and regress for commercial or any other purposes, or the right of transporting articles for trade from one State to another. It only protects the personal rights of the citizens of one State, when within the jurisdiction of another, by securing to them "all the privileges and immunities of a citizen" of that other, which they hold subject to the laws of the State as its own citizens; and it protects their property against any duty to be imposed on its introduction. The right, then, of intercourse with a State, by the subjects of a foreign power, or by the citizens of another State, still rests on the original right, as derived from the law of nations. Suppose there

1824. Gibbons v. Ogden.

was no treaty with a foreign power, and no act of Congress regulating intercourse with that power, but barely a state of peace; that power would enjoy the right of trade and intercourse with New-York, by the law of nations alone. But that right might be restrained, or regulated, or abolished by the law of New-York alone. Such was the situation of New-York before the adoption of the constitution, both as to foreign nations and the other States. The constitution has not abridged the power of the State in this respect. It has only subjected it to the superior power of Congress when actually exercised.

An examination of the acts of Congress on this subject will show, that, as the constitution has not given the right of intercourse and trade, so neither has Congress, in the exercise of its constitutional powers, by any law, given that right. Here the learned counsel entered into an elaborate examition of the statutes, for the purpose of establishing this position.

It would seem to follow, from this view of the constitution and the acts of Congress, that the right of transit from State to State, by land or water, for commercial or other purposes, is founded on the *jus commune* of nations; that the constitution does not affect that right, except in specified cases; and as to all others, leaves the right as before, with a general power in Congress to regulate and control it, so far as it may be connected with commerce; that the State has the concurrent power also, to regulate and control it, so far as it may be connected with commerce; that the State has

1824.

Gibbons v. Ogden.

the concurrent power also, to regulate and control it, in all cases where its regulations do not actually conflict with those of Congress; that Congress has made no regulations, which alter or affect the right at all, by giving any other right than was before enjoyed; that all the regulations of the State, therefore, which operate within its own limits, are binding upon all who come within its jurisdiction; and that if Congress deems such regulations to be injurious, it may control them by express provisions, operating directly upon the case.

The case has, heretofore, been considered as if the steam boat laws were regulations of commerce among the States, in the ordinary acceptation of those terms. But is the law in question any thing more than a regulation of the internal navigation of the waters of the State? In terms, it applies only to the waters within the State. It does not deny the right of entry into its waters to any vessel navigated by steam: it only forbids such vessel, when within its waters and jurisdiction, to be moved by steam; but that vessel may still navigate by all other means; and it leaves the people of other States, or of New-York, in the full possession of the right of navigation, by all the means known or used at the time of the passage of the law. It is, therefore, strictly a regulation of internal trade and navigation, which belongs to the State. This may, indeed, indirectly affect the right of commercial intercourse between the States. But so do all other laws regulating internal trade, or the right of transit from one part to another of the same State; such as quarantine laws, inspec-

1824.

Gibbons v. Ogden.

tion laws, duties on auctions, licenses to sell goods, &c. All these laws are acknowledged to be valid. They are passed, not with a view or design to regulate commerce, but to promote some great object of public interest, within the acknowledged scope of State legislation: such as the public health, agriculture, revenue, or the encouragement of some public improvement. Being passed for these legitimate objects, they are valid as internal regulations, though they may incidentally restrict or regulate foreign trade, or that between the States. So of the laws now in question; they were passed to introduce and promote a great public improvement, clearly within the power of the State to encourage. They operate entirely within the limits of the State. They put no restraint on the right of entry into the State; but they exclude from the right of navigation on its waters in a particular mode, because they deem that mode injurious to the public interest, unless used by particular persons. How can they be distinguished in principle, from all the other laws which have been referred to? If steam boats had been pernicious in themselves, or had been deemed so as affecting injuriously other great public interests, could Congress have prohibited them on the waters of New-York, by any exercise of the power to regulate commerce? Could not the State have done it, by virtue of its general power, on its navigable waters? Suppose that steam boats were found to be unsafe, and destructive to property or lives, unless built or navigated by persons particularly skilful, could not the State prohibit the

use of them, unless thus built and navigated? If, under any circumstances, the State may restrict the use of them to particular persons, it may do so in its own discretion, for reasons of which it alone is the judge.

All this shows that the restraint imposed by these laws, on the navigation of the waters of the State, is merely an internal regulation of the right of transit, or passage from one part of the State to another; that it is a regulation which, if even indispensable to the public safety, Congress could not make; and that the power to make it must, therefore, be in the State.

The right of a State to regulate its internal trade, applies as well to its navigable waters, as to its other territory. Its rivers are its territory and domain, as much as the land, and equally subject to its laws in all respects. The power of Congress to regulate commerce applies as well to the land as to the water. Commerce between the States, and with foreign powers, is very extensively carried on by land. Congress has accordingly adapted its revenue laws to the land, by imposing duties on goods imported in carriages, &c. When goods are brought into the State in a carriage or wagon, cannot the State prohibit the transportation of those goods from one part of the State to another, except in a particular manner, or by a particular road, or in vehicles of a particular description? Where is the difference between an exclusive right to navigate vessels by steam on the water, and an exclusive right to move carriages by steam on the land? Cannot a

1824.

Gibbons v. Ogden.

State grant an exclusive privilege to carry goods as well as passengers, in carriages or vessels, by water or by land? May it not convert all its roads leading into other States, into turnpikes, levy tolls upon them, and alter and abolish them at pleasure? All these are regulations of the internal trade of the State, but they may, and, indeed, must affect, to a great degree, the trade between the States. By virtue of the right of a State over its navigable waters, it establishes *ferries*, which are exclusive rights to use parts of navigable waters for particular purposes and in a particular manner; and *bridges*, which interrupt, and sometimes destroy the navigation of rivers: It grants the land under the water at pleasure, builds public piers, erects dams and other obstructions, and diverts the course of the waters for any purpose whatsoever. By its power over its land territory, a State establishes roads and canals, regulates the carrying of goods, and the amount of tolls upon them, grants exclusive privileges to stage wagons and others, for the carriage of goods and passengers, and performs all other acts of sovereignty in regard to these public highways.

It appears, then, that a State may exercise the same control in these respects, over both land and water, within its own jurisdiction; that the right, as to both, rests on the same foundation, that of a sovereign over his domain; and that it has uniformly been exercised over both in the same manner. What, then, is the right under which the respondent claims? It is only an internal regulation of the use of the waters of the State. This

is clearly the case, when it applies to the case of the conveyance of passengers or goods, on the waters of the State, where the whole journey or transit is within the State, as from New-York to Albany. Is it in truth any thing more than an exclusive right of ferry over the waters of Hudson's river? It is, in substance and effect, an exclusive right to carry passengers in boats navigated in a particular mode, on the navigable waters of the State. These waters are a public highway, like any other public road on land, and, as such, are completely subject to the control of the State laws. There are various acts of Congress which recognise the power of the States to control their navigable waters. Thus, in the act enabling the people of Louisiana to form a constitution, there is a provision, that the State convention *shall* "*pass an ordinance providing* that the river Mississippi, and the navigable rivers and waters leading into the same, or into the gulf of Mexico, *shall be common highways*, and for ever free, as well to the inhabitants of the said State, as to other citizens of the United States, without any tax, duty, impost, or toll therefor, imposed by the said State."[a] And in the act for the admission of that State, the above provisions, as to the navigation of the Mississippi, are made one of the fundamental conditions of the admission.[b] Similar conditions were also imposed upon the admission of the States of Mississippi, Missouri,

a Ingersoll's Dig. 586.
b Id. 583.

1824.

Gibbons v. Ogden.

and Alabama;[a] which strongly imply, that the new States would have had a right to control the navigation of their waters, if these provisions had not been inserted; that there is nothing in the constitution which could prevent them from doing so, when they should once have been admitted as equal members of the Union; and that Congress could pass no law, under the constitution, to prevent them from doing it.

But the power of Congress is "to regulate *commerce*." The correct definition of *commerce* is, the transportation and sale of commodities. It is so considered in all the regulations made by the laws of Congress. They speak generally of vessels and their cargoes, and whatever rights are given by the laws of Congress, apply to commerce strictly and properly speaking. Any person claiming to navigate the waters of the State of New-York against the State laws, under any right derived from the laws of Congress relative to commerce, must show himself qualified according to these laws, and actually exercising that right under their provisions. Now, if the license here set up gives any right, it is to carry on the coasting trade, which consists in transporting goods from one State to another. It is not pretended that the appellant was engaged in this trade, when stopped by the injunction. It appears by the pleadings, that his boat was employed in the transportation of persons or passengers for hire, and it is notorious that this is a distinct business.

[a] *Ingersoll's Dig.* 506. 612. 617.

It is often entirely disconnected from any commercial object, though sometimes indirectly connected with trade. So it has been considered by some of the States. New-York once laid a tax upon passengers travelling in the steam boats; and Delaware taxed passengers travelling through that State in carriages. But these States could have laid no tax on *property* thus transported. If, then, the appellant's boat was engaged, *bona fide*, in the coasting trade, the question might arise as to its rights and privileges under the enrolment and license. But, when no trade is carried on, or intended to be carried on, under the license, it is clear that the license is a fraud upon the State law, if that law is in other respects valid. An examination of the provisions of the statutes relating to the coasting trade will show, that they all relate exclusively to the coasting trade as before defined, and do not contemplate the carrying of passengers as distinguished from commerce. Every vessel engaged in it, must not only have a license, but must comply with various regulations, at every departure she takes from one district to another; and, unless it is shown that such regulations have been complied with, the vessel can claim no right (in any case) to navigate under the laws of the United States. It does not appear that the appellant's boat has ever done this, or pretended to do it, or, in fact, to be engaged in trade at all.

It has thus been attempted to be shown, that our exclusive right is valid, even if the law granting it is to be considered as a regulation or restric-

1824. Gibbons v. Ogden.

tion of the right of commercial intercourse between the States, on the ground, (1.) That the power to regulate commerce is strictly a concurrent power. (2.) That the State may act in any manner, in the exercise of that power, so long as its laws do not interfere with any right exercised under the constitution or laws of the United States. (3.) That the appellant, in this case, has shown no right under that constitution or these laws, and, therefore, cannot contest the validity of the exclusive grant. (4.) That even if the enrolment and license relied on, give a right, it is not the right of intercourse for any other purpose than for the coasting trade; and the appellant does not show that he was carrying on, or intended to carry on, that trade. But that the State law, in fact, is only a regulation of the internal trade and right of navigation, within the territorial limits of the State: that the power to regulate this, is exclusively in the State; that the State has exercised it, in the same manner, both by land and water; and that the law is valid, although incidentally it may affect the right of intercourse between the States.

To which it may be added, that the State law may be valid in part, or as enforced under particular circumstances, though it may be void under other circumstances. Thus, the law may be held void, so far as it restrains the right of navigation between State and State, either for commercial purposes, strictly speaking, or for all purposes, including the transportation of passengers. And it may, at the same time, be valid, so far as it restrains the right of internal navigation, strictly

speaking, either in the whole extent of the right, or as a mere exclusive right to carry passengers in steam boats. Thus, the State law may be suffered to operate, in whole or in part, so far as it may, without actual conflict with the constitution or laws of the United States.

Mr. *Emmett*, on the same side, stated, that the question sought to be presented, was the complete invalidity of these laws of New-York, as being repugnant to the constitution of the United States. If the invalidity be not total and absolute, (and that might well be the case with statutes, which are often void in part, and good for the residue,) the appellant must further show, that *he himself* stands in that situation, which entitles him to allege their partial invalidity; that *his* case is such, as that the part of the law which is void, is calculated, if enforced, to affect or injure his rights.

In addition to the general *prima facie* presumption in favour of the constitutionality of every act of a State Legislature, this series of laws derives a peculiar claim to that presumption, from the history of the circumstances attendant on their enactment. On the 19th of March, 1787, a short time before the meeting of the federal convention, the Legislature of the State of New-York made its grant to John Fitch, for 14 years. From motives, of the correctness of which this Court can take no cognizance, the Legislature, on the 27th of March, 1798, thought fit to repeal that law, on the suggestion that Fitch was either dead, or had with-

1824.

Gibbons v. Ogden.

drawn himself, and that Robert R. Livingston was possessed of a mode of applying the steam engine to propel boats, &c. At this time, all the laws of Congress regulating commerce and patents, had been for above five years in operation, and their provisions familiarly known. The Council of Revision, consisting of Mr. Jay, as Governor, Chief Justice Lansing, Judge Lewis, and Judge Benson, notwithstanding the personal regard they might well be supposed to have entertained for Chancellor Livingston, (who was also a member, but did not sit,) thought it their duty to object to this bill, on the ground that the facts from which Fitch's forfeiture was to arise, had not been found by some due course of law. The act, however, passed the Legislature by a constitutional majority. But he would here ask, *who* made this objection, and what were the inferences it afforded, as to the constitutionality of the law? Mr. Jay's is a name of peculiar authority; Chief Justice Lansing had been a member of the federal convention; and both the Judges were perfectly conversant with the political proceedings of the day. They were adverse to this act on principle, and must be presumed to have presented all the objections against it which they thought well founded. They not only did not think that the adoption of the constitution, and the enacting by Congress of her revenue and patent laws, had made Fitch's privileges cease, but neither the constitution nor those laws appeared to furnish any objection against a similar grant to Robert R. Livingston. On the 29th of March, 1799, an act was passed, extend-

ing the former act for twenty years from its date, and giving two years for making the experiment. That passed the Council of Revision without any objection, none of the judges having dreamt that it was unconstitutional. The time for making the experiment having run out, without a boat having been made, and Mr. Fulton having associated himself to Mr. Livingston in the investigation, on the 5th of April, 1803, the Legislature made the grant anew to Messrs. Livingston and Fulton. And that law was again approved of by the Council of Revision, consisting almost entirely of new members, and differing from the first. The time granted by this law for constructing a boat, again ran out; and on the 6th of April, 1807, it was again extended for two years, and that act also approved of by the Council of Revision. In the course of that year, the experiment was successfully made; and on the 11th of April, 1808, the Legislature, by an act, which also passed the Council of Revision, *made a contract* with Messrs. Livingston and Fulton, by which they hoped to gain, and did gain, unequalled accommodations for persons travelling in the State.

The success of those gentlemen awoke the cupidity of others, and doubts of the constitutionality of those laws were, for the first time, raised. But, after these questions were first broached, and while opposition boats were actually building, on the 9th of April, 1811, the Legislature passed another act, which also received the sanction of the Council of Revision. These were not judicial decisions; but they were six consecutive and de-

1824. Gibbons v. Ogden.

liberative acts of Judges, equally bound, by their duty and oath of office, to examine, decide, and act upon this objection, if it had sufficient force; they so nearly resembled judicial decisions, that they might well be cited as authorities. They also showed, that the laws now objected to had not grown out of any temporary effervescence, or excitement, or party intrigues. The grant began in 1798, and had been universally ratified down to 1811.

But the constitutionality of those laws had been the subject of a judicial decision of the most respectable character. The act of 1811 had a proviso, that nothing therein contained should extend to the three opposition boats actually built and launched. With regard to two of them, Livingston and Fulton filed a bill for an injunction to prevent their navigating. The then Chancellor thought the question too important to grant an injunction, in the first instance, and refused it; from that decision an appeal was made to the Court of Errors of that State; there the constitutionality of those laws was very ably disputed, but supported by the unanimous decree of that Court, and the very elaborate opinions of the Judges, which, for sound constitutional reasoning, can scarcely be surpassed.[a]

New-York is not the only State which has passed such laws. Massachusetts, February 7, 1815, granted to J. L. Sullivan, a similar grant for steam tow-boats, on Connecticut river, for

[a] Livingston v. Van Ingen, 9 *Johns. Rep.* 507.

twenty-eight years, after the expiration of his patent, which, on February 11, 1819, was enlarged for two years. New-Hampshire, in June, 1816, gave him a similar privilege on the Merrimack. Pennsylvania, on the 26th of March, 1813, gave a similar right to James Barnes, from Wilksbarre to Tioga Point, the borders of our State. Georgia, on the 14th November, 1814, gave a similar right to S. Howard, for all the waters of the State, with steam tow-boats; and by another act, 19th December, 1817, granted to a company, (probably deriving under Howard,) a similar right for steam boats for twenty years. Tennessee has lately given a similar right on the Tennessee river.

What are the provisions of the constitution alleged against the validity of those laws? They are to be found in the powers given to Congress, art. 1. s. 8. to regulate commerce with foreign nations, and among the several States, and with the Indian tribes; and, also, to promote the progress of science and of the useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

If the constitution had not contained either of the provisions referred to, the right of the States to grant exclusive privileges would be unquestionable. At any rate, no point could be presented to this Court, by which it could have jurisdiction to consider the validity of their grants. In free countries, which reject the pretensions of prerogative, it is (unless constitutionally forbidden) a

1824.

Gibbons v. Ogden.

part of the right of legislation; and whether wisely exercised or not, is a question between the government and the people, with which this Court have nothing to do.[a] Those are the only provisions on the subject; for it is clear, that the 2d sec. of the 4th art. (which, however, has sometimes been mentioned,) would not have prevented the exercise of this right: That is only intended to secure to all citizens of the United States, when coming into any State, the same immunities and privileges that are enjoyed by the citizens of that State, and subject to the same laws and regulations; and, unquestionably, those laws do not place the citizens of other States on a different footing than the citizens of the State of New-York.

Those provisions, before specified, cannot apply to interfere with the State laws, unless where a case is presented, the facts of which bring it within one or other of those provisions.[b] Now, the case presented contains nothing to make either of the provisions of the constitution applicable to it. Certainly *no patent* is here presented touching the same subject matter, and with which the State grants are pretended to interfere. On this point the appellant has no right to ask for the decision of this Court, or to claim the benefit of its jurisdiction.

Neither does the case present any ground on

a 6 *Johns. Rep.* 559, 560. Per Yates, J. 563. Per Thompson, J. 573, 574. Per Kent, Ch. J.

b Houston v. Moore, 5 *Wheat. Rep.* 1. Per Johnson, J. p. 33.

which the application of the clause respecting commerce can be made; the vessels not having been engaged in trade or commerce, but in carrying passengers for hire. But if either of those provisions can be applicable, what is the general rule for their construction, as to the extent and conclusiveness of the powers they confer? In the delegation of authority to Congress itself by the constitution, the phrascology does not imply exclusive power. It is remarkable, that even the definite article *the* is omitted, and it is only provided that Congress shall *have power*, &c. And this omission was not accidental, but studiously made. By referring to the journals of the Federal Convention,[a] it will be found, that the sixth article of Mr. Charles Pinkney's draft has the words "shall have *the* power," &c. In the draft reported by the committee of five, (art. 7th,) the definite article is still preserved.[b] In the draft as reported by Mr. Brearly, the word "the" is left out, clearly by design.[c] Notwithstanding that, Mr. Patrick Henry and Mr. George Mason, and, indeed, the opposers of the constitution generally, thought, that by that instrument, as originally presented to the people, all the powers given to Congress would be considered as given to them exclusively of the States.[d] Mr. Henry said, "the right interpretation of the delegation of those

a p. 75.
b p. 222.
c p. 323, 324.
d Virginia Debates, 300.

1824.

Gibbons v. Ogden.

powers was, that when power was given, it was exclusively given." And Mr. George Mason[a] asks, "will powers remain to the States, which are not expressly guarded and reserved?" This construction, which was the general foundation of the opposition to the constitution, was strenuously disavowed and reasoned against in the *Federalist*,[b] and actually produced the 10th article of the amendment. The same doctrine was, nevertheless, maintained by one of the counsel in the case of *Sturges v. Crowninshield*.[c] He says, "every power given to the constitution, unless limited, is entire, exclusive and supreme." But the Court held differently; that the grant of a power to Congress does not imply a prohibition on a State to exercise the same right.[d] And the doctrine is very fully enlarged upon by Mr. Justice Story, in *Houston v. Moore*.[e] It is also very clearly laid down in the case already cited, by Thompson, J. and by Kent, Ch. J.[f] But the rule is more strongly, and perhaps not less justly, laid down by Judge Tucker, in his edition of *Blackstone's Commentaries*;[g] after alluding to the clauses restraining the powers given, he says, "the sum of all which appears to be, that the powers delegated to the federal government are, in all cases, to receive the

a *Virginia Debates*, 313.
b Nos. 32. 82.
c 4 *Wheat. Rep.* 124.
d *Id.* 193.
e 5 *Wheat. Rep.* 48. 54.
f Livingston v. Van Ingen, 9 *Johns. Rep.* 565. 571.
g *Tucker's Bl. Comm.* Part 1. App. D. p. 154.

1824.

Gibbons v. Ogden.

most strict construction that the instrument will bear, where the rights of a State, or of the people, either collectively or individually, may be drawn in question." This rule of construction must be correct; for *the constitution gives nothing to the States or to the people.* Their rights existed before it was formed, and are derived from the nature of sovereignty and the principles of freedom. The constitution *gives* only to the general government, and so far as it operates on State or popular rights, it takes away a portion, which it gives to the general government. In respect to *extent and range*, this delegation of powers ought, perhaps, to be liberally construed; but the States or the people must not be thereby excluded from the exercise of any part of the sovereign or popular rights held by them before the adoption of the constitution, except where that instrument has given it exclusively to the general government. The 10th amendment of the constitution was adopted to secure that construction, and it is conformable to the rules of reason and law, in construing every similar instrument. The truth of this rule has, however, been sometimes controverted, by referring to the power of naturalization as exclusive, and reasoning from that to the others. Naturalization is decided by this Court to be an exclusive power; but it must be so considered, not from the grant of it in the 7th article, but from the force and necessary effect of the 2d sec. of the 4th article. It is, therefore, an exception, and does not shake the general rule.

It is of very little importance, whether the power

1824.

Gibbons v. Ogden.

to regulate commerce be *exclusive* or *concurrent*, since this State grant does not, in fact, interfere with any congressional regulation of commerce. But as the exclusive nature of that power has been always insisted on, and used as an argument against this grant, it may be right to consider the solidity of the assertion.

The expression, *concurrent powers*, is objected to, as if it implied equality in the rights vested in Congress and the States. It is only a verbal criticism, that it would be more correct if the term used was *co-ordinate*. The term, concurrent, is adopted by the *Federalist*, and has constantly been used to express those powers. It is always understood, when so applied, that the exercise by the States must be subordinate, and never can be in collision with that by Congress. It has been said, *commerce is an unit*; the meaning of that expression does not very clearly appear, nor its force and application to the argument. If it be an unit, the constitution has broken it into fractions, and given to the States the exclusive control of one of the fractions. But further, the *regulations* relating to that unit, are many and various: some acting on one part, and some on another, and operating on it in different ways. It is with these regulations, that this discussion has to do; and the question still remains, whether some of those regulations may not, subordinately, emanate from the States.

As Congress has no power to regulate the internal commerce of any State, none of its regulations can affect so much of the exclusive grant, as

1824.

Gibbons v. Ogden.

restrains vessels which are only used within the States; nor can it give to any man a permission to carry on any steam boat navigation, which, in its beginning, and ending, and course, is entirely confined within the waters of the State: for instance, between New-York and Albany; on Cayuga lake; on lake Ontario, and the St. Lawrence, from Niagara to Ogdensburg. The only questions can be, as to navigation between foreign countries, or another State and New-York; and even there, the power of Congress could only be extended to fair cases of *trading*, within the purview of the constitution, and not to the mere transportation of passengers; nor to any colourable pretence of trading, as a cover for carrying passengers, and defeating the grant. This distinction is, in itself, of great consequence, and peculiarly applicable to the case before the Court, in which the complainant states, and the defendant admits, the vessels to have been employed in the transportation of passengers. The power given to Congress to regulate commerce with foreign nations, and between the several States, relates to commerce, in the proper acceptation of the term; "the exchange of one thing for another; the interchange of commodities; trade or traffic." This is the direct subject of the power; and by force of the auxiliary power, "to make all laws which shall be necessary for carrying into execution the foregoing powers," Congress has passed laws for erecting ports of entry and delivery, for the collection of duties, regulation of seamen and ships employed in foreign commerce, or that between the States. Ports, duties, seamen

1824.

Gibbons v. Ogden.

and ships, afford the means of regulating commerce, and therefore, so far as they are used in such commerce, they come within the powers of Congress. It has an incidental power, indeed, to regulate *navigation*, but only so far as that navigation is, or may be, subservient to the commerce it has a direct power to regulate. It has no right to interfere with the navigation of the navigable waters of any State, or even where they are common to two States, except so far as that navigation is used for, or applicable to, the purposes of the commerce it has the power to regulate; and it is a proposition unequivocally false, when asserted generally, that Congress has power to interfere with or regulate the navigation of the navigable waters of any State or States. The proposition can only be made true, by adding the qualification, "in so far as that navigation is used in foreign commerce, or commerce between the States." It is contended, that the navigable waters belong peculiarly to the Federal government, and not to the States within which they are. This position, combined with some others, made by the appellant's counsel, leads to alarming results. We have canals of which we are proud, and from their tolls the State anticipates large profits: one is laying out from Sharon, in Connecticut, to the Hudson; and another contemplated through New-Jersey, from the Delaware to the Hudson. Those already in operation, run from navigable waters to navigable waters; from lake Erie or Champlain to the Hudson: those projected, are to be from one State to another. Their utility and profits must

1824.

Gibbons v. Ogden.

result from transporting the produce of Canada, or other States, to New-York, principally for exportation and foreign trade; and bearing back, in return, the products of foreign commerce to those places. They are, then, instruments of foreign commerce, and of that among the States; and mere channels of communication between navigable waters, or different States. Now, where a power is given to Congress, all the means which are appropriate and plainly adapted to the execution of that power, are also given.[a] It is contended, that it belongs exclusively to Congress to regulate the navigation and vessels that are the medium of foreign trade, and that between the States; this commerce is an unit, and cannot be divided; the navigable waters belong to the general government, and not to the States; no State has a right to collect revenue from foreign trade, or that between the States. If these positions be considered together, what becomes of the State control over our canals, the craft on them, or the tolls from them? the pier at Black Rock, or the basin at Albany? If the power of Congress over commerce be exclusive, it must also have exclusive control over the means of carrying it on. No State, then, should be mad enough to make another canal, susceptible of being used for intercourse between the States, or foreign commerce.

But there is no grant in the constitution giving the navigable waters peculiarly to the Federal go-

a United States v. Fisher, 2 *Cranch*, 358. M'Culloch v. Maryland, 4 *Wheat. Rep.* 316.

1824.

Gibbons v. Ogden.

vernment, and not to the States within which they may be; nor is it traced to any grant, but to some mystical consequence of the Union itself. The position is entirely denied, and met by another, of which the strictest examination is solicited. It is this: *the Federal government can do no act on the navigable waters within the limits of the United States, which, or a corresponding act to which, it cannot do on the land, within the same limits.* If it can, let the act be named. Then the navigable waters belong no more to the Federal government, and are no otherwise affected by the Union, than the land itself. Both are equally subject to the jurisdiction of the general government, for the exercise of all powers delegated to it by the constitution, and both equally subject to State jurisdiction, for the exercise of all powers connected with State sovereignty. It is said, that admiralty and maritime jurisdiction belong exclusively to the Federal government; but this Court has decided, that the grant to the United States in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same; and that the general jurisdiction over the place, subject to this grant, adheres to the territory as a portion not yet given away; and that the residuary powers of legislation still remain in the State. Besides, admiralty and maritime jurisdiction depends either on the place where the act is done, or the nature of

a United States v. Bevans, 3 *Wheat. Rep.* 336.

the act itself. The place gives no jurisdiction, where the navigable waters in which the tide ebbs and flows are within the body of a county or a State, or of two States.[a] Accordingly, the laws giving jurisdiction of crimes to the District and Circuit Courts, confine it to "places out of the jurisdiction of any particular State." If the Admiralty Court has cognisance of any matter done on navigable waters within a State, it is derived, not from the *locus*, but from the *causa litis*, which gives jurisdiction, though it should arise on land: for instance, seamen's wages, founded on shipping articles made on land, have always, and charter parties and policies of insurance, have lately, been held to be of admiralty jurisdiction.[b]

But, it is further said, to prove the exclusive control of the general government over those navigable waters, that they are regarded and treated as the high seas, since this admiralty and maritime jurisdiction includes "all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas." The seizures alluded to, are for breaches of commercial laws, coming under the constitutional powers of Congress, and the authority of the United States over the place, on that account, is equal, whether the of-

[a] 4 *Inst.* 137, 138, 139, 140. 12 Co. 129. *Moor*, 122. 891, 892.

[b] De Lorio v. Boit, 2 *Gallis. Rep.* 308.

1824.

Gibbons v. Ogden.

fence be committed on land or water; and the very next sentence gives to the same District Court "exclusive original cognisance of all seizures on land, or other waters, than as aforesaid made." In fact, analogous provisions for regulating foreign commerce by land, are made by the act of the 2d of March, 1821, "further to regulate the entry of merchandise imported into the United States from any adjacent territory." It directs every conductor of any carriage or sleigh, and every other person coming from any adjacent foreign territory into the United States, with merchandise subject to duty, immediately on arrival within the United States, to deliver a manifest, &c. at the office of the nearest Collector, or Deputy Collector, to be verified on oath; for non-compliance, the carriage or sleigh shall be forfeited. The duties to be paid or secured by bonds; and all penalties and forfeitures to be sued for and recovered in the manner prescribed by the general collection law. Clearly, then, Congress has no more power over the navigable waters, than over the land; nor over the ships, than it has over the carriages and sleighs engaged in the same kind of commerce. It might register, enrol and license the latter, if it thought fit, as well as ships. Nor is there any greater control acquired by the general government, in virtue of the existence of the Union, over navigable waters or shipping, than over land and land carriages. The power it possesses as to ships or vessels, is only in so far as they are instruments of foreign commerce, or of that between the different States; but in so far

as the employment of a ship or vessel in navigating the waters of any State or States, has no connexion with the commerce which Congress has power to regulate; neither that employment, nor its regulation or prohibition, falls within the purview of the federal constitution. It could not, I think, be seriously contended, that Congress can regulate the carrying of passengers from any part of the Union, who are travelling to Balston, Saratoga, or any other place, for health or pleasure; and even if the object of their passing were to trade, that would not legalize the interference of Congress as to the mode of their conveyance from place to place. That naturally falls within the sphere of State legislation; and we must keep in memory the rule of construction laid down by Judge Tucker, and already cited, "that the powers delegated to the federal government are, in all cases, to receive the most strict construction that the instrument will bear, where the rights of a State or of the people, either collectively or individually, may be drawn in question." Those who contend, that navigating by steam boats between different States, falls within the powers of Congress, must admit that it would have the power to prohibit the carrying of goods, wares or merchandise in a steam boat from any foreign place, or different State, to another. Now, would Congress have the power to prohibit the carrying of passengers in steam boats from Norfolk or Elizabethtown Point to New-York? Certainly such a power could not be contended for; and why not?

1824.

Gibbons v. Ogden.

only because the powers of Congress have nothing to say to the carrying of passengers.

It may be urged against this train of reasoning, that Congress has actually legislated on the subject of passengers. By the act of the 2d of March, 1819, regulating passenger ships and vessels, the fact is admitted; but, though the humane motives which suggested the law, and its provisions, are laudable, its constitutionality may well be doubted. If Congress has the power to regulate the conveyance of mere passengers, coming by water from foreign countries, it has an equal power to regulate those coming by land, or passing from one State to another. If that law be constitutional, or if a steam boat, only employed in carrying passengers between New-Jersey and New-York, can come within the jurisdiction of Congress, it must necessarily follow, that Congress has a right (and, indeed, according to the doctrine of our adversaries, is exclusively authorized,) to regulate the number of passengers to be received into every ordinary stage coach, though it does not carry the mail, and the size, shape, description, and kind of diligence, and the kind and number of horses, to be employed in conveying passengers between New-Brunswick and Maine, Vermont and New-York, and through the State of New-Jersey, between New-York and Philadelphia! If this legislation falls under the power to regulate commerce, and that power is exclusive, it must be contended, that none of the States in which these diligences may travel, have a right to pass any law respecting them! Neither this Court, nor the people of the

United States, are, probably, prepared for the assertion of that claim. The States have always legislated on a different principle, whether the conveyance of passengers was to be by land or water. Every State has, probably, made numerous provisions on this subject; but, want of time and opportunity has confined research to the statutes of New-York and Georgia.[a]

a In those States, 1st, as to *ferries and bridges:* In the laws of *New-York*, (3d vol. *Webster's ed.* p. 321.) an act passed 19th March, 1803, grants to John Ransom the exclusive right, for ten years, to keep a ferry across Lake Champlain, from his landing, at Cumberland Head, to Grand Isle, in Vermont, with a prohibition and penalty against any other person's keeping a ferry, or transporting any persons, goods or chattels, for hire or pay, across the lake, between the point of Cumberland Head and the north point, called Gravelly Point, on said Cumberland Head. An act passed May 16th, 1810, (6th vol. *Websters & Skinner's ed.* p. 16.) makes the same grant for ten years more, with the same prohibition and penalties, to Russel Ransom. An act passed May 26th, 1812, (*Id.* 394.) grants, in the same way, to Peter Deall, and his assigns, to keep a ferry across Lake Champlain, from Ticonderoga to the town of Shoreham, in Vermont, for sixteen years, with a like prohibition and penalties for carrying, &c. from any place on the west shore, within half a mile north or south of Deall's dwelling house. An act, passed March 28, 1805, (4th vol. same ed. 66.) gives to David Mayo the same right, from his landing, in the said town of Champlain, to Windmill Point, in Vermont, for ten years, with a like prohibition and penalty. An act, passed February 20, 1807, (5th vol. same ed. p. 11.) gives to Peter Steenberg the same right to keep, &c. a ferry between the south west point of Carlton Island and the outlet of Lake Ontario, (the high road to Canada,) with the same prohibition and penalty.

In Georgia, by an act of the 14th December, 1809, an exclusive right is given to Joseph Hill, &c. for one hundred years, to erect three toll bridges across the Savannah and its branches, (di-

1824.

Gibbons v. Ogden.

It is, however, contended, that the power of regulating commerce is *concurrent*. This position, indeed, is by no means universally acceded

viding South Carolina and Georgia,) a little above the city of Savannah, on the road between it and Charleston; and it prohibits any person's erecting a toll bridge across the said river Savannah, up or down it, within five miles of the city. An act of December 6, 1813, authorized John Hill to establish a ferry from Savannah to Proctor's Point, till he has built his bridges. An act of 15th of December, 1809, gives to William Garritt and Le Roy Hammond a right to make a toll bridge, and exact toll, across the Savannah river, from a place on the Georgia side, opposite Campbletown; and to Walter Leigh and Edward Rowell a similar bridge, &c. over the Savannah river, at Augusta. An act of December 5, 1800, gives to commissioners the right to establish a ferry over the river Savannah, at Augusta; the tolls to be for the benefit of the academy of Richmond county; which, perhaps, the appellant's counsel may think at variance with his position, that no State has a right to derive revenue by tolls on the trade or intercourse between two States. The same law prohibits any other ferry or bridge between Williams' ferry, opposite Fort Moore's bluff, and Ray's ferry, opposite Campbletown. An act of 6th of December, 1813, gives a ferry across the Savannah, to Ezekiel Dubze; and another is given to Zachariah Bowman and Daniel Tucker. An act, passed 9th of November, 1814, on the express ground of facilitating intercourse with South Carolina, gives to John M'Kinne and Henry Shultz, for twenty years, an exclusive right to a toll bridge over the Savannah, from Augusta, or within four miles thereof; and prohibits the establishing of any other toll bridge over the Savannah, from Augusta, or within four miles above or below the city.

2. *As to stages.* In the laws of *New-York*, an act, passed March 30, 1798, (4th vol. *Loring & Andrews' ed.* p. 399.) grants to Alexander J. Turner and Adonijah Skinner, an exclusive right for five years, of running stages between Lansingburgh and the town of Hampton, in the county of Washington, (i. e. to Vermont, or the road through it to Canada.) An act, passed February 26, 1803, (3d vol. *Webster's ed.* p. 322.) grants to T. Donally and

to. Judge Tucker, in his edition of *Blackstone*,[a] ranks among the powers exclusively granted to the federal government, the power to regulate

others, the exclusive right, for seven years, of the same kind, from the city of Albany to the north boundary line of the State of New-Jersey. An act, passed April 6, 1807, (5th vol. *Websters & Skinner's ed.* p. 186.) grants to John Metcalf the exclusive right, for seven years, of running stage wagons between the village of Canandaigua and the village of Buffalo, (i. e. the road by lake Erie to Pennsylvania, Ohio and Michigan.)

In *Georgia*, an act of November 25, 1802, gives to Nathaniel Twining, &c. for ten years, the sole and exclusive right of running a line of stage carriages between the city of Savannah and town of St. Marys, (on the borders of Florida.) Sec. 2, gives to him an exclusive right of conveying passengers and their baggage, *by water*, between Darien and St. Marys, (a coasting trade between two ports of entry, if carrying passengers be a branch of trade,) till a post road is established. An act of December 7th, 1812, gives to William Dunham the right of running stage carriages as above. Add to these, the decision of Perrins v. Sikes, in 1802, (*Day's Connect. Rep. in Err.* p. 19.) that a grant by the General Assembly, of an exclusive privilege to carry passengers by the stage, on the post road leading to Boston, as far as the Massachusetts line, was valid, which may be added as another legal decision on the constitutionality of those laws. Indeed, as to the regulation of passengers arriving in ships from foreign parts, some of the States have exercised, at least, a concurrent power. Of that kind is the act of the State of *New-York*, (2 *N. R. L.* 440.) and *New-Jersey* has passed a similar law on 10th of February, 1819. (*Justice's ed. N. J. Laws*, 655.) So also in *Massachusetts*, (2 *Mass. Laws*, 629.) by an act of February, 1794, masters of vessels coming from abroad, are required to report passengers, &c. And in *Delaware*, (2 *Laws of Del.* ed. 1797, by *S. & J. Adams*, c. 134. p. 1354.) an act to prevent infectious diseases, passed 24th of January, 1797, (sec. 5.) enacts, that no master, &c. of any ship bound to any port of that State, shall bring or import any greater

[a] Vol. 1. Part 1. App. D. p. 180.

1824.

Gibbons v. Ogden.

commerce, &c. the commerce between the individuals of the same State being reserved to the State governments. And he repeats the doctrine,[a] on the very untenable ground, that the regulation of commerce is not susceptible of a concurrent exercise: a doctrine which a review of State laws will show to be contrary to fact and experience. The opposite doctrine is strongly supported by Kent, Ch. J. in Livingston v. Van Ingen,[b] as the only safe and practicable rule of conduct, and the true constitutional rule, arising from the federal system. And it is the only safe

number of passengers and servants than shall be well provided and supplied with good and wholesome meat, drink, and other necessaries, particularly vinegar, as well to wash and cleanse the vessel, as for the use of the persons on board, during the voyage; and it directs the size of each birth, &c.; and that if any master shall offend, &c. he shall forfeit 600 dollars for every such offence. Sec. 7, enacts, that every master, &c. shall pay to the physician who boards his ship, six cents for every person he shall import or land in that State, which he is thereby authorized to recover from such passengers and servants respectively; and the physician shall pay over the moneys so received, to the treasurer of the trustees of the poor in his county. Here is another instance inconsistent with the position of the appellant's counsel, (if carrying passengers be trading,) that a State has no right to raise a tax or revenue by foreign trade. By another act of that State, passed February 3, 1802, the master or owner is required to give bond, that the person so imported and landed, shall not become chargeable. If the regulation of passengers belong to commerce, and that exclusively, (as it must, if the power to regulate commerce be exclusive,) by what authority can a State Court issue a *ne exeat* against a trader or merchant about to leave the State?

[a] *p.* 309.

[b] 9 *Johns. Rep.* 577, 578.

1824.

Gibbons v. Ogden.

and practicable rule; it is one which the extent of our territory would indicate, even if the government were despotic. In China, the Mandarins of provinces must be intrusted with some subordinate authority, to make commercial regulations adapted to local circumstances. With us, the peculiar nature and principles of our free and federative government, make the existence of such subordinate legislation more prudent and politic. There must be, even in respect to foreign commerce, local interests and details, which cannot well be presented to the view of Congress, and can be, at least, better provided for by the State Legislatures, emanating from the very people to whom they relate. This must have been perceived by the framers of the constitution, and they must have felt the difficulty of designating the limits of what ought to be permitted to State authority. They did not, therefore, attempt the limitation, except in some plain cases, which they marked by restrictions and prohibitions; but they guarded against any practical abuse of the permission, by securing to Congress the paramount and controlling power over the whole matter. This view of the subject is exceedingly strengthened, when we contemplate the probable future increase and extent of this confederacy. The thirteen original States were a band of brothers, who suffered, fought, bled, and triumphed together; they might, perhaps, have safely confided each his separate interest to the general will; but if ever the day should come, when representatives from beyond the Rocky Mountains shall sit in this capi-

1824.

Gibbons v. Ogden.

tol; if ever a numerous and inland delegation shall wield the exclusive power of making regulations for our foreign commerce, without community of interest or knowledge of our local circumstances, the Union will not stand; it cannot stand; it cannot be the ordinance of God or nature, that it should stand. It has been said by very high authority, that the power of Congress to regulate commerce, "sweeps away the whole subject matter." If so, it makes a wreck of State legislation, leaving only a few standing ruins, that mark the extent of the desolation. The position, however, is not correct. A power of regulating commerce is impliedly acknowledged to be in the States, by the 10th section of the 1st article; for that section makes specific limitations on its exercise by them, which would be unnecessary, if the power were not possessed by them; and tacitly admits (what is true as to all the State powers) that it is possessed in all other matters not expressly restrained. Congress can lay no tax or duty on any articles exported from any State. If the word *exports* were not in the 10th section, what would be the consequence? that the States, and they only, could lay duties on exports; and as it is, what is the construction? that, although Congress can, under no circumstances, impose a duty on exports, any State can, with the consent of Congress, to any amount; and without asking the consent of Congress, to an amount and extent necessary for executing its inspection laws; possessing, in that respect, a power of regulating external commerce, which is directly withheld from Congress. And

1824.

Gibbons v. Ogden.

from whence is derived the power *to make* inspection laws, but from the existing and more extensive right of making laws to regulate commerce? It seems, also, that the 9th section of the same article, paragraph 1, in like manner, admits the power to be in the States. The *importation* of slaves is, and has always been, considered as a branch of commerce; and it is in that point of view only, that Congress has authority to legislate on the subject. When, then, that paragraph speaks of any of the States thinking proper to allow that importation, it surely admits in them a right to permit or prohibit; and thus to legislate on what is undoubtedly a branch of commerce with foreign nations, or among the several States.

Indeed, it seems susceptible of demonstration, that Congress did not intend to ask, nor the States to give to that body, the exclusive power of regulating foreign commerce, or that between the States. In Colvin's edition of the Laws of the United States,[a] we find the proceedings, which led to the formation of the General Convention. The appellant's counsel has selected, as one of these, the representation from New-Jersey, to be found in pages 22, 23. art. 2d. But that can scarcely be said to have led to the convention. It was made in 1778, during the revolutionary war, and to meet objectionable parts of the old articles of confederation. At any rate, it appears from page 25, that the proposed alterations were rejected in Congress. In 1781,[b] Mr. Witherspoon

a 1st vol.

b *Ib. p.* 28.

1824.

Gibbons v. Ogden.

proposed in Congress a modified change of the power of regulating commerce, which was also negatived. None of the other States made any proposition similar to that from New-Jersey, in 1778. The following, more nearly approaching the time of the convention, better shows the extent of what Congress asked, and the States appeared willing to concede." "In Congress, Wednesday, July 13th, 1785. The committee, consisting of Mr. Monroe, Mr. Spaight, Mr. Houston, Mr. Johnson, and Mr. King, to whom was referred the motion of Mr. Monroe, submit the following report: 'That the 1st paragraph of the 9th of the articles of confederation, be altered, so as to read thus, viz. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace or war, except in cases mentioned in the 6th article; of sending and receiving ambassadors; entering into treaties and alliances; of regulating the trade of the States, as well with foreign nations as with each other; and of laying such imposts and duties upon imports and exports, as may be necessary for the purpose. *Provided*, that the citizens of the States shall, in no instance, be subjected to pay higher imposts or duties than those imposed on the subjects of foreign powers. *Provided* also, *that the legislative power of the several States, shall not be restrained from prohibiting the importation or exportation of any species of goods or commodities whatsoever.*'" This is what the

n 1 *L. U. S.* p. 49, 50.

1824.

Gibbons v. Ogden.

Congress itself asked for and required. The State of Virginia was among the first to meet its views; and Mr. Madison, in the Legislature of that State, proposed a resolution, which will be found in the same book,[a] as follows:

"Virginia, to wit: In the House of Delegates, Wednesday, November 30th, 1785."

[Mr. Madison's resolution for empowering Congress to regulate trade.]

"Mr. Alexander White reported, according to order, a resolution agreed to by the committee of the whole house, on Monday last, respecting commerce," &c.

"Whereas the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States; for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations; and whereas such uniformity can be best concerted and carried into effect by the federal councils, which, having been instituted for the purpose of managing the interests of the States, in cases which cannot so well be provided for by measures individually pursued, ought to be invested with authority in this case, as being within the reason and policy of their institution:

[a] p. 53.

1824.

Gibbons v. Ogden.

"Resolved, That it is the opinion of this committee, that the delegates representing this Commonwealth in Congress, be instructed to propose in Congress a recommendation to the States in the Union, to authorize that assembly to regulate their trade on the following principles, and under the following qualifications: 1st. Giving power to Congress to prohibit foreign vessels from entering any port, or to impose duties on them and their cargoes; such duties to be uniform, and carried into the treasury of the State. 2d. That no State be at liberty to impose duties on any goods, wares, or merchandise imported, by land or by water, *from any other State; but may altogether prohibit the importation from any State, of any particular species or description of goods, wares or merchandise, of which the importation is, at the same time, prohibited from all other places whatsoever.*" In each of those proceedings, it was clearly contemplated, that the individual States should at least retain the power of *absolutely prohibiting* the importation of any article they thought fit, within their own respective limits. How far was this intention subsequently departed from? Where is the power of prohibiting the exportation or importation of any article taken from the States by the constitution? They are indeed qualifiedly restrained from laying imposts or duties on exports or imports, but not from entirely prohibiting their exportation or importation; and they are also restrained from laying any duty on tonnage; and it is, perhaps, the fair construction of the instrument, that even their prohibitory legislation, is

1824.

Gibbons v. Ogden.

under the control of Congress, as having the paramount authority to regulate commerce; but valid until Congress shall have made regulations inconsistent with their laws. A review of some of the laws of different States, will show that they have always exercised the power of making very material regulations respecting commerce. This review must be abridged; but it is of extreme importance, and if it were possible to spread out in detail the immense mass of State laws, regulating and affecting foreign commerce, and that among the States, it would be conclusively seen, that they have always considered themselves as possessing, and have, accordingly, exercised a *concurrent* power over both those branches of trade; and that the power of Congress cannot be decided to be exclusive, without declaring to be unconstitutional, an appalling body of State legislation.

To begin with the laws respecting slaves. The appellant's counsel has questioned their constitutionality, and called them of doubtful authority. That expression showed he felt their application and important bearing, if their constitutionality be admitted; and it has never before been called in question. The constitution most clearly admits the right of the States to legislate on this subject, not merely till 1808, but always, unless Congress should prohibit the trade; and yet, as has been already suggested, slaves are treated in that very paragraph itself, as an article of commerce or trade. Congress, renouncing for a time the paramount right to prohibit their importation, claims the right to lay a tax or duty on it. So also, they

1824.

Gibbons v. Ogden.

are treated as an article of commerce in the *laws* of Congress; for it is only under the power to regulate foreign commerce, that, before 1808, *they* could forbid and make penal, the trade by our citizens to foreign nations, and since 1808, prohibit it entirely. In this point of view it was also considered, and the right of the States to prohibit it asserted, in the debates of the Virginia convention. On this article, Mr. George Mason observed,[a] "should the government be amended, still this detestable *kind of commerce* cannot be discontinued till after the expiration of twenty years." To which Mr. Madison, in reply, says,[b] "*We* are not in a worse situation than before. *That traffic is prohibited by our laws, and we may continue the prohibition. The Union*, in general, is not in a worse situation. Under the articles of the confederation, it might be continued for ever." And again,[c] "as to the restriction in the clause under consideration, it was a restraint on the exercise of a power expressly delegated to Congress, *namely, that of regulating commerce with foreign nations.*" Mr. George Nicholas also, alluding to both objections, says,[d] "Virginia might continue the prohibition of such importation during the intermediate period." And to obviate the objection, that the restriction of Congress was a proof that they would have power *not*

a p. 321.
b p. 322.
c p. 323.
d p. 324.

given to them, he remarked, "that they would only have had a general superintendency *of trade*, if the restriction had not been inserted. But the southern States insisted on this exception to that general superintendency for twenty years. It could not, therefore, have been a power by implication, as the restriction was an exception to a delegated power." And, finally, Governor Randolph says,[a] "*the power respecting the importation of negroes, is an exception from the power given to Congress to regulate commerce.*" The same doctrine is also maintained in the *Federalist*.[b] Let us then see the laws that have been made by some of the different States respecting this branch of trade.[c]

a p. 330.

b No. 42.

c *New-York*, as well as many other States, prohibited the importation and exportation of slaves before the adoption of the constitution. The first law was passed in February, 1788; (2 *Greenleaf*, 85.) it prohibits the selling of an *imported* slave, and the buying of a slave with intent to *export* him: and subsequent laws have confirmed and increased the prohibition of exporting and importing slaves. It may be proper here to observe, as applicable to this, as well as to many other laws of the States respecting commerce, that if, after the adoption of the constitution, the individual States had not a right to make them, they, and all other previously made similar laws, would, by force of that disqualification, have become inoperative.

In 1792, the State of *Virginia* passed a law prohibiting the importation or selling of imported slaves. (1 *Pleasants & Pace's ed.* p. 186. sec. 18.) In *Delaware*, (*Laws of Del. ed. of* 1797, *by S. & J. Adams*, p. 942.) an act passed February 3, 1789, enacts, that if any owner, master, &c. shall fit out, equip, man, or otherwise prepare any ship or vessel, within any port or place in that

1824.

Gibbons v. Ogden.

Indeed, Congress itself has recognised and acted on the power of the States to prohibit this trade. The constitution restrained Congress (as

State, or shall cause any vessel to sail from any port or place in that State, for the purpose of carrying on a *trade or traffic* in slaves, to, or from, or between Europe, Asia, Africa, or America, or any places or countries whatsoever, or of transporting slaves to or from one port or place to another, in any part of the world, such ship, &c. her tackle, &c. shall be forfeited to the State, and shall be liable to be seized and prosecuted *by any officer of the customs*, by information, &c. And, moreover, every person so fitting out, &c. shall severally forfeit and pay the sum of 500 pounds, one half to the use of the State, the other half to the informer. It further enacts, that if any person shall export, or sell, with intention to export or carry out for sale, any negro or mulatto slave, from that State to Maryland, Virginia, either of the Carolinas, Georgia, or the West Indies, without license or permit of five Justices, &c. he shall pay, for every slave so exported, 100 pounds, and for every attempt so to do, 20 pounds, one half to the use of the State, and one half to the informer. Here is a State law minutely controlling a branch of foreign trade, and of that between the States, and operating explicitly by the officers of the customs. It was passed, indeed, a few weeks before the present constitution went into operation, but long after it had been accepted by Delaware; at all events, it is referred to, and confirmed, by an act, passed June 24, 1793, (c. 22. p. 1094.) requiring bail as to those offences.

In *Pennsylvania*, (*Bioren's ed.* vol. 2. p. 448.) an act was passed, March, 1788, also prohibiting *the trade*; but, before examining it, let it be remembered, that the first law Congress passed on that subject, was in 1794, and that Pennsylvania had accepted the constitution in December, 1787, which, at the time of passing this act, she had recently studied and discussed. Her legislation, then, was not founded on, and did not rely on, any law of Congress *in pari materiâ*. She not only prohibited the exportation and importation of slaves, but, by sec. 5. of that act, prohibits *the building, fitting out, &c.* of any vessel *for the slave trade, or to sail from the port for that trade, under the penalty of forfeiture of the vessel, &c. and* 1000 *pounds by qui tam.*

has been already seen) from prohibiting the importation of negroes, &c., before 1808. But in 1803, it passed "an act to prevent the importation

At that time, Congress absolutely permitted the slave trade; but, would not that law have been valid to prohibit it from that port?

New-Jersey passed a law to the same purport, in March, 1798, (*Patterson's ed.* p. 307. *Justice's ed.* p. 371, 372, 373.) when Congress had only prohibited, and could only prohibit, the trade as a *foreign trade*. Sec. 12, 13. prohibit the importation of slaves for sale. Sec. 17, 18, 19. prohibit *the slave trade*, and the fitting out of vessels, for the purpose of transporting slaves *from one place to another*, clearly including from one State to another, which Congress then could not do.

Connecticut, in October, 1788, after she and nine States had ratified the constitution, (*Hudson & Goodwin's ed.* p. 626.) forbade any citizen or inhabitant of that State, either as master, factor, supercargo, owner, or hirer of any vessel, directly or indirectly, to transport, or buy, or sell, or receive on board his vessel, *with intent to cause to be transported or imported, any of the inhabitants of Africa, as slaves*, with *qui tam* penalties; *and made all insurances on them void*. And, in 1792, (p. 628.) let it be still remembered, when Congress had no such power, she enacted, that no citizen or inhabitant of that State *should transport out of the State, for the purpose of selling into any other State, country or kingdom*, or buy or sell, with intent to transport out of that State, or should sell, if transported, &c. In Massachusetts, (1 *Laws of Mass.* 407, 408.) an act, passed March 26, 1788, reciting the evils of the *African trade*, enacts, that no citizen of that Commonwealth, or other person residing within the same, shall, for himself or any other person, as master, factor, supercargo, owner or hirer, in whole or in part, of any vessel, directly or indirectly, import or transport, or buy, or sell, or receive on board his or their vessels, with intent to cause to be imported or transported, any of the inhabitants of any state or kingdom, in that part of the world called Africa, as slaves, &c. under a penalty for every vessel fitted out with such intent, and actually employed, &c. Doubtless, the laws of other States might be produced to the same purpose, if the means of examination had been convenient;

1824.

Gibbons v. Ogden.

of certain persons into certain States, where, by the laws thereof, their importation is prohibited.[a] Proceeding upon the right of the several States to prohibit, and acting under its general power to regulate commerce, it imposes additional penalties on the importing or landing of any negro, mulatto, or person of colour, &c., in any State which, by law, has prohibited, or shall prohibit, their admission or importation. And it makes it the duty of the officers of the customs, to notice and be governed by the provisions of the laws of the several States prohibiting their importation or admission; and enjoins it on them vigilantly to carry into effect the said laws of such States, any law of the United States to the contrary notwithstanding. How could Congress do this, if the power of *prohibiting* the trade were not unquestionably possessed by the States, in their sovereign capacity?

The quarantine laws further illustrate our position. The appellant's counsel says, these are to be considered merely as laws of police; they are laws of police, but they are also laws of commerce; for such is the nature of that commerce, which we are told must be regulated exclusively by Congress, that it enters into, and mixes itself with, almost all the concerns of life. But surely that furnishes an argument, showing the necessity

those already cited, however, are sufficient to show, that the individual States regulated the slave trade, *as a trade*, both with foreign nations, and between the States, by virtue of their own sovereign authority, after the adoption of the constitution; but before Congress did, and before they could do it.

[a] 3 *U. S. L.* p. 529.

1824.

Gibbons v. Ogden.

that the States should have a *concurrent* power over it. Judge Tucker considers them as laws of commerce, when he says,[a] "another consequence of the right of regulating foreign commerce, seems to be, the power of compelling vessels infected with any contagious disease, or arriving from places usually infected with them, to perform their quarantine. The laws of the respective States upon this subject, were, by some persons, supposed to have been virtually repealed by the constitution of the United States:" (and why must not that be the case, if the power of Congress regulating commerce be exclusive?) "but Congress have manifested a different interpretation of that instrument, and have passed several acts for giving aid and effect to the execution of the laws of the several States respecting quarantine." It will be recollected, that the first recognition by Congress of the quarantine laws, was in 1796; and that only directs *the officers of the government* to obey them; but does not pretend, or attempt, to legalize them. And, indeed, it could not do so, if the States had no concurrent power, and the regulation of commerce was *exclusively* delegated to Congress; for the power which is *exclusively* delegated to Congress, can only be exercised by Congress itself, and cannot be sub-delegated by it. It is, therefore, no reply to the force of the argument drawn from those laws, to say, that they have been ratified by Congress. Another answer to that observation is, that the supposed ratification by Con-

[a] *Tuck. Black.* part 1st. Appen. D. p. 251.

1824.

Gibbons v. Ogden.

gress did not take place until 1796; and that many of those laws were in active operation several years before. For instance, as few out of many: *New Hampshire* passed her quarantine laws first, February 3d, 1789,[a] and again on the 25th of September, 1792.[b] *Connecticut* passed hers in May, 1795.[c] The laws of *Maryland*[d] show the temporary continuation of those laws in that State, from 1784 to 1785, from 1785 to 1792, from 1792 to 1799, and so down to 1810; and the 2d vol.[e] contains a law passed in November, 1793, giving to the Governor the strongest powers on the subject. The State of *Virginia* passed, 26th of December, 1792,[f] "an act reducing into one the several acts to oblige vessels coming from foreign parts, to perform quarantine;" which act was amended on the 5th of December, 1793;[g] and further amended on the 19th of December, 1795.[h] *Georgia* passed her quarantine law December 17th, 1793.[i] Undoubtedly those laws derive their efficacy from the sovereign authority of the States; and they expressly restrain, and indeed prohibit, the entry of vessels into part of the waters and ports of the States. They are all so similar, that one or two

a *Melcher's ed.* p. 302.
b *p.* 304.
c *p.* 611.
d 1 vol. p. 270.
e *p.* 200.
f 1 vol. p. 244.
g *p.* 313.
h *p.* 349.
i *Marbury & Crawford's Dig.* p. 393.

may suffice as examples. The quarantine law of *Georgia*, s. 1. prohibits the landing of persons or goods coming in any vessel from an infected place, without permission from the proper authority; and enacts, that the said vessels or boats, and the persons and goods coming and imported in, or going on board during the time of quarantine; and all ships, vessels, boats, and persons, receiving any person or goods under quarantine, shall be subject to such orders, rules and directions, touching quarantine, as shall be made by the authority directing the same. The law of *Delaware*, passed the 24th of January, 1797,[a] s. 1. provides, that "no master of a ship bound to any part of that State, having on board any greater number of passengers than forty, or any person with an infectious disease, or coming from a sickly port, shall bring his ship, or suffer it to be brought, nearer than one mile to any port or place of landing; nor land such persons, or their goods, till he shall have obtained a permit." The law of *Massachusetts*, passed June 22d, 1797, s. 6.[b] enacts, that "vessels passing the castle, in Boston harbour, may be questioned and detained; s. 12. that vessels at any other port than Boston, may be prevented from coming up, and brought to anchor where the select men shall direct; s. 4. empowers the select men of any town, bordering on either of the neighbouring States, to appoint persons to attend at ferries and other proper places, by or over which passengers

a 2 *Del. Laws*, ed. 1797, cap. 134. p. 1354.

b 2 *Mass. Laws*, p. 788.

1824.

Gibbons v. Ogden.

may pass from such infected places, which persons have power to examine, stop and restrain such passengers from travelling, until licensed by a Justice of the peace, or the select men; and a fine of 100 pounds is enacted on the passenger presuming to travel onward; s. 5. gives power to seize and detain suspected goods coming from any other State," &c. By an act of June 20th, 1799, s. 10.[a] "any master, &c. who shall enter the harbour of Boston after notice of a quarantine, for all vessels coming from the same place, &c., or who shall land, or suffer to be landed, any passenger or goods, without permission of the board of health, is subject to fine and imprisonment." These are all obviously direct regulations of trade, and so is the whole of every quarantine system.

The regulation of pilots in sea ports, flows from the power of regulating external commerce. This power, like that of making quarantine regulations, has hitherto been exclusively exercised by the several States; Congress having only made one law on the subject, and that seems explicitly to recognise the concurrent power of the States, and to place over it the true constitutional control. By the 4th sec. of the act of August 7th, 1789, c. 9.[b] it is enacted, that "all pilots in the bays, inlets, rivers, harbours and ports of the United States, shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be; or with such laws as the States

[a] *p.* 872.

[b] 2 *U. S. L.* p. 34.

1824.

Gibbons v. Ogden.

may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress." Now, it is a principle which cannot be too often brought into view or enforced, that Congress cannot delegate to State Legislatures, the exercise of powers which are given to it exclusively; and the very act of referring to those laws, is a recognition that the power to legislate on the subject is concurrent.

In like manner, the laws regulating light houses, buoys, &c. are all exercises of the implied powers derived from that of regulating commerce. They have hitherto been generally left to Congress; but it does not follow from thence, that they are exclusive. Can it be doubted, that any State has a right to establish a light house or buoys at its own expense, in one of its harbours? That a State has such a power cannot be questioned, if it be shown that individuals have. Some time in 1798, a number of the inhabitants of New-Bedford, Massachusetts, raised a fund by subscription, for building and maintaining a light house at Clark's Point, at the entrance of the harbour of New-Bedford. They maintained it, and kept it regularly lighted for about a year; and the act of Congress admits their right to do so. On the 29th of April, 1800, Congress enacted, that the light house lately erected at Clark's Point, &c., shall and may be supported at the expense of the United States, &c. *Provided*, that the property and jurisdiction of the said light house, and sufficient territory for

a 3 *U. S. L.* p. 366. c. 193. s. 3.

1824.

Gibbons v. Ogden.

the accommodation thereof, shall be fully ceded and legally vested in the United States.

The laws of Congress on this subject, recognise the right of the States to maintain light houses, if they please. The first act, passed August 7th, 1789,[a] directs, that their expenses, after the 15th of August, 1789, shall be defrayed out of the treasury of the United States: *Provided*, nevertheless, that none of the said expenses shall continue to be so defrayed by the United States, after the expiration of one year, unless such light houses shall, in the mean time, be ceded, &c. Few States did make the requisite cession; and by the act of July, 1790,[b] the time was extended to the 1st of July, 1791, and so, from time to time, for five or six years, till all the States came in; during which the light houses in several of the States were kept up by their authority, without the control of Congress.

The inspection laws are very important regulations of trade. Tucker says, "there seems to be one class of laws, which respects foreign commerce, over which the States still retain an absolute authority; those I mean which relate to the inspection of their own produce, for the execution of which, they may even lay an impost or duty, as far as may be absolutely necessary for that purpose. Of this necessity, it seems presumable, they are to be regarded as the sole judges." The extent

a 2 *U. S. L.* p. 34.

b 2 *U. S. L.* p. 121.

and importance of this system of regulations does not strike the mind at the first view; nor do the powerful inferences it affords, to show the concurrent right in the States to regulate commerce. Judge Tucker has very imperfectly stated their extent. They do, indeed, regulate, in almost every State, the foreign trade, so far as it is connected with our produce to be exported; but they do not confine themselves to produce to be exported, they relate to *imports* also. They act by restraining, and sometimes prohibiting, the exportation and importation of certain articles. Before examining those laws, it may be asked, from whence is the right of *restraining* derived, but from the more extended right of *prohibiting*? The difference between *regulation or restraining* and *interdiction*, is only a difference of degree in the exercise of the same right, and not a difference of right. The article in the constitution, art. 1. sec. 10. impliedly allows that right to be in the several States, and the right to enforce their laws by any other means than imposts and duties, and, therefore, by *prohibitions* of exports or imports. The right does not depend on the idea, that the thing prohibited or restrained from being exported or imported, is *dangerous or noxious*; even if that could, *ex necessitate*, create a right, and give it to the State, instead of the congressional jurisdiction; on the contrary, the rules and enactments seem arbitrary.[a]

[a] For instance, as to the number of hoops on, and size of barrels or casks, (2 *N. R. L. of N. Y.* p. 321. s. 5. p. 325. s. 3. p.

1824.

Gibbons v. Ogden.

As to trade with the Indian tribes, without stopping to enter into details, it is sufficient to say, it must stand on the same footing as foreign com-

330. s. 3, 4. 1 *Laws of Maryland, Maxey's ed.* 218. 1 *Vir. Laws, Pace & Pleasant's ed.* p. 352. s. 3. p. 350. s. 3. *Laws of Conn. Hudson & Goodwin's ed.* p. 394. s. 1, 2. 5, 6. 8, 9.) as to quantity as well as quality or kind, of their contents. What pieces of beef or pork, (2 *N. R. L. of N. Y.* p. 326. s. 4. p. 326. s. 5. 9. p. 327. s. 11.) or quantity and size of nails should be in one cask, (*Laws of N. H. Melcher's ed.* 386. *Laws of Conn.* p. 394. s. 2. p. 256. s. 2.) or the length, breadth, and thickness of staves and heading, lumber, boards, shingles, &c. (2 *N. R. L. of N. Y.* p. 336. s. 1. 1 *Laws of Vir.* 237. *Laws of Conn.* p. 397. s. 21.) These regulations have no object but to improve our *foreign* trade, and raise the character and reputation of the articles in a foreign market; and if the States have no right to pass laws prohibiting exportation, what can prevent a person having an inferior article, from exporting it, in its uninspected state, and taking his chance for the price it might bring in a foreign market?

These laws are much too numerous and complicated to be detailed; but a very slight examination of some of them will show the very extensive powers for regulating commerce, possessed by the Legislatures from which they emanate. Some operate by the *forfeiture* of the uninspected article, as in the New-York act for inspecting pot and pearl ashes. (2 *N. R. L.* p. 335. s. 8.) It gives the liberty of *entering on board of any ship*, &c. to search for any pot or pearl ashes, shipped or shipping for exportation; and, if any unbranded be discovered, *it is forfeited*, and the captain subject to a pecuniary fine. A similar *forfeiture* is given in the same State, (p. 339. s. 8.) and a penalty on the master. (p. 339, 340. s. 10.) In Kentucky, a similar *forfeiture* is given, for attempting to export unbranded flour. (*Ky. Laws, Tolman's ed.* 440.) In New-Hampshire, a like *forfeiture* is given of unpacked beef or pork shipped for exportation. (*Laws of N. H.* p. 387, 388.) And in Connecticut, a *forfeiture* is given of unbranded nails. (*Laws of Conn.* p. 527. s. 5.) Virginia has enacted a *forfeiture* of unbranded fish, and a penalty on the master. (1 *Laws of Va.* p. 353. s. 6.) She has not only done the same in respect to lumber, but

merce and that among the States, as they are all given in the same sentence. If the power of regulating the two latter be exclusive, so must it be

1824.

Gibbons v. Ogden.

she has gone much farther, *and acted on the collector and officers of the customs.* (1 *Laws of Va.* p. 238. s. 4.) The collector, or other proper officer of the customs, is thereby *charged and directed* not to suffer any vessel to clear from his office, unless the master, &c. shall produce inspection notes or certificates, &c. and make oath that he has no lumber on board, but what is entered on his manifest. To this exercise of power, equal to that of Congress itself, I probably shall be told, that Congress has, in the collection laws, directed the collectors to pay regard to the inspection laws of the respective States. That is at least an admission that they are *rightfully made*; but the answer is entirely insufficient; for the first act of the United States, directing this, was passed the 2d of March, 1799, and the act of Virginia, that I have last referred to, was passed the 26th of December, 1792. In like manner, the laws of the same State give a *forfeiture* of uninspected tobacco, about to be exported, and similar duties are imposed on the master and collector. (1 *Laws of Va.* p. 263. s. 27. p. 269. s. 45. p. 271. s. 49.) This law was also passed in November, 1792. Connecticut, too, gives a forfeiture of unsurveyed tobacco; (1 *Laws of Conn.* p. 395. s. 13.) and, as to provisions, it also enacts a penalty against the master, and imposes a duty on the collector. (p. 397. s. 20. p. 303. s. 11. p. 407. s. 3.)

Several of those inspection acts regulate as to the *importation* of articles, equally with their *exportation.* The New-York act, relative to the inspection of sole leather, expressly says, "Whether such leather be manufactured within the same, *or imported or brought into it from any place whatsoever.*" (2 *N. R. L.* p. 340. s. 2.) In Maryland, the act for the inspection of salted provisions, *exported and imported* from and to Baltimore, relates to beef, pork and fish "*imported* into the said town, from any part of this State, *or any one of the United States, or from any foreign port whatever.*" (2 *Laws of Maryland*, p. 3. s. 5.) Sec. 6 relates to the size, quality, and make of all *imported* beef and pork barrels. This act, it is true, was passed in 1786, before the adoption of the constitution. If the power of Congress, how-

1824. with the former. And yet every State, whose situation places it in communication or contiguity with Indian tribes, has thought fit, and, indeed,

Gibbons v. Ogden.

ever, was exclusive, it should then have ceased to operate. But the argument does not stop there. In 1796, it was extended to Havre de Grace, (p. 335. s. 9.) and in 1797 to Chester. (p. 369. s. 9.) The act of the same State, for the gauge of barrels for pork, beef, pitch, tar and turpentine, and tare of barrels for flour and bread, continued by several statutes down to 1810, and probably to the present time, prohibits the *importation*, by land or water, of those articles, except in barrels of certain dimensions and contents. In Virginia, the act for the inspection of fish, passed in December, 1795, sec. 6. provides for the inspection of *imported* fish, as well as of that packed for exportation; and it also enacts a *forfeiture* of the article, and a penalty on the master. (1 *Laws of Va.* p. 352. s. 3.) In Pennsylvania, the act providing for the inspection of gunpowder, relates to the inspection of *imported* as well as manufactured; and gives a *forfeiture* of the article for selling *imported* gunpowder without inspection. (3 *Laws of Penn.* p. 240.) And an antecedent law of March, 1787, directs the captain of every vessel, *importing* gunpowder into the port of Philadelphia, under a penalty and *forfeiture* of the article, if it be his own property, to deliver it at a magazine, and directs the health officer to give strangers notice of the act, and also *enjoins the custom-house and naval officers, and their deputies*, to do the same." (2 *Laws of Penn.* p. 402. s. 3.) In New-Hampshire, (*Laws of N. H. ed. of* 1815. p. 460.) by the act relating to gunpowder, sec. 2. it is enacted, that every master of any merchant vessel bringing gunpowder into Portsmouth, shall, within forty-eight hours, deposit it in a magazine, and, on neglect, shall pay a fine of 30 pounds to the poor of Portsmouth. Sec. 13. directs a keeper of the magazine to be chosen, who shall be entitled to a fee on all he shall receive and deliver out; another instance of what the appellant's counsel has declared to be unconstitutional, the raising of revenue by a State law from foreign commerce. In Massachusetts, (2 *Mass. Laws*, p. 37.) the act of June 19, 1801, sec. 1. directs *imported* gunpowder, landed at the port of Boston, to be deposited in a magazine. And by sec. 3. no gunpowder shall be kept on board any ship or other vessel,

found it necessary, by acts of their own Legislatures, to regulate their trade with the Indians, the laws of Congress not only not exhausting, but not even adequately reaching the subject.

It now seems incontrovertibly established, that the States have a *concurrent* right to legislate on matters of foreign trade, or of that between the States; and a concurrent right to *prohibit* the exportation or importation of articles of merchandise. If they can do that, even as to the articles themselves, to which the power of Congress expressly relates, and if the right to regulate shipping be only impliedly given to Congress, by the general power to regulate commerce, and only so far as they are instruments of that commerce, why cannot a State, that has a concurrent right, within its own sphere, (and that not by implication, but directly, and as the result of its sovereign power, unabridged and unaltered by the constitution,) over all ships or vessels within, or coming within, its jurisdiction, prohibit the entry of any particular kind of vessels within its waters, subject

lying to or grounded at any wharf in Boston, under pain of confiscation and pecuniary penalty.

More extensive examinations would produce a much greater variety of regulations of foreign commerce, and that between the States, made by State Legislatures; but only one more instance need be added, not indeed coming under any of the preceding heads. In Virginia, the act laying taxes for the support of government, passed in January, 1799, prohibits *unlicensed merchants* from selling, by wholesale or retail, goods of *foreign* growth or manufacture, on land, *or on board of any vessel.* (1 *Laws of Va.* p. 386. s. 2.) The same law has been renewed, from time to time, and it probably exists at this day.

1824.

Gibbons v. Ogden.

always to be controlled by the contradictory and paramount regulations of Congress, made within the sphere of its powers.

This leads to the consideration of an argument that has been frequently urged on this subject. It is said, that if a State has a right to prohibit the navigation of its waters to steam boats, it has an equal right to prohibit the same navigation to row boats or sailing vessels; and the extravagance of this position, it is supposed, sufficiently refutes the assertion of a more limited right. First, there is an error in the statement of our claim. We do not prohibit the navigation of our waters to steam boats; we only prohibit them, while in our waters, from using steam as the means of their propulsion. Every steam boat which ventures on the ocean, carries and uses sails; and they can, without difficulty, be adapted to every steam boat. Such a vessel, therefore, may, without objection, load in a different State, or foreign port, and come, by means of steam, to the verge of our waters; there is no difficulty opposed to its coming up, with its full cargo, to our custom house, entering, discharging, reloading, and departing, provided that, for the short space of time while it may be in our waters, it employs the only things that any other vessel can employ for entering and departing, and with which it is or may be amply provided—sails and oars. That is the extent of what is very inconsiderately called our extravagant claim. Let us now examine the argument itself, and to test its soundness, let us apply it to other cases. A State has no right to prohibit the use of narrow wheeled

1824.

Gibbons v. Ogden.

wagons for the transportation of merchandise on any of its roads; for if it can do that, it can prohibit the use of any kind of wagons, and, indeed, all transportation of merchandise on any of its roads, and thus affect the commerce between different States. A State has no right to regulate the assize of bread; for if it can do that, it can prohibit all baking of bread, and thus starve the community. Is there any one act of legislation against which the same reasoning, drawn from an excessive and tyrannical exercise of legislative authority, may not be urged? And if the argument be unsound, when applied to all those instances, what makes it sound in its application to the present question? The answer to it is found in the rights of a free people, which make every act of tyranny void. But, either the right entirely to prohibit the use of row boats, sailing vessels, and steam boats, belongs to some of the constituted authorities that govern those States, or it does not. If it does not belong to any of them, then, clearly, this boasted argument falls to the ground. If it does belong to some of them, to whom does it belong? Has Congress the power to make such a prohibition of all modes of commercial intercourse, by virtue of its limited authority to regulate commerce with foreign powers, and between the different States? In answering no, the embargo laws are fully remembered, and their constitutionality admitted; but it is not derived from the power to regulate commerce. The embargo was a measure of State policy, nearly approaching to war: it may sometimes be of such a character as

1824.

Gibbons v. Ogden.

to derive a legitimate origin from the war making power; but the embargo of 1807 rests for its constitutionality on the power in Congress of providing for the common defence and general welfare of the United States. If, then, the power of entirely prohibiting trade, as a commercial measure, exists in some of the governing powers of those States, and does not exist in Congress, where does it exist? Assuredly in the State Legislatures. If its exercise should ever become void, it will not be because it is contrary to the constitution of the United States, but because it is oppressive to the people it affects to bind; not because it is *unconstitutional*, but because it is *tyrannical*.

Congress itself seems to acknowledge that the constitution does not deprive the States of this probibitory power; for, if it did, as it binds all the citizens of the United States, it would necessarily bind the territorial governments, and all States admitted into the Union subsequent to its adoption. Yet, in the ordinance of the 13th of July, 1787, for the government of the territory of the United States north west of the river Ohio,[a] by art. 4th, for the government of the said territory, and the States which may be formed therein, it is provided, among other matters, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and for ever free, as well to the inhabitants of the said terri-

[a] 1 *L. U. S.* p. 475. *ed.* 1815.

tory, as to the citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost, or duty thereon." It is made a fundamental provision of the different acts erecting portions of this territory into States, that their constitutions shall not be repugnant to this ordinance. In the act also for erecting the State of Louisiana, sec. 3. it is enacted, that the convention for making the constitution, shall provide by an ordinance, irrevocable without the consent of the United States, among other things, "that the river Mississippi, and the navigable waters leading into the same, or into the gulf of Mexico, shall be common highways, and for ever free, as well to the inhabitants of the said State, as to the other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said State." The same was also done with regard to the States of Mississippi and Missouri. Now, this provision, so studiously introduced into all those new compacts, which Congress had a right to make with new States, as the condition of their admittance into the Union, would be very singular, and very useless, if, by an effect of the Union itself, all navigable waters belonged exclusively to the general government; or if the federal constitution, which each State adopted, contained in itself an equivalent restraint on the States. The appellant's counsel has alluded to and denied a position, stated to have been used by counsel in arguing the case of *Livingston v. Van Ingen*, before the Court of Errors, that the Legislature might, if it thought fit, stop up the mouth of the

1824.

Gibbons v. Ogden.

Hudson. It is of very little importance to defend what fell, on that occasion, from counsel, and has not been adopted by the Court; still, the learned counsel may be asked, by what authority the State of Rhode Island has erected a bridge over the Seakonnet branch of Taunton river, essentially impairing, if not destroying, its navigation from the sea, and far below where the tide ebbs and flows? By what authority his native State of New-Hampshire has erected a bridge from Portsmouth over the Piscataqua river? By what authority his adopted State of Massachusetts has built two bridges over Charles river, on its tide waters, one near Boston, and the other higher up? and, by what authority the State of Pennsylvania has built a dam over the Schuylkill, near Philadelphia, and three miles below where the tide used previously to ebb and flow?

There, however, is, in fact, no regulation of commerce, made by Congress, with which this exclusive right does or can interfere. What is that degree or kind of interference, which is sufficient to invalidate a State law?

The *Federalist*,[a] discussing the cases where powers are exclusively delegated to the United States, makes one of the classes, (and, perhaps, unnecessarily, if not incorrectly,) where the constitution granted an authority to the Union, to which a similar authority in the States would be, absolutely and totally, *contradictory* and *repugnant*; and then goes on: "I use these terms to distinguish this last case from another, which might ap-

[a] *The Federalist*, No. 32.

pear to resemble it; but which would, in fact, be essentially different: I mean, where the exercise of a concurrent jurisdiction might be productive of occasional interferences in the policy of any branch of administration, but would not imply any direct contradiction or repugnancy, in point of constitutional authority." And again: "It is not, however, a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty."

That the third class of cases, as arranged by the *Federalist*, is unnecessary in its application to any of the powers, and that it is derived from an erroneous notion, as to the possibility of repugnancy and its consequences, seems to follow, from the principles laid down by Thompson, J. in *Livingston v. Van Ingen*.[a] "There are subjects upon which the United States and the individual States must, of necessity, have concurrent jurisdiction; and all fears and apprehensions of collision in the exercise of these powers, which have been urged in argument, are unfounded. *The constitution has guarded against such an event, by providing that the laws of the United States shall be the supreme law of the land, any thing in the constitution of any State to the contrary notwithstanding. In case of collision, therefore, the State laws must yield to the superior authority of the United States.*" The same doctrine is very ably maintained by Kent, Ch. J.[b] who gives, as a safe rule of construc-

a 9 *Johns. Rep.* p. 568.

b 9 *Johns. Rep.* p. 575, 576.

1824.

Gibbons v. Ogden.

tion and of action, "that if any given power *was originally vested in this State*, if it has not been exclusively ceded to Congress, or if the exercise of it has not been prohibited to the States, we may then go on in the exercise of the power, until it comes practically in collision with the actual exercise of some congressional power. When that happens to be the case, the State authority will so far be controlled; but it will still be good in all those respects, in which it does not absolutely contravene the provision of the paramount law."

The same doctrine is very briefly, but very clearly laid down, by Mr. Ch. J. Marshall, in the case of Sturges v. Crowninshield:[a] "It is not the mere existence of the power, *but its exercise*, which is incompatible with the exercise of the same power by the States." In Houston v. Moore,[b] Mr. J. Story, however, adopts the arrangement of the *Federalist*, and goes on: "In all other cases, not falling within the classes already mentioned, it seems unquestionable, that the States retain concurrent authority with Congress, not only upon the letter and spirit of the 11th amendment of the constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority; and the State

a 4 *Wheat. Rep.* 196.
b 5 *Wheat. Rep.* 49.

laws, so far, and *so far only* as such incompatibility exists, must necessarily yield."

Although those authorities show, that nothing but a direct and absolute collision can produce such an interference as will render the State grants invalid, yet a license is relied on by our adversaries, as creating this interference. There is a leading and fundamental error growing out of the nature and form of that instrument, and one which has induced the supposition, that a license *gives* a *right to trade*, or a *right to enter*, or a *right to navigate* the waters of the United States, to any vessel possessing it. It, indeed, uses the words, "license is hereby granted for the said vessel to be employed in carrying on the coasting trade for one year, from the date hereof, and no longer;" but those words must necessarily be understood in reference to the extent of the authority granting the permission. Equivalent words are to be found in every license to *distil* or to *sell*, or to do any act, the right to do which existed prior to and independent of the authority by which it may be regulated; and they only mean, license is granted to do the act, notwithstanding the regulations made on that subject by the licensing authority, and which, without this instrument, would restrain the act. So far as those rights to *trade*, to *enter*, or to *navigate*, exist unmodified, they rest on the common law, independent of any *gift* from or *right conferred* by Congress; which, in truth, has no power whereby it might be enabled to make such gift, its authority being only to *regulate* commerce. These rights are, all three, portions of the

1824.

Gibbons v. Ogden.

jus commune, and so far as the competent Legislatures have thought fit to let them remain, the right to them, and their efficacy, depend on that *jus commune* and the common law. The right *to trade* is regulated by the State Legislatures and laws of Congress; the right *to enter* is modified principally by the laws of Congress; and the right *to navigate the waters*, almost exclusively by the State Legislatures. *The license has nothing to do with any of those rights;* it only gives some privileges as to payment of tonnage duties, and less frequent entries at the custom houses; and it exempts the licensed vessel from being included within a restriction of the *jus commune* as to trading, by which Congress prohibits certain vessels from carrying foreign articles and distilled spirits from State to State: even there, not *giving* to the licensed vessel *the right* of doing so, but *only* exempting them from the prohibition. A review of the acts of Congress on the subject, will show the truth of these positions.

By the now repealed act of July 20th, 1789,[a] imposing duties on tonnage, different rates were fixed: 1st. six cents per ton on vessels built in the United States, &c., and *belonging to a citizen or citizens of the United States;* 2d. thirty cents on vessels built in the United States, and *belonging to foreigners;* 3d. forty cents on all other ships and vessels. But it was provided, that no United States built vessel, owned by a citizen, or citizens, while employed in the *coasting trade*, or on the fisheries, should pay tonnage more than once a year; and that every

[a] 2 *U. S. L.* p. 6.

ship employed in transporting the produce and manufactures of the United States, unless United States built, and owned by a citizen or citizens, should, on every entry, pay 50 cents per ton. The *only* advantages, then, to American built and owned ships, were, a less tonnage duty; and, if on the coasting trade, paying it only once a year; *but let it be well remembered, that they had no exclusive or peculiar right to trade any where.* By the collection law of July 31, 1789,[a] which established ports of entry and delivery, it was enacted, that no ship or vessel from a foreign port, not wholly belonging to a citizen or citizens, should be permitted to unload at any port or place, except those there specified.

Neither this, nor any other act, GIVES the *right of entering* into the designated ports. It proceeds on the supposition and the truth, that by some other code, distinct from the laws of Congress, the entry into all places had been antecedently lawful, and then *restrains it* as to all other places but those named.

The registering, recording, and enrolling of vessels, were enacted by the act on that subject, passed September 1st, 1789.[b] They were for the purpose of describing the vessel, her built, tonnage, and ownership; and neither they, nor their certificates, *give*, nor purport to give, any *right to trade.* The enrolment, and certificate of enrolment, is to entitle unregistered vessels of twenty

a 2 *U. S. L.* p. 7.
b Ib. p. 35, 42.

1824.

Gibbons v. Ogden.

tons and upwards, American built and property, and destined from district to district, or to the fisheries, to the privileges of a ship belonging to the United States, employed in the coasting trade or fisheries. These I have already mentioned, to be a less tonnage duty, and paying it only once a year; but no exclusive or peculiar right to trade any where.[a] Registered or enrolled vessels, on application to the collector where they belonged, were entitled to receive *a license to trade between the different districts in the United States*, or carry on the bank or whale fishery for one year.[b] The meaning of that license, notwithstanding the generality of its language, was only to certify that the proper tonnage duty for that year had been paid; and that the vessel was *licensed*, for that year, *to trade without paying any tonnage duty.* That such is its object, appears from the 22d sec.[c] enacting, that the master, &c. "shall annually procure a license from the collector of the district to which such vessel belongs, who is hereby authorized to give the same, *purporting that such vessel is exempt from clearing and entering for the term of one year from the date thereof.*" Every vessel had a right to carry on the trade (between district and district) without a license, on paying the prescribed tonnage duties, suited to the case. That further appears, by a provision in the same section, (s. 23.) that if any vessel of twenty tons or

a 2 *U. S. L.* p. 6
b *Ib.* p. 43. s. 23.
c *Ib.* p. 42, 43.

upwards, not having *certificate of registry*, or *enrolment*, and *a license*, should be found trading between different districts, or be employed in the bank or whale fisheries, *it should be subject to the same tonnage and fees as foreign ships or vessels.*

The act, already cited, for tonnage and duties, was repealed by the act of July 20th, 1790;[a] but the substituted clauses do not affect this argument. A ship *having a license* to trade between different districts, or to carry on the fisheries, while employed therein, is only to pay the six cents per ton once a year, (i. e. on getting the license,) and "upon every ship, &c. *not of the United States*, which shall be entered in one district from another, having on board goods, &c. taken in one district, to be delivered in another, *there shall be paid at the rate of fifty cents per ton*;"[b] a duty which clearly recognises their right to carry on that trade on those terms.

The former act for registering and clearing vessels, was repealed by that passed the 18th of February, 1793. This enacted, that none but *enrolled and licensed* ships, &c. (or, if under twenty tons, simply licensed,) should be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries. These privileges, it will be again remembered, are only the paying of a less tonnage duty, and paying it but once a year; and they do not comprehend any exclusive or peculiar

a 2 *U. S. L.* p. 119, 126.
b Ib. p. 332.

1824.

Gibbons v. Ogden.

right to trade any where. It enacts, that before getting the license, the tonnage for the year must be paid; and the effect and object of the license was to certify that the proper tonnage duty for that year had been paid, and that the vessel was, therefore, *licensed* for that year to trade without paying tonnage. But every other vessel had still a right to trade. By sec. 6.[a] vessels of twenty tons and upwards, *except registered*, found trading between district and district, or different places in the same district or fishery, *not enrolled and licensed*, &c. if laden with domestic produce or manufacture, *shall pay the same duties as foreign ships;* or, if laden with foreign produce or manufacture, or distilled spirits, shall be forfeited. This shows that *foreign* ships had a right to carry on the coasting trade without a license, (a thing which they could not possibly obtain,) on paying the extra tonnage duties, and making entry at every port. This further and most fully appears by the 24th section of the same act,[b] prescribing the duties of masters of foreign ships, bound from one district to another, whether with a cargo or in ballast; and by sec. 34.[c] establishing the rates of fees under that act, in which are found, "For granting a permit for a vessel *not belonging to a citizen or citizens of the United States*, to proceed from district to district, and receiving the manifest, 200 cents. For receiving a manifest, and

a 2 *U. S. L.* p. 335.
b *Id.* p. 343.
c *Id.* p. 346.

granting a permit to unload, for such last mentioned vessel, on her arriving in one district from another district, 200 cents." Indeed, until the year 1817, there was no kind of prohibition on foreign vessels carrying on the coasting trade. On the 1st of March, 1817, "an act concerning the navigation of the United States" was passed; and by sec. 4. it was enacted, "that no goods, wares, or merchandise, shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging, wholly or in part, to a subject of any foreign power." This, however, does not affect *American* ships not having a license, and *they* have still a right to trade coastwise, subject only to the increased tonnage duty, and the necessity of making entry at every port. How, then, can it be said, that the license *gives* the right to carry on the coasting trade, which exists as part of the *jus commune*, and existed, and was exercised, before the constitution, or any law on the subject, was formed; and when, until March, 1817, every foreign vessel had a right to carry it on; and when, to this hour, every American vessel has a right to carry it on, without a license or register, and only becomes subject to an increase of tonnage duty, and the necessity of making entry at the custom-house on every voyage? It is only a license to carry on the coasting trade, *without making entry or paying tonnage duties, conformably to the laws of Congress in other cases.* It *gives* no *right* to enter, nor to trade, nor to navigate the waters of the United States;

1824.

Gibbons v. Ogden.

1824.

Gibbons v. Ogden.

it only enables the licensed vessel to do those things, in certain cases, on cheaper and easier terms than other vessels could, who, nevertheless, had equal rights to carry on the same trade, though with less advantages; and now, in the event of having foreign produce or manufacture, or distilled spirits, on board, a license protects from a forfeiture, which was not enacted for some years after licenses were devised and used in their present shape. It is not, then, a license to trade, to enter, or to navigate, but *to be exempt from paying tonnage duty for a year*. If, then, the position is correct, (and it undoubtedly is,) that a license gives no right to trade, to enter a port, or to navigate its waters, no argument can be drawn from the act of March 12, 1812, "respecting the enrolling and licensing of steam boats."[a] The only object of that law is, to enable aliens to be part owners of such vessels, and to modify, as to them, the oath that the boat belongs to a citizen or citizens of the United States.

But, even if the *right of entry*, or *to trade* or *navigate*, were *given* by the acts of Congress, and not by the common law, as originally existing or subsequently modified, this exclusive right does not prevent the entry of any vessels into our waters, nor their navigating or trading there; nor does it materially impede them. The only part of this exclusive grant that can come under the cognizance of this Court, in this case, is that on which the injunction is grounded. That, and the

[a] 4 *U. S. L.* p. 393.

1824.

Gibbons v. Ogden.

prohibition of the injunction, can only be fairly considered as extending to prevent the navigation of the waters by the force or agency of steam or fire; not to prevent vessels from navigating those waters, because they have a steam engine on board, and wheels at the side, if the engine and the wheels be not used on our waters for propelling the vessel, contrary to our State laws. Before the vessel comes into those waters, and after it leaves them, it is out of the State jurisdiction, and not liable to any State penalty for using the agency of steam. What, then, is the amount of the prohibition of entry? That the same vessel, with the same cargo and crew, may come up and pass through our waters, if, while in our waters, she will come up and navigate *under sail*, as all commercial vessels have hitherto done. In the argument of this case before the Court of Errors,[a] one of the appellant's counsel couched his reasoning in the form of a remonstrance by an English ship master against those State laws. The reply can, perhaps, be best given by turning the discussion into a dialogue. An English steam vessel is boarded by a pilot, outside of Sandy-Hook. "Captain," says the pilot, "you will have to stop those wheels at your sides, when you get within our waters." "Why so?" asks the captain. "Because the State of New-York have granted to Livingston and Fulton an exclusive right of navigating in its waters by steam." "Sir," resumes the captain, "I care nothing for the laws

[a] 17 *Johns. Rep.* p. 488.

1824.

Gibbons v. Ogden.

of New-York. I know of no laws or regulations of a particular State, in regard to trade and commerce. I claim the privilege of entering the harbour of New-York, under the laws of the United States, and the treaty of amity and commerce subsisting between them and my sovereign. I insist upon my right of entering your waters as I please; and if your State authorities, or any one acting under them, should prevent me, the King, my master, will know how to enforce the rights of his subjects." "Patience, good captain, patience," replies the pilot; "let your head and your boiler cool; no one means to prevent your entering into our waters. Only stop your machinery, and hoist those sails you have carried twenty times between this and Liverpool, and, I'll answer for it, we shall be alongside the wharf as soon as yon vessel, that you see bound inwards, with all her canvass spread." This is the extent of the prohibition—the *Deo dignus vindice nodus!* When the case occurs of a vessel navigating across the Atlantic, without sails, the question may be discussed, whether it be a violation of the laws of Congress, that she should be required to fit herself to the harbour, by providing herself with a sail. The same may be said as to coasting vessels from more distant States. As to those from contiguous States, and whose trade can just as well be carried on by sails as by steam engines, it is ridiculous to say, that such a regulation prohibits or interferes with their commerce. Is it any part of the power intended to be delegated to Congress, to regulate as to those matters?

1824.

Gibbons v. Ogden.

The utmost that can be said is, that the passage may be a little longer, and may be somewhat retarded. The doctrine of the *Federalist*[a] applies here, that it is not a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty. Regulations for a toll-bridge may delay the mail carrier, and so far interfere with the execution of the power delegated to Congress, of regulating the post office and post roads; but, could he *gallop* over a bridge, that a State law directed should always be crossed on a walk?

But the clause in the constitution, authorizing Congress to make laws respecting patents, is supposed to present another argument against the constitutionality of those State laws. This point, having been but very slightly mentioned, and in some measure abandoned, by the appellant's opening counsel, would not be dwelt on now, if the Attorney General had not intimated an intention of insisting and relying on it. If the appellant had a patent of any kind, on which he could rest, it might fairly be urged by us, that a patent cannot give to any unpatented thing, even though connected with one that is patented, the right to violate the State law. But how does or can that question come up in this case? There is here no allegation of a patent, nor a claim of any thing entitled to be protected by the patent law, and the use or enjoyment of which has been interfered

a *The Federalist*, No. 32.

1824.

Gibbons v. Ogden.

with by the exclusive grant. As the appellant claims no patent, if this power in Congress can furnish to him any objection against the State laws, it must be on the ground, that inasmuch as Congress is authorized to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries, every State law, calculated or purporting to promote the progress of science and useful arts, is utterly void, merely because that is its purport and object, even though it should not relate to any invention or discovery; though the privileges it may confer should not be given on the score of invention or discovery, but of public policy and convenience; and further, although there is no discovery or invention of any other person in existence, the right to which Congress could secure, and which has any relation to the State grant. That, in short, the appellant, or any other person, has a right to treat the State law as a nullity, and, in violation of it, to use unpatented articles, and incapable of being the subject of a patent or protection; and, that no Court or process of law has authority to restrain him from the use of what never can come within the power of Congress; because, peradventure, something may hereafter be discovered, having some relation to the subject of the State grant, and some person may, hereafter, be entitled to claim the benefit of the constitutional protection, as an inventor. The extraordinary boldness of this position must surprise and astonish. If the passing of the patent law is *per se* compe-

tent to prevent a State granting this exclusive right, for a thing (so far as the pleadings show) not the subject of a patent, it is equally so to prevent a State granting every other exclusive right, and particularly if connected with science and the useful arts. If the *law alone* will not produce that effect, until a patent is granted, at variance with the exclusive right, the patent should appear, to let us see if it be really at variance, and have that effect.

If the last steam boat laws, enacted since the North River boats were in operation, had, instead of using a general phraseology, forbid any person to use, on the waters of the State, steam boats constructed or made *in the same manner* as those then used by Livingston and Fulton, or *in any manner before known or used*, or *in any manner invented by a non-resident alien*, would there be any thing for the patent laws or power of Congress to operate on in collision thereto? If not, then those State laws are *so far good;* and any one, to impeach their operation, must claim and show that he has a boat constructed in a different manner, and which is patented as an invention, or, at least, is a subject for the laws of Congress to operate upon, and which he is restrained from using.

Has it ever been disputed that each State has a right to grant exclusive privileges, where not forbidden to the Legislature by its constitution? The wisdom and the motives of the grant, are points for which it is responsible to the people of the State only; they can never be drawn into

1824.

Gibbons v. Ogden.

discussion in this Court, nor come under the control of Congress. It is a right inherent in the sovereignty of every country, not delegated to Congress, but allowed to, and constantly exercised by, the State governments. It is a legislative instrument of great power, and may, therefore, be used to evil purposes; but it may be, and often has been, as in the present instance, productive of splendid benefits. It must reside somewhere; it does not reside in Congress; where, then, does it reside?

Whether the power delegated to Congress be exclusive or concurrent, the power of promoting science and useful arts, by the introduction of *imported* improvements, and encouraging the employment of things not susceptible of being patented, is *exclusively* in the State Legislatures. It is of great importance, and exercised by every wise government; by England, France, &c. It domesticates the sciences and useful arts, the talents and genius of the civilized world. The States, in the exercise of this their *exclusive power*, which has been employed in making those laws, are not to be interfered with from any apprehension of collision in the exercise of a *concurrent* power, only relating to another branch of the same subject, *which the State has not used*, and which Congress may never have an opportunity of using.

I say, a *concurrent* power; for such is that delegated to Congress. One of the counsel now opposed to us, in his argument in the case of

1824.

Gibbons v. Ogden.

Sturges v. Crowninshield,[a] places in his third class, that is, among the concurrent powers, that to promote the progress of science and useful arts; and says, very truly, "from the exercise of any of these powers, the States are neither expressly, nor by any fair rule of construction, excluded." Judge Tucker, in his Appendix D. p. 132. 265. among the cases in which the States have *unquestionably* concurrent, though, perhaps, subordinate powers, with the federal government, ranks the power to promote the progress of science and the useful arts, by securing to the authors and inventors the exclusive right, *within the State,* to their respective writings and discoveries. In the case of *Livingston v. Van Ingen,*[b] Thompson, J. takes for granted, that it is so, and it is expressly asserted by *Kent,* C. J.; and in the same case, an instance is given of its exercise, by an act of the Legislature of New-York, in favour of Mr. Rumsey, passed on the 23d of February, 1789, after the adoption of the federal constitution, and shortly before the first meeting of Congress. It was entitled, "for securing to James Rumsey the sole right and advantage of making and employing, for a limited time, the several mechanical improvements by him lately invented."[c] I do not speak from research, but I understand that he obtained a similar patent from several other States. This law is a cotemporaneous exposition of the

a 4 *Wheat. Rep.* 168.

b 9 *Johns. Rep.* 567, 568.

c 2 *Greenleaf's ed. of the Laws,* p. 271.

1824.

Gibbons v. Ogden.

constitution, and shows that the State considered itself as still retaining a concurrent right of legislation on the subject of inventions in science and the useful arts, notwithstanding the new constitution, and the recent transfer of similar powers to Congress.

What is the power delegated to Congress, and on what principle is it founded? A confined and partial mode of promoting the progress of science and useful arts, viz. by *securing*, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. The *Federalist*, No. 43,[a] says, "the utility of this power will scarcely be questioned. The *copy-right* of authors has been solemnly adjudged in Great Britain to be a right at common law. The right to useful inventions seems, with equal reason, to belong to the inventors." This commentary, and the words of the constitution, show that the power is only founded on the principle of literary property extended to inventions. It proceeds upon assuming a pre-existent common law right, which, however, requires to be properly *secured* by adequate remedies. Its principle is entirely different from that on which patents rest in England. *They* are exclusive rights, *not merely secured*, but *created and granted; they* are monopolies for things invented or imported, and do not suppose or act on any *pre-existent right;* but grant a right, the origin and efficacy of which is derived from its being a gift from the

[a] *p.* 269.

crown, permitted and legalized by act of Parliament. It is contended, because the English Judges have construed their statute of monopolies so as to include imported improvements, under the term *inventions*, that our constitution should receive the same construction; but there is no foundation for the position. The English Judges strained the words of their statute, contrary to all fair construction, because they felt the importance of a power to encourage imported improvements, and saw no other way by which it could be done; and, besides, their interpretation went to strengthen and increase the royal prerogative. But, with us, imported improvements can be perfectly encouraged by the States; and the power delegated to Congress, is founded on the common law pre-existent right of inventors to their own discoveries, which can have no application to the mere possessors of imported improvements. The constitution itself does not use the word *patent*, and it is to be regretted that the act of Congress does; for, the use of the word implying a resemblance to the English patent, has led to a false view of the powers of Congress.

1824.

Gibbons v. Ogden.

But, in truth, according to the English acceptation of the term, Congress has no power to grant them. It has no authority to make exclusive *grants* of any kind; that power remains solely in the States, as a part of their original sovereignty, which has never come within the purview of the federal constitution. A patent, in England, and every country but this, implies, the creation and gift of a right, by force of the sovereign power,

1824.

Gibbons v. Ogden.

conferring upon an individual a monopoly, in which he had no pre-existent right. This can be done by the States, and only by the States. The power delegated to Congress, does not authorize it to *create* any *right*, or to *give* any *right;* it only enables that body to *secure* a pre-existent common law right, and for that purpose it may *create and give a remedy*. Where there is no pre-existent right to be secured, the power of Congress cannot operate. To these positions, the attention of the Court is directed, as they may be found important in the sequel.

Although the article in the constitution is expressed with accuracy, yet it also has employed a word, sometimes taken in different senses, and which has likewise contributed to a false view of the power of Congress: the expression is, "an *exclusive* right." The word "exclusive" may well mean, as it does here, *individual, sole,* or *separate,* in which sense, every man's private property, to which no other man has any claim, is his *exclusive property*. In that sense, Judge Chase says, in the case of Calder et ux. v. Bull et ux.[a] "If any one has a right to property, such right is a *perfect and exclusive right.*" But, that word, *exclusive,* is more frequently applied to express, that others have been excluded or shut out from the participation of what they were previously entitled, or would, but for that exclusion, be entitled to enjoy and use. In this sense, the phrase, *exclusive rights or privileges,* is ordinarily under-

[a] 3 *Dallas' Rep.* 394.

stood. But, it never was intended to give Congress any power to grant exclusive privileges; and in the article of the constitution, that meaning of the word would be inconsistent with the idea of securing a pre-existing right. All error would have been avoided, if the adjective had been entirely omitted, or the word *individual* substituted.

At the time of making the State grant in question, no man had, and, indeed, no man yet has, any pre-existing right to an invention, connected with the subject matter of the grant. Suppose any man, however, now to make an invention, and seek to use it without procuring for himself a patent, or availing himself of the power delegated to Congress, surely the law of the State would be competent to prevent his using it within its waters and jurisdiction. The statute law would, in that instance, operate on the common law, and prevent the common law right, *pro tanto*, from ever arising, in the same way as in a fishery. The right of fishing, in a public navigable river, is a common right; but, suppose that before the birth of any given individual, a part of that navigable river had, by statute, been turned into a several fishery, surely his common right would not entitle him to fish in that part of the navigable river which a statute had, before the commencement of his common right, turned into a separate fishery. His right to fish *there* never had a commencement or origin—So with this supposed inventor. A statute, prior to the commencement of his common law right, so acted on that common law itself, that a right

1824.

Gibbons v. Ogden.

in him to use his invention, in the waters of the State, never had a commencement or origin. Now, suppose the inventor to procure a patent; would that enable him to use his patented invention within the jurisdiction and waters of a State, contrary to its statutes? If it did, what would be its operation? The delegated power is only *to secure* a pre-existent right; it can only do that, so far as there is a pre-existent right; where there is not, there is nothing to be secured. So far, then, as relates to any use or exercise of the invention within the State, there would be no right to be secured, and nothing for the power of Congress to operate upon. But further, if the inventor, before obtaining his patent, could not legally use his invention, but, after obtaining his patent, could use it in despite of the State laws, the patent would then *create and give* a right that did not exist before, and thus transcend the power delegated to Congress, which does not enable that body *to create or give any right,* but only to *create and give a remedy,* for the purpose of *securing* an existing right, which derives its origin and force from some other law or laws than those made by Congress.

So far, then, as relates to those State laws, it is impossible that their validity can be affected by the patenting of any invention or discovery made subsequent to their enactment. But it may still be advisable to pursue the same course of reasoning, and inquire how far even the existence of a patent, previous to the passing of such acts, would

enable the patentee to use his invention in despite of them.

The object of a patent, granted in pursuance of the delegated power, is to perfect an imperfect right, by exactly ascertaining, if I may say so, its means, and boundaries, and identity, and by affording an adequate remedy for its violation. The precise nature of the remedy is within the discretion of Congress; but the nature of the evil it purports to remedy, is entirely illustrative of the extent of the power delegated to Congress. The patent law itself shows that its object is, to turn the imperfect right into *property*, for it directs, that the applicant's petition shall signify a desire of obtaining an *exclusive property* in his improvement. And the clause giving the remedy, shows the injury against which Congress intended to guard, and against which alone it had any power, under the constitution, to provide a guard: where any person "shall *make, devise, use,* or *sell*" the thing, whereof the exclusive right is secured to the patentee by such patent, &c.[a] But, no remedy is provided against *preventing* the patentee from *making, devising, using* or *selling* the thing so patented. *That*, if any grievance at all, is one not within the purview of the act, nor within the powers of Congress, and against which, therefore, no remedy is there provided.

The object of this power, and of the law made under it, is to give to the pre-existent but imperfect right, the security and attributes of *actual*

[a] *Act of Feb.* 21, 1793, s. 1.

1824.

Gibbons v. Ogden.

property. When the law of Congress has done that, it is *functus officio;* and it leaves that right, which it has placed in the class of *actual* property, to be used and enjoyed like every other kind of actual property, conformably to the laws of the place where it is to be enjoyed. That which is thus the object of the power and law of Congress, is the *patent-right,* which it has, as it were, converted into a chattel. But the difference between the patent-right and the thing patented, is great and palpable, equal to the difference between a copy-right and a book. If a State attempted to authorize a violation of these rights, to enable another to make use of or vend the thing patented, or to print the book, or to throw open and in common, the patent-right or the copy-right, then its law would be unconstitutional. But the *rights,* and *only the rights,* are the object of the power and laws of Congress; the things themselves are personal property or chattels of the ordinary kind, to be enjoyed, like all other property, subject to laws over which Congress has no control.

If so, why has not a State a right to prohibit the use of the *thing patented* within its jurisdiction? It can do so, as to all other kinds of property. It is no argument to say, that if one State can do it, every State can do it. If every State wished to do it, how could they, or why should they, be prevented? But, is not that the case with every kind of property? And if they should extend that power over any species of unpatented property, could Congress interfere? The individual States having that power over every kind of

originally perfect property, can it be supposed, that because Congress was empowered to turn imperfect into perfect property, this newly secured species should occupy a superior class, and possess privileges and exemptions that were never attached to any other kind of property? The power of regulating and prohibiting the use of every kind of property must be somewhere; it is a necessary part of legislative sovereignty, and must be intrusted to some constituted authority. As to all other kinds of property, it is undoubtedly in the State Legislatures. Things patented may be dangerous or noxious; they may be generally useful, and locally injurious; such, for instance, might be torpedoes in a peaceful and commercial port; fire balloons and squibs in a populous city; though, in some places and on some occasions, they may well be useful and advantageous, or, at least, harmless. Among the curiosities in the patent office, there probably are some patented velocipedes. The Corporation of New-York, in 1819, by an ordinance, prohibited the use of any velocipede in the streets of that city. Had it not a right to do so; and could the owner of any of those patent velocipedes use them in the streets, in despite of that ordinance? The Legislature of New-York has, for many years, prohibited the drawing of any lotteries there, except what it has granted to certain public institutions, such as Union College, and the College of Physicians. By virtue of the prohibition to others, and the grant to those institutions, they have obtained an exclusive right of drawing lotteries, similar to

1824.

Gibbons v. Ogden.

1824.

Gibbons v. Ogden.

that, the constitutionality of which is now in controversy. Joseph Vanini has patented a new mode of drawing lotteries, which is, unquestionably, a great improvement, simplifying the operation, and, by completing it in less than five minutes, preventing all insurances, and many of the evils attendant on the old mode. But, could he, because his invention is an improvement and patented, insist on a right to use it, and draw lotteries in the State of New-York, contrary to its laws, and indeed, now, to the express provisions of its constitution? No. The power to prohibit the use of patented things, either generally or locally, must reside somewhere. Can Congress prohibit the use of locally injurious, but patented, things, in the waters, or the cities, or the populous towns of New-York? If not, because it has no power of regulation or prohibition, where does that power reside? If it reside, as it must, *exclusively* in the State Legislatures, or subordinate authorities, who but their constituents can inquire into the motives or propriety of their exercise of that power, or the extent to which it should be carried? If the States have not that regulating and controlling power, as Congress assuredly has it not, what is the consequence? A patent can be got for any thing, and with no previous competent authority to decide upon its utility or fitness. If it once issues from the patent office, as full of evils as Pandora's box, if they be as new as those that issued from thence, it is above the restraint and control of the State Legislatures—of the Legislature of the United States—of every human autho-

rity! I put the case of their being noxious or dangerous; but there may be a multitude of other reasons for regulating, restraining, or even prohibiting their use; of these Congress can take no cognizance. If the State governments can take no cognizance of them, no institution can; if they *can* take cognizance, their power is exclusive, and their exercise of it cannot be reviewed. Could Congress (incapable as it is, of itself, prohibiting the use of patented things,) pass a law, *in words*, that a patentee shall have a right to use his patented machine in any State, notwithstanding any prohibitory laws of that State? Would that be within the power of Congress? How, then, can implication give to the patentee the same right? If a patent can give a right to use the thing patented, in contravention of this exclusive right, it would have the same effect in contravention of any other exclusive right granted by a State. Ferries, stage-coaches, &c. all the grants respecting them, would be broken down by some patented vehicle, for, they are all, *in pari materia*, exclusive grants, from motives of public policy; and, having no connexion with the principle of literary property, which is the origin and the object of patent-rights, they cannot be affected by any power given to Congress. A State has the same jurisdiction and authority over its rivers and lakes, that it has over its canals. Now, if the Legislature of New-York judged it advisable so to do, could it not prohibit any boat, using some patented machinery, from navigating its western canal? If it could, why could it not make the

1824.

Gibbons v. Ogden.

same prohibition as to its rivers and lakes; and if the act here should be an excess or abuse of legislation, would not its responsibility be *exclusively* to the people of the State?

The State of New-York, from motives not examinable here, made a *contract*, which is the foundation of our right; it could only do so by a law. The State had a right to contract, and, so far, it stands on the same footing as if *one individual* contracted, for a valuable consideration, with another, to receive his supplies of any article from him only. In the case of individuals, could a man, having a patented improvement of the same article, insist on annulling that contract, as interfering with his exclusive right and patent? If not, why should not a State, capable of contracting, have the same right to make that bargain, and, consequently, exclude the use of the patented article in its jurisdiction and domain, as an individual has in his own house and farm? The waters of the State are the domain and property of the State, subject only to the commercial regulations of Congress. Why should not the contract of a State, in regard to its domain and property, be as sacred as that of an individual? Such a contract was in this, and may in many cases, be very useful and advantageous. Who is to judge of that but the State Legislatures? Could Congress have made this contract, or acquired this benefit for the State? Certainly not. If the State cannot, what power or authority can? And is it come to this, that a contract, such as every individual in the land may wisely and law-

fully make, for his own benefit, and to be enforced in his own premises, no State, and no authority for any State, can make for its benefit, and to be enforced in its jurisdiction?

1824.

Gibbons v. Ogden.

There are circumstances connected with those laws, sufficient to make any tribunal require the strongest arguments before it adjudged them invalid. The State of New-York, by a patient and forbearing patronage of ten years, to Livingston and Fulton, by the tempting inducement of its proferred reward, and by the subsequent liberality of its contract, has called into existence the noblest and most useful improvement of the present day. Genius had contended with its inherent difficulties, for generations before; and if some had nearly reached, or some even touched, the goal, they sunk exhausted, and the result of their efforts perished in reality, and almost in name. Such would, probably, have been the end of Fulton's labours; and, neither the wealth and talents of his associate, nor the resources of his own great mind, would have saved him from the fate of others, if he had not been sustained, for years, by the wise and considerate encouragement of the State of New-York. She has brought into noonday splendour, an invaluable improvement to the intercourse and consequent happiness of man, which, without her aid, would, perhaps, have scarcely dawned upon our grandchildren. She has not only rendered this service to her own citizens, but the benefits of her policy have spread themselves over the whole Union. Where can you turn your eyes, and where can you travel,

1824.

Gibbons v. Ogden.

without having your eyes delighted, and some part of the fatigues of your journey relieved, by the presence of a steam boat? The Ohio and Mississippi, she has converted into rapid channels for communicating wealth, comforts and enjoyments, from their mouths to their head waters. And the happy and reflecting inhabitants of the States they wash, may well ask themselves, whether, next to the constitutions under which they live, there be a single blessing they enjoy from the art and labour of man, greater than what they have derived from the patronage of the State of New-York to Robert Fulton? But the mighty benefits that have resulted from those laws, are not circumscribed, even by the vast extent of our Union. New-York may raise her head, she may proudly raise her head, and cast her eyes over the whole civilized world; she there may see its countless waters bearing on their surface countless offsprings of her munificence and wisdom. She may fondly calculate on their speedy extension in every direction, and through every region, from Archangel to Calcutta; and justly arrogating to herself the labours of the man she cherished, and, conscious of the value of her own good works, she may turn the mournful exclamation of Æneas into an expression of triumph, and exultingly ask,

Quæ regio in terris, nostri non plena laboris?

And it is, after all those advantages have been acquired and realized to the world—after numerous individuals have embarked their fortunes, on

the faith of those grants, and a ten years acquiescence in the decision by which they were sanctioned—after the property they have created has been diffused among a multitude of possessors—after it has become the sole support of the widow and the orphan—after it has received and exhausted the accumulated savings of the laborious and industrious heads of families, that a decision is required, which cannot, indeed, undo the lasting benefits already procured to the world, but would, assuredly, undo many of those who have confided their wealth and means to the stability and observance of those laws!

The *Attorney-General*, for the appellant, in reply, insisted, that the laws of New-York were unconstitutional and void:

1. Because they are in conflict with powers exclusively vested in Congress, which powers Congress has fully exercised, by laws now subsisting and in full force.

2. Because, if the powers be concurrent, the legislation of the State is in conflict with that of Congress, and is, therefore, void.

He stated, that the powers with which the laws of New-York conflict, are the power "to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and inventions," and the power "to regulate commerce with foreign nations, and among the several States." If these powers were exclusive in Congress, and it had exercised them by

1824.

Gibbons v. Ogden.

subsisting laws; and if the laws of New-York interfere with the laws of Congress, by obstructing, impeding, retarding, burdening, or in any other manner controlling their operation, the laws of New-York are void, and the judgment of the State Court, founded on the assumption of their validity, must be reversed.

In discussing this question, the general principles assumed, as postulates, on the other side, might be, for the most part, admitted. Thus, it might be admitted, that by force of the declaration of independence, each State became sovereign; that they were, then, independent of each other, and foreign to each other; that by virtue of their separate sovereignty, they had, each, full power to levy war, to make peace, to establish and regulate commerce, to encourage the arts, and generally to perform all other acts of sovereignty. It was also conceded, that the government of the United States is one of delegated powers; and the counsel for the respondent added, that it is one of enumerated powers. Yet they admitted that there were implied powers, and had given a different rule for the construction of the two classes of powers, which was, that "the express powers are to be construed *strictly*, the implied powers *liberally*." But the implied powers, he presumed, were only those which are necessary and proper to carry the powers, expressly given, into effect—the means to an end. This clause had not been generally regarded as, in fact, giving any new powers. Congress would have had them without the express declaration.

1824.

Gibbons v. Ogden.

The clause was inserted only *ex abundanti cautela*. With this explanation, it might be conceded, that the constitution of the United States is one of delegated and enumerated powers; and that all powers, not delegated by the constitution to the national government, nor prohibited by it to the States, are reserved to the States respectively, or to the people. The peculiar rule of construction demanded for those powers, might also be conceded: that the express powers are to be strictly construed, the implied liberally. By which was understood to be meant, that Congress can do no more than they are *expressly* authorized to do; though the means of doing it are left to their discretion, under no other limit than that they shall be necessary and proper to the end.

On the other hand, the counsel for the respondent themselves admitted, that Congress, nevertheless, has some exclusive powers; and, in conformity with the decisions of the Court, they admit that those exclusive powers exist under three heads. (1.) When the power is given to Congress in express terms of exclusion. (2.) When a power is given to Congress, and a like power is expressly prohibited to the States. (3.) Where a power given to Congress, is of such a nature, that the exercise of the same power by the States would be repugnant.

With regard to the degree of repugnancy, it was insisted, that the repugnancy must be manifest, necessary, unavoidable, total, and direct. Certainly if the powers be repugnant at all, they must be so with all these qualifications. If Con-

1824.

Gibbons v. Ogden.

gress, in the lawful exercise of its power, says that a thing shall be done, and the State says it shall not; or, which is the same thing, if Congress says that a thing shall be done, on certain terms, and the State says it shall not be done, except on certain other terms, the repugnancy has all the epithets which can be lavished upon it, and the State law must be void for this repugnancy.

A new test for the application of this third head of exclusive power, had been proposed. It was said, that "no power can be exclusive from its own nature, except where it formed no part of State authority previous to the constitution, but was first created by the constitution itself." But why were these national powers thus created by the constitution? Because they look to the whole United States as their theatre of action. And are not all the powers given to Congress of the same character? Under the power to regulate commerce, the commerce to be regulated is that *of the United States* with foreign nations, among the several States, and with the Indian tribes. No State had any previous power of regulating these. The same thing might be affirmed of all the other powers enumerated in the constitution. They were all created by the constitution, because they are to be wielded by the whole Union over the whole Union, which no State could previously do. If any one power, created by the constitution, may be exclusive for that reason, then all may be exclusive, because all are originally created. If, on the other hand, we are to consider the powers enumerated in the constitution, not with reference

1824.

Gibbons v. Ogden.

to the greater arm that wields them, and the more extended territory over which they operate, but merely in reference to the nature of the particular power in itself considered; then, according to this new test, all the powers given to Congress are *concurrent;* because there is no one power given to it, which, considered in this light, might not have been previously exercised by the States within their respective sovereignties. But this argument proved too much: for, it has been conceded, that some of the powers are exclusive from their nature; whereas, if the argument were true, none of them could be exclusive. On this argument, the entire class or head of exclusive powers, arising from the nature of the power, must be abolished. But this Court had repeatedly determined, that there is such a class of exclusive powers. The power of establishing a uniform rule of naturalization, is one of the instances. Its exclusive character is rested on the constitutional requisition, that the rule established under it should be uniform.[a]

It had been objected, that this would have been a concurrent power, but for the auxiliary provision in the constitution, that a citizen of one State shall be entitled to all the privileges of a citizen in every other State. The answer was, that it is not so determined by the Court in the case cited, and that the commentators on the constitution place it exclusively on the nature of the power as described in the grant.[b]

a Chirac v. Chirac, 2 *Wheat. Rep.* 269.
b *The Federalist*, No. 42.

1824.

Gibbons v. Ogden.

So also, the power of establishing *uniform* laws on the subject of bankruptcies, is clearly an exclusive power from its nature. The Court has, indeed, determined, that until Congress thought fit to exercise the power, the States might pass local bankrupt laws, provided they did not impair the obligation of contracts; but, that as soon as Congress legislate on the subject, the power of the States is at an end.[a]

But it had been said, that this doctrine takes away State power, by implication, which is contrary to the principles of interpretation laid down by the commentators on the constitution. It was not the opinion of the authors of the *Federalist*, that a State power could not be alienated by implication. Their doctrine was, that it might be alienated by implication, provided the implication be inevitable; and that it is inevitable wherever a direct and palpable repugnancy exists. The distinction between repugnancy and occasional interference, is manifest. The occasional interference, alluded to in the *Federalist*, and admitted by this Court, in its adjudications, is not a repugnancy between the powers themselves: it is a mere incidental interference in the operation of powers harmonious in themselves. The case put, was of a tax laid by Congress, and a tax laid by the State, upon the same subject, *e. g.* on a tract of land. The taxes operate upon, and are to be satisfied out of the same subject. It might be inconvenient to the proprietor to pay both taxes. In an

[a] Sturges v. Crowninshield, 4 *Wheat. Rep.* 122.

extreme case, the subject might be inadequate to the satisfaction of both. Then the tax laid by the paramount authority must be first satisfied. Still, this incidental interference in their operation, is not an inherent repugnance in the nature of the powers themselves.

It was also said, that to constitute the power an exclusive one in Congress, the repugnance must be such, that the State can pass no law on the subject, which will not be repugnant to the power given to Congress.

This required qualification before it could be admitted. Some subjects are, in their nature, extremely multifarious and complex. The same subject may consist of a great variety of branches, each extending itself into remote, minute, and infinite ramifications. One branch alone, of such a subject, might be given exclusively to Congress, (and the power is exclusive only so far as it is granted,) yet, on other branches of the same subject, the States might act, without interfering with the power exclusively granted to Congress. Commerce is such a subject. It is so complex, multifarious and indefinite, that it would be extremely difficult, if not impracticable, to make a digest of all the operations which belong to it. One or more branches of this subject might be given exclusively to Congress; the others may be left open to the States. They may, therefore, legislate on commerce, though they cannot touch that branch which is given exclusively to Congress.

So Congress has the power to promote the progress of science and the useful arts; but only in

1824.

Gibbons v. Ogden.

one mode, viz. by securing, for a limited time, to authors and inventors, the exclusive right to their respective writings and discoveries. This might be an exclusive power, and was contended to be so. Yet, there are a thousand other modes in which the progress of science and the useful arts may be promoted, as, by establishing and endowing literary and philosophical societies, and many others which might be mentioned. Hence, notwithstanding this particular exclusive grant to Congress, of one mode of promoting the progress of science and the useful arts, the States may rightfully make many enactments on the general subject, without any repugnance with the peculiar grant to Congress.

But, to come now to the question, whether these State laws be repugnant to this grant of power, we must first inquire, why it was conferred on Congress? Why was it thought a matter of sufficient importance to confer this power upon the national government? The answer to this question would be found in the history of the country, in the nature of our institutions, and the great national objects which the constitution had in view. The country was in its infancy; its population was small; its territory immense: it had recently thrown off its bondage by the war of the revolution, and was left exhausted and poor—poor in every thing but virtue and the love of country. It was still dependent on the arts of Europe, for all the comforts, and almost all the necessaries of life. We had hardly any manufactures, science, or literature of our own. Our statesmen saw the

1824.

Gibbons v. Ogden.

great destiny which was before the nation, but they saw also the necessity of exciting the energies of the people, of invoking the genius of invention, and of creating and diffusing the lights of science. These were objects, in which the whole nation was concerned, and were, therefore, naturally and properly confided to the national government. The States, indeed, might have exercised their inherent power of legislating on this subject; but their sphere of action was comparatively small; their regulations would naturally have been various and conflicting. Discouragement and discontent would have arisen in some States, from the superior privileges conferred on the works of genius in others; contests would have ensued among them on the point of the originality of inventions; and laws of retortion and reprisal would have followed. All these difficulties would be avoided by giving the power to Congress, and giving it exclusively of the States. If it were wisely exerted by Congress, there could be no necessity for a concurrent exercise of the power by the States.

The terms of the grant are, "Congress shall have power to promote the progress of science and the useful arts, by securing, for a limited time, to authors and inventors, the *exclusive* right to their respective writings and discoveries." This exclusive right is to be co-extensive with the territory of the Union. The laws to be made for securing it, must be uniform, and must extend throughout the country. The exclusive nature of every power is to be tested by the character of the

1824. Gibbons v. Ogden.

acts which Congress is to pass. This is the case with the naturalization laws. The exclusiveness of the power to establish them, resulted from their character of uniformity. So here, the exclusiveness results from the character of the right which they are to confer. It is to be exclusive. It is not, indeed, said, that Congress shall have the exclusive power, but it is said that they shall have power to do a certain act, which, when done, shall be exclusive in its operation. The power to do such an act, must be an exclusive power. It can, in the nature of things, be performed only by a single hand. Is not the power of one sovereign to confer *exclusive* rights, on a given subject, within a certain territory, inconsistent with a power in another independent sovereign, to confer *exclusive* rights on the same subject, in the same territory? Do not the powers clash? The right to be conferred by Congress, is to exclude all other rights on the subject in the United States; New-York being one of those States. The right to be conferred by New-York, is to exclude all other rights on the subject within the State of New-York. That one right may exclude another, is perfectly intelligible; but that two rights should reciprocally exclude each other, and yet both continue to subsist in perfect harmony, is inconceivable. Can a concurrent power exist, if, from the very nature of its action, it must take away, or render nugatory, the power given to Congress? Supposing the power to be concurrent, Congress may secure the right for one period of time, and the respective States for another. Congress may

1824.

Gibbons v. Ogden.

secure it for the whole Union, and each State may secure it to a different claimant, for its own territory. Congress possesses the power of granting an exclusive right to authors and inventors, within the United States. New-York claims the power to grant such exclusive right within that State. An author or inventor in that State, may take a grant for a period of time far longer than that allowed by the act of Congress. He may take a similar grant from every other State in the Union; and thus this pretended concurrent power supersedes, abrogates, and annuls the power of Congress. What would become of the power of Congress after the whole sphere of its action was taken away by this concurrent power of the States? Who would apply to the power of Congress for a patent or a copy-right, while the States held up higher privileges? This concurrent legislation would degenerate into advertisements for custom. These powers would be in the market, and the highest bidder would take all. Are not powers repugnant, when one may take from the other the whole territory on which alone it can act? Is not the repugnance such as to annihilate the power of Congress, as completely as if the whole Union was itself annihilated?

Something had been said of Congress repealing the laws of the State, wherever they should conflict with those of the Union. But where is this power of repeal? There is no such head of power in the constitution. Congress can act only by positive legislation on any subject, and this it has done in the present instance. But this action

1824.

Gibbons v. Ogden.

would be in vain, if another authority can act on the same subject. If this concurrent power would defeat the power of Congress, by withdrawing from it the whole territory on which it is to act, it would also defeat it by giving a monopoly of all the elements with which invention is to work. This has been done by these laws, as to fire and steam. Why should it not be done equally with all the other elements, such as gravitation, magnetism, galvanism, electricity, and others? What is to consecrate these agents of nature, and secure them from State monopoly, more than fire or steam? If not, then is the power of Congress subject to be defeated by this concurrent power, first by a monopoly of all the territory on which it can act, and then by a monopoly of all the elements and natural agents on which invention can be exerted. Still it would be said, that there is no direct repugnance between these powers, and that the power of Congress may still act. But on what can it act? The territory is gone, and all the powers of invention are appropriated. There is no difference whatever between a direct enactment, that the law of Congress shall have no operation in New-York, and enactments which render that operation impossible. If, then, this process of reasoning be correct, the inevitable conclusion from it is, that a power in the States to grant *exclusive* patents, is utterly inconsistent with the power given to the national government to grant such exclusive patents: and hence, that the power given to Congress is one which is exclusive from its nature.

1824.

Gibbons v. Ogden.

But suppose, for the sake of the argument, that the States have this concurrent power, yet it cannot be denied, that if the legislation of the State be repugnant to the laws of Congress, that of the State is void, so far as the repugnance exists. In the present case the repugnance is manifest. The law of Congress declares, that all inventors of useful improvements throughout the United States, shall be entitled to the exclusive right in their discoveries for fourteen years *only*. The law of New-York declares, that this inventor shall be entitled to the exclusive use of his discovery for thirty years, and as much longer as the State shall permit. The law of Congress, by limiting the exclusive right to fourteen years, in effect declares, that after the expiration of that time, the discovery shall be the common right of the whole people of the United States. The law of New-York declares that it shall not, after fourteen years, be the exclusive right of the people of the United States, but that it shall be the exclusive right of this inventor for thirty years, and for so much longer as she, in her sovereign will and pleasure, may permit. If this be not repugnance, direct and palpable, we must have a new vocabulary for the definition of the word.

But it was said, that the appellant had no patent under the United States, and, therefore, could not raise the question. To this it was answered, that it was not necessary that he should have a patent. The question as to the validity of the law of New-York, is raised, whenever a right is asserted under that law, and is resisted by the

1824. Gibbons v. Ogden.

party against whom it is asserted; and that validity is to be tested, not by comparing the law of New-York with a patent, but by comparing it with the constitution and laws of the United States.

It was also said, that there could be no repugnance, because it was admitted, that wherever a patent from the United States appears, the patent obtained under the State law must yield to it; that the patent under the State is valid only until the patent from the paramount power appears; and that the rights derived from the different sovereigns must be found practically to clash, before the law of New-York was to give way for repugnancy. This is an insidious argument, and fraught with all the dangers which have been enumerated. For if the New-York patentee be the inventor, the law of New-York is absolute, and however unconstitutional it may be, there is no power of resistance. Besides, the argument is incorrect. To illustrate this, suppose a grant from Virginia, within the military reservation in Ohio, after she had ceded the whole territory to the United States; would the party in possession, even if a mere intruder, be bound to show a grant from the United States, before he could resist the unlawful grant of Virginia? But there the plaintiff would be claiming under a State which had previously ceded away the power to make such grants, which is precisely the case here, so that there need be no repugnance arising from patents. If a repugnance exist between the laws of New-York and the constitution and laws of the United States, any citizen of the United States has a right to act

as if the law of New-York were a nullity; and the question of its nullity and validity arises, wherever an attempt is made to enforce it.

1824.

Gibbons v. Ogden.

But it was argued that the power of Congress is limited to inventors, and that the power to encourage by patents the introduction of foreign discoveries, stands clear of this constitutional grant. If it were necessary, this doctrine might be questioned. The statute of the 21st James I. c. 3. uses the same word with the constitution, "inventors;" and the decisions upon the construction of this statute might be referred to, in order to show that it has been considered as embracing discoveries imported from abroad.[a] But, even acceding to this doctrine, it might be asked whether the question now before the Court had any thing to do with an art, machine, or improvement, imported from abroad? The privilege here granted by the State, is to an American citizen, who claims to be the inventor. The privilege is the reward of invention, not of importation, and this it is which brings it in conflict with the act of Congress. It is true, the law does not call him the inventor; it calls him merely the "possessor." But, can the constitution and laws of the United States be evaded in this manner? If he was not the inventor, why this unjust tax which has been levied upon our admiration and gratitude? When the validity of a law is challenged for a fraudulent evasion of the rights of others, you are not bound by its own averments, but may resort to proof

[a] 17 *Vin.* 211.

1824.

Gibbons v. Ogden.

aliunde to establish the facts. The word *possessor* is a new and unusual word to apply to such a case, and marks a studious effort to conceal the truth. He was, of necessity, either the inventor or the importer. If he was the *importer*, there is no conceivable reason why he should be called by any other than that name. The Legislature of New-York, in its act in behalf of Fitch, passed before the adoption of the constitution, had no difficulty in applying the natural and appropriate name to him. But when the final law was passed in favour of Livingston and Fulton, in 1798, the constitution of the United States, which cedes this power to Congress, had been adopted, and the laws by which that power is executed had been passed. This constitution and these laws used the term *inventors*. But the privilege was too short. The State of New-York offered better terms. The only difficulty was, to give them effect without encroaching upon that power which had been constitutionally exercised by Congress. It would not do to call them *inventors*, and the device was adopted of calling him merely the *possessor*, which was a manifest evasion of the law of Congress.

But it was contended, that the patent laws of the United States give no right; they only secure a pre-existing right at common law. What then do these statutes accomplish? If they do nothing more than give the inventor a chattel interest in his invention, and a remedy for its violation, he had these at common law. And if they only give him a mere right to use his invention in the States,

1824.

Gibbons v. Ogden.

with their permission, he had that before. The case of *Millar v. Taylor* proves the right to have been perfect at common law. The time of enjoyment was far greater. Thompson's Seasons had been published forty years when that action was brought. If the patent and copy-right laws were merely intended to secure an exclusive right throughout the United States, and are, in fact, a limitation on the common law right, (as was contended by the respondent's counsel,) when this right has been thus secured throughout the United States, and a limitation constitutionally put upon it by Congress, can a State interfere with this regulation? The limitation is not for the advantage of the inventor, but of society at large, which is to take the benefit of the invention after the period of limitation has expired. The patentee pays a duty on his patent, which is an effective source of revenue to the United States. It is virtually a contract between each patentee and the people of the United States, by which the time of exclusive and secure enjoyment is limited, and then the benefit of the discovery results to the public. A State cannot, by its local laws, defeat this resulting interest of the whole Union.

But it was said that a State might prohibit the use of a patented machine, if it be noxious to the health of its citizens, or of an immoral or impious book, the copy-right of which had been secured. The answer to all such arguments was, that it would be time enough to consider such questions when they arise. The constitutional power of Congress is to patent *useful* discoveries. The

1824.

Gibbons v. Ogden.

patent authorizes the patentee to *use* his invention, and it is the use which is secured. When a discovery is deemed *useful* by the national government, and a patent shall issue authorizing the patentee to use it throughout the United States, and the patentee shall be obstructed by a State in the exercise of this right, on the ground that the discovery is useless and dangerous, it will be time enough to consider the power of the States to defeat the exercise of the right on this ground. But this is not the question before the Court. It might be admitted, that the State had authority to prohibit the use of a patented machine on that ground, or of a book, the copy-right of which had been secured, on the ground of its impiety or immorality. But the laws which are now in judgment were not passed upon any such ground. The question raised by them is, can the States obstruct the operation of an act of Congress, by taking the power from the National Legislature into their own hands? Can they prohibit the publication of an immoral book, licensed by Congress, on the pretext of its immorality, and then give an exclusive right to publish the same book themselves? Can they prohibit the use of an invention on the ground of its noxiousness, and then authorize the exclusive use of the same invention by their own law?

But there is no pretext of noxiousness here. The authority to enact these laws is taken up under a totally distinct head of State power. It is the sovereign power to grant exclusive privileges and create monopolies, the constitution and laws

1824.

Gibbons v. Ogden.

of the United States to the contrary notwithstanding. This is the real power under which these laws are defended; and it may perplex, although it cannot enlighten the discussion, to confound it with another and a distinct head of State power. If then the power of securing to authors and inventors the use of their writings and discoveries, be exclusively vested in Congress, the acts of New-York are void, because they are founded on the exercise of the same power by the State. And if the power be concurrent, these acts are still void, because they interfere with the legislation of Congress on the same subject.

These laws were also void, because they interfere with the power given to Congress, to regulate commerce with foreign nations and among the several States. This nullity of the State laws would be supported, first, upon the ground of the power being exclusive in Congress; and, secondly, that if concurrent, these laws directly interfered with those of Congress on the same subject.

That this power was exclusive, would be manifest from the fact, that the commerce to be regulated, was that of the United States; that the government by which it was to be regulated, was also that of the United States; and that the subject itself was one undivided subject. It was an entire, regular, and uniform system, which was to be carried into effect, and would not admit of the participation and interference of another hand. Does not regulation, *ex vi termini*, imply harmony and uniformity of action? If this must be admitted to be the natural and proper force of the

1824.

Gibbons v. Ogden.

term, let us suppose that the additional term, *uniform*, had been introduced into the constitution, so as to provide that Congress should have power to make uniform regulations of commerce throughout the United States. Then, according to the adjudications on the power of establishing a uniform rule of naturalization, and uniform laws of bankruptcy, throughout the United States, this power would unquestionably have been exclusive in Congress. But *regulation* of that commerce which pervades the Union, necessarily implies *uniformity*, and the same result, therefore, follows as if the word had been inserted.

With regard to the quarantine laws, and other regulations of police, respecting the public health in the several States, they do not partake of the character of regulations of the commerce of the United States. It had been said, that these local regulations were recognised by Congress, which had made them a part of its own system of commerce. But this recognition would have been superfluous, if they could have stood without it on the basis of State sovereignty; and so far as their adoption by Congress could be considered as affecting the question, the manner and purpose of the recognition operated the other way. It would be found that, by the commercial regulations which Congress had made, a general system was adopted, which, if executed in every instance, would have carried ships and vessels into all the ports of the several States, their local quarantine laws to the contrary notwithstanding. An express regulation is, therefore, introduced, requiring the collectors

of the customs to conform the execution of their official duties, under the navigation and revenue laws, with the quarantine laws of the respective States. Without such a provision, the local health laws must have given way to the supremacy of the navigation and revenue laws of the Union.

A serious objection to the exclusive nature of this power of regulating commerce, was supposed to arise from the express prohibitions on the States, contained in the 10th sec. of the 1st art. of the constitution. It has been considered, that these prohibitions imply that, as to every thing not prohibited, the power of the State was meant to be reserved; and the authority of the authors of the *Federalist*, was cited in support of this interpretation. But another commentator, of hardly less imposing authority, and writing, not as a polemic, for the purpose of vindicating the constitution against popular objections, but for the mere purpose of didactic instruction as a professor, with this section before him, and with a strong leaning towards State pretensions, considers the power to regulate commerce as an exclusive power.[a] But the difference between them is rather in appearance, than in reality. It does not appear that the author of that number of the *Federalist*, did himself consider these police regulations as, properly speaking, regulations of the commerce of the Union. But the objectors to the constitution had presented them as such, and his argument in substance is, that if

[a] *Tucker's Bl. Com. part* 1. *Appx.* 180.

1824.

Gibbons v. Ogden.

they are, the constitution does not affect them. The other commentator did not consider them as regulations of the commerce of the United States; for if he did, he could not admit them, as he did, to be left in the States, and yet hold the opinion that the power to regulate commerce was exclusively vested in Congress. But might not a reason for these prohibitions be found, in the recent experience of the country, very different from that which had heretofore been assigned for them. The acts prohibited, were precisely those which the States had been passing, and which mainly led to the adoption of the constitution. The section might have been inserted *ex abundanti cautela*. Or the convention might have regarded the previous clause, which grants the power to regulate commerce, as exclusive throughout the whole subject; and this section might have been inserted to qualify its exclusive character, so far as to permit the States to do the things mentioned, under the superintendance and with the consent of Congress. If either or both of these motives combined for inserting the clause, the inference which had been drawn from it against the exclusive power of Congress to regulate commerce, would appear to be wholly unwarranted.

But if these police regulations of the States are to be considered as a part of the immense mass of commercial powers, is not the subject susceptible of division, and may not some portions of it be exclusively vested in Congress? It was viewing the subject in this light, that induced his learned asso-

ciate[a] to assume the position which had been misconceived on the other side. This proposition was, not that all the commercial powers are exclusive, but that those powers being separated, there are some which are exclusive in their nature; and among them, is that power which concerns navigation, and which prescribes the vehicles in which commerce shall be carried on. It was, however, immaterial, so far as this case was concerned, whether the power of Congress to regulate commerce be exclusive or concurrent. Supposing it to be concurrent, it could not be denied, that where Congress has legislated concerning a subject, on which it is authorized to act, all State legislation which interferes with it, is absolutely void. It was not denied, that Congress has power to regulate the coasting trade. It was not denied that Congress had regulated it. If the vessel now in question, was sailing under the authority of these regulations, and has been arrested by a law of New-York forbidding her sailing, the State law must, of necessity, be void. The coasting trade did, indeed, exist before the constitution was adopted; it might safely be admitted, that it existed by the *jus commune* of nations; that it existed by an imperfect right; and that the States might prohibit or permit it at their pleasure, imposing upon it any regulations they thought fit, within the limits of their respective territorial jurisdictions. But those regulations were as various as the States; continually conflicting, and the source of perpetual dis-

1824.

Gibbons v. Ogden.

[a] *Mr. Webster.*

1824.

Gibbons v. Ogden.

cord and confusion. In this condition, the constitution found the coasting trade. It was not a thing which required to be created, for it already existed. But it was a thing which demanded regulation, and the power of regulating it was given to Congress. They acted upon it as an existing subject, and regulated it in a uniform manner throughout the Union. After this regulation, it was no longer an imperfect right, subject to the future control of the States. It became a perfect right, protected by the laws of Congress, with which the States had no authority to interfere. It was for the very purpose of putting an end to this interference, that the power was given to Congress; and if they still have a right to act upon the subject, the power was given in vain. To say that Congress shall regulate it, and yet to say that the States shall alter these regulations at pleasure, or disregard them altogether, would be to say, in the same breath, that Congress shall regulate it, and shall not regulate it; to give the power with one hand, and to take it back with the other. By the acts for regulating the coasting trade, Congress had defined what should be required to authorize a vessel to trade from port to port; and in this definition, not one word is said as to whether it is moved by sails or by fire; whether it carries passengers or merchandise. The license gives the authority to sail, without any of those qualifications. That the regulation of commerce and navigation, includes the authority of regulating passenger vessels as well as others, would appear from the most approved definitions of the term *commerce*. It al-

ways implies intercommunication and intercourse. This is the sense in which the constitution uses it; and the great national object was, to regulate the terms on which intercourse between foreigners and this country, and between the different States of the Union, should be carried on. If freight be the test of commerce, this vessel was earning freight; for what is freight, but the compensation paid for the use of a ship? The compensation for the carrying of passengers may be insured as freight. The whole subject is regulated by the general commercial law; and Congress has superadded special regulations applicable to vessels employed in transporting passengers from Europe. In none of the acts regulating the navigation of the country, whether employed in the foreign or coasting trade, had any allusion been made to the kind of vehicles employed, further than the general description of ships or vessels, nor to the means or agents by which they were propelled.

1824.

Gibbons v. Ogden.

In conclusion, the *Attorney-General* observed, that his learned friend (Mr. Emmett) had eloquently personified the State of New-York, casting her eyes over the ocean, witnessing every where this triumph of her genius, and exclaiming, in the language of Æneas,

"Quæ regio in terris, nostri non plena laboris?"

Sir, it was not in the moment of triumph, nor with feelings of triumph, that Æneas uttered that exclamation. It was when, with his faithful Achates by his side, he was surveying the works of art

1824.

Gibbons v. Ogden.

with which the palace of Carthage was adorned, and his attention had been caught by a representation of the battles of Troy. There he saw the sons of Atreus and Priam, and the fierce Achilles. The whole extent of his misfortunes—the loss and desolation of his friends—the fall of his beloved country, rush upon his recollection.

"Constitit, et *lachrymans;* Quis jam locus, inquit, Achate,
Quæ regio in terris nostri non plena laboris?"

Sir, the passage may, hereafter, have a closer application to the cause than my eloquent and classical friend intended. For, if the state of things which has already commenced is to go on; if the spirit of hostility, which already exists in three of our States, is to catch by contagion, and spread among the rest, as, from the progress of the human passions, and the unavoidable conflict of interests, it will too surely do, what are we to expect? Civil wars have often arisen from far inferior causes, and have desolated some of the fairest provinces of the earth. History is full of the afflicting narratives of such wars, from causes far inferior; and it will continue to be her mournful office to record them, till time shall be no more. It is a momentous decision which this Court is called on to make. Here are three States almost on the eve of war. It is the high province of this Court to interpose its benign and mediatorial influence. The framers of our admirable constitution would have deserved the wreath of immor-

tality which they have acquired, had they done nothing else than to establish this guardian tribunal, to harmonize the jarring elements in our system. But, sir, if you do not interpose your friendly hand, and extirpate the seeds of anarchy which New-York has sown, you *will* have civil war. The war of legislation, which has already commenced, will, according to its usual course, become a war of blows. Your country will be shaken with civil strife. Your republican institutions will perish in the conflict. Your constitution will fall. The last hope of nations will be gone. And, what will be the effect upon the rest of the world? Look abroad at the scenes which are now passing on our globe, and judge of that effect. The friends of free government throughout the earth, who have been heretofore animated by our example, and have held it up before them as their polar star, to guide them through the stormy seas of revolution, will witness our fall *with dismay and despair*. The arm that is every where lifted in the cause of liberty, will drop, unnerved, by the warrior's side. Despotism will have its day of triumph, and will accomplish the purpose at which it too certainly aims. It will cover the earth with the mantle of mourning. Then, sir, when New-York shall look upon this scene of ruin, if she have the generous feelings which I believe her to have, it will not be with her head aloft, in the pride of conscious triumph—"her rapt soul sitting in her eyes;" no, sir, no: dejected, with shame and confusion—drooping under the weight of her

1824.

Gibbons v. Ogden.

sorrow, with a voice suffocated with despair, *well* may *she then* exclaim,

"Quis jam locus,
Quæ regio in terris nostri non plena laboris!"

March 2. Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States.

They are said to be repugnant—

1st. To that clause in the constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New-York maintains the constitutionality of these laws; and their Legislature, their Council of Revision, and their Judges, have repeatedly concurred in this opinion. It is supported by great names—by names which have all the titles to consideration that virtue, intelligence, and office, can bestow. No tribunal can approach the decision of this question, without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this Court, while it respects, not to bow to it implicitly; and the Judges must exercise, in the examination of the subject, that understanding which Providence has bestowed upon them, with that independence which the people of the United

States expect from this department of the government.

1824.

Gibbons v. Ogden.

Principles of interpretation.

As preliminary to the very able discussions of the constitution, which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States, anterior to its formation. It has been said, that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But, when these allied sovereigns converted their league into a government, when they converted their Congress of Ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear, underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said, that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants, expressly, the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used, is not extended to the powers which are conferred; nor is there one sentence in

1824.

Gibbons v. Ogden.

the constitution, which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean, by a strict construction? If they contend only against that enlarged construction, which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction, which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the constitution is to be expounded. As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects

1824.

Gibbons v. Ogden.

for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can enure solely to the benefit of the grantee; but is an investment of power for the general advantage, in the hands of agents selected for that purpose; which power can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant. We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

The power of regulating commerce extends to the regulation of navigation.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the com-

1824.

Gibbons v. Ogden.

mercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce," to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

If the opinion that "commerce," as the word is used in the constitution, comprehends naviga-

tion also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power, that which was not granted—that which the words of the grant could not comprehend. If, then, there are in the constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The 9th section of the 1st article declares, that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties, in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes, must also be considered as showing, that all America is united

1824.

Gibbons v. Ogden.

in that construction which comprehends navigation in the word commerce. Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war, cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument, and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case, an embargo is no more a war measure, than a merchantman is a ship of war, because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was, the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep rooted hostility, will not be imputed to those who were arrayed in opposi-

1824.

Gibbons v. Ogden.

tion to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but, on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation of commerce. In terms, they admitted the applicability of the words used in the constitution to vessels; and that, in a case which produced a degree and an extent of excitement, calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more strongly illustrate the universal understanding of the American people on this subject.

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation, is as expressly granted, as if that term had been added to the word "commerce."

The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State.

To what commerce does this power extend? The constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be

1824.

Gibbons v. Ogden.

carried on between this country and any other, to which this power does not extend. It has been truly said, that commerce, as the word is used in the constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain intelligible cause which alters it.

The subject to which the power is next applied, is to commerce "among the several States." The word "among" means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary line of each State, but may be introduced into the interior.

But it does not extend to a commerce which is completely internal.

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended, would not have been made, had the inten-

1824.

Gibbons v. Ogden.

tion been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power, if it could not pass those lines. The commerce of the United States with foreign nations, is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when

1824.

Gibbons v. Ogden.

applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them; and how is it to be conducted? Can a trading expedition between two adjoining States, commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and probably pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the nation on this subject, is unequivocally manifested by the provisions made in the laws for transporting goods, by land, between Baltimore and Providence, between New-York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry—What is this power?

The power to regulate commerce is general, and has no limitations but such as are prescribed in the constitution itself.

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the

1824.

Gibbons v. Ogden.

questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation, within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New-York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be co-extensive with the subject itself, and have no other limits than are prescribed in the constitution, yet the States may severally

1824.

Gibbons v. Ogden.

exercise the same power, within their respective jurisdictions. In support of this argument, it is said, that they possessed it as an inseparable attribute of sovereignty, before the formation of the constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the tenth amendment; that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends, that full power to regulate a particular subject, implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources, to support and illustrate the propositions they respectively maintain.

The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly

1824.

Gibbons v. Ogden.

exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c. to pay the debts, and provide for the common defence and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress,

1824.

Gibbons v. Ogden.

and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question, whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry, whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make, are now in full operation. The sole question is, can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the 10th section, as supporting their opinion. They say, very truly, that limitations of a power, furnish a strong argument in favour of the existence of that power, and that the section which prohibits the States from laying duties on imports or exports, proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.

That this restriction shows the opinion of the Convention, that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows as a conse-

quence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports," is considered in the constitution as a branch of the taxing power, or of the power to regulate commerce. We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause of the 8th section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and, before commerce is mentioned, the rule by which the exercise of this power must be governed, is declared. It is, that all duties, imposts, and excises, shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred. The constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States

1824. to levy taxes, not from the questionable power to regulate commerce.

Gibbons v. Ogden.

"A duty of tonnage" is as much a tax, as a duty on imports or exports; and the reason which induced the prohibition of those taxes, extends to this also. This tax may be imposed by a State, with the consent of Congress; and it may be admitted, that Congress cannot give a right to a State, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its prohibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true, that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution, to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue, produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

These restrictions, then, are on the taxing power.

1824.

Gibbons v. Ogden.

not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But, the inspection laws are said to be regulations of commerce, and are certainly recognised in the constitution, as being passed in the exercise of a power remaining with the States.

State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress.

That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, cannot be admitted. The object of inspection laws, is to improve the quality of articles produced by the labour of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts of this mass.

No direct general power over these objects is granted to Congress; and, consequently, they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for national purposes; it must be where the

1824.

Gibbons v. Ogden.

power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious, that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State, in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another, in the same State, the act is supposed to be, necessarily, incidental to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other, which remains with the State, and may be executed by the same means. All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose

action extends over the whole, but which possesses only certain enumerated powers; and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers, would often be of the same description, and might, sometimes, interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress, passed in 1796 and 1799,[a] empowering and directing the officers of the general government to conform to, and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true, that they do proceed upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State, to provide for the health of its citizens. But, as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might

[a] 2 *U. S. L.* p. 345. 3 *U. S. L.* p. 126.

1824.

Gibbons v. Ogden.

interfere with, and be affected by the laws of the United States, made for the regulation of commerce, Congress, in that spirit of harmony and conciliation, which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the States. But, in making these provisions, the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.

The act passed in 1803,[a] prohibiting the importation of slaves into any State which shall itself prohibit their importation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred, that they possess the same power with respect to other articles.

If this inference were correct; if this power was exercised, not under any particular clause in the constitution, but in virtue of a general right over the subject of commerce, to exist as long as the constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious, that the power of the States over this subject, previous to the year 1808, constitutes an exception to the power of

[a] 3 *U. S. L.* p. 529.

Congress to regulate commerce, and the exception is expressed in such words, as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period. The words are, "the migration or importation of such persons as any of the States, now existing, *shall* think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is, to preserve the power to those States which might be disposed to exercise it; and its language seems to the Court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the constitution, cannot be admitted to prove the possession of any other similar power.

It has been said, that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the States. But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned, adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made

1824.

Gibbons v. Ogden.

in future, presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbours, and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular state. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the Court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could control the whole subject, and might adopt the system of the States, or provide one of its own.

A State, it is said, or even a private citizen, may construct light houses. But gentlemen must be aware, that if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals who own lands, may, if not forbidden by law,

erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

These acts were cited at the bar for the purpose of showing an opinion in Congress, that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion, that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature, full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

There is great force in this argument, and the Court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether

1824.

Gibbons v. Ogden.

of trading or police, the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the constitution, the Court will enter upon the inquiry, whether the laws of New-York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New-York must yield to the law of Congress; and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

The laws of N. Y. granting to R. R. L. and R. F. the exclusive right of navigating the waters of that State with steam boats, are in collision with the acts of Congress regulating the coasting trade, which being made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States.

This opinion has been frequently expressed in this Court, and is founded, as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended, that if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act,

inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

In pursuing this inquiry at the bar, it has been said, that the constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world. This is true. The constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power, Congress has passed "an act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend, that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

It will at once occur, that, when a Legislature

1824.

Gibbons v. Ogden.

attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone, if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New-York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New-Jersey, to New-York, from enjoying, in her course, and on her entrance into port, all the privileges conferred by the act of Congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the Court it seems very clear, that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

A licence under the acts of Congress for regulating the coasting trade, gives a permission to carry on that trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares, that vessels enrolled by virtue of a previous law, and certain other vessels, enrolled as described in that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the Court to contain a positive enactment, that the vessels it describes shall

be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described, to carry on the coasting trade, would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant to a vessel qualified to receive it, "a license for carrying on the coasting trade;" and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steam-boat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the legislature; and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act, than in the license itself.

The word "license," means permission, or authority; and a license to do any particular thing, is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to

1824.

Gibbons v. Ogden.

him all the right which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New-York?

The license must be understood to be what it purports to be, a legislative authority to the steamboat Bellona, "to be employed in carrying on the coasting trade, for one year from this date."

It has been denied that these words authorize a voyage from New-Jersey to New-York. It is true, that no ports are specified; but it is equally true, that the words used are perfectly intelligible, and do confer such authority as unquestionably, as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted, that a voyage from New-Jersey to New-York, is one of those operations.

The license is not merely intended to confer the national character.

Notwithstanding the decided language of the license, it has also been maintained, that it gives no right to trade; and that its sole purpose is to confer the American character.

The answer given to this argument, that the American character is conferred by the enrolment, and not by the license, is, we think, founded too clearly in the words of the law, to require the support of any additional observations. The enrolment of vessels designed for the coasting trade, corresponds precisely with the registration of ves-

sels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burthen of twenty tons and upwards; and requires no circumstance essential to the American character. The object of the license, then, cannot be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission to a vessel already proved by her enrolment to be American, to carry on the coasting trade.

The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers.

But, if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America, to comprehend navigation, it is a very persuasive, if not a conclusive argument, to prove that the construction is correct; and, if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire, and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted, which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers, is as much a portion of the American marine, as one employed

1824.

Gibbons v. Ogden.

in the transportation of a cargo; and no reason is perceived why such vessel should be withdrawn from the regulating power of that government, which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men, as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not be placed in the same hands. The argument urged at the bar, rests on the foundation, that the power of Congress does not extend to navigation, as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the constitution, or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals; and, so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equal-

ly to the regulation of vessels employed in transporting men, who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally, must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed to a greater or less extent in the transportation of passengers, and have never been supposed to be, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections 23 and 46, contains provisions respecting passengers, and shows, that vessels which transport them, have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things, this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business, within those provisions which were intended for vessels generally; and, on the 2d of March, 1819, passed "an act regulating passenger ships and

1824.

Gibbons v. Ogden.

vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of every thing concerning them which may interest the government, to the Department of State, but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress, (if, indeed, any evidence to that point could be required,) that the pre-existing regulations comprehended passenger ships among others; and, in prescribing the same duties, the Legislature must have considered them as possessing the same rights.

If, then, it were even true, that the Bellona and the Stoudinger were employed exclusively in the conveyance of passengers between New-York and New-Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question, in the case before the Court. The laws of New-York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New-York are closed against them, though their cargoes be dutiable goods, which the laws of the

United States permit them to enter and deliver in New-York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law, is the bill of the plaintiff in the State Court. The bill does not complain that the Bellona and the Stoudinger carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers, or otherwise." The answer avers, only, that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed vessels, not from carrying passengers, but from being moved through the waters of New-York by steam, for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be, whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

The power of regulating commerce extends to vessels propelled by steam or fire, as well as to those navigated by the instrumentality of wind and sails.

In considering this question, the first idea which presents itself, is, that the laws of Congress for the regulation of commerce, do not look to the

1824.

Gibbons v. Ogden.

principle by which vessels are moved. That subject is left entirely to individual discretion; and, in that vast and complex system of legislative enactment concerning it, which embraces every thing that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act, granting a particular privilege to steam boats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed, that there is no fact in this case which can bring up that question. And, if the occupation of steam boats be a matter of such general notoriety, that the Court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history, that, in our western waters, their principal employment is the transportation of merchandise; and all know, that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the Court to be put completely at rest, by the act al-

ready mentioned, entitled, "An act for the enrolling and licensing of steam boats."

This act authorizes a steam boat employed, or intended to be employed, only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress, that steam boats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters, and entering ports which are free to such vessels, than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter in an examination of that part of the constitution which empowers Congress to promote the progress of science and the useful arts.

The Court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavour to prove that which is already clear, is imputable to

1824.

Gibbons v. Ogden.

a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come, depends on a chain of principles which it was necessary to preserve unbroken; and, although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

Mr. Justice JOHNSON. The judgment entered by the Court in this cause, has my entire approbation; but having adopted my conclusions on views

1824.

Gibbons v. Ogden.

of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have, also, another inducement: in questions of great importance and great delicacy, I feel my duty to the public best discharged, by an effort to maintain my opinions in my own way.

In attempts to construe the constitution, I have never found much benefit resulting from the inquiry, whether the whole, or any part of it, is to be construed strictly, or literally. The simple, classical, precise, yet comprehensive language, in which it is couched, leaves, at most, but very little latitude for construction; and when its intent and meaning is discovered, nothing remains but to execute the will of those who made it, in the best manner to effect the purposes intended. The great and paramount purpose, was to unite this mass of wealth and power, for the protection of the humblest individual; his rights, civil and political, his interests and prosperity, are the sole *end*; the rest are nothing but the *means*. But the principal of those means, one so essential as to approach nearer the characteristics of an end, was the independence and harmony of the States, that they may the better subserve the purposes of cherishing and protecting the respective families of this great republic.

The strong sympathies, rather than the feeble government, which bound the States together during a common war, dissolved on the return of peace; and the very principles which gave rise to the war of the revolution, began to threaten the

1824.

Gibbons v. Ogden.

confederacy with anarchy and ruin. The States had resisted a tax imposed by the parent State, and now reluctantly submitted to, or altogether rejected, the moderate demands of the confederation. Every one recollects the painful and threatening discussions, which arose on the subject of the five per cent. duty. Some States rejected it altogether; others insisted on collecting it themselves; scarcely any acquiesced without reservations, which deprived it altogether of the character of a national measure; and at length, some repealed the laws by which they had signified their acquiescence.

For a century the States had submitted, with murmurs, to the commercial restrictions imposed by the parent State; and now, finding themselves in the unlimited possession of those powers over their own commerce, which they had so long been deprived of, and so earnestly coveted, that selfish principle which, well controlled, is so salutary, and which, unrestricted, is so unjust and tyrannical, guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad.

This was the immediate cause, that led to the forming of a convention.

As early as 1778, the subject had been pressed upon the attention of Congress, by a memorial from the State of New-Jersey; and in 1781, we find a resolution presented to that body, by one of

1824.

Gibbons v. Ogden.

the most enlightened men of his day,[a] affirming, that "it is indispensably necessary, that the United States, in Congress assembled, should bevested with a right of superintending the commercial regulations of every State, that none may take place that shall be partial or contrary to the common interests." The resolution of Virginia,[b] appointing her commissioners, to meet commissioners from other States, expresses their purpose to be, "to take into consideration the trade of the United States, to consider how far an uniform system in their commercial regulations, may be necessary to their common interests and their permanent harmony." And Mr. Madison's resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: "Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations," &c. "therefore, resolved," &c.

The history of the times will, therefore, sustain the opinion, that the grant of power over commerce, if intended to be commensurate with the evils existing, and the purpose of remedying those

a *Dr. Witherspoon.*

b *January* 21, 1786.

1824.

Gibbons v. Ogden.

evils, could be only commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people, when the grant was made.

There was not a State in the Union, in which there did not, at that time, exist a variety of commercial regulations; concerning which it is too much to suppose, that the whole ground covered by those regulations was immediately assumed by actual legislation, under the authority of the Union. But where was the existing statute on this subject, that a State attempted to execute? or by what State was it ever thought necessary to repeal those statutes? By common consent, those laws dropped lifeless from their statute books, for want of the sustaining power, that had been relinquished to Congress.

And the plain and direct import of the words of the grant, is consistent with this general understanding.

The words of the constitution are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

It is not material, in my view of the subject, to inquire whether the article *a* or *the* should be prefixed to the word "power." Either, or neither, will produce the same result: if either, it is clear that the article *the* would be the proper one, since the next preceding grant of power is certainly exclusive, to wit: "to borrow money on the credit

of the United States." But mere verbal criticism I reject.

My opinion is founded on the application of the words of the grant to the subject of it.

The "power to regulate commerce," here meant to be granted, was that power to regulate commerce which previously existed in the States. But what was that power? The States were, unquestionably, supreme; and each possessed that power over commerce, which is acknowledged to reside in every sovereign State. The definition and limits of that power are to be sought among the features of international law; and, as it was not only admitted, but insisted on by both parties, in argument, that, "*unaffected by a state of war, by treaties, or by municipal regulations, all commerce among independent States was legitimate,*" there is no necessity to appeal to the oracles of the *jus commune* for the correctness of that doctrine. The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power to prescribe the limits to its freedom, necessarily implies the power to determine what shall remain unrestrained, it follows, that the power must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon.

And such has been the practical construction of

1824.

Gibbons v. Ogden.

the act. Were every law on the subject of commerce repealed to-morrow, all commerce would be lawful; and, in practice, merchants never inquire what is permitted, but what is forbidden commerce. Of all the endless variety of branches of foreign commerce, now carried on to every quarter of the world, I know of no one that is permitted by act of Congress, any otherwise than by not being forbidden. No statute of the United States, that I know of, was ever passed to permit a commerce, unless in consequence of its having been prohibited by some previous statute.

I speak not here of the treaty making power, for that is not exercised under the grant now under consideration. I confine my observation to *laws* properly so called. And even where freedom of commercial intercourse is made a subject of stipulation in a treaty, it is generally with a view to the removal of some previous restriction; or the introduction of some new privilege, most frequently, is identified with the return to a state of peace. But another view of the subject leads directly to the same conclusion. Power to regulate *foreign commerce*, is given in the same words, and in the same breath, as it were, with that over the commerce of the States and with the Indian tribes. But the power to regulate *foreign* commerce is necessarily exclusive. The States are unknown to foreign nations; their sovereignty exists only with relation to each other and the general government. Whatever regulations foreign commerce should be subjected to in the ports of the Union, the general government would be

held responsible for them; and all other regulations, but those which Congress had imposed, would be regarded by foreign nations as trespasses and violations of national faith and comity.

But the language which grants the power as to one description of commerce, grants it as to all; and, in fact, if ever the exercise of a right, or acquiescence in a construction, could be inferred from contemporaneous and continued assent, it is that of the exclusive effect of this grant.

A right over the subject has never been pretended to in any instance, except as incidental to the exercise of some other unquestionable power.

The present is an instance of the assertion of that kind, as incidental to a municipal power; that of superintending the internal concerns of a State, and particularly of extending protection and patronage, in the shape of a monopoly, to genius and enterprise.

The grant to Livingston and Fulton, interferes with the freedom of intercourse among the States; and on this principle its constitutionality is contested.

When speaking of the power of Congress over navigation, I do not regard it as a power incidental to that of regulating commerce; I consider it as the thing itself; inseparable from it as vital motion is from vital existence.

Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society, labour, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce; the sub-

1824.

Gibbons v. Ogden.

ject, the vehicle, the agent, and their various operations, become the objects of commercial regulation. Ship building, the carrying trade, and propagation of seamen, are such vital agents of commercial prosperity, that the nation which could not legislate over these subjects, would not possess power to regulate commerce.

That such was the understanding of the framers of the constitution, is conspicuous from provisions contained in that instrument.

The first clause of the 9th section, not only considers the right of controlling personal ingress or migration, as implied in the powers previously vested in Congress over commerce, but acknowledges it as a legitimate subject of revenue. And, although the leading object of this section undoubtedly was the importation of slaves, yet the words are obviously calculated to comprise persons of all descriptions, and to recognise in Congress a power to prohibit, where the States permit, although they cannot permit when the States prohibit. The treaty making power undoubtedly goes further. So the fifth clause of the same section furnishes an exposition of the sense of the Convention as to the power of Congress over navigation: "nor shall vessels bound to or from one State, be obliged to enter, clear, or pay duties in another."

But, it is almost labouring to prove a self-evident proposition, since the sense of mankind, the practice of the world, the contemporaneous assumption, and continued exercise of the power, and universal acquiescence, have so clearly esta-

blished the right of Congress over navigation, and the transportation of both men and their goods, as not only incidental to, but actually of the essence of, the power to regulate commerce. As to the transportation of passengers, and passengers in a steam boat, I consider it as having been solemnly recognised by the State of New-York, as a subject both of commercial regulation and of revenue. She has imposed a transit duty upon steam boat passengers arriving at Albany, and unless this be done in the exercise of her control over personal intercourse, as incident to internal commerce, I know not on what principle the individual has been subjected to this tax. The subsequent imposition upon the steam boat itself, appears to be but a commutation, and operates as an indirect instead of a direct tax upon the same subject. The passenger pays it at last.

It is impossible, with the views which I entertain of the principle on which the commercial privileges of the people of the United States, among themselves, rests, to concur in the view which this Court takes of the effect of the coasting license in this cause. I do not regard it as the foundation of the right set up in behalf of the appellant. If there was any one object riding over every other in the adoption of the constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints. And I cannot overcome the conviction, that if the licensing act was repealed to-morrow, the rights of the appellant to a reversal of the decision complained of, would be as

1824.

Gibbons v. Ogden.

strong as it is under this license. One half the doubts in life arise from the defects of language, and if this instrument had been called an *exemption* instead of a license, it would have given a better idea of its character. Licensing acts, in fact, in legislation, are universally restraining acts; as, for example, acts licensing gaming houses, retailers of spiritous liquors, &c. The act, in this instance, is distinctly of that character, and forms part of an extensive system, the object of which is to encourage American shipping, and place them on an equal footing with the shipping of other nations. Almost every commercial nation reserves to its own subjects a monopoly of its coasting trade; and a countervailing privilege in favour of American shipping is contemplated, in the whole legislation of the United States on this subject. It is not to give the vessel an American character, that the license is granted; that effect has been correctly attributed to the act of her enrolment. But it is to confer on her American privileges, as contradistinguished from foreign; and to preserve the government from fraud by foreigners, in surreptitiously intruding themselves into the American commercial marine, as well as frauds upon the revenue in the trade coastwise, that this whole system is projected. Many duties and formalities are necessarily imposed upon the American foreign commerce, which would be burdensome in the active coasting trade of the States, and can be dispensed with. A higher rate of tonnage also is imposed, and this license entitles the vessels that take it, to those exemptions, but to nothing more.

A common register, equally entitles vessels to carry on the coasting trade, although it does not exempt them from the forms of foreign commerce, or from compliance with the 16th and 17th sections of the enrolling act. And even a foreign vessel may be employed coastwise, upon complying with the requisitions of the 24th section. I consider the license, therefore, as nothing more than what it purports to be, according to the 1st section of this act, conferring on the licensed vessel certain privileges in that trade, not conferred on other vessels; but the abstract right of commercial intercourse, stripped of those privileges, is common to all.

Yet there is one view, in which the license may be allowed considerable influence in sustaining the decision of this Court.

It has been contended, that the grants of power to the United States over any subject, do not, necessarily, paralyze the arm of the States, or deprive them of the capacity to act on the same subject. That this can be the effect only of prohibitory provisions in their own constitutions, or in that of the general government. The *vis vitæ* of power is still existing in the States, if not extinguished by the constitution of the United States. That, although as to all those grants of power which may be called aboriginal, with relation to the government, brought into existence by the constitution, they, of course, are out of the reach of State power; yet, as to all concessions of powers which previously existed in the States, it was otherwise. The practice of our government cor-

1824.

Gibbons v. Ogden.

tainly has been, on many subjects, to occupy so much only of the field opened to them, as they think the public interests require. Witness the jurisdiction of the Circuit Courts, limited both as to cases and as to amount; and various other instances that might be cited. But the license furnishes a full answer to this objection; for, although one grant of power over commerce, should not be deemed a total relinquishment of power over the subject, but amounting only to a power to assume, still the power of the States must be at an end, so far as the United States have, by their legislative act, taken the subject under their immediate superintendence. So far as relates to the commerce coastwise, the act under which this license is granted, contains a full expression of Congress on this subject. Vessels, from five tons upwards, carrying on the coasting trade, are made the subject of regulation by that act. And this license proves, that this vessel has complied with that act, and been regularly ingrafted into one class of the commercial marine of the country.

It remains, to consider the objections to this opinion, as presented by the counsel for the appellee. On those which had relation to the particular character of this boat, whether as a steam boat or a ferry boat, I have only to remark, that in both those characters, she is expressly recognised as an object of the provisions which relate to licenses.

The 12th section of the act of 1793, has these words: "That when the master of any ship or vessel, *ferry boats* excepted, shall be changed," &c. And the act which exempts licensed steam

boats from the provisions against alien interests, shows such boats to be both objects of the licensing act, and objects of that act, when employed exclusively within our bays and rivers.

But the principal objections to these opinions arise, 1st. From the unavoidable action of some of the municipal powers of the States, upon commercial subjects.

2d. From passages in the constitution, which are supposed to imply a *concurrent* power in the States in regulating commerce.

It is no objection to the existence of distinct, substantive powers, that, in their application, they bear upon the same subject. The same bale of goods, the same cask of provisions, or the same ship, that may be the subject of commercial regulation, may also be the vehicle of disease. And the health laws that require them to be stopped and ventilated, are no more intended as regulations on commerce, than the laws which permit their importation, are intended to innoculate the community with disease. Their different purposes mark the distinction between the powers brought into action; and while frankly exercised, they can produce no serious collision. As to laws affecting ferries, turnpike roads, and other subjects of the same class, so far from meriting the epithet of commercial regulations, they are, in fact, commercial facilities, for which, by the consent of mankind, a compensation is paid, upon the same principle that the whole commercial world submit to pay light money to the Danes. Inspection laws are of a more equivocal nature, and it is obvious, that

1824.

Gibbons v. Ogden.

the constitution has viewed that subject with much solicitude. But so far from sustaining an inference in favour of the power of the States over commerce, I cannot but think that the guarded provisions of the 10th section, on this subject, furnish a strong argument against that inference. It was obvious, that inspection laws must combine municipal with commercial regulations; and, while the power over the subject is yielded to the States, for obvious reasons, an absolute control is given over State legislation on the subject, as far as that legislation may be exercised, so as to affect the commerce of the country. The inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce, and the reverse of that which the appellee contends for.

This section contains the positive restrictions imposed by the constitution upon State power. The first clause of it, specifies those powers which the States are precluded from exercising, even though the Congress were to permit them. The second, those which the States may exercise with the consent of Congress. And here the sedulous attention to the subject of State exclusion from commercial power, is strongly marked. Not satisfied with the express grant to the United States of the power over commerce, this clause negatives the exercise of that power to the States, as to the only two objects which could ever tempt them to assume the exercise of that power, to wit, the collection of a revenue from imposts and duties on imports and exports; or from a tonnage duty. As

to imposts on imports or exports, such a revenue might have been aimed at *directly*, by express legislation, or *indirectly*, in the form of inspection laws; and it became necessary to guard against both. Hence, first, the consent of Congress to such imposts or duties, is made necessary; and as to inspection laws, it is limited to the minimum of expenses. Then, the money so raised shall be paid into the treasury of the United States, or may be sued for, since it is declared to be for their use. And lastly, all such laws may be modified, or repealed, by an act of Congress. It is impossible for a right to be more guarded. As to a tonnage duty, that could be recovered in but one way; and a sum so raised, being obviously necessary for the execution of health laws, and other unavoidable port expenses, it was intended that it should go into the State treasuries; and nothing more was required, therefore, than the consent of Congress. But this whole clause, as to these two subjects, appears to have been introduced *ex abundanti cautela*, to remove every temptation to an attempt to interfere with the powers of Congress over commerce, and to show how far Congress might consent to permit the States to exercise that power. Beyond those limits, even by the consent of Congress, they could not exercise it. And thus, we have the whole effect of the clause. The inference which counsel would deduce from it, is neither necessary nor consistent with the general purpose of the clause.

But instances have been insisted on, with much confidence, in argument, in which, by municipal

1824.

Gibbons v. Ogden.

laws, particular regulations respecting their cargoes have been imposed upon shipping in the ports of the United States; and one, in which forfeiture was made the penalty of disobedience.

Until such laws have been tested by exceptions to their constitutionality, the argument certainly wants much of the force attributed to it; but admitting their constitutionality, they present only the familiar case of punishment inflicted by both governments upon the same individual. He who robs the mail, may also steal the horse that carries it, and would, unquestionably, be subject to punishment, at the same time, under the laws of the State in which the crime is committed, and under those of the United States. And these punishments may interfere, and one render it impossible to inflict the other, and yet the two governments would be acting under powers that have no claim to identity.

It would be in vain to deny the possibility of a clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal powers of the one, and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits of; that of a frank and candid co-operation for the general good. Witness the laws of Congress requiring its officers to respect the inspection laws of the States, and to aid in enforcing their health laws; that which surrenders to the States the superintendence of pilotage, and the

many laws passed to permit a tonnage duty to be levied for the use of their ports. Other instances could be cited, abundantly to prove that collision must be sought to be produced; and when it does arise, the question must be decided how far the powers of Congress are adequate to put it down. Wherever the powers of the respective governments are frankly exercised, with a distinct view to the ends of such powers, they may act upon the same object, or use the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers.

I have not touched upon the right of the States to grant patents for inventions or improvements, generally, because it does not necessarily arise in this cause. It is enough for all the purposes of this decision, if they cannot exercise it so as to restrain a free intercourse among the States.

DECREE. This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and Correction of Errors of the State of New-York, and was argued by counsel. On consideration whereof, this Court is of opinion, that the several licenses to the steam boats the Stoudinger and the Bellona, to carry on the coasting trade, which are set up by the appellant, Thomas Gibbons, in his answer to the bill of the respondent, Aaron Ogden, filed in the Court of Chancery for the State of New-York, which were granted under an act of Congress, passed in pursuance of the constitution of the

1824.

Gibbons v. Ogden.

United States, gave full authority to those vessels to navigate the waters of the United States, by steam or otherwise, for the purpose of carrying on the coasting trade, any law of the State of New-York to the contrary notwithstanding; and that so much of the several laws of the State of New-York, as prohibits vessels, licensed according to the laws of the United States, from navigating the waters of the State of New-York, by means of fire or steam, is repugnant to the said constitution, and void. This Court is, therefore, of opinion, that the decree of the Court of New-York for the Trial of Impeachments and the Correction of Errors, affirming the decree of the Chancellor of that State, which perpetually enjoins the said Thomas Gibbons, the appellant, from navigating the waters of the State of New-York with the steam boats the Stoudinger and the Bellona, by steam or fire, is erroneous, and ought to be reversed, and the same is hereby reversed and annulled: and this Court doth further DIRECT, ORDER, and DECREE, that the bill of the said Aaron Ogden be dismissed, and the same is hereby dismissed accordingly.

1824.

Kirk
v.
Smith.

[Local Law.]

KIRK and others, *Plaintiffs in Error*,
v.
SMITH, ex. dem. PENN, *Defendant in Error*.

The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this Commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land office.

The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries within the manors for which warrants had issued.

Nor is the statute of limitations of 1785, a bar to such an action.

ERROR to the Circuit Court of Pennsylvania. This was an ejectment, brought by the defendant in error, in the Court below, to recover the possession of certain lands in York county, in the State of Pennsylvania. On the 4th of March, 1681, Charles II. granted to William Penn, the ancestor of the lessor of the plaintiff below, that tract of country which now constitutes the State of Pennsylvania. The grant contains special powers to erect manors and to alien the lands, with liberty to the alienees to hold immediately of the proprietor and his heirs, notwithstanding the statute of *quia emptores*. On the 11th of July, in the same year, William Penn, having interested many persons in his grant, agreed with "the adventu-

1824.

Kirk v. Smith.

rers and purchasers" in England, on "certain conditions and concessions," which, being for their mutual advantage, were to be obligatory in the future management of the property and settlement of the province. The 9th of these conditions is, that "in every 100,000 acres, the Governor and proprietary, by lot, reserveth ten to himself, which shall lie but in one place." In the year 1762, a warrant was issued for the survey of the manor of Springetsbury. This warrant recites a former survey of the same land, in 1722, as a manor; states the general outlines of such former survey, and directs a resurvey. This resurveying was made, and returned into the land office in 1768, where it has remained ever since. This resurvey included the lands claimed by the plaintiffs in error, which were held under warrants, of which the following is a specimen:

"*Pennsylvania, ss:* By the Proprietaries.

"Whereas, Bartholomew Sesrang, of the county of Lancaster, hath requested that we would grant him to take up two hundred acres of land, situate between Codorus creek and Little Conewaga creek, adjoining the lands of Killian Smith and Philip Heintz, on the west side of the Susquehannah river, in the said county of Lancaster, for which he agrees to pay to our use the sum of fifteen pounds ten shillings, current money of this province, for each hundred acres; and the yearly quit-rent of *one halfpenny* sterling for every acre thereof.

"These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the

1824.

Kirk v. Smith.

said Bartholomew, at the place aforesaid, according to the method of townships appointed, the said quantity of 200 acres, if not already surveyed or appropriated; and make return thereof into the secretary's office, in order for further confirmation; for which this shall be your sufficient warrant: which survey, in case the said Bartholomew fulfil the above agreement within six months from the date hereof, shall be valid; otherwise void.

"Given under my hand and seal of the land office, by virtue of certain powers from the said Proprietaries, at Philadelphia, [L. S.] this eighth day of January, Anno Domini one thousand seven hundred and forty-two. "GEORGE THOMAS.

"To WM. PARSONS, *Surveyor General.*"

In virtue of this warrant, a survey of the land claimed by Caleb Kirk, one of the plaintiffs in error, was made on the 12th of October, 1747, in favour of Jacob Wagner, the then holder of the warrant, by various mesne transfers. The title was regularly deduced by various conveyances, from Wagner to Kirk, accompanied with possession. No grant was ever issued for the land. Ten pounds, a part of the consideration, were paid about the date of the warrant, and there was no proof of the payment of the residue. It appeared to have been the usage of the proprietaries, not to insist upon the terms of the contract, by which the survey was declared to be void, unless the agreement was fulfilled within six months from the date of the warrant, and large arrearages of purchase money remained due after the surveys were made.

1824.

Kirk v. Smith.

both within and without the manors. The only distinction appears to have been, that the reserved lands were sold by special contract; and the lands not reserved, were sold at stated prices.

At the commencement of the war of the American revolution, the proprietary went to Great Britain, where he remained; and in the year 1779, the legislature of Pennsylvania passed an act, entitled "an act for vesting the estates of the late proprietaries of Pennsylvania, in this commonwealth." The ejectment was brought in the year 1819, and on the trial of the cause, the question whether the land in controversy was included within the lines of the manor of Springetsbury, as surveyed under the warrant of 1762, was left to the jury, who found that it was included within those lines. The opinion of the Court below, was, that if the land was within those lines, the right of the plaintiff below was excepted out of the general operation of the act of 1779, and was not vested in the commonwealth. The court also instructed the jury, that the statute of limitations of 1705, commonly called the "seven years law," was inapplicable to the case. To these instructions, the defendant's counsel excepted, and a verdict and judgment for the plaintiff having been rendered in the Court below, the cause was brought by writ of error to this Court.

March 14th, 1823.

The cause was argued by Mr. *Clay* and Mr. *Webster* for the plaintiffs in error, and by the *Attorney General* and Mr. *Sergeant* for the defendants in error.

1824.

Kirk v. Smith.

On the part of the plaintiffs in error, it was contended, 1. That the rights derived to the plaintiffs below, were *proprietary*, and not *manorial*. Being in their origin proprietary, they were not, and could not be, affected by the survey of a manor in 1768, subsequent to their commencement.

2. That the rights, being *proprietary*, and not manorial, vested in the Commonwealth of Pennsylvania, by the right of conquest, and the act of confiscation of 1779. The 7th section confirms all persons, and, consequently, the plaintiffs below, in their rights, *derived* from the proprietaries. The act must be construed according to its intention, ascertained by a comparison of all its parts. The intention was to confiscate the proprietary rights, wherever situated; and to reserve the private or manorial rights, wherever located. If a proprietary right was situated within a manor, it was to be confiscated. If it were part of the manor, that is, of the right springing out of the manor, it was reserved. There is no reservation to the proprietaries of the arrears of purchase money due within manors. There is only an exception from the operation of the abolition of quit-rents and arrears of purchase money, within manors; and this exception must be construed to mean the case of lands bought as part of the manor. It would be to contradict the whole scope and meaning of the act, to construe it as abolishing proprietary rights every where but in manors, and to leave them there in full vigour. According to this view of the act, we shall have a consistent and congruous interpretation. The pub-

1824.

Kirk v. Smith.

lic rights of the proprietaries, wherever situated, will have been confiscated; and the private rights, wherever situated, will have been preserved. The Court will look to the nature of the thing, and not to the accident. If a proprietary right be situated within a manor, it will be abolished, because it is proprietary. Such is the construction which the local Legislature itself has put upon this statute, by the act of 1781, for establishing the land office,[a] and by the act of 1784.[b] These acts are cotemporaneous, and in *pari materia*. If, then, the rights of the proprietors were vested in the State, there remained nothing in them; the legal title passed to the Commonwealth, and, consequently, they could not maintain this action of ejectment. But if any was reserved, it was only the arrears of the purchase money, and not the title, which they might sue for in any manner.

3. That whatever might be the nature of the claim, (manorial or proprietary,) it was barred by the statute called the seven years law, passed in 1705, whether the consideration money is paid or not.[c] This limitation of seven years, appears to have been a favourite period of protection in Pennsylvania. William Penn enacted a law to that effect, in England, the year after he obtained his charter;[d] and again, in 1700, the same period is provided.[e] And a short period of limitation to

a 1 *Laws of Penn.* 529. preamble and sec. 5.
b 2 *Ib.* 102.
c 1 *Ib.* 48.
d 5 *Ib.* 416. art. 16.
e *B. Franklin's App.* 9, 10.

protect possessions, is believed to have been the favourite policy of all the colonies. The act of 1705, to afford the protection which it intends to give, requires two circumstances: 1. That the entry should be under an equitable estate. 2. That there should have been seven years quiet possession. The intention of the act was to protect the property. The vendor was at liberty to enforce payment of the consideration money, by all legal means. Even the land itself was not withdrawn from the operation of a judgment. After seven years, the title was complete, but it was still liable to execution. If the plaintiffs in ejectment can recover, it is because they have a lien. Now, if the lien were express, it would have been barred by the lapse of twenty years; and no lien, created by operation of law, can be more durable, than one created by express act of the party.[a] To support this right of recovery, would be to uphold a remedy after the right is gone, and to make the remedy immortal, whilst the right is temporary.

1824.

Kirk v. Smith.

4. That the payment of the purchase money ought to have been presumed; and, consequently, a perfect equitable title in the defendants, barring the action of ejectment. The length of time elapsed, would have authorized a jury to presume a charter, patent, or deed.[b] The fact of actual payment being made out by presumption, the Courts of Pennsylvania adopt the Chancery principle of considering that as done which ought to

a Ricard v. Williams, 7 *Wheat. Rep.* 119.
b *Id.* 109. 1 *Phill. Ev.* 119, 120. 125.

1824.

Kirk v. Smith.

be done.[a] When a party, entitled to a conveyance, does every thing necessary to be done, in order to obtain a decree for a specific performance, he stands by the local law, in a situation to support or defend an action for the possession of the land.[b]

5. That the plaintiffs below were barred by the statute of limitations of 1785.[c] If we had entered by disseisin, our right would have been protected. We entered claiming the whole fee. Our title and our possession were, therefore, exclusive; that is to say, adverse to every other title or possession. It is said that it was not adversary, because we claim from them: but the mortgagee claims from the mortgagor, and, nevertheless, is barred after twenty years. The idea of an amicable possession, is founded upon confounding the case with that of leases, reversions, and remainders. If the vendee purchases the whole estate, his possession, from the moment of his entry, is adverse to that of the vendor.[d] But, from the period of the survey of 1768, there was an adverse state of possession. The proprietaries set up their manorial or private right against their public or proprietary right, and from that epoch, inconsistent and opposing titles were brought into being. From that moment, the statute of limitations began to run. There is no

a Moody v. Vandyke, 4 *Binn.* 41. Vincent v. Huff, 4 *Sergt. and Rawle*, 301.

b Griffith v. Cochrane, 5 *Binn.* 105.

c 2 *Laws of Penn.* 299.

d Blight v. Rochester, 7 *Wheat. Rep.* 535.

escape from this dilemma: either the survey of the manor did not affect, in any way whatever, the previous proprietary right, or it did, and was an attempt to reappropriate to the use of the manor, what had been appropriated before. In the first case, the right was confiscated; in the latter it is barred.

1824.
Kirk v. Smith.

For the defendants in error, it was stated, that, by the royal charter to William Penn, of 1681, he derived an absolute right of ownership to the territory within the limits described, and power to grant, subject to no restrictions but such as he thought fit to impose upon himself. He came to Pennsylvania in 1682; and the powers of government and rights of property were always kept distinct, the former being exercised by the General Assembly, and the latter by means of an agency, constituting what is called a land office. Two principles were early settled, that no sales were to be made, nor settlements permitted, till the Indian title should be extinguished; and that no title could originate but by grant from William Penn. In the establishment of the land office, it was originally intended that no title should begin but by warrant and survey. But this was soon broken in upon; every kind of irregularity occurred; and, finally grew up the title by settlement and improvement.[a] All these inceptive rights were under the proprietary, and they were to be consummated by payment of the purchase

[a] 2 *Smith's Laws of Penn.* 137. Note.

1824.

Kirk v. Smith.

money and issuing the patent. For that purpose, the warrant fixed a price and time of payment; and where there was no warrant, the price of the time was to be paid, which was called "common terms." The mass of the country was opened by opening the land office, but this did not include proprietary *tenths and manors*. These last were appropriated by virtue of his own right of ownership, and are not to be understood as meaning a *manor* in a legal sense, with its court and train of feudal appendages. The term did not mean a *private* reservation, for his own separate use, to be taken out of the market, and granted in a different mode. It meant only a portion of country, separated from the common mass, so as not to be open to purchasers (on common terms) or to settlers. The peculiar and appropriate mode of granting in a manor, was a *warrant to agree*. It was, in fact, an exception out of the country offered for sale. No particular form of exceptions was necessary, and none was pursued.[a] He was subject to laws, but only to his own laws. He might be considered as saying, "So much I will sell at a fixed price; so much at the value to be agreed." W. Penn died in 1718, and a dispute arose with Lord Baltimore respecting the boundary line of Maryland,[b] which was settled by an agreement between the two proprietaries, in 1732, and ratified by decree in Chancery, in 1750.[c] The line

a 4 *Dall. Rep.* 407.

b 2 *Smith*, 133. Note.

c Penn v. Lord Baltimore, 1 *Ves.* 444.

1824.

Kirk v. Smith.

was finally run in 1768, and ratified by the King in Council, in 1769. In 1732, the Marylanders encroaching, and the Indians growing uneasy, Sir W. Keith, at the request of the latter, issued an order to survey the manor of Springetsbury, which was accordingly surveyed in that year. The land office was not then open west of the Susquehannah, the Indian title not being extinguished. In 1736, before the land office was opened, Thomas Penn, the proprietary, recognised and adopted the survey, and thereby gave it validity. In 1762, the survey of 1732 having been mislaid or lost, Gov. Hamilton issued a warrant of resurvey, which was duly returned into the land office, in 1768, where it has since remained.

When the revolution occurred, the descendants of the proprietary were the owners of all the vacant lands in the province; they had the legal estate in all lands, to which individuals had only acquired inceptive rights, for the purpose of enforcing the terms; they were entitled to all purchase money, and to all quit-rents; they had also private estates subject to the ordinary legislation. The whole, as then existing, may be arranged into three classes. (1.) Their private estates, which may be at once dismissed. (2.) Estates or rights in lands not included in the limits of manors: and these might be legal, or legal and equitable. (3.) Estates or rights in lands included within the limits of manors: which might also be legal, or legal and equitable. And the nature of their legal right to lands within a manor, would depend upon the nature of the equity of the oc-

1824.

Kirk v. Smith.

cupant. Whether his equity be more or less, is of no consequence at law, since it does not diminish the extent or power of the legal right. These inceptive rights are passed from hand to hand, by deed; they descend, are devised, and sold by the Sheriff; and every body knows their nature, and the liabilities to which they are subject. The deeds frequently express it, as in the present instance. Hence the lapse of time affords no presumption of the payment of the purchase money, or completion of the title. In truth, there is no such thing in Pennsylvania as the presumption of a grant.

This was the state of things at the period of the revolution. That event, *ipso facto*, determined the powers of government conferred by the charter, but left the rights of property exactly as they stood before, in which state they remained until the act of 1779. That act devests the estate of the proprietaries, only by vesting it in the Commonwealth. It, therefore, devests no further than it vests; and as to all besides, leaves it on the same footing as before. It did not at all change the relation between the proprietaries and those who had purchased their lands. They then had, and still have, a land office, to receive purchase moneys and grant patents. The Commonwealth land office will not receive the purchase money of lands included in the limits of manors, nor will they grant patents for it. The act thus had the effect of making a partition, and from that time forward there have, in fact, been two land offices in Pennsylvania. Great indulgence has

1824.

Kirk v. Smith.

been shown in the collection of the purchase money; but the tenure has never undergone any change, and it has never been doubted that the legal title remained in the proprietors and the Commonwealth, respectively, and that they might at any time enter, to enforce the terms of sale.

The act of 1779 did not assert that the estates of the proprietaries had been devested by the revolution, nor could that proposition now be maintained, if the question were open. It did not profess to confiscate their property, nor could it justly do so, for they had committed no offence. Neither did it assert a right of conquest. The act was not passed to benefit individuals, nor to alter or lessen their just liability. It was a partition between the Commonwealth and the proprietary of all their estates, legal and equitable, of which the manor lines were the lines of division. It left the proprietors, then, their vacant lands, their legal estates, and all else within the manors. The terms of the act give no countenance to the idea, that the legal title was assumed by the Commonwealth, leaving the purchase money to the proprietaries The reservation is of *private* rights. But the whole of this question has been long since disposed of, and it is now considered as settled law in Pennsylvania, that the legal estate is in the descendant of the proprietaries, as a security for the purchase money.[a]

As to the seven years law of 1705, it has never

a 4 *Dall. Rep.* 402. 410. Penn v. Klyne, 1 *Peters' Rep. C. C.* 6 *Laws of Penn.* 205.

1824. Kirk v. Smith.

been heard of since the time of its enactment, and we are, therefore, *compelled* to look for a construction of it consistent with its disuse. It is a retrospective law in its very terms, and, having performed its office at the time, has been ever since disused. No such construction as that insisted on, ever could have been given to it.

As to the presumption of payment, it must be founded, in every such case, both upon the length of time, *and* the omission to do what would be done if the presumed fact did not exist. It is a *presumption* merely, and may be repelled by circumstances, showing why an earlier demand has not been made.[a] No such presumption, therefore, exists, unless the forbearance be unusual, or contrary to what might have been expected. But it has been the universal practice to forbear. If there had been a payment, there would have been a patent. Where the fact to be proved must appear by *deed*, the presumption, from length of time, does not arise.[b] The surveys, if made, were never returned; therefore, there could have been no payment. The receiver general's books will show what has been paid.

The statute of limitations of 1785, is not a bar. To make possession a bar, it must be adverse.[c] It may be adverse as to one, and not as to another. A possession *under* one, is not adverse to him.

a *Phill. Ev.* 118, 119.
b *Ib.* 117, 118.
c 1 *Dall.* 67.

1824.

Kirk v. Smith.

Possession under an agreement, is not adverse;[a] and ouster cannot be presumed where the possession is not only under, but according to the agreement. To maintain a title, or a claim, of adverse possession, such possession must be adverse at its commencement, and so continue for twenty years.[b] There must be, at least, a claim, or colour of title, adverse or hostile; though it is not necessary that it should be a good title.[c] A person who enters without claim, or colour of title, is deemed to be in possession in subservience to the legal owner, and no length of time will make it adverse.[d] The doctrine of adverse possession must be strictly taken, and the fact must be made out by clear and positive proof, and not by inference. Every presumption is in favour of a possession, in subordination to the title of the true owner.[e] If the defendant has acknowledged the plaintiff's title, he cannot, afterwards, dispute it.[f] So, an acknowledgment, by a person under whom the defendant claims, that he went into possession under the lessors of the plaintiff, is conclusive against the defendant, as to tenancy. And though it may not have that effect, yet it will prevent possession from being adverse.[g]

a Barr v. Gratz, 4 *Wheat. Rep.* 213.

b Branett v. Ogden, 1 *Johns. Rep.* 230. Doe v. Campbell, 12 *Johns. Rep.* 365.

c 2 *Caines*, 183. 13 *Johns. Rep.* 118.

d 16 *Johns. Rep.* 293.

e 3 *Johns. Cas.* 124. 8 *Johns. Rep.* 220. 9 *Johns. Rep.* 163. 12 *Johns. Rep.* 365. 10 *Johns. Rep.* 475.

f 1 *Caines*, 444. 2 *Caines*, 215. 3 *Johns. Rep.* 499.

g 2 *Johns. Cas.* 358. 4 *Johns. Rep.* 230.

1824. Kirk v. Smith.

In the present case, it is not disputed, that the defendants went into possession under the proprietors, and nothing has since occurred to change the character of the possession. No one could hold adversely, unless he came in by title paramount to the proprietary; and no title against the Commonwealth, or grantee of the Commonwealth, can be acquired by length of time.[a] The possession of lands held by warrant and survey, is not adverse to, but under the Commonwealth.[b]

The cause was continued to the present term for advisement.

February 5. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment rendered by the Circuit Court for the District of Pennsylvania, in favour of Penn's lessee, who was plaintiff in a writ of ejectment. The case depends on a bill of exceptions taken to the opinion of the Court, expressed in a charge to the jury.

On the 4th of March, in the year 1681, Charles II. granted to William Penn, the ancestor of the plaintiff in the Circuit Court, that tract of country which now constitutes the State of Pennsylvania. By this grant, the property in the soil, as well as in the right of government, was conveyed to William Penn and his heirs, in fee simple.

The grant contains special powers to erect manors, and to alien the lands, with liberty to the

a Morris v. Thomas, 5 *Binney*, 77.

b M'Coy v. Dickinson College, 4 *Sergt. & Rawle*, 305.

1824.

Kirk v. Smith.

alienees to hold immediately of the proprietor and his heirs, notwithstanding the statute of *quia emptores*. On the 11th of July, in the same year, William Penn, having interested many persons in his grant, agreed with the "adventurers and purchasers" in England, on "certain conditions or concessions," which being for their mutual advantage, were to be obligatory in the future management of the property and settlement of the province. The 9th of these conditions is, that "in every 100,000 acres, the governor and proprietary, by lot, reserveth ten to himself, which shall lie but in one place."

It would seem as if this article should be construed as restraining the power of the proprietor. Being the absolute owner of the soil, it was in his power, independent of contract, to sell, or not to sell, any part of it. But, as the value of the lands must necessarily depend on the progress of settlement, it was obviously the interest of the great purchasers and adventurers, as well as of the proprietor, that he should open the country generally to emigrants. It was also the interest of the proprietor, to make large reservations for his private use, that he might avail himself of the increased value to be derived from settlement. To prevent his checking the advance of the settlements by unreasonable reservations, this article fixes the proportion of land which he may take out of the general stock offered to the public. The great mass of land was in the market, to be acquired by any adventurer, at a given price; but out of this mass,

1824.

Kirk v. Smith.

the proprietor reserved for himself one tenth, to lie in bodies of not less than 100,000 acres.

The survey reserving these lands for his own use, whether distinguished by the common appellation of manor, or by any other name, was not to give any new title to the proprietor. The sole effect was, to separate the land so surveyed from the common stock, and to withdraw it from the market. The survey was notice to all the world, that the land was not subject to individual appropriation on the common terms, but could be acquired only by special contract.

It was not the intention, because it could not be the interest of the proprietor, to continue all these manors, or reserved lands, as unoccupied wastes, but to sell them at such advanced price as the continuing progress of settlement and increase of population would justify. The lands reserved, and the lands not reserved, belonged equally to the proprietor, and were equally for sale. The only difference between them was, that the lands not reserved, were offered to the public at a fixed price, while those which were reserved, could be acquired only by special agreement. This difference produced the distinction, of which we have heard in argument, and which seems to have been well understood in Pennsylvania, between warrants on the common terms, and warrants to agree.

In the year 1762, a warrant was issued for the survey of the manor of Springetsbury. This warrant recites a former survey of the same land, in 1722, as a manor, states the general outlines of such former survey, and directs a resurvey. This

resurvey was made, and returned into the land office, in the year 1768, where it has remained ever since, among the documents of the land titles in Pennsylvania.

1824.

Kirk v. Smith.

This resurvey included the lands of the plaintiffs in error, which were held under warrants, of which the following has been selected as a specimen:

"*Pennsylvania, ss.:* By the Proprietaries.

"Whereas, Bartholomew Sesrang, of the county of Lancaster, hath requested that we would grant him to take up two hundred acres of land, situate between Codorus creek and Little Conewaga creek, adjoining the lands of Killian Smith and Philip Heintz, on the west side of the Susquehannah river, in the said county of Lancaster, for which he agrees to pay to our use the sum of fifteen pounds ten shillings, current money of this province, for each hundred acres; and the yearly quit-rent of *one halfpenny* sterling for every acre thereof.

"These are, therefore, to authorize and require you to survey, or cause to be surveyed, unto the said Bartholomew, at the place aforesaid, according to the method of townships appointed, the said quantity of 200 acres, if not already surveyed or appropriated, and make return thereof into the secretary's office, in order for further confirmation; for which this shall be your sufficient warrant: which survey, in case the said Bartholomew fulfil

1824. Kirk v. Smith.

the above agreement within six months from the date hereof, shall be valid; otherwise void.

"Given under my hand and seal of the land office, by virtue of certain powers from the said Proprietaries, at Philadelphia, [L. S.] this eighth day of January, Anno Domini one thousand seven hundred and forty-two. GEORGE THOMAS.

"To WM. PARSONS, *Surveyor General*."

In virtue of this warrant, a survey of the land claimed by Caleb Kirk, one of the plaintiffs in error, was made on the 12th of October, 1747, in favour of Jacob Wagner, the then holder of the warrant, by various mesne transfers. The title was regularly deduced by various conveyances, from Wagner to Kirk, accompanied with possession.

No grant has been issued for the lands. Ten pounds, in part of the consideration, were paid, about the date of the warrant, and there is no proof of the payment of the residue.

It appears to have been the common usage, for the proprietaries to give great indulgence to the purchasers of lands, for the purchase money. Although, by the terms of the contract, the survey was declared to be void, unless the agreement were fulfilled in six months, yet the proprietaries appear not to have been in the practice of availing themselves of this condition. Large arrearages of purchase money remained due after the surveys were made, which, as the grants were withheld, were debts upon interest, secured in the

best possible manner. This credit was mutually advantageous. By accelerating the settlement of the province, it was beneficial to the proprietaries; and the purchaser could terminate it whenever it ceased to be beneficial to himself.

Until the war of our revolution, this state of things appears to have continued. The settlements advanced with great rapidity. Manors were surveyed, lands were sold, and large arrearages were due for purchases made, both within and without the manors. The only distinction appears to have been, that the reserved lands were sold by special contract, and the lands not reserved, were sold at stated prices.

When the war of our revolution commenced, the proprietary went to Great Britain, and was, consequently, to be considered as a British subject, not as an American citizen. The right to confiscate his property, or to leave it untouched, was in the government of Pennsylvania. The Legislature of that State, for reasons satisfactory to itself, took a middle course. In 1779, an act was passed, entitled "An act for vesting the estate of the late proprietaries of Pennsylvania in this Commonwealth." This ejectment was brought in the year 1819.

On the trial of the cause, the question, whether the land in controversy was included within the lines of the manor of Springetsbury, as surveyed under the warrant of 1762, was left to the jury, who have found that it was included within them. The opinion of the Judges who tried the cause, was, that if the land was within those lines, the

1824. right of the plaintiff, in that Court, was excepted out of the general operation of the act of 1779, and was not vested in the Commonwealth.

Kirk v. Smith.

To this opinion an exception was taken, which has been supported in this Court by arguments, in part, applicable to warrants of every description; and, in part, to those only which were issued on the common terms.

In that part of the argument which applies to all warrants, the plaintiffs in error contend, that the 5th section of the act of 1779, vests all the rights of the proprietary in the commonwealth, with the exception of those only which are reserved by other sections of the same act; and that the right to the purchase money, which then remained unpaid, is comprehended within the general words of the 5th section, and not excepted in any other section.

In considering this argument, it will be necessary to examine the 5th section critically, and to ascertain its extent with precision.

It enacts, "that all and every the estate, right, title, interest, property, claim, and demand, of the heirs," &c. "or others claiming as proprietaries of Pennsylvania," "to which they, or any of them, were entitled, or which to them were deemed to belong on the 4th day of July, 1776, of, in, or to, the *soil and land* contained within the limits of the said province," "together with the royalties, franchises, lordships, and all other the hereditaments and premises comprised, mentioned, or granted in the same charter or letters patent of the said King Charles the second, (ex-

cept as hereinafter is excepted,) shall be, and they are hereby vested in the Commonwealth of Pennsylvania."

1824

Kirk v. Smith.

The first part of the description of that which the Legislature intended to vest in the Commonwealth, comprehends all the rights of the proprietaries in the "soil and land" of Pennsylvania, but comprehends nothing else. It would not, we presume, be contended, that this part of the description would embrace the purchase money due for land, if any such case existed, which had been sold and conveyed by the proprietary, and for the purchase money of which a bond had been taken. This act could not, we presume, be pleaded in bar to an action of debt on a bond given to secure the payment of money due for land. This section, at least, is directed against the landed estate of the proprietary, not against his claims for money.

If this first part of the description does not reach debts on account of land sold, neither does the second. It seems almost useless to observe, that a debt for land sold, is neither "a royalty, franchise, lordship, or other hereditament;" and that it forms no part of the premises granted in the charter.

The subsequent part of the section vests nothing. It contains only a more ample description of the absolute and unqualified manner in which the property, previously described, is to vest in the Commonwealth. It is freed and discharged from every incumbrance, claim, or demand whatsoever, as fully as if the said charter, &c. "and all other

1824. Kirk v. Smith.

the estate, right, and title, of the said proprietaries, of, in, and to the same premises, were herein transcribed and *repealed*."

It is unnecessary to comment on the particular words of the legislature, which are regularly and technically applicable to the charter, because it is too obvious for controversy, that the whole design and effect of the clause is to show, that the property described in the preceding confiscating clause, is to vest in the Commonwealth, freed from every trust, limitation, or incumbrance whatsoever. But the property comprehended in the confiscating clause, was land only; and the land of the proprietaries, together with the royalties, &c. annexed to it.

If, then, the particular subject of this controversy be within the 5th section of the act of 1779, it is because it is to be considered as land to which the proprietaries were entitled. If not so considered, the 5th section does not vest it in the Commonwealth. If it be so considered, the next inquiry is, whether it be within the exceptions made by the act.

The 8th section provides and enacts, "that all and every the private estates, lands and hereditaments of any of the said proprietaries, whereof they are now possessed, or to which they are now entitled, in their private several right or capacity, by devise, purchase or descent; and likewise all the land called and known by the name of 'the proprietary tenths,' or manors, which were duly surveyed and returned into the land office, on or before the 4th day of July, in the year 1776, toge-

ther with the quit or other rents, and arrearages of rents, reserved out of the said proprietary tenths, or manors, or any part or parts thereof, which have been sold, be confirmed, ratified and established forever, according to such estate or estates therein, and under such limitations, uses, and trusts, as in and by the several and respective reservations, grants, and conveyances thereof, are directed and appointed."

This section reserves the private estates of the proprietaries, "and likewise all the lands called and known by the name of 'the proprietary tenths,' or manors, which were duly surveyed and returned into the land office, on or before the 4th day of July, in the year 1776."

That the manor of Springetsbury was dulys urveyed, and returned into the land office before the 4th of July, 1776, has not been controverted in this Court, so far as respects land not sold before the resurvey, which constitutes the question now under particular consideration; and that the land for which this ejectment was brought, lies within the survey describing the external boundaries of that manor, is established by the verdict of the jury. The dilemma, then, presented to the plaintiffs in error, is a fair one. The legislature did or did not consider the right reserved by the proprietary to re-enter and avoid the warrant, or to re-grant the land, as an estate or interest in the soil, as land, even before such right was asserted. If it was so considered, and, as land, was confiscated by the 5th section, then it was likewise so considered in the 8th section; and, as land, was excepted and

1824. Kirk v. Smith.

saved to the proprietary. If the Legislature considered this right merely as a claim to money, secured on the land, then it is not confiscated by the 5th section, but remains to the proprietor, unaffected by it. We can perceive no principle of sound construction, by which, comparing the 5th and 8th sections with each other, the 5th shall, so far as respects land in manors, be made more comprehensive than the 8th; no principle by which the confiscating clause shall be made broader than the saving clause.

It was necessary to reserve the quit-rents expressly in the 8th section, because they may, on fair construction, be understood to be comprehended in the 5th section; and, consequently, to be vested in the Commonwealth, if not expressly excepted. The quit-rents would not, indeed, be confiscated by that part of the section which relates to soil or land; but may very well pass under the words "royalties, franchises, lordships, *and all other the hereditaments and premises* comprised, mentioned, and granted in the same charter, or some of them." The quit-rent is a hereditament, reserved under the very words of the charter, and annexed to the seignory. It would not be absolutely improper, to term it "royalty," since similar reservations are generally to be found in grants made to individuals in the royal governments. The express exception of quit-rents, therefore, without mentioning the arrears of purchase money, furnish no argument in favour of the plaintiffs in error. The quit-rents were excepted in the 8th section, because they would, if not excepted, have

been vested in the Commonwealth by the 5th. The arrears of purchase money were not excepted, because they did not pass by the 5th section. But if the quit-rents were not comprised in the 5th section, they were abolished in the 9th, and might, therefore, without impropriety, be included in the exception of the 8th, so far as respects manors.

There is nothing in the act of 1779, which would lead to the opinion, that the Legislature was actuated by a spirit of hostility against the Penn family. No disposition is shown to confiscate the debts generally, which were due to that family. The great object of the act was, to transfer the right to the soil of Pennsylvania, from the proprietary to the Commonwealth. This was a great and a national object. It was of the more pressing importance at the moment, because no means existed at the time of obtaining titles to ungranted lands, in consequence of which, as the 4th section recites, "multitudes of inhabitants were daily emigrating from the State." In accomplishing this great object, the Legislature was not unmindful of the ties by which Pennsylvania had been formerly connected with the proprietor. In addition to the private estates of the family, to the manors actually surveyed, and to the quit-rents received on the lands sold within those manors, 120,000 pounds sterling are bestowed on the family, among other considerations, "in remembrance of the enterprising spirit which distinguished the founder of Pennsylvania." Not only, then, is there nothing in the act evincing that vindictive, hostile temper, which would justify the Court in extending it, by construction, to

1824.

Kirk v. Smith.

objects not fairly embraced by its terms, but its whole spirit is in opposition to the idea. Taking this view of the subject, we should be astonished, indeed, to find, that the same Legislature which left untouched the accruing quit-rents on the lands sold within the manors, as well as those which were in arrear, should seize the arrears of purchase money within the same manors; that the Legislature should spare, so far as respected the manors, that which partook, in its nature and essence, of the proprietary character, and should seize that which was, in its essence, private debt, and was distinguishable from other private debts in nothing but in the manner in which it was secured.

The 5th and 8th sections, then, leave the arrears of purchase money due for land sold within the manors, precisely in the situation in which the act found them.

Both parties have resorted to the 9th and 10th sections of the act.

The 9th section discharges all the lands held under the late proprietaries, not within the tenths or manors, from quit-rents, or arrearages of quit-rents, and arrearages of purchase money. And the 10th section provides "that the said arrearages of purchase money, other than for lands within the said tenths and manors, shall be accounted to be due and payable to the Commonwealth."

No man who reads this act, will be at a loss for the motive which induced the draftsman of the bill to introduce the 9th section. The 5th and 8th taken together, would leave all the lands of

1824.

Kirk v. Smith.

Pennsylvania still chargeable with quit-rents, and would vest those not within the manors, in the Commonwealth. It was the intention of the Legislature to discharge the lands not within the manors, from this burthen, and a section was necessary for that purpose. Read the section, omitting the words respecting the purchase money of lands not within the manors, and it expresses, with plainness and perspicuity, the idea which has been suggested. All who are acquainted with our course of legislation, know, that after a bill has been framed, and the language adapted to its objects, amendments are sometimes introduced into it, in a late stage of its progress, without being sufficiently cautious to change the language which was adapted to the original matter, so as to fit it to the new matter contained in the amendment. This can alone account for the perplexity and confusion of the 9th and 10th sections of this act. The 9th section, which is so perfectly clear without the words respecting the arrearages of purchase money for lands not within the manors, is so embarrassed and confused with them, as to be scarcely intelligible; and the whole office of the 10th section is, to vest in the Commonwealth a part of that which the 9th had abolished. Courts must, however, give to these sections that interpretation which seems best to comport with the intention of the Legislature.

The 8th section had confirmed to the proprietors, for ever, the quit-rents reserved in the manors. The 9th, which was intended to abolish all quit-rents on all other lands, commences with

1824.

Kirk v. Smith.

general words, which in themselves would comprehend the quit-rents of the manors, and produce a conflict between the two sections, were not those general words limited and explained afterwards. But they are limited and explained by the words "other than the quit or other rents, reserved within the proprietary tenths, or manors, before mentioned." Between the general words, however, with which the clause commences, and those words of limitation, which have been just recited, are introduced the words, "and arrearages of purchase money for lands not within the tenths or manors aforesaid." Because the words of limitation apply to the quit-rents only, and not to the purchase money, it has been supposed that the purchase money for lands within, as well as without, the manors, has been abolished, and that the concluding words of the section, that the "same lands shall be held free and discharged therefrom, for ever," apply to the purchase money of lands within the manors, as well as to the quit-rents of lands not within the manors.

This construction cannot, we think, be sustained. The general words which introduce the section, required the exception and limitation afterwards introduced, so far as respected quit-rents; but the words respecting purchase money, contain their limitation within themselves. The words of description exclude lands within the manors. No general words are applied to the purchase money, which require subsequent explanation or diminution. The words of limitation too, are, in themselves, applicable to quit-rents

1824.

Kirk v. Smith.

only. When, then, we come to the enacting part of the clause, which ordains that the "same lands and other hereditaments, shall be held free and discharged therefrom, and from the payment thereof, for ever;" and ask, what are the same lands? and from what are they discharged? the only answer which can be made to the question is, that "the same lands" are lands not within the manors; and that the discharge is "from all quit-rents other than the quit or other rents reserved within the proprietary tenths or manors, before mentioned," "and arrearages of purchase money for lands not within the tenths or manors aforesaid." That the Legislature deemed it necessary, by one of these sections, to take from the proprietaries the arrearages of purchase money not within the manors, and by the other, to vest them in the Commonwealth, is proof that this was not done by the 5th.

The inference to be drawn, as we think, from the 9th section, that the Legislature never lost sight of the distinction set up between manors and the general territory of the Commonwealth, is strengthened by the language of the 10th section, which provides and enacts, "that, in order to preserve equality among the purchasers of land under the said late proprietaries, the said arrears of purchase money, other than for lands within the said tenths and manors, shall be accounted to be due and payable to the Commonwealth."

Now, if the Legislature had supposed itself, by the preceding section, to have abolished all the arrears of purchase money due from lands within

1824.

Kirk v. Smith.

the manors, how would it "preserve equality among the purchasers," to coerce the payment of the purchase money for lands without the manors, to the Commonwealth? Or, what motive can be assigned for discharging those within the manors from paying for their lands, and requiring payment from those without the manors. It would be a caprice for which it would be impossible to account.

Where the language of the Legislature is clear, Courts cannot be permitted to assume an intention repugnant to that language, because it imports what they think unreasonable; but words are not to be forced out of their natural meaning, to produce what is unreasonable, if not absurd.

The plaintiffs in error also rely on the 6th section of the act establishing a land office, passed in 1781, as amounting, unequivocally, to a confiscation of the rights of the proprietary in the land in contest.

This proposition is sustained, by applying to all lands, words which are, indeed, general in themselves, but which are, obviously enough, used by the Legislature with reference to particular lands, the right to which was vested in the Commonwealth by the act of 1779.

This act does not purport to be an act of confiscation, but an act for opening a land office for the lands of the Commonwealth. It does not purport to be an act of acquisition, but of disposition of that which had been previously acquired. It commences with a recital, that "many of the lands in the State, heretofore taken up," &c.,

1824.

Kirk v. Smith.

"are yet unpatented, and the purchase money, and arrearages of purchase money, thereon due, are vested in the Commonwealth;" "and the owners and holders of such rights, since the shutting up of the land office, have not had it in their power to pay in the purchase money and obtain patents: for remedy whereof, be it enacted, that an office be erected," &c.

The subsequent regulations, then, respecting the payment of the purchase money, were intended for such purchase money only as was already vested in the Commonwealth; and the unpatented lands referred to, are those only, the purchase money due on which was then vested in the Commonwealth. It is important, too, in the construction of this act, to recollect that the framers of the act of 1779 could not have intended any interference, by means of a land office, or otherwise, with the manors. They remained the property of the proprietaries, who were themselves to receive the arrears of purchase money, and to complete the titles. The whole act being framed for the property of the Commonwealth, the general words of the 6th section must be understood to be limited to the subject matter of the act; that is, to the property of the Commonwealth.

The act directs, that patents shall be issued for lands for which the purchase money shall be received: and the 16th section directs, that the land, so granted, "shall be free and clear of all reservations and restrictions, as to mines, royalties, quit-rents, or otherwise." Now, the act of 1779

1824.

Kirk v. Smith.

expressly reserves for the proprietors the quit-rents within the manors. This act, then, cannot be construed to authorize the issuing patents for lands within the manors, unless it be also construed to be a confiscation, by implication, of property expressly reserved for, and vested in individuals, by a preceding act of the Legislature. This construction, to be justified, must be unavoidable.

But the 12th section appears to the Court to deserve some consideration. That section declares, "that nothing in the act shall be construed to extend to lands, not granted in the usual forms of the land office."

There were, then, lands in Pennsylvania, "not granted in the usual forms of the land office."

As this case comes on after a general verdict, on an exception to a charge given by the Court to the jury, it is incumbent on the person taking the exception, to show that the charge is erroneous. If it comprehended this act, of which the Court is not satisfied, still it is incumbent on the exceptor to show that lands within manors were "granted in the usual forms of the land office." This fact is not shown.

The act of 1783 is obviously limited to the same subject to which the act of 1781 applies. All arguments founded on this act are liable, too, to this additional objection. It was enacted after the treaty of peace, when the power of the State Legislature over the estate of William Penn, real and personal, had ceased.

We come now to that part of the argument which

applies particularly to warrants issued on the common terms, for lands afterwards surveyed as a manor.

It is contended by the plaintiffs in error, that such lands, though comprehended geographically within the lines of a manor, are not legally a part of it; and are not, therefore, either as to the land itself, or as to the purchase money, saved to the proprietaries, under the act of 1779.

The reservation in the 8th section of that act, is of "all the lands called and known by the name of 'the proprietary tenths, or manors,' which were duly surveyed and returned into the land office, on or before the 4th day of July, 1776."

It has not been suggested, that the lands which may happen to be held by common warrants within a manor, are distinguished by a different appellation, and are "not called and known by the general name given to all the adjoining lands within the survey;" but it is contended, that such are not brought within that part of the description, which requires that they should be "duly surveyed." Although lands for which a conditional warrant had previously issued, be, in fact, surveyed as a manor, it is insisted that such survey was not duly made.

This is giving to the word "duly," a meaning which, in the opinion of the Court, was not intended by the Legislature.

The act of 1779 conferred no new right on the Penns, but left them in possession of their pre-existing rights, whatever they might be, within a described territory. It did not interfere with any controversy which might exist between Penn and

1824.

Kirk v. Smith.

others within that territory, but left such controversy to be decided between the parties, as if the law had never been passed. The act is simply an adjustment between Penn and the Commonwealth. It refers to a fact of public notoriety, as marking the lines of division between them. That fact is, a survey, duly made and returned into the land office, before the 4th of July, 1776. The survey must be understood as one entire thing, describing the particular tract of country surveyed, and the words "duly made," mean, made according to the forms prescribed by law or usage. It was very well known, that, within these surveys, some lands were sold, and some were not sold. On all which were sold, quit-rents were received, and on some of them, the purchase money was still due. With the land, if not sold, with the quit-rents and purchase money, if sold, the Legislature, as has been already shown, declares its purpose not to interfere. There is nothing in the language, nor is there any thing in the character of the transaction, which would lead to the opinion that the Legislature intended to discriminate between the different rights of the proprietaries within the manors. The hand of government is not laid upon the manors, and all the rights of the proprietaries within those boundaries, whether to land, purchase money, or quit-rents, remain untouched. There can be no conceivable reason for supposing, that the Legislature meant to inquire into the dates of the warrants evidencing the sale of lands, while the right to sell was acknowledged, and to discharge one contract of sale within the untouched bounda-

ry, while another remained valid. The words make no such distinction, and we can perceive nothing in the nature of the property which will justify the Court in making it.

If we trace these words, "manors," and "proprietary tenths," to their first use, we shall find reason to confirm, not to change, the sense in which we suppose them to have been used in the act of 1779.

By the 19th section of the charter, license is granted to William Penn, and his heirs, "to erect any parcels of land, within the province aforesaid, into manors." There is no restriction on this power, which confines its exercise to lands which are vacant at the time. There was, then, no want of power in Penn to comprehend within a manor lands which were actually sold. The rights of the purchaser, the tenure by which he held his property, could not be changed, nor would they be changed, by including his land within the survey of a manor.

The proprietary tenths originate in the "conditions or concessions agreed on between William Penn and certain adventurers and purchasers, on the 11th of July, 1681. The 9th condition, or concession, is: "In every 100,000 acres, the governor and proprietary, by lot, reserveth ten to himself, which shall lie but in one place."

Now, it is very apparent that, supposing this stipulation to be a fundamental law, and to enure to the benefit of all the inhabitants, it can only restrain the proprietary from reserving more than ten out of every 100,000 acres of land, and compel him to lay it off in one body. If within any survey

1824.

Kirk v. Smith.

of 10,000 acres, there should be some lands previously granted, the survey would certainly not impair those grants; nor would those grants vitiate the survey. The respective rights of the parties would depend upon the law, which would decide that the purchaser should hold his land, on complying with the conditions of the purchase; and that, on his failing to comply with them, the proprietary might either indulge him by giving further time, or might re-enter and hold the land, or re-grant it. In the event of re-entry, it can scarcely be contended, that this land would not be considered as a part of the proprietary tenth, provided it did not swell the amount of the reservation beyond the tenth which might be legally reserved. The including of lands previously sold, within a survey of a reserved tenth, as it would give the proprietary no new right against the purchaser, might sink so much of his reservation, but could produce no other question than might arise between him and the purchaser, respecting the validity of the sale. These are questions with which the Legislature of 1779 manifested no intention to interfere. It will not, we presume, be doubted, that the words "manors" and "proprietary tenths," have the same meaning throughout the act; that they always designate the same lands; that, when used in reference to quit-rents, they have the same meaning as when used in reference to the arrears of purchase money.

Now, it appears, from the statement of the testimony made in the charge of the Court to the jury, which is the only regular information of the

1824.

Kirk v. Smith.

evidence given in the cause, that an agreement was entered into, in 1736, between the proprietary and a number of the inhabitants, by which he engaged to make them titles for certain specified quantities of land in their possession, on the common terms. This agreement is stated to have been afterwards carried into execution. The contract, as stated, contains unequivocal proof of having been made under the idea that the survey of 1722 was valid, that it related to lands within the lines of that survey, and that the land within its lines was considered as a manor. That survey may not have been attended with those circumstances which would bring it within the saving of the act of 1779, and, certainly, in this cause, is not to be considered as a valid survey of a manor. It was, nevertheless, believed, in 1736, by the parties to this contract, to be a manor; and those proceedings which took place respecting lands within it, are, consequently, such as might take place respecting lands within a manor. We find sales of land made to fifty-two persons, upon the common terms, and grants made to them according to contract. When the final survey was made, comprehending these lands as being part of the manor of Springetsbury, were they less a part of that manor because they were granted as a part of it before that survey was made? When, in 1779, the Legislature excepted from confiscation the quit-rents "reserved out of the said proprietary tenths or manors," is it credible that they intended to create a distinction, never heard of before, between the quit-rents on lands lying

1824.

Kirk v. Smith.

within the lines of the manor, and sold as part of the manor, to depend on the terms or the time of the grant?

The defendants in the Circuit Court gave in evidence, fifteen instances of lands lying within the manor being settled for on the common terms. Were these lands excluded from the manor by being so settled for? Did the Legislature of 1779, when about to save for the proprietaries the quit-rents reserved out of manors or proprietary tenths, or out of land commonly called and known by the name of manors or proprietary tenths, which were duly surveyed and returned into the land office, on or before the 4th of July, 1776, fix its mind on the survey to which reference is made, or on the dates and terms of the grants made for lands within the survey? If on the survey, then the language expresses the intention; if some other distinction was designed, it is strange that no words were inserted pointing to such distinction. The Legislature intended to confiscate the estates of the proprietaries in part, and in part only. The line of partition between the Commonwealth and the Penn family, was to be drawn. It was the province of wisdom and of justice to make this line a plain one. It was proper that the Commonwealth, and Penn, and the people of Pennsylvania, should be able distinctly to discern it. If the lines of the manors, as surveyed and returned in the land office, before the 4th of July, 1776, constitute the dividing lines between the parties, they are plainly and distinctly drawn. If some

1824.

Kirk v. Smith.

imaginary distinctions are to be made between the lands comprehended within those lines, or the quit-rents reserved on those which had been sold, the whole certainty of the division is lost, unless some other line, equally plain, equally rational, and equally justified by the words of the act, can be substituted. Is this practicable in the case before the Court? Extensive sales were made in a tract of country, supposed by the seller and the purchaser to be a manor. Other sales were made, containing in the contracts no intrinsic evidence that the parties understood the lands to be within a manor. The purchase money, in both cases, is paid, and deeds are made, reserving the usual quit-rents. To ascertain the real boundaries of the manor, to make a legal survey of it, if one had not before been made, a warrant of resurvey is issued, and a survey made and returned into the land office, comprehending both these classes of lands, with others which were at the same time vacant, as being within the manor. When the Legislature saves to the proprietaries the quit-rents out of lands sold within the manors, can a distinction have been intended between those lands which were sold as part of the manor before, and those which were sold after the resurvey? If it be assumed, where the warrants contain no evidence of being intended for manor lands, that the parties or the proprietaries were ignorant of their being comprehended within a manor, what difference, in reason, can this make? The lands were equally liable to quit-rents in the one case and the other. They were equally within a manor,

1824.

Kirk v. Smith.

whether known or not known to be within it. Could the Legislature have a motive in the one case more than in the other, for abolishing these quit-rents? If the motive existed, it would be shown in the language adopted. But the search for it in the language of the Legislature, would be as fruitless as in the reason of the case. The Court cannot set up this distinction.

If the word manor, when used as describing territory within which quit-rents are saved, comprehends lands sold before the resurvey, then the same word, when applied to the arrears of purchase money, retains the same meaning.

It has been urged in argument, that the Legislature intended clearly to distinguish between the rights of Penn, as an individual, and his rights as proprietor. The first were reserved; the last were confiscated. This distinction, so far as respects the subject of the present controversy, is not to be found in the law. The 8th section confirms to the proprietaries all their private estates, "and likewise all the lands called and known by the name of the proprietary tenths or manors." These proprietary tenths or manors, then, did not compose a part of, but were in addition to, their private estates. They were held too by precisely the same title by which other lands in Pennsylvania, not sold nor reserved, were held. Nor was there any new modification of that title. They were withdrawn from the mass of property offered for sale on the common terms; but were still held by Penn, solely as proprietor under the charter. The quit-rents, too, were clearly an appendage

to the original grant, retained on the lands which were sold, and retained by Penn in his character as proprietor. Yet these are expressly saved to him. There is, then, in the act of 1779, no intention to make the private and proprietary rights of Penn the criterion by which the line of partition between him and the Commonwealth should be ascertained; but there is a clear intention to divide his proprietary estate, and to make his surveys of manors the criterion by which this line of partition should be ascertained.

This result is, we think, very clearly produced, so far as respects the soil, by the 5th and 8th sections; and is, we think, produced not less clearly with respect to the arrears of purchase money, by the 9th and 10th sections. Strike out those sections, and there is nothing in the act which can reach the arrears of purchase money, within or without the manors. They would, like other debts, remain the property of the creditor. The 9th section expressly abolishes "the arrearages of purchase moneys for lands not within the tenths or manors aforesaid;" and if, as we think, the tenth, or manor, was in the minds of the Legislature, described by a survey thereof, made according to law or usage, and returned into the land office before the 4th of July, 1776, then the lands on which the arrearage of purchase money is claimed, in this case, are within one of the aforesaid tenths, or manors.

We think, then, that the lands, or the purchase money, which the plaintiffs in the Circuit Court

1824.

Kirk v. Smith.

claim in this case, are not confiscated by any act of the State of Pennsylvania.

Before we take leave of the act of 1779, it may be proper to inquire, whether it has any operation on the lands lying within the manors, and which had been sold, but not granted, the terms of sale not having been complied with. It will be recollected, that those on whose property this law acted, were the subjects of an enemy, and that the Legislature possessed full power over their estates. Having the power to confiscate absolutely, they might modify that power in its exercise, as to them might seem proper. The 7th section provides and enacts, that all the rights, &c. which were derived from the proprietaries, or to which any person other than the said proprietaries were entitled, "either in law or equity," by virtue of any deed, patent, *warrant* or *survey*, of, in or to any part or portion of the lands contained within the limits of this State, or by virtue of any location filed in the land office before the 4th of July, 1776, shall be, and they are hereby confirmed, ratified, and established for ever, according to such estate or estates, rights or interests, and under such limitations or uses as in and by the several and respective grants and conveyances thereof are directed and appointed.

This section comprehends all the lands within the State, whether within or without the manors, to which any individuals had derived a title from the proprietaries, either in law or equity, by virtue of any deed, patent, *warrant* or *survey*, and confirms such title according to the estate, right or in-

terest conveyed. That the section operates alike on lands within and without the manors, and that it confirms titles under warrants or surveys, for which the purchase money has been paid, are certain. It is equally certain, that it does not interfere with the arrears of purchase money which may still be due, because that whole subject is taken up and disposed of in the 9th and 10th sections of the act. The doubt is, whether it has any influence on any lands, the purchase money for which had not been paid; and if any, how it affects the title to such lands.

1824.

Kirk v. Smith.

The right of re-entry was reserved as a security for the payment of the purchase money, but does not appear to have been exerted, and was probably considered in the light of a mortgage, to be used merely as the means of enforcing the fulfilment of the contract, not as absolutely terminating the estate. That the proprietaries looked on for a great number of years, and saw lands held under warrants void on their face, for the failure to fulfil the contract within the specified time of six months, and never, in a single instance, so far as appears in the case, or has been alleged in argument, attempted to avoid the estate, would certainly afford a strong equity to such purchaser against the proprietary, should such an attempt be made. And that ejectments were maintained on such titles, is also evidence of the opinion entertained of them in the Courts of Pennsylvania. It seems to have been understood by all, that the proprietary was to avail himself of the condition in the warrant, for no other purpose than to coerce the payment of the

1824. Kirk v. Smith.

purchase money. This became, from usage, a kind of tacit agreement, which their real interest required all parties to observe. Yet, when a new state of things was introduced, it was natural for that numerous class of purchasers, who had not paid up the whole of the purchase money, to be uneasy at the hazard in which their titles were involved; and their representatives would very naturally feel disposed to quiet their minds on this interesting subject. It would not be unreasonable, to suppose the existence of a disposition to make the contract expressly what it was understood to be, and to do away the forfeiture, except as a mode of enforcing payment of the arrears of purchase money. The confirmation of titles, by their own terms void, for non-payment of the purchase money, accompanied with the preservation of the right to the purchase money, admits of the construction, that the clause of forfeiture may be used to enforce the payment of those arrears, but not as extinguishing the estate. At all events, this section has the same application to lands within, as to lands without the manor; and the construction it has received with respect to the one, may serve as a rule for the other.

The next exception to be considered, is to that part of the charge, which declares the act of 1705, commonly called the seven years law, to be inapplicable to the case. That act enacts, "that seven years quiet possession of lands within this province, which were first entered on upon an equitable right, shall for ever give an unquestionable title to the same against all, during the es-

tate whereof they are or shall be possessed, except in cases of infants," &c.

1824.

Kirk v. Smith.

It has been contended, that this act is merely retrospective; and, in support of this opinion, it has been said, that for more than one hundred years it has never been resorted to in the Courts of Pennsylvania.

To this argument it is answered, that the language of the act is prospective, that it purports to be an act of limitations, that it is found among the printed statutes of Pennsylvania, and that its operation has never been denied, so far as we are informed, in any of the Courts of that State. During the irregularities which take place in the first settlement of a country, an act of limitations is peculiarly desirable, and it would be strange if Pennsylvania should have remained entirely without one. The 16th section of the laws agreed upon in England, enacts, "that seven years quiet possession shall give an unquestionable right, except in cases of infants," &c. An act of the same import as to possession, without any exception in favour of infants and others, was passed in 1700, but was repealed in England, in 1705, in which year the act was passed which is now under consideration. The people of Pennsylvania had one uniform and constant wish on this subject. Neither the 16th section of the laws agreed on in England, nor the repealed act of 1700, can be considered as retrospective; and there is some difficulty in giving this construction to the act of 1705. But, the Courts of Pennsylvania having never considered this act as having the effect of

1824. Kirk v. Smith.

an act of limitations, this Court is not inclined to go further than they have gone. If, however, it were to be so considered, it must be governed by those rules which apply to acts of limitation generally.

One of these, which has been recognised in the Courts of England, and in all others where the rules established in those Courts have been adopted, is, that possession, to give title, must be adversary. The word is not, indeed, to be found in the statutes; but the plainest dictates of common justice require that it should be implied. It would shock that sense of right which must be felt equally by legislators and by Judges, if a possession which was permissive, and entirely consistent with the title of another, should silently bar that title. Several cases have been decided in this Court, in which the principle seems to have been considered as generally acknowledged;[a] and in the State of Pennsylvania particularly, it has been expressly recognised. To allow a different construction, would be to make the statute of limitations a statute for the encouragement of fraud—a statute to enable one man to steal the title of another by professing to hold under it. No laws admit of such a construction.

The true question then is, whether the occupancy of those who held under these conditional warrants, was consistent with, or adversary to,

a See Alexander v. Pendleton, 8 *Cranch*, 462. Base v. Gray, 4 *Wheat. Rep.* 213. M'Clary v. Ross, 5 *Wheat. Rep.* 116. Ricard v. Williams, 7 *Wheat. Rep.* 59.

1824.

Kirk v. Smith.

the title of the proprietaries? Upon the answer to this question, it seems difficult to entertain a serious doubt. It is reasonable to suppose that the practice of selling lands on credit, and of issuing warrants in the form of that which is inserted in this case, and of holding the legal title to secure the payment of the purchase money, prevailed from the first proceedings under the charter, until the declaration of independence, a period of near one hundred years. In the particular case before the Court, credit was given from the year 1742; and we are not informed, and, consequently, have no reason to suppose, that this indulgence was singular. The legislation of Pennsylvania on the subject, justifies the contrary opinion; for we perceive among their printed statutes, several of a late date, giving farther time to pay in the purchase money for lands sold before the 10th of December, 1776. These acts of farther indulgence, continued for such a length of time, furnish strong evidence that the cases were very numerous to which those acts would apply; and show, too, that in the opinion of the Legislature, no act of limitations had barred the claim. Now, this practice, in which the proprietaries, and a great portion of the population of Pennsylvania, concurred, is incompatible with the idea that the title of the purchaser became adverse to that of the proprietary, within six months after the date of the warrant of survey. In the case before the Court, the survey was made, in fact, upwards of five years after the date of the warrant. Is it conceivable that the surveyor, who

1824. Kirk v. Smith.

was an agent of the proprietary, would have made the survey, had he supposed it to confer a title adversary to that of his principal? a title which would enable the holder, by remaining quiet only one year and three months longer, to set the proprietary at defiance, and to hold the land discharged from the contract by which it was acquired. The very practice of holding back the title, and of giving such extensive indulgence for the payment of the purchase money, seems to demonstrate a general opinion, that, so long as this state of things continued, the title to the land was still in the proprietary, and the purchaser acknowledged his title. The occupation of the purchaser was with the consent of the proprietary, and, consequently, not hostile to his rights. The proprietary permitted the purchaser to hold the land, subject to his claim to the purchase money; and the purchaser held under the admission, that the land remained liable to the purchase money, and that the proprietary might, at any distance of time, assert his title to it, so far at least as to secure his purchase money. There seems to have been a mutual understanding and a mutual confidence between the parties. How far the proprietary may have had it in his power to violate this confidence, by seizing the land, and refusing to convey it on a tender of the residue of the purchase money, is a question which does not appear ever to have been determined, or ever to have occurred. But, certainly, during this state of things, the purchaser could not be considered

1824.

Kirk v. Smith

as holding a possession adversary to the title which he acknowledged.

It has been contended, that the survey of the manor was a determination of the estate under the warrant, and the assertion of an adversary title, from which time the act of limitations began to run.

There is certainly nothing in the fact itself, which supports this proposition. All the transactions of the parties contradict it. There is no fact which shows a disposition in the proprietary to re-enter on any lands for which a warrant had previously been granted; nor is any case of such re-entry shown, from the first settlement of Pennsylvania. Several instances are mentioned, of grants completed on the common terms, within the manor of Springetsbury, while it was considered by the parties as a manor. No inference, then, is to be drawn from the facts in the case, favourable to the conclusion, that the survey of a tract of country as a manor, was considered as determining the estates created by surveys on warrants previously issued, the conditions of which had not been fulfilled by the purchasers. This must be a conclusion of law, from the single act of survey, so inflexible as not to be influenced by the intention with which that act was performed, and the opinion prevailing at the time, as attested by usage, or the argument cannot be sustained.

But how is this conclusion of law to be supported? The survey of a large tract of land cannot be considered as an entry on a smaller tract within its lines, as an ouster of the occupant, or even as a

1824. trespass on him. How, then, can such survey be considered as having any legal effect different from the intention with which it was made? It is indispensable to the argument, to maintain that the mere act of survey does, of itself, in point of law, show an intention inconsistent with the continuance of any conditional estate, within the limits of the manor. This the plaintiffs in error have endeavoured to maintain; and for this purpose have contended, that a new title, which they call the "manorial title," and which they say is distinct from the proprietary title, was created by the survey: that the plaintiffs in error hold under the proprietary title; the plaintiffs in ejectment, under the manorial title. Their claims are, consequently, adversary to each other.

Kirk v. Smith.

But this argument cannot be reconciled with the fact. No new title was created by the survey. There was no source from which title could be derived, other than from the proprietary himself. The survey was, not to give a new title, but to separate a certain tract of land from the general mass, which was offered to every adventurer. The effect of this survey was, not to avoid contracts already made, but to give notice to the public, that these lands were thereafter to be acquired by special contract only. The act of 1779 found this to be the existing state of things; and, in dividing the estates of the proprietaries between the Commonwealth and the former owners, adopted the lines of the manors as the lines of partition between them. This created no new title, but left

1824.

Kirk v. Smith.

to the proprietaries their former title, within the described boundaries.

We perceive, then, nothing, either in the law or the fact of this transaction, which tends to show that the possession of the plaintiffs in error has been adversary to the rights of the person under whom he originally claimed.

Having considered the act of 1705 as if it were an act of limitations, all the reasoning which has been applied to that act, applies also to the act of 1785, on which the 8th exception is founded. The several treaties formed with Britain, have a very important influence on the time which has elapsed since the war between the two countries.

The opinion that the plaintiffs in ejectment have still a right, notwithstanding the acts of 1705 and 1785, to proceed at law, presupposes their consent to the continuance of the original title, created by the warrant; for if the possession taken under the warrant or survey was not continued with the consent of the proprietary, it immediately became adversary, and the act of limitations immediately commenced. If, then, there be any case in which this assent is not to be presumed, that is a case in which the plaintiff in ejectment is barred by the act of 1705 or 1785.

If, as the Court thinks, the rights of the proprietaries were converted, by long acquiescence in the usage which must have been known to them, of selling the lands, as being liable only for the purchase money; or, by the 7th section of the act of 1779, or by both united, into a mere right to the purchase money, still the remedy of proceeding

1824.

Kirk v. Smith.

against the land for the purchase money remains, and is not taken away by the act of 1779. That act, having reserved the purchase money for the proprietor, must, of course, be construed to reserve his remedy, unless it was expressly taken away. It is not easy to point out any other remedy than this, by ejectment. The original purchaser has transferred; and were his representatives even still liable for the purchase money, which is far from being admitted, they may not be able to pay it, if they could be found. It was not on their personal responsibility, but on the land itself, that the vendor relied. His claim was attached to the land, and passed with it. The remedy reserved is on the land, not on the person. It would be difficult to form an action at law against the person; and in Pennsylvania, there is no Court of Chancery, even if a bill in equity could be sustained. The remedy must be by ejectment.

There are other exceptions in the record, which, though not pressed, have not been waived. It was, therefore, the duty of the Court to examine them. The result of that examination is, that the only serious questions in the cause are those which grow out of the acts of 1705 and 1779. These having been rightly decided, there is no error, and the judgment of the Circuit Court is affirmed.

Mr. Justice JOHNSON, dissented.—The reasoning upon this cause, must be utterly unintelligible to those who hear it, unless premised by the following state of facts:

The grant to William Penn, vested in him and

his heirs, both the soil and sovereignty of the State of Pennsylvania, subject to a few reservations of right and power, not material to be noticed here. But, before his colony took their departure from England, he entered into a variety of stipulations, restricting the exercise of both his power and rights over the territory which they were about to occupy. These are known by the epithets of his conditions or concessions; and it is by one of the articles of this instrument that he precludes himself from setting apart more than one tenth of the soil, for the several and individual use of his family. The rest was to be granted out to settlers, on terms which were to be common to all except those who purchased within the proprietary tenths, with whom he was at liberty to contract as he pleased for the sale of his lands.

1824.

Kirk v. Smith.

By the 17th section of the charter, there was power given to the proprietary to erect manors, with right of court-baron, frank-pledge, &c., and to grant the land therein for estates, which the grantees could not devest of the incident of being held directly of the manor, or the grantee of the manor, who is denominated lord of the manor. The manor of Springetsbury, within which this land lies, was surveyed for the use of the proprietaries, and surveyed as a manor. There was evidence in the cause below, of its having been laid off as early as 1722, but it was certainly resurveyed in 1768; and as the Court below rested the case upon the effect of the resurvey, as equivalent to an original appropriation, I presume the case does not require that we should look beyond it.

1824.

Kirk v. Smith.

The titles under which the defendants below (and plaintiffs in appeal,) defend their possession, originated in 1747 and 1748, and would be entitled to unquestionable precedence, but for the following facts: The warrants of survey contain a condition in these words, "which survey, in case the said A. B. fulfil the above agreement within six months from the date hereof, shall be valid, otherwise void." The agreement here referred to was, to pay a sum of money, (called, with reference to its fixed amount, the common terms,) in six months. A portion, about one third, of this sum, it appears, was paid, but there was nothing in the cause to sustain the payment of the residue, unless it was possession, lapse of time, and supposed acquiescence of the proprietaries. When the manor was surveyed in 1768, there were many of these individual land-holders comprized within the lines then laid off, all holding on the common terms; and there were, afterwards, many other tracts sold, upon what are called, in the peculiar language of that country, the terms agreed; by which is understood, according to a value to be adjusted, without confining the vendor to the common terms. Such tracts were sold out to the purchasers of this class, as Penn's individual property. Upon all these lands there were reserved a small annual sum, called quit-rents. In the year 1779, the Legislature passed an act, entitled, an act "for vesting the estates of the late proprietaries of Pennsylvania in this Commonwealth," by one section of which, the proprietary tenths, or manors, are granted to the proprietaries, "toge-

1824.

Kirk v. Smith.

ther with the quit-rents and other rents reserved thereon." By another, all the lands of the State, except those within the tenths or manors, are exempted from quit-rents, and released from any lien for balances of purchase money, which purchase money is vested in the Commonwealth.

The question is, whether the lands within the manors, granted out to individuals previous to surveying the manors, are entitled to the benefit of these exemptions, in common with all lands of the same class within the State; and the action below is an attempt to exclude from that benefit those prior grantees, under the idea that they are excepted by the effect of the reservations in favour of the proprietaries. And this supposed right of the proprietaries is asserted through the medium of an action of ejectment, under the idea that the legal estate is in the grantee of the manor, and only an equitable interest in the tenant, the prior purchaser.

The received doctrines on the subject of what creates a legal estate in a grantee, it must be observed, are altogether peculiar in the State of Pennsylvania. A warrant, a survey, and payment of the consideration money, is held to give an absolute estate in fee, though not consummated by a patent. This subject came on to be considered by this Court, as early as the year 1799; and the law was then clearly recognised to be as I here state it. Judge Iredell uses the expression, as applied to a title so acquired, "a legal title, as distinguished from an equitable title."

a 3 *Dallas*, 457. 465.

1824.

Kirk v. Smith.

The peculiarities of the form in which this question comes up, must be attributed to local practice. The charge given by the Court, on summing up to the jury, is copied into the record, and exceptions taken to those parts of it which were unfavourable to the defendants below. These exceptions were ten in number; but only the 4th, 7th, 8th, and 10th, have been insisted on in argument here. Of these, I consider the last in numerical order as proper first to be noticed. It is expressed in these words: "Because the evidence exhibited manifested the absence of legal title in the plaintiff's lessee, whereas the Court charged the jury, that he was possessed of the legal title, and as such, entitled to recover in this action."

The Court below has considered the title of the defendants below as a mere equitable title; all its conclusions, from first to last, have their basis in this doctrine. And had it been shown in argument that this idea was sustained by a course of decisions in the State Courts, I certainly should not feel myself at liberty to contest it. But every thing conspires to satisfy me, that the estate vested in the warrantee upon the execution of a survey, was never considered in any other light than a legal estate, in the jurisprudence of that country. Whatever may be the correct legal construction of the words of the warrant, if such has been the practical construction, *communis error facit jus*, and it is now too late to criticise on the meaning of terms.

1824.

Kirk v. Smith.

My reasons for adopting this opinion are the following:

1. I look in vain through the statutes of that State, for any legal provision for entering, avoiding, and regranting lands, for failure in paying the arrears of purchase money. On the contrary, I find an act passed on the 9th of April, 1751, which furnishes a legislative exposition of the law on this subject. By the provisions of that act, the treasurer is authorized to issue an execution for the arrears of purchase money due on lands granted prior to the 10th of December, 1776, and to levy on and sell the land so granted. That the warrants and survey created in favour of the State a debt and a lien, is unquestionable; and this is all that the State affirms in passing this law; but, by the same legal provision, it negatives the idea of the property in the soil having ceased to exist in the tenant. No change in this respect was effected by the act of 1779, commonly called the vesting act, since that act only confirms individual estates according to their existing qualities.

Nor has the legislative power been altogether silent on the subject of forfeiture and regranting; for, by the 10th article of the concessions, there is provision made for regranting lands which may become forfeited for failing, for three years, to seat and improve them. Nor do I believe that there can be produced in the history of the jurisprudence of that country, an instance in which this power of regranting has been extended to any other case.

1824.

Kirk v. Smith.

2. I think this opinion follows as a corollary to the proposition, that payment of the consideration money vests a legal estate. For why should a patent be unnecessary, if there remained any act to be done on the part of the proprietary, in order to pass a legal estate? It may be contended, that this doctrine results from the peculiar jurisprudence of that State, in which, for want of Courts of equity, the Courts of law have adopted the maxim, that we must consider that as done which ought to be done. But to this there is a brief and unanswerable reply. Such might be the reason where a patent is demanded, and the fees tendered; but such demand and tender have never been insisted on as necessary in support of the general effect of payment of the consideration money, to vest a fee simple absolute, without a patent.

Some analogy may be supposed to exist between this case, and that of mortgagor and mortgagee. But, if so, the relation is reversed, and the converse of the rights and liabilities of the mortgagee results from it. For, the debtor conveys the fee to the creditor, in the ordinary form of mortgaging, and retains only the right to redeem. Here the creditor conveys the estate *cum onere*. And the question as to the interest vested in the defendants below, whether it was legal or equitable, still recurs. If legal, it bears an analogy with an estate in fee subject to a charge, rather than to an estate subject to a mortgage; in which former case, the creditor could not maintain ejectment.

1824.

Kirk v. Smith.

The only analogy, in my judgment, between this estate and any one known to the common law, is that of a feoffment on condition. The warrant is the deed, the survey the livery of seisin, and the condition is a condition in deed, as distinguished from a condition in law; and it is also a condition subsequent. In which case, it is clear, that the estate is a legal estate, and remains good until entry made for the forfeiture, by some one legally authorized. This leads to the questions, whether, previous to their formal entry on bringing this ejectment, such an entry was made? Whether legally made? And what were its legal effects?

Unless the manorial appropriation of 1768 can be considered as an entry, it is not pretended that any legal eviction of the defendants below ever took place. And as to that, I think it perfectly clear, that it could, on no principle, operate as a legal eviction. It was an act, on every principle, perfectly consistent with the full and unmolested enjoyment of the premises in question. And this consequence follows, whether we consider it in the light of a simple designation of metes and bounds, over which the original proprietary rights were retained, or, what appears to be the more proper view, as an original grant, converting it from an interest existing in the proprietary, in his political capacity, into an estate held by him in his individual relations to the society, of which he was both a member and a ruler. In the first view, there was no sensible change made in the estate, as it existed previously in this, and the whole ter-

1824. Kirk v. Smith.

ritory; and in the second, the interest acquired, or effect produced, could be nothing beyond that of a grant to any individual, other than the proprietary. In the latter case, it is perfectly clear, that running the circumscribing lines, would be no trespass or eviction. These appropriations to the proprietary, were intended to operate exclusively upon unseated territory. On that which had been previously surveyed to individuals, they could produce no effect whatever; otherwise they might as well have dispossessed those who held by a perfect, as those who held by an inchoate title. Although circumscribed by the lines of the manor, the seated tracts composed no part of the thing appropriated; they could not have been estimated as any part of the proprietary's tenths; and there never was a doubt of his right having still existed, to extend the limits of his survey, so as to take in as much land as he was deprived of by these prior included individual appropriations. A different construction would be greatly to his prejudice, inasmuch as he might, by possibility, have lost the whole of his tenths, by taking in the grants to others. This view of the subject, I shall again have reason to recur to, on another point.

But, if this circumscribing survey could, on any principle, be held equivalent to an entry, it is still necessary to maintain that it was a legal entry. And this I am prepared to negative, upon various grounds. It is obvious, that such an entry must be justified, either on the ground of personal right or legal power. A mere arbitrary power to resurvey, did not exist in the proprietary; the province

1824.

Kirk v. Smith.

of Pennsylvania had taken the form of a State, governed by a wise and beneficent government, in which the will of the proprietary had been subjected to the public will, and his allodial interests circumscribed to his purchase money and quit-rents, and his reserved tenths. As to the land seated under warrants to individuals, he was bound by his own concessions and the legislative will; and I see no power delegated by law to any one to enter and evict for failure to pay the consideration money reserved on such appropriations; nor have we been told of any practice on this subject, that could be construed into a national acquiescence, in the exercise of such a power. The debt and the lien remained, but the right of eviction and regranting for non-payment, was never legalized nor asserted, nor could it, in any case, have been tolerated, without a tender of that part of the consideration money which had been already paid. Again, an entry for condition broken, must be made as such, and with intent to produce the legal effects of an entry; a mere casual friendly passing of the boundaries of the premises will be unconsequential; but here, the sole object of the survey of 1768, was to appropriate *unseated* land, and not to assert a title to that which had been previously appropriated. The present claim is but an after thought; a speculation upon the possible effect of an act not intended to produce eviction.

This leads to another consideration, operating against both the fact and legality of this supposed entry, for condition broken. It is agreed, on all hands, that proof of the full payment of the con-

1824.

Kirk v. Smith.

sideration money, would have been conclusive against the title of the plaintiffs below. But why may not presumption of such a payment arise from length of time and acquiescence? and that of the plaintiff below be left as a fact to the jury? If resumption of a patent may, under circumstances, be left to a jury in favour of possession, much more so may a fact so much less solemn in its nature, and more difficult of proof, as payment. In this case, and in all cases arising in Pennsylvania, such a fact may well be submitted, since in practice it has superseded the issuing of a patent, and may well tempt the parsimony of purchasers, since the expense of a patent has become an expense of supererogation. The long forbearance and acquiescence of the proprietaries, can be referred only to one of three causes: a consciousness that they had acquired nothing in the seated lands within their manorial appropriations; that they had no right to enter on the premises previously seated; or, that the title in it was perfected by payment. All which would operate against both the fact and legality of the supposed entry.

From these considerations, I am led to adopt the opinion, that the title of the defendants below was a legal title, and the better title; that if voidable, it could be avoided only by entry for conditions broken. That no such entry was made, or was intended to be made, or could be legally made; and that they were, therefore, entitled to a charge in their favour. With this view of the subject, it may not be necessary for me to go farther. But it comports with the practice of this

1824.

Kirk v. Smith.

Court, that I should express an opinion on the other points in the cause.

And first, as to the bearing of the act of confiscation, on the subject of this suit.

The Court below appears to have considered a manor in the light of a geographical tract, or portion of territory designated by metes and bounds. I, on the contrary, consider the term as designating an estate or legal interest within the geographical limits. In this sense, nothing will be comprized in the meaning of the words of the 8th section of the law, but those tracts of land within those limits which were held of the manor; or, in the peculiar language of that country, granted on terms to be agreed. It is very clear, that the 8th section of the act of confiscation was not intended to convey to the proprietaries any interest not previously existing in them. Now, how did a manorial appropriation operate upon the lands that had been seated previous to such appropriations? It is clear that it vested no interest in such lands, nor any thing incident to them. If the whole purchase money had been paid, the individual's estate was consummated. And if the whole was not paid, it is admitted in the charge, that the proprietary could not change the tenure or the terms of purchase. And so far were these previously seated tracts from being considered in law as making part of the manor, that the proprietary's right to indemnify himself from adjacent unseated territory, for the deduction from his tenths, caused by these excepted tracts, has been solemnly recognised in that Court. Then,

1824.

Kirk v. Smith.

though within the manor, they were not of the manor; as well might an island or an oasis be denominated water or desert. And there were unanswerable reasons, in justice and policy, why such land should have been so considered. It is asserted that the proprietaries never, in fact, exercised any of those privileges and powers within the tracts denominated manors, which were authorized by the charter. But this consideration has no influence upon my opinion; for, 1st, I see no reason, except the intervention of the revolution, why the proprietaries, or lords of the manors, may not have assumed the exercise of those privileges. In case of escheats, there can be no doubt that they would have asserted one manorial right, and were probably prevented from asserting all, only because in the actual state of the province, they would have been burthensome, and unproductive. But, 2dly, They did assert one important privilege within those limits, a privilege which they were precluded by law from exercising beyond those limits. This was the right to demand a higher price for the lands within their manors, than that to which they had restricted themselves in the State at large. And this appears to me to establish a familiar and definite ground of discrimination, by which to determine the operation of this act of confiscation, in any given case. Was the land held on the common terms, or the terms agreed? It cannot be disputed that the general purpose of the act of confiscation was, to distinguish between the land appropriated to the individual use of the proprie-

taries, and that over which they were held to exercise only a political power, or fiduciary interest. They were permitted to acquire an individual property in one tenth of the territory of the State; and the lands so appropriated, as well as the proceeds of the sale of such lands, were meant to be set apart to them, while that which had been seated by individuals, as a part of the unappropriated nine tenths, reserved to the community, was intended to be confiscated. Any other construction would go to imply, that the State had reserved to the proprietaries, territory which was no part of their legal tenths; and, also, that but for this reservation, the act of confiscation would have devested individual interests not intended to be confiscated.

But let us examine more particularly the provisions of this act, with a view to determining its just construction. And here let me premise, that, for all the purposes of this suit, I care not whether the 9th section of the act vests in the proprietaries the balances due on the tracts within the manor, sold on the common terms, or not. The question here is, whether they are entitled to judgment in a suit in ejectment, and of consequence, to a writ of possession, for I cannot distinguish the one from the other. I wholly reject the doctrine of suing for possession, and recovering money; of suing for land, and recovering pounds, shillings and pence. Such a perversion of means might proceed from positive legislation; and, in the State of Pennsylvania, where an amalgamation of law and equity necessarily grows out of

1824.

Kirk v. Smith.

the want of an equity jurisdiction, the practice has grown up, of giving an alternative judgment in such cases, for either the land or the money, or rather for the money to be levied on the land. But this Court is expressly prohibited from thus confounding legal and equitable proceedings, and the whole opinion of the Court below proceeds on a recognition of the necessity of pursuing the two classes of legal and equitable rights, by their appropriate remedies. I have said, and in this I do not understand myself as differing from this Court, that the only practical effect of the terms of the warrants to individuals is, to create a debt and a lien; but surely a tenant may covenant to stand seised, subject to a charge in gross, and yet retain the legal estate. And even in the ordinary case of a mortgage, where the legal estate passes from the debtor to the creditor, and the converse of the present case exists, an assignment of the debt is no conveyance of the *legal* estate to the assignee. A Court of equity will pass the one as an incident to the other; but in a Court of law, the assignee could not maintain ejectment. And that is the only question here. If it be said, that although in this suit the plaintiff below may not be entitled to recover the land, but may avail himself of this form of action to recover the purchase money due, I consider it as an abandonment of the question; for, the debt, if existing, was but an equitable lien, and the remedy here resorted to, is a common law remedy. I think, however, I shall show, that although the debt exists, the lien is taken away by the act of confiscation; and

1824.

Kirk v. Smith.

though the debt be due, it is not due to these parties, but to the Commonwealth of Pennsylvania.

In following this act of confiscation through the detail of its provisions, we find, that after four sections, setting forth the views and motives of the Legislature, the fifth section, or first enacting clause, contains a general assumption of the soil and sovereignty of the State, and a revocation of the charter to Penn, as fully, to use its own language, "as if the same were therein transcribed and repealed." The sixth section asserts the future exclusive appropriation of the "soil and lands, hereditaments and premises, to be in the Legislature of the State;" and, under the operation of these two clauses, it is very clear, that every right, civil and political, of the proprietaries, "of, in, or to the soil" of Pennsylvania, derived under the charter, was (subject to the exceptions in the same act) vested in the Commonwealth, "freed and discharged," as the act expresses it, "from and against all estates, uses, trusts," "charges, incumbrances, titles, claims, and demands whatsoever." And all the title which they now hold therein, they hold by virtue of the provisoes contained in the 8th and 9th sections. But to understand the force and meaning of those two sections, I deem it material, that the language and effect of the 7th section should be duly weighed. This section contains a general confirmation of all the estates, legal and equitable, derived from the proprietaries, their officers, &c. *or otherwise,* or to which any person or persons, *other than the proprietaries,* were entitled, either by deed, patent, warrant, *or survey,*

1824. Kirk v. Smith.

on the 4th of July, 1776. This clause operates in favour of all persons "other than the proprietaries," and confirms, unquestionably, the estates of these defendants below, in common with every other citizen. The next proviso, (8th section,) is confined to the subject of the estates and interests of the proprietaries. And here it is obvious, that three subjects claimed the attention of the Legislature. Their estates and interests were distributable into three classes: they held property acquired, in common with every other individual, "by devise, purchase, descent," &c.; they held other property, under the reservation of a tenth of the soil, to their individual use; and they held, or claimed, a third class of interests, as proprietaries, which clashed with that eminent domain, which was now about to be assumed by the State of Pennsylvania. The latter, the State determined to confiscate, and compensate them for; the former two, to preserve to them unviolated. And these considerations draw a line of demarkation between the subjects of this act, infinitely more definite and rational, than that marked out by trees or streams. The estates held upon the common terms, were those which constituted the third class; and the phraseology of the act appears to me to be in perfect accordance with the general intent. On this point, I hold it to be an important fact, that, without exception, throughout these two sections, tenths and manors are never used apart; they are constantly considered synonimous and equivalent. Now, although a manor may, by common acceptation, be considered as a geographical section, a

1824.

Kirk v. Smith.

tenth is a term of comparison and quantity, and has direct relation to that interest which the proprietaries had acquired, and might acquire, as a distinct individual property in the soil. I consider, therefore, both manor and tenth, as here used, as designating estate and interest, and not geographical limits. And why should it be held a reservation, by geographical limits? Let it be remarked, that it is no immaterial question to the defendants in the Court below, not only as it affects their interests, but as it affects their claims upon the justice and impartial legislation of country. There can be no reason assigned, why they should be excluded from the benefits which this act confers upon citizens of their class, and, in fact, subjected to confiscation. There are important interests growing out of this act to all other landholders, upon common terms; they are exempted from quit-rents, and the lien for the balance of purchase money is taken from off their lands. Can there be a reason assigned, why those of this class who, by the caprice or cupidity of the proprietaries, or their agents, have been embraced within the lines of their surveys, should be excluded from the common benefits extended to their fellow citizens? The injustice of such a discrimination is conclusive on the construction of the act, if an act is to be construed according to the intent of the Legislature. With regard to those who held of the manor, or held, as is usually said, on terms agreed, the case is widely different. It is the effect of their own individual contracts with the proprietary. They are, by the nature of

1824. Kirk v. Smith.

their relation to the proprietaries, distinguished from those of the other class, and have nothing to complain of. Their quit-rents and arrears were considered as debts due to their landlord, and the Legislature intended to take from the Penns nothing which belonged to them in their individual capacity.

Again; extending the construction of the act to the geographical limits of the manor, leads to the most absurd consequences.

It has been insisted, that it was lawful, in surveying the manors, to include within their boundaries the grants to individuals. This is readily conceded; and the inference from the fact, is directly the reverse of what has been attributed to it. Did the Legislature mean, by the proviso in favour of the Penns, to reserve to them their legitimate tenths; or did they mean, by possibility, to reserve to them half the State? There cannot be a doubt that, although any particular survey had embraced half a county, yet if the vacant land within it had amounted to no more than a tenth, the appropriation would have been duly made, and valid. But could the Legislature ever have intended to exclude all the individuals thus circumscribed, from the common benefits of grantees on the common terms? to have subjected them to the most odious and unmerited exceptions? Could the State have intended to permit the proprietaries, under the pretext of surveying a tenth, to cast their net over half its limits? It was for the very reason that including individual surveys made them no part of the manor, that the right to include previous

locations to individuals was tolerated. It had not entered into the mind of man to conceive, that they thereby produced any change in the relation which subsisted between those individuals and the Commonwealth; or could expose them to be separated from the mass of the community, in the several legislation of the State; or exclude them from an equal participation in all the benefits of the revolution. But by this geographical construction, without any act or offence on their part, they are shut out from immunities extended to others, who had no greater claims upon the community than themselves.

But again; if we are to construe this act without a reference to its general spirit and intent, we have but to carry the principle through, in order to involve us in irreconcilable absurdity, and such as will oblige us, for the purpose of common sense, to come back to the very principle of construction which I would apply to the law throughout. A liberal construction of the 8th section, vests in the Penns the whole geographical contents of their manors, whether sold or unsold; and then adds to the grant the rents reserved out of the parts sold. The words are, "All the lands, &c. duly surveyed, &c., together with the quit or other rents, or arrearages of rent, reserved out of the said proprietary tenths, or manors, or any part or parts thereof sold." Now, to reduce this section to the standard of common sense, we have at once to reject the geographical limits, and circumscribe the thing granted to the estate or interest existing in the Penns at the time specified,

1824.

Kirk v. Smith.

Nor is it immaterial, to note the particular phraseology here made use of. The words are, "reserved out of the said proprietary tenths, or manors, or the part or parts thereof which have been sold." Now the lands sold to these defendants below, were sold out of the general funds of the State, and the quit-rent on these was reserved out of the land of the State, and not of the manor, for that had no legal existence when this sale and reservation were made. The land was not sold as part of the manor, nor was the rent reserved out of part of the manor.

But, secondly; there is not a pretext for this supposed resulting legal estate in the Penns, except the assumed reservation to them of the balance of purchase money on the grants held within their lines upon common terms. And how does this stand? It will be found to be only an *implied* grant, to which this *implied* legal estate is appended; an implication tacked to another implication; and finally, as the concluding link of this chain of implication, that ejectment is the remedy reserved for the recovery of that balance of the purchase money, which is itself the subject of the first implication.

If the rights of the Penns be circumscribed by the positive enactments of this law, then are they not only precluded from all claim to the balances due by this class of grantees, but also from those due by every description of purchasers; for there is no positive provision in the law which vests those balances in them. Their *quit-rents* are expressly reserved to them in the manors, but not so

1824.

Kirk v. Smith.

with their balances of purchase money. But in the 9th and 10th sections, these arrearages of purchase money are excepted from the provisions of the law, without any express declaration to whom they shall belong; and from this, an implication is supposed to result in their favour. But surely, so far as relates to the balances due by the general grantees, the implication is so far from being a necessary implication, that its bearing is altogether the other way; the implied intent of the Legislature is against a construction so obviously inconsistent with the general purposes of that body; a construction producing such an unjust, unreasonable, and improbable discrimination between innocent and equally meritorious men of the same class. Construe the act so as to confine the grant to the Penns to their private interests in the manors, and it becomes sensible and consistent throughout; and while it secures to them, on the one hand, all the interests which, as individuals, they are entitled to; on the other hand, you extend to all other individual citizens, one uniform rule of legislation and relief.

Again; there is no reason for supposing that when the Legislature uses the terms *tenths and manors aforesaid*, in the 9th section, or *the said tenths and manors*, in the 10th section, that it uses them in any other sense than that in which they are used in the 8th section. The terms used, in fact, identify their meaning. But a correct construction of the terms used in the 8th section, in describing these tenths, or manors, is fatal to all implication in favour of the Penns, with reference to any

1824.

Kirk v. Smith.

interest in the lands legally seated, previous to their appropriation. The words are, "tenths, or manors, *duly surveyed and returned* into the land office." But who will deny, that these words are to be construed with reference to the intent and effect of such surveys? And what was that intent and effect? simply to appropriate unseated lands. Would these proprietaries have been content in laying off these surveys, to have been precluded and deprived of half their interest by previous surveys, over which they could not have exercised the right of selling or retaining, as they thought proper? If not, then, so far as relates to previously ceded lands, they never were appropriated by them, and it cannot be predicated of them, that in the sense of the parties they were *surveyed and returned.*

The construction now contended for, is obviously an after thought of the plaintiffs below, growing entirely out of a supposed ambiguity in the words of the confiscation act, and would have been strenuously resisted, had they been so applied when their surveys of manors were first made.

Again; the rule of construction applicable to leases and wills are not essentially different in their principles. In legislating on this subject, the State had assumed all the rights, and, at least, could exercise all the powers of a manor-holder, in making his last will. Although by the charter, the purchasers under manors are restricted from any alienation of their purchases, by which they might be devested of the incident of holding directly of the manor, it is obvious that such a change of

estate might be produced, by the act of the manor-holder. Suppose, then, the grantees of the manor of Springetsbury had sold any portion of the soil, and devested it of this incident, lying, we may suppose, in the very centre of the whole, would a devise in the very words of this act, "to wit, of the manor of Springetsbury, as duly surveyed and returned," have been construed to carry the portion previously disposed of? Or, to pursue the analogy further; suppose the purchase money unpaid, and a covenant by indenture of the tenant to pay the money to the vendor and his heirs, and even to hold the land charged with the payment, would a devise of the manor carry the money so reserved, or the devise of the debt carry the freehold in the land sold?

But, on this doctrine of implication I will make another observation. It is rebutted by the provisions of the instrument itself; and, in the case of a will, would be considered as an undisposed residue; for, when we look through the whole act, and find this 8th section to be the only one which purports to give any thing to the proprietaries, their whole interest having been previously confiscated; and when, in this section, we find their individual interests in the soil of the State, whether acquired as other individuals, or as proprietary appropriations, carefully designated, and even to the arrearages of quit-rents on such lands, expressly reserved to them; surely the implication arises, that this section was intended to embrace the whole provision meant to be made for them out of the common patrimony of the State.

1824.

Kirk v. Smith.

The omission to mention and reserve the arrearages of purchase money due on the manorial sales, might, with much greater reason, be urged as raising a presumption against their claims even to those balances. This, however, I reject; and for a reason which serves to throw some light upon the subsequent clauses of this statute; which is, that as the Legislature, in so many words, recognises these alienations as individual sales, they very properly considered the balances due thereon as *private debts;* and, as no confiscation of private debts could be implied from the enacting clauses of the act, so no express reservation of such balances was deemed necessary. The subsequent exceptions in favour of balances due on manorial lands, therefore, I consider as intended only to guard against an extension of the words of the law to such individual contracts. The nine tenths of the soil, and the balances of purchase money due on such parts as had passed to individuals, they considered as the property of the body politic, and appropriated it as such to the State. The one tenth set apart for the proprietaries, they propose to put on the same footing with their individual interests, properly so called, and with it, to reserve to them the balances due on the lands appropriated to themselves. These are fair and consistent inferences, if not positive enactments; but it would be much more consistent with the positive enactments, to hold, that all the balances due on the lands circumscribed by the manorial lines, were still at the disposition of the Legislature, than that they meant to

confer on the Penns more than they have declared, or made discriminations among the citizens at large, which no reason or policy could justify. 1824. Kirk v. Smith.

Upon the questions that have been raised upon the operation of the law, commonly called the seven years law, or the law of 1705, (though of much greater antiquity,) it may be proper to make a few remarks.

I cannot see a reason why this law should have been supposed obsolete, more especially with reference to the early day in which it must have acted upon the interests of the parties in this cause. On the contrary, it appears to have been a favourite law of the colony, for we find it enacted and re-enacted, in opposition to reiterated repeals by the King in council, as will be seen by reference to Carey and Bioren's edition of the Laws. In the same work, we find it printed under sanction of the Legislature, and republished under the same authority, as lately as 1810. Indeed, upon reference to the concessions which composed the fundamental laws of the colony, we find the very law in its present terms; and are led to the conclusion, that its constitutional character gave it a peculiar sanctity in the eyes of the Commonwealth. Another consequence, also, results from its very early enactment; which is, that, contrary to a ground taken in argument, it must be construed as having a prospective effect, since it was adopted at a time when there could not have existed a case for it to govern, if solely retrospective. Of this law it has been remarked, that for 116 years it does not appear that a cause

1824.

Kirk v. Smith.

has been won or lost on the basis of it. And had the decisions of the State Courts, prior to the revolution, been preserved, the observation would have had its influence. But in the absence of reports of such adjudications, there cannot exist such satisfactory evidence on the subject as to sustain the fact. One thing is very certain, that some beneficial influence must have been felt from its existence, or it would not have been so often and so pertinaciously insisted on by the colonists. If it covered their estates in no other way than by preventing suits, its great purposes were answered; and its sovereign influence, in this respect, may well be inferred, from the assumed non-existence of decisions at law. It preserved health, if it did not cure disease. At present, it is unquestionably repealed by the act of 1785, for the two acts cannot stand together. The latter act extends the limitation of suits to twenty-one years; but if the limitation of seven years would produce the same effect, then would the prior law repeal the latter, or render it a mere nullity. And this accounts for its not having been heard of for the last forty years, which may be called the period of reported causes. Its repeal, however, at that time, has no influence upon its previous effect upon the rights of these parties.

It has been remarked of this law, as incontestable, that it could not convert an equitable into a legal estate: But this doctrine appears to me to do more than render the law obsolete; it renders it a mere nullity in its origin. What is gained by an estate's continuing an *equitable* estate? From

1824.

Kirk v. Smith.

its inherent strength, unaided by the law, if accompanied with continued possession, it would continue a good *equitable* estate; and why should not the comprehensive words, "shall for ever give an unquestionable title against all," be construed into a transmutation from an equitable into a legal title? How can any but a good legal title be denominated *an unquestionable title?* and why should not *all* comprise *legal* as well as equitable claimants? The opinion below supposes the signification of those terms to be circumscribed by the words "during the estate." But from this I must dissent, since these words do not necessarily convey that meaning, and are more properly applied to the distinction of estates into terms for years, estates for life, estates in fee, in tail, &c.; all which may be either legal or equitable. Neither can I acquiesce in that part of the opinion, which considers a discharge from the purchase money of the land, as a necessary consequence of giving effect to the seven years law, as against the plaintiffs below in this cause; for the lien might continue, though a legal and absolute estate be vested in the defendants below. And, to prevent the operation of this law in favour of the possession, lest the claim for the purchase money should incidentally be barred, appears to be inverting the order of things; for, by the acts limiting suits on contracts, the suit for the purchase money might by possibility be barred; while the remedy to recover the land was still in full force, being of longer duration. The superior purpose of quieting estates of freehold, also would, under that

1824.

Kirk v. Smith.

doctrine, be controlled by the inferior one of enforcing open contracts, or implied covenants. While the most ordinary means of adjusting contracts for the sale of lands on credit remained in practice, there could be no danger, in giving credit on sales, of losing both land and money, as the Court supposes. But if that consequence did follow, *non constat*, but that the public interest, as well as private tranquillity, might have been promoted by it.

To me it appears, that this seven years law has had a sovereign influence over the rights of property in that State. I have no doubt that it is under its influence the doctrine has grown up, that a possessor of the soil need not produce a patent to protect his freehold; as well as the doctrine, that those words which, on the face of the warrant, would seem a condition, shall not be held to produce more than a contract and a lien.

But if this seven years law did not quiet the possession of the defendants below, I confess I am at a loss to understand the principle upon which that effect is denied to the limitation act of 1785. Was their estate void or voidable, legal or equitable? In every point of view, the law appears to me to operate in their favour.

The opinion below is thus expressed: "Possession, to create a bar by length of time, must be adverse, which it cannot be, *if the defendant's entry was under a title derived from the plaintiffs.*" That a possession, to sustain a bar under the act, must be adverse, is unquestionable. But when the Court comes, in the next member of the

period, to explain what is meant by an adverse possession, we find the doctrine asserted, that a possession cannot be held adverse to the title of *him* from whom it is derived. This doctrine I hold to be altogether untenable; and this sentence alone, though every other idea be put out of the case, would, in my view of the subject, entitle the plaintiffs here to a reversal of the judgment. The title acquired by a vendee is most peculiarly adverse to that of him from whom he purchases.

But under what view of the subject could these plaintiffs be held mere tenants at will to the parties plaintiffs below? or their possession any other than an adverse possession? They did not hold as the agents or representatives of those through whom they derived the title. From the time of entering into possession, they held in virtue of the estate in themselves, and not that of any other. If the idea is, that the proprietaries might at any time have entered upon them, and in that sense, the estate was held at their will, the answer is, that is one of the very cases that the act of limitation provides against; for it takes away that volition in the proprietary, unless the entry be made in twenty-one years. But the fact was not so; these tenants did not hold at the will of the proprietaries, for all those who acquired under the common terms were taken under the care of the law, and we find act upon act to regulate the proceedings of the proprietary towards them. The right to turn them out by the shoulders never existed in the proprietary; he must have resorted to his entry, or suit, to recover possession; they were

1824.

Kirk v. Smith.

considered as holding a freehold, and the law did not entitle him to resume possession arbitrarily. It was the doctrine of that State, that his rights were restricted to the payment of the purchase money and quit-rents, at least until he tendered a return of advances and improvements. It cannot be imagined that the reservation of quit-rents converted the purchasers into tenants at will; neither principle nor authority would sanction the idea. Nor can I perceive any thing either in the legal relations or contracts of these parties, that could sustain the doctrine that the possession of the defendants was permissive, and identified with that of the proprietary. A tenancy at will, must be the result of *contract*, express or implied; but a freehold granted on condition, is not converted by forfeiture into a tenancy at will. Yet, had it been otherwise, surely lapse of time, general acquiescence, and received opinion, ought to be held to produce the same consequences as to the tenure of property in this State, which were produced by the same causes in England upon the tenure by copy of court-roll. That which was in its origin nothing but a tenure at will, retains now nothing of its origin but the formula which attests its history.

To conclude; let the estate of these defendants below be considered as either void or voidable, and I see not how the act of limitations is to be escaped by their antagonist. If voidable, on failure to pay the purchase money, the entry is expressly taken away by that statute; and if void, they cannot be reduced lower than to the grade

of tenants by sufferance, with regard to whom entry and suit was just as indispensable, as with regard to any other tenure. (*Co. Lit.* 57.) In the application of the doctrines on the statute of limitations, the incidents to the two tenures ought not to be confounded.

Judgment affirmed.

[DEVISE. CONDITION PRECEDENT OR SUBSEQUENT.]

ROBERT J. TAYLOR and others, *Appellants*,

v.

JOHN THOMPSON MASON, *Respondent*.

R. B., being seised of lands in Maryland, made three instruments of writing, each purporting to be his will. The first, dated in 1789, gave his whole estate to his nephew, J. T. M., after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to J. T. M., during his life; and after his death, to his eldest son, A., in tail, on condition of his changing his name to *A. Barnes*, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, for ever, on their changing their surnames to Barnes.

The third will, which was executed after the others, and probably in 1803, after some small bequests, proceeded thus: "I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew, J. T. M., *lawfully begotten, for ever*, agreeably to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that the *name of the one that may have the right*, at the age of twenty-one, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has

1824.

Taylor v. Mason.

possession, before a magistrate of St. Mary's county, and have it recorded in the office of the Clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the same terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say, not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my niece, Mrs. C., lawfully begotten, on their complying with the above mentioned terms; and on their refusal, to the daughter of my nephew, J. T. M., named Mary, so on to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of 1600 dollars per annum, for his life, and adds, "and my will is, that he shall keep the whole of my property in his possession, during his life." He then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned."

Held, that the conditions, annexed to the estate devised to the oldest male heir of J. T. M., were *subsequent* and not *precedent*, and that, consequently, the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of J. T. M.; to be devested, on the non-performance of the condition.

Quære, Whether J. T. M. took an estate tail?

Quære, Whether the last will revoked those which preceded it?

APPEAL from the Circuit Court of Maryland.

The bill in this cause was filed in behalf of

1824.

Taylor v. Mason.

one of the coheirs of Richard Barnes, deceased, and her children; and claims an account of the profits of his estate, from the defendant, J. T. M., also a co-heir, who claims and holds possession of the estate, under the will of the said Richard.

Three instruments of writing, purporting to be the will of the testator, all of them properly authenticated, were exhibited in the record. The first, dated on the 31st day of October, in the year 1789, gives his whole estate, after pecuniary legacies to his other nephews and niece, to the defendant, J. T. M.

In the second will, which is dated the 16th day of July, 1800, the testator gives his whole real estate to J. T. M. during his life, and after his death to his eldest son, Abraham, in tail, on condition of his changing his name to Abraham Barnes, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, forever, on their changing their surname to Barnes.

The third will is without date, but is proved, by its contents, to have been executed after the others, probably in the year 1803. After some small bequests, the testator says, "I give the whole of my property, after complying with what I have mentioned, *to the male heirs of my nephew, J. T. M., lawfully begotten, for ever,* agreeable to the law of England, which was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that *the name of the one that may have the right,* at the age of twenty-one, with his consent, be changed to Abra-

1824.

Taylor v. Mason.

ham Barnes, by an act of public authority of the State, without any name added; together with his taking an oath, before he has possession, before a magistrate of Saint Mary's county, and have it recorded in the office of the clerk of the county, that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my niece, Mrs. Chichester, lawfully begotten, on their complying with the above mentioned terms; and their refusal, to the daughter of my nephew, J. T. M., named Mary; so on, to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of sixteen hundred dollars per year for his life; and adds, "and that my will is, that he shall keep the whole of my proper-

ty in his possession during his life." The testator then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and to build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which, to be the property of the person that may have a right to it, as above mentioned." The testator also requires his executor to take an oath, "that he will justly account for the property that he may have the power of."

Richard Barnes died in April, 1804, and J. T. M. proved three several paper writings, as his last will, and qualified as his executor. The testator had one brother, who died in his lifetime without issue, and one sister, who intermarried with Thompson Mason, and died also in the lifetime of the testator, leaving three sons, H. T. M., A. B. T. M., and J. T. M., and one daughter, A. T. M., one of the complainants, who intermarried with R. W. Chichester. The rights of the said A. T. Chichester are conveyed, by deed, to trustees, for the benefit of herself and children. J. T. M. had no son living at the death of the testator, but has two after-born sons, who are now alive.

The Circuit Court dismissed the bill, and the cause was brought by appeal to this Court.

The appellants made the following points in this Court:

1. That the third will, whether its disposition

1824.

Taylor v. Mason.

be valid or not, revokes the other two, since it expresses a clear intention on the part of the testator, to dispose differently of the whole estate.

2. That it gives no estate for life or years, absolute or in trust, to John Thompson Mason, the respondent, but merely the custody and care of the property, during his life, as agent or curator, with a salary for his services.

3. That no estate for life or years, can be raised for him by implication, because the original estate did not move from him, and never was in him.

4. Consequently, that he has no estate of freehold, with which a subsequent limitation in fee could unite, so as to create a fee in him, under the rule in Shelly's case.

5. That if he takes a life estate, it is merely fiduciary, and not beneficial, for which reason it could not unite with a limitation over in fee, if there were one, so as to give him a fee under the rule.

6. That the words in this will, "the male heir of my nephew, John Thompson Mason, lawfully begotten, for ever," as explained and modified by the subsequent expressions, designate the "male heir of the body of J. T. Mason," as the person who is to take the estate, and thus operate as a "*descriptio personæ*," and not as a "limitation." Consequently, that they do not create such an estate of inheritance, as is capable of uniting with a life estate, under the rule; but must operate, if at all, as a devise, *per se*, of an estate

in possession or remainder, or as an executory devise.

7. That this disposition cannot operate as the devise of an estate in possession, for want of some person, in existence at the testator's death, who could then take: 1st. Because the person designated, was to be "the heir" of John Thompson Mason, who was then alive, and *nemo est hæres viventis*. 2d. Because, as he had then no issue male, or heir male of his body, there was no person who answered the description, taken in its largest and most general sense.

8. That the disposition in question cannot operate as a remainder, vested or contingent, because there was no preceding estate to support it; none having been directly given to John Thompson Mason by the will, or being raised for him by implication.

9. That, admitting John Thompson Mason to have a life estate under the will, which might support a remainder, this disposition cannot operate as a vested remainder, because, at the testator's death, there was no person in existence who answered the description; nor as a contingent remainder, because it depended on two distinct and successive contingencies: 1st. That John T. Mason should have a son; 2d. That this son should live to the age of twenty-one years, then assume the name of Abraham Barnes, by legislative authority, and take the oath prescribed by the will, which is a possibility too remote.

10. That this disposition cannot be supported as an executory devise, because it was to take

1824.

Taylor v. Mason.

effect on two remote and contingent events: 1st. That the eldest son of John T. Mason should voluntarily, and after he attained the age of twenty-one years, change his name to that of Abraham Barnes, through the operation of a legislative enactment; and, 2d. That he should take an oath, as prescribed by the will; which events, if they took place at all, might not happen within the lifetime of John Thompson Mason, and twenty-one years and nine months afterwards.

March 3d, 1823.

The cause was fully argued, upon all these points, by Mr. *Jones* and Mr. *Harper* for the appellants, and by the *Attorney-General* and Mr. *Emmet*, for the respondents; but, as the questions whether an estate tail vested in John Thompson Mason, and whether the last will revoked those which preceded it, were not considered and determined by the Court, it has not been thought necessary to report that part of the argument.

The counsel for the appellants stated, that as to whether a condition be *precedent* or *subsequent*, it is always a matter of construction, depending on the intention of the testator. The principle is, that where an intention appears to create an estate at all events, and merely to annex a condition to it, by which it may be defeated, this is a condition *subsequent:* and if followed by a limitation over, in case the condition be not fulfilled, it makes a *conditional limitation.* But if the intent appear to be, that the vesting or creation

1824.

Taylor v. Mason.

of the estate shall depend on the condition, then it is *precedent*.[a] There could be no dispute as to general principles, which were incontrovertibly settled by all the authorities. The only question was, as to the application of them to the particular case. They entered into a critical examination of the words of the last will, to show that the conditions annexed to the estate devised to the oldest male heir of J. T. M., were precedent and not subsequent.

The counsel for the respondents considered the conditions as *subsequent* and not *precedent*; or rather, they considered them as conditional limitations, attached to, and defeating, in each instance, the preceding estate, on refusal to perform the acts required, and thus creating a new estate in tail male. It was said to be laid down by the authorities, that there are no precise technical words required *in a deed, (a fortiori* in a will,) to make a stipulation a condition precedent or subsequent.[b] Neither does it depend on the circumstance, whether the clause was placed prior or posterior in the deed, so that it operated as a proviso or covenant; for the same words have been construed to operate as either the one or the other, according to the nature of the transaction.[c]

a 2 *Cruise Dig.* 3, 4, 5. *Cas. temp. Talb.* 165. 1 *T. R.* 645. 2 *Bos. & Pull.* 295. 2 *Vern.* 620. *Fearne Cont. Rem.* 424, 425. 502. *Coll. Jurid.* 378.

b 1 *Plowd.* 28. 2 *Vern.* 660. *Cas. temp. Talb.* 164. 1 *Burr.* 38. 4 *Burr.* 1929.

c Hotham v. East India Co. 1 *T. R.* 645.

1824.

Taylor v. Mason.

Thus, Lord Eldon says,[a] "I take it to be fully settled, that a condition is to be construed to be precedent or subsequent, as the intention of the testator may require." And Heath, J., in the same case, adds, "It has been truly said, that there are no technical words by which a condition precedent is distinguishable from a condition subsequent; but that each case is to receive its own peculiar construction, according to the intent of the devisor." Now, let that test be applied to the point in question. It is clear that the testator intended the estate for the benefit of the sons of J. T. M., after his death, and successively for the heirs male. If this be a condition precedent, as is contended by the appellants, and the will of 1789 be entirely revoked, the fee will be in the heirs at law, from the death of J. T. M., till the condition be performed, and the rents, issues, and profits, belong to them. Suppose the first heir male an infant of tender years; the rents, &c. do not go to his maintenance and education, nor yet accumulate for his benefit, as was directed, even in the lifetime of his father. Let him die under twenty-two, without having performed the condition, leaving an infant son; that son must take by inheritance, if at all, and not by purchase. Can he take by inheritance from his father, an estate tail that never vested in his father? But suppose he can, there is still another long enjoyment of the estate by the heirs at law, for their own benefit. The appellants seek, by making this a con-

[a] In Planner v. Scudamore, 2 *Bos. & Pul.* 295.

dition precedent, entirely to defeat the testator's bountiful intentions in favour of J. T. M.'s family: for they say, this being a condition precedent, the limitation cannot take effect as a contingent remainder; for then there would be three contingencies, and a possibility on a possibility necessary to its vesting. It is clear, then, that to preserve the testator's primary or general intention, or indeed any part of his intention towards that family, the terms must not be considered as a condition precedent. In a will, no words of condition are too strong to bend to the testator's intention. Thus, "if a man devises a term to A., and that if his wife suffers the devisee to enjoy it for three years, she shall have all his goods as executrix; but if she disturbs A., then he makes B. his executor, and dies; his wife is executrix presently: for though in grants, the estate shall not vest till the condition precedent is performed, *yet it is otherwise in a will*, which must be guided by the intent of the parties; and this shall not be construed as a condition precedent, but only as a condition to abridge the power of the executrix, if she perform it not."[a] Although the conditions over may be void, their existence may be used to illustrate the testator's intention, and to show that this was intended to operate only as a limitation. It was intended that every one having the right, should change his name, and take the oath, before he had possession; "so that no act of intention to defeat his will should be

[a] Jennings v. Gore, *Cro. Eliz.* 219.

1824. Taylor v. Mason.

allowed of." Those, then, taking by inheritance through the first heir male, were to be subject to this condition, and on their refusing, the estate was to go over. It is impossible to contend, that those so taking by inheritance, should be regarded as purchasers, or that, with them, this should be considered as a *condition precedent*: and why should not the same construction of the testator's intention, that must be given with respect to them, be given in the first instance, where the same proviso is used, viz. that it is a conditional limitation, on the refusal to perform which, the antecedent estate is defeated, and a new one arises? Unquestionably the limitation, on refusal to comply, is a conditional limitation. If, then, between such conditional limitation and a condition precedent, bearing on the same object, (let the words be ever so clear,) there be a positive incompatibility, the principle must be applied, that if words be so inconsistent that they cannot possibly stand or be reconciled, those words shall be rejected which are least consistent with the general intention of the testator.[a] The incompatibility between conditions and conditional limitations, results from this: "conditions can only be reserved to the feoffer, donor, lessor, or their heirs, but not to a stranger;" and this by implication, without any words of reservation; and for

[a] 2 *Fonbl. Eq.* c. 3. s. 3. (Note *l.* p. 69.) Haws v. Haws, 3 *Atk.* 524. 1 *Ves.* 14. Perkins v. Bayntum, 1 *Bro. Ch. Cas.* 118. Doe v. Aplyn, 4 *T. R.* 88.

[b] 1 *Co. Litt.* 214 *b.*

1824.

Taylor v. Mason.

every condition broken, the *heir* of the donor shall enter, and by so doing, restore the original estate. So that, except in gavelkind[a] and borough-english,[b] and a husband's alienating his wife's estate on condition,[c] the heir at law enters and holds for his own benefit. This applies to conditions *subsequent*. As to conditions *precedent*, the estate remains in the heir at law, and *never vests* till the performance of the condition, and, during all that time, the heir at law holds it beneficially. But the effect of a conditional limitation is, that the next devisee alone can enter, and he takes and enjoys for his own benefit. Now, it is incompatible, that the heir at law should have the right to hold the estate for his own benefit, and the devisee to hold it for his benefit; and in these incompatible results, the question, which shall prevail, must depend upon which is conformable to the intention of the testator. Thus, it is laid down that "words of an *express condition* shall not ordinarily be construed into a *limitation;* but where an estate is to remain over for breach of a condition, which is by express words a condition, yet it ought to be intended as a limitation."[d] And the contrary doctrine in *Mary Portington's* case,[e] has been often denied to be law.[f]

a Co. *Litt.* 11, 12.
b *Godb.* 8.
c 8 *Co.* 43.
d Page v. Hayward, 11 *Mod.* 61. 2 *Salk.* 578.
e 10 *Co.* 35.
f *Brownl.* 65. *Roll. Abr.* 412. *Ventr.* 200. 3 *Lev.* 132. 2 *Show.* 398. 1 *Bos. & Pull.* 313.

1824.

Taylor v. Mason.

The expression "before he has possession," is much relied on, as showing a condition precedent. But is must, like other equally strong expressions, bend to the testator's general intent, and to the words "who has the right." How "has the right," if obtaining an act of the legislature and changing the name after twenty-one, be a condition precedent? For then no estate can vest, and no right be had, till the condition be performed. So it is said, the will shows the right is not to commence till he has arrived at twenty-one. But the age of twenty-one connects itself, both in sense and grammar, with the act to be done, and not with the vesting of the right. The expression "refusing to comply," and the giving over the estate to others, show the refusal to be the definite act, by which one estate was to be determined, and the other to commence. Thus where similar words were used, "on condition that he should in twelve months after the testator's death, or in twelve months after he attained the age of twenty-one years, suffer a recovery of an estate in the county of Warwick, and settle it to certain uses," they were clearly taken to be a condition subsequent, and not a conditional limitation.[a] Indeed, the words "before he has possession," are susceptible of another interpretation, consistent with the previous vesting of the estate. The testator did not view all possible contingencies accurately. He clearly took for granted that the one to take would be an infant, and meant to make a provision accordingly. He probably used those words to dis-

a Duke of Montague v. Beaulieu, 3 *Bro. Parl. Cas.* 277.

tinguish the time when a guardian would receive the rents, issues and profits, from that when the minor would come into the actual possession of his estate.

The cause was continued for advisement, to the present term.

Mr. Chief Justice MARSHALL delivered the opinion of the Court; and, after stating the case, proceeded as follows: *Feb. 5, 1824.*

If the estate should yield any surplus profits, after satisfying the charges placed on it by the testator, J. T. M. is directed to account for those profits, and they are the property of "the person that may have the right," according to the language of the will.

Are the heirs at law the persons "who have the right," according to this language?

Certainly not. The plain intention of the will is to exclude them. They admit this; and support their claim by alleging that the will, so far as respects the devises which are to take place after the death of J. T. M., is utterly void, the limitations over being too remote.

The first limitation is to "the male heirs of my nephew, J. T. M., lawfully begotten, for ever, agreeably to the law of England;" that is, the oldest male heir to take all.

If the clause stopped here, there could be no question in the case. The person who should be the eldest male heir of J. T. M. at the time of his death, would take the estate. But the testator proceeds to prescribe the "terms" on which such

1824.

Taylor v. Mason.

eldest male heir should take. They are, "that the name of the one that may have the right, at the age of twenty-one, with his consent, be changed to Abraham Barnes, by an act of public authority of the State, without any name added, together with his taking an oath before he has possession;" "that he will not make any change during his life in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the above terms; and all of them refusing to comply in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, if in that time it can be done, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, H. T. M." &c.

The time allowed the eldest male heir of J. T. M. to perform the condition on which his estate would, according to the words of the will, become absolute, is twelve months after he shall attain his age of twenty-one years. As J. T. M. might die, leaving no son alive at his death, but leaving his wife ensient of a son, it is obvious that the contingency on which the estate depended might not happen within a life, or lives, in being, or within twenty-one years and nine months after the death of J. T. M. If, therefore, the estate did not vest until the contingency should happen, the limitation over to the eldest male heir of J. T. M., de-

pends on an event which is too remote to be tolerated by the policy of the law, and the remainder is, consequently, void. If, on the contrary, the estate is to vest on the death of J. T. M., to be devested on the non-performance of the condition, the limitation in remainder is valid, and the plaintiffs are not entitled to the account for which the bill prays.

The inquiry, then, is, whether the conditions annexed to the devise of the remainder, be precedent or subsequent; and this, it is admitted, must be determined by the intention of the testator, which intention is to be searched for in his will.

All the instruments of writing purporting to be his last will, show that his firm and continuing purpose, from the 31st day of October, in the year 1789, to the time of his death, in the year 1804, was to preserve his estate entire for the benefit of a single devisee, and not to permit it to be divided among his heirs. The same papers, likewise, show that the first object of his affection and bounty, was J. T. M.; and the second, was the eldest male heir of J. T. M. An ample and unconditional provision, perhaps equivalent to the whole value of his real estate, is made for J. T. M. during his life; and on his death, the whole real estate, with any residuum of profit which might possibly be accumulated during his life, is given to his eldest male heir. If these devises should be expressed in ambiguous language, this obvious and paramount intention ought to serve as a key to the construction.

The language of the devise in remainder, imports an intention that it should take effect on the

1824.

Taylor v. Mason.

determination of the particular estate. So soon as J. T. M., the first object of his bounty, is removed, the eldest male heir of J. T. M., the second object of his bounty, comes into view: "I give the whole of my property" "to the male heirs of my nephew, J. T. M., lawfully begotten, for ever, agreeable to the law of England; that is, the oldest male heir to take all, on the following terms," &c. These words postpone the interest of the devisee no longer than till he can be ascertained; that is, till the death of J. T. M., who was to occupy the premises for his life. The eldest male heir of J. T. M. would be known at his death, at which time the particular estate which was carved out of this general devise, would determine, or at farthest, within nine months afterwards. The language is not such as a man would be apt to use who contemplated any interval between the particular estate and the remainder. The words import the same intention, as if he had said, I give to the eldest male heir of J. T. M. all my property, on condition that, at the age of twenty-one years, his name be changed to that of Abraham Barnes, by an act of public authority of the State, &c. Such words, it seems to the Court, would carry the estate immediately to the devisee, without waiting for the performance of the condition.

With this general intent, manifested in each of these instruments, and this language, showing the expectation that no interest would intervene between the particular estate devised to J. T. M. and that to his eldest male heir, the conditions on which that devise was made, must be expressed

1824.

Taylor v. Mason.

in language to show very clearly, that they were to be performed before the estate could vest, to justify the Court in putting that construction on this will.

Let that language be examined. The devise is of the whole property to the male heirs of J. T. M., in succession, the eldest to take first. The condition is to be performed by "the one that may have the right." In the mind of the testator, then, the right was to precede the condition, not be created by it. He would not have described the person who was to perform the condition, as already having "the right," if the impression on his mind had been, that no person would have the right until the condition should be performed.

This expression is entitled to the more influence, from the consideration that the condition is to be performed by the person having the right at the age of twenty-one, or in a convenient time afterwards. The devisee might be an infant at the time of the death of J. T. M. The person who has the right, if an infant, is allowed till he attains his age of twenty-one years, and a reasonable time afterwards, to perform the condition. This is inconsistent with the idea that the condition must be performed before the estate vested, before the right accrued.

The testator then directs, in addition to the change of name, that an oath, prescribed in his will, shall be taken, and then proceeds, "and on his (the person that may have the right) refusing

1824. to comply with the above mentioned terms, to the next male heir on the same terms."

Taylor v. Mason.

The property is, in the first instance, devised to all the male heirs of J. T. M., the oldest to take first. The testator then proceeds to describe the state of things in which the next oldest is to take. That state of things *is* the *refusal* of the oldest to comply with the terms annexed to the estate given to him. Upon this refusal, the devise is immediate. No intervention of the heir at law is necessary to defeat the title of the oldest, and to vest the property in the next male heir. But, until this refusal, the rights of the oldest remain unchanged.

Although the words "refusing to comply," may, in general, have the same operation in law as the words "failing to comply" would have; yet, in this case, they are accompanied and explained by other words, which show that the word "refusing" was used in a sense which might leave the estate in the devisee, though his name should not be changed. Where the condition to be performed depends on the will of the devisee, his failure to perform it is equivalent to a refusal. But where the condition does not depend on his will, but on the will of those over whom he can have no control, there is a manifest distinction between "refusing," and "failing" to comply with it. The first is an act of the will, the second may be an act of inevitable necessity.

In this case, the name is to be changed by a legislative act. Now the eldest male heir of J. T. M. may petition for this act, but the Legisla-

ture may refuse to pass it. In such a case, the devisee would not "refuse" to comply with the terms on which the estate was given to him; those terms would neither be literally nor substantially violated. If there were nothing in the words of the will to give additional strength to this construction, the refusal of the Legislature to pass the act would not be a refusal of the devisee to comply with the terms, and would seem in reason to dispense with the condition, as effectually as the passage of an act to render the condition illegal. Its performance would be impossible, without any default of the devisee.

But there are other words which show conclusively that the testator intended, by this expression, to make the devise to the next and other devisees to depend entirely on a wilful and voluntary disregard, on the part of the eldest, of the terms on which the property was devised to him.

After giving the estate to the male heirs of J. T. M., in succession, the testator proceeds, "And all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say not exceeding twelve months, *if in that time it can be done, so that no act of intention to defeat my will shall be allowed of,* and of their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, H. T. M.," &c.

These words expressly refer to all the male heirs of J. T. M., including the oldest, apply to each particular devise, and fully explain the intention of the testator on the subject of the change of

1824.

Taylor v. Mason.

name. It is to be changed in twelve months after the devisee attains his age of twenty-one years, "if in that time it can be done;" and this provision is made, that "no act of intention to defeat his will may be allowed of." The devise over is on "refusing" to comply with the terms on which the estate is given in the first instance, and this "refusing to comply," takes place only "if it can be done"—exists only where there is "an act of intention to defeat his will." If it "cannot be done," if there be "no act of intention to defeat his will," then there is not that "refusing to comply with the terms" on which the devise over is to take place.

All these provisions appear to the Court to demonstrate that the testator intended the devise to take effect immediately, to be defeated by the devisee's refusing to comply with the terms on which the property was given.

The devisees are, all of them, the coheirs of the testator, and the whole purpose of the will is to prevent their inheriting any part of his estate as his heirs. J. T. M. takes an interest for life, beneficially, to a considerable extent, perhaps to the whole extent of the profits, certainly to the whole extent, if he chooses to expend the whole, except 1600 dollars per annum, in repairs, buildings, and the support of himself and family; and is to take the surplus profits, if there be any, as trustee: but as trustee for whom? For his eldest male heir, not for the heirs of his testator.

That eldest male heir takes the whole property, including these possible surplus profits, on

1824.

Taylor v. Mason.

certain conditions, one of which is, the change of his name by act of Assembly. He might possibly, nay probably, be an infant, for J. T. M. had no male heir at the death of the testator. The event of his being an infant is particularly contemplated, and provided for, in the will. Such infant devisee is allowed twelve months, after attaining his full age, to perform the condition. No provision whatever, if the estate does not vest immediately, is made for his education and maintenance. Not even these surplus profits, which are so carefully to accumulate for his use, are given to him. The infant orphan, heir of an enormous estate, who was the particular favourite, and whose future grandeur constituted the pride of his ancestor, is cast, by this construction, on the world, without the means of subsistence, while the whole profits of his estate pass, without account, to those for whom the testator intended nothing.

The estate is devised, in succession, to each of the heirs of the testator, on the same condition; and, if it be a condition precedent, the consequence is, that the same persons who could not take it in succession, as he wished it to pass, would take it in common, as he wished it not to pass. The whole scheme of the will would be defeated, and an object be effected, which all his ingenuity had been exerted to prevent.

In this view of the case, it may be proper again to observe, that the devise over to the second male heir of J. T. M., is limited to take effect on the refusal of the oldest to perform the terms on which the estate is given to him. This must be a volun-

1824.

Taylor v. Mason.

tary refusal, an "act of intention to defeat his will." Now, a failure to perform the condition may take place, although the devisee may have used his utmost endeavours to perform it: the Legislature may refuse to pass the act required.

If it be a condition precedent, the estate, in that event, can never vest, and the whole intention of the testator may be defeated, without the fault of the devisee. But the will was framed with very different views. The testator declares, that each devise over is to take effect on the previous devisee's "refusing" to comply with the terms on which the devise was made to him; on his obtaining the act of Assembly, "if it can be done;" on there being no "act of intention to defeat his will." This construction would make the devise to depend on the will of the Legislature, although the testator declares that it shall depend on the devisee himself.

To take the oath not to make any alteration in the will, so far as respects the real property, is completely within the power of the devisee, and this is directed to be taken "before he has possession." This direction shows the opinion of the testator, that the estate vested immediately, otherwise there could be no necessity for the clause suspending the possession. It would be a very useless declaration, to say, that the devisee should not take possession of an estate to which he had no right. This assists, too, in marking more clearly the distinction taken by the testator, between a condition annexed to the estate, which was in the power of the devisee, and one not in his power. The pos-

session is not postponed until he shall obtain an act of the Legislature for the change of his name, but is postponed until he shall take the oath directed by the will.

1824.

Taylor v. Mason.

In the case of *Gulliver v. Ashby*, (4 *Burr.* 1929.) William Wykes devised his estate to several persons in succession, after the death of his wife, and added the following clause: "Provided always, and this devise is expressly on this condition, that whenever it shall happen that the said mansion house, and said estates, after my wife's decease, shall descend or come to any of the persons herein before named, [that] the person or persons to whom the same shall, from time to time, descend or come, [that he or they] do or shall then change their surname, and take upon them and their heirs the surname of Wykes only, and not otherwise."

In giving his opinion on this case, Lord Mansfield said, "First, that this is not a condition precedent. It can not be complied with instantly. It is 'to take the name for themselves and their heirs.' Now, many acts are to be done in order to oblige the heirs to take it, such as a grant from the King, or an act of Parliament. It is not, therefore, a condition precedent, but, being penned as a condition, it must be a condition subsequent."

All the Judges concurred in the opinion, that it was not a condition precedent. Mr. Justice Yates thought it no more than a recommendation. The other Judges considered it as a condition subsequent.

To the reason given by Lord Mansfield, for

1824.

Taylor v. Mason.

considering the conditions on which the testator, in the case in Burrow, devised his estates, as conditions subsequent, are superadded, in the case at the bar, others of great weight, which have been mentioned and relied on.

The case put at the bar, that the eldest male heir of J. T. M. might die within twelve months after attaining his age of twenty-one years, leaving an infant son, deserves serious consideration. If the estate vested in the ancestor, it would descend to him. If the condition be precedent, the estate did not vest, and cannot descend to him. This would be contrary to the general spirit of the will.

If the change of name constituted the whole condition of the devise, the proofs furnished by the will of its being a condition subsequent, are so strong as to dispel all reasonable doubt. But there is another condition, respecting which the intention is less obvious.

The person "that may have the right" is to procure an act of Assembly for the change of his name, "together with his taking an oath, before he has possession, before a magistrate," &c. "that he will not make any change during his life in this my will, relative to my real property."

It has been truly said, that this condition is against law, is repugnant to the nature of the estate, and consequently void. But if this be a condition precedent, its being void will not benefit the devisee. It becomes necessary to inquire, therefore, whether this also be a condition subsequent, or must be performed before the estate can vest.

1824.

Taylor v. Mason.

In making the devise, the testator uses the words, "I give the whole of my property." Immediately afterwards, he describes the person who is to perform the conditions on which the property is given, as "the one that may have the right;" and, after directing the change of name, adds, "together with his taking an oath, *before he has possession*, before a magistrate of St. Mary's county," &c.

The person who "has the right," is to take the oath "before he has possession." Title then is distinguished from possession. The most attentive perusal of the will furnishes no reason for the opinion that the testator has confounded possession with title. All those parts of the will which respect change of name, dispose of the whole property, and dispose of it in such terms as to show, we think, a clear intention that the right should vest in the devisee on the death of J. T. M., to be defeated on the non-performance of the condition annexed to the estate. The change of language, and the adoption of the word "possession," indicate very strongly that the word was used in its popular sense, to denote the taking actual and corporal possession of an estate. The testator was contemplating the event of an infant becoming entitled to his property, and providing for that event. Such infant was, within twelve months after attaining his age of twenty-one years, "if in that time it could be done," to obtain an act of the Legislature for the change of his name; and moreover to take the oath prescribed, "before he has possession;" alluding, we think, clearly, to that possession which an infant devisee takes of

1824.

Taylor v. Mason.

his estate, when he attains his majority. A different construction would make this devise repugnant to itself. It would make the devise to depend on two conditions, to be performed at the same time, and yet the one to precede the vesting of the estate, and the other to be capable of being performed more than twenty years after it had vested. The word possession cannot be construed as equivalent to right, for the purpose of producing such consequences as these.

After disposing of his estate in fee tail, the testator proceeds to carve out a particular estate for his favourite nephew, J. T. M.; and it is not entirely unworthy of notice, that he continues the use of the word "possession," with the obvious intent to affix to it the meaning of simple occupancy. It is impossible to read these wills, without perceiving a continuing and uninterrupted desire to bestow his whole estate on J. T. M. and his family. The first will gives him the estate absolutely. His desire to preserve it in mass, and to connect it with his name, increased with his age; and his second will gives his estate to J. T. M. for life, remainder to his eldest son in tail male, remainder to the heirs of J. T. M., the oldest to take all, on condition of their changing their surname to that of Barnes. The last will contains intrinsic evidence that, preserving the same intention with respect to his estate, he had been alarmed by the suggestion that the remainder in tail to the heirs of J. T. M. might coalesce with his life estate, and, vesting in him, might enable him to break the entail and divide the estate. To re-

1824.

Taylor v. Mason.

concile his kindness to J. T. M. with his pride, he endeavours to give his nephew the advantages of an estate for life, in such form as to leave him no power over the fee. It is not unworthy of remark, that in endeavouring to accomplish this object, he continues the use of the word "possession." My will is, he says, "that he (J. T. M.) shall keep the whole of my property in his possession during his life, with full power," &c. Whether the legal effect of this clause be the same with an express devise to J. T. M. for life, remainder to his heirs in tail, is unimportant with respect to the present inquiry. It shows the intention of the testator, and the sense in which he used the word. It shows that he distinguished between possession and title.

The Court is of opinion, that were the paper which is supposed to have been executed in 1803 to be considered as constituting singly the will of Richard Barnes, and were it to be admitted, that an estate tail did not vest in J. T. M., still the conditions annexed to the estate devised to his oldest heir male are subsequent, and not precedent; and, consequently, the contingency on which the devise is to take effect is not too remote. This opinion renders it unnecessary to decide the questions, so elaborately discussed at the bar, whether the last will revoked those which preceded it, and whether an estate tail is vested in J. T. M. It would be improper to decide those questions at this time, because persons may be interested in them who are not now before the Court.

Decree affirmed.

1824.

M'Creery v. Somerville.

[DESCENT. ALIEN.]

M'CREERY'S lessee v. SOMERVILLE.

The statute of 11 and 12 Wm. III. c. 6., which is in force in Maryland, removes the common law disability of claiming title through an *alien ancestor*, but does not apply to a *living alien ancestor*, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject or citizen.

Thus, where A. died seised of lands in Maryland, leaving no heirs, except B., a brother, who was an alien, and had never been naturalized as a citizen of the United States, and three nieces, the daughters of the said B., who were native citizens of the United States: it was *held*, that they could not claim title by inheritance, through B., their father, he being an alien, and still living.

ERROR to the Circuit Court of Maryland.

The case agreed, stated, that William M'Creery was seised and possessed of a tract of land in Baltimore county, in the State of Maryland, called Clover Hill, and died possessed thereof about the 1st of March, 1814. He had previously executed an instrument of writing, purporting to be his last will and testament, by which he devised the above tract of land to those under whom the defendant, Somerville, claimed; but it was witnessed by two persons only, and was, therefore, inoperative to pass lands in Maryland, the laws of which require three witnesses to a will for that purpose. W. M'Creery left at his death no children, but a brother, Ralph M'Creery, a native of Ireland, who is still living, and who has not been naturalized, and three nieces, Letitia Barwell, Jane M'Creery, and Isabella M'Creery, the latter being the lessor of the plaintiff, who are the daughters of the said Ralph, and native born citizens of the United States.

1824.

M'Creery v. Somerville.

The devisees under the will applied by petition to the Legislature of Maryland to confirm the will, and the Legislature, accordingly, without the knowledge or consent of the lessor of the plaintiff, passed an act for that purpose; saving, nevertheless, the rights of all persons claiming title to the lands devised, by conveyance from any of the heirs of W. M'Creery. The action was brought to recover an undivided third part of Clover Hill.

Upon this case, judgment was rendered by the Court below for the defendant, and the cause was brought by writ of error to this Court.

March 14th, 1823.

The cause was argued by Mr. *Winder*,[a] for the plaintiff in error, and by Mr. *D. B. Ogden*, for the defendant, and continued to the present term for advisement.

Feb. 3d, 1824.

Mr. Justice STORY delivered the opinion of the Court.

The title of the lessor of the plaintiff to recover in this case, depends upon the question, whether she can claim as one of the coheirs of her deceased uncle, her father being an alien, and alive at the commencement of the present suit. It is perfectly clear that, at common law, her title is invalid, for no person can claim lands by descent through an alien, since he has no inheritable blood. But the statute of 11 and 12 Wm. III. ch. 6. is ad-

[a] He cited *Co. Litt.* 3 *b.* 1 *Sidif.* 193. 2 *Bl. Com.* 226. 249, 250. 257. *Bac. Abr. Alien*, C. 132. 4 *Wheat. Rep.* 453. 2 *Mass. Rep.* 179.

1824.

M'Creery v. Somerville.

mitted to be in force in Maryland; and that statute, beyond all controversy, removes the disability of claiming title by descent, through an *alien* ancestor. The only point, therefore, is, whether the statute applies to the case of a *living alien* ancestor, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject.

We have not been able to find any case in England, in which this question has been presented for judicial decision. In the case of *Palmer v. Downer*, (*2 Mass. Rep.* 179.) in the State of Massachusetts, the facts brought it directly before the Court, but it does not appear to have attracted any particular attention, either from the Bar or the Bench. It may, then, be considered as a question of new impression, and is to be settled by ascertaining the true construction of the statute of William.

That act is entitled, "An act to enable his majesty's natural born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father or mother were aliens." The title is not unimportant, and manifests an intention merely to remove the disability of alienage. It proceeds to enact, "that all and every person or persons, being the King's natural born subject or subjects, within any of the king's realms or dominions, should and might, thereafter, inherit and be inheritable, as heir or heirs, to any honours, &c. lands, &c. and make their pedigrees and titles, by descent, from any of their ancestors, lineal or collateral, although the father and mother, or father or mother, or other ances-

tor, of such person or persons, by, from, through, or under whom he, she, or they should or might make or derive their title or pedigree, were, or was, or should be, born out of the King's allegiance, and out of his majesty's realms and dominions, as freely, fully, and effectually, to all intents and purposes, *as if such father and mother, or father or mother, or other ancestor or ancestors*, by, from, through, or under whom he, she, or they should or might make or derive their title or pedigree, *had been naturalized, or natural born subjects.*" In construing this enactment, it ought not to escape observation, that the language is precisely such as Parliament might have used, if the intention were confined to the mere removal of the disability of alienage. It declares, that persons might lawfully inherit and be inheritable, *as heirs*, and make their titles and pedigrees, by descent, from any of *their* ancestors, *although* their parents were born out of the realm; plainly supposing that they might take *as heirs* by descent, but for the circumstance of the alienage of the intermediate ancestors, through whom they must claim. It speaks of such intermediate ancestors, as persons who were or should be born out of the realm, and it enables the party to take, as heir, as effectually *as if such ancestors had been natural born subjects.* Now, this language imports no more than a removal of the defect, for want of inheritable blood. It does not, in terms, create a right of heirship, where the common law, independently of alienage, prohibits it; it puts the party in the same situation, and none

1824.

M'Creery v. Somerville.

other, that he would be in, if his parents were not aliens. If his parents were natural born subjects, and capable to take as heirs of the deceased ancestor, it is clear that he could not inherit by descent through them, as they would intercept the title, as nearer heirs. The only cases in which he could inherit, living his parents, are those where the common law has prohibited the parents from taking, although they have inheritable blood. Such are the cases of a descent from brother to brother, and from a nephew to an uncle, where the common law has disabled the parents of the deceased brother or nephew from taking the estate by descent, upon the ground that inheritances cannot lineally ascend. (2 *Bl. Comm.* 208. 212. *and Christian's Note.*) If the Legislature had intended, not only to create inheritable blood, but also to create absolute heirship, some explanatory language would have been used. The statute would have declared, not only that the party should make title by descent, in the same manner as if his parents were natural born subjects, but that he should be deemed the heir, whether his parents were living or dead. No such explanation is given or hinted at; and if we are to insert it, it is by expounding the language beyond its obvious meaning and limitations. We do not feel at liberty to adopt this mode of interpretation, in a case where no legislative intention can be fairly inferred, beyond the ordinary import of the words.

This construction is not impugned by the explanatory act, afterwards passed in 25 Geo. II.

1824.

M'Creery v. Somerville.

ch. 39. It seems that inconveniences were apprehended, in case persons should be held by the statute of William, to gain a future capacity to inherit, who did not exist at the death of the persons last seised. The statute of Geo. II., therefore, after reciting the act of William, declares, that it shall not be construed to give any right or title to any persons to inherit as heirs, &c. by enabling any such persons to claim, or derive their pedigree, through any alien ancestor, unless the persons so claiming "were, or shall be, in being, and *capable to take the same estate as heir or heirs*, &c. by virtue of the said statute, at the death of the person who shall last die seised," and to whom they shall claim to be heir or heirs. Then follows a proviso, "that in case the person or persons who shall be in being, and capable to take, at the death of the ancestor, so dying seised, &c. and upon whom the descent shall be cast, by virtue of this act, or of the said recited act, shall happen to be a daughter or daughters of an alien, and that the alien father or mother, through whom such descent shall be derived by such daughter or daughters, shall afterwards have a son born within any of his majesty's realms or dominions, the descent, so cast upon such daughter or daughters, shall be devested in favour of such son; and *such son shall inherit and take the estate, in like manner as is allowed by the common law of this realm, in cases of the birth of a nearer heir.*" Then follows a provision for the case of the subsequent birth of a daughter, who is enabled to take as a coheir with the other

1824.

M'Creery v. Somerville.

daughters. It has been argued that this proviso includes the cases of all children born after the descent cast in the lifetime of their alien parents, and, therefore, supposes the descent may be cast, notwithstanding their parents are living. Admitting this to be the true construction of the proviso, and that it is not restrained to posthumous children, the case of the plaintiff is not aided by it; for the clause, that the son shall take, in like manner as is allowed by the common law, in cases of the birth of a nearer heir, shows that Parliament had in view cases where the children might, at common law, take as heirs, although their parents were living; and yet the common law devested the title, so cast by descent, upon the birth of a nearer heir. For instance, if lands are given to a son, who dies, leaving a sister his heir, if the parents have, at any distance of time afterwards, another son, the common law devests the descent upon the sister in favour of such son, and he is entitled to take the estate as heir to his brother. (2 *Bl. Comm.* 208. *Christian's Note.* 5 *Co. Litt.* 11. *Doct. & Stud.* 1 *Dialog. c.* 7.) We think, then, that this proviso does not shake the construction, already given by us, to the statute of William. For, here, the case of after born children is expressly provided for, which would otherwise be excluded by the declaratory clause of the statute; and if it was contemplated that the act of William created a new title, by heirship, independently of alienage in the parents, beyond the rules of the common law, the natural presumption is, that the declaratory clause would

in some manner, have expressed that intention. So far from affirming a new title, by heirship, it asserts that the true construction of that statute excludes all persons who were not in being at the time of the descent cast, and then "capable to take the estate as heir or heirs, &c. by virtue of the said statute of William;" and we have already seen, that the terms of that statute give no other capacity than would exist if the parents were natural born subjects. The exception, then, of after born children, out of the declaratory clause of the act of George II., carries no implication that the Legislature was dealing with any other cases except those where, if the alien parents were living at the time of the descent cast, the children were capable of taking, as heirs at common law, in their own right, independently of the alienage. Mr. Justice Blackstone, in his learned Commentaries, (2 *Bl. Comm.* 251.) gives no explanation of these statutes, which extends them beyond such cases; and his omission to notice the larger construction, now contended for by the plaintiff, would be somewhat remarkable, if that had been deemed the true interpretation of the statutes.

In the absence of all authority, we do not feel ourselves at liberty to derogate from the general doctrine of the common law as to descents, by incorporating into the statute of William a case which is not within its terms, and is not called for by any clear legislative policy.

Judgment affirmed, with costs.

1824.

The Apollon.

[Instance Court.]

The Apollon, *Edon, Claimant.*

A decree of acquittal, on a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other Court, that there was no justifiable cause of seizure.

The French Tonnage Duty Act of the 15th of May, 1820, c. 135., inflicts no forfeiture of the vessel for the non-payment of the tonnage duty. The duty is collectable in the same manner as by the Collection Act of 1799, c. 128.

The 29th section of the Collection Act of 1799, c. 128., does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory.

The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens.

A seizure for the breach of the municipal laws of one nation, cannot be made within the territory of another.

It seems that the right of visitation and search, for enforcing the revenue laws of a nation, may be exercised beyond the territorial jurisdiction, upon the high seas, and on vessels belonging to such nation, or bound to its ports.

A municipal seizure cannot be justified or excused, upon the ground of probable cause, unless under the special provisions of some statute.

The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts.

Where the property is restored, after a detention, demurrage is allowed for the detention of the ship, and interest upon the value of the cargo.

Where the vessel and cargo have been sold, the gross amount of the sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances.

Counsel fees may be allowed, either as damages or costs, both on the Instance and Prize side of the Court.

1824.

The Apollon.

THE cause was argued by the *Attorney-General*,[a] for the respondent, and by Mr. *Harper* and Mr. *Clay*,[b] for the appellant. *March 13th.*

Mr. Justice STORY delivered the opinion of the Court. *March 17th.*

This is a libel, brought by the master of the French ship Apollon, against the Collector of the District of St. Mary's, for damages occasioned by an asserted illegal seizure of the ship and cargo, by the respondent, while she was lying in Belle river, a branch of the St Mary's, within the acknowledged territories of the King of Spain.

There is no dispute as to the national character of the ship. It appears that she sailed from France, bound to Charleston, in South Carolina; but as apprehensions were then entertained, that the proposed tonnage duty on French vessels might be passed by Congress, an alternative destination was given to her for a Spanish port, the object of the voyage being to land her cargo in the United States, and to take a return cargo of cotton to France. The cargo was partly owned by French subjects, and partly by a Mr. Le Maitre, a domici-

a He cited Church v. Hubbart, 2 *Cranch*, 187. 234. Locke v. U. S., 7 *Cranch*, 339. 1 *Mass. Rep.* 27. 1 *Gall. Rep.* 111. 315. 5 *Cranch*, 311.

b They cited 2 *Cranch*, 122. 3 *Cranch*, 490. 3 *Dall.* 335. 3 *Rob.* 208. 5 *Rob.* 43. 4 *Rob.* 72. 1 *Gall. Rep.* 427. 3 *Wheat. Rep.* 559. 3 *Dall.* 133. 1 *Rob.* 241.

1824.

The Apollon.

led merchant at Charleston, who was also the consignee. Upon her arrival off the port of Charleston, the master ascertained, that the French tonnage duty act had passed, (act of 15th of May, 1820, ch. 125.) and, therefore, declined entering the port. He had on board some specie belonging to the Bank of the United States, which, by the permission of the collector, was brought on shore by the revenue cutter. Having obtained information from the collector, that Amelia Island was not deemed an American territory, he sailed for that place, under the direction of the consignee; and there the ship lay for a considerable time, while the master proceeded to St. Augustine, a distance of about eighty miles, where he entered his ship and cargo, and paid the regular duties required by the Spanish authorities. While at this port, he ascertained, that the local authorities had it in contemplation to establish a new port of entry, to be called St. Joseph's, on Belle river, within the Spanish territory, and to appoint officers of the customs to reside there. The unquestionable object of this establishment, as disclosed in some correspondence between the immediate agents, which is inserted in the transcript, was to have a convenient depot, for the purpose of carrying on an illicit trade, in fraud of the revenue and navigation laws of the United States. Indeed, it is manifest, that there could be no other object, for there was no commercial population in the neighbourhood whose wants were to be supplied in the regular course of commerce. Of this object, perhaps, Captain Edon was not ignorant; but he

1824.

The Apollon.

does not appear to have participated in any of the schemes connected with it. His own avowed object was, to transship his cargo into the United States, and to receive from thence a cargo of cotton, without subjecting himself to the payment of the French tonnage duty. Part of the cargo was sold at St. Augustine, probably to pay duties and charges; and upon Captain Edon's return to Amelia Island, under the advice and instructions of the Spanish officers of the customs, he removed his vessel from Amelia Island up Belle river, about six or eight miles; and after having lain at anchor near St. Joseph's for eighteen days, the ship with her cargo was there seized by the collector of St. Mary's, and carried to the latter port for adjudication. Admiralty proceedings were instituted by the attorney for the United States, in the District Court of Georgia, to subject the ship to the payment of the tonnage duty, and the cargo to forfeiture; but upon the hearing of the cause, the Court awarded a decree of restitution of the ship and cargo. From this decree the Government interposed an appeal, but the appeal was finally abandoned before any hearing in the appellate Court. In the mean time the present libel for damages was instituted, and some difficulty arose as to the propriety of entertaining it during the pendency of the other suit, because in that suit it was competent for the Court to award damages, if the seizure was without reasonable cause. The objection was well founded; but it was withdrawn, from the anxious desire of the Government to have the cause speedily adjudged in the proper tribunal, upon

1824. the substantial merits. Upon the hearing of this cause, the District Court pronounced a decree for damages, from which an appeal was taken to the Circuit Court; and from the decree of the Circuit Court, confirming the decree of the District Court, with an addition of thirty-three and a third per cent. to all demurrage allowed by the latter, the present appeal was taken, and the cause now stands for a final decision.

The Apollon.

The questions arising upon the record, have been argued with great zeal and ability, and embrace some considerations, which belong more properly to another department of the government. It cannot, however, escape observation, that this Court has a plain path of duty marked out for it, and that is, to administer the law as it finds it. We cannot enter into political considerations, on points of national policy, or the authority of the government to defend its own rights against the frauds meditated by foreigners against our revenue system, through the instrumentality and protection of a foreign sovereignty. Whatever may be the rights of the government, upon principles of the law of nations, to redress wrongs of this nature, and whatever the powers of Congress to pass suitable laws to cure any defects in the present system, our duty lies in a more narrow compass; and we must administer the laws as they exist, without straining them to reach public mischiefs, which they were never designed to remedy. It may be fit and proper for the government, in the exercise of the high discretion confided to the executive, for great public purposes,

to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws. Such measures are properly matters of state, and if the responsibility is taken, under justifiable circumstances, the Legislature will doubtless apply a proper indemnity. But this Court can only look to the questions, whether the laws have been violated; and if they were, justice demands, that the injured party should receive a suitable redress.

Effect of a decree of acquittal as a *res adjudicata*.

The first question is, whether there was a justifiable cause of seizure. This question has been already decided in the proceedings *in rem*, and the decree of acquittal, not having been appealed from with effect, is conclusive evidence in every inquiry before every other tribunal, that there was no such cause. This point was decided upon great consideration, in the case of *Gelston v. Hoyt*, (3 *Wheat. Rep.* 246.) and is not believed to be susceptible of any legal doubt. In the present case, however, as the parties have been induced to waive objections to this libel, for damages pending the former suit, upon the supposition, that the same questions might be as open here as there, it may not be amiss to examine the ground upon which the right of seizure is now attempted to be maintained. As to any forfeiture, or supposed forfeiture, under the act of 1820, ch. 125. it is very clear, that it cannot be maintained. That act simply authorizes a tonnage duty of eighteen dollars per ton, to be collected on all French ships, which shall be entered in the United States,

1824.

The Apollon.

and provides for the collection of the duty, in the same manner as tonnage duties are to be collected by the collection act of 1799, ch. 128.; but this act inflicts no forfeiture for the non-payment of the tonnage duty, nor did the libel *in rem* even affect to proceed for any such forfeiture. The consideration of this act may then be at once dismissed. But the 29th section of the collection act of 1799, is supposed to contain a direct authority for the seizure. That section provides, "that if any ship or vessel, which shall have arrived within the limits of any district of the United States, from any foreign port or place, shall depart, or attempt to depart from the same, unless to proceed on her way to some interior district, to which she may be bound, before report or entry shall have been made by the master, &c. with the collector of some district of the United States, the master, &c. shall forfeit and pay the sum of 400 dollars; and it shall be lawful for any collector, &c. to arrest and bring back, or cause to be arrested and brought back, such ship or vessel, to such port of the United States, to which it may be most conveniently done." It is observable, that no forfeiture is here inflicted upon the vessel or cargo; but the penalty is personal upon the master. There was no pretence, then, to institute proceedings in the District Court, *in rem*, for the forfeiture, and the delay occasioned by such proceedings was clearly unjustifiable; in fact, the giroinal libel did not proceed for any forfeiture, except against the cargo. But it is said, that the arrest and bringing into port was justifiable, be-

1824.

The Apollon.

cause the ship had entered the district of St. Mary's, and had departed therefrom, without making any report or entry. The district of St. Mary's, by law, comprehends "all the waters, shores, harbours, rivers, creeks, bays, and inlets, from the south point of Jekyl Island, exclusive, to St. Mary's river, inclusive." St. Mary's river formed, at this period, the boundary between the United States and the Spanish territory, the boundary line, by the treaty of 1795, running through the middle thereof, in its whole course to the Atlantic ocean. The only access from the ocean to the Spanish waters running into the St. Mary's, as well as to the adjacent Spanish territories, was through this river. So that, upon the general principles of the law of nations, the waters of the whole river must be considered as common to both nations, for all purposes of navigation, as a common highway, necessary for the advantageous use of its own territorial rights and possessions. There is no doubt, that the Apollon did not enter the St. Mary's for the purpose of going into any American port, for trade or intercourse. Her avowed destination was for the Spanish waters and Spanish territories; and she never anchored in the St. Mary's, except upon the Spanish side of the river. Her proceeding up Belle river, was still more decisive of this intention. Under such circumstances, the question arises, whether a mere transit through the waters of the St. Mary's, for the purpose of proceeding to the Spanish territory, is to be deemed an arrival within the limits of the United States from a foreign port, within the sense of the 29th section

1824.

The Apollon.

of the act already referred to. We are decidedly of opinion, that it cannot be so considered. The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction. And, however general and comprehensive the phrases used in our municipal laws may be, they must always be restricted in construction, to places and persons, upon whom the Legislature have authority and jurisdiction. In the present case, Spain had an equal authority with the United States over the river St. Mary's. The attempt to compel an entry of vessels, destined through those waters to Spanish territories, would be an usurpation of exclusive jurisdiction over all the navigation of the river. If our government had a right to compel the entry at our custom house, of a French ship, in her transit, the same right existed to compel the entry of a Spanish ship. Such a pretension was never asserted; and it would be an unjust interpretation of our laws, to give them a meaning so much at variance with the independence and sovereignty of foreign nations. The true exposition of the 29th section is, that it means to compel an entry of all vessels coming into our waters, being bound to our ports; and the very exception of vessels bound to some interior district, demonstrates the sense of the Legislature, by indicating the entire stress laid upon the destination of the vessel. But, even supposing, for a moment, that our laws had required an entry of the Apollon, in her transit, does it fol-

low, that the power to arrest her was meant to be given, after she had passed into the exclusive territory of a foreign nation? We think not. It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories, for the purpose of seizing vessels which had offended against our laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations. The arrest of the offending vessel must, therefore, be restrained to places where our jurisdiction is complete, to our own waters, or to the ocean, the common highway of all nations. It is said, that there is a revenue jurisdiction, which is distinct from the ordinary maritime jurisdiction over waters within the range of a common shot from our shores. And the provisions in the collection act of 1799, which authorize a visitation of vessels within four leagues of our coasts, are referred to in proof of the assertion. But where is that right of visitation to be exercised? In a foreign territory, in the exclusive jurisdiction of another sovereign? Certainly not; for the very terms of the act confine it to the ocean, where all nations have a common right, and exercise a common sovereignty. And over what vessels is this right of visitation to be exercised? By the very words of the act, over our own vessels, and over foreign vessels bound to our ports, and over no others. To have gone beyond this, would have been an usurpation of exclusive sovereignty on the ocean, and an exercise of an universal right of search, a right which has never yet been acknowledged by

1824.

The Apollon.

other nations, and would be resisted by none with more pertinacity than by the American. Assuming, then, the distinction to be founded in law, it is inapplicable to a case where the visitation and arrest have been in a foreign territory. It appears to us, then, that the Apollon was not bound to make entry at our custom house; and that the arrest was, under the circumstances, wholly without justification under our laws.

The next question, which has been argued at the bar, is, whether there was, in this case, probable cause of seizure. The most that can, with correctness, be argued on this point, is, that there was probable cause to arrest the vessel, under the 29th section of the collection act; but neither that section, nor any other law, authorized a seizure as for a forfeiture in this case, much less a prosecution *in rem*, to enforce a forfeiture; and so indeed the original libel *in rem* considered the case. But before adverting to the facts urged in support of the suggestion of probable cause, it may not be improper to consider, how far the existence of probable cause can be inquired into, or constitutes matter of defence in a suit like the present. Some obscurity arose at the argument, from not distinguishing between the effect of probable cause in cases of capture *jure belli*, and the effect in cases of municipal seizures. In respect to the former, no principle is better settled in the law of prize, than the rule that probable cause will not merely excuse, but even, in some cases, justify a capture. If there be probable cause, the captors are entitled, as of right, to an exemption from damages; and if

Effect of probable cause of seizure in municipal cases.

the case be of strong and vehement suspicion, or requires further proof to entitle the claimant to restitution, the law of prize proceeds yet farther, and gives the captors their costs and expenses in proceeding to adjudication. But the case is far different in respect to municipal seizures. Probable cause has never been supposed to excuse any seizure, except where some statute creates and defines the exemption from damages. The party who seizes, seizes at his peril; if condemnation follows, he is justified; if an acquittal, then he must refund in damages for the marine tort, unless he can shelter himself behind the protection of some statute. The very act under which the present seizure is sought to be justified, contains an express provision on the subject, and shows the clear opinion of the Legislature. It declares, in the 89th section, "that when any prosecution shall be commenced, on account of the seizure of any ship or vessel, goods, &c., and judgment shall be given for the claimant, &c., if it shall appear to the Court, before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said Court shall cause a proper certificate, or entry, to be made thereof; and in such case, the claimant, &c. shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure or prosecution." By a subsequent act, (act of the 24th of February, 1807, ch. 74.) the like provision is extended to all seizures "under any act of Congress authorizing such seizures." It is apparent, from

1824.

The Apollon.

the very language of this clause, that unless the certificate be obtained in the manner prescribed by the law, the seizing officer is liable to a suit for damages. And it was adjudged by this Court, in the case of *Gelston v. Hoyt*, (3 *Wheat. Rep.* 246.) that the denial of such certificate was conclusive evidence that there was no probable cause of seizure. No certificate was given upon the original libel instituted against the Apollon and cargo, and restitution having been decreed without it, it follows, of course, that probable cause can, in point of law, form no excuse against damages in this case. It is true, that if vindictive damages were sought, the circumstances of suspicion might properly go in mitigation; but where, as in the present case, compensation only is sought, the inquiry into the existence of such probable cause, can have no legal operation upon the merits of the controversy.

Whether there was probable cause of seizure in the present case.

But how stands the fact as to the existence of probable cause? It has been very justly observed at the bar, that the Court is bound to take notice of public facts and geographical positions; and that this remote part of the country has been infested, at different periods, by smugglers, is matter of general notoriety, and may be gathered from the public documents of the government. But the question, whether the Apollon designed to engage in this unlawful traffic, must be decided by the evidence in this record, and not by mere general suspicions drawn from other sources. It is somewhat remarkable, that no act or attempt of smuggling is charged upon her by any testimony

in the record. Her avowed intention was, to send her cargo into the United States: but in what manner? It was perfectly lawful to transship the cargo, in American or other foreign vessels, to our ports; no law was violated thereby, and no evasion of the French tonnage duty accomplished; for the expense of the transshipment must have been supposed by Congress to be, in ordinary cases, a full equivalent to the increased duty. It has been very justly observed at the bar, that the act of Congress was not intended to operate as a non-intercourse or non-importation law, but merely as an additional and onerous tax upon French navigation, in retaliation of the restrictions of France upon our navigation. The policy of the act was, therefore, as completely effected by compelling French ships to perform circuitous voyages, and thus to incur the disadvantages of transshipments, as by payment of the tonnage duty. Now, it is principally from the declarations and admissions of Capt. Edon himself, that the designs of his voyage are known; and if we take part of his testimony, we ought in fairness to call in aid every explanation that he gives on the subject. He utterly disclaims any intention of fraud; and his declarations on this point have not been discredited. But, admit that he had an intention of illegal trade, how could that intention, not carried into effect within our jurisdiction, afford probable cause of seizure in a foreign territory? It was not matter of doubt, that Belle river was within the limits of Florida; and how can there be probable cause of seizure under our laws, when

1824.

The Apollon.

1824.

The Apollon.

the vessel is in a place exempt from our jurisdiction?

It is unnecessary to pursue this subject farther, as, in point of law, probable cause, if it existed, would not, under the circumstances of this case, constitute a valid defence. The remaining question is, as to the damages. The District Court allowed the following items of damage: 1. Demurrage of the ship for 175 days, at 30 dollars per day. This item, upon the appeal, was enhanced by the Court, as has been already stated, to 40 dollars per day. 2. The difference between the amount of the sales of the cargo (which was sold under a perishable monition,) being 3523 dollars and 10 cents, with ten per cent. thereon; and the nett proceeds of the sales, which had been restored to the claimants, that difference being 1215 dollars and 99 cents, together with six per cent. interest thereon. 3. The allowance of 250 dollars to the libellant, for travelling expenses to Washington. 4. The allowance to the second captain of 100 dollars, for his travelling expenses to Savannah, on the business of the ship. 5. The allowance of 500 dollars, as necessary counsel fees.

Rule of damages in marine torts.

The principal arguments against this decree, have been directed to the allowance of demurrage, as a just measure of compensation. The *Attorney-General* contends, that it ought to be disallowed, as far too high a compensation; the Counsel for the libellant, as an allowance unreasonably low. This Court, on various occasions, has expressed its decided opinion, that the probable profits of a voyage, either upon the ship or cargo, cannot fur-

1824.

The Apollon.

nish any just basis for the computation of damages in cases of marine tort. The basis has accordingly been, in every instance, rejected. Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with interest upon the amount, from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted, as a fair recompense, and the addition of ten per cent. has been sometimes made, where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be truly said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation, upon principles of public policy.

Demurrage.

But it is now said, that demurrage always arises *ex contractu*, and, therefore, cannot furnish any rule of compensation in cases of tort. The practice in Courts of Admiralty, has certainly been otherwise; and the very cases cited at the bar,

1824.

The Apollon.

show that no distinction has been taken, as to its application, between cases of contract and cases of tort. In truth, demurrage is merely an allowance or compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that, in ordinary commercial voyages, a particular sum is deemed by the parties a fair compensation for delays, is the very reason why it is, and ought to be, adopted as a measure of compensation, in cases *ex delicto*. What fairer rule can be adopted, than that which founds itself upon mercantile usage as to indemnity, and fixes a recompense upon the deliberate consideration of all the circumstances attending the usual earnings and expenditures in common voyages? It appears to us, that an allowance, by way of demurrage, is the true measure of damages in all cases of mere detention, for that allowance has reference to the ship's expenses, wear and tare, and common employment. Every other mode of adjusting compensation, would be merely speculative, and liable to the greatest uncertainties. In respect to the quantity of the allowance in the present case, there is a diversity of evidence on the record. Two of the witnesses examined upon the appeal, speak of 30 dollars, and one of 40 dollars, as a reasonable demurrage. The Circuit Court, upon this new testimony, allowed the latter; and as it is perfectly clear, that every Judge, in his own circuit, must have better means of weighing the testimony of credible witnesses, from a more exact acquaintance with their experience and extent of business, than we can

possibly derive from the bare inspection of the records; and as we perceive no reason to be dissatisfied with his judgment, we think that the decree, on this point, ought to be confirmed.

The second item is perfectly correct, except as to the allowance of the ten per cent. The cargo was sold at the market, though not at the port, of its destination; and from the appraisement, it appears to have sold for a higher price than it was valued at. The ground of the allowance of the ten per cent. then fails, for that is given for supposed losses upon a forced sale, or a falling market.

The third item, though small, does not appear to us proper to be allowed upon principle. It was no necessary expense in the prosecution of the suit; and, as it has been objected to, it must be struck out. The fourth item is not open to the same objection, and, therefore, may well stand.

The fifth item, allowing 500 dollars as counsel fees, is, in our opinion, unexceptionable. It is the common course of the Admiralty, to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the Court; it is not less the law of the Court in instance causes, it resting in sound discretion to allow or refuse the claim. Counsel fees.

Upon the whole, the decree of the Circuit Court is to be reformed in these not very important particulars; in all other respects it is affirmed, and interest is to be allowed, at the rate of six per cent., upon the amount of the decree thus re-

1824. The Apollon. formed, from the time of the appeal from the Circuit Court, until it shall be carried into effect in the same Court, pursuant to the mandate of this Court.

DECREE. This cause came on to be heard, &c. On consideration whereof, it is ORDERED and DECREED by the Court, that the decree of the Circuit Court, awarding the sum of 8695 dollars and 37 cents, damages, to the libellant, with his costs of suit, be in part reversed, to wit, for the sum of 602 dollars and 31 cents, and be affirmed in all other respects; and that the libellant do recover of the respondent, the said amount of damages decreed in the said Circuit Court, deducting the said sum of 602 dollars and 31 cents, to wit, the sum of 8093 dollars and 6 cents, together with interest, at the rate of six per cent. per annum, on the same sum, from the date of the decree in the Circuit Court, to the period of carrying this decree into effect in the Circuit Court, pursuant to the mandate of this Court.

Decree in Circuit Court,		$8695 37
Deduct 10 per cent. on sales of cargo,	$352 31	
Allowance for Washington journey,	250 00	
	$602 31	602 31
		$8093 6

1824.

The Emily and the Caroline.

[Instance Court. Slave Trade Acts.]

The Emily and The Caroline, Broadfoot, *Claimant.*

A libel of information does not require all the technical precision of an indictment at common law. If the allegations describe the offence, it is all that is necessary; and if founded upon a statute, it is sufficient if it pursues the words of the law.

An information, under the Slave Trade Act of 1794, c. 187. [xi.] s. 1., which describes, in one count, the two distinct acts of *preparing a vessel* and of *causing her to sail*, pursuing the words of the law is sufficient.

Stating a charge *in the alternative*, is good, if each alternative constitutes an offence for which the thing is forfeited.

Under the above act, it is not necessary, in order to incur the forfeiture, that the vessel should be completely fitted and ready for sea. As soon as the preparations have proceeded so far, as clearly to manifest the intention, the right of seizure attaches.

APPEAL from the Circuit Court of South Carolina.

In each of these two cases, a libel of information was filed in the District Court of South Carolina, against the ship Emily and the brig Caroline, under the 1st section of the act of the 22d of March, 1794, c. 187. [xi.] prohibiting the carrying on the slave trade, from the United States to any foreign place or country; and on the 2d section of the act of the 2d of March, 1807, c. 77. [lxvii.] to prohibit the importation of slaves into the United States, after the 1st day of January, 1808. Each libel contained three counts, two upon the act of 1794, and one upon that of 1807,

1824.

The Emily and the Caroline.

which are the same in their provisions, so far as respects this case; and the libels described the offence in the alternative, pursuing the words of the law, "that the said vessel *was fitted out* within a port or place of the United States, to wit, the port of Charleston, or *caused to be sailed* from a port or place within the United States, to wit, the said port of Charleston, &c. for the purpose of carrying on trade or traffic in slaves," &c. A decree of condemnation was pronounced, in each case, in the District Court, which was affirmed in the Circuit Court, and the causes were brought by appeal to this Court.

Feb. 7th. The causes were argued by Mr. *Harper*, for the appellant, and by the *Attorney-General* and Mr. *M'Duffie*, for the respondent.

On the part of the appellant it was contended, (1.) That the informations were fatally defective; inasmuch as in all the counts, they charge alternatively, the commission of one or the other of two distinct and separate acts, each of which constitutes, under the statute of Congress, a distinct substantive offence; thus leaving it wholly uncertain to which of the charges the claimant was to direct his defence and proof.[a] (2.) That the proof did not sustain any of the counts, because it showed that neither of the vessels *was actually sent* from the port of Charleston, before the seizure; and did not show that either of them was so *fitted out*

a The Caroline, 7 *Cranch*, 496.

1824.

The Emily and the Caroline.

there, previous to the seizure, as to be in a condition to be sent. That the offence of fitting out, was not complete when the seizure took place, and that a mere inceptive fitting out, or an attempt to fit out, did not constitute the offence created by the acts of Congress.

For the respondents, it was argued, (1.) That the charge, with the alternative, was sufficient, both of the alternatives being illegal. The note of the reporter, correcting the account of the decision, when one of these cases (the Caroline) was formerly before this Court, was referred to, in order to show that the Court did not mean to decide in that case, that stating the charge in the alternative, would not have been sufficient, if each alternative had constituted an offence, for which the vessel would have been forfeited by the law.[a] The informations had been amended, and studiously avoided the difficulty heretofore made on account of the alternativeness of the charges. As they now stand, they are in conformity with the language of the statute which creates the forfeiture, and though still alternative in *form*, they are not so in *substance;* since both the facts charged are equally penal, and the latter part of the section merely makes either of the facts evidence of the illegal intention. The Legislature has thought fit to depart, in this instance, from the general principle of penal enactments; it aims at punish-

[a] The Caroline, 7 *Cranch*, 496. Note of errata at the beginning of the volume.

1824. ing the intention, and makes either of the two facts evidence of the illegal intention. Both, then, being illegal, the information has correctly charged the offence. (2.) The law requires nothing more to consummate the offence, than distinct acts, showing the *quo animo*. The offence is complete, when there is any overt act clearly indicative of the attempt to commit it. If this were not the case, and the crime were not to be considered as consummated until the preparations were complete, it would be impossible to define what was a complete preparation. Many articles might be purposely left unfinished, and completed at sea; so that the construction contended for, would furnish an effectual recipe for a fraudulent evasion of this part of the law.

The Emily and the Caroline.

Feb. 24th. Mr. Justice THOMPSON delivered the opinion of the Court.

These cases come before the Court on appeals from decrees of the Circuit Court, for the District of South Carolina, affirming the decrees of the District Court, by which the vessels in question were condemned as forfeited, under the laws of the United States, in relation to the slave trade.

The information, in both cases are the same, except as to the name and description of the vessels; and the proofs differ in no respect, but in the state of preparation in which the vessels were found at the time of seizure; but this circumstance, according to the view taken by this Court of the law, under which these forfeitures have been incurred, is unimportant, and cannot vary the result. The

1824.

The Emily and the Caroline.

cases have been argued together, and it is unnecessary that they should be considered separately by the Court.

The informations are founded upon the first section of the act of the 22d of March, 1794, c. 187. [xi.] to prohibit the carrying on the slave trade from the United States to any foreign place or country; and on the second section of the act of the 2d of March, 1807, c. 77. [lxvii.] to prohibit the importation of slaves into the United States after the 1st of January, 1808. Each information contains three counts; two upon the act of 1794, and one upon that of 1807. These acts, however, are precisely the same in those parts which are brought under consideration in these cases, and will not require to be separately noticed.

The objections on the part of the claimant, to the decree of the Circuit Court, are,

1. The insufficiency of the informations; and

2. That the proofs fall short of what is required, under the statutes, to work a forfeiture of the vessels.

The law (2 *U. S. L.* 333.) declares, that no citizen of the United States, or any other person coming into, or residing within the same, shall, for himself or any other person whatsoever, either as master, factor, or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, within any port or place of the United States, *nor* shall cause any ship or vessel to sail from any port or place within the same, for the purpose of carrying on any trade or traffic in slaves, &c. And if any vessel shall be *so fitted out as aforesaid*, for the said

1824.

The Emily and the Caroline.

purpose, *or* shall be caused to sail so as aforesaid, every such ship or vessel shall be forfeited, &c. The first branch of the prohibiting part of this section, is very broad and comprehensive, using various terms appropriate to the preparation for a voyage. "Shall not build, fit, equip, load, or otherwise prepare any ship," &c. In the forfeiting part of the section, these various terms are not repeated, but doubtless intended to be co-extensive, and included under the words *so fitted out as aforesaid.* Under this law, then, the forfeiture is incurred, either by *fitting out*, or, in other words, preparing a vessel, within the United States; *or*, by causing a vessel to sail from the United States for the purpose of carrying on the slave trade: two distinct acts, either of which draws after it the same consequence, the forfeiture of the vessel. The informations embrace both acts in the same count, pursuing the words of the law; and it is contended that, on this account, they are fatally defective; that one or the other of the acts should have been alleged, and not both stated in the *alternative*, as has been done. Objections of this kind, made at so late a period, if not entirely precluded, are not entitled to much indulgence; they ought, if well founded, to be made at an earlier day, when the information might be amended, and great expense and delay avoided. But the exception would, at no time, be available. In admiralty proceedings, a libel in the nature of an information, does not require all the formality and technical precision of an indictment at common law. If the allegations are such as plainly and

1824.

The Emily and the Caroline.

distinctly to mark the offence, it is all that is necessary. And where it is founded upon a statute, it is sufficient if it pursues the words of the law. And this is not at all at variance with what fell from the Court, when these cases were formerly before it, as explained by the note referred to by the Reporter, (7 *Cranch*, 496, *and note at the beginning of the vol.*) which states, "that the Court did not mean to decide, that stating the charge in the alternative would not have been sufficient, if each alternative had constituted an offence for which the vessel would have been forfeited." In the information now before the Court, it is so stated. One alternative is, *fitting out*, and the other, *causing the vessel to sail*; either of which, if proved, would induce a forfeiture. It is said, that this mode of alleging two separate and distinct offences, leaves it wholly uncertain to which of the accusations the defence is to be directed. This objection, if entitled to consideration, would apply equally to an information laying each offence in a separate count. This might, undoubtedly, be done; and yet no one interested in the proceedings could know, to which accusation to direct his defence. This kind of uncertainty is no objection, even to an indictment at common law. Distinct offences may be laid in separate counts, and the accused may not know upon which he is to be tried. The objection, if available at all, must go the full length of limiting every information to a single offence. This, we think, is not required by any principle of justice.

1824.

The Emily and the Caroline.

or sanctioned by any rule of practice, applicable to Admiralty proceedings.

2. It is, in the second place, contended, that the proof does not sustain any of the counts, or show that any acts have been done, which can, under a just construction of the law, work a forfeiture of the vessels. These vessels, although cleared out, were seized before leaving the port of Charleston; of course there can be no proof applying to one of the offences laid in the information, viz. causing the vessels to sail from a port or place within the United States, &c. The proof is only applicable to the offence, which relates to the preparation of the vessels. And to incur the forfeiture under this branch of the act, it is said, the vessel must be completely fitted and ready for sea; that no state of preparation, short of this, will satisfy the terms of the law, or furnish any certain rule by which to determine when the offence has been committed, and the penalty incurred. We cannot, however, think that even applying to this law the most rigid rules of construction applicable to penal statutes, it will admit of the interpretation contended for on the part of the claimant. In construing a statute, penal as well as others, we must look to the object in view, and never adopt an interpretation that will defeat its own purpose, if it will admit of any other reasonable construction.

The object in view, by the section of the law now under consideration, was to prevent the preparation of vessels in our own ports, which were intended for the slave trade. Hence is connected

1824.

The Emily and the Caroline.

with this preparation, whether it consists in building, fitting, equipping, or loading, the purpose for which the act is done. The law looks at the intention, and furnishes authority to take from the offender the means designed for the perpetration of the mischief. This is not punishing, criminally, the intention merely; it is the preparation of the vessel, and the purpose for which she is to be employed, that constitute the offence, and draws after it the penalty of forfeiture. As soon, therefore, as the preparations have progressed, so far as clearly and satisfactorily to show the purpose for which they are made, the right of seizure attaches. To apply the construction contended for on the part of the claimant, that the fitting or preparation must be complete, and the vessel ready for sea, before she can be seized, would be rendering the law in a great measure nugatory, and enable offenders to elude its provisions in the most easy manner. The intention or purpose for which the vessel is fitting, must be made out so as to leave no reasonable doubt as to the object. This is matter of proof, and, generally speaking, to be collected from the kind of preparation that has been made. It is unnecessary to notice minutely the evidence taken in these cases. It shows conclusively, and beyond the possibility of doubt, that both the Emily and the Caroline were fitting out for the slave trade. In this the witnesses, both on the part of the United States and the claimant, concur. All the preparations were such as were peculiarly adapted to what the witnesses call slaving vessels, and not to those for the mer-

1824.

The Emily and the Caroline.

chant service. The ship carpenter, a witness on the part of the claimant, and who, of all others, was best qualified to give information on this subject, says, the vessels were fitting in a manner similar to that in which vessels generally are for the slave trade; that the Emily was almost complete, and the work in which he was engaged on the Caroline, was of the same character and description. There was no attempt whatever by the claimant, to explain the object of these peculiar fitments, or to show that the destination of the vessels was other than that of the slave trade. Nor has his counsel, on the argument here, set up for him any such pretence. We may, therefore, safely conclude, that the purpose for which these vessels were fitting, was the slave trade; and if so, the right of seizure attached. We can discover no sound reason for delaying the seizure until the vessels were on the point of sailing. It could only be necessary to render more certain, from their complete fitment, the purpose for which they were to be employed; and if that be satisfactorily ascertained, at an earlier stage of the preparation, the delay would be useless, and evasion of the law rendered almost certain.

Decrees affirmed.

1824.

The Merino, *et al.*

[Instance Court. Slave Trade Acts.]

The Merino. The Constitution. The Louisa. Barrias, and others, *Claimants.*

The technical niceties of the common law are not regarded in Admiralty proceedings. It is sufficient, if an information set forth the offence so as clearly to bring it within the statute upon which the information is founded. It is not necessary that it should conclude *contra formam statuti.*

The District Court of the District where the seizure was made, and not where the offence was committed, has jurisdiction of proceedings *in rem* for an alleged forfeiture.

If the seizure is made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the Court of the District where the property is carried and proceeded against.

A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the District Court into whose District the property may be carried for adjudication.

The prohibitions in the Slave Trade Acts of the 10th of May, 1800, c. 205. [li.] and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying them from one port to another of the same foreign empire, as well as from one foreign country to another.

Under the 4th section of the act of the 10th of May, 1800, c. 205. [li.] the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a Court of the United States, although they may be held in servitude according to the laws of his own country. But if, at the time of the capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim; the section only applying to persons interested in the enterprise or voyage in which the ship was employed *at the time of such capture.*

APPEAL from the District Court of Alabama. These were the cases of several vessels, and their

1824.

The Merino, et al.

cargoes of African slaves. The information filed in the case of the *Constitution* was, as well on behalf of the United States, as of George M. Brooke, a colonel in the army of the United States. The first count, after stating the seizure of this vessel, with a valuable cargo on board, and eighty-four African slaves, by the said Brooke, on waters navigable from the sea by vessels of ten tons burthen and upwards, alleges, that the said vessel, being a vessel of the United States, owned by citizens of the United States, was employed in carrying on trade, business or traffic, contrary to the true intent of an act of Congress, passed on the 10th of May, 1800, entitled, "an act to prohibit the carrying on of the slave trade from the United States to any foreign place or country," that is to say, was employed or made use of in the transportation of slaves from one foreign country to another, viz. from Havanna to Pensacola, both places belonging to the king of Spain, contrary to the form of the said act, whereby the said vessel and her cargo became forfeited.

It was admitted, by the counsel for the respondents, that the second and third counts were unsupported by the evidence, and they were, therefore, abandoned.

The fourth count charges, that certain citizens of the United States did, in June, 1818, take on board, or transport from one foreign place or country to another, certain negroes, in a vessel, for the purpose of holding, selling, or otherwise disposing of them as slaves, or to be held to labour or service. In the case of the *Merino*, the information

contains three counts, the second of which alone was relied upon by the counsel for the respondent, and this states, that on the day of June, 1818, certain citizens of the United States received on board of the said vessel, belonging to citizens of the United States, and transported from one foreign place or country, viz. from Cuba to Pensacola, a certain number of negroes, for the purpose of holding the said negroes as slaves; and that the said vessel, with her cargo, and the negroes, were, on the 21st of June, 1818, seized on the high seas by Capt. M'Keever, commander of the United States ketch Surprise, and were brought into the District of Mobile, for a violation of the laws of the United States, and particularly of the 4th section of the act of 1818.

The information in the case of the *Louisa* and her cargo, was substantially the same as the one last mentioned, the second count being also founded on the 4th section of the act of 1818.

The evidence in these cases established the following facts, viz. that the above vessels, owned by citizens of the United States, and registered as such, sailed from certain ports in the United States to Havana, where they each received on board certain goods, as also a number of slaves, newly imported from the coast of Africa, the latter belonging to subjects of Spain, residents either of Havana or Pensacola, to be transported from the former to the latter place. The Merino cleared out at Havana on the 2d of June, 1818, for Mobile, and the Constitution and Louisa, on the 10th of the same month, for New-Orleans.

1824.

The Merino, et al.

The owners of these vessels, however, engaged to land the slaves at Pensacola, on their respective voyages to New-Orleans and Mobile. On their arrival within, or near to, the bay of Pensacola, that place was found in possession of the American army, under the command of Gen. Jackson. The Merino was seized by the United States ketch Surprise, commanded by Capt. M'Keever, within a mile and a half of fort Barancas, inside the bar, and within the harbour of Pensacola. The Constitution was taken possession of by Col. Brooke, of the United States army, under the guns of fort Barancas, then in possession of the United States forces. The Louisa was captured by Capt. M'Keever, in the ketch before mentioned, outside of the bar at Pensacola, standing in. These vessels, with their goods on board, and the negroes, were sent to the district of Mobile for adjudication. The Constitution, having on board an agent of Col. Brooke, was boarded off Mobile point by the United States revenue boat, and was carried in and reported by Capt. Lewis, commanding said boat, to the Collector, as having been seized by him, the agent reporting the seizure as having been made by Col. Brooke.

The informations against these vessels and their cargoes, were filed in the General Court for the territory of Alabama, from whence the proceedings were removed into the District Court of Alabama, where the vessels and their cargoes were severally condemned as forfeited to the United States, but the distribution was reserved for the future order of the Court. From these

sentences of condemnation, the claimants of the vessels and the cargoes appealed to this Court.

1824.

The Merino, *et al.*

Feb. 20th.

Mr. *C. J. Ingersoll*, for the appellants, (1.) argued upon the facts, to show that the transactions were in good faith; that Pensacola was the real destination of the persons transported, who were slaves by the laws of Spain established in the island of Cuba: that there was no intention of introducing them into the United States, contrary to our laws, but that they were bound from one Spanish colony to another, under a license from the local government. (2.) That the temporary occupation of Pensacola, in 1818, by the troops of the United States, under Gen. Jackson, was not such a conquest in war as changed the national character of the province of Florida, but was a mere incursion into the country, for the purpose of chastising the Indian savages, and depriving them of succours and a place of refuge. The principle, that a lawful conquest in war has the effect of suspending the operation of the local laws of the place, and of establishing such others as the conqueror thinks fit to substitute, was incontestable, but could not apply to such a case as that before the Court.[a] The United States were not at war with Spain; and even if they had been, the occupation of the Spanish territory by their arms would not change the jurisdiction, until its possession was confirmed by a

[a] The United States v. Hayward, 2 *Gall. Rep.* 501. United States v. Rice, 4 *Wheat. Rep.* 246. The Foltina, *Dodson's Adm. Rep.* 450.

1824.

The Merino, et al.

treaty of peace.[a] But, according to our municipal constitution, even if the territory had been ceded by treaty, it would require an act of Congress to apply the laws of trade for its government. (3.) The slave act of 1800, c. 205., does not affect the slaves transported, unless they belong to the owner of the vessel. Besides, it merely prohibited their transportation from one foreign country to another, and not from one place of the same country to another. This was the case of a removal of slaves, who were such by the laws of the island, from Cuba to another Spanish colony. Since the enactment of the first law on the subject, in 1794, down to the present time, the policy of the National Legislature has been limited to the suppression of the slave trade, (properly so called,) and to prevent, as far as could be done, the bringing into a state of servitude those persons who were free in their own country; and since the condition of persons who are already slaves, cannot be changed or made worse, by their removal from one slave-holding country to another, the statutes ought not to be so construed as to prohibit citizens of the United States from being concerned in such removals. (4.) The District Court of Alabama had no jurisdiction of these causes, under the Judiciary Act of 1789, c. 20. s. 9., since the seizure was made, neither *upon the high seas*, nor upon waters navigable from the sea, *within the district*, but it was made within

[a] *Grotius de J. B. ac P. lib.* 3. c. 6. s. 4, 5. *par Barbeyr.* tom. 2. p. 786. *Mably, Droit de l'Europe.* tom. 1. c. 2. p. 144.

the territorial jurisdiction of a foreign power. The waters where this seizure was made, form no part of the "high seas."[a] He also insisted, that no regular Admiralty process had issued in the Court below, and that the informations were defective, in not concluding *contra formam statuti*, and, at the same time, not containing any express reference to the statutes under which the proceedings were commenced.

The *Attorney-General* and Mr. *Kelly*, contra, (1.) insisted, that there was no ground for limiting the operation of the slave trade acts in the manner proposed on the part of the appellants. Foreigners cannot be permitted, with impunity, to employ our shipping in the transportation of slaves. The acts of Congress may attach to American vessels, wherever they may be, or however employed. Both the vessels and the slaves had here committed an offence, in the eye of the law, for which it pronounced a forfeiture, without regard to the national character of the owners of ship or cargo. Foreigners are bound to know, and are supposed to know, our laws of trade, in all cases where those laws may be justly applied; and they may be justly applied to the conduct of our vessels, whether in our own ports, in foreign ports, or on the high seas. Under the statutes now in question, it is not necessary that the two foreign ports or places, between which the traffic is carried on, should be in

[a] United States v. Wiltberger, 5 *Wheat. Rep.* 93. United States v. Pirates, *Id.* 200.

1824.

The Merino, et al.

different foreign countries or empires. Much of the slave trade was carried on from European factories on the coast of Africa to the colonies of the same nation in the West Indies or South America; and could there be a doubt, that this trade was meant to be prohibited by Congress? It is sufficient to satisfy the words of the statute, if the two places are foreign with respect to the United States. Nor is it material, whether the American owner of the vessel has any proprietary interest in the slaves or not. Whether they are carried as his property for sale, or to be held to service, or are transported on freight for the slave merchant, or owner, the forfeiture equally attaches to vessel and cargo. (2.) By the 4th section of the act of 1800, c. 205. the claimants, if interested in the enterprise or voyage in which the vessel is employed, are expressly excluded from restitution of the slaves which belong to them. But here it may be doubted, whether they have proved any proprietary interest, which will entitle them to restitution. The *onus probandi* was on them. They must show, by positive evidence, that those persons were slaves according to the laws of Spain, and that they had a right to carry them from one colony to another, by those laws. Foreign laws are matters of fact, and as such, must be proved, according to the rules of evidence applicable to them, whether written or unwritten. (3.) It was not meant to be contended, that the United States acquired any sovereignty or jurisdiction over the Spanish territory, by its temporary occupation. It was unnecessary to

maintain such a position. Here was a fraudulent attempt to violate our laws, by transporting those persons from the Island of Cuba, with a colourable destination, for another Spanish colony, but with the real intention of introducing them into the United States. In order to give the District Court of Alabama jurisdiction, it is immaterial where the offence was committed; and it is equally immaterial where the seizure was made, provided it was not made in any other district of the United States. In any other case, jurisdiction is given to the Court within whose district the property is carried for adjudication. The trespass on the Spanish territory cannot be so connected with the subsequent seizure, under the process of the Court below, as to invalidate the seizure.[a] If there was any offence against the sovereignty of Spain in the original seizure, that is a matter to be adjusted between the two governments. 1824. The Merino, et al.

Mr. Justice WASHINGTON delivered the opinion of the Court; and, after stating the case, proceeded to enumerate the objections made by the counsel March 5th.

a The Richmond, 9 *Cranch*, 102.

b The counsel was proceeding to argue the question as to the rights of Colonel Brooke, as a non-commissioned captor, or seizor, but was stopped by the Court, upon the suggestion, that the decrees of the Court below had reserved the question of distribution of the proceeds of the seizure, for its further directions, as in cases of prize and other Admiralty proceedings; and that nothing was before this Court upon the present appeal, but the question of forfeiture.

1824. for the appellants, to the several decrees of the Court below.

The Merino, et al.

1. That the regular Admiralty process was not issued in these cases.

2. That the informations do not conclude against the form of the statute.

3. That the District Court of Alabama had not jurisdiction, the seizures having been made, not within the waters of that State, or on the high seas, but within the jurisdiction of a foreign nation.

4. That the acts of Congress, on which these informations are founded, were intended to apply exclusively to the suppression of the slave trade, from the coast of Africa, or elsewhere, for the purpose of holding or disposing of the subjects of the trade, as slaves, and not to the carrying of them, when in a state of slavery, from one foreign country to another.

1. That the proceedings in these cases were not conducted with the regularity usually observed in Admiralty causes, must be admitted. But the Court is of opinion, that all objections of this nature were waived, by the appearance of the parties interested in the property seized, and filing their claims to the same. In each case, a warrant issued to the Marshal to seize the property libelled, and to cite and admonish all persons claiming an interest in the same, to appear before the Court, and to show cause why the same should not be condemned, as forfeited to the United States. This process was returned executed, and claims were interposed for the several vessels and their

cargoes, by the asserted owners thereof. Upon the strictest rules which govern in Courts of common law, objections to the regularity of the process, to enforce an appearance, would be considered as removed by the appearance of the party, and pleading to the merits.

2. The second objection is without foundation, *in fact*, in relation to the information against the Constitution and her cargo; and we think it inadmissible in point of *law*, in the other two cases; the count relied upon in those informations stating expressly, that the seizure was made for a violation of the 4th section of the act of 1818, the title of which is accurately set forth. For all the purposes of justice, and of notice to the claimant of the charge which he was called upon to answer, this must be deemed sufficient; and the addition of the technical words, *contra formam statuti*, is altogether formal and unnecessary. In the cases of the *Samuel*, (1 *Wheat. Rep.* 9.) and the *Hoppet*, (7 *Cranch*, 389.) it was observed by this Court, that technical niceties of the common law, as to informations, which are unimportant in themselves, and stand only on precedents, are not regarded in Admiralty information; the material inquiry in the latter cases being, whether the offence is so set forth, as clearly to bring it within the statute upon which the information is founded.

3. The objection raised to the jurisdiction of the District Court of Alabama, is principally grounded upon the 9th section of the Judiciary Act of 1789, c. 20. which provides, "that the District Courts shall have exclusive original cog-

1824.

The Merino, et al.

nizance of all civil causes of Admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burthen, within their respective districts, as well as upon the high seas." It is contended, that the seizures in these cases, were not made upon the high seas, or upon waters within the District of Alabama, and, therefore, the jurisdiction was not conferred on that Court. The section above recited, marks out, not only the general jurisdiction of the District Courts, but that of the several District Courts in relation to each other, in cases of seizures on waters of the United States, navigable from the sea, by vessels of a particular burthen. If made within the waters of one district, the jurisdiction attaches to the Court of that district, and the suit must be there prosecuted. The jurisdiction, in these cases, is given to the Court of the district, not where the offence was committed, but where the seizure is made. But where the seizure is made on the high seas, the jurisdiction is conferred upon no particular District Court, and it may, therefore, be exercised by the Court of any district into which the property is carried, and there proceeded against. In like manner, if the seizure be made within the waters of a foreign nation, as was done in these cases, cognizance of the cause is given, under the general expressions of the section, as to civil cases of Admiralty and maritime jurisdiction, to the Court of the district into which the property

1824.

The Merino, *et al.*

is conducted, and on which the prosecution is instituted. The illegality of the service in this latter case, has nothing to do with the question of jurisdiction, as was decided by this Court, in the case of the *Richmond.* (9 *Cranch*, 102.)

4. The last objection involves the merits of these causes. In the case of the Constitution, the counsel for the appellees rely upon the first and fourth counts in the information; and, in the two other cases, on the second count. But, we think, that the first count, in the first of these cases, must be put out of view; because, although it charges a violation of the act of 1794, it states the offence within the words of the act of the 10th of May, 1800, and yet it alleges it to have been committed contrary to the form of the act of 1794, the title of which is specially recited. This was, no doubt, a mistake of the proctor; but it partakes too much of substance to be the foundation of a sentence of condemnation, in a case so highly penal as this is. But, that count is not, in the opinion of the Court, material to the decision of that case, because, we are all of opinion, that the fourth count is fully supported by the evidence in the cause, and warrants the sentence of condemnation pronounced by the inferior Court. This count is strictly within the 4th section of the act of 1818; and so is the second count in the informations against the Merino and Louisa, and their cargoes.

The argument relied upon by the counsel for the appellants, was, that the policy of our laws, from the year 1794, down to the latest act of legislation, has been confined to the suppression of

1824.

The Merino, *et al.*

the slave trade, and to prevent, as far as could be done, the bringing into bondage those persons who were free in their own country; and, that since the condition of persons already slaves cannot be changed or made worse, by their removal from one slave-holding country to another, the acts of 1800 and 1818, ought not to be so construed, as to prohibit citizens of the United States being concerned in such removals.

It may well be doubted, whether even the act of 1794, the first which passed upon this subject, can fairly receive the narrow construction which is contended for, since it prohibits the fitting of vessels within the United States, not only for the purpose of procuring from any foreign kingdom the *inhabitants* thereof, to be transported to some foreign country, to be disposed of as slaves, but also for the purpose of carrying on any trade or traffic in *slaves*, to any foreign country, apparently embracing the two cases of free persons of colour, whose condition is changed by being brought into a state of slavery, and also persons already slaves, and intended to be used as subjects of traffic. Be this as it may, the language of the acts of 1800 and 1818, leaves no reasonable doubt, that the intention of the Legislature was to prevent citizens of, or residents within, the United States, from affording any facilities to this trade, although they should have no interest or property in the slaves themselves, and although they should not be immediately instrumental to the transportation of them from their native country. By the former of these laws, the offence is made to con-

sist in the employment of a vessel belonging to citizens of the United States, or to persons resident within the same, in carrying slaves from one foreign country or place to another, no matter for what purpose. By the latter, it consists in the taking on board, or transporting from Africa, or from any foreign country or place, any negro, &c., in *any vessel*, for the purpose of holding or disposing of such person as a slave, or to be held to service, &c., where those acts are performed by citizens of, or residents within the United States.

1824.

The Merino, *et al.*

It cannot be questioned, but that the case of the Constitution, as stated in the information, and proved by the evidence, is literally within the provisions of the latter act. The slaves seized in that vessel, were taken on board of her by a citizen of the United States, in one foreign place, for the purpose of their being held to service or labour. The Court do not feel themselves justified in restraining the general expression of this law, upon the ground of a supposed policy, the reality of which, to say the most of it, is very questionable. The sentence, therefore, of the Court below, in the case of this vessel and her cargo, must be affirmed.

The same decision would, of course, be made in the cases of the Merino and the Louisa, and their cargoes, if it were not for the circumstance, that the second count in the informations against those vessels alleges, that the citizens of the United States, who took the slaves on board at the Havana, did so for the purpose of *holding them as slaves*, which allegation is not proved by the evidence in those cases. They were taken on board

1824.

The Merino, *et al.*

merely as passengers, to be delivered at Pensacola to their owners, or to those to whom they were consigned. The sentences in these two cases must, therefore, be reversed, and the causes remitted to the District Court, with directions to permit the libellants to amend, it being obvious to this Court, from the evidence, that the negroes taken on board of those vessels, were transported for the purpose of their being *held to service*.

The three remaining cases, present the claims of the asserted owners of the slaves transported in the above vessels, from Havana to Pensacola, which were brought before the Court below, in the form of libels for restitution. To these libels no claims were filed, and the sentence of the Court in each of the cases, was, "that the slaves remain subject to the laws of Alabama;" from which decision appeals were taken; and as they amount, substantially, to a dismission of the libels, it becomes necessary to examine their correctness. The ownership of the slaves, as claimed by the respective libellants, appears to the Court to be sufficiently established. It is in proof, that slavery was, and is, permitted to exist in the Island of Cuba, either by particular ordinances of the Spanish government, or by custom; that the slaves in question were imported into that island from Africa by Antonio de Frias, and were shipped at Havana for Pensacola by these libellants, as their property, under a passport regularly granted by the Governor-General of Cuba; the slaves claimed by the libellants, other than Frias, having been purchased from him by those libellants. It would

seem unreasonable to require other or better proof of ownership, in property of this description, than these facts furnish.

The only question, then, is, whether these persons are prevented from claiming restitution of these slaves by any law of the United States. The only act which bears upon this subject, is that of the 10th of May, 1800, the 4th section of which, after declaring that it should be lawful for any of the commissioned vessels of the United States, to seize any vessel employed in carrying on trade, business, or traffic, contrary to the intent and meaning of that act, or the act of 1794, enacts, that "all persons interested in such vessel, or in the enterprise or voyage in which such vessel shall be employed, at the time of such capture, shall be precluded from all right or claim to the slaves found on board such vessel, and from all damages or retribution on account thereof." There can be no question, but that this section is strictly applicable to the claimants of the slaves on board the Merino and Louisa, those vessels having been seized whilst employed in carrying on trade forbidden by the act of 1800, by a commissioned vessel of the United States. The case of the claimants of the slaves on board of the Constitution, is different. That vessel, with her cargo, was seized in the bay of Pensacola by a military officer, and was conducted by his agent to Mobile, for the purpose of being libelled for his use. The 1st section of this act, which declares the forfeiture of any vessel belonging to a citizen of the United States, employed in transporting slaves from one foreign country to ano-

1824.

The Merino, *et al.*

ther, contains a provision, that the said vessel may be libelled and condemned for the use of the person who shall sue for the same. The right to seize the vessel, and slaves on board, would seem to be a necessary consequence of the right to enforce the forfeiture. The possession of the vessel, then, being lawfully vested in Col. Brooke, at the time she was boarded by the revenue boat, off Mobile Point, it could not, with any propriety, be asserted, that she was employed in carrying on trade, contrary to law, at the time she was so boarded. Her employment in such trade was completely terminated by the first seizure, and she was on her way for adjudication when the second seizure was made. If, under these circumstances, a capture of the vessel could not be legally made by the revenue boat, then the claims of the owners of the slaves on board, is not precluded by the 4th section of the act of 1800; the sentence above quoted applying only to persons interested in the voyage in which the vessel was employed at *the time of such capture.*

The Court is, therefore, of opinion, that in the case of Antonio de Frias and David Nagle against eighty-four African slaves, the sentence of the Court below is erroneous, and ought to be reversed, and that a decree of restitution ought to be made.

Sentence in the case of the *Constitution* affirmed. Sentences in the cases of the *Louisa* and *Merino* reversed, with leave to amend. Sentence reversed as to the claim of Frias and Nagle, and restitution decreed.

1824.

The St. Jago de Cuba.

[Instance Court. Slave Trade Acts. Lien of Material Men.]

The St. Jago de Cuba. Vinente, and others *Claimants.*

A question of fact, under the Slave Trade Acts. Condemnation pronounced.

The claim of seamen, for wages, on a voyage, undertaken in violation of the Slave Trade Acts, out of the proceeds of the forfeited vessel in the registry, rejected.

The claims of seamen, for wages, and of material men, for supplies, where the parties were innocent of all knowledge of, or participation in, the illegal voyage, preferred to the claim of forfeiture on the part of the government.

Material men have a lien, which may be enforced by a proceeding in the Admiralty, *in rem*, for necessaries or supplies, furnished in a port to which the vessel does not belong.

APPEAL from the Circuit Court of Maryland.

This cause was argued by the *Attorney-General* for the appellants, and by Mr. *Winder* for the respondents and claimants. *Feb. 20th.*

Mr. Justice Johnson delivered the opinion of the Court. *March 15th.*

This vessel, with her lading, found on board at the time of seizure, were libelled for an infraction of the laws prohibiting the African slave trade.

The causes of forfeiture alleged in the libels, comprise all those contained in the 1st section of the act of 1794, and those of the 2d section of the act of 1818, with the exception of the offence of being *laden* for the prohibited trade.

1824.

The St. Jago de Cuba.

The claims filed to this libel, were,

1. That of one Vinente, a Spanish subject, who alleges her to be a regularly documented Spanish vessel, engaged in traffic sanctioned by the laws of Spain. This claim goes both to vessel and cargo.

2. Of certain seamen, who demand compensation for their wages from the proceeds of the vessel.

3. And, lastly, of several material men, who claim the payment of their bills, alleging the vessel to be foreign, and their being employed in her equipment and repairs by the captain, and one Strike, as his agent.

The Court below condemned the vessel, but restored the cargo, and from that decree the Spanish claimant has not appealed. The fate of the vessel, therefore, is irrevocably fixed; but the United States having appealed from the decree of restitution in favour of the cargo, that appeal gives rise to a complicated inquiry.

The Court below repelled every other charge against the vessel, except that of having been "caused to sail," with a view to be employed in the prohibited traffic. But "being caused to sail," is not among the offences enumerated in the latter part of the 2d section of the act of 1818, under which alone the *lading* of the vessel is subjected to forfeiture. That offence is among those enumerated in the enacting clause of the section, but in the forfeiting clause it is dropped; and if, therefore, the case of this vessel exhibits no other offence, than that which in the decree below was

made the ground of her condemnation, the decree restoring the cargo would be well sustained; hence it becomes necessary to review the whole case. 1824. The St. Jago de Cuba.

One John Gunn, it appears, built and equipped this vessel in the port of Norfolk, as a packet, intending her for sale; but falling in debt, it became necessary to raise a sum of money upon her hull, and he accordingly took her to Baltimore for that purpose. When there, he addressed himself to one Maher, who advanced him the money, and instead of an hypothecation in ordinary form, Gunn executed a bill of sale to Maher, admitted, on all hands, to have been intended to serve only as the means of enabling Maher to expedite the vessel on a voyage to Cuba, there to be sold, and to account with Gunn for the proceeds, as well of freight as of sale.

This purpose Maher appears soon to have abandoned, for an enterprise of a very different nature. The vessel was put up for freight, and various applications ensued; but Maher undertook himself to load her for St. Jago de Cuba, and Gunn left Baltimore under the persuasion that her destination was fixed. Some time, however, having elapsed, and not hearing of her sailing, he writes to Maher on the subject, and is then informed, that he had despatched her, in ballast, to St. Jago de Cuba, under the care of Strike, a personage who, from that time, makes a conspicuous figure in the *res gestæ*. For no sooner does she arrive at St. Jago, than she is colourably conveyed to Vinente, but still under the absolute control of Strike; and without having

1824.

The St. Jago de Cuba.

shipped an article, appears at once with a valuable cargo on board, the property also of Strike, furnished with a Spanish coasting license, on a voyage to Havana, thence to Matanzas, where a part of her cargo is sold, and she is completely equipped, colourably a Spaniard, but really an American, for the African trade.

On her voyage thence to the coast of Africa, she is pursued by hostile vessels, and in the chase sustains damage, which compels her to put into Baltimore to refit. There she encounters Gunn, her original and equitable owner, but who finds in her nothing of her original character, but what served to identify his vessel, and expose to him how his confidence had been abused, and his property forfeited, through his own indiscretion, in conveying her to Maher. In the present cause, his interests are out of the question, and he appears only as a witness, on behalf of the prosecution.

It is immaterial to inquire whether this vessel was in the inception of her voyage, "laden" for the illegal purpose for which she was caused to sail. The Court below has attached much importance to the omission of this allegation; and, certainly, as a substantive offence, the vessel could not have been condemned for that cause, unless comprised among the allegations in the libel.

But as to the liability of the lading, found on board at the time of the seizure, to forfeiture under the act, that consequence is made to depend upon the liability of the vessel herself to condemnation; and, although this Court is not

1824.

The St. Jago de Cuba.

prepared to carry that forfeiture beyond the limits of an intimate connexion with the prohibited voyage, they are of opinion, that, in this case, that connexion is so intimate, as to leave no doubt of its liability, to the full extent of the liability of the vessel. If, then, the evidence will sustain any one of the offences alleged in the libel, which offence is made a ground of forfeiture by law, the cargo must share the fate of the vessel.

One of those allegations is, that she was *fitted out;* and, contrary to the opinion of the Court below, we think the evidence establishes that she was *fitted out* for the prohibited trade. This conclusion we place on the ground assumed in the cases of the *Emily and Caroline*, decided at the present Term. The general purposes of the enterprise, in its inception, are affirmed by the ground on which the Court below founded its sentence against the vessel, and are fully made out by her subsequent conduct. This point being established, it follows, that acts, which otherwise would be indifferent, and might be intended as well for an innocent as a prohibited enterprise, become offences with a view to their purpose. Besides these, the utter improbability that this voyage could have been undertaken from Baltimore to St. Jago, without many acts which would amount to a *fitting out*, we have the positive words of Maher himself, the *dux facti* in the transaction, in his letter of the 28th of October, to Gunn, in which, when speaking of having despatched the

1824.

The St. Jago de Cuba.

vessel to St. Jago, he says, "Mr. Strike has an account of all her expenses in *fitting out.*"

This charge, therefore, we consider as established against her; and this is one of the enumerated offences which subject vessel and lading to forfeiture.

The Court below having subjected the vessel to forfeiture, and the proceeds being in the registry, was then called on to distribute those proceeds among the various claimants, the seamen and material men. Among the former, it dismissed all except that of Pietro Rosso. From the decree, as to those whose claims are dismissed, there is no appeal, and the Court is not called on to pass an opinion upon the grounds of the decision as relates to their claims. But the decree in favour of Pietro Rosso, is appealed from by the United States, and it becomes necessary to examine that part of the decree which awards him both his account, and precedence in payment of it.

We think it erroneous, and that it must be reversed, since it is impossible to believe that he entered this vessel without a perfect knowledge of her character and destination. Spanish masters, in common with all others, may commit infractions of the act of 1818, within the ports of the United States; and it is easy to conceive, that engaging a crew, as well as many other acts of preparation for this trade, may be committed by a vessel coming lawfully into the ports of this country. If the plea of stress of weather, and other incidental embarrassments, be set up, as taking a

vessel out of the action of the laws against the slave trade, it is incumbent on the party who claims benefit of the excuse, to establish it. In the present instance, this seaman was engaged in the port of Baltimore, and so far was the vessel from a want of seamen, that we find the master actually refusing recruits, when offered by Strike to be put on board his vessel. If one seaman may be engaged, why may not a crew? the offence is the same in essence, though not in magnitude. The general policy of the law is, to discountenance every contribution, even of the minutest kind, to this traffic in our ports; and the act of engaging seamen, is an unequivocal preparatory measure for such an enterprise. This part of the decree, therefore, must also be reversed.

1824.

The St. Jago de Cuba.

The next question arises on the claims of the material men, or rather of those whose claims were sustained in the Court below. From those which were rejected there is no appeal.

On this point, the material facts are these: that this vessel, although appearing under the character of a foreign vessel, was, in reality, in her home-port: and this, whether considered as the property of Gunn, or of Maher and Strike. The questions then arise, on what does the privilege of material men depend? On the state of facts, or on their knowledge or belief of facts? On the actual absence of a vessel from her home-port, oth e power given to the shipmaster, in another port, to subject his vessel to Admiralty process and implied lien, in favour of material men? And, lastly, whether the prior forfeiture of the

1824.

The St. Jago de Cuba.

vessel to the United States precludes their general rights, and places them on the footing of subsequent purchasers, whether with or without notice of the forfeiture?

These questions are all solved by a reference to the nature, origin, and objects of maritime contracts. The precedence of forfeiture has never been carried further than to overreach common law contracts entered into by the owner; and it would be unreasonable to extend them further. The whole object of giving Admiralty process and priority of payment to privileged creditors, is to furnish wings and legs to the forfeited hull, to get back for the benefit of all concerned; that is, to complete her voyage.

There are two considerations that fully illustrate this position. It is not in the power of any one but the shipmaster, not the owner himself, to give these implied liens on the vessel; and, in every case, the last lien given will supersede the preceding. The last bottomry bond will ride over all that precede it; and an abandonment to a salvor, will supersede every prior claim.

The vessel must get on; this is the consideration that controls every other; and not only the vessel, but even the cargo, is *sub modo* subjected to this necessity.

For these purposes, the law maritime attaches the power of pledging or subjecting the vessel to material men, to the office of shipmaster; and considers the owner as vesting him with those powers, by the mere act of constituting him shipmaster. The necessities of commerce require,

1824.

The St. Jago de Cuba.

that when remote from his owner, he should be able to subject his owner's property to that liability, without which, it is reasonable to suppose, he will not be able to pursue his owner's interests. But when the owner is present, the reason ceases, and the contract is inferred to be with the owner himself, on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived. From this view of the subject, this Court will be best understood, when it speaks of the home-port of the vessel, an epithet which, it is very easy to perceive, has no necessary reference to State or other limits. And from this view of the subject it results, both that the forfeiture does not ride over the rights derived under maritime contracts, whether they be called liens or privileges, and that the real owners of a vessel, who have themselves contributed to give her a foreign aspect or character, hold out the foreign captain to material men, as one legally authorized to exercise the rights and powers over his vessel which appertain to a foreign vessel. They are thus precluded by their own act from denying her foreign character. In case of wreck and salvage, it is unquestionable that forfeitures would be superseded; and we see no ground on which to preclude any other maritime claim, fairly and honestly acquired.

We concur, then, in the opinion of the Court below, that the fair claims of seamen, and subsequent material men, are not overreached by the previous forfeiture; and that, even in the home-port, a vessel may be subjected to the liabilities of

1824.

The St. Jago de Cuba.

a vessel in a strange port, by being falsely held up as foreign by her owners. And the question will now be considered, whether these material men have sustained their claims against this vessel upon that principle.

With this view the claims must be examined separately.

The large claim of Maher himself, the real owner, but affected agent, of the vessel, has been properly rejected, and he has not appealed.

That of Despreux, for 1856 dollars, was sustained in the Court below, and from that the United States appeal.

This item, we are of opinion, is affected by express notice. Guion swears, that upon the arrival of the vessel at Baltimore, he gave notice to Despreux of her American character, warned him against repairing her, and received for answer, that he *was secured for the repairs.* There is nothing in the transcript to repel this evidence, but many circumstances to corroborate it. He, therefore, does not bring himself within the rule.

There is, however, one item in this account, to the amount of 300 or 400 dollars, which was certainly good against all the world. This was for wharfage; but the credits in the account will more than cover it, and having been paid by Maher, or Strike, his employer, it is but reasonable that the payments should be applied to the item entitled to precedence.

The three claims of Hubbard & Co. for 72 dollars and 4 cents, James Ramsay for 645 dol-

lars and 99 cents, and Richard Coleman for 256 dollars and 3 cents, have nothing in their circumstances to distinguish them from each other. They all allege the vessel to be foreign, and as she was, in fact, not foreign, the question is, whether there was an imposition practised upon them, under circumstances calculated to deceive and mislead men of ordinary vigilance.

1824.

The St. Jago de Cuba.

We are of opinion there was not. It appears, that immediately on the vessel's arrival she was libelled by Gunn, and although some difficulty has existed in the cause, in consequence of Gunn's libel not having been inserted in the transcript, yet there are documents connected with it inserted, which sufficiently explain the tenor and purport of the libel, if any doubt could be entertained what that tenor was. These are, the answer and claim to it, and a retraction of that claim, from which it appears, that during the whole time these material men were furnishing this vessel, she was under arrest by the Court of Admiralty, under a libel, claiming her as American property, in her home-port, which claim, the retraction of the answer filed to the libel fully admits. There was, then, to say the least of the facts, enough to put reasonable men upon inquiry. Despreux, it appears, was put upon inquiry, and obtained security, and with ordinary prudence or vigilance these material men may have done the same. Many facts in the case concur to affect them with suspicion of positive knowledge of her real character. We think they have not sustained the exception made in the Court below in their favour,

1824.

The St. Jago de Cuba.

from the general doctrine, that such claims cannot be sustained against a vessel in her home-port.

The decree of the Court below, therefore, so far as the appeal of the United States brings it before this Court, will be reversed, and the proceeds of the vessel and cargo adjudged to the United States.

Decree reversed.

DECREE. This cause came on to be heard, &c. On consideration whereof, it is ADJUDGED, ORDERED, and DECREED, that so much of the decree of the Circuit Court as affirms the decree of the District Court, dismissing so much of the libel as relates to the lading of said vessel, and also so much thereof as sustains the several claims of Pietro Rosso, Joseph Despreux, Hubbard and Carr, James Ramsay, and Richard Coleman, be, and the same hereby is annulled. And it is further DECREED and ORDERED, that the proceeds of the cargo or lading of the said schooner St. Jago de Cuba, and so much of the proceeds of the sale of the said schooner as is embraced in the appeal to this Court, be, and the same are hereby condemned as forfeited to the United States, and that the proceeds of the said schooner St. Jago de Cuba, and her cargo, be distributed according to law; for which purpose, this cause is remanded to the said Circuit Court, with instructions to make such distribution.

1824.

The Margaret.

[Instance Court. Ship Registry Act.]

The Margaret, *alias* Carlos Fernando, Haley, *Claimant.*

A transfer of a registered vessel of the United States, to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former owner, works a forfeiture of the vessel, under the 16th section of the Ship Registry Act of the 31st of December, 1792, c. 1., unless the transfer is made known in the manner prescribed by the 7th section of the act.

The statute does not require a beneficial or *bona fide* sale; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient.

Quære, Whether, in such a case, a reconveyance would be decreed by a Court of justice in this country?

The proviso in the 16th section of the Ship Registry Act, being by way of exception from the enacting clause, need not be taken notice of in a libel brought to enforce the forfeiture. It is matter of defence to be set up by the party in his claim.

The proviso applies only to the case of a *part owner*, and not to a *sole owner* of the ship.

The trial, in such a case, is to be by the Court, and not by a jury, in seizures on waters navigable from the sea by vessels of ten tons burthen and upwards.

A registered vessel, which continues to use its register, after a transfer under the above circumstances, is liable to forfeiture under the 27th section of the act, as using a register without being actually entitled to the benefit thereof.

APPEAL from the Circuit Court of Maryland.

This cause was argued by the *Attorney-General*, for the appellants, and by Mr. *D. B. Ogden*, for the respondent and claimant. *Feb. 11th.*

1824.

The Margaret. Feb. 15th.

Mr. Justice STORY delivered the opinion of the Court.

This is a case of seizure, for an asserted forfeiture under the ship registry act of the 31st of December, 1792, c. 1. The libel contains five counts, the four first of which are founded on the 16th section, and the last on the 27th section of the act. The former declares, "that if any ship or vessel heretofore registered, or which shall be hereafter registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part, by way of trust, confidence, or otherwise, to a subject or citizen of any foreign prince or state, and such transfer shall not be made known, in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel, and furniture, shall be forfeited." The manner of making known the transfer here referred to, is found prescribed in the 7th section of the act; and, so far as respects the present case, would have been a delivery of the certificate of registry by the master of the vessel to the collector of the district, within eight days after his arrival in the district, from the foreign port where the transfer was made.

It appears, from the evidence, that the claimant was the sole owner and master of the schooner under seizure. She was duly registered at the port of Baltimore; and on the 4th day of May, she was duly transferred at Havana, by procuration, to a Spanish subject domiciled in Cuba, and received the proper documents evidencing her Spanish character. The schooner was, at this time, lying at Matanzas, and soon afterwards sail-

ed on the homeward voyage, under her American papers, still having the Spanish documents on board, in the custody of a person who assumed the character of a passenger, but who was, in fact, the Spanish master, and kept them concealed. The name of the vessel had been blacked out of the stern, which was the first circumstance that excited suspicion of her character. On further inspection, it was found, that her name, "Margaret, of Baltimore," was inserted on a moveable sheet of copper; and upon a close search, directed by the captain of the revenue cutter, the Spanish documents were discovered, and delivered up to the collector of Baltimore.

1824.

The Margaret.

The fact of the transfer of the schooner to a Spanish subject, and the assumption of the Spanish character, are not denied; and the defence is put upon this point, that it was a mere colourable transfer, for the purpose of evading the Spanish revenue laws, the real American ownership not having been *bona fide* changed. There is certainly nothing in this record, that shows that the intention might not also have been to evade the American revenue laws; for the obvious purpose of keeping the Spanish master and papers on board, was to assume the American character in our ports, and to re-assume the Spanish character on the next voyage, so that the parties might obtain the fullest benefit of the double papers. But, assuming that the sole object of the transfer was a fraud upon the laws of Spain, it was, nevertheless, a transfer binding between the parties, and changing the legal ownership. It was completely, with-

1824. The Margaret.

in the words of the law, a transfer, "by way of trust and confidence," to a foreign subject; the trust and confidence being, that the vessel should be reconveyed to the American owner when the special purposes of the transfer were entirely consummated. That a reconveyance would be decreed in an American Court of justice, upon such a transaction with a foreign subject, in a foreign port, in violation of the municipal laws of his country, is a point which we are by no means disposed to admit. It is sufficient for us, however, that the case is brought within the very terms of the act of Congress, which does not require a beneficial or *bona fide* sale, but a transmutation of ownership, "by way of trust, confidence, or otherwise." But it is said, that the case is not within the policy of the act. What the policy of the act is, can be known only by its provisions; and every section of it betrays a strong solicitude on the part of the Legislature to trace and inspect every change of ownership; and, for this purpose, to require a public avowal of it, and an alteration of the ship's documents, so as to exhibit, at all times, the names of all persons who are the legal owners. The policy evinced by this course of legislation, is the encouragement of American navigation and American ship building, to the exclusion of foreign navigation and foreign ownership, and securing to American registered ships a preference, in all our revenue transactions, over all vessels which were not strictly entitled to the character. The Legislature foresaw that it would be impossible for the officers of government to ascertain the secret in-

1824.

The Margaret.

tentions of parties, or the object of ostensible transfers of ownership. Whether such transfers were *bona fide*, or colourable, for meritorious or illegal purposes, were matters of private confidence, and could rarely be ascertained by competent and disinterested proof. To admit secret transfers of ownership to any persons, and especially to foreigners, and allow, at the same time, to the ships the full benefit of the American character, would be hazarding the main objects of the act; it would invite all sorts of contrivances to evade the laws, and disable the government from possessing means to detect frauds. The correct course of legislation was, therefore, obvious. It was to lay down a strict and plain rule, requiring all transfers to be made known, from time to time, as they occurred; and a surrender of the American documents, when the legal ownership passed to a foreigner, whatever might be the secret trusts with which it was accompanied. The words of the section now under consideration, are direct to this purpose; and so far from contravening, they support, in the fullest manner, the general policy of the act. They are not, then, to be construed in a more limited sense than their obvious purport indicates.

But it is agreed that the proviso of this section shows, that the forfeiture inflicted by the enacting clause is not absolute, and that the trial ought not to have been by the Court, as a cause of admiralty and maritime jurisdiction, but by a jury, as upon an exchequer information, since a verdict alone can fix the forfeiture. The words of the

1824.

The Margaret.

proviso are, "Provided, that if such ship or vessel shall be *owned in part* only, and it shall appear to the jury, before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to, or ownership of, such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to forfeiture; and the residue only shall be forfeited." Now, in the first place, this being a mere proviso, by way of exception from the enacting clause, it constitutes properly matter of defence, and need not be taken notice of in a libel, brought to enforce the forfeiture. The party who seeks the benefit of it, must, in his claim, insist upon it, so as to bring it as matter cognizable in the issue to the jury. In the next place, the very terms of the proviso apply only to the case of a *part owner*, and not to a *sole owner*, of the ship. The case put is, where the ship "shall be owned, *in part* only," by a person ignorant of the transfer, such part shall not be subject to forfeiture. In the case before the Court, the claim is by Haley, as sole owner of the schooner, and all her American documents establish him as sole owner. He does not assert an ignorance of the transfer, nor claim in any way the benefit of the proviso. So that, whatever may be the true construction of the proviso, in other respects, it is plain, that it is inapplicable to his predicament, and might, on this account, be dismissed from the consideration of the Court.

But the other suggestion, in respect to jurisdic-

1824.

The Margaret.

tion, is entitled to scrupulous attention. The 29th section of this act declares, that all penalties and forfeiture incurred for offences against it, "shall and may be sued for, prosecuted, and recovered, in such Courts, and be disposed of in such manner, as any penalties and forfeitures, which may be incurred for offences against an act entitled, 'an act to provide more effectually for the collection of the duties imposed by law on goods, wares and merchandise imported into the United States, and on the tonnage of vessels,' may be legally sued for, prosecuted, recovered and disposed of." The act here referred to, is the revenue act of the 4th of August, 1790, ch. 35. which, in the 67th section, provides for the prosecution for penalties, and libelling for forfeitures, in the same general terms, which are employed in the revenue act of the 2d of March, 1799, ch. 128. on the same subject. Now, the judiciary act of 1789, ch. 20. in express terms, and as has been repeatedly adjudged, upon the most solemn consideration, by this Court, rightfully includes all seizures for forfeitures made under laws of impost, navigation, and trade, on waters navigable from the sea, by vessels of ten tons burthen and upwards, as causes of admiralty and maritime jurisdiction, which are to be tried by the Court, and not by a jury. And seizures made under the revenue act of the 4th of August, 1790, ch. 35. as well as under that of 1799, ch. 128. have been uniformly tried in this manner. Where the seizures have been made on land, or on waters not so navigable, the trial has been by jury. It is true, that the first case in which the question as to

1824.

The Margaret.

the admiralty jurisdiction under the judiciary act of 1789 came under consideration, did not arise until after the enactment of the ship registry act,[a] and, therefore, it may have escaped the attention of Congress, that such was the legal construction. But such a supposition is not lightly to be indulged, not only from the direct and unequivocal language of the judiciary act of 1789, but also from the reference in the registry act to the revenue act of 1790, for the mode of suing for penalties and forfeitures. The latter act (s. 67.) takes an express distinction between penalties and forfeitures, confining the trial of any fact put in issue in suits for penalties, to the judicial district in which such penalties *shall accrue*, and then providing, in general terms, for libels, to enforce forfeitures, to be brought "in the proper Court having cognizance thereof;" thus pointing to the judiciary act, for the tribunal which is to exercise jurisdiction, and for the mode in which it is to be exercised. It certainly cannot be admitted, that the obscurity of a proviso like the present ought to repeal, by implication, the deliberate act of the Legislature, in settling the general jurisdiction of its Courts, and placing, with so much solicitude, causes of this nature on the admiralty side of the Courts. The proviso is still applicable, in its terms, to all cases of seizures, on land and on waters, where the trial is to be by a jury; and, perhaps, taking the whole language, it ought to be construed to include within its equity, cases, where the trial is by the Court,

[a] La Vengeance, 3 *Dall.* 297.

and the forfeiture is not intended to be inflicted by the act. The probability is, that the words "court or," were omitted before the word "jury," by mistake, in the draft of the act. But this omission, if it is to have any effect, is not to oust the jurisdiction of the Court, but to take from the party a benefit, which is not within the words of the proviso. It is the opinion of the Court, that the present seizure, which is averred in the libel to have been made upon waters navigable from the sea by vessels of ten tons burthen and upwards, is a cause of admiralty and maritime jurisdiction, and was rightfully tried by the District Court, without the intervention of a jury.[a] This objection cannot, therefore, avail the claimant.

1824.

The Margaret.

The view that has already been taken of the cause upon the merits, as applicable to the four first counts in the libel, render it unnecessary to go into a particular examination of the fifth count. That count is founded, as has been already stated, upon the 27th section of the act, which declares, "that if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel and furniture." We think, that there are facts enough in the proofs before us, to establish the forfeiture also under this clause. By the transfer at Havana, the schooner lost her American character, and the title to

[a] Vide ante, vol. 8. p. 391. The Sarah, and Note a. p. 396.

1824.

200 Chests of Tea.

use her certificate of registry for the return voyage. She, however, did use it, and sailed under its avowed protection, "not being entitled to the benefit thereof, according to the intent of the act."

The judgment of the District Court is reversed, and a decree of condemnation awarded against the schooner and her appurtenances.

[Instance Court.]

Two Hundred Chests of Tea, Smith, *Claimant.*

In a libel of information, under the 67th section of the collection act of 1796, c. 128. against goods, on account of their differing in description from the contents of the entry, it is not necessary that it should allege an intention to defraud the revenue.

A question of fact, as to the rate of duties payable upon certain teas, imported as *bohea*. That term is used in the duty act in its known commercial sense; and the bohea tea of commerce is not usually a distinct and simple substance, but is a compound, made up in China, of various kinds of the lowest priced *black* teas.

But, by the duty acts, it is liable to the same specific duty, without regard to the difference of quality and price.

APPEAL from the Circuit Court of Massachusetts.

This was a libel of information, filed in the District Court of Massachusetts, against two hundred chests of tea, alleging that, on the 8th of September, 1819, the collector of the customs for the port of Boston seized at that port the said chests of

1824.

200 Chests of Tea.

tea, as forfeited, for having been unlawfully imported at the port of New-York, in the ship Ontario, on the 29th of June, 1819, from Canton, in China, as being that kind and denomination of teas commonly called bohea teas, and afterwards transported coastwise to Boston, in the original chests and packages, and there entered as bohea; and that, on such seizure and examination, according to law, the chests and packages were found to differ in their contents from the entries, and the teas contained in them to be of a different kind and quality of black teas, and not bohea teas, as represented in the entries.[a] The claim interposed by T. H. Smith, stated, that the teas in question

a The 67th section of the collection act of 1799, ch. 128. upon which this information was founded, provides, "that it shall be lawful for the collector, naval officer, or other officer of the customs, after entry made of any goods, wares or merchandise, on suspicion of fraud, to open and examine, in the presence of two or more reputable merchants, any package or packages thereof; and if, upon examination, they shall be found to agree with the entries, the officer making such seizure and examination, shall cause the same to be repacked, and delivered to the owner or claimant forthwith; and the expense of such examination shall be paid by the said collector or other officer, and allowed in the settlement of his accounts; but if any packages so examined, shall be found to differ in their contents from the entry, the goods, wares, or merchandise, contained in such package, or packages, shall be forfeited: *Provided*, that the said forfeiture shall not be incurred, if it shall be made appear, to the satisfaction of the collector and naval officer of the district where the same shall happen, if there be a naval officer; and if there be no naval officer, to the satisfaction of the said collector, or of the Court in which a prosecution for the forfeiture shall be had, that such difference proceeded from accident or mistake, and not from an intention to defraud the revenue."

1824.

200 Chests of Tea.

were imported and entered by him, at the port of New-York, as bohea teas, and that they are of the kind and denomination called bohea teas, and not of a different kind or quality of teas. The District Court pronounced a decree of condemnation, upon the testimony taken in the cause, which was affirmed, *pro forma*, in the Circuit Court, upon appeal; and the cause was, thereupon, brought to this Court.

March 8th. The cause was argued by Mr. *Webster* and Mr. *D. B. Ogden*, for the appellant, and by Mr. *Blake*, for the respondents.

On the part of the appellant, it was contended, that the examination and seizure authorized by the 67th section of the duty act of 1799, c. 128. are limited to the collector of the district, where the goods were originally entered, and the duties secured upon importation; and that, consequently, the case made out by the libel was not within the purview of the act, even supposing the collector might, by his general authority, make a seizure, and assert the forfeiture in a libel properly framed for that purpose. The United States were concluded, by the entry and inspection of the teas, at the port of New-York, where the importation from a foreign port was made, and the duties paid and secured. Besides, the libel contains no allegation of an intention to defraud the revenue. By the terms of the statute, no forfeiture is incurred if the difference between the entry and the packages proceeded from accident and mistake, and not

1824.

200 Chests of Tea.

from an intention to defraud the revenue. The want of such an allegation must, therefore, be considered as a substantial defect in the libel. The counsel also minutely examined the evidence, and insisted that the statute meant to describe the different kinds of teas in ordinary commercial language, and not with scientific precision. The tea now in question, is the bohea of commerce, whatever might be its botanical designation, or its Chinese name.

For the respondents it was argued, that the construction of the 67th section of the act, which had been contended for by the claimant, would, if adopted by the Court, be fatal to the whole system of revenue laws. There was nothing in the terms of the section, or in other parts of the statute, which restricted it to the collector of the port and district where the original importation from abroad was made. On the contrary, the terms, "*a* collector," and "*the* collector," are used promiscuously throughout the act, where an authority is intended to be given to, or a duty imposed on, the collectors of the customs generally; and wherever it is intended to confine the authority or duty to the collector of any particular port, appropriate words are used for that purpose. It was altogether an erroneous supposition, that an entry of goods, brought coastwise from the collection district where they were originally imported to another, was not required by the revenue laws. On the contrary, whenever the value of such goods exceeds 400 dollars, and they are contained

1824.

200 Chests of Tea.

in the original packages as imported, an *entry* is required, upon their being transported from one port to another, although that precise term may not be used in the various revenue and navigation laws.[a] All the formalities required by these acts were complied with on bringing these teas from the port of New-York to the port of Boston, and consequently an entry was made with the collector of the latter port, so as to authorize him to make the examination and seizure under the 67th section of the collection act. Nor was any allegation of an intention to defraud the revenue necessary, since the libel pursues the language of the enacting clause of the act, by which the forfeiture is inflicted whenever the packages are found to differ in their contents from the entry; and the exemption from forfeiture, where the difference proceeds from accident or mistake, is contained in a separate proviso to the section, which is matter of defence for the claimant. By the act of April 16, 1816, c. 107. and by several preceding statutes, the first of which was enacted in 1789, a specific duty was imposed on "bohea tea." All these acts make a discrimination in terms, between "*bohea*" and "souchong and all other *black* teas." The Legislature must necessarily have had in view, in both cases, a certain commodity, known by those names respectively. Had this not been the fact, an *ad valorem* duty would long since have been imposed, in order to prevent the gross frauds upon the revenue, which must

a Act of Feb. 18, 1793, for enrolling and licensing ships and vessels to be employed in the coasting trade, &c. c. 153. [viii.] s. 16, 17. 19.

be the inevitable consequence of permitting such teas as those now in question to be imported as *bohea*. The same distinctive term is used in the British revenue laws, and is supported by the authority of various writers on commerce.[a] It is exclusively applied to the common bohea tea, sometimes called *moji* or *mocc* by the Chinese; and, consequently, the various instances of the mixtures of teas in China, which are spoken of by the witnesses, as being composed ordinarily of not more than one third part of that species, and the residue of old souchong, congo, and others of the higher order of teas, and thus imported into this country under the name of bohea, must be regarded, in a legal point of view, as being an evasion of the several statutes on that subject.

1824.

200 Chests of Tea.

Mr. Justice STORY delivered the opinion of the Court. *March 15th.*

The two hundred chests of tea in controversy in this suit, were imported into the city of New-York, in the ship Ontario, from China, and entered there at the custom house, and the duties regularly secured as bohea teas. They were afterwards transported coastwise to Boston; and upon examination there, under the direction of the collector of the district, they were seized as forfeited, under the collection act of the 2d of March, 1799, ch. 128. s. 67. on account of their differing in de-

[a] *Stat.* 43 *Geo.* II. *c.* 12. 24 *Geo.* III. *c.* 28. *Milborne's Oriental Commerce*, vol. ii. p. 521. *Ree's Cyclopedia*, art. *Tea. Thea. Morrison's Chinese Dict.* art. *Tea.*

1824. scription from the contents of the entry. The libel states the facts specially, but contains no allegation of an intention to defraud the revenue. Upon this state of the case, the libel is assailed for a supposed defect, arising from the absence of such an allegation. But we think this objection cannot be sustained. The libel follows the language of the enacting clause of the act, which inflicts the forfeiture; and the exemption from forfeiture, when the collector or the Court shall be satisfied that the difference between the entry and the packages "proceeded from accident or mistake, and not from an intention to defraud the revenue," being found in a separate proviso, is properly matter of defence, to be asserted and proved by the claimant, and is not, according to the course of adjudications in this Court, essential to the structure of the libel itself. This objection, then, may be dismissed without further observation.

200 Chests of Tea.

Another question, of more serious importance, is, whether the examination and seizure authorized by the 67th section of the act, are not limited to the collector of the district where the goods were originally entered and the duties secured, upon importation; and so the case made by the libel is not within the purview of the act, whatever might be the authority of the collector to seize for forfeitures generally, and to assert the claim in a libel, properly framed for such a purpose. The decision of this question would require a very minute and critical examination of the whole revenue and coasting acts; and as the Court can satisfac-

torily dispose of the cause upon the merits, in point of fact, it is deemed unnecessary to institute so laborious an inquiry. 1824. 200 Chests of Tea.

The claim admits, that the teas were imported and entered as bohea teas; and asserts, that they are of the kind and denomination called bohea teas, and not of a different kind or quality of teas; and this forms the main point in controversy between the parties. One of the earliest acts of Congress, (the act of the 20th of July, 1789, ch. 2.) imposes duties on teas in the following words: "On bohea tea, per pound, six cents; on all souchong or other black teas, per pound, ten cents; on all hyson teas, per pound, twenty cents; on all other green teas, per pound, twelve cents." The act of the 10th of August, 1790, ch. 39. varied the duties, but retained the same descriptions. The act of the 29th of January, 1795, ch. 82. declared that "teas commonly called imperial, gunpowder, or gomee," should "pay the same duties as hyson teas." The act of the 3d of March, 1797, ch. 64. laid an additional duty of two cents "upon all bohea tea." And the act of the 27th of April, 1816, ch. 107. under which this cargo was imported, levies duties on "bohea, twelve cents per pound; souchong and other black, twenty-five cents per pound; imperial, gunpowder, and gomee, fifty cents per pound; hyson, and young hyson, forty cents per pound; hyson skin, and other green, twenty-eight cents per pound." The legislation of Congress here detailed, exhibits a progressive discrimination in the kinds of green teas, but leaves

1824.

200 Chests of Tea.

the black teas with no other specific discrimination than that of bohea and souchong.

The argument on behalf of the United States, is, that the two hundred chests of tea, now in controversy, are in reality simple congo tea, and not bohea; that the latter is a pure unmixed tea, entirely distinct from congo, and known in China by an appropriate name; that it is to this pure and unmixed bohea tea, that the successive acts of Congress refer, and not to any other mixed tea, though known by the common denomination of bohea. If we were to advert to scientific classifications, for our guide on the present occasion, it is most manifest, from the works cited at the bar, that bohea is a generic term, including under it all the black teas, and not merely a term indicating a specific kind. But it appears to us unnecessary to enter upon this inquiry, because, in our opinion, Congress must be understood to use the word in its known commercial sense. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the Legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless, to attempt any other

classification, than that derived from the actual business of human life. Bohea tea, then, in the sense of all our revenue laws, means that article which, in the known usage of trade, has acquired that distinctive appellation. And even if the article has undergone some variations in quality or mixture, during the intermediate period from 1789 to 1816, when the last act passed, but still retains its old name, it must be presumed that Congress, in this last act, referred itself to the existing standard, and not to any scientific or antiquated standard. 1824. 200 Chests of Tea.

The true inquiry, therefore, is, whether, in a commercial sense, the tea in question is known, and bought, and sold, and used, under the denomination of bohea tea. We think the evidence on this point is altogether irresistible. It establishes that the bohea tea of commerce is not usually a distinct and simple substance, but is a compound made up in China of various kinds of the lowest priced black teas, and the mixture is of higher or lower quality, according to the existing state of the market. Indeed, from the uniformity of its price in the midst of great fluctuations in the prices of all other teas, it seems rather to indicate the lowest quality of black teas, than any uniform compound. It is accordingly in proof, that old congo teas are often sold as bohea, and have sometimes been imported into our market under that denomination. In short, whenever black teas are deteriorated by age, or are of the lowest price, they are mixed up to form bohea for the market, and are suited to the demand and wishes of the

1284. 200 Chests of Tea.

purchasers. It is not meant to affirm that there is no such simple and distinct tea known as bohea. All that the evidence justifies us in saying is, that this is not the common bohea of commerce. The latter may or may not be a simple substance, according to circumstances. The generic name bohea, comprehending under it all the varieties of black teas, whenever they are at the cheapest price in the market, or are of a very inferior quality, or are mixed up for sale, they lose their specific names, and sink into the common denomination.

Such is the conclusion which, in the opinion of the Court, the evidence in this record justifies and requires. It is true, that the Boston witnesses very strongly state that the present teas are pure unmixed congo; and their testimony is entitled to very great consideration, from their personal respectability as well as their long experience. But the New-York witnesses speak with equal positiveness and point, that the present teas are the common bohea of the market, and have been bought and sold as such without hesitation. These witnesses, also, are entitled to entire credit, for the same reasons; they have had great experience, and are of unquestioned credibility. In this apparent conflict of competent and credible witnesses, the only way of reconciling the testimony, is to suppose that they do not speak *ad idem;* that the Boston witnesses speak to the specific nature of the particular teas in controversy, and the New-York witnesses to their known commercial denomination in their actual state. In

1824.

200 Chests of Tea.

this way of considering the testimony, the conflict exhibits more a matter of apparent than real diversity of opinion. But if it be not thus reconcilable, it appears to us that the weight of the evidence is so strong, that teas of this description have been long imported into our market as bohea, that no Court of justice would feel itself authorized to inflict the forfeiture under the statute, upon a presumed intentional violation of its provisions. There is, indeed, something that applies still more forcibly to the claimant, under these circumstances, than applies in common cases. He came into the tea trade since the peace of 1815, and has been most extensively engaged in it. At the time of his first commercial enterprise, teas of this description were publicly and commonly imported into New-York as bohea, and had acquired a known commercial character. He acted upon this settled usage; and if the present seizure can be sustained, he is to suffer for a forfeiture, which he had no adequate means to avoid, and could not have foreseen.

Then, as to the intention of fraud. It is said that these teas were imported in congo chests, covered with a thin paper, for the purposes of disguise, and that, upon inspection, it is clear that the original congo still remained in the chests. The circumstance that these are congo chests, whose structure is perfectly known, would not justify the conclusion that there was an intention to defraud the revenue, since that structure might attract observation, and thus lead to immediate

1824.

200 Chests of Tea.

detection. It would have been more natural to have disguised congo teas in bohea boxes. But the difficulty that lies in the argument derived from this source, is, that upon opening the chests, the contents are proved to be exactly what the New-York witnesses call bohea, and the Boston witnesses congo. So that the question of fraudulent disguise depends upon the fact, whether the tea be or be not bohea; and if it be settled to be the latter, then the suspicion from this circumstance vanishes. The same answer may be given to all the other circumstances relied on as badges of fraud. They become utterly unimportant, if there was not a real misrepresentation of the quality of the tea.

There is one cogent fact, which presses with peculiar weight in the consideration of this part of the case. It is, that after the present seizure was made, and the whole train of suspicions disclosed, the remaining teas, of the same denomination and importation, which were yet in the public stores at New-York, underwent a strict examination there under the authority of the officers of the customs. The result of that examination was an unequivocal opinion, that they were the common bohea of commerce; and this result being communicated to the government, no farther proceedings were thought necessary to vindicate its rights.

But another fact, which is decisive against the supposition of a fraudulent intention, is, that the teas were purchased in China as bohea, at the usual bohea price, and upon their importation into

New-York, were there sold at the usual bohea price. They were sold at prices from thirty-one to thirty-six and a half cents per pound, when, at the same time, and in the same place, congo sold at forty-eight cents per pound. This is not a matter of doubtful or equivocal evidence; it is admitted and proved in the most positive manner. What then could have been the inducement to fraud? Men do not perpetrate frauds upon the revenue from the mere love of mischief, or the wanton disregard of duty. There must be some leading interest, some enticing object in view, to lead them to such a violation of social law and moral sentiment. In the present case, no such motive could exist, for the whole conduct of the party is at war with the supposition. Nay, more, the perpetration of the fraud would have been against his interest. We do not here allude to his private reputation as an opulent merchant, engaged in an extensive commerce in teas, nor to the powerful influence that, under such circumstances, public opinion must have upon him, in its stern and severe, though silent rebukes. But his immediate interest in the same trade and in the same voyage, would be sacrificed by such unworthy proceedings. He would hazard large interests upon a paltry saving in duties, from which he could in the end derive not the slightest benefit. 1824. 200 Chests of Tea.

It has been said, that unless the present libel can be maintained, a wide door will be opened for the admission of frauds in the importation of teas. If this be true, it forms no reason for a different judicial construction of the acts of Con-

1824.

200 Chests of Tea.

gress, much less for the enforcing a forfeiture where the facts will not warrant it. Congress can provide an easy remedy, by changing the specific duty to a duty *ad valorem*, a policy which has already obtained the sanction of other nations.

It is unnecessary to go farther into the discussion of the merits of this case. The judgment of the Court is, that the decree of the Circuit Court of Massachusetts, given *pro forma*, ought to be reversed, the libel of the United States be dismissed, and the 200 chests of tea be restored to the claimant. But the Court are also of opinion that there was probable cause of seizure, and direct it to be certified upon the record.

Decree reversed.

1824.

Mason v. Muncaster.

[Local Law.]

JOHN MASON, *Appellant*,

v.

JOHN MUNCASTER, survivor of George Dencale and John Muncaster, CHURCH-WARDENS OF CHRIST CHURCH, FAIRFAX PARISH, ALEXANDRIA, and the said JOHN MUNCASTER and EDMUND J. LEE, PRESENT CHURCH-WARDENS OF THE SAID CHURCH, and others, *Respondents*.

A bill in equity, brought to rescind a purchase made under the decree of this Court, in *Terrett v. Taylor*, (9 *Cranch*, 43.) upon the ground that the title to the property was defective, and could not be made good by the Vestry and other persons, who were parties to the former suit. Bill dismissed.

The Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry, in succession, of the parish of Fairfax, and, in connexion with the Minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the Church lands, with the assent of the Minister, under the former decree of this Court, conveys a good title to the purchaser.

Although the *Church-Wardens* of a parish are not capable of holding *lands*, and a deed to them and their successors in office, for ever, cannot operate by way of *grant*; yet, where it contains a covenant of general warranty, binding the grantors and their heirs for ever, it may operate *by way of estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land.

The parishioners have, individually, no right or title to the glebe lands; they are the property of the parish in its aggregate or corporate capacity, to be disposed of, for parochial purposes, by the Vestry, who are the legal agents and representatives of the parish.

APPEAL from the Circuit Court for the District of Columbia.

1824.

Mason v. Muncaster.

This was a bill brought by the appellant, Mason, to rescind a purchase made by him, jointly with W. Jones, of a part of the glebe land which was sold under the decree of this Court, in the case of *Terrett v. Taylor*, reported in the 9th vol. of Mr. *Cranch's Reports*, p. 43. After a confirmation by the Court below, of the report of the sale made by the commissioners for this purpose, and after various intermediate negotiations, the appellant gave his promissory notes to John Muncaster, one of the respondents, and George Deneale, since deceased, who were at the time Church-Wardens of the Episcopal Church of Alexandria, in payment of part of the purchase money; and judgment having been obtained against the appellant, upon these notes, in the Circuit Court for the District of Columbia, the appellant also sought by his bill a perpetual injunction of this judgment. The grounds of the prayer of the bill were, that the title of the property was substantially defective, and could not be made good by the Vestry, and other persons, who were parties to the bill in the former suit; that the same bill contained a material misrepresentation of the facts respecting the title, of which the appellant was, at the time of the purchase, wholly ignorant, and of which he had but recently acquired full knowledge.[a]

Upon the final hearing in the Court below, the bill was dismissed, and the cause was brought by appeal to this Court.

[a] The essential parts of the pleadings and evidence will be found fully stated in the opinion of the Court.

1824.

Mason v. Muncaster. *Feb. 5th.*

The cause was argued by the *Attorney-General* and Mr. *Key* for the appellant, and by Mr. *Swann* and Mr. *Lee* for the respondents.

On the part of the appellant it was contended, (1.) That the respondents had no title, legal or equitable. It was admitted to be the rule of equity, that where a *vendor* comes in for a specific execution, he is bound to show a title free from all doubt; but where the vendee is the plaintiff, and comes in to rescind the sale, he must show the title to be bad. The *onus probandi* was, therefore, on the appellant, and the counsel argued at large, to show that the conveyance from Daniel Jennings and wife to the Church-Wardens, in 1770, was insufficient to pass his title in fee for the benefit of the parish. The exposition of this deed, in the former case of *Terrett v. Taylor*,[a] merely establishes, that inasmuch as the Church-Wardens were not a body corporate capable of holding lands, this deed did not operate by way of grant to convey the title: that its only legal operation results from the covenant of warranty, which creates an *estoppel* in favour of the church and its privies; *i. e.* that the legal title still remains in Jennings and his heirs, but that they are *estopped* by the warranty from the assertion of that title against the church and its privies. Now suppose that the respondents are the regular successors of the Vestry and Church-Wardens of Fairfax, still they have no title to the land; all that they hold is an estoppel against Jennings and

[a] 9 *Cranch*, 52, 53.

1824.

Mason v. Muncaster.

those claiming under him. What title have they which they could assert against a disseizor, or one claiming under a title foreign to that of Jennings? A mere estoppel against a particular grantor and and his heirs, constitutes neither a legal nor an equitable title to lands. This Court declares that the deed conveys *no title*, but merely an estoppel by force of the clause of warranty. But, even admitting that this estoppel is a title, it belongs to all the episcopal members of the parish of Fairfax, whose rights are precisely the same as if no part of the parish had ever been separated from Virginia. It is quite clear, that the former decision of the Court proceeded on the ground of the plaintiffs in that suit being considered as the regular successors of the original *cestui que trusts;* and that, if it had appeared otherwise, and that there was another church in the parish, or other parishioners who were not represented by them, the decree would have been different.[a] To connect themselves with this deed, therefore, the parties are bound to show that they are the successors. If they are not, the connexion between them is broken, and they have no title under it. The parish of Fairfax forms about one half of the county, which is equally divided into the parishes of Fairfax and Truro; the former comprehending the northern half, the latter the southern. This parish had but one Vestry, but it was the Vestry of the whole parish, elected by the whole body of the parishioners, charged with the common interests of the whole parish,

[a] 9 *Cranch*, 52, 53.

1824.

Mason v. Muncaster.

and of both the churches equally. The funds with which the glebe was bought were levied from the whole parish, and consequently belonged to the whole parish; and in the case of a vacancy of the parsonage, this Court say, the parish was entitled to the profits of the glebe. It therefore follows, that previous to the separation of a part of this parish from the State of Virginia, its interests were one and identical throughout. No part of the parishioners could, by themselves, do any act affecting the interests of the whole, without giving the whole a voice in the measure, either by themselves or their representative agents. It is laid down, that although the Church of England, in its aggregate description, is not deemed a corporation, yet the Church of England, of a particular parish, is a corporation for certain purposes, although incapable of asserting its rights and powers, except through its parson regularly inducted.[a] And in the judgment of this Court in the former case, it is strongly intimated, that the corporate character conferred on the Vestries in 1784, could be taken away at pleasure, without any fault in the corporation.[b] If then the parish of Fairfax was a corporation, its name becomes a part of its identity, and those who call themselves successors, must have the same name. If it was a corporation, all the corporators have equal rights, and no part of them could exercise the rights which belong to the whole. But, suppose

a Town of Pawlet v. Clark, 9 *Cranch*, 292. 325.
b Terrett v. Taylor, 9 *Cranch*, 51, 52.

1824.

Mason v. Muncaster.

it not to have been a corporation, it was a definite body; it had a unity and identity which separated it from all others. It had a technical identity.[a] It consisted of all the Episcopal members within the territorial limits. It was represented by a Vestry chosen by the voice of the whole of that parish, in which election no other parish could interfere. Those who claimed to be their successors, must, before the separation of the District of Columbia from the State of Virginia, have shown these qualifications; and it is determined that the separation has produced no change in the unity and identity of the parish, so far as the rights of property are concerned.[b] The Vestry and Church-Wardens of the Episcopal Church of Alexandria, cannot be the regular successors of the Vestry and Church-Wardens of the parish of Fairfax, because they have a distinct name, which it would have been needless to assume, unless from a consciousness of a distinct origin and nature. In fact, they have a different origin, different powers, and different duties. In the period which intervened from 1796 to 1803, there was no incumbent. What then were the rights of the parties? This Court has answered, that "the fee remained in abeyance, and the profits of the parsonage were to be taken by the parish for their own use."[c] What parish? Most certainly the

a 2 *Henn. Stat. at large*, 218.

b Terrett v. Taylor, 9 *Cranch*, 53.

c Terrett v. Taylor, 9 *Cranch*, 47. Weston v. Hunt, 2 *Mass. Rep.* 502. See also, 1 *Tuck. Bl. Com.* Part 2. App. 113.

parish of Fairfax, to which it belonged. The Vestries chosen in 1804, and subsequently, cannot be deemed the Vestries of the parish of Fairfax, but must be considered as the Vestries of the Episcopal Church of Alexandria, because, in the parish books, the entries constantly style them the Vestry of the Protestant Episcopal Church *at*, or *in*, or *of*, Alexandria, and not the Vestry of the parish of Fairfax. The congregation of Christ's Church actually separated themselves, in 1803, from the parish of Fairfax, and formed a distinct Episcopal Church; and the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

2. This defect in the title being thus made out, it follows that the appellant has a right to require that the contract should be rescinded, unless there be some special objection to preclude him. As to the sale being under a decree, the English practice on this subject relates to objections arising on the abstract which is presented to the purchaser. But defects subsequently discovered, may be objected, and if it appears that the vendor can make no title, the bill will be entertained.

As to notice, there is no proof of actual notice; and the circumstances are not sufficient to infer constructive notice. Nor has the objection to the title been varied by taking possession. The doctrine is, that if the vendee has knowledge of the defects before he takes possession, it is considered as a waiver of the objection, and it will be found that all the cases turn upon this distinction.

1824.

Mason v. Muncaster.

On the part of the respondents, it was insisted, 1. That the appellant had full notice, either actual or constructive, at the time of the sale, of all the facts and circumstances of which he now seeks to avail himself, in order to rescind the sale. The proceedings in the former case were alone sufficient to charge him with notice.

2. This being a judicial sale, under a decree, the party was bound to have applied to the Court below, either before confirmation of the sale, or afterwards, to rescind the sale, and cannot now maintain an independent bill for that purpose, the effect of which would be, collaterally, to set aside the sale, as it stands confirmed by the report.[a]

3. The contract has been executed on the part of the appellant, by taking possession of the land, and it is now too late for him to make any objection to the sufficiency of the title.[b]

4. But a careful examination would show that there was not any defect in the title. The former decision of this Court had put at rest the question as to the sufficiency of the deed from Jennings, to pass his title to the Church-Wardens, for the benefit of the parish. It was there determined that the conveyance could not operate by way of grant, but might operate by way of estoppel, to confirm to the church, and those claiming under it, the perpetual estate in the land.

a 1 *Fonbl. Eq.* 371. Note 6. 1 *Atk.* 489. 3 *Ves. jr.* 333. 3 *P. Wms.* 220. 306. 1 *Rev. Code*, 80. s. 34.

b 1 *Ves. jr.* 221. 226. 3 *P. Wms.* 191. 4 *Dess. Ch. Rep.* 134. 12 *Ves.* 25.

c Terrett v. Taylor, 9 *Cranch*, 53.

1824.

Mason v. Muncaster.

The present Vestry of the Episcopal Church at Alexandria, called Christ's Church, are the legal successors of the Vestry of the parish of Fairfax. From the year 1765 until 1801, the town of Alexandria was a part of the county of Fairfax, and the parish of Fairfax. After the year 1792, the Vestry met exclusively in Alexandria; the congregation at the Falls Church, by degrees became extinct; and the Vestry of the parish, with the church at Alexandria, has been constantly kept up, whilst the congregation that used to assemble at the *Falls Church* has ceased to exist. The consequence is, that the glebe land belongs to the Alexandria congregation, as much as if the two congregations had agreed to meet in the church at Alexandria, and had disposed of the other. There never was, and there never could be, two Vestries in the parish, that is, one for each church. Since the year 1776, there have been no compulsory means used for the support of the church, and it has rested on the voluntary contributions of the parishioners; yet every thing that has been done in respect to the property of the church, shows conclusively the regular succession of this Church and Vestry, as the Church and Vestry of the parish of Fairfax. The Vestry has been elected by the members and contributors to the church, but the right of voting did not belong to the parishioners generally, it was confined to those members and contributors. At the same time, no inhabitant of the parish has been denied the privilege of becoming a contributor, with its consequent right of voting. All parties who had

1824.

Mason v. Muncaster.

any title to the property, were before the Court in the former case, in which the sale was decreed.[a] It was unnecessary to make the whole body of parishioners parties to that suit. They have not individually any right or title to the property. It is the property of the parish, and the Vestry are the legal agents and representatives of the parishioners, with authority to administer and dispose of it.

Feb. 20th. Mr. Justice STORY delivered the opinion of the Court.

Upon the very voluminous pleadings in this case, assuming more the shape of elaborate arguments, than the simple and precise allegation of facts, which belong to Chancery proceedings, the principal questions discussed have been, 1. Whether the Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry in succession of the parish of Fairfax. 2. Whether the existence of another parish church, called the *Falls Church*, within the same parish, has any material bearing upon the title, either as to making parties, or settling the right to the glebe. 3. Whether the appellant had full notice of the true nature of the title before the purchase, and so took it with its infirmities, if any such existed. 4. Whether, this being the case of a judicial sale under a decree, the party was not bound to have applied to the Court below, before confirmation of the sale, or

[a] 3 *Ves. jr.* 505.

afterwards, to rescind the sale; and can now maintain an independent bill for that purpose, the effect of such bill being collaterally to set aside the sale, as it stands confirmed by the report. Another point was made at the bar, as to the sufficiency of the conveyance by Jennings to the Church-Wardens, in 1770, to pass his title in fee for the benefit of the parish. But that point was put at rest, in the case of *Terrett v. Taylor*, and is not now open for discussion.[a]

[a] Upon this point, the Court says, in the former case, "Upon inspecting the deed, which is made a part of the bill, and bears date in 1770, the land appears to have been conveyed to the grantees, as Church-Wardens of Fairfax, and to their successors in that office, for ever. It is also averred in the bill, that the plaintiffs, together with two of the defendants, (who are Church-Wardens,) are the Vestry of the Protestant Episcopal Church, commonly called the Episcopal Church of Alexandria, in the parish of Fairfax, and that the purchase was made by the Vestry of said parish and church, to whom the present Vestry are the legal and regular successors in the said Vestry; and that the purchase was made for the use and benefit of the said church in the said parish. No statute of Virginia has been cited, which creates Church-Wardens a corporation for the purpose of holding lands; and at common law, their capacity was limited to personal estate. (1 *Bl. Com.* 394. *Bro. Abr. Corp.* 76. 84. 1 *Roll. Abr.* 393. 4. 10. *Com. Dig. tit. Esglise*, F. 3. 12 *Hen.* VII. 27. *b.* 13 *Hen.* VII. 7. 9. *b.* 37 *Hen.* VI. 6. 30. 1 *Burns' Eccles. Law*, 290. *Gibs.* 215.) It would seem, therefore, that the present deed did not operate by way of *grant*, to convey a fee to the Church-Wardens and their successors; for their successors, as such, could not take: nor to the Church-Wardens in their natural capacity; for 'heirs' is not in the deed. But the covenant of general warranty in the deed, binding the grantors and their heirs for ever, and warranting the lands to the Church-Wardens and their successors for ever, may well operate, by way of *estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land." 9 *Cranch*, 52, 53.

1824.

Mason v. Muncaster.

If the first question is decided against the plaintiff, it will be unnecessary to consider the other question, for it is not denied, that the Vestry of the parish of Fairfax sufficiently represent the whole parish for all the purposes of the original bill, and that both by the former laws of Virginia and the canons of the Episcopal Church, they, in connexion with the Minister, have the care and management of all the temporalities of the parish within the scope of their authority. To the consideration of this question, the attention of the Court has been mainly directed; and it is now my duty to explain the grounds upon which we have come to the conclusion, that the Vestry of the Episcopal Church of Alexandria is the regular Vestry in succession of the parish of Fairfax; and being so at the commencement of the former suit, the main objection to the title to the glebe falls, and the bill of the plaintiff ought to be dismissed.

By the laws of Virginia, passed antecedent to the revolution, each parish was authorized to elect a Vestry of twelve persons, to manage their parochial concerns; and however many distinct Episcopal Churches, or places of public worship, there were within the parish, the same Vestry had the superintendance and direction of them all. In point of fact, there were two such places of worship within the parish of Fairfax, the church at Alexandria, and the Falls Church; but the cure of both belonged to the same Minister, who was the rector of the whole of the parish, and the parochial concerns were managed by a single Vestry. Not the least trace can be found of any other Vestry

until the year 1819, when a Vestry was chosen *de facto*, by persons purporting to belong to the Falls Church, and that portion of the parish of Fairfax which is not included within the District of Columbia. Up to the year 1796, it is not disputed that a Vestry was regularly chosen for the whole parish; and the place of the choice of the Vestry, as well as the Vestry meetings, appears to have been usually, but not universally, at Alexandria. In April, 1796, a Vestry was chosen for the parish, to serve for the usual period of three years, who continued to hold meetings until April, 1799; and from that time, there seems to have been an interregnum, so far as the minutes in the parish books afford information, until April, 1804, when a Vestry was chosen, for the usual term of three years; and there has been a continuation of Vestries from that election down to the present time. The validity of these elections, from 1804, as elections of the Vestry of the parish of Fairfax, forms the point in controversy, and will be presently considered. Since the year 1800, the Falls Church has fallen into a state of dilapidation and decay, and public worship has not been celebrated there by the Minister of the Episcopal Church, on account of its deserted state; but there has been a regularly inducted Minister at the parish church in Alexandria, where divine services have been constantly performed.

The counsel of the plaintiff contend, that the Vestries chosen in 1804, and subsequently, are not to be deemed the Vestries of the parish of Fairfax, but of the Episcopal Church, (that is, of Christ's

1824.

Mason v. Muncaster.

Church,) in Alexandria; and they support their argument upon the following grounds: 1. That in the parish books the entries constantly style them the Vestry of the Protestant Episcopal Church, *at*, or *in*, or *of*, Alexandria, and not the Vestry of the Parish of Fairfax. 2. That, in point of fact, the congregation of Christ's Church, in 1803, separated themselves from the parish of Fairfax, and formed a distinct Episcopal Church. 3. That the elections were made by subscribers and contributors to the Episcopal Church in Alexandria, and not by the parishioners at large of the parish of Fairfax.

Under some one of these heads, all the objections urged at the argument may be arranged.

As to the first point. It is true, that in general the style of the entries of the Vestry meetings, since 1804, is as the plaintiff stated it to be. But it will scarcely be contended, that the errors of a recording clerk, in description, will change the nature or character of the Vestry proceedings, or devest them of their authority, if, in point of fact, they constituted the Vestry of the parish of Fairfax. The irregularities of merely ministerial officers, and especially of parish clerks, whose records are generally kept in a loose and inaccurate manner, have never been, hitherto, supposed to have such a controlling authority. Courts of justice will examine into the proceedings of ecclesiastical bodies with indulgence; and if, upon the whole, a consistent construction can be given to them, in conformity to existing rights, they will suppose them to be done in the exercise of those rights, ra-

ther than in gross usurpations of authority. Now, there is no pretence to say, that there existed any right on the part of the congregation of the Episcopal Church at Alexandria, to choose a Vestry of its own, which should not be the Vestry of the parish. The church itself, with the church-yard and appurtenances, belonged to the parish of Fairfax. It was the parish church. The Vestry, which had a right to govern and manage its temporal concerns, was the parish Vestry. It was an Episcopal Church, under the direction and authority of the General Episcopal Church of Virginia; and by the canons of that church, made in conformity with the laws of Virginia, and never repealed, the Vestry were to be elected for the parish. It is not lightly to be presumed, therefore, that an election of a Vestry was intended to be made in any other manner than the canons of the Episcopal Church and the rights of the parishioners would justify. The very fact of a total silence, and absence of any objection, through so long a period, would authorize the conclusion that the Vestry was understood to be a parish Vestry, and its acts were for the benefit of the whole, and not for the part connected with the Alexandria Church. It should also be recollected, that the Falls Church had fallen into decay, and was no longer used for purposes of public worship. It was considered in the same light as if totally destroyed; and then, as the Alexandria Church was the only worshipping church in the parish, nothing could be more natural than, in common parlance, and in parochial records, to designate the Vestry as the Vestry of the Episcopal Church *of*,

1824. Mason v. Muncaster.

in, or *at*, Alexandria. It was so in a strict sense, not because it was not the parish Vestry, but because the church at Alexandria was the parish church, and its congregation, in an ecclesiastical sense, consisted of the Episcopalian parishioners of Fairfax. If we advert to the history of the Virginia legislation on this subject, there will be found a natural reason for this apparent change of style, without any intended change of character. That legislation is referred to, somewhat at large, in the case of *Terrett v. Taylor*, and need not here be minutely examined. The act of 1784, ch. 83. created the Minister and Vestry of every parish a corporation, by the name of the Protestant Episcopal Church, in the parish where they respectively resided. When, by the subsequent act of 1786, ch. 12. this act was repealed, there was provision made, that all religious societies might, according to the rules of their sect, appoint, from time to time, trustees to manage their property, which trustees were, by the subsequent act of 1788, ch. 47. declared to be the successors to the former Vestries. The general Episcopal Church of Virginia, in convention, adopted general regulations on this subject, conforming, in substance, to the act of 1784, and providing for the regular appointment of Vestries, who should be trustees, for every Episcopal Church in every parish. Under such circumstances, the natural denomination of the Vestry would be, the Vestry of the Episcopal Church in the particular parish. And when, in consequence of the separation of the county of Alexandria from the State of Vir-

1824.

Mason v. Muncaster.

ginia, by the cession to the United States, the parish church fell within the boundaries of Alexandria, the embarrassment arising from this new state of things, might well create doubts as to the proper designation, and introduce the new appellation. Whether this description was right or wrong, is of no consequence; for if there has been no legal change of character, in contemplation of law, the regular Vestry of this church remains the Vestry of the parish. It appears in proof, that a number of the congregation of the church at Alexandria, are persons residing without the boundaries of the District of Columbia, and in the Virginia part of the parish; and there is not the slightest evidence that, in the election of Vestries since 1804, a single parishioner of Fairfax has ever been refused his vote at any election, on account of his residence. We think, then, that the circumstance of a change of style in the parish records, furnishes no proof of the asserted change of character. In the election, however, of 1810, the entry in the books is, that the Vestry were elected "to serve the parish as Vestrymen;" and, immediately afterwards, in subscribing the test, they speak of themselves as the Vestry "of the Protestant Episcopal Church of Alexandria." Now, what parish is here spoken of? Plainly the parish of Fairfax, for no other parish is pretended to exist. And when the Vestry subscribed the test, as Vestry of the church of Alexandria, it is as plain that they understood that the parish and the church of Alexandria meant the same thing. If then the books of the

1824.

Mason v. Muncaster.

church are to furnish evidence against the defendants, they are entitled to the benefit of the same records, by way of explanation.

The second ground is, that the congregation of the church at Alexandria has separated itself from the parish, and formed a distinct society, and can no longer be deemed the parish church of Fairfax. This is principally attempted to be sustained by an agreement made in 1803, which is found fastened, by wafers, to the vestry book. That agreement, after reciting that a committee was appointed by "the Protestant Episcopal Church of Alexandria," to adopt measures for insuring a competent salary for a Minister, &c. and that the committee so appointed had reported, as an advisable mode, to rent out the pews to occupiers and others, at a fixed annual rent, amounting in the aggregate to 1186 dollars, and further proposed soliciting a voluntary subscription to supply any deficiency; then proceeds to state, that the subscribers agree to rent the pews, and to pay to the Rev. Thomas Davis, (then the Rector of the parish,) the sums annexed to their names, in quarterly payments, &c. &c. reserving a right to surrender up their pews at the end of a year. Such is the substance of the agreement; and it is extremely difficult to perceive how it conduces to prove, in any shape, the establishment of a new society. It is to be considered, that the church, whose pews were to be disposed of, was the parish church of Fairfax; and it cannot be pretended that the parish could be deprived of it, except by its own consent through its authorized

1824.

Mason v. Muncaster.

agents. A new society, composed partly of the parishioners, had no more right or power to dispose of the pews than utter strangers. It would be as gross a usurpation, and as tortious an act, in the one case as in the other. But there can be no doubt, that a parish may regulate the sale or renting of the pews of the church, in such manner as may conduce to the general benefit. The parish is not the less the owner of the church, because the pews in it are rented or sold to others; for the right to the exclusive use of the pews, is very different from the right to the freehold in the church itself. The agreement, in the present case, was nothing more, and purports to be nothing more, than a mere agreement for renting the pews. It is made with persons who are the committee of the church, and who claim the right to use it. It is an act which might be done by authority of the parish, without in any respect transcending its rights or duties. How then is it to be deemed an act which indicates the creation of a new society, or a separation from the parish? What authority could any new society claim to the parish property? If such a claim had been made, it would have been resisted; and the very circumstance, that no resistance was made, is conclusive that the agreement was made in the exercise of ordinary parochial rights, and indicated no severance of interests. In point of fact, an agreement, in substance like the present, was made, respecting the pews in this very church, in the year 1785; and yet no one supposed that the church ceased to be the parish church, or that the

1824.

Mason v. Muncaster.

subscribers constituted a new society. There is another circumstance, which is too significant to be passed over in silence; it is, that the Rev. Mr. Davis, to whom the agreement in question refers, was regularly inducted, in the year 1792, as Rector of the parish of Fairfax, and continued to officiate as such, in this very church, down to the year 1806, three years after this agreement was made. During all this period, the freehold of the glebe was vested in him, as *persona ecclesiæ*. How then is it possible to maintain, that the support of the Rector of the parish in the exercise of his parochial rights and duties, and the continuance of the Rector in possession of the glebe and the church, can be construed as an abandonment of all connexion with the parish, and a renunciation of its privileges? It is a fact, also, corroborative of the view that has been already taken by the Court of this agreement, that the possession and management of the temporalities of the church, have always been in the Vestries of the Alexandria Church, since 1804. They have exercised the sole and exclusive control over them. They have never disclaimed, in any ecclesiastical assembly, their former connexion. They have not applied to the Bishop, or other proper authority, to be formed into a new and distinct society, separate from the parish. And yet it is not denied that, by the rules and customs of the sect, new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority. In the act of consecration of the

1824.

Mason v. Muncaster.

church in 1814, the Vestry expressly declare the church to be the parish church of Fairfax, and in virtue of their authority, as the Vestry thereof, they dedicate it to the public worship of God; and the Bishop of the diocess then acknowledged and consecrated it as such. In the year 1807, the Rev. Mr. Gibson was elected Rector of the parish, upon the resignation of the Rev. Mr. Davis; and on that occasion, the Vestry resolved, that he should be inducted *as Rector of the parish*; and in the succeeding election of the Vestry, in the same year, the Vestry are stated in the records to be chosen "to serve the parish." So that, if in the records there are single expressions which, standing alone, might be of doubtful interpretation, the solemn acts of the Vestry in consecrating the church, in choosing the Minister, and in managing the temporalities, all point to their character as representatives of the whole parish. It may be added, that in the bill of *Terrett v. Taylor*, the Vestry assume to be the parish Vestry in succession; and that in the answer to the present bill, by the defendants, who are the existing Vestry of the Church of Alexandria, they assert, in the most positive and solemn manner, the same character, and utterly deny the allegations of the defendant's bill on this point. So that, unless the Court were prepared to divert the clear purport of the evidence, and the solemn acts of the Church, for a series of years, and the presumptions arising from long and undisputed possession of the property, and exercise of parochial authority, on account of some irregularities, which may occur in the trans-

1824.

Mason v. Muncaster.

actions of most public bodies, the conclusion cannot be arrived at, that the church at Alexandria has ceased to be the parish church of Fairfax, or that its congregation has become a distinct society.

The third ground of objection is, that the Vestry were chosen, not by the parishioners of Fairfax, but by subscribers and contributors to the Episcopal Church at Alexandria. This objection proceeds upon the supposition, that if the Vestry is *de facto* the Vestry of the parish, the very mode of choice demonstrates that it cannot be the Vestry *de jure*. Whether, in a case like that before the Court, the inquiry can properly be gone into as to the mode and regularity of the choice of a Vestry actually in office and exercising the duties thereof; and if the inquiry be proper, whether the legal distinction between a Vestry *de jure* and *de facto*, could avail the plaintiff, are questions upon which it is not necessary for the Court to express any opinion. We think a short examination of the subject will put the objection at rest, whatever might be the conclusion drawn from such a legal distinction.

Before the revolution, the Episcopal Church was the established church of Virginia, and all the parishioners were liable to be rated for parish taxes, and were entitled to vote in the choice of the Vestry. But the church establishment fell with the revolution, and the compulsive power of taxation ceased; and as no person could be compelled to worship in the Episcopal Church, or pay taxes for its support, the parishioners of the Episcopal Church, in the ecclesiastical sense of the term, af-

terwards consisted only of the Episcopalian contributors and members. The act of 1784, ch. 88. provided that, at all future elections of Vestries, no person should be allowed to vote, who did "not profess himself a member of the Protestant Episcopal Church, and actually contribute towards its support." Although this act was repealed by the act of 1786, ch. 12. yet the same act saved the management of their property and regulation of their discipline, according to the rules of their own sect, to all religious societies. By the canons of the Episcopal Church, subsequently passed, the right to elect Vestries is confined to the "freeholders and housekeepers, who are members of the Protestant Episcopal Church within the parish, and regularly contribute towards the support of the Minister, and to the common exigencies of the church within the parish." These canons being assented to by the various parishes which they govern, and not being inconsistent with the laws of Virginia, are not denied to be in force for parochial purposes. Now, there is not in this record the slightest proof, that any election of the Vestry has been made in any other manner, than that pointed out by the canons of the church; and the answer of the defendants expressly avers, that the choice has been constantly made according to the canons of the church, and that no person belonging to the Falls Church, has ever been a contributor, or ever offered to vote at any election. It seems to the Court, therefore, that, the elections being regularly made, by persons qualified according to the canons, the whole foundation of the objection is removed.

1824.

Mason v. Muncaster.

No inference can be deduced from this circumstance, in proof of the Alexandria Church having separated itself from the parish, and become a distinct and independent society.

It has been said, that the parishioners of the whole parish are the *cestuis que trust* of the glebe and other parochial property, and ought to be parties to any bill to dispose of it. But in an accurate and legal sense, the parishioners are not the *cestuis que trust*, for they have, individually, no right or title to the property. It is the property of the parish, in its corporate or aggregate capacity, to be applied and disposed of for parochial purposes, under the authority of the Vestry, who are its legal agents and representatives. Upon the sale of the glebe, the proceeds become parochial property, and must be applied for the common benefit, the maintenance of the Minister, the repairs of the churches, and other parochial expenses, by the Vestry, in good faith. But the mode, and extent, and circumstances, under which the fund is to be applied, are necessarily left to the discretion of the Vestries, from time to time chosen. An abuse of their trust, or duty, is not to be presumed; and if it should occur, the same remedy will belong to the parishioners as in other cases, where money is wantonly misapplied to wrong purposes, which constitute a common fund for the benefit of the whole parish, and not for the benefit of a part. It will be sufficient to decide upon such a case when it shall arise in judgment. But the individual parishioners residing out of Alexandria county, were no more necessary to be made

parties to the bill praying a sale of the glebe, than the individuals residing within the county. Both were represented in the only way known to the laws, by the Vestry duly appointed to manage parochial concerns.

These are some of the reasons which have led the Court to the conclusion that has been already stated, to wit, that the Vestry of the church in Alexandria is, in succession, the regular Vestry of the parish of Fairfax.

This decision renders it unnecessary to consider the other points raised at the argument; and it remains only to declare, that the judgment of this Court is, that the decree of the Circuit Court dismissing the bill, be affirmed with costs.

[Local Law.]

Doddridge v. Thompson and others.

Under the reserve contained in the cession act of Virginia, and under the acts of Congress of August 10th, 1790, ch. 67. [xl.] and of June 9th, 1794, ch. 288. [lxii.] the whole country *lying between the Scioto and Little Miami rivers*, was subjected to the military warrants, to satisfy which the reserve was made.

The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river.

The act of June 26th, 1812, ch. 432. [cix.] to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designate *Ludlow's line* as the western boundary, did

1824.

Doddridge v. Thompson.

not invalidate the title to land between that line and *Roberts' line*, acquired under a Virginia military warrant, previous to the passage of that act.

The land between Ludlow's and Roberts' line was not withdrawn from the territory liable to be surveyed for military warrants, by any act of Congress passed before the act of June 26th, 1812, ch. 432. [cix.]

ERROR to the Circuit Court of Ohio.

March 6th. This cause was argued by Mr. *Clay*, for the plaintiffs, and by the *Attorney-General*, for the defendants.

March 16th. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

Both parties in this cause claim under grants made by the United States, in that tract of country which was reserved by Virginia, out of her cession to Congress, for the purpose of satisfying the claims of her officers and soldiers on continental establishment. The reserve was at first dependent on a deficiency of good land, to satisfy those claims, in a territory reserved for the same objects in Kentucky, which was then a part of Virginia; but the necessity of making this fact appear, was afterwards dispensed with, and the deficiency was admitted to exist. The plaintiff, having the oldest patent, has, of course, the better title, if his patent be valid.

A case was agreed in the Circuit Court, on which a *pro forma* judgment was rendered for the defendant, which is now before this Court on a writ of error.

1824.

Doddridge v. Thompson.

The plaintiff claims under a military warrant, issued to one of the officers of the Virginia line, on continental establishment; and the defendant, under a purchase made from the United States, subsequent to the emanation of the plaintiff's grant. The first question made in the cause is, whether the land in controversy be within the Virginia reserve. The words are, that if the quantity of land reserved, on the south-east side of the Ohio, "for the Virginia troops on continental establishment, should prove insufficient for their legal bounties, the deficiency should be made up to the said troops, in good lands between the Scioto and Little Miami."

In 1790, Congress passed an act,[a] in which, after reciting that the agents for the troops of Virginia had reported to the Executive of that State, that there was a deficiency of good lands in the territory reserved on the south-east of the Ohio, and, after directing the Secretary of War to make a return to the Executive of that State of the number of officers, non-commissioned officers, and privates, who served in the Virginia line on continental establishment, it is enacted, "that it shall and may be lawful for the said agents to locate, to and for the use of the said troops, between the rivers Scioto and Little Miami, such a number of acres of good land, as shall, together with the number already located between the said two rivers, and the number already located on the south-easterly side of the river Ohio, be equal to

[a] 2 *U. S. L.* 179.

1824.

Doddridge v. Thompson.

the aggregate amount so to be returned, as aforesaid, by the Secretary of the Department of War."

In June, 1794, Congress passed another act[a] on this subject, declaring that every officer and soldier of the Virginia line, on continental establishment, entitled to bounty lands, between the Scioto and Little Miami rivers, "shall, on producing the warrant, or a certified copy thereof, and a certificate under the seal of the office where the said warrants are legally kept, that the same, or a part thereof, remains unsatisfied; and on producing the survey, agreeably to the laws of Virginia, for the tract or tracts to which he or they may be entitled, as aforesaid, to the Secretary of the Department of War, such officer and soldier, his or their heirs or assigns, shall be entitled to, and receive a patent for the same, from the President of the United States."

Under these acts the plaintiff's patent was issued. It is not, we think, to be questioned, that under the reserve contained in the cession act of Virginia, and under the acts of Congress which have been recited, the whole country lying between the Scioto and Little Miami was subjected to the military warrants, to satisfy which the reserve was made, and any part of it might be surveyed for any person holding such warrant. What is the extent of this country?

The plaintiff contends, that it is the territory between the Ohio, into which both rivers empty, and a line to be drawn from the source of the main

[a] 2 *U. S. L.* 440.

1824.

Doddridge v. Thompson.

branch of one river to the source of the main branch of the other, and the rivers themselves, from their sources to their mouths.

The Scioto is a much longer river than the Little Miami, and the defendant has suggested, that the country reserved may be limited by the Ohio on one side, and a line drawn from the source of the Miami to the Scioto, which shall be parallel with the Ohio, on the opposite side. But this suggestion has not been pressed; and the idea it conveys, is directly opposed to the words of the reserve, and the construction which has been uniformly given to the deed of cession by both the contracting parties. The territory lying between two rivers, is the whole country, from their sources to their mouths; and if no fork of either of them has acquired the name, in exclusion of another, the main branch, to its source, must be considered as the true river. Any other rule would be arbitrary, depending on caprice, not on principle; and the whole legislation of Congress upon the subject shows, we think, a disposition to be guided by this reasonable rule.

We are relieved from the inquiry respecting the main branches of these rivers, by the case agreed, which finds a map, certified by the commissioner of the land office, dated the 26th of February, 1820; and that a line on the said map, marked and thereon described as Roberts' line, represents a line extending from the source of the Little Miami to the source of the Scioto, and that the sources of both rivers are truly shown thereon.

Admitting this line to constitute the true boun-

1824.

Doddridge v. Thompson.

dary of the military reserve, the land in controversy lies within it; and the plaintiff's patent would, consequently, be valid, if it depended entirely on the original deed of cession, and the acts of Congress which have been recited. But the defendant's counsel contends, that as the plaintiff's title was to be derived from the government of the Union, it must have been obtained conformably to the laws of the United States, or is invalid.

It has been very truly observed, that, while the government of the Union is to be considered as holding the territory ceded by Virginia, in trust for the officers and soldiers of the Virginia line, so far as the reservation for their benefit extends, it is also to be considered as holding the lands not reserved, in trust for the nation; and as being bound by its high duties to execute that trust. Congress, therefore, found it necessary to provide for the sale of the territory not included within the reserve; and its laws made for this purpose may control, and have controlled, the original rights of the military claimants, and have established a line between the sources of the Scioto and Little Miami, different from that for which the plaintiff contends.

Without questioning the power of the government, the Court will proceed to inquire whether Congress has passed any law, contracting the military reserve within narrower limits than are prescribed by the deed of cession, as herein construed, or has made any provision which, in any manner, affects the plaintiff's grant.

In May, 1785, Congress passed "an ordinance for ascertaining the mode of granting lands in the

western territory," in which, for the purpose of securing to the officers and soldiers of the Virginia line, on continental establishment, the bounties granted them by that State, it is ordained, "that no part of the land between the rivers called Little Miami and Scioto, on the north-west side of the river Ohio, be sold, or in any manner alienated, until there shall first have been laid off and appropriated for the said officers and soldiers, and persons claiming under them, the lands they are entitled to, agreeably to the said deed of cession, and act of Congress accepting the same."

In May, 1796, Congress passed an act[a] for the survey and sale of these lands, directing the appointment of a Surveyor General, whose duty it should be "to survey and mark the unascertained outlines of the lands lying north-west of the river Ohio, and above the mouth of the river Kentucky, in which the titles of the Indian tribes have been extinguished, and to divide the same in the manner hereinafter directed."

The 2d section enacts, "that the part of the said land which has not been already conveyed," &c., "or which has not been heretofore, and during the present session of Congress may not be, appropriated for satisfying military land bounties, and for other purposes, shall be divided," &c.

This law, then, which gives to the Surveyor General his authority to survey the country generally, and to lay off the lands as prescribed in the act, excludes from this general authority all lands pre-

[a] 2 *U. S. L.* 533.

1824.

Doddridge v. Thompson.

viously appropriated for military land bounties, and for other purposes; and, consequently, excludes the lands between the Scioto and the Little Miami.

In May, 1800, Congress passed an act[a] providing further for the sale of these lands, and establishing for that purpose four land offices. The places at which these offices shall be fixed are designated in the act, and the district of country attached to each, is described. Neither of these districts comprehends any lands between the Scioto and the Little Miami. The Surveyor General was not authorized to survey any lands within the military reserve, nor was the sale of such lands authorized at any of the land offices. In the execution of this act, the Surveyor General caused a line to be run from the source of the Little Miami towards what he supposed to be the source of the Scioto, which is denominated Ludlow's line, and surveyed the lands west of that line in sections and parts of sections, as prescribed in the act of Congress.

In March, 1804,[b] Congress passed a law for ascertaining the boundary of the land reserved by the State of Virginia for military bounties, which enacts, "that the line run under the direction of the Surveyor General of the United States, from the source of the Little Miami towards the source of the Scioto, and which binds, on the east, the surveys of the lands of the United States, shall, together with its course continued to the Scioto river, be considered and held as the westerly boun-

a 3 *U. S. L.* 385.
b 3 *U. S. L.* 592.

dary line, north of the source of the Little Miami, of the territory reserved by the State of Virginia, between the Little Miami and the Scioto rivers, for the use of the officers and soldiers of the continental line of that State: Provided, that the State of Virginia shall, within two years after the passing of this act, recognise such line as the boundary of the said territory." The line mentioned in this act, is called Ludlow's line.

This act shows, we think, very clearly, that Congress did not mean to assert a power to fix the western boundary of the military reserve. The deed of cession, and the act of acceptance, were considered as forming a contract respecting a territory, the western line of which could not, at the time, be fixed with precision, and which was unavoidably described in terms requiring subsequent explanation and adjustment. This adjustment was to be made, not by one of the parties, but by both; and this act is an essay towards it. Congress makes a proposition to Virginia, by which the United States are to be bound, provided Virginia accepts it within two years. If it be not accepted within that time, the parties stand on their original rights, as if it had never been made. This is a very fair and equitable proceeding on the part of the government, and is founded on the idea that the rights of the parties are equal. Had Virginia accepted this proposition, it would have become a contract, and Ludlow's line would have been established as the western boundary of the military reserve; the land in controversy lying west of that line, would not have been liable to be surveyed to satisfy the plaintiff's war-

1824.

Doddridge v. Thompson.

rant. But Virginia did not accept the proposition, and the rights of the parties remained as if it had never been made.

In 1812,[a] Congress made another effort to establish this line. The President was authorized to appoint three commissioners, to meet commissioners to be appointed by Virginia, who were to agree on the western line of the military reserve, and to cause the same to be surveyed and marked out. Should commissioners from Virginia fail to meet them, they were to proceed alone, and make their report to the Executive. In the mean time, and until the line should be established by consent, Ludlow's line was to be considered as constituting the western boundary of the Virginia reserve.

The commissioners of the United States were met by those of Virginia, and they proceeded to ascertain the sources of the two rivers, and employed a Mr. Charles Roberts to survey and mark a line, from the source of one to that of the other. This line is called *Roberts' line*, is reported by the commissioners to the Executive, and is found, in the case agreed, to represent truly a line drawn from the source of the Little Miami to the source of the Scioto. The Virginia commissioners, however, refused to accede to this line, and claimed to run, from the source of the Scioto, a straight line to the mouth of the Little Miami, which would pass south of that river, and include a considerable tract of country not lying between that river and the Scioto. This demand prevented an agree-

[a] 4 *U. S. L.* 455.

1824.

Doddridge v. Thompson.

ment establishing Roberts' line; and as the act of June, 1812, provisionally designated Ludlow's line as the western boundary of the reserve, until one should be finally established, with the consent of Virginia, it remains the boundary for the present. Had the plaintiff's title been acquired subsequent to the passage of this act, there would be much force in the objection to it; but it was acquired before this act passed, and cannot, we think, be affected by it. Congress cannot have intended to annul, by a legislative act, a title which was valid at the time; and a law which does not express that intention ought not to have that effect given to it by construction. If the words of the act of 1804 were doubtful, which they are not, the act of 1812 would expound them, and show that not even a temporary boundary had been previously fixed. The appointment of commissioners to meet others to be appointed by Virginia, who were to agree upon and mark the true line, and the establishment of a temporary line till such agreement should be made, prove incontestably, that Congress did not suppose the line to be established. Had the commissioners from Virginia assented to the equitable proposition made by those of the United States, the plaintiff's patent, founded on a survey made before that time, would be admitted to be unassailable. And yet the land was, in fact, within the territory actually reserved at the time the survey was made, and no law had then passed substituting any other line for the true one. The act of 1812 does not look back, and annul existing titles; it is entirely prospective, and leaves

1824.

Doddridge v. Thompson.

prior titles as it found them. If, then, there be no other act of Congress, which impairs this patent, it must be considered as valid.

The defendant contends that there are previous acts, by which the land between Ludlow's and Roberts' lines was withdrawn from the territory liable to be surveyed for military warrants. The act of 1804, already mentioned, enacts, "that all officers and soldiers, or their legal representatives, entitled to bounty lands within the above mentioned reserved territory, shall complete their locations within three years after the passing of this act," and that the locations made within that part of the territory to which the Indian title has been extinguished, shall be surveyed, and the surveys returned to the Department of War, within five years. The 3d section provides, that such parts of the territory as shall not have been located, and such part as shall not have been surveyed, and the surveys returned to the Department of War, within the times prescribed by the act, shall be released from any claim for such bounty lands, and shall be disposed of in conformity with the laws passed for that purpose.

In March, 1807, an act passed, giving three years farther time for making locations, and five years farther time for making and returning surveys; "Provided, that no locations, as aforesaid, within the above mentioned tract, shall, after the passing of this act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained, for

land located contrary to the provisions of this section, shall be considered as null and void."

The time for making locations and surveys was farther extended, by subsequent acts containing the same proviso.

The defendant contends that this proviso comprehends the land previously surveyed by the Surveyor General of the United States.

We do not concur in this opinion, for several reasons.

The words refer to the whole military reserve, and seem intended to apply to surveys which might be made throughout that entire tract of country, not to the land surveyed in townships, sections, and parts of sections, by the United States, west of Ludlow's line. There were such surveys. The records of this Court show, that many controversies were produced in that country, by the mode of locating and surveying military lands, which had been adopted under the laws of Virginia; and it is not unreasonable to suppose, that Congress, when giving farther time to make locations and surveys, might be disposed to cure the defects in titles already acquired, and to prevent second locations on lands already located. The words of the proviso too are adapted to the saving of private rights.

It has great influence, we think, on this question, that if the proviso be construed to comprehend the surveys made by the United States, it would amount to the establishment of Ludlow's line; for those surveys were made up to that line, and would indirectly curtail the Virginia military

1824.

Doddridge v. Thompson.

reserve. This was obviously not, at that time, the intention of the government. Subsequent to this period, in 1812, commissioners were appointed for the purpose of agreeing with those of Virginia on the true line, and marking it; who were directed "to note the intersections, if any, of said line with any surveys heretofore authorized by the United States." Congress was induced to give farther time for making these locations and surveys, by a just sense of the real difficulties attending the completion of titles in that country, and an equitable regard for the rights of the claimants. There can be no reason to suppose that it was intended to withdraw one part of the country from these claims more than another.

If this intention had existed, it would have been manifested in more intelligible and direct words. Instead of the ambiguous language used in this proviso, all locations would have been restrained beyond Ludlow's line; Congress would have avowed its intention in plain terms, and would have effected its object by direct means. But the course of legislation which has been pursued on this subject, the scrupulous regard which the government has shown to the conditions on which the cession of Virginia was made, the liberal and fair offers of the United States, for adjusting the real extent of the reserve, forbid a construction which would indirectly abridge that reserve.

But were it to be admitted that the proviso does comprehend the lands between the lines surveyed by Roberts and Ludlow, that admission could not affect this cause. The words of the proviso are, "that no *locations shall* be made on tracts of land,

1824.

Riggs v. Taylor.

for which patents had been previously issued, or which had been previously surveyed." The prohibition respects future locations, not future surveys; and the case does not show when this location was made. It might have been made previous to the passage of the act of 1807; and the presumption of law is, that it was made before that time, since the patent is presumed to be valid, until the contrary is shown.

On both points, the Court is of opinion that the law upon this case is for the plaintiff, and that the judgment of the Circuit Court, in favour of the defendants, must be reversed, and judgment entered for the plaintiff.

Judgment reversed.

[Evidence.]

Riggs v. Taylor.

If a party intend to use a written instrument in evidence, he must produce the original, if in his possession. But if it is in the possession of the other party, who refuses to produce it, after notice, or if the original is lost or destroyed, secondary evidence (being the best which the nature of the case allows) will be admitted.

The party, in such case, may read a counterpart; or, if there is no counterpart, an examined copy; or, if no such copy, may give parol evidence of the contents.

Where a writing has been voluntarily destroyed, for fraudulent purposes, or to create an excuse for its non-production, secondary evi-

1824.

Riggs v. Tayloe.

dence of its contents is not admissible. But where the destruction or loss (although voluntary) happens through mistake or accident, such evidence will be admitted.

ERROR to the Circuit Court for the District of Columbia.

Feb. 26*th.* This cause was argued by Mr. *Key*, for the plaintiff, and by Mr. *Hay*,[a] for the defendant.

March 16*th.* Mr. Justice Todd delivered the opinion of the Court.

This was an action on the case brought by the plaintiff against the defendant in the Circuit Court of the District of Columbia, upon a contract in writing, entered into between the plaintiff and defendant, for the sale of bank stock of the Central Bank of Georgetown. At the time that this contract was entered into, each party had a counterpart of the contract, and the plaintiff alleging the loss of his, he gave notice to the defendant to produce, upon the trial, the one which he, the defendant, had; but the defendant declined producing it, stating that he had lost his also. In consequence of these losses, the plaintiff, upon the trial of the cause, offered to prove, by a person who was a witness to the contract, and had subscribed it as such, the contents of the contract, and to entitle himself to give this testimony, made the following affidavit: "The plaintiff in this cause makes oath, in relation to the memorandum

a He cited 2 *M'Nally on Evid.* 344. 1 *Phill. on Evid.* 167. 3 *T. R.* 51. 3 *Dall.* 415.

1824.

Riggs v. Taylor.

of agreement between the defendant and himself, relative to the stock in the declaration mentioned, that his impression is, that he tore up the same, after the transfer of the stock, believing that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. He is not certain that he did tear it up, and does not recollect doing so, but such is his impression. If he did not tear it up, it has become lost or mislaid; and that he has searched for it among his papers repeatedly, and cannot find it." The defendant objected to this testimony, and insisted that no evidence ought to be given of the contents of the said contract. The Court sustained the objection; whereupon a verdict and judgment was given for the defendant. The plaintiff filed a bill of exceptions to the opinion of the Court, excluding the evidence aforesaid from going to the jury, and the cause is brought up to this Court by a writ of error.

The only question to be decided by this Court is, whether the Circuit Court erred in rejecting the said evidence.

Whether the plaintiff in the cause was a competent witness to prove the loss or destruction of the written agreement, referred to in the bill of exceptions, need not be inquired into, as it was not objected to in the Court below, and the question was waived by the defendant's counsel in this Court.

The admissibility of evidence of the loss of a deed or other written instrument, is addressed to the Court, and not to the jury.

1824.

Riggs v. Taylor.

The general rule of evidence is, if a party intend to use a deed, or any other instrument, in evidence, he ought to produce the original, if he has it in his possession; but if the instrument is in the possession of the other party, who refuses to produce it, after a reasonable notice, or if the original is lost or destroyed, secondary evidence, which is the best that the nature of the case allows, will in that case be admitted. (*Phillips on Evid.* 399.) The party, after proving any of those circumstances, to account for the absence of the original, may read a counterpart, or, if there is no counterpart, an examined copy, or, if there should not be an examined copy, he may give parol evidence of the contents.

It is contended by the defendant's counsel, that the affidavit is defective, not being sufficiently certain or positive, as to the loss of the original writing. The affiant only states his *impression* that he tore it up; and *if* he did not tear it up, it has become lost or mislaid; that this is in the alternative, and not certain or positive. We do not concur in this reasoning. An impression is an image fixed in the mind, it is belief; and believing the paper in question was destroyed, has been deemed sufficient to let in the secondary evidence. (*Phillips on Evid.* 399. 7 *East*, 66. 3 *East*, 284.) The alternative alluded to is, "if he did not tear it up, it has become lost or mislaid." Now, if he tore it up, it was destroyed; if it was not destroyed, it was lost or mislaid; in either event, it was not in the power or possession of the affiant, which, we think, is suffi-

ciently certain and positive to let in the secondary evidence.

It is further contended, that it appears from the plaintiff's own showing, the destruction or loss of the writing was voluntary and by his default; in which case, he ought not to be permitted to prove its contents. It will be admitted, that where a writing has been voluntarily destroyed, with an intent to produce a wrong or injury to the opposite party, or for fraudulent purposes, or to create an excuse for its non-production, in such cases the secondary proof ought not to be received; but in cases where the destruction or loss (although voluntary) happens through *mistake* or *accident*, the party cannot be charged with default. In this case, the affiant states, that if he tore up the paper, it was from a belief that the statements upon which the contract had been made were correct, and that he would have no further use for the paper. In this he was *mistaken*. If a party should receive the amount of a promissory note in bills, and destroy the note, and it was presently discovered that the bills were forgeries, can it be said that the voluntary destruction of the note would prevent the introduction of evidence to prove the contents thereof; or, if a party should destroy one paper, believing it to be a different one, will this deprive him of his rights growing out of the destroyed paper? We think not. Cases of voluntary destruction of papers, arising from *mistake*, as well as from *accident*, might be multiplied *ad infinitum*. In this case, the evidence offered was

1824.

Riggs v. Tayloe.

that of the subscribing witness to the writing; it was the best evidence that the nature of the case admitted, which was in the possession or power of the party. This Court is, therefore, of opinion, the Circuit Court erred in refusing to let the said evidence go to the jury.

It was further contended by the defendant's counsel, that the declaration is radically defective, stating no cause of action whatever.

If there had been a single count only, in the declaration on the written contract, it might be necessary to go into an examination of this point; but as there is a count for money had and received, and money paid and advanced, which, if the evidence had been permitted to go to the jury, and they had found their verdict on this count, it would have been clearly good, we deem it immaterial to decide it.

Judgment reversed, and a *venire facias de novo* awarded.

1824.

Hughes v. Edwards.

[Chancery. Alien. Mortgage.]

Hughes and others, *Appellants*,
v.
Edwards and Wife, *Respondents*.

Where the mortgage deed contained a defeasance that the mortgagor should pay the debt, according to the condition of a bond recited in the deed, by which it was payable on a day already past, at the time of the execution of the deed, *held* that this circumstance did not avoid the mortgage deed in equity, where it was to be considered as a conveyance, absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage.

A Court of equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage, wherever it is shown to have been intended merely as a security for the payment of a debt.

In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption.

Under the 9th article of the treaty between the United States and Great Britain, of 1794, it is not necessary for the alien to show that he was in the actual possession or seisin of the land, at the date of the treaty, which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. The title of an alien mortgagee is protected by the treaty.

But, independent of the stipulations of the treaty, an alien mortgagee has a right to come into a Court of equity, and have the property, which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land as an incident.

A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in equity by analogy to the statute of limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for the neglect.

1824.

Hughes v. Edwards.

Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged, unless circumstances can be shown to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still subsisting, and the like.

A *bona fidei* purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgagor.

Such a purchaser is not entitled to have the value of the improvements made by him deducted from the proceeds of the sale of the mortgaged premises.

APPEAL from the Circuit Court of Kentucky.

Feb. 28th. This cause was argued by Mr. *Clay*,[a] for the appellants, and by Mr. *Wickliffe*, for the respondents.

March Mr. Justice WASHINGTON delivered the opinion of the Court.

This is an appeal from a decree in equity of the Circuit Court for the district of Kentucky. Edwards and wife, the plaintiffs in the Court below, filed their bill in that Court, on the 8th of June, 1816, in which they charge, that the female plaintiff, before her coverture, advanced, by way of loan, to James Hughes, her brother, the sum of £770 2s. 4d., for which he gave his bond, bearing date the 10th of September, 1793, with condition to pay the same on the 12th of the same month; and for securing the said debt, she took from the said

a He cited Foster v. Hodgson, 19 *Ves.* 184. Cholmondeley v. Clinton, *Jac. & Walk.*

1824.

Hughes v. Edwards.

Hughes a mortgage upon sundry lots, situate in Lexington, in Kentucky, which are particularly described. It further charges, that the debt still remains due and unpaid; and that the defendant, Hughes, subsequent to the execution of the mortgage deed, had sold part of the mortgaged premises to Gabriel Tandy, David and James M'Gowan, Robert Wilson, Samuel Patterson, James Wilson and John Anderson, John Parker, and William Bowman, all of whom are alleged to have purchased with legal notice of the plaintiff's lien on the said property, the deed having been duly recorded in the County Court of Fayette, agreeably to law. The mortgagor, and the purchasers under him, all of whom are stated to be citizens of Kentucky, are prayed to be made defendants; and the prayer of the bill is, that the defendants may be decreed to pay the aforesaid debt, with interest, &c.; and on failure, that the equity of redemption of the defendants be foreclosed, and the mortgaged property decreed to be sold, to satisfy the said debt, &c. The bill alleges the plaintiffs to be aliens, and subjects of the King of Great Britain. The deed of mortgage, dated the 14th of February, 1794, which (as well as the bond referred to in it) is made an exhibit, contains a defeasance, that the mortgagor should pay the said sum of £770 2s. 4d., with lafwul interest thereon, according to the condition of the bond recited in it. It was duly proved and recorded in the County Court of Fayette, on the 11th of March, 1794.

Tandy and Patterson severally answered this bill, each of them admitting himself to be in pos-

1824.

Hughes v. Edwards.

session of certain parts of the mortgaged premises, under a *bona fide* conveyance, for valuable consideration paid, from the mortgagor, or others claiming under him, and without notice of the mortgage, other than the constructive notice given by the record of the same. They allege the continued possession of the mortgaged premises, from the date of the mortgage, by the said Hughes, or those claiming by purchase under him; and rely upon the length of time, and uninterrupted possession, as grounds for presuming that the debt has been paid, or released, in bar of the relief sought.

M'Gowan, and Hughes, the mortgagor, having died pending the suit, the guardians *ad litem* of their heirs and representatives severally answered, not admitting any of the charges in the bill, and relying upon the presumption of payment, or a release of the debt, from length of time.

The bill was dismissed, as to all the defendants, except Hughes' heirs, Patterson and Tandy, upon their answers coming in; and after one or more interlocutory decrees, the Court pronounced a final decree of foreclosure, as to the above defendants; and in case the balance found to be due by the report of the commissioner, should not be paid by a certain day, a sale of the mortgaged property, in which the equity of redemption was foreclosed, was decreed.

It was admitted by the parties, that the defendants had made lasting and valuable improvements on the mortgaged property claimed by them; and that the female plaintiff, shortly after the date of

1824.

Hughes v. Edwards.

the mortgage, left the United States, and that neither she, nor her husband, has been since within the United States.

Amongst the exhibits filed in the cause, are two letters from James Hughes, the mortgagor, to the female plaintiff, the one bearing date the 24th of February, 1803, and the other the 17th of December, 1808; in the former of which, he recognises distinctly the existence of the mortgage, and in both, promises to make remittances as soon as it should be in his power.

The counsel for the appellants insist upon the following objections:

1. That the mortgage deed is a void instrument, the defeasance being to pay the money on the day it became due by the bond, viz. on the 12th of September, 1793, which was impossible, that day having already passed.

2. The plaintiffs, being aliens, by their own showing, cannot hold lands in Kentucky, and, therefore, cannot maintain a bill to foreclose this mortgage.

3. The plaintiffs are barred of their right to foreclose, by length of time.

4. That the mortgaged property ought not to have been made liable to the payment of this debt, beyond its unimproved value.

Effect of the impossible condition contained in the mortgage deed.

1. The first objection is well founded in point of fact; but as to its legal consequences, it was in a great measure answered by the concession which the learned counsel, who urged it, was constrained to make. He admitted the law to be, as it unquestionably is, that if a deed for land is to be

1824.

Hughes v. Edwards.

made void, by the happening of a subsequent condition, the performance of which is impossible at the time the deed is made, the condition only is void, and the estate of the grantee becomes absolute. But the use which he endeavours to make of the objection, was to turn the respondents out of the Court of equity, and to leave them to their legal remedy, by ejectment, to recover the possession of the granted premises, in which it was supposed they might be successfully encountered by the statute of limitations. But in what respect the situation of a grantee in a deed without a defeasance, but which was intended by the parties to operate only as a security, differs from that of an ordinary mortgagee, in respect to jurisdiction, and the act of limitations, is not perceived by the Court. The latter may pursue his legal remedy by ejectment, and he may, at the same time, file his bill, for the purpose of foreclosing the mortgagor of his equity of redemption. The objects of the two suits are totally distinct; and it is no objection to the remedy sought in equity, that the plaintiff has another remedy which he may pursue at law. In the one, he seeks to obtain possession of the mortgaged premises; and in the other, to compel the mortgagor to pay the debt, for the security of which the mortgaged property was pledged. Whether the defendant could avail himself of the act of limitations in the former case, whilst the equitable remedy of the plaintiff is subsisting, is a question which need not be decided in the present case, as the parties are now before a Court of equity. The effect which length of time may have upon

1824.

Hughes v. Edwards.

the plaintiff's rights in that Court, will be considered under another head.

The principles here laid down, are not less applicable to the case of an absolute deed, which is intended by the parties to operate as a security for a debt, than they are to that of a common mortgage. A Court of equity looks at the real object and intention of the conveyances; and when the grantor applies to redeem, upon an allegation that the deed was intended as a security for a debt, that Court treats it precisely as it would an ordinary mortgage; provided the truth of the allegation is made out by the evidence. So, too, the grantee in such a deed, may treat it as a mortgage, and, acknowledging it to be such, may apply to a Court of Equity to foreclose the equity of redemption, which will be decreed, in like manner as if an unexceptionable defeasance were attached to the deed. That Court directs its attention to the real object of the deed, and the intention of the parties, and will compel a fulfilment of both. Now what was the object of the present deed? It is admitted by all the parties to this cause, that it was to secure a debt due by James Hughes, the grantor, to Martha Hughes, the grantee; and it is apparent, from the instrument itself, exclusive of the condition, that the debt to be secured was that of which the bond recited in the deed was the evidence, which was payable on the 12th day of September, 1793, with interest from the date of the bond. This, then, being the contract of the parties, it ought to be carried into execution, unless

An absolute deed considered as a mortgage, in equity, where it is intended merely as security.

1824.

Hughes v. Edwards.

there should be objections to such a decree, other than the one which has been just disposed of.

Alienage of the mortgagee.

2. The next objection relied upon, is the alienage of the respondents. This objection would not, we think, avail the appellants, even if the object of this suit was the recovery of the land itself, since the remedies, as well as the rights, of these aliens, are completely protected by the treaty of 1794, which declares "that British subjects, who now hold lands in the territories of the United States, &c. shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please, in like manner as if they were natives; and that neither they, nor their heirs or assigns, shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens." In the cases of *Harden v. Fisher*, (1 *Wheat. Rep.* 300.) and *Orr v. Hodgson*, (4 *Wheat. Rep.* 463.) it was decided, that, under this treaty, it was not necessary for the alien to show that he was in the actual possession or seisin of the land, at the time of the treaty; because the treaty applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. Now, it is unquestionable, that at the time this treaty was made, the female plaintiff was entitled to assert a legal claim to the possession of this land, or to foreclose the equity of redemption, unless the debt with which it was charged was paid, in which case, equity would have considered her as a mere trustee for the mortgagor.

1824.

Hughes v. Edwards.

But the objection is deprived of all its weight, and would be so, independent of the treaty, in a case where the mortgagee, instead of seeking to obtain possession of the land, prays to have his debt paid, and the property pledged for its security sold, for the purpose of raising the money. Under this aspect, the demand is, in reality, a personal one, the debt being considered as the principal, and the land merely as an incident; and, consequently, the alienage of the mortgagee, if he be a friend, can, upon no principle of law or equity, be urged against him.

Lapse of time, its effects upon the rights of mortgagor and mortgagee, and of purchasers claiming under the former.

3. It is objected, in the third place, that the respondents are barred of their right to foreclose, by length of time. It is not alleged or pretended, that there is any statute of limitations in the State of Kentucky, which bars the right of foreclosure or redemption, and the counsel for the appellants placed this point entirely upon those general principles which have been adopted by Courts of equity, in relation to this subject. In the case of a mortgagor coming to redeem, that Court has, by analogy to the statute of limitations, which takes away the right of entry of the plaintiff, after twenty years adverse possession, fixed upon that as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances to account for the neglect appearing, beyond which a right of redemption shall not be favoured. In respect to the mortgagee, who is seeking to foreclose the equity of redemption, the general rule is, that where the mortgagor has been permitted

1824.

Hughes v. Edwards.

to retain possession, the mortgage will, after a length of time, be presumed to have been discharged, by payment of the money, or a release, unless circumstances can be shown sufficiently strong to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like. Now, this case seems to be strictly within the terms of this rule. The two letters from the mortgagor to the female plaintiff, in 1803 and 1808, admit that the mortgage was then subsisting, that the debt was unpaid, and they contain promises to pay it when it should be in the power of the writer. In addition to these circumstances, credits were endorsed on the bond, for payments acknowledged to have been made, which, though blank, the Court below ascertained to have been made on the 15th of January, 1796, the 15th of May, 1803, and the 2d of August, 1808. The *mortgagor*, then, cannot rely upon length of time to warrant a presumption that this debt has been paid or released, the circumstances above detailed having occurred from 8 to 13 years only prior to the institution of this suit.

But it is insisted that, although these acknowledgments may be sufficient to deprive the mortgagor of a right to set up the presumption of payment or release, they cannot affect the other defendants, who purchased from him parts of the mortgaged premises, for a valuable consideration. The conclusive answer to this argument is, that they were purchasers, with notice of this incumbrance. It must be admitted, that it was but con-

1824.

Hughes v. Edwards.

structive notice; but for every purpose essential to the protection of the mortgagee against the effect of those alienations, it is equivalent to a direct notice, and such is unquestionably the design of the registration laws of Kentucky. A purchaser, with notice, can be in no better situation than the person from whom he derives his title, and is bound by the same equity which would affect his rights. The mortgagor, after forfeiture, has no title at law, and none in equity, but to redeem upon the terms of paying the debt and interest. His conveyance to a purchaser with notice, passes nothing but an equity of redemption, and the latter can, no more than the mortgagor, assert that equity against the mortgagee, without paying the debt, or showing that it has been paid or released, or that there are circumstances in the case sufficient to warrant the presumption of those facts, or one of them. The Court is, therefore, of opinion that this objection cannot be sustained by either of the appellants.

Improvements made upon the mortgaged property.

4. The last objection is, that the mortgaged property ought not to have been made liable to the payment of this debt, beyond its unimproved value. The object of this suit is, to recover a debt, and to have the property pledged for its security sold, for the purpose of paying it. The debt, as was before observed, is the principal, and the land is only as a collateral security for the payment of it. The mortgagee seeks not to obtain the possession of the land, and to deprive the mortgagor or the purchaser of the improvements they have made upon it; and even if he did,

1824.

Hughes v. Edwards.

the question would not be materially changed. If by means of these improvements the value of the land has been increased, the mortgagor, or purchasers, are permitted to enjoy all the benefit of such increase, by paying the debt charged upon the land. If he will not do this, but submits rather to a sale of the property, he has all the benefit of its increased value, by receiving the overplus raised by the sale, after the debt is discharged. His improvements were made upon property which he knew was pledged for the payment of this debt, and he made them solely with a view to his own interest. The land was in reality his own, subject only to the lien; so much his own, that he is not accountable to the mortgagee for the rents and profits received by him during the continuance of his possession, even although the land, when sold, should be insufficient to pay the debt. Neither is the purchaser accountable for any part of the debt, beyond the amount for which the land may be sold, although it should have been deteriorated by waste, dilapidation, or other mismanagement. The claim, therefore, of a purchaser with notice, to have the value of the improvements which may have been made from the fruits of the property itself deducted from the price at which the property may be sold, seems to the Court too unreasonable to admit of a serious argument in its support. No case was cited, nor has this Court met with one, which affords it the slightest countenance. We must, therefore, overrule this objection.

Apportionment of the debt among the different purchasers of the mortgaged property.

Before concluding this opinion, it may be pro-

1824.

Hughes v. Edwards.

per to notice a point which was made by the counsel for the appellants, although it was not much insisted upon; it was, that the balance due upon this mortgage ought to have been apportioned upon all the purchasers from Hughes. The bill was properly dismissed as to all the defendants, except the heirs and representatives of Hughes, Tandy, and Patterson, upon their answers, denying the equity of the bill; and from these decrees no appeal was taken. As to Tandy and Patterson, who acknowledge themselves to be purchasers with notice, they stand precisely in the situation of the mortgagor, and the mortgagees have nothing to do with their relative rights to contribution amongst themselves. They are entitled to be paid the debt due to them, and to call for a foreclosure and sale of all the mortgaged property, whether it be in the possession of the mortgagor, or of others to whom he has sold it. If either of these defendants should pay more than his proportion of the debt, according to the relative value of the property they possess, that is a matter to be settled amongst themselves. But it would be most unreasonable to force the mortgagees into the delay and expense incident to the adjustment of those differences between persons with whom they have no concern. The conveyances by the mortgagor to them are void, as to the mortgagees, against whom they have no right, except that of redeeming, upon payment of the mortgage debt and interest.

Decree affirmed with costs.

1824.

Stephens v. M'Cargo.

[Local Law.]

STEPHENS, *Appellant*,

v.

M'CARGO and others, *Respondents*.

The land law of Virginia, of 1779, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant has forfeited that superiority, by failing to enter his warrant with the surveyor of the county, within twelve months after the end of the session at which the land law was enacted; and on that period having expired, and being prolonged by successive acts, during which time there was one interval between the expiration of the law and the act of revival, the original right of the holder of the pre-emption warrant was preserved, notwithstanding that interval, the entry of the holder of the treasury warrant not having been made during the same interval.

March 16th. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is an appeal from a decree pronounced by the Circuit Court of the United States for the District of Kentucky, directing the appellant to convey to the respondents certain lands mentioned in their bill, and claimed by them under two distinct titles.

The board of commissioners granted a certificate of pre-emption on the 26th day of April, 1780, to Benjamin Harrison, for 1000 acres of land, which certificate contained, within itself, a good location.

The entry with the surveyor was made on the 5th day of June, 1786; the land was surveyed on

1824.

Stephens v. M'Cargo.

the 12th of December, 1787; and the grant was issued on the 10th of February, 1789.

The complainants deduce title from Harrison to parts of this land.

The appellant claims under a grant issued on the 1st day of March, 1784, founded on a survey of the 14th of February, 1783, and on an entry made the 30th of May, 1780, on a treasury warrant.

In an ejectment brought against all the persons occupying the land covered by his patent, judgment was rendered in his favour; whereupon, several of the defendants filed their bill on the equity side of the Court, setting forth their better title, under the pre-emption warrant of Harrison, and praying that Stephens might be enjoined from proceeding farther at law, and might be decreed to convey to them, respectively, the lands they held under Harrison.

An amended bill was afterwards filed, with the leave of the Court, in which two of the defendants in the suit at law, who were not parties to the original bill, united with the original complainants. This amended bill sets forth, that on the 10th day of May, 1780, Richard Barbour made a valid entry of 1000 acres of land, on a treasury warrant, which was surveyed in January, 1786, and patented in June, 1787. One of the original complainants, and the two complainants introduced in the amended bill, show a regular title under this patent.

The answer of the defendant put the claims in issue, and the Court sustained the titles both of

1824.

Stephens v. M'Cargo.

Harrison and Barbour, and directed the defendant, Stephens, to convey to the plaintiffs so much of the land recovered by him in the suit at law, as was held by those titles.

From this decree Stephens has appealed; and his counsel alleges, that it is erroneous, because,

1. The titles of Harrison and Barbour are united in the same bill.

2. Stephens has the better title in equity, as well as law.

1. As to the form of the proceedings:

It may be admitted, that two persons cannot unite two distinct titles in an original bill, although against the same person. Such a proceeding, if allowed, might be extended indefinitely, and might give such a complexity to Chancery proceedings, as would render them almost interminable. But we know of no principle which shall prevent a person claiming the same property by different titles, from asserting all his titles in the same bill. If this principle be correct, then, as three of the complainants held under both titles, there would be a strict propriety in submitting both titles to the Court.

This would not be questioned, so far as the same land was claimed by both titles. So far as the surveys of Barbour and of Harrison interfered with each other, and the same person held under each, he would be unquestionably correct in comprehending both claims in the same bill. If this were the fact in only a small portion of the land, still the two titles may be brought before the Court; and if this may be done, it would follow, that all who

claim under either, and who are properly in Court, may assert their claims under both titles.

But a joint judgment has been rendered at law, against all these complainants, and they have an unquestionable right to unite in their application to a Court of equity, for an injunction to this judgment. The Court may, consequently, hear the whole cause, for the purpose of determining whether this injunction shall be perpetuated; and it is a rule, that a Court of equity, which has jurisdiction of a question, may proceed to its final and complete decision. Directing a conveyance, is only making that relief, which would be afforded by a perpetual injunction, more complete.

We think, that all those against whom the judgment at law was rendered, might properly unite in this bill, and assert their titles under Barbour and Harrison, or either of them.

We proceed, then, to the inquiry, whether the appellant or the respondent have the better title in equity.

This inquiry is confined to that part of the case which respects the title under Harrison. Barbour's entry, being prior to that of Stephens, gives a better equitable title, according to the settled course of decisions in Kentucky, if the entry be a valid one, as this is admitted to be.

The land law of Virginia, under which all parties claim, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant shall have forfeited that superiority, by failing to comply with some of the requisites of

1824. Stephens v. M'Cargo.

the law. One of these is, that the warrant shall be entered with the surveyor of the county within twelve months after the end of the session of Assembly in which the law was enacted. That session of Assembly ended on the 26th of June, 1779, and, consequently, the time given by this act for making entries, expired on the 26th of June, 1780.

But the Legislature was induced, by weighty considerations, to prolong this time, and various acts of Assembly were passed, which did prolong it, until after this entry was made. It has been supposed, however, that there was, at least, one interval between the expiration of the law and the act of revival; and this circumstance gives birth to the present controversy.

The right of the Legislature to give farther time for entering pre-emption warrants, has never been drawn into doubt; but the influence of such laws on the rights or claims of others, has been questioned. The appellant contends, that by making his entry on the 30th of May, 1780, he acquired an inchoate right to the land, which could be defeated only by such an observance of the law, on the part of the person possessing the pre-emption warrant, as would preserve it from forfeiture; and that the land vested in him, by virtue of his entry, the instant the forfeiture took place.

We will inquire how far this principle is countenanced by the words of the act.

When the Virginia Assembly was about to open a land office, for the purpose of selling the immense tract of vacant territory within its limits, certain pre-existing rights were recognised and

affirmed; and others, which had no previous legal existence, were created, and conferred on meritorious individuals, as a reward for the fatigue and hazard encountered in exploring the country. Of the latter description, was the pre-emptive right, given to him who had marked and improved a tract of land. When the land office was opened, it was opened for the sale of waste and unappropriated land, not for the sale of land already appropriated, or of land, a right to appropriate which was vested by law in another; consequently, no entry, strictly speaking, was authorized, either by the act or the words of the warrant, on lands which were not at the time waste and unappropriated.

The words of the law opening the land office, are, "Be it enacted, that any person may acquire title to so much waste and unappropriated land, as he or she shall desire to purchase, on paying the consideration of forty pounds for every hundred acres," &c. The land, then, which was brought into market and offered for sale, on which the purchaser might place his warrant, and to which he might acquire a title, was "waste and unappropriated land;" land to which another had by law a pre-emptive right, could not be of this description. So long as that pre-emptive right continued, it was withdrawn from the general mass of property brought into market and offered for sale; it was land to which the power of appropriation conferred by the warrant did not extend.

The idea and intention of the Legislature, on this subject, is more clearly expressed in the clause

1824.

Stephens v. M'Cargo.

which provides for the disposition of the property in the event of a failure to make the entry within the time limited by law. It is in these words: "And where any such warrant shall not be entered and located with the county surveyor, within the before mentioned space of twelve months, the right of pre-emption shall be forfeited, and the lands therein mentioned may be entered for by any other person holding another land warrant; but such pre-emption warrant may, nevertheless, be located on any other waste and unappropriated lands, or upon the same lands, where they have not, in the mean time, been entered for by some other."

It would be, at least, useless, to grant an express power to the holder of a common treasury warrant, to locate the land after the forfeiture of the pre-emption right, if that power had been previously granted by the general clause, which enables him to locate waste and unappropriated land; and the limitation on the right of location, which makes it to commence after the forfeiture of the pre-emptive right, is opposed to the idea of its pre-existence.

The subsequent words authorize the holder of the pre-emption warrant to locate it "on any other waste and unappropriated lands, or upon the same lands, where they have not, in the mean time, been entered for by some other."

There can be no doubt that the words, "in the mean time," do of themselves import that interval which occurred between the forfeiture of the pre-emption right and the re-entry of the warrant.

1824.

Stephens v. M'Cargo.

Only an entry made in this interval, obstructs the re-entry which may be made by the holder of the pre-emption warrant. If the sense of these words could be rendered still plainer, it would be done by considering them in connexion with the other parts of the sentence. The entry which is preserved and protected against the re-entry of the pre-emption warrant, is that which had just before been authorized; that is, an entry made after the right of pre-emption had been forfeited. If the pre-emption warrant of Harrison had been re-entered, and had come in conflict with the entry of Stephens, made prior to its forfeiture, it must have prevailed, or the words of the law have been entirely disregarded. The act of Assembly, prolonging the time for making his entry, is certainly equivalent, while in force, to a re-entry made by himself without such act. It was in force when his entry was made, on the 5th day of June, 1786.

Upon the words of the law, then, there can be no doubt respecting the superiority of the title under Harrison, so far as it depends on the entries. The difficulty is produced by the circumstance that a patent was issued to Stephens before the warrant of Harrison was entered with the surveyor.

The entry of Stephens was made on the 30th day of May, 1780, before the pre-emptive right of Harrison had expired. The survey was made on the 14th of February, 1783, while the act of May session, 1782, which prolonged the time for making these entries until June, 1783, was in force. The patent issued on the 1st of March,

1824.

Stephens v. M'Cargo.

1784, at a time when the act, passed in 1783, prolonging the time for making entries until nine months after the end of that session of Assembly, was in force.

It is not, we think, to be doubted, that the several acts of Assembly, prolonging the time for entering pre-emption warrants, have the same effect, except as to entries made "in the mean time," that is, in the interval between a forfeiture and a renewal of the right, that would be allowed to the original act, had it continued in force until after Stephens obtained his patent.

The act of 1783 expired in June, 1784, and was revived and continued, by a subsequent law, until November, 1786. It was during the existence of this law that Harrison's entry was made.

The pre-existing law was permitted to expire before the act for its revival and continuance was passed; and the appellant contends, that this interval cured all the defects in his title, and placed it beyond the reach of any legislative enactment. In support of this position, he relies on the principle settled in Kentucky, that a patent is an appropriation of land, and that no subsequent entry can draw its validity into question. He relies also on the case of *Hoofnagle et al. v. Anderson*, (7 *Wheat. Rep.* 212.)

The Court has felt great difficulty on this point. The proposition that a patent is an appropriation of the land it covers, although the proceedings previous to its emanation may be irregular and defective, is unquestionably true; but this principle has never, so far as is known to the Court,

been applied to a case in which the opposing title to the particular land in controversy, had its commencement before the patent issued. In the case of *Hoofnagle and others v. Anderson*, the plaintiffs sought to set aside a patent by an entry made after the grant had issued, on a warrant which gave no specific claim to the particular land in controversy, but a general right to locate any unappropriated land in the military district. In that case, too, the warrant, under which Anderson's patent had been obtained, was issued to an officer really in the State line, but said, by mistake, to belong to the continental line. It was, originally, equally entitled with that under which Hoofnagle and others claimed, to be placed in the military district north-west of the Ohio, and had lost that equal right by an act of the Legislature, not entirely compatible with that strict regard to vested interests, which all governments deem a sacred obligation. The mistake in the warrant was a plain official error, not mingled with the slightest suspicion of fraud, and its holder, who was a purchaser without notice, had lost, in consequence of that mistake, the chance of acquiring any other land. The mistake, too, had done no more than to restore him a right which had been taken from him, perhaps inadvertently, certainly with a belief that no injury was done him.

The situation of both parties was different in that case from what it is in this. The party who obtained the patent, had an original right, equal to that of the person who demanded the land. In

1824.

Stephens v. M'Cargo.

this case, the appellant has no such original right. The warrant of Hoofnagle and others gave them no particular claim to the land in controversy; but, in this case, Harrison's warrant gave him, and those claiming under him, originally, an exclusive right to the particular land in controversy. That exclusive right, it is true, was forfeitable, and was at one time forfeited. But the Legislature, which created the right, and limited its duration, might, with the strictest propriety, prolong its existence; and might also prescribe the manner in which the property should be afterwards acquired by any other person. The Legislature has prescribed that manner. It is by an entry made when the pre-emptive right was forfeited. With the single exception of the claim given by such an entry, the Legislature might certainly remit the forfeiture, and reinstate the pre-emptioner in his original rights.

A title acquired according to law, might very properly be considered as obstructing the operation of this reinstating act, and be sustained against him; but a title which, in no stage of its progress, was authorized by law, appears under circumstances much less favourable. That patents obtained on improper entries have prevailed against persons whose titles commenced after such patents have issued, is no authority for the opinion that such patents ought to prevail against a title which traces its commencement to a time anterior to the emanation of the patent. The only difficulty in the case consists in connecting the right of the pre-emptioner, at the time his

entry was made, with the original right given by the act which opened the land office. That act gave the person who had marked and improved a piece of ground, the pre-emption to 1000 acres of land, to include his improvement, provided the warrant was entered within twelve months. That any act prolonging the time for making this entry, would continue the original right, is not to be questioned. It is plainly the intention of the Legislature, and nothing can prevent that intention from being effectual, but the intervention of some other title, which the Legislature cannot rightfully remove. The original act shows how that other intervening title may be obtained. It is by an entry made while the pre-emptive right had no existence.

Considering this question as being *res integra*, entirely unaffected by the decisions made in the Courts of Kentucky, the opinion of this Court would be, that a title acquired while the pre-emptive right of Harrison was in force, could not be sustained against his entry, if made according to the act by which his right was continued. We do not think that this opinion is opposed to the decisions of Kentucky, because no decision has ever been made in that country against a pre-emption right, properly entered, under the acts of Assembly for continuing the original law in favour of a treasury warrant, located while those laws were in force. Titles under treasury warrants, entered during the existence of a prior right, have been sustained against other subsequent entries,

1824.

Stephens v. M'Cargo.

made under similar circumstances; but never, so far as we are informed, against that prior right, if completed according to acts of the Legislature prolonging the time for its completion.

In the case of *Alsted et al. v. Miller*, (*Hardin*, 193.) the Court of Appeals of Kentucky decided in favour of a title founded on a pre-emption warrant, entered in December, 1782, against a title founded on a treasury warrant, entered on the 9th of June, 1780. That case is admitted to differ essentially from this, because, when Miller's pre-emption warrant was entered, no interval had occurred between the different acts, during which the land might have been legally entered; and because, too, Miller's appears to have been the oldest patent. But in that case the Court decided that the time for entering the pre-emption warrant might be prolonged, notwithstanding the previous entry of a treasury warrant on the same land. The Court observed, that the holders of treasury warrants purchased, subject to the reservations made in favour of pre-emptioners; that the Legislature might have permitted this reserved land to return to the common fund, on the failure of the person holding the pre-emption warrant to comply with the terms of the law, or might dispense with those terms in his favour, and prolong the time allowed for making his entry. The principle of this decision is, that an entry made during the existence of the pre-emptive right, is not such an inceptive title, as could be defeated only by the performance of the condition on which

the pre-emption right depended, at the time his entry was made. It gave him no rights which were not under the control of the Legislature, and might not be defeated by an act giving the pre-emptioner farther time to enter his warrant.

So far, then, as the decisions of Kentucky go, they are rather in favour of the opinion, that the original right of Harrison was preserved, notwithstanding the interval during which it was forfeited, since the entry of the appellant was not made in that interval.

The decree of the Circuit Court affirmed, with costs.

[Local Law.]

LOVE, *Plaintiff in Error*,

v.

SIMMS's lessee, *Defendant in Error*.

A question, under the registry acts of Tennessee, whether a junior conveyance registered, should take precedence of a prior unregistered deed. *Held*, that the registry did not, under the circumstances, vest the title against the elder deed.

ERROR to the Circuit Court of West Tennessee.

This cause was argued by Mr. *Eaton*, for the *Feb. 23d.*

1824.

Love
v.
Simms.

plaintiff in error,[a] and Mr. *Harper*, for the defendant in error.

March 10th.

Mr. Justice JOHNSON delivered the opinion of the Court.

This cause comes up from the Circuit Court for the district of West Tennessee. The judgment in that Court is in favour of the plaintiff in ejectment, and error is brought to reverse that judgment, on the ground that the Court below instructed the jury that the plaintiff there had the better title, and ought to recover. The facts of the cause are exhibited in a bill of exceptions, and, so far as are necessary to illustrate this opinion, may be stated thus:

One Stockly Donaldson obtained a grant of lands of the State of North Carolina, in that region of territory which lies west of the Cumberland mountain, and now composes a part of West Tennesse. This grant issued upon an entry made in the office of John Armstrong.

After obtaining the patent, Donaldson executed a power of attorney to one Grant, to sell this land, and Grant accordingly sold it to one Allison, and executed a conveyance to him in due form. This deed bears date in 1795. But it appears, that two years previous to this sale, Donaldson himself had executed a title for the same land to one Adair. And the plaintiff in ejectment now makes title through Allison, while the de-

[a] He cited, *Cro. Eliz.* 321. 1 *Burr.* 119.

fendant protects himself under the conveyance to Adair, but without connecting himself with it.

If the case rested here, there would be no difficulty in it; but, by the laws of North Carolina, no deed passes an estate, unless it be recorded in the county in which the land lies, and that within twelve months of its date. In this instance, the subsequent deed claims precedence, on the ground of prior registration, after the twelve months prescribed to the prior deed, and, of consequence, at a time when the prior deed was supposed to be altogether void, for want of registration.

On the point of registration the facts are these. The act of 1715, which is the registering act alluded to, has been suspended, as to the limitation of time, almost ever since its enactment. A similar provision in the land laws of that State, on the subject of registering grants, has also been the subject of a similar suspension. But as there was no County Court embracing within its jurisdiction that region of country in which this land lay, a new provision is introduced into the suspending act of 1788, by which it is enacted, that persons owning lands of this description, shall register them in the counties in which they reside; and a proviso, as to non-residents, is inserted, in these words: "Provided always, that persons owning such lands in this State, west of the Cumberland mountain, and not residing therein, shall register their grants for such lands in Hawkins county."

The holder of the junior conveyance from Donaldson, availed himself of this proviso, or (more properly speaking) enacting clause, and recorded

1824.

Love v. Simms.

it, with all his muniments of title, in Hawkins county. This took place in the year 1797, but the defendant below, the holder of the senior title from Donaldson, did not record his title until the year 1806, when, the State of Tennessee having created a county embracing this land, he committed his deed to registration in the county where the land lay; which was also done by the plaintiff below, four years afterwards. If, then, the registration in Hawkins county was a valid registration, and the effect of it was to vest the estate, to the prejudice of the prior conveyance from Donaldson, the plaintiff had the better title, and the charge was correct.

This question will now be examined.

It is obvious, that to attribute to the registration in Hawkins county the effect here contended for, it is necessary,

1. To attach to the provisions of the 5th section of the act of 1788, a variety of incidents, and to give it a latitude of construction which nothing but the unequivocal intent of the Legislature could countenance. The word *land* must be taken to mean muniments of title; the word *grant*, both patents and mesne conveyances; and words of enactment, which, in their direct and ordinary signification, are solely imperative, must be considered as importing a privilege or exemption. Besides which, all the provisions of the 5th section of the act of 1715, must be incorporated with the 5th section of that of 1788, in order to sustain the implication, that recording in Hawkins county shall make the one valid, or the failure to record in that place

1824.

Love v. Simms.

be fatal to the other. This view of the subject would lead to a protracted and subtle discussion, which the conclusions of this Court on other points, render now unnecessary to be pursued; and the subject is only noticed, to avoid the implication, that this Court has acquiesced in such a construction of the clause in question.

2. To give effect to the registration in Hawkins county, it is also obvious, that the 5th section of the act of 1788 must have continued in force until 1797, when the deed to Allison was recorded in that county. And this must either be inferred from the words of the section itself, or must be the effect of the subsequent reviving acts.

In their ordinary and direct signification, the words of the section in question certainly import perpetuity; and did it stand alone, such would be the effect given to it, whether in its operation it be considered imperative or remedial. But the context necessarily limits its duration. Both the title and preamble of the act, declare it to be to relieve persons, who would be sufferers from neglecting to record their muniments of title in due time. And it would be hard to conceive a reason why grants and mesne conveyances elsewhere, should be forced upon record within a limited time, and those for lands in this district of country left without limitation as to time. While there was no office assigned for their registration, a reason existed; but that reason is taken away, when we admit that a proper office was opened for that purpose.

The question, however, does not rest here: a

1824.

Love v. Simms.

recording law, unlimited in point of time, and unaffected by penalties, is an absurdity, since it destroys its own views, when it leaves the individual at large, to record or not, as he pleases. And if an additional proof be wanting, to indicate the sense of the Legislature in passing this section of the act of 1788, it is to be found in the reviving act of North Carolina, of 1790, in which it is expressly declared, that the act of 1788 would expire, if not then revived. The idea, therefore, of its being perpetual, in its own provisions, is rejected; and it remains to inquire, whether it was continued in force up to 1797, when the deed to Allison was recorded in Hawkins county. This must depend upon the several reviving acts passed subsequent to 1788. And it is perfectly clear, upon collating those acts, that the 5th section of the act of that year had expired, and was dropped, before Allison's deed was registered. In 1790, the State of North Carolina passed a law, reviving, for two years, the act of 1788, with all its provisions; but the State of Tennessee had previously been separated from North Carolina, and the provisions of the 5th section of the act of 1788, appear never to have been taken up in Tennessee.

It is not necessary, in arriving at this conclusion, to examine whether the words of the section shall be restricted to *grants*, or extended to mesne conveyances, or whether to deeds prior or subsequent. In no point of view will this section sustain the registration; for the deed is registered as a mesne conveyance, not a *grant*, properly so called, and

must take effect under those legal provisions which extend to mesne conveyances.

1824.

Love v. Simms.

The act which purports to revive the act of 1788, is that of Tennessee, of 1794; and by that, the right of recording out of the county where the land lies, is wholly dropped. The general words of the act of North Carolina, in 1790, are not adopted; but the right of recording again, is explicitly brought back to the general policy of the country, that of recording titles in the county where the land lies.

The question will, no doubt, here occur, whether the Legislature could have intended to impose this duty, while there was no county, and no Court, in which such record could be made.

The answer is, that the question is here immaterial, since it is enough for all the purposes of the defendant below, if the obligation to record did not exist at all, until there was a county established; but were it otherwise, the only question here is, whether the provisions of the act of 1794, or any other act prior to 1797, revives the supposed right to record in Hawkins county; whether it grants a privilege, or imposes a duty, as to that particular county, and the right of recording in any other place than where the land lies.

The act of 1796, which is that under the immediate protection of which it is necessary that Allison's deed should be sustained in favour of the plaintiff below, contains a simple revival of the act of 1794, without any farther provision. Its meaning and effect, therefore, must be read upon the face of the latter act.

1824.

Love v. Simms.

There were some other points made in the argument, which, as the cause must be sent back, it is proper to notice.

At one, if not two periods, of the early history of Tennessee, there occurred an interval of time, during which the suspending laws, as they are called, did not exist, and that of 1715, of course, operated upon all cases within it. That State passed from the jurisdiction of North Carolina in 1790, but its first territorial Legislature did not meet until 1794. By a provision of the act of separation, the laws of North Carolina became the laws of Tennessee, until repealed by the Legislative authority of the ceded territory, or, it is presumed, until they expired by their own limitations. Whether an hiatus occurred in these suspending laws, at the interval of time, is immaterial in this cause, since the junior deed did not come into existence until after the passage of the act of 1794. But between the sessions of 1800 and 1801, there did occur a chasm in these suspending laws, which chasm, the defendant in error contended in argument, put an end to the interest claimed under the prior deed altogether.

It is obvious, that this argument assumes for its basis the supposition, that the registration of his deed in Hawkins county was valid and effectual to this purpose. The opinion has been expressed, that the 5th section of the act of 1788, was not in force at the time when that registration was made. And the Court now recurs to the subject, only to avoid the imputation of having admitted the conclusion in favour of the defendant in error, had the

1824.

Love v. Simms.

registration in Hawkins county been made while the law was in force. We give no opinion on the operation of the act of 1715, on titles to those lands which were so situated that it was impossible for the provisions of the act of 1715 to be complied with; that is, those lands which lay in no designated county. In the present instance, the land in controversy was not included within a county line, until the year 1801. As both deeds were registered in the proper county, after the chasm occurred, they are both equally affected by it; and it has no bearing upon their interests, as made out under the registration where the land lies.

Another point made in argument, was, that the defendant could not protect himself under the title to Adair, without connecting himself with it. Upon recurring to the words of the charge, we find it to be, that the plaintiff below had the better title. From this, an inference undoubtedly arises, that if the defendant below had exhibited a better title, the plaintiff could not recover, even though the defendant did not show that better title to be transmitted to himself.

Since the registration in the county where the land lies, and which is the only registration deemed valid in this cause, gave the prior registration to the prior deed, and thus took away every claim to precedence from the deed under which the plaintiff below made title, the Court must be adjudged to have erred in its charge upon that subject. On the implied proposition, that the better title might be set up, as a shield against the plain-

1824.

Love v. Simms.

tiff's recovery in ejectment, even though the defendant does not show that better title in himself, we will limit ourselves to the following remarks:

The rule of law, that a plaintiff must recover by the strength of his own title, and not the weakness of his adversary's, must be limited and explained by the nature of each case as it arises. Since the rule is universal, that a plaintiff in ejectment must show the right to possession to be in himself positively, and it is immaterial as to his right of recovery, whether it be out of the tenant or not, if it be not in himself, it follows that a tenant is always at liberty to prove the title out of the plaintiff, although he does not prove it to exist in himself. Possible difficulties may be suggested as to the application of this principle to mere tort feasors or forcible disseisors; but besides that such cases, being generally provided for under statutes of forcible entry, must be of rare occurrence, it is time enough, when they occur, to consider what exceptions they present to the general principle.

The last point proper to be noticed, is that made in the former argument, on the question of revocation of the power of attorney under which the junior deed was executed.

This was supposed to be virtually revoked by the prior conveyance of the same land, executed by Donaldson, who gave the power. And this, on general principles, is unquestionably correct. Whatever liabilities, for damages or otherwise, Donaldson might have incurred by not revoking the power by due notice, it is unques-

tionable, that a power must cease and determine when there is nothing left for it to act upon. It will be seen, however, that this question resolves itself into the principal question in the cause, to wit, whether the first deed ever was a subsisting valid conveyance. If it was not, then the ground of the argument fails, for the estate had not, in effect, ever passed out of Donaldson; and if it was, then its effect is complete, without recurring to the ground of revocation.

1824.

Love v. Simms.

Judgment reversed.

JUDGMENT. This cause came on to be heard, &c. On consideration whereof, this Court is of opinion, that the said Circuit Court erred in instructing the jury "that the lessor of the plaintiff had the better title to the land in controversy." It is, therefore, ADJUDGED and ORDERED, that the judgment of the said Circuit Court in this case be, and the same is hereby reversed and annulled: and it is further ORDERED, that said cause be remanded to the said Circuit Court, with instructions to issue a *venire facias de novo*.

1824.

Stewart v. Ingle.

[PRACTICE.]

STEWART v. INGLE and others.

ERROR to the Circuit Court for the District of Columbia.

Feb. 24th. At a former day of this term, Mr. *Hay*, for the plaintiff in error, had obtained a certiorari, upon a suggestion of diminution in the record, directed to the Court below, and returnable *immediate*. The Clerk of the Circuit Court accordingly made return to the certiorari, with another record. Whereupon, Mr. Hay moved for a new certiorari, upon the ground that the return ought to have been made by the Judge of the Court below, and not by the Clerk.

Mr. Justice WASHINGTON, after consultation with the Judges, stated, that according to the rules and practice of the Court, a return made by by the Clerk was a sufficient return.

Motion denied.

[Jurisdiction.]

Peyton v. Robertson.

In replevin, if it be of goods distrained for rent, the amount for which avowry is made, is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to this Court upon a writ of error.

Mr. Chief Justice Marshall delivered the opinion of the Court. *March 17th.*

This is a writ of error to a judgment in the Circuit Court of the United States for the county of Washington, in the District of Columbia, rendered for the sum of 591 dollars. The writ was dismissed in the early part of the term, for want of jurisdiction, the judgment being for less than 1000 dollars. The plaintiff in error now moves to reinstate the cause, alleging that the damages laid in the declaration, not the amount of the judgment, is the matter in controversy between the parties.

The property of the plaintiff in error had been seized for rent, upon which she sued out a writ of replevin, and laid her damages in the declaration at 1000 dollars. The defendant in error acknowledged the taking charged in the declaration, and justified it as a distress for the sum of 591 dollars, due for rent in arrear. The judgment of the Court was in favour of the avowant, for the amount of the rent claimed.

1824.

Peyton v. Robertson.

The plaintiff in error contends, that her suit was not merely for restitution of the property taken, but also for damages, and that, in such a case, the value of the matter in dispute is the sum laid in the declaration.

Her counsel relied on the case of *Hulscamp v. Teel*, (2 *Dallas*, 358.) and on *Cook v. Woodrow*, (5 *Cranch*, 13.) to show that, in actions sounding in damages, the sum laid in the declaration is the standard of value. The case in *Dallas*, was an action of trespass, and that in *Cranch*, an action of trover. We think this case stands on different principles from either of those. In a writ of replevin, the real matter in controversy is the sum claimed as rent, or the property replevied. If the replevin be, as in this case, of property distrained for rent, the amount for which avowry is made is the real matter in dispute. The damages are merely nominal. If the writ be issued as a means of trying the title to property, it is in the nature of detinue, and the value of the article replevied is the matter in dispute. In this case, the judgment against the plaintiff in error being for less than 1000 dollars, this Court has no jurisdiction, and the motion to replace the cause on the docket must be overruled.

Motion denied.

1824.

Ex parte Burr.

[Practice. Jurisdiction.]

Ex parte Burr.

Quære, As to the authority of this Court to interfere, by mandamus, in the case of the removal or suspension of an attorney of the District and Circuit Courts.

Whatever may be the authority of this Court in that respect, it will not be exercised unless where the conduct of the Court below has been grossly irregular and unjust.

In a regular complaint against an attorney, charges cannot be received and acted on, unless made on oath. But he may himself waive the preliminary of an affidavit, and the Court may proceed, at his instance, to investigate the charges, upon testimony, which must be on oath and regularly taken.

Mr. *Emmett* moved for a rule to show cause why a mandamus should not issue to the Circuit Court for the District of Columbia, commanding that Court to restore one Burr, an attorney of that Court, who had been suspended from practice for one year, by order of that Court.[a] *March 16th.*

Mr. Chief Justice Marshall delivered the opinion of the Court. *March 17th.*

This is a motion for a mandamus to the Circuit Court for the District of Columbia, to restore Mr. Burr to his place of attorney at the bar of that Court.

It is a very unusual application, on which the Court has felt considerable doubts.

a Mr. Emmett cited *Tidd's Pract.* 59. 1 *Johns. Cas.* 134. 181. *Bac. Abr.* tit. *Mandamus.*

1824.

Ex parte Burr.

On one hand, the profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him. On the other, it is extremely desirable that the respectability of the bar should be maintained, and that its harmony with the bench should be preserved. For these objects, some controlling power, some discretion, ought to reside in the Court. This discretion ought to be exercised with great moderation and judgment; but it must be exercised; and no other tribunal can decide, in a case of removal from the bar, with the same means of information as the Court itself. If there be a revising tribunal, which possesses controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Some doubts are felt in this Court respecting the extent of its authority as to the conduct of the Circuit and District Courts towards their officers; but without deciding on this question, the Court is not inclined to interpose, unless it were in a case where the conduct of the Circuit or District Court was irregular, or was flagrantly improper.

In the case at bar, the proceedings were supposed to be irregular, because Mr. Burr was put to answer charges not made on oath.

That the charges, in a regular complaint against an attorney, ought not to be received and acted on, unless made on oath, is admitted. It is a course of proceeding which is recommended by consi-

derations, too obvious to require that they should be urged. But this is not a proceeding of that description. The Court did not call on Mr. Burr to answer an accusation in the nature of an information against him. The inquiry was invited by himself; the charges were made at his instance; and the Court proceeded on them at his request. Mr. Burr himself, then, dispensed with the preliminary step of an affidavit to the charges which were to constitute the subject of that inquiry. He waived this preliminary. The testimony on which the Court proceeded was all on oath, and obtained in a manner which is not exceptionable. There is, then, no irregularity in the mode of proceeding which would justify the interposition of this Court. It could only interpose, on the ground that the Circuit Court had clearly exceeded its powers, or had decided erroneously on the testimony. The power is one which ought to be exercised with great caution, but which is, we think, incidental to all Courts, and is necessary for the preservation of decorum, and for the respectability of the profession. Upon the testimony, this Court would not be willing to interpose where any doubt existed. It is the less inclined to interpose in this case, because the complaint is not of an absolute removal, but of a suspension, which is nearly expired, after which, Mr. Burr may be restored by the Court itself, should not very serious objections exist to that measure.

1824.

Ex parte Burr.

Motion denied.

1824.

Smith v. M'Iver.

[Chancery. Jurisdiction.]

Smith v. M'Iver.

In all cases of concurrent jurisdiction, the Court which first has possession of the subject, must determine it conclusively.

Although Courts of equity have concurrent jurisdiction with Courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a Court of law, a Court of equity cannot take cognisance of it, unless there be the addition of some equitable circumstance to give jurisdiction.

In such a case, some defect of testimony, or other disability, which a Court of law cannot remove, must be shown, as a ground for resorting to a Court of equity.

APPEAL from the Circuit Court of West Tennessee.

Feb. 10*th.* This cause was argued by Mr. *Eaton*, and Mr. *Isaacks*,[a] for the appellants; and by Mr. *White*, and Mr. *Spaten*,[b] for the respondents.

Feb. 20*th.* Mr. Chief Justice Marshall, delivered the opinion of the Court.

This is an appeal from a decree of the Circuit Court of the United States for the District of West Tennessee, dismissing the plaintiff's bill.

The bill states, that the plaintiff had made seve-

a They cited 1 *Madd. Ch.* 130. 180. Polk v. Wendell, 5 *Wheat. Rep.* 293. 303. *Coxe.* 208. 1 *Burr.* 450. 2 *Str.* 592. Winchester v. Evans, *Cooke's Tenn. Rep.* 420. Polk v. Wendell, 9 *Cranch*, 87. Burton v. Williams, 3 *Wheat. Rep.* 529.

b They cited 4 *Johns. Rep.* 510. 5 *Hayn.* 106. 206. 216.

1824.

Smith v. M'Iver.

ral entries for small tracts of land within the district, for which he had obtained patents. That the defendant, John M'Iver, claiming title to the same land, under an older grant, obtained by Donaldson and Tyrrel, had brought ejectments against him for the several tracts of land he claims, and has obtained judgment in some of them. That he has attempted to bring the causes before this Court by writ of error, but has been unable to do so, because no one of his tracts is worth two thousand dollars; though all of them, taken together, are worth a larger sum.

The bill alleges, that the grant to Donaldson and Tyrrel is a pretended grant, purporting to be issued by the State of North Carolina, in the year 1795; that if genuine, it does not cover his land, because it calls for 40,000 acres only, but includes 70,000 within its boundaries; that the grant is not founded on any warrants, or, if upon any, on those previously granted; and the numbers of the warrants have been inserted in the plat and certificate by the grantees, since the grant issued; that it is probable the grant never did issue, but was stolen out of the office in blank, and was filled up by the grantees, of all which the said M'Iver had notice, before he received his conveyance. That M'Iver contends sometimes, that the grant issued on one set of warrants, and sometimes on another, and has caused it to be registered in Knox county, in one way, and in Overton, where the land lies, in another; and to avoid detection, has torn the plat and certificate of survey from the grant. And, finally,

1824.

Smith v. M'Iver.

that the State of North Carolina had no power to issue the grant.

The defendant demurred to this bill, and on argument, the demurrer was sustained, and the bill dismissed.

The first question made in the cause, is the jurisdiction of the Court, sitting as a Court of Chancery. It is contended, on the part of the respondent, that a Court of equity can exercise no jurisdiction in the case, because the plaintiff has full and adequate remedy at law.

The several allegations of the bill have been reviewed; and it is contended, that each of them is examinable at law, and ought to be decided in precisely the same manner in both Courts. If the surplus quantity of land contained in the patent, avoids the grant, in whole or in part, in a Court of equity, its effect would be the same in a Court of law. If the grant be void, because issued without warrants, or on warrants previously satisfied, it is void at law. So with respect to the allegations, that it was stolen out of the land office; that the plat and certificate of survey have been torn off; that North Carolina had no power to issue it; and so with respect to every allegation in the bill. The facts alleged are all examinable at law, and a Court of law is as capable of deciding on them as a Court of equity. In such a case, the existence of some fact, which disables the party, having the law in his favour, from bringing his case fairly and fully before a Court of law, has been generally supposed to be indispensable to the jurisdiction of a Court of equity. Some defect of testimony, some disability,

which a Court of law cannot remove, is usually alleged as a motive for coming into a Court of equity. But, in the case at bar, the bill alleges nothing which can prevent a Court of law from exercising its full judgment. No defect of testimony is alleged; no discovery is required; no appeal is made to the conscience of the defendant. Facts are alleged, which have precisely the same operation in a Court of law as in a Court of equity; and the bill does not even insinuate that they cannot be proved at law.

The argument on the other side is, that the bill charges gross fraud on those under whom the defendant claims, and charges him with knowledge of that fraud; and that Courts of equity have concurrent jurisdiction with Courts of law, in all matters of fraud.

Admitting this proposition to be true, to the full extent in which it is stated, it will not, we think, aid the case. In all cases of concurrent jurisdiction, the Court which first has possession of the subject must decide it. The questions in these cases have all been decided at law, and the party can have no right to bring them on again before a Court of Chancery. Were a Court of equity, in a case of concurrent jurisdiction, to try a cause already tried at law, without the addition of any equitable circumstance to give jurisdiction, it would act as an appellate Court, to affirm or reverse a judgment already rendered, on the same circumstances, by a competent tribunal. This is not the province of a Court of Chancery.

The appellant has relied on the case of *Winches-*

1824.

Smith v. M'Iver.

ter v. Evans, et. al. (Cook's Tenn. Rep. 420.) That was a bill in the Court of Chancery of Tennessee, to be relieved against a judgment rendered in the State Court of Pennsylvania, on the suggestion that it was a trial by surprise, in the absence of the party and of his witnesses. The defendant filed a plea in bar, denying the surprise alleged in the bill, and averring that the trial was a full and a fair one, and that the judgment was rendered on all the testimony belonging to the cause. The plaintiff demurred; and, on the argument of the demurrer, the Court said, "taking the matter of the plea to be true, it would bar an investigation in this Court. If the complainant chooses to deny the truth of this plea, he can still reply to it, as well as to the answer; and he may then have an opportunity of showing, that there was not *a full and fair trial*; and that, therefore, the judgment ought, in equity, to have no effect. But while ever I am constrained to believe that there was a full and fair trial in a Court of law, it will be an objection with me, to a re-investigation in a Court of equity."

This case appears to the Court to decide the very principle laid down in the preceding part of this opinion.

Admitting, then, the concurrent jurisdiction of the Courts of equity and law, in matters of fraud, we think the cause must be decided by the tribunal which first obtains possession of it, and that each Court must respect the judgment or decree of the other. A question decided at law, cannot

be reviewed in a Court of equity, without the suggestion of some equitable circumstance, of which the party could not avail himself at law. 1824. Mollan v. Torrance.

Decree affirmed, with costs.

[PRACTICE. JURISDICTION.]

MOLLAN and others v. TORRANCE.

An endorsee of a promissory note, who resides in a different State, may sue, in the Circuit Court, his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note.

But where the suit is brought against a remote endorser, and the plaintiff, in his declaration, traces his title through an intermediate endorser, he must show that this intermediate endorser could have sustained his action in the Circuit Court.

A plea to the jurisdiction of the Circuit Court must show that the parties were citizens of the same State, at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties.

ERROR to the District Court of Mississippi.

This cause was argued by Mr. *Jones*,[a] for *March 6th.*

[a] He cited Young v. Bryan, 6 *Wheat. Rep.* 146. Dugan v. U. S., 3 *Wheat. Rep.* 180. *Chitty. Bills*, 149. 370.

1824.

Mollan v. Torrance. *March 10th.*

the plaintiffs, and by Mr. *Rankin*,[b] for the defendant.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

The declaration in this cause contains two counts. The first is against the defendant, Torrance, as endorser of a promissory note, made by Spencer & Dunn, payable to Sylvester Dunn, and endorsed by him to the defendant, Torrance, by whom it was endorsed to H. J. Lowrie, and by him to the plaintiffs. The other count is, for money had and received by the defendant to the plaintiffs' use.

The declaration states the plaintiffs to be citizens of New-York, and the defendant to be a citizen of Mississippi, but is silent respecting the citizenship or residence of Lowrie, the immediate endorser of Torrance, through whom the plaintiffs trace their title to the money for which the suit is instituted.

The case of *Young v. Bryan*, (6 *Wheat. Rep.* 146.) has decided, that an endorsee who resides in a different State, may sue his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note; but in this case the suit is brought against a remote endorser, and the plaintiffs, in their declaration, trace their title through an intermediate endorser,

b He cited Turner v. Bank of N. Amer. 4 *Dall.* 8. Montalet v. Murray, 4 *Cranch*, 46.

without showing that this intermediate endorser could have sustained his action against the defendant in the Courts of the United States. The case of *Turner v. The Bank of North America*, (4 *Dallas*, 8.) has decided, that this count does not give the Court jurisdiction. But the count for money had and received to the use of the plaintiffs, being free from objection, it becomes necessary to look farther into the case.

The defendant has filed a plea to the jurisdiction of the Court, in which he states, that the promises laid in the declaration were made to H. J. Lowrie, and not to the plaintiffs, and that the said H. J. Lowrie and the defendant, are both citizens of the State of Mississippi. The plaintiffs demurred to this plea, and the defendant joined in demurrer. On argument, the demurrer was overruled, the plea sustained, and judgment rendered for the defendant.

The case is now before the Court on a writ of error.

The plaintiffs contend that the plea is defective, because it avers that the said H. J. Lowrie and the defendant are both citizens of the State of Mississippi, at the time of the plea pleaded, not that they were citizens of the said State at the time the action was brought.

It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny

1824.

Mollan v. Torrance.

that jurisdiction, we think that judgment ought not to have been rendered on the demurrer in favour of the defendant. It must, therefore, be reversed, and the cause remanded to the Court for the District of Mississippi, where the parties may amend their pleadings, which are very defective.

Judgment reversed.

Judgment. This cause came on to be heard on the transcript of the record of the District Court of the United States for the District of Mississippi, and was argued by counsel. On consideration whereof, this Court is of opinion that there is error in the judgment of the said District Court, in overruling the demurrer of the plaintiffs to the plea of the defendant, and in giving judgment for the defendant; wherefore it is considered by this Court, that the said judgment be reversed and annulled, and it is hereby reversed and annulled accordingly; and the said cause is remanded to the said District Court, with liberty to the parties to amend their pleadings, and that further proceedings may be had therein, according to law.

1824.

Walker v. Turner.

[Local Law.]

Den ex dem. Walker v. Turner.

By the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection, only when held under a grant, or under mesne conveyances which connect it with a grant.

A Sheriff's deed, which is void for want of jurisdiction in the Court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations.

Mr. Justice Washington delivered the opinion of the Court. *March 19th.*

This was an ejectment brought in May, 1818, in the Circuit Court for the District of Tennessee, by the plaintiff in error, to recover possession of a lot of ground in the town of Nashville, distinguished in the plan of the town, as lot No. 85. Upon the trial of the cause, the plaintiff gave in evidence, a deed for the lot in controversy, from the commissioners of the town of Nashville to the lessor of the plaintiff, bearing date the 6th of August, 1790, and then proved the defendant to be in possession of the same at the time the suit was brought.

The defendant then gave in evidence a record of the County Court of Davidson, in the State of Tennessee, by which it appears, that upon the complaint of Roger B. Sappington, administrator of Mark B. Sappington, deceased, to a Justice of the Peace for the said county, supported by his oath, that George Walker (the lessor of

1824.

Walker v. Turner.

the plaintiff) was justly indebted to him, as administrator aforesaid, as appears by the books of the said Mark, to the amount of 20 dollars and 25 cents, and that the said Walker was an inhabitant of another government, so that the ordinary process of law could not be served upon him, an attachment, bearing date the 24th of April, 1804, was awarded by the magistrate against the estate of the said Walker, which the officer was, by the said process, directed to secure, so as to be liable to further proceedings to be had before the said Justice, or some other Justice for the said county. The return upon the attachment was, that no personal property was to be found; and on the 26th of April, 1804, judgment was rendered by the magistrate in favour of the plaintiff for 20 dollars and 25 cents, and costs.

These proceedings being carried into the County Court of Davidson, the cause was there docketted, and the defendant having appeared by attorney, a stay of six months, under the law, was entered on the docket. At the sessions of the Court, in October, 1804, the defendant entered special bail, and reprieved the property attached. The record then exhibits the following entry, viz. "On which attachment the said administrator obtained judgment before J. A. Parker, [who issued the attachment,] a Justice of the Peace, on the 26th of April, 1804; which proceedings being brought up to Davidson County Court, April sessions, 1804, and a stay of further proceedings ordered to the present sessions, (October, 1804,) at which sessions bail was entered, in order to

1824.

Walker v. Turner.

replevy the property attached; after which, and during the same sessions, the said Sappington moved the Court for an order to sell the property attached, whereupon the Court directed the Clerk to issue orders of sale to the Sheriff, to sell the property attached." The record proceeds to state, that, in pursuance of this judgment, orders of sale issued, returnable to the January sessions of 1805, but which did not appear to have been returned.

The defendant then gave in evidence a deed, dated the 22d of July, 1809, from the Sheriff of Davidson county to Roger B. Sappington, for the lot in question, purchased by him at public auction, under process of the Court of said county, for non-payment of the taxes due upon the said lot. The defendant also gave in evidence a deed from the said Roger B. Sappington to Lemuel P. Turner, deceased, to whom the defendant was proved to be heir and devisee. He further proved, that shortly after the deed by the Sheriff to Roger B. Sappington, he (the grantee) exercised acts of ownership on the lot in question, by cutting trees, quarrying stones, &c. which he continued to do until he sold the lot to Turner, but that he never resided on the lot, or had any continued possession thereof, except as above stated.

The next evidence given by the defendant, was a deed, dated the day of January, 1806, from the Sheriff of Davidson county to Roger B. Sappington, which, after reciting all the proceedings before mentioned, before the magistrate of Davidson county, and the Court of that county, in the suit of Sappington against Walker, the writ of

1824.

Walker v. Turner.

vend. expo. to sell the said lot, issued by the said County Court, and the purchase of the same by the said Sappington, as the highest bidder, at public auction, conveys the said lot to him.

The defendant then proved, that in the year 1811 or 1812, Lemuel P. Turner commenced building a stone fence on this lot, which he was one or two years engaged in completing; that he commenced building a house on the lot, which he incessantly persevered in till it was finished, after which he removed into it, in 1812 or 1813.

Upon the above evidence, set forth in a bill of exceptions to the opinion of the Court, the charge to the jury was, that the deed from the Sheriff of Davidson county to R. B. Sappington, under the judgment of Sappington's administrator against Walker, was sufficient, if the jury believed the facts to be as above stated, to vest the title of said Walker to said lot in Sappington, the purchaser at the execution sale; that the tribunal that adjudicated, and from whom the execution issued, had jurisdiction of the subject matter, and that the parties, too, were in Court; that the deeds aforesaid were of such a colour or appearance of title as, connected with seven years peaceable and continued possession, by the persons claiming under them, and the grant to Walker, would protect the possession under the statute of limitations. The fact as to possession was left to the jury. The Judge further stated, that a party, to be protected by the statute, must have an adverse continued possession of the land in dispute, either by actually residing on it, or by

having it enclosed with a stone fence, and that a possession, by such enclosing or fence, would be sufficient, without an actual residence on the land.

This charge presents, for the consideration of the Court, the following questions:

1. Whether the deed from the Sheriff of Davidson county to Sappington, did vest in the latter a title to the land in question?

2. Whether, under the circumstances stated in the bill of exceptions, the possession of the defendant was protected by the statute of limitations of the State of Tennessee?

3. Whether the Court below was right in the statement made to the jury, as to what constitutes a possession to be protected by the act of limitations?

1. Whether the Sheriff's deed conveyed to Sappington a title to the land in controversy, depends upon the question, whether the sale was made under the judgment of a tribunal having jurisdiction of the cause in which it was rendered. The judgment was rendered by a Justice of the Peace, upon an attachment issued by him against a non-resident, and returnable before himself; and the order for selling the property attached, was made by the County Court. It does not, however, appear by the return made upon the attachment, that the lot in dispute, or any other property of Walker, was attached; nor does it even appear, otherwise than by a recital in the deed from the Sheriff to Sappington, that any process issued from the County Court, which authorized the Sheriff to sell this lot. Evidence was given by

1824.

Walker v. Turner.

the Clerk, that an execution issued, corresponding with the order of the Court, but that the execution could not be found. If the execution corresponded with the order of the Court, then it authorized the sale of the property attached; and as the return of the constable does not state that any property was attached, it is difficult to perceive by what authority the lot in dispute was sold to Sappington. As to the recital in the deed from the Sheriff to Sappington, that the writ of *venditioni exponas*, under which the sale was made, authorized the sale of this lot, it is inadmissible as evidence of that fact against the plaintiff, who was neither a party nor privy to the deed.

But passing by this objection to the validity of the sale, the Court will inquire, whether the same was sanctioned by the judgment of a tribunal having competent jurisdiction of the case in which it was rendered. It is, in the first place, by no means to be admitted, that at the time these proceedings were instituted, a Justice of the Peace was authorized, by the laws of Tennessee, to issue an attachment against the estate of a *non-resident* debtor, returnable before himself, and determinable by him. By the 19th, 20th, and 21st sections of the act of 1794, a Justice of the Peace is empowered to issue an attachment against the estate of a debtor who has removed, or is removing himself privately out of the county, or who so absconds and conceals himself, that the ordinary process of law cannot be served upon him; and also, against the estate of a non-resident; but in all these cases, the attachment is to be returned

1824.

Walker v. Turner.

to the Court where the suit is cognizable, and is to be there adjudicated. This attachment may be levied on the lands, goods, and chattels of the debtor. By the 56th section of this act, the magistrate is authorized, *in cases where by the said act he has jurisdiction,* to issue an attachment against the estate of an absconding or absent debtor; and the proceedings thereon, before him, are to be in a summary way, as on a warrant. The Court does not understand that this section extends to persons who are citizens and residents without the limits of Tennessee. It may well be doubted, then, whether the proceedings before the Justice were not, on this ground, *coram non judice.* But without giving a positive decision upon that point, the Court is of opinion, that the Justice had not jurisdiction of the subject matter, upon which his judgment was rendered. By the 52d section of the above act, jurisdiction is given to any Justice of the Peace, in cases of debts and demands amounting to twenty dollars and under, where the balance is due on any specialty, note, or agreement, for money or specific articles, or for goods, wares and merchandise, sold and delivered, or work and labour done; in which cases he is empowered to render judgment, and to award execution against the goods and chattels, or the body of the debtor. It is admitted by the counsel, that a subsequent law raised the jurisdiction of the Justice beyond the sum for which this judgment was rendered. By the act of 1786, which we understand is still in force in Tennessee, it is provided, that when an

1824.

Walker v. Turner.

execution is in the hands of a constable, in consequence of a judgment of a Justice of the Peace, and there shall be no personal property whereon to levy it, in such case he shall levy it on the real estate of the defendant, and make return thereof to the next County Court, that the Court may order the Sheriff to sell the said real estate, or enough thereof, according to law. Whether it was under this act, that the proceedings before the magistrate found their way into the County Court, it is impossible for this Court to decide. It does not seem to us, that the case is one which was provided for by that act, since it does not appear that any execution was issued by the magistrate, upon his own judgment; or if any did issue, that it was levied on the real estate of the debtor, and returned to the County Court. Be all this as it may, the ground of the jurisdiction of the magistrate does not appear upon the face of the proceedings before him; without which, the Court must consider them as *coram non judice*. The cases of which he had cognizance, are particularly enumerated in the 52d section, before recited; and it appears, by the record given in evidence, that the demand sworn to by Sappington, was for 20 dollars and 25 cents, as appeared by the books of his intestate. But this was not the assertion of a cause of action, for "a balance due on any specialty, note or agreement, for money or specific articles, or for goods, wares and merchandise sold and delivered, or for work and labour done." It might have been for rent due, for money advanced, money received to the use of the plaintiff, and even for money claimed

by the plaintiff as due *ex debito*, and charged in the books of the intestate. It is obvious, that the magistrate had no authority to take cognizance of these cases, and of others, which might be stated; and since his jurisdiction was strictly special and limited, it is essential to the validity of his judgment, and of the proceedings under it, that the record should show that he acted upon a case which the law submitted to his jurisdiction. The order of the County Court, for the sale of the defendant's land, having been founded upon this judgment, is exposed to the same objection which applies to the judgment itself. If the judgment was void, an execution, or order of sale, founded upon it, was equally so. This Court must, therefore, decide, that the deed from the Sheriff to Sappington, under whom the defendant claims, was utterly void, having been made without any legal authority.

2. The next question is, whether, under the circumstances stated in the bill of exceptions, the possession of the defendant was protected by the statute of limitations of the State of Tennessee? This statute, which passed in the year 1797, enacts, "that in all cases wherever any person or persons shall have had seven years peaceable possession of any land, by virtue of a grant, or deed of conveyance, founded upon a grant, and no legal claim by suit in law be set up to said land, within the above said term, that then, and in that case, the person, &c. &c. holding possession as aforesaid, shall be entitled to hold possession, in preference to all other claimants, of such quantity of land as shall be specified in his, her, or their said grant,

1824.

Walker v. Turner.

or deed of conveyance, founded on a grant as aforesaid."

In the case of *Patton's lessee v. Easton*, (1 *Wheat. Rep.* 476.) a construction of the above act was given by this Court, in which it was decided, that a possession of seven years is a bar, only when it is held under a grant, or under a deed founded on a grant; and that, as the defendant, in that case, showed no title under the trustees of the town of Nashville, nor under any other grant, his seven years possession was insufficient to protect his title, or to bar that of the plaintiff, under a conveyance from the trustees.

That was a stronger case for the defendant than the present; for in that the defendant gave in evidence a deed, for a valuable consideration, from Josiah Love to William T. Lewis, at a time when the possession of the land in controversy was vacant. That Lewis, immediately after the conveyance, took possession of the land, made valuable improvements thereon, and continued so possessed for about seventeen years, when he sold and conveyed the same to the defendant, who took and continued the possession until the ejectment was brought. Here, then, was an entry upon land in the actual possession of no person, under a *bona fide* deed, and a long continued possession under that title, which could not avail the defendant, because he could not trace a connected title up to a grant. In the present case, it appears, from the defendant's own showing, that Sappington, under whom he claims, had no title. If the defendant claims under a grant, or under mesne conveyances,

which connect him with a grant, he gains a preference, by seven years possession, over all other claimants, however superior their title may be to his, independent of such possession. But this possession is of no value to him, unless he can show such a title as is above described. The case of *Harris and Holmes v. Bledsoe's lessee*, decided by the Supreme Court of Errors and Appeals of the State of Tennessee, in January, 1821, of which a manuscript report was handed to the Court, seems in principle to be undistinguishable from the present, except that in that, the defendant connected himself with a grant; if the state of the case, which is very imperfectly set forth, in the opinion of one of the Judges, is rightly understood by this Court. But the infirmity of the defendant's title lay in one of the links of the chain, which was that of a deed from executors who had no power to sell and convey by the law, nor was it given by the will of the testator. Even a deed of confirmation, which was executed with a view to cure this defect in the title, was unavailing, "because," to use the language of one of the Judges, "the act to be confirmed was void." In the case before the Court, the defect in the defendant's chain of title, is the want of authority in the Sheriff to convey to Sappington, which rendered his deed absolutely void.

The Court is, therefore, of opinion, that the Court below erred in stating to the jury that the deed to Sappington, under the judgment of Sappington's administrator against Walker, was sufficient to vest the title of Walker in Sappington;

1824.

Walker v. Turner.

and that the deeds referred to were of such a colour or appearance of title as, connected with seven years peaceable and continued possession, by the persons claiming under them, and the grant to Walker, would protect the possessor under the statute of limitations. It is deemed unnecessary to notice the third point, because, if the charge requires of a defendant more than the law does, to entitle him to the benefit of the seven years possession, it is so far favourable to the plaintiff in error. It certainly does not require of him less. Neither does the Court notice the Sheriff's deed to Sappington for the lot in controversy, purchased by him at public auction, under process of the County Court, for non-payment of taxes, as that subject was not noticed by the Judge, in his charge to the jury, and it can, therefore, present no question for the consideration of this Court.

Judgment reversed, and a *venire facias de novo* awarded.

JUDGMENT. This cause came on to be heard, &c. On consideration whereof, this Court is of opinion, that the said Circuit Court erred in stating to the jury that the deed to R. B. Sappington, under the judgment of said M. B. Sappington's administrator against said Walker, was sufficient to vest the title of said Walker in said Sappington, and that the deeds referred to, were of such a colour or appearance of title, as, connected with seven years peaceable and continued possession, by the person claiming under them, and the grant

to said Walker, would protect the possession under the statute of limitations. It is, therefore, ORDERED and ADJUDGED, that the judgment of the said Circuit Court in this case be, and the same hereby is reversed and annulled.

1824.

Catlett v. Brodie.

[PRACTICE.]

CATLETT v. BRODIE.

Under the judiciary act of 1780, ch. 20. s. 22. the security to be taken from the plaintiff in error, by the Judge signing a citation on a writ of error, must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate Court may adjudge for the delay.

Mr. Justice STORY delivered the opinion of the Court. *March 17th.*

A motion has been made to dismiss this, and several other suits, unless the plaintiff in error shall give new bonds for the prosecution of the writ, within a limited period, to be fixed by the Court, upon the ground that the writs of error have been allowed by the Judges of the Circuit Court for the District of Columbia, upon bonds being given in small sums to respond the damages and costs, the debts secured by the judgments being very much larger.

The judiciary act of 1789, ch. 20. s. 22. requires every Judge or Justice, signing a citation on

1824.

Catlett v. Brodie.

a writ of error, to take good and sufficient security that the plaintiff in error "shall prosecute his writ to effect, and answer all damages and costs, if he fails to make his plea good." A writ of error lodged in the Clerk's office, within ten days after the rendition of judgment, operates as a *supersedeas* of execution; and the question arises, whether, in cases where it operates as a *supersedeas*, the security taken by the Judge or Justice ought not to be sufficient to secure the whole amount of the judgment.

It has been supposed at the argument, that the act meant only to provide for such damages and costs as the Court should adjudge for the delay. But our opinion is, that this is not the true interpretation of the language. The word "damages" is here used, not as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to, if the judgment is affirmed. Whatever losses he may sustain by the judgment's not being satisfied and paid, after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. Upon any suit brought on such bond, it follows, of course, that the obligors are at liberty to show that no damages have been sustained, or partial damages only; and for such amount only is the obligee entitled to judgment.

In the present case, and in the other cases which are in the same predicament, the Court di-

rects that these suits stand dismissed, unless the plaintiff in error shall give good and sufficient security to an amount to secure the whole judgments, on which the writs are brought, within thirty days from the rising of this Court, such security to be taken and approved by any Judge or Justice by whom a writ of error or citation may be allowed.

Order. It is ordered by the Court, on motion of Mr. Key, of counsel for the defendant in error, that this cause do stand dismissed, unless the plaintiff in error shall, within thirty days from the rising of this Court, give a bond, with good and sufficient security, in due form of law, to prosecute his writ with effect, and to answer all damages and costs, if he fail to make his plea good; the amount of such security to be sufficient to secure the whole judgment, in case the same shall be affirmed, and be not otherwise discharged; such security to be taken and approved by any Judge or Justice who is authorized to allow a writ of error and citation on the said judgment.

1824.

Baits
v.
Peters.

[Extinguishment.]

Baits v. Peters & Stebbins.

A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made, having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made.

ERROR to the District Court of Alabama.

This was an action of assumpsit, commenced in the Court below, in February, 1821, by Baits, the plantiff in error, against Peters & Stebbins, the defendants in error, in which the plaintiff declared against the defendants, upon an agreement to account with him for goods delivered by him to the defendants, for sale on commission, and also for money had and received, and upon an *in simul computassent*. The defendants pleaded the following pleas: 1st. The general issue. 2d. Payment. 3d. An agreement, under seal, made at New-York, on the 15th of July, 1820, and long after the said promises and undertaking, between the plaintiff and one of the defendants, by which the plaintiff covenanted not to sue the defendants within six months, and to send on an agent, within the same term of time, to settle the accounts with the defendants, at Blakely, in Alabama; and the defendants covenanted to come to a settlement

with the said agent, and to pay the balance which should be found to be due. To this last plea there was a demurrer, and, judgment being rendered thereon, by the Court below, for the defendants, the cause was brought by writ of error to this Court.

1824.

Baits v. Peters.

The cause was argued by Mr. *Wheaton*, for the plaintiff in error, no counsel appearing for the defendants in error. He argued that the agreement thus pleaded in bar, as an extinguishment, was not a sufficient bar to the action, but was merely a collateral undertaking, which did not extinguish the original demand.[a]

Feb. 20th.

Mr. Chief Justice MARSHALL delivered the opinion of the Court, that the third plea was bad. The agreement stated in that plea, although under seal, did not operate as an extinguishment of the simple contract debt. The agreement was but a collateral undertaking, to come to a settlement within a limited period, which had elapsed before the commencement of the suit, and to pay the balance found due upon such settlement. There was no averment in the plea that any such settlement had been had, under that agreement, and, consequently, the covenant to pay the balance did not appear to have attached upon the demand.

a The Bank of Columbia v. Patterson, 7 *Cranch*, 299. 303. Day v. Leal, 14 *Johns. Rep.* 404.

1824.

Sebree v. Dorr.

[Local Law.]

SEBREE and others, *Plaintiffs in Error*,

v.

DORR, *Defendant in Error*.

In a declaration upon a promissory note, the omission of the place where it is payable is fatal.

Secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party.

This rule of evidence is not dispensed with by the local statutes of Kentucky, which provide that no person shall be permitted to deny his signature, as maker or assignor of a note, in a suit against him, unless he will make an affidavit denying the execution or assignment. These statutes do not dispense with proof of the existence of the instrument, or of the right of the party to hold it by assignment.

Feb. 27th. This cause was argued by Mr. *Bibb*,[a] for the plaintiffs in error, and by Mr. *Wickliffe*,[b] for the defendant in error.

March 6th. Mr. Justice STORY, delivered the opinion of the Court.

This is a writ of error to the Circuit Court of Kentucky. The action was brought by Dorr, as

a He cited, *Hardin. Rep.* 223. 3 *Marsh. Ken. Rep.* 163. 1 *Marsh.* 228. 2 *Marsh.* 256. 522. 610. 614. 1 *Cranch*, 290. *Print. Dec.* 152. 1 *Bibb*, 239. 542. 596. 2 *Bibb*, 34. 3 *Bibb*, 6. 227. 4 *Bibb*, 286. 527. 290. 424. 556. 7 *Johns. Rep.* 174. 4 *Johns. Rep.* 1. 3 *Caines*, 112. 2 *Mass. Rep.* 433. 5 *Cranch*, 322. 1 *Saund.* 32.

b Who cited, 1 *Marsh. Ken. Rep.* 535. 541. 2 *Marsh.* 256. 5 *Cranch*, 135. 2 *Bibb*, 35. 1 *Phillips on Evid.* 286.

1824.

Sebree v. Dorr.

assignee, against Sebree and Johnson, as assignors, upon two notes, under seal, made to them by the Lexington Manufacturing Company. The declaration, instead of distinct counts upon each note, combines, in an inartificial manner, both notes in a single count. It states, that "the Lexington Manufacturing Company, by their corporate seal, and signed by John T. Mason, jun., their president, did, on the 12th day of March, 1818, at, &c., execute and cause to be made, their note or writing obligatory, by which they did oblige themselves to pay to John T. Mason and James Johnson, twelve months after the date of the said writing, 10,065 dollars and 88 cents; and on the same day, and at the same place, did execute their other writing obligatory, in like manner, by which they bound and obliged themselves to pay to the said James Johnson and John T. Mason the further sum of 311 dollars and 31 cents;" omitting to state when the last note was payable. It then proceeds to allege the endorsements of the notes to the plaintiff, the presentment of the same to the Lexington Manufacturing Company for payment, the refusal, and protest for non-payment, and the commencement and prosecution of suits to final judgment and execution, against the Company, for the amount of the notes, in the General Court of Kentucky; the return upon the execution, that no property could be found, and due notice to the defendants. It farther avers, that the General Court had jurisdiction of the suits, and that, in consideration of the premises, the defendants became indebted and promised to pay the amount to the

1824.

Sebree v. Dorr.

plaintiff. There were also counts for goods sold, and for money had and received. The cause came on for trial upon the general issue; and the only evidence produced by the plaintiff to support his action, was the records of the foregoing suits, which also contained copies of the original notes, and of the protests by the Notary. The defendants then prayed the Court to instruct the jury, 1. that the plaintiff had not made out a good cause of action; 2. that the records and proceedings aforesaid were not evidence against the defendants, because it did not appear that the General Court had cognizance of the subject matter; 3. That the records were not sufficient evidence of diligence on the part of the plaintiff, nor of the insolvency of the makers, nor of the assignment by the defendants. The Court overruled the motion, and instructed the jury, that the records entitled the plaintiff to a verdict against the defendants; and to these proceedings on the part of the Court, the defendants filed their bill of exceptions, and have thus brought the same points for consideration before this Court.

By the local law of Kentucky, instruments of this nature are assignable; and if due and reasonable diligence is used by the assignee, to procure payment from the maker, by the speedy commencement and prosecution of a suit against him, and satisfaction cannot be obtained upon the judgment and execution in such suit, the assignor is responsible for the amount. But without such suit, no action lies against the assignor. It is also provided by the statutes of Kentucky, and the sub-

1824.

Sebree v. Dorr.

stance of these statutes has been incorporated into the rules of the Circuit Court, that no person shall be permitted to deny his signature, as maker or as assignor, in a suit against him, founded on instruments of this nature, unless he will make an affidavit denying the execution or assignment.

These explanations are necessary, to enable us more accurately to understand the nature and bearing of the objections relied on at the bar, to reverse the present judgment.

The first objection that occurs, upon the examination of this cause, is, that the note for 311 dollars and 31 cents, is not stated in the declaration to be payable at any particular time; and if this be not a substantial infirmity in the count, the conclusion of law is, that the note was due presently, or on demand. Now, the record of the suit, which is offered to show due diligence in endeavouring to recover this note from the maker, is not founded on a note payable on demand, but on a note payable *twelve months after the date;* so that there is a material variance between the note declared on in this suit, and the note which was declared on in the record offered in evidence. If we admit the copy of the note in the same record to be evidence, a farther difficulty is presented; for on its face, the note purports that, "twelve months after date, *the President, Directors and Company* of the Lexington Manufacturing Company promise to pay to James Johnson and John T. Mason, jun., *or their order,* 311 dollars and 31 cents, *negotiable and payable at the Office of Discount and Deposit of the Bank of the United States,*

1824.

Sebree v. Dorr.

at Lexington, without defalcation, for value received." The variance of this note from that described in the present declaration, is very striking. It is payable to the defendants, *or order*, in *twelve* months after date, and *at the Bank of Discount and Deposit of the United States, in Lexington.* These are all material parts of the note, and they are all omitted in the declaration. The variance, then, in this view also, would be fatal. And it may be added, that in the suit in the General Court, the declaration also omits to state, that the note was payable to order, and at the Bank of the United States; so that, in fact, the note is materially different from the declaration, in both suits. In regard, too, to that part of the present declaration, which describes the note for 10,065 dollars and 88 cents, there is a total omission to state, that it was "negotiable and payable at the Office of Discount and Deposit of the Bank of the United States, without defalcation, for value received," as in the copy produced in the record it purports to be; and the same omission occurs in the declaration in the suit in the General Court. Nothing is better established, both upon principle and authority, than that if the place where a note is payable is omitted in the declaration, it is fatal; for the evidence produced does not support the declaration. There is a variance in the essence of the instrument, as declared on, and as proved. Upon these grounds, then, it is manifest, that the record produced in evidence did not support the plaintiff's action.

There is another objection, which is equally decisive of the case. It is, that there was no pro-

duction of the original notes, nor any excuse offered to account for the non-production of them, at the trial. It is a general rule of the law of evidence, that secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party. Here no proof was offered, to show that the original notes were impounded, or that they were not within the possession of the party, or within the reach of the process of the Court. Without such proof, the principles of the common law repudiate the introduction of copies; and copies were all that the record, in the most favourable view for the plaintiff, presented to the Court. But it is said, that the statutes of Kentucky, already referred to, dispense with the proof of the execution of instruments of this nature by the maker, and also of assignments by the assignor, unless the party will, on oath, deny the signature and the assignment; and that the only object of producing the originals, is to establish these facts. The argument, therefore, is, that these statuteable provisions amount to a dispensation with the general rules of evidence as to the production of the original notes. But to us it appears, that the statutes of Kentucky ought to have no such interpretation. The object of the Legislature manifestly was, to dispense with the formal proof of instruments, where the party would not deny on oath the fact of their execution. It was thought inconvenient to suffer parties to take advantage of unexpected objections, and multiply delays by general denials, which might often spring up by surprise

1824.

Sebree v. Dorr.

at the trial, and thus load the cause with heavy and unnecessary expenses. But it would be most dangerous to allow that, because the proof of the execution of an instrument was dispensed with, therefore, no proof of its existence, or of the right of the party to hold it by assignment, was to be required. The production of the originals might still be justly required, to ascertain its conformity with the declaration, to ascertain whether it remained in its genuine state, to verify the title by assignment in the plaintiff, to trace any payments which might have been made and endorsed, and to secure the party from a recovery by a *bona fide* holder under a subsequent assignment. These are important objects, and which no wise Legislature would lose sight of; and it is too much to expect any Court of justice to infer, upon so slight a foundation, the abolition of those salutary rules of evidence which constitute the great security of the property and rights of the citizens.

We are, therefore, of opinion, that the records, however admissible for the purpose of showing due and reasonable diligence by suit, were not legal evidence of the assignment of the notes, so as to dispense with the production of the originals.

It is unnecessary to go into the question as to the jurisdiction of the General Court over the suit against the Lexington Manufacturing Company, and what would be the legal effects growing out of the defect of such jurisdiction. These, as well as some other minor points, may be passed over,

since the cause may be disposed of without entering upon the discussion of them. 1824.

Sebree v. Dorr.

It is the opinion of the Court, that the Circuit Court erred in instructing the jury, that the records aforesaid entitled the plaintiff to a verdict; and the judgment must, therefore, be reversed, and a *venire facias de novo* be awarded.

Judgment accordingly.

[Lex Loci.]

KERR, *Appellant*,

v.

The DEVISEES OF A. MOON, *Respondents*.

The disposition of real property, by deed or will, is subject to the laws of the country where it is situated.

Where the devisor was entitled to warrants for land in the Virginia Military District in the State of Ohio, under the laws and ordinances of Virginia, on account of his military services, and made a will in Kentucky, devising the lands, which was duly proved and registered according to the laws of that State: *Held*, that although the title to the land was merely equitable, and that not to any specific tract of land, it could not pass, unless by a will proved and registered according to the laws of Ohio.

Even admitting it to have been personal property, a person claiming under a will proved in one State, cannot intermeddle with, or sue for, the effects of a testator in another State, unless the will be proved in the latter State, or it is permitted by some law of that State.

Letters testamentary give to an executor no authority to sue for the personal estate of his testator, out of the jurisdiction of the State by which they were granted.

Under the statute of Ohio, which permits wills made in other States

1824.

Kerr v. Moon.

concerning property in that State, to be proved and recorded in the Court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the State.

APPEAL from the Circuit Court of Ohio.

Feb. 20th. This cause was argued by Mr. *Scott* for the appellant, and by Mr. *Brush* for the respondents.

March 15th. Mr. Justice WASHINGTON delivered the opinion of the Court.

The respondents filed their bill in the Circuit Court for the District of Ohio, in which it is stated, that Archelaus Moon was, in his lifetime, entitled to warrants for 4000 acres of land in the Virginia Military District, between the Scioto and Little Miama rivers, in the State of Ohio, under the ordinances and laws of Virginia, on account of his services as a captain in the Virginia line on continental establishment, during the war of the revolution. That, being so entitled, he, on the 8th of May, 1796, in the county of Fayette, in Kentucky, where he resided, duly made and published his last will and testament, which, after his decease, in the same year, was proved and admitted to record in the Court of that county; an authenticated copy whereof, with the probate annexed, is made an exhibit, and referred to as part of the bill. That by this will, the testator devised the aforesaid land to the complainants, his widow and children. The bill then sets forth, that on the 2d of January, 1809, four warrants, for 1000 acres

each, were granted to Robert Price, assignee of Josiah P. Moon, and George C. Friend, and Martha his wife, formerly Martha Moon, who are described in the assignment, as the only children and representatives of Archibald Moon, deceased; which warrants were, some time in the same or the succeeding year, assigned by Price to the defendant Kerr, who, in March, 1810, made fifteen entries or locations thereon, amounting in the whole to 3723 acres, leaving 277 acres unlocated. That, some time in the winter of 1811, the complainants gave notice to Kerr of their claim to the said warrants and land, and of their intention to prosecute the same, personally, in writing, and by a publication in a newspaper printed in Chillicothe. That Archelaus and Archibald Moon were the same name and person, and that Josiah P. Moon and Martha Friend were his children by his first wife, and were disinherited by the aforesaid will. That the defendant had notice that the assignment to Price was fraudulent. The bill prays a discovery of the matters so alleged, and a decree that the defendant Kerr assign the evidences of title to the said lands to the complainants, and for general relief.

The answer admits that the defendant purchased from Robert Price, in September, 1809, four several land warrants, for 1000 acres each, for which he paid and secured to be paid to said Price, the sum of 2663 dollars. That the warrants issued for the military services of Archibald Moon, and that they were assigned to the defendant at the time of his purchase. That in March, 1810, and at different times thereafter, the defen-

1824.

Kerr v. Moon.

dant made various entries of land on the said warrants, in the Virginia military district, believing his title to said warrants to be unquestionable; and that the lands so located are owned either by the said defendant, or by those to whom he had sold them. The defendant denies the notice charged in the bill, except that, in the winter of 1811, he saw the publication in which the claim of the complainants was asserted, before which time he had sold a great part of the lands to different persons for a valuable consideration, the principal part of which he had received, and that some of the purchasers have made valuable improvements on the lands. He denies all knowledge of the will, or that the complainants are the heirs or devisees of said Moon.

To this answer a general replication was put in, and a number of depositions were taken and appear in the record. The material facts which they establish are, the execution of Moon's will; the proof of it, and its admission to record in the County Court of Fayette, in Kentucky; the destruction by fire of the Clerk's office of that County in 1802 or 1803, with most of its records; and that an attested copy of the above will was procured and admitted to record in the said County Court, in conformity with a special act of the State of Kentucky, for supplying the evidence of deeds, wills, and other records of the said office, which had been consumed. That the testator was sometimes called Archelaus, and at other times Archibald; and that he had four children by his first wife, of whom Josiah P. and Martha were

two, and six children by his last wife, who, with his widow, are the plaintiffs in this suit.

After a reference to the Master, and the coming in of his report, a final decree was made thereon, that the defendant, Kerr, assign to the complainants all the warrants, entries, and surveys procured under the warrants granted to Price, and by him assigned to the defendant; that Kerr was to be paid by the complainants, for his trouble and expense in locating and surveying the said lands, at the rate of £12 10s. per 1000 acres; and also, the sum of 487 dollars and 48 cents, which he had paid for taxes on the said lands, with interest thereon. From this decree an appeal was taken to this Court.

The objection principally relied upon by the appellant's counsel is, that no estate in the lands in controversy passed by the will of Archelaus Moon to the respondents, because the same was not proved and recorded in any Court of the State of Ohio, where the lands lie, in conformity with the existing laws of that State. By an ordinance of Congress, for the government of the territory north-west of the river Ohio, passed on the 13th of July, 1787, it is declared, that, until the Governor and Judges should adopt laws as prescribed by that ordinance, estates in the territory might be devised or bequeathed by wills in writing, signed and sealed by the testator, (being of full age,) and attested by three witnesses; provided such wills should be duly proved and recorded within one

1824. year after proper Magistrates, Courts, and Registers should be appointed for that purpose.

Kerr v. Moon.

It is an unquestionable principle of general law, that the title to, and the disposition of real property, must be exclusively subject to the laws of the country where it is situated. This was decided in the case of the *United States v. Crosby*, (7 *Cranch*, 115.) The application of this principle to the present case, is controverted by the counsel for the respondents, upon the following grounds:

1. That the interest of the testator in these lands ought to be considered and treated as personal estate, and, therefore, it might well pass by a will, proved and admitted to record in the State where the testator died.

2. That by an act of the Legislature of Ohio, passed on the 25th of January, 1816, authenticated copies of wills, proved according to the laws of any State or Territory of the United States, relating to any estate within that State, are allowed to be proved in the Court of the county where such estate shall be; and when so proved and admitted to record, they are declared to be good and valid in law, as wills made in the State.

3 That as no objection was made in the Circuit Court to the admission of the authenticated copy of this will, it ought not to avail the appellant in this Court.

1. It can by no means be admitted, that this is to be considered in the light of personal property, notwithstanding the title of Moon rested merely upon a legislative reservation in his favour by

1824.

Kerr v. Moon.

the State of Virginia, which was to be afterwards perfected by the grant of a warrant, and by a location, survey and patent. Although his title to any particular tract of land was, in the first instance, altogether uncertain, and, even after location, was purely equitable, still *the subject matter* of the devise was land, the title to which could not be acquired or lost, except in the way prescribed by the laws of Ohio. But could it even be conceded, that this was personal property, it would still be property within the State of Ohio; and we hold it to be perfectly clear, that a person claiming under a will proved in one State, cannot intermeddle with, or sue for, the effects of a testator in another State, unless the will be proved in that other State, or unless he be permitted to do so by some law of that state. In the case of *Doe v. M'Farland*, (9 *Cranch*, 151.) it was decided, that letters testamentary gave to the executors no authority to sue for the personal estate of the testator, out of the jurisdiction of the power by which the letters were granted.

2. The next reason assigned why the general principle above laid down does not apply to this case, is deemed by the Court altogether insufficient; because, whatever benefit the devisees might have derived under the act of the 25th of January, 1816, had they pursued the requisitions it prescribes, as to which we give no opinion, it is a sufficient answer to the argument drawn from that act, to observe, that its requisitions were not pursued. It permits authenticated copies of wills, proved according to the laws of any State of this

1824. Kerr v. Moon.

Union, relating to any estate within that State, to be offered for probate in the Court of the county where the estate lies, and authorizes the same to be there recorded; and it then proceeds to declare the effect of such recording to be, to render the will good and valid, as if it had been made in the State, subject, nevertheless, to be contested as the original might have been. But it does not appear that the copy of this will was offered for probate and admitted to record. Had it been so offered, it might have been contested, and for any thing that we can say, the sentence of the Court of Probate might have been not to admit it to record.

3. The last point remains to be considered. That the objection to the validity of this will to pass the lands in controversy to the respondents, was not made in the Court below, is highly probable, as we observe that it is not noticed, much less relied upon, in the answer. Nevertheless, the will, duly proved and recorded, according to the laws of Ohio, constituted the sole title under which the plaintiffs in the Court below claimed the lands in dispute. It was as essential, therefore, to the establishment of that title, to allege in the bill, and to prove by the evidence, or by the admission of the defendant, that this will had been proved and recorded, according to the laws of Ohio, as to set forth and prove the existence of the will itself. The defect in the title of the respondents appears upon the face of the bill, and as it contains no allegation that a copy of the will had been duly proved and recorded, the de-

fendant cannot be said to have admitted those facts by not denying them in his answer.

The Court erred, therefore, in decreeing an assignment of all the warrants, entries, and surveys under the warrants, to the complainants.

Considering, as we must, in the present state of the cause, that A. Moon died intestate as to these lands, they of course descend to those persons who are entitled to the same according to the laws of Ohio; and this is a subject fit to be decided by the Court below, to which the cause must be remanded for further proceedings.

Decree reversed, and the cause remanded for further proceedings.

[Local Law.]

MEREDITH and others, *Appellants*,

v.

PICKET and others, *Respondents*.

Under the following entry, "H. R. enters 2000 acres in Kentucky, by virtue of a warrant for military services performed by him in the last war, in *the fork of the first fork of Licking*, running up each fork for quantity;" it appeared in evidence, that at the first fork of Licking, the one fork was known and generally distinguished by the name of the South fork, and the other by the name of the main Licking, or the Blue Lick fork, and that some miles above this place the South fork again forked: *held*, that the entry could not be satisfied with lands lying in the first fork.

1824.

Meredith v. Picket.

In such a case, the entry could not be explained, and the survey supported, by oral testimony. The notoriety and names of places may be shown by such testimony, but the words of an entry are to be construed by the Court as any other written instrument.

Feb. 20th. THIS cause was argued by Mr. *Bibb*, for the appellants, and by Mr. *Talbot*, for the respondents.

Feb. 21st. Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This case depends entirely on the question, whether the entry under which the appellees claim has been surveyed on the land for which it calls.

The entry is in these words: "Holt Richeson enters 2000 acres in Kentucky, by virtue of a warrant for military services performed by him in the last war, in *the fork of the first fork of Licking*, running up each fork for quantity."

It is shown in testimony, that at the first fork of Licking, the one fork was known and generally distinguished by the name of the South fork, and the other by the name of the main Licking, or the Blue Lick fork. Some miles above this place the South fork again forks. The land of the appellees has been surveyed in the first fork.

It is contended by the appellants, that the entry calls for land in the second fork, and that the survey is made on land which will not satisfy its words.

The Court concurs in this opinion. The first fork of the first fork cannot be the first fork itself. Whatever difficulties may attend the attempt to place the lands properly the Court feels none in

saying, that the entry cannot be satisfied with lands lying in the first fork.

Some other objections were made in argument, which it is unnecessary to notice, as this is completely decisive of the case.

It may not, however, be improper to say, that the attempt of the appellees to explain their entry, and to support their survey, by depositions, cannot avail them. It is the proper province of testimony to show the notoriety and names of places, but not to explain a written instrument. That is the proper province of the Court. The Judges must construe the words of an entry, or of any other title paper, according to their own opinion of the words as they are found in the instrument itself, and not according to the opinion of witnesses, who may or may not be selected for the purpose.

The decree of the Circuit Court, perpetuating the injunction awarded to the appellees to restrain the appellants from proceeding on their judgment in ejectment, is erroneous, and ought to be reversed, and the bill of the plaintiffs in the Circuit Court dismissed.

1824.

Walden v. Craig.

[PRACTICE.]

WALDEN ex dem. DENN v. CRAIG.

In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the Court.
But a writ of error will not lie, in a case where the Court below has denied a motion for this purpose.

ERROR to the Circuit Court of Kentucky.

In 1797, John Den, lessee of Ambrose Walden, instituted an action of ejectment in the United States District Court of the District of Kentucky, against Richard Fen, as casual ejector. The declaration states a demise for the term of ten years from the 15th day of August, 1789. At March term, 1798, Lewis Craig and Jonathan Rose were admitted defendants, in the place of Richard Fen, the casual ejector; and entered into the usual rule, confessing the lease, entry, &c. At June term, 1800, judgment was rendered for the plaintiff for his term yet to come, &c. and a writ of *hab. fac. poss.* was awarded. On the 5th day of September, 1800, Thomas Bodley and others, claiming as landlords of Craig and Rose, obtained an injunction to the above judgment. At May term, 1809, the bill of injunction was dismissed, for want of jurisdiction. In September, 1811, Bodley and others obtained a second injunction to stay execution on the judgment at law in ejectment. At May term, 1812, the injunction was

1824.

Walden v. Craig.

dissolved on hearing, on bill, answers, depositions, and exhibits; and in April, 1813, the complainants dismissed their bill. Walden, on the 22d of May, 1819, took out a writ of *hab. fac. poss.*, which was quashed by the Court, on the ground, it is presumed, that the term stated in the declaration in ejectment had expired. At November term, 1821, Walden moved the Court to enlarge the term stated in the declaration. The Court being divided, the motion was entered as overruled; and the plaintiff (Walden) took out a writ of error to the judgment of the Court on this motion.

Feb. 6th.

This cause was argued by Mr. *Taylor*,[a] for the plaintiff, no counsel appearing for the defendant.

Feb. 21st.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

Upon this case two questions arise:

1. Ought the Circuit Court to have granted leave to the plaintiff to extend the term laid in his declaration?

2. Does a writ of error lie to the refusal to grant this amendment?

It has been truly said in argument, by the counsel for the plaintiff in error, that the power of amendment is extended at least as far in the 32d

a He cited *Cro. Jac.* 440. 1 *Salk.* 47. 2 *Str.* 807. 2 *Burr*, 1159. 4 *Burr*, 2447. *Str.* 1272. *Coup.* 841. 7 *Cranch*, 569. 1 *Cranch*, 110. 4 *Cranch*, 237. 4 *Cranch*, 324. 5 *Cranch*, 11. 5 *Cranch*, 15. 6 *Cranch*, 206. 7 *Cranch*, 569.

1824.

Walden v. Craig.

section of the judiciary act, as in any of the British statutes; and that there is no species of action to which the discretion of the Court in this respect ought to be more liberally applied than to the action of ejectment. The proceedings are all fictitious, fabricated for the mere purposes of justice, and there is every reason for allowing amendments in matters of mere form. There is peculiar reason in this case, where the cause has been protracted, and the plaintiff kept out of possession beyond the term laid in the declaration, by the excessive delays practised by the opposite party. The cases cited by the plaintiff's counsel in argument are, we think, full authority for the amendment which was asked in the Circuit Court, and we think the motion ought to have prevailed. But the course of this Court has not been in favour of the idea that a writ of error will lie to the opinion of a Circuit Court, granting or refusing a motion like this. No judgment in the cause is brought up by the writ, but merely a decision on a collateral motion, which may be renewed. For this reason, the writ of error must be dismissed.

1824.

United States v. Perez.

[PRACTICE.]

The UNITED STATES v. JOSEF PEREZ.

The discharge of the jury from giving a verdict in a capital case, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offence.

The Court is invested with the discretionary authority of discharging the jury from giving any verdict, in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated.

Mr. Justice STORY delivered the opinion of the Court. *March 17th.*

This cause comes up from the Circuit Court for the southern district of New-York, upon a certificate of division in the opinions of the Judges of that Court. The prisoner, Josef Perez, was put upon trial for a capital offence, and the jury, being unable to agree, were discharged by the Court from giving any verdict upon the indictment, without the consent of the prisoner, or of the Attorney for the United States. The prisoner's counsel, thereupon, claimed his discharge as of right, under these circumstances; and this forms the point upon which the Judges were divided. The question, therefore, arises, whether the discharge of the jury by the Court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence. If it be, then he is entitled to be discharged from custody; if not, then he ought to be held in imprisonment

1824.

United States v. Perez.

until such trial can be had. We are of opinion, that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defence. We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject, in the American Courts; but, after weighing the question with due deliberation, we are of opinion, that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial. A certificate is to be directed to the Circuit Court, in conformity to this opinion.

1824.

Renner v. Bank of Columbia.

CERTIFICATE. This cause came on, &c. On consideration whereof, it is ORDERED by the Court, that it be certified to the Circuit Court of the District of New-York, that, under the circumstances stated in the record, the prisoner, Josef Perez, is not entitled to be discharged from custody, and may again be put to trial, upon the indictment found against him, and pending in the said Court.

[PROMISSORY NOTE. EVIDENCE. PLEADING. LOCAL LAW.]

RENNER, *Plaintiff in Error*,

v.

The PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF COLUMBIA, *Defendants in Error*.

By the custom of the banks in the District of Columbia, payment of a promissory note is to be demanded on the *fourth* day after the time limited for the payment thereof, in order to charge the endorser, contrary to the general law merchant, which requires a demand on the *third* day.

Evidence of such a local custom is admissible, in order to ascertain the understanding of the parties, with respect to their contracts made with reference to it.

Cases in which evidence of commercial usage is admissible, in order to ascertain the meaning of contracts.

The declaration against the endorser, in such a case, must lay the demand on the *fourth*, and not on the *third* day.

Quære, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer?

Secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed, or *lost*, by accident, without any fault of the party.

1824.

Renner v. Bank of Columbia.

In the case of a lost note, it is not necessary that its contents should be proved by a *notarial* copy. All that is required is, that it should be the best evidence the party has it in his power to produce.

To admit secondary evidence of a lost note, it is not necessary that there should be a special count in the declaration upon a lost note.

Feb. 24*th.* This cause was argued by Mr. *Webster* and Mr. *Jones*,[a] for the plaintiff in error, and by Mr. *Key*,[b] for the defendants in error.

March 5*th.* Mr. Justice THOMPSON delivered the opinion of the Court.

This case comes up on a writ of error to the Circuit Court of the District of Columbia; and by the record it appears, that the action in the Court below was prosecuted against Renner, the plaintiff in error, as endorser of a promissory note, drawn by James Foyles, and discounted at the Bank of Columbia. The note bears date on the 9th day of January, 1817, for 4600 dollars,

a They cited Rushton v. Aspinwall, *Doug.* 679. *Chitty on Bills*, 62. 465. *Bayley on Bills*, 185, 186. 7 *East's Rep.* 231. Lyndo v. Burgos, Per Sir W. Grant, 1 *Wheat. Selw. N. P.* 280. Heylin v. Adamson, 2 *Burr*, 678. Thompson v. Ketchum, 8 *Johns. Rep.* 189. Hoare v. Graham, 3 *Coop.* 57. 1 *Phillips on Evid.* 432, 433. 496. 498. Lewis v. Thatcher, 15 *Mass. Rep.* 431. Edie v. E. I. Company, 2 *Burr*, 1216. Davis v. Todd, 4 *Taunt.* 673.

b He cited 4 *T. R.* 153. 173. 2 *Caines' Err.* 196. 2 *Caines' Rep.* 443. 1 *Caines' Rep.* 43. 18 *Johns. Rep.* 230. 12 *Johns. Rep.* 423. 13 *Johns. Rep.* 470. 1 *Phillips on Evid.* 490. 492. 1 *Harris & Johns.* 423. 4 *Mass. Rep.* 251. 6 *Mass. Rep.* 449. 477. 9 *Mass. Rep.* 155. 159. 10 *Mass. Rep.* 26. 365. 12 *Mass. Rep.* 89. 3 *Dall. Rep.* 365. 415. 5 *Cranch*, 49. 9 *Cranch*, 1.

1824.

Renner v. Bank of Columbia.

and is payable sixty days after date. In the declaration it is averred, that demand of payment of the maker was made on the 14th of March, which was on the *fourth* day after the expiration of the sixty days, which the note had to run.

Several questions, arising out of the record, have been presented for the consideration of the Court. The principal one, however, is that which relates to the time of demand of payment of the maker of the note, and grows out of a bill of exceptions taken upon the trial. This has been pressed upon the Court as a question of great importance, and the decision of which, in its application to the concerns of the Bank, will have a very wide and extensive effect.

We shall proceed to the consideration of this point, in the first place, leaving the others, which are of minor importance, to be noticed hereafter.

The testimony given at the trial was for the purpose of showing that the Bank of Columbia had, from its first establishment, in 1793, adopted the practice of demanding the payment of notes discounted by it, on the *fourth* day after the time limited for the payment thereof, according to the express terms of the note. And that such was the universal *custom* of all the banks in Washington and Georgetown. That this *custom* was well known and understood by the defendant, when he endorsed the note in question. After this testimony had been received, *without objection*, the counsel for the defendant below called upon the Court to instruct the jury, that upon the evidence so given by the plaintiffs, of a demand upon the

1824.

Renner v. Bank of Columbia.

maker of the note, on the *fourth* day after the time limited by the note for the payment, the defendant was not liable on his endorsement; which instruction the Court refused give, and a bill of exceptions was thereupon taken.

This Court must, therefore, assume as established facts, (and, looking at the evidence before the jury, no doubt could be entertained on the subject,) that the *custom* of the Bank of Columbia, and all the other Banks in Washington and Georgetown, from their first institution, had been, to demand payment of notes due them, on the fourth day after the time limited therein; and that this *custom* was known and well understood by the defendant, Renner, when he endorsed the note in question: and it may be added, with full knowledge and expectation, that this note was to be dealt with in the same way; for it was a renewal of a discount, continued for a considerable time before, on other notes similarly drawn and endorsed, some of which had been demanded in like manner, and protested, and afterwards paid and taken up by himself. Under such circumstances, it would seem, that nothing short of some positive and unbending principle of law, could shield the defendant from responsibility. But, so far from trenching upon any such principle, we think his liability completely established, by well settled rules of law.

The general rule of law is, to demand payment on the *third* day of grace; but it may be varied by evidence of a different usage.

It seems to be assumed as the settled law of promissory notes, that in order to charge an endorser, demand of the maker must be made on the third day after that limited in the note; and that

this is so stubborn a rule, that parties are not permitted to violate it, even by their mutual agreement.

We admit, in the most unqualified manner, that the usage of making the demand on the third day of grace, has become so general, that Courts of justice will notice it *ex officio;* and in the absence of any proof to the contrary, will presume that such was the understanding of all parties to a note, when they put their names upon it. But that this rule has any attributes so inviolable, as not to be touched by the parties to negotiable paper, cannot be admitted. It has its origin in *custom*, and that custom, too, comparatively, of recent date; and is not one of those, to the contrary of which the memory of man runneth not, and which contributed to make up the common law code, which is so justly venerated. So far from this, that the allowance of any days of grace, is in derogation of the common law rule, applicable to other contracts. They are, emphatically, the mere creatures of usage, varying in different countries, to suit the views and convenience of men in business, originally gratuitous, and not binding on the holder. The common law would require payment on the last day limited by the contract, and would also give to the maker the whole of that day. It is a settled principle of the common law, applicable to all contracts, that a party has until the last day limited by his agreement, to perform his engagement, and even until the last hour of the day. The common law knows of no fractions of a day; custom, however, and that introduced, too, principally by banks, has limited

1824.

Renner v. Bank of Columbia.

the day to a few hours of business. But this, and whatever other rules have been adopted by consent, and merely for the convenience of commercial men, are departures from the common law doctrine. When, therefore, the allowance of only three days of grace, is said to be the law of the contract, by bills of exchange and promissory notes, nothing more can be intended, than that custom has so long sanctioned this rule, that all dealers in paper of this description, are understood to govern themselves by it. The law of the contract, properly speaking, is to pay when due; and that time is to be ascertained, either from the contract *per se*, or that taken in connexion with some known *custom*, which the parties are presumed to have tacitly consented, should be made a part of the contract. And it is in this view only, that three days of grace are allowed, where that *custom* is recognised as the rule; for a note, which upon its face has sixty days to run, is in truth and in fact, a contract for sixty-three days, and interest is taken for that time. And how is it ascertained that it is a note for sixty-three days, but by looking out of the contract, and finding what was the understanding of the parties? Where the *custom* has existed for a long time, and has become general, Courts of justice, as before observed, will notice it *ex officio*; and where it has not, it is matter of proof. If this is not the light in which these transactions are to be considered, all banks are chargeable with usury; for all take interest beyond what is allowed by law, if time is to be determined by the note itself. The general rule of law is,

1824.

Renner v. Bank of Columbia.

that demand of payment must be made of the maker, when the note falls due; and that time, as now settled, is on the last day of grace; and even this rule is of recent date, for in the King's Bench in England, as late as the year 1791, about coeval with the institution of this bank, and the *custom* established by it, we find (*Leftly v. Mills*, 3 *T. R.*) Lord Kenyon and Mr. Justice Buller differing on this very point: the former holding that, by analogy to other contracts, the acceptor of a bill of exchange had the whole of the third day of grace to pay the bill, and that a demand on the fourth day was not too late. Mr. Justice Buller thought the demand ought to be made on the third day of grace; that the nature of the acceptor's undertaking, was to pay the bill on demand, on any part of the third day of grace; and he inferred this, from its having been, as he said, the practice to make the demand on that day. If it was a doubtful question in England, so late as the year 1791, whether the demand ought to be made on the third day of grace, or the day after, this bank is not chargeable with any culpable innovation upon long established rules of law or usage, by adopting the practice of making the demand on the fourth day.

Evidence of the usage is admissible, for the purpose of explaining the understanding of the parties as to their contract.

It is said, however, that the effect of this testimony is, to alter and vary, by parol evidence, the written contract of the parties. If this is the light in which it is to be considered, there can be no doubt that it ought to be laid entirely out of view; for there is no rule of law better settled, or more salutary in its application to contracts, than that

1824.

Renner v. Bank of Columbia.

which precludes the admission of parol evidence, to contradict or substantially vary the legal import of a written agreement. Evidence of usage or custom is, however, never considered of this character; but is received for the purpose of ascertaining the sense and understanding of parties by their contracts, which are made *with reference to such usage or custom*; for the *custom*, then, becomes a part of the contract, and may not improperly be considered the law of the contract; and it rests upon the same principle as the doctrine of the *lex loci*. All contracts are to be governed by the law of the place where they are to be performed; and this law may be, and usually is, proved as matter of fact. The rule is adopted, for the purpose of carrying into effect the intention and understanding of the parties. That the note in question was to be paid at the Bank of Columbia, and to be governed by the regulations and custom of the institution, and so understood by all parties, cannot admit of a doubt.

Cases in which evidence of commercial usage is admissible, to ascertain the meaning of contracts.

It would be a waste of time, to go very much at large into an examination of the various usages and customs, that are admitted in evidence and recognised in Courts of justice, both in England and in this country, in almost every branch of business, and especially in commercial transactions, for the purpose of ascertaining the meaning and interpretation of contracts. A few only will be noticed, that are somewhat analogous to the present case.

In the case of *Cutler v. Powell*, (6 *T. R.* 320.) where was brought under consideration the legal effect of a promissory note, given to the mate of a

ship for a certain sum of money, provided he proceeded on her voyage, and continued to do duty *to the port of destination*. The legal construction to be given to this note was clear, and so considered by the Court, that nothing was due, unless the mate continued to do duty to the port of destination. He having died, however, on the voyage, the Court directed an inquiry into the usage of merchants in such cases, declaring that if it sanctioned an allowance for the time the service was performed, the plaintiff should recover according to such usage.

No intimation is here given, that such proof would be repugnant to the contract, although it was against the legal import of the note, if construed without reference to the usage; and although the usage related to trade, it was very limited in its application.

So in *Noble v. Kenneway*, (*Doug.* 511.) usage of trade was admitted in evidence, to explain the understanding of parties, in a policy of insurance, although the usage had not existed three years. Lord Mansfield said, the usage could only be known by proof, and must be tried by a jury; that underwriters must be presumed to be acquainted with the practice of the trade they insure, whether recently established or not. If it were necessary, cases might be multiplied almost without end, showing the same principle and same recognition of local and particular usages, in almost every branch of business.

We have, also, in the State Courts in our own country, the decisions of very enlightened Judges, adopting the same principles, and governing them-

1824.

Renner v. Bank of Columbia.

selves by the same rules; and in many cases, not unlike the one before us.

In *Jones v. Fales*, (4 *Mass. Rep.* 252.) the same doctrine as to usages of banks, was fully sanctioned; and although that particular usage might have been found, in practice, inconvenient, and not to meet public approbation, yet the principle which governed the decision of the Court, is not thereby weakened, viz. that the usage with which the defendant was conversant, was proper evidence to be submitted to a jury, to infer from it the agreement of the party. And although, as suggested at the bar, this *custom* was altered by the banks, we do not find the Courts of justice in that State attempting to control it, in its application to notes made in reference to the usage.

The doctrine of this case was again fully recognised in *The Lincoln and Kennebeck Bank v. Page*, (9 *Mass. Rep.* 155.) where it was held, that bank usages, established respecting demands on makers of promissory notes, and notices to endorsers, being known to dealers in the banks, they were bound by them, and that the usage was proper evidence to be submitted to a jury. These cases are not referred to for the purpose of approving the particular usages, but to show that evidence of such usage was never considered as contradicting the written contract.

Halsey v. Brown and others, (3 *Day*, 346.) is a very strong case on this subject. The question was as to the liability of ship owners, for the loss of money taken on freight by the captain. The defence set up was, that the master, according to

established custom, was permitted to take money on freight, as a perquisite to himself, and the owners discharged from responsibility; and the question directly presented to the Court was, whether a particular custom or usage could be given in evidence, to control the general law. And the Court says, it is a principle, that the general common law may be, and in many instances is, controlled by special custom. So the general commercial law may, by the same reason, be controlled by a special local usage, so far as that usage extends, which will operate upon all contracts of this nature, made in view of, or with reference to, such usage.

1824.

Renner v. Bank of Columbia.

In *Smith v. Wright*, (1 *Caines*, 43.) this general principle is laid down: The true test of a commercial usage is, its having existed long enough to have become generally known, and to warrant a presumption that contracts are made in reference to it.

In the case of *The Bank of Utica v. Smith*, (18 *Johns. Rep.* 230.) a note, payable at the Mechanics' Bank in New-York, was presented, and payment demanded, fifteen minutes after bank hours, and this was held sufficient; it appearing, that although it was a quarter of an hour after the usual time of closing the bank as to other business, it was within bank hours, it appearing that, according to the general course of doing business at this bank, these fifteen minutes were the usual and accustomed time for these presentments, and of this course of business the defendant ought to have informed himself.

1824.

Renner v. Bank of Columbia.

It is unnecessary to pursue this subject farther by particular reference to decisions in the State Courts. The same doctrine, as to the effect of particular usages in controlling the general law, will be found to accompany the administration of justice, wherever the subject is brought under consideration. Whether these usages are, in all instances, wise and beneficial, may, perhaps, be questionable, but where they do exist, they are considered as regulating and controlling contracts, made under and in reference thereto.

The same principle is recognised by this Court, in the case of *Yeaton v. The Bank of Alexandria*, (5 *Cranch*, 492.) The Chief Justice, in speaking of the effect of usage upon the legal obligation of parties, observes, if the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this Court is not prepared to say, that the undertaking created by the endorsement, would not be so fashioned as to give effect to the real intention of the parties.

These cases are sufficient to show, in the most satisfactory manner, the light in which Courts of justice consider contracts, made in reference to any particular usage, and the effect that such usage is to have upon them. And no good reason is perceived why these principles should not be applied to the case before us. The *custom*, under which this bank has transacted business for five and twenty years, of demanding payment of the drawers of notes on the fourth instead of the third day, after the time limited for payment, is

1824.

Renner v. Bank of Columbia.

not unreasonable or repugnant to any principles of general policy. It does not stand alone, but is in accordance with the usage of every other bank in Washington and Georgetown. The defendant endorsed the note in question, with full knowledge of the *custom*. A demand on the fourth day is in perfect harmony with the principles of the common law, if applied to the contract, the maker having the whole of the third day to pay his note, and not being in default until the fourth. The inconveniences suggested on the argument growing out of a usage here, differing from that which is in practice in other places on this subject, are not of great public concern. If they exist, they affect the banks and their customers only. And if felt to the prejudice of either the one or the other, we may rest assured it would be altered. Their private interest is a sure guaranty for this.

But, admitting the practice to be inconvenient, and that a uniformity, in this respect, with other parts of the country would be desirable, the remedy is not in the hands of Courts of justice, whose business it is to judge of contracts as made by parties themselves, and not to prescribe the manner in which they shall be made.

We are, accordingly, of opinion that the Court below did not err in refusing to instruct the jury that the demand upon the maker of the note, on the fourth day after the time limited for payment thereof, discharged the defendant from liability on his endorsement.

Objections to the declaration.

One of the minor points, which has been alleged as error, appearing on the face of the re-

1824.

Renner v. Bank of Columbia.

cord, is, that the demand on the maker of the note should, at all events, have been laid on the third day after the time limited by the note for payment, and not on the fourth. This objection cannot be sustained at this time. Whether the declaration would not have been bad on demurrer, not, however, because the demand is laid on a wrong day, but because it does not aver the usage, is a question not necessary now to decide. But if, as we have determined, the demand was properly made on the fourth day, it would have been bad if laid at an earlier day, because the maker would have been under no obligation to pay, and, of course, not in default. If, therefore, the cause should be sent back to the Court below, no amendment in this respect ought to be made. The want of an averment, so as to let in the proof of usage, cannot now be objected to the record. The evidence was admitted *without objection*, and now forms a part of the record, as contained in the bill of exceptions. Had an objection been made to the admission of the evidence of usage, for the want of a proper averment in the declaration, and the evidence had, notwithstanding, been received, it would have presented a very different question.

The time of the demand, as laid in the declaration, is according to the legal effect of the note. If made at an earlier day, it would have given no cause of action against the endorser, for he was not bound to pay until the default of the maker, and he was not in default until the fourth day.

1824.

Renner v. Bank of Columbia.

It is a general rule, in declaring as to time, that it must be laid after the cause of action accrues.

Rule in declaring, as to time.

The case of *Rushton v. Aspinwall*, (*Doug.* 679.) does not apply. The bill of exchange, upon which that suit was founded, was dated on the 27th of November, in the year 1773, payable three months after date. The declaration stated, that the bill was presented for acceptance on the day of the date thereof, and duly accepted, and, afterwards, on the same day, the acceptor was requested to pay, &c. but neglected and refused, &c., and then goes on to state the liability of the defendant, as endorser, and that he, on the same day, assumed and promised to pay, &c. It appears, therefore, that the refusal of the acceptor, and the assumption of the endorser, are laid on the day of the date of the note, which was three months before it fell due. The plaintiff, therefore, by his own showing, had no cause of action when he commenced his suit. This was a defect which no verdict could cure. He had not set forth his cause of action defectively, but shown that he had no cause of action; and this was the ground on which it was placed by the Court. A cause of action, defectively or inaccurately set forth, is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary in form or in substance, to make out his cause of action, so imperfectly stated, must be proved at the trial; but when no cause of action is stated, none can be presumed to have been proved.

This case is not to be considered as if before

1824.

Renner v. Bank of Columbia.

us on demurrer to the declaration. There being no averment of the special *custom* as to the demand on the fourth day, and the general rule being that the demand must be made on the third, if the declaration alleges it to have been made on the fourth, the joinder in demurrer admits the fact, and, of course, that the demand was too late. But had the declaration contained an averment of the special *custom*, it must allege a demand on the fourth day. That is according to the legal effect of the note; and a demand laid on any other day would have been bad. We must now consider the case as if the declaration had contained a special averment of the *custom*, the proof having been before the Court and jury *without objection*, and now making a part of this record.

Secondary evidence of the contents of written instruments, when admissible.

The only remaining question arises out of a bill of exceptions, taken upon the trial, to the decision of the Court below, admitting secondary evidence of the contents of the note. And it has been contended,

1st. That no such evidence was admissible, unless it appeared that the note was *destroyed*.

The rule with respect to the admission of secondary evidence, we think, is not so restricted. If the original is *lost*, by accident, and no fault is imputable to the party, it is sufficient. In the present case, it appeared that the note was in Court a few days before, and introduced in evidence on the trial against Foyles, the maker, but had been mislaid, and upon thorough search could not be found. Every case of this kind must depend, in a great measure, upon its own circumstances.

1824.

Renner v. Bank of Columbia.

This rule of evidence must be so applied as to promote the ends of justice, and guard against fraud or imposition. If the circumstances will justify a well grounded belief, that the original paper is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description, that no doubt can arise as to the proof of its contents, there can be no danger in admitting the secondary evidence. In this case, the note having been in Court a few days before, and proved, upon a trial against the maker, there could be no possible inducement to withhold it, and it was, no doubt, mislaid purely by accident.

What secondary evidence is necessary to be produced.

It is objected, in the second place, that if secondary evidence is admissible, the contents of the note was not proved by that which was competent; that it should have been by a notarial copy. Proof of the contents of a lost paper ought to be the best the party has in his power to produce, and, at all events, such as to leave no reasonable doubt as to the substantial parts of the paper. But, to have required a notarial copy, would have been demanding that, of the existence of which there was no evidence, and which the law will not presume was in the power of the party; it not being necessary that a promissory note should be protested.

English practice of requiring a special count in the declaration upon a lost note, in order to let in secondary evidence of its contents, has not been adopted in the United States.

It is objected, lastly, that secondary evidence was not admissible, without a special count in the declaration upon a lost note. The English practice on this subject has not been adopted in this country, as far as our knowledge of it extends,

1824.

M'Gruder v. Bank of Washington.

and to require a special count upon a lost note, would be shutting the door against secondary evidence, in all cases where the note was lost after declaration filed. We do not *think* any danger of fraud is to be apprehended from the admission of such evidence, under the usual count upon the note; and, the practice in the Court below not requiring a special count in such cases, no error was committed in the admission of the evidence.

Judgment affirmed.[a]

[Promissory Note.]

George M'Gruder, *Plaintiff in Error,*

v.

The President, Directors, and Company of the Bank of Washington, *Defendants in Error.*

Where the maker of the note has removed into another State, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary to charge the endorser, but it is sufficient to present the note at the former place of residence of the maker.

March 18th. The opinion of the Court was delivered by Mr. Justice Johnson.

[a] Mr. Chief Justice Marshall, Mr. Justice Washington, and Mr. Justice Duvall, did not sit in this cause. Mr. Justice Story dissented.

1824.

M'Gruder v. Bank of Washington.

This case comes up from the Circuit Court of the District of Columbia, in which a suit was instituted against the plaintiff here, as endorser of one Patrick M'Gruder.

The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action, and the defendant brings this writ of error to have that judgment reversed, and a judgment entered in his favour.

The leading facts in the cause are so much identified with those in the case of *Renner v. The Bank of Columbia*,[a] decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this.

But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was, whether the facts stated will excuse it.

At the time of drawing the note, and until within ten days of its falling due, the maker was a housekeeper in the District of Columbia. But he then removed to the State of Maryland, to a place within about nine miles of the District. The case admits, that neither the holder of the note, nor the notary, knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of

[a] *Ante*, p. 581.

1824.

M'Gruder v. Bank of Washington.

the admission to this point are, that he "went to the house where the said Patrick had last resided, and from which he had removed, as aforesaid, in order there to present the said note, and demand payment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest."

The alternative in which the judgment of the Court is to be rendered, is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is,

Whether the holder had done all that he was bound to do, to excuse a personal demand upon the maker.

On this subject the law is clear: a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly *personal*, in the language of the submission, is not required; it is enough if it is at his place of abode, or, generally, at the place where he ought to be found. But his actual removal is here a fact in the case, and in this, as well as every other case, it is incumbent upon the endorsee to show due diligence. Now, that the notary should not have found the maker at his late residence, was the necessary consequence of his removal, and is entirely consistent with the supposition of his not

having made any one of those inquiries which would have led to a developement of the cause why he did not find him there. *Non constat*, but he may have removed to the next door, and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might, with equal correctness, have returned, "that he had not found him," and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

The party must, then, be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties.

Mere distance is, in itself, no excuse from demand; but, in general, the endorser takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post office allowed him, as in the case of notice to the endorser.

But the question on the recent removal into another jurisdiction, is a new one, and one of some nicety. In case of original residence in a State different from that of the endorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another State, the holder shall be required to pursue the maker, is a question not without its difficulties.

We think that reason and convenience are in

1824.

M'Gruder v. Bank of Washington.

favour of sustaining the doctrine, that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law, than their abstract justice. On this point, there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases, that the endorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the endorser is held, in England, to stand committed; and, although from the contiguity, and, in some instances, reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious, that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British channel.

With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

1824.

Ex parte Wood.

[PATENT. PRACTICE.]

Ex parte WOOD & BRUNDAGE.

Under the 10th section of the patent act of the 21st of February, 1793, ch. 11. upon granting a rule, by the Judge of the District Court, upon the patentee, to show cause why process should not issue to repeal the patent, the patent is not repealed, *de facto*, by making the rule absolute; but the process to be awarded is in the nature of a *scire facias* at common law, to the patentee to show cause why the patent should not be repealed, with costs of suit; and upon the return of such process, duly served, the Judge is to proceed to stay the cause, upon the pleadings filed by the parties, and the issue joined thereon. If the issue be an issue of fact, the trial thereof is to be by a jury; if an issue of law, by the Court, as in other cases.

In such a case, a record is to be made of the proceedings, antecedent to the rule to show cause why process should not issue to repeal the patent, and upon which the rule is founded.

This cause was argued by Mr. *Haines*,[a] in support of the rule, and by Mr. *Emmett*,[b] against it. *March 11th.*

Mr. Justice STORY delivered the opinion of the Court. *March 17th.*

The District Judge of the southern district of New-York, under the 10th section of the patent act, of the 21st of February, 1793, chapter 11., granted a rule upon Charles Wood and Gilbert

a He cited Stearns v. Barrett, 1 *Mason's Rep.* 153. 8 *Mod.* 28. 1 *Salk.* 144.

b He cited 1 *U. S. Law Journal*, 88. *Ex parte* O'Reilly, 1 *Ves. jr.* 112. *Ex parte* Fox, 1 *Ves. & Beames*, 67. Jefferson's Case, 2 *Saund.* 15.

1824.

Ex parte Wood.

Brundage, at the instance and complaint of Jethro Wood, to show cause why process should not issue against them, to repeal a patent granted to them for a certain invention, in due form of law; and upon hearing the parties, no sufficient cause being, in his judgment, shown to the contrary, he, on the 2d day of July, 1823, passed an order, that the said rule be made absolute, and that the said patent be repealed; and that process issue to repeal the said patent, and for the costs of the complainant. The patentees, by their counsel, moved the Court to direct a record to be made of the whole proceedings, and that process, in the nature of a *scire facias*, should be issued, to try the validity of the patent. The Court denied the motion, upon the ground that these were summary proceedings, and that the patent was repealed *de facto*, by making the rule absolute; and that the process to be issued, was not in the nature of a *scire facias*, to try the validity of the patent, but merely process repealing the patent.

A motion was made, on a former day of this term, in behalf of the patentees, for a rule upon the district Judge, to show cause why a mandamus should not issue from this Court, directing him to make a record of the proceedings in the cause, and to issue a *scire facias*, for the purpose of trying the validity of the patent. The rule having been granted, and due service had, the case has since been argued by counsel, for and against the rule; and the opinion of this Court is now to be delivered.

Two objections have been urged at the bar,

1824.

Ex parte Wood.

against the making this rule absolute. The first is, that these proceedings, being summary, are not properly matters of record. The second, that this is not a case in which, by law, a *scire facias*, or process in the nature of a *scire facias*, can be awarded, to try the validity of the patent.

Both of these objections are founded upon the provisions of the 10th section of the patent act, and must be decided by a careful examination of those provisions. The words are, "that, upon oath or affirmation being made, before the Judge of the District Court, where the patentee, his executors, &c. reside, that any patent, which shall be issued in pursuance of this act, was obtained surreptitiously, or upon false suggestion, and motion made to the said Court within three years after issuing the said patent, but not afterwards, it shall and may be lawful for the Judge of the said District Court, if the matter alleged shall appear to him to be sufficient, to grant a rule that the patentee, or his executor, &c. show cause why process should not issue against him, to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute; and thereupon, the Judge shall order process to be issued against such patentee, or his executors, &c., *with costs of suit*. And in case no sufficient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of the said patent. And if the party at whose complaint the process issued, shall have judgment given against him, he shall pay all

1824. such costs as the defendant shall be put to in defending the suit, to be taxed by the Court, and recovered in due course of law."

Ex parte Wood.

Upon the slightest inspection of this section, it will be at once perceived, that however summary the proceedings may be, they are of vast importance to the parties, and involve the whole right and interest of the patentee. The jurisdiction given to the Court, is not general and unlimited, but is confined to cases where the patent was obtained surreptitiously, or upon false suggestions; where the patentee resides within the district; and where the application is made within three years after the issuing of the patent. It is, therefore, certainly necessary, that all these facts, which are indispensable to found the jurisdiction, should be stated in the motion and accompanying affidavits; and without them, the Court cannot be justified in awarding the rule. It follows, of course, that in any record that is to be made of the proceedings, they constitute the preliminary part, and ought not to be omitted. In the present case, they have been wholly omitted, and the record is, in this respect, incomplete and inaccurate.

But it is said that, technically speaking, these proceedings are not matters of record. They are certainly proceedings of a Court of record, for such are all the Courts of the United States, in virtue of their organization, both upon principles of the common law, and the express intendment of Congress. In general, the interlocutory proceedings in suits are not entered of record, as they are deemed merely collateral incidents. But where

1824.

Ex parte Wood.

a special jurisdiction is given to a Court, as in the present instance, it appears to us that, in conformity to the course of decisions in this Court, upon the subject of jurisdiction, all the preliminary proceedings required to found that jurisdiction should appear of record, as they constitute an essential part of the case. In general, motions and rules made in the course of suits, over which the Court has an acknowledged jurisdiction, are not entered of record. But where a rule is the sole foundation of the suit, and the first step in its progress, that rule can only be granted under special circumstances prescribed by law; it is not sufficient to show that the rule itself was granted, but it must also appear, by the proceedings, that it was rightfully granted.

But the more material question is, whether the proceedings, so far as the rights of the patentees are concerned, terminated with the rule being made absolute, so that, *ipso facto*, the patent was repealed, and the process to be issued was only process to enforce or declare the repeal; or whether the process was in the nature of a *scire facias* at common law, to repeal the patent, if, upon a future trial, the same should be found invalid.

This question must be decided by the terms of the section in controversy; but in the interpretation of those terms, if their meaning is somewhat equivocal, that construction ought certainly to be adopted which, not departing from the sense, is most congenial to our institutions, and is most convenient in the administration of public justice.

1824.

Ex parte Wood.

The securing to inventors of an exclusive right to their inventions, was deemed of so much importance, as a means of promoting the progress of science and the useful arts, that the constitution has expressly delegated to Congress the power to secure such rights to them for a limited period. The inventor has, during this period, a property in his inventions; a property which is often of very great value, and of which the law intended to give him the absolute enjoyment and possession. In suits at common law, where the value in controversy exceeds 20 dollars, the constitution has secured to the citizens a trial by jury. In causes of equity and admiralty jurisdiction, they have the security of a regular and settled course of proceedings, where the rules of evidence and the principles of decision are well established. And in all these cases, there is the farther benefit conferred by our laws, of revising the judgments of the inferior Courts, by the exercise of appellate jurisdiction. It is not lightly to be presumed, therefore, that Congress, in a class of cases placed peculiarly within its patronage and protection, involving some of the dearest and most valuable rights which society acknowledges, and the constitution itself means to favour, would institute a new and summary process, which should finally adjudge upon those rights, without a trial by jury, without a right of appeal, and without any of those guards with which, in equity suits, it has fenced round the general administration of justice. The patent acts have given to the patentee a right to sue at common law, for damages for any violation of his in-

vention; and have given him a farther right to claim the interference of a Court of equity, by way of injunction, to protect the enjoyment of his patent. It would be somewhat surprising if, after such anxious legislation, there should exist in the act a clause which, in a summary manner, enables any person to repeal his patent, and thus sweep away his exclusive property, without interposing any guards by way of appeal, or any regular proceedings, by which the validity of titles, in ordinary cases, is examined and contested.

1824.

Ex parte Wood.

With these considerations in view, let the 10th section of the act be examined. Its object is to provide some means to repeal patents which have been obtained surreptitiously, or upon false suggestions; the very cases for which a *scire facias* issues at the common law. As the patents are not enrolled in the records of any Court, but among the rolls of the Department of State, it was necessary to give some directions as to the correct time and manner of instituting proceedings to repeal them. It accordingly directs, that the District Judge may, upon proper evidence, under oath, and motion made to the Court, in his discretion, "grant a rule that the patentee, &c. show cause why process should not issue against him, to repeal such patent; and if sufficient cause shall not be shown to the contrary, the rule shall be made absolute, and thereupon the Judge shall order process to be issued against such patentee, &c. with costs of suit." It is obvious, from the language of this clause, that the rule is a rule not to repeal the patent, if it is made absolute, but a

1824.

Ex parte Wood.

rule for process to issue to repeal the patent. It is not then the rule, but the process contemplated by the act, that repeals the patent. It is not a mere form, but it is of the essence of the proceedings, without which, the rule has no efficacy. Is the process to be issued a process which, *per se*, repeals the patent, or are the words "to repeal such patent," to be construed as merely descriptive of the nature of the process, and of the effect of it, if judgment shall be finally pronounced in support of it? In other words, is it a process in the nature of an execution, or a judicial process, in the nature of a *scire facias*, calling for further proceedings? If the words of the section had stopped at the clause already referred to, it would, perhaps, have been difficult to find a sufficient explanation of the legislative will, to have led the Court to the conclusion, that judicial process, in the nature of a *scire facias*, was certainly intended; there would have been some reason for hesitation; but, even then, an interpretation against such process would not have been without serious embarrassments. It could not be arrived at, without leaving much of questionable reasoning behind. But the section does not stop here. It goes on to make farther provisions, which, if the process absolutely repealed the patent, could have no operation, and no intelligible meaning. On the other hand, if the process was to be in the nature of a *scire facias*, all the words are sensible and operative, and describe the proper progress and proceedings upon such a writ. The clause is in these words: "And, in case no suffi-

cient cause shall be shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, judgment shall be rendered by such Court for the repeal of the patent." These words follow after the clause awarding the process, and, of course, suppose the process already issued. The party is supposed to be called upon to show cause, which is precisely what a *scire facias* requires in its official mandate; and if no sufficient cause is shown to the contrary, or if it shall appear that the patentee was not the true inventor or discoverer, then the patent is to be repealed. If the process is merely to repeal the patent, and not to institute a trial, how can the party show cause? how can it judicially appear that the patentee is not the inventor? These provisions are intelligible in a *scire facias*, for that authorizes subsequent inquiry into the law and the facts. But, farther, "judgment" is to be rendered. Now, it is not necessary to lay any particular stress on this word, as a known juridical phrase, expressive of the final decision of the Court; but if the making the rule absolute repealed the patent, and the process is merely an execution, how could any subsequent judgment be rendered in the case? It would be contrary to all analogy, to all rules of judicial interpretation, to suppose that judgment is to succeed, and not to precede, the writ of execution. The clause goes on, "and if the party, at whose complaint the process issued, shall have judgment against him, he shall pay all such costs as the defendant shall be put to in defending the suit, to be taxed

1824.

Ex parte Wood.

by the Court, and recovered in due course of law." The language is here still more distinct and persuasive. It imports, in a clear manner, that some proceedings were to be had after the process issued, by which the case might be farther investigated; and if upon such investigation judgment should be against the complainant, the patentee should recover his costs. The language is, that the party, at whose complaint the *process issued*, not the rule issued, shall have judgment against him. Upon what? the rule? Certainly not; but upon the *process issued*. He shall pay the costs to which the defendant is put in defending the suit. What suit is here intended? We think it is clear that it means the suit upon the process, that is, upon the *scire facias;* for the proceedings upon the rule are not, in a technical, or in any accurate sense, a suit. The costs of *defending* the suit are to be paid. But how can any costs arise from a defence upon a process which is final and absolute? It appears to the Court, that to give the construction contended for by the counsel against the rule, would be to reject the plain and obvious purport of the whole of the last clauses of the section, and make them a perfect nullity. In the other view, they have entire effect, and are as reasonable and just, in themselves, as they are promotive of the security of vested rights and property.

Nor does the occurrence of the words "costs of suit," in the preceding part of the section, where it is said that "the process shall be issued, &c. with costs of suit," in the slightest degree impugn

1824.

Ex parte Wood.

this interpretation. The true meaning of these words in this connexion, is not that costs of suit, already incurred, shall be paid and collected, but that the process shall be, to show cause why the patent shall not be repealed, and costs of suit given to the complainant. In this view, it fortifies the construction already asserted by the Court. That this is the true exposition of the words, is made apparent by examining the 5th section of the patent act of 1790, ch. 34., which is exactly similar in terms to the 10th section of the present act, except that it omits, in this place, the words "costs of suit." These words, therefore, were not intended to change, and cannot be admitted to change, the natural meaning of the other parts of the section. And if the other words used in this connexion are descriptive of the nature of the process, these words are merely explanatory of the legislative intent, that the costs of the suit should follow upon the final judgment in favour of the complainant. Without this provision, as the other clause giving costs applies to the patentee only, the complainant, although he should prevail in the suit, would not be entitled to any costs. This was a real defect in the first act, and is cured by the insertion of the words under consideration.

Nor are there any public mischiefs which will result from the view which the Court takes of this section. On the contrary, it will subserve the purposes of general justice. If a patent has been fraudulently obtained, or upon false suggestions, it may be repealed within three years, if a jury,

1324. Ex parte Wood.

upon a trial, shall be satisfied of the fact. If such a repeal be not had, still the public have a perfect security. They may violate the patent with impunity, and if sued for the violation, any person may show the same facts in his defence, and they will constitute a complete bar to the suit, by the express provisions of the 6th section of the patent act. Here, also, the trial will be ordinarily by a jury, and if the verdict is found, upon such facts, in favour of the defendant, the law expressly declares, that "judgment shall be rendered for the defendant, with costs, and the patent shall be declared void." Many patents, under this section, have already, in such suits, been adjudged void; so that the danger of extensive imposition or injury is wholly chimerical. On the other hand, if, by any accident or mistake, the patentee should neglect to appear to oppose the rule, upon the argument on the other side, he may be remediless. But, upon the exposition of the statute adopted by the Court, he will still be entitled to appear to the *scire facias*, and have a more deliberate opportunity to defend his rights.

Upon the whole, it is the opinion of the Court, that the rule ought to be made absolute, and that a peremptory mandamus issue to the Judge of the District Court, directing him to enter upon record the proceedings in this cause, antecedent to the granting of the rule, and upon which it was founded: that he award a process, in the nature of a *scire facias*, to the patentees, to show cause why the patent should not be repealed, with costs of suit: that upon such process being returned,

duly executed, he proceed to try the same cause, upon the pleadings filed by the parties, and the issue joined thereon; and that, if the issue so joined be an issue of fact, then the trial thereof to be by a jury; if an issue of law, then by the Court, as in other cases.

1824.

Ex parte Wood.

Mandamus accordingly.

JUDGMENT. Upon the hearing of this cause upon the rule to show cause, heretofore awarded by this Court, and on consideration of the arguments of counsel for and against making the same rule absolute, it is ORDERED and ADJUDGED by the Court, that the same rule be, and hereby is, made absolute. And it is further ORDERED by the Court, that a peremptory mandamus issue to the District Judge of the Southern District of New-York, commanding him to enter upon record the proceedings in this cause, antecedent to the granting by him of the rule to show cause why process should not issue, to repeal the patent in the proceedings mentioned, and upon which the said rule was founded: that the said Judge do award a process, in the nature of a *scire facias*, to the patentees, to show cause why the said patent should not be repealed, with costs of suit: that upon the return of such process, as duly served, the said Judge do proceed to try the cause upon the pleadings filed by the parties, and the issue joined thereon; and that if the issue be an issue of fact, the trial thereof be by a jury; if an issue of law, then by the Court, as in other cases.

1824.

The Monte Allegre.

[Prize. Judicial Sale.]

The Monte Allegre, Tenant, *Claimant.*

In judicial sales, there is no warranty, express or implied.

Upon a sale by the Marshal, under an order of Court, no warranty is implied.

Neither the Marshal, nor his agent, the auctioneer, has any authority to warrant the article sold.

Quære, How far the Marshal is responsible to the vendee, in his private capacity, if he undertake to warrant, or to do what would imply a warranty in a private sale?

Upon an Admiralty proceeding, *in rem*, where the proceeds of the sale are brought into Court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold.

APPEAL from the Circuit Court of Maryland.

The appellant, Thomas Tenant, filed his petition on the 14th of November, 1821, in the Circuit Court for the Maryland District, setting forth that at a public sale of part of the cargo of the ship Monte Allegre, under an interlocutory order of the District Court, in the case of Joaquim Jose Vasques, Consul-General of Portugal, against the ship Monte Allegre, and her cargo, he became the purchaser of six hundred and fifty-three seroons of Brazil tobacco, part of said cargo, for which he paid to the Marshal of the District, under whose superintendence the sale was conducted, 15,495 dollars and 46 cents. That the tobacco was sold by samples, which were sound and merchantable, and that, believing the bulk of the to-

bacco corresponded, in this respect, with the samples, he became the purchaser. That, shortly afterwards, he exported the whole of the tobacco so purchased to Gibraltar; and, after its arrival there, it was found, upon examination, to be wholly unsound and unmerchantable, the greater part being entirely rotten, and the remainder unsaleable but at very reduced prices, and was, in fact, sold for 4,818 dollars and 52 cents.

1824.

The Monte Allegre.

The appellant, in his petition, further alleges, that the tobacco received no damage in its transportation to Gibraltar, but was, at the time it was sold by the Marshal, wholly unsound, rotten, and unmerchantable: that the cause in which the order was passed, by virtue of which the tobacco was sold, was still pending in this Court; and that the proceeds of said sale remained in the Circuit Court, under its authority and control; and, thereupon, prayed for such relief, as, upon proof of the allegations, he might be considered by the Court entitled to.

To this petition an answer was filed on the 2d of May, 1822, in the name of Joaquim Jose Vasques, Consul-General of Portugal, on behalf of the owners of the proceeds of the ship Monte Allegre and her cargo, resisting the claim of the appellant:

1. Because the Court had no jurisdiction or power whatever to sustain the petition, inasmuch as it was calling on the Court to award damages on a claim in the nature of an action for a deceit, or on a warranty, as an *incident* to a cause, in its nature wholly of admiralty and maritime cogni-

1824.

The Monte Allegre.

zance, the claim being entirely of common law jurisdiction, and could not be made an incident to that which appertains exclusively to the Admiralty. And, secondly, the claim was resisted upon the merits. Proofs were taken on both sides, in the Court below, and a decree, *pro forma*, was entered by consent, dismissing the petition with costs; on which the cause was brought by appeal to this Court.

March 3d.

Mr. *Meredith*, for the appellant, in answer to the objection as to defect of jurisdiction, stated, 1. That this claim was an incident to the principal case of the Monte Allegre, which had been formerly determined in this Court by a decree of restitution to the original Portugnese owners.[a] The general rule is, that where a Court has jurisdiction in the principal question, it has jurisdiction, incidentally, over all interlocutory matters that are connected with, or arise out of, the original cause. It would seem to follow, therefore, that a sale, made in virtue of an interlocutory decree, by a Court exercising a rightful and exclusive jurisdiction over the cause in which such decree is pronounced, must necessarily be considered as an incident. It could not be denied, that the interlocutory decree itself was strictly incidental; and if so, the sale must necessarily have the same character, since it and the decree are inseparably connected. The decree and the sale both depend on the jurisdiction in the principal cause, and so does

[a] 7 *Wheat. Rep.* 520.

1824.

The Monte Allegre.

the title acquired by the purchaser. The proceeds of the sale are in Court, and the Court has an undoubted power to distribute them according to equitable circumstances, and, so long as they remain within its control, to decide on all claims respecting them.[a] The answer in this case, however, places the jurisdiction on distinct ground. It is said, that the claim is in the nature of an action for a deceit, or on a warranty, which are actions known only to the common law, and cannot, therefore, be an incident to that which appertains exclusively to the admiralty. Such, however, is not the rule. Whether the original cause of action be either of admiralty or common law jurisdiction, all incidental matters follow the jurisdiction of the original cause, whatever the complexion of those matters, separately considered, may be.[b]

2. In judicial sales, the Court has entire control over the contract. It considers the contract as made with itself, and will interfere, under equitable circumstances, to relieve the purchaser, where it would not interfere in a private contract. This is the established doctrine in equity.[c] The same principle applies to sales under decrees in the Court of Admiralty, which executes a "wide equity."

a Smart v. Wolff, 3 *T. R.* 323.

b 3 *Bl. Com.* 107. 2 *Bro. Civ. and Adm. Law*, 107. 2 *Saund.* 259. *Cro. Eliz.* 685. *Doug.* 594. *Bee's Adm. Rep.* 370.

c *Sugd. Vend.* 34. 115., 1st Am. ed. Saville v. Saville, 1 *P. Wms.* 746. Morehead v. Frederick, *Sugd. Vend.* Appx. 524. Lawrence v. Cornell, 4 *Johns. Ch. Rep.* 542.

1824.

The Monte Allegre.

3. But, even admitting that the sale in this case is to be governed by the stricter rules of the common law, it may be brought within those rules. The proof shows, conclusively, that this was a sale by sample, which is equivalent to a warranty;[a] and such warranty extends as well to the soundness and merchantable condition of the commodity, as to its particular species.[b] The proof, and the admission on the record, are conclusive, to show that at the time of sale the tobacco was unsound and unmerchantable; and if the sale by sample amounts to a warranty, the purchaser was not bound to examine the tobacco. Such an examination, if made, would have been no waiver of the warranty.

4. The Marshal, being the agent of the Court, was authorized to sell by sample, that being, according to the proof, the usual and customary mode of sale; and this even if he be considered as a special agent.[d] The Marshal, however, being the agent of the Court, in all sales under its decrees, is to be considered strictly as a general agent,[e] and is, therefore, authorized to do all acts within the scope of his employment.

a Hibbert v. Shee, 1 *Camp.* 113. Klinitz v. Surry, 5 *Esp. Rep.* 267. Gardiner v. Gray, 4 *Camp.* 144. Sands v. Taylor, 5 *Johns. Rep.* 404. Sweet v. Colgate, 20 *Johns. Rep.* 196. Bradford v. Manly, 13 *Mass. Rep.* 139.

b 13 *Mass. Rep.* 139.

c 1 *Peters' C. C. Rep.* 317.

d 3 *T. R.* 757. 4 *T. R.* 177. 5 *Esp. Rep.* 75. 2 *Camp.* 555. 12 *Mod.* 514. *Willes*, 407. 1 *Camp.* 259., and cases collected in *Paley on Agency.*

e 15 *East's Rep.* 408.

1824.

The Monte Allegre.

5. The proceeds now remaining in the registry, though not the specific proceeds of the tobacco, are, notwithstanding, liable to this claim. The proceeds of the tobacco were disbursed in payment of duties and expenses, which were a joint charge of ship and cargo. The fund now in Court is a common fund, on which the owners of the tobacco have a claim for their distributive charge.

Mr. *D. Hoffman*, for the respondents, contended, that the Marshal possessed no power to warrant the *quality* of the article sold, he being a special agent, with limited powers; and that if he had exceeded the scope of his authority, he could not thereby implicate the proceeds of the property, being the agent of the *Court*, and not of the *owners*. That the limited authority of the Marshal, in the case of sales by order of the Court, is universally known and acknowledged; that all persons, therefore, are presumed to purchase on their own means of judging; and public officers are never presumed to possess the same extent of knowledge in regard to the quality of property sold by them, as the owners thereof would be presumed to possess.

Admitting, then, *argumenti gratia*, that there has, in fact, been *gross fraud*, or a *warranty* express or implied, by the Marshal, or by his agent, the auctioneer, or by both, such fraud, or warranty, would neither implicate the property, nor involve the owners in any responsibility. It is not competent for a Court, nor for the Marshal, as agent of that Court, nor for the auctioneer, as agent of

1824.

The Monte Allegre.

the Marshal, in any case, to charge the property or owners by any fraud or warranty.

And *first*, as to the power of the *Court* in this respect: It must be conceded, that the owners have had no agency in this sale; as to them, it was wholly *in invitum*. The sale was by the Court, not by the owners; the Court is not even the agent of the owners *pro hac vice;* and as the purposes of justice demand a sale, and nothing more, and as Courts are never presumed to know the *quality* of property sold under their order, so, in the present case, the order contains an authority to sell, which, we shall presently show, does not authorize a warranty. If the appellant's claim be well founded, in respect to the acts either of the Court or its agent, it must, as there has been no express warranty, repose either on the doctrine that a sound price will insure a sound article, or this, that a fraudulent representation imposes a legal obligation on the Court, to the same extent to which similar representations would bind an individual. The acts of a Court, as such, whatever the motives of the individuals who compose it, are, in the eye of the law, wholly uncontaminated by fraud or deceit. To that to which the law has assigned the part of declaring justice, it cannot impute a vice contradictory of such a character, nor suppose that the oracles of justice can dictate injustice. The distinction between judicial sales and those of individuals, rests mainly, (1.) on the actual or presumed knowledge of owners, and the actual or implied ignorance of Courts, (whose province it sometimes is to or-

1824.

The Monte Allegre.

der sales,) of the nature and quality of the thing sold; (2.) on the absolute impracticability of a Court's inquiring into circumstances of quality and title in these cases, and the consequent absence of any reliance, by purchasers, in these respects; and, (3.) on the total want of all motive in Courts and their officers, to warrant, defraud, or misrepresent. On these grounds is it that the maxim, *caveat emptor*, emphatically applies to such sales. It is on a similar principle that all judicial sales are out of the operation of the statute of frauds; and this is by no means because the judicial sale is at *auction*, for auction sales are within the statute, unless they are also in pursuance of judicial authority; but it is because there is a peculiar respect due to judicial sales. The danger which the statute intended to guard against, cannot be supposed of such sales.[a]

On the direct question under consideration, there are but few cases to be found in the books. In South Carolina it has been expressly decided, that, at a Sheriff's sale, *caveat emptor* is the best possible rule that can be laid down. The Court emphatically states, that all who attend such sales ought to take care and examine into the title, &c.; that no warranty, express or implied, can be raised on the part of the owner, as to whom the proceeding is compulsory, nor of the Sheriff, who is the mere agent of the Court, nor of the

a Attorney-General v. Day, 1 *Ves. sen.* 221. Bragden v. Bradbear, 12 *Ves.* 472. Mason v. Armitage, 13 *Ves.* 25. 3 *Munf.* 102. *Sugd. Vend.* 78.

1824.

The Monte Allegre.

Court itself; and, therefore, in that case, the claim of the defendant's wife to dower, is no reason why the purchaser should not pay the money bid at such sale.[a] In New-York, however, we find something of a contrary doctrine advanced by Mr. Chancellor Kent, who repudiated Lord Hardwicke's doctrine in the case of the *Attorney-General v. Day*, and held that Sheriff's sales are within the statute of frauds.[b]

The cases on this point, which have been cited by the appellant's counsel, may be distinguished.

The first is *Saville v. Saville*,[c] where it was merely decided, that while such a purchase before the Master remained *in fieri*, the Court would not actively interfere to compel performance, the purchase having been made under a prevalent delusion as to the value of estates, and the purchaser was willing, in order to be relieved, *to forfeit his deposit*, which was one tenth of the whole purchase money. It is further to be remarked of this case, that a *quære* is added by the learned commentator, "whether this be now the law of the Court."

Several cases also were cited from *Sugden*, all which may be accounted for by their peculiar circumstances. The sale was *in fieri* in every case; the Master, who conducted the sale, had all the knowledge possessed by the owners, was

a The Creditors of Thayer v. Sheriff of Charleston, 2 *Bay*, 170.

b Simonds v. Catlin, 2 *Caines*, 63.

c 2 *P. Wms.* 745.

1824.

The Monte Allegre.

possessed of every muniment of title, and ought to have known of every incumbrance; and most of the sales were voluntary; or, if not, the Court either required a forfeiture of the deposit, or the clearest proof of gross mistake, which it was in the master's power to have guarded against.[a]

Having nearly exhausted the common law sources of information, on this question, I shall be pardoned for seeking further light in the Roman code, that pure and copious fountain of written reason. It is well known how strict the Ædilitian law was in regard to the obligations of vendors. Not only a sound price warranted a sound commodity, but the seller was bound to declare all the faults known to him, nay, was responsible even for such as were altogether unknown to him. Yet all the commentators on this edict admit, that neither the action *quanti minoris*, *redhibitoria*, nor that *ex empto*, would lie in the case of *fiscal* and *judicial* sales. It appears that where an extravagant price was given for a commodity, the Roman law allowed a diminution of the price, to be enforced by the action *quanti minoris*, though the purchaser suggested neither fraud nor warranty. But this applied only to private sales, not those under public authority. So, if the commodity were unsound, or unfit for its ordinary purpose, that law compelled the vendor, by the *actio redhibitoria*, to take back the property, or make allowance for its defects; but the policy of

[a] *Sugd. Vend.* 34. 49. 115. 185. *App.* 524. Lawrence v. Cornell, 4 *Johns. Ch. Cas.* 542.

1824.

The Monte Allegre.

the law did not suffer judicial or fiscal sales to be impugned by the redhibitory action. Again, if the title proved defective, in lands or goods, the purchaser resorted to the action *ex empto;* but this, too, applied only to private sales.

This doctrine is emphatically stated in the Roman code. *Illud, sciendum est, edictum hoc non pertinere ad venditiones fiscales.*[a] To the same effect is *Domat*, who cites the Ædilitian edict. "Redhibition and diminution of price, on account of the vices of the thing sold, do not take place in public sales which are made by a decree of a Court of justice. For in these sales it is not the proprietor who sells, but it is the authority of justice, which adjudges the thing *only such as it is.*"[b] *Pothier*, commenting on the clause, "tamen illud sciendum est," says, that this exclusion of responsibility on the part of the owner of property, is owing to the trust and confidence reposed in Courts of justice: their sales, therefore, must stand; they shall not be annulled by the action *ex empto*, nor the price be reduced by the action *quanti minoris* or *redhibitoria.*" "Propter auctoritatem hastæ fiscalis (continues *Pothier*) cujus fides facile convelli non debet."[c] The same author, in his treatise of the contract of sale, after commenting on the various remedies under this celebrated edict, says, "but the consequential actions on account

a Dig. l. 1, t. 1. De Ædilio. Edicto.
b Domat's Civ. Law, b. 1, t. 2. s. 11.
c Poth. Pand. Just. l. 21. t. 1. s. 4. art. 1. No. 5.

1824.

The Monte Allegre.

of redhibitory defects, are not allowed on sales made under judicial authority."[a]

Leaving the Roman code, analogous principles are not wanting in the jurisprudence of other countries. In Holland and the Netherlands, certain purchasers have the privilege of *rescinding* their contracts within twenty-four hours, if the inequality of the transaction exceeds one half the price paid. But it is said, that this right does not appertain to any sales made under a decree, or in the presence of a Judge, and that it certainly does not to sales on *involuntary* decrees.[b] There is a similar *locus penitentiæ* accorded to the inhabitants of these countries, who, as the same author in substance remarks, "through much internal heat are commonly much inclined to liquor, and, therefore, in the midst of innocent drunkenness, are induced to mislead and defraud the unwary in their sales and purchases. The persons thus used may recede within twenty-four hours, which privilege is, in every respect, to be understood of private trade, as there can be no suspicion of deception, where the sale is public by an authorized functionary." In the same jurisprudence we find what is called an *appropriation* or *redemption right*, which gives to the *vendor*, in certain cases, within a limited time, the privilege of repossessing himself of the property sold, at the

a *Traité du Contrat de Vente*, s. 232.
b *Van Leeuwen's Com.* b. 4. c. 20. s. 4.
c *Ib.* s. 6, 7.

1824.

The Monte Allegre.

same price. But this permission applies in no case to judicial or public sales.[a]

But it is said that the *Marshal* was competent to warrant the quality of the property sold, or, at least, that he has done so, and that, therefore, it is the Court's duty to adopt his acts, and to save the purchaser from loss. This doctrine, we presume, can hardly be sound. The Marshal is only a *ministerial* agent of the Court; his authority cannot be more extensive than that whence it flows:—*derivitiva potestas non potest esse major primitiva.* Nay, further, he was *pro hac vice* a *special* agent with defined powers; his authority was only to *sell*, and *sale* does not *ex vi termini* imply even a warranty of the title, much less of the quality of the commodity sold: for if the *title* should be defended by the Court, it would be only on the ground that, as the proceeding was *in rem*, all the world was a party, and not on the principle of *warranty*, either express or implied. The Marshal, had he been guilty of fraud, or exceeded his powers by warranting the quality of the tobacco, could only have subjected himself to personal responsibility, and not the property; nor could any such excess in the execution of his powers impose the least obligation on the Court, either to bind the property, or compel the owners to ratify his act. The Marshal's authority was to *sell*, and this, it has often been decided, does not convey a power to *warrant*.[b] Again, the acts of an agent beyond the

a Van Leeuw. Com. b. 4. c. 19. s. 1. 12.

b Nixon v. Hyserott, 5 *Johns. Rep.* 58. Gibson v. Colt, 7 *Johns. Rep.* 390.

scope of his authority, are void as to every one but himself.[a]

The Marshal is necessarily a *special* agent only, and his, like all other defined authorities, must be strictly pursued. He need not be directed *not* to warrant: this is implied *ex natura officio*.[b] He cannot be presumed to warrant, because between him and the owners there can be no privity. An owner has the requisite knowledge of the nature and qualities of his merchandise; he, and his agent, the auctioneer, who have the fullest means of judging, may consequently sometimes *impliedly* warrant. But an officer of Court cannot be presumed to warrant any thing, since he sells the products of every region of the globe, often without invoices, letters, description, or muniments of title, and often without seeing, or the possibility of seeing, the contents of numerous packages, whose opening might lead to expense or prejudice. And even with respect to agents and servants, the general doctrine is, that they are not competent to implicate their constituents, either by their warranty or their fraud; though there are many cases where the principal has been bound, especially in the sale of horses, which rests on special grounds. It is, however, laid down by *Rolle*, that "a warranty on a sale must be made by him who sells; and, therefore, if a servant, on a sale of goods of

a Paley on Agency, 165. 302, 303. 3 *Johns. Cas.* 70. 1 *T. R.* 205. 3 *T. R.* 757. 4 *Taunt.* 242. 1 *Dow's Rep.* 44. 15 *East.* 45.

b Paley on Agency, 165. 170, 171.

1824.

The Monte Allegre.

his master, warrant them, it will be a void warranty, for it is the sale of the master."[a] So here, if the Marshal have warranted the property, it is a void warranty as to the source whence he derived his power to sell.

What has been said of the Marshal, applies with like force to the auctioneer. It may, besides, be remarked, that auctioneers are ever considered as *special* agents, and that generally they have an authority to sell only.[b] The auctioneer's powers were defined in this case by the character of the source whence he drew them, and this source was known to every bidder. But where auctioneers are clothed with a general authority, *usage* may, and has limited it in this class of cases, though private instructions, without usage, might not have availed.[c]

As to the question of express warranty, or fraud, it may be laid down as a settled principle, that purchasers are bound to apply their attention to those particulars, which may be supposed within the reach of their observation and judgment; and that if they are wanting in that attention where it would have protected them, they must endure the loss, unless in the case of an express warranty, or of gross fraud.

This is a case in which the purchaser's vigilance should have been particularly awakened. He well

a *Roll. Abr.* 95. pl. 30. 2 *Roll's Rep.* 270.

b 7 *Ves.* 276.

c *Paley on Agen.* 163. note 9. Dickinson v. Lilwall, 4 *Campb.* 279.

knew, that the tobacco was sold under an interlocutory decree, which must have been either under a perishable monition, the consent of proctors, or the arbitrary mandate of the Court. The decree itself, however, seemed to imply the perishable state of the property; and besides, interlocutory decrees for the sale of property are seldom allowed, unless from some such necessity. This alone was sufficient to put the party on the inquiry. A Court, also, and its officers, (unlike owners,) cannot be presumed acquainted with the quality and condition of the property offered for sale; and the nature of the property itself (as we shall presently see) excluded the possibility of the Marshal or his agent's possessing any knowledge not equally within the reach of the purchaser's observation. These circumstances bring the case entirely within the position just laid down, and more extensively expressed and well illustrated, in *Fonblanque*.[a] It is a rule of law, no less than of moral justice, that if both parties be ignorant of the quality, a loss, if any, must be sustained by the purchaser: *Vigilantibus non dormientibus jura subserviunt*.[b] If, then, the vendor have knowledge of patent defects discoverable by ordinary attention, the disclosure of them is a duty but of *imperfect* obligation, and he cannot be charged by the purchaser, unless there has been a concealment *ex industria*, or a warranty.[c] Nay,

a *Fonbl. Eq.* 379, note 12.

b *Hob.* 347. 2 *Day*, 128. 1 *Hayw.* 464. 1 *Hardin*, 50.

c *Sugd. Vend.* 1, 2. 195. 200. 2 *Bay* 383. 7 *Johns. Rep.* 392. 4 *Dig.* 4. 4. 16. 4.

1824.

The Monte Allegre.

further, a purchaser is not presumed to have been put off his guard, and diverted from his inquiry, by the vendor's commendation of the goods. Even under the Ædilitian edict, the maxim was *simplex commendatio non obligat;* for though that law aimed at producing the utmost good faith in sales, yet it was also a rule of the civil code, that "in buying and selling, the law of nations connives at some cunning and overreaching;" *in pretio emptionis et venditionis naturaliter licet contrahentibus se circumvenire;* and our law has adopted these principles, in *regard both to commendation and enhancement of price.* We are, then, brought to the inquiry, *first,* whether the soundness of the price paid will entitle the purchaser to a sound article, or to compensation for its defects; *secondly,* whether there has been a sale by sample in this case, and what is the true meaning of, and obligation flowing from, a sale by *sample.*

Admitting a sound price to have been paid for this tobacco, we contend, *first,* that this does not, in our law, insure a sound and merchantable commodity. Every common law author, *Wooddeson* excepted,[a] sustains this position. "In the civil law," says *Lord Coke,* "a sound price demands a sound article; but it is not so in the common law, in which there must be either *fraud* or an *express* warranty.[b] Wooddeson's position is unsustained by any authority; nor has it been subsequently ap-

a Sugd. Ven. 3. 1 *Tyl. Rep.* 404. 2 *Com. Con.* 265. 2 *Dall.* 146. 322. 2 *Wood.* 415.

b Co. Litt. 102 b.

1824.

The Monte Allegre.

proved by the profession. In America, Coke's law has been almost universally sanctioned. Wooddeson's doctrine has been adopted only in the two Carolinas, and by a few elementary writers in this country.[a] We might go even farther, and say, that if the vendor not only receives a full price, but affirms the goods to be sound, neither the fulness of the price nor the falsity of the affirmation will oblige him to a diminution of the price.[b] An implied warranty as to *quality*, is wholly unknown to the common law, all the cases of implied warranty being applicable to *title* only.[c] The only exception to this, may be in the sale of provisions, which, if unsound, are positively noxious. But even this exception, though its policy is obvious, is denied.[d] The same doctrine has also been maintained in equity.[e] No implied warranty, then, can be inferred, either from the fulness of the price, or from any affirmation having been made. And even in those Courts where a sound price has been held to imply a warranty of the soundness of the commodity, it has been held, that if the purchaser has neglected to inform himself of such matters within his observation, as might have prevented the purchase, he shall bear the loss: and,

a 2 *Bay*, 17. 19. 380. 1 *Tayl.* 1. 2 *Swift's Conn. Law*, 120.
b 5 *Johns. Rep.* 354. 18 *Johns. Rep.* 403. 2 *Caines' T. R.* 48.
c 12 *Johns. Rep.* 468. 10 *Mass. Rep.* 197.
d 5 *Ves.* 508. 6 *Ves.* 678. 10 *Ves.* 505. *Sugd. Vend.* 199.
e 1 *Fonbl.* 109. 373. 1 *Johns. Rep.* 96. 129. 274. 4 *Johns. Rep.* 421. 1 *Bin. Rep.* 27. 6 *Johns. Rep.* 5. 2 *Caines*, 48. *N. H. Rep.* 176. *Peake's N. P. Cas.* 123. 2 *East*, 448. 2 *Caines' R.* 48. 55. 1 *Dall.* 217. 4 *Dall.* 334.

1824. farther, even an express warranty would not extend to things discernable by ordinary vigilance."

The Monte Allegre.

The only remaining ground, then, on which the appellant's claim can rest, is, *secondly*, that there has been, *in fact*, a sale by *sample*, and that this, *in law*, implies a warranty that the bulk of the commodity shall correspond with the article exhibited. We deny the fact; and contend, that no sale by sample ever did take place; and as to the law relating to sales by sample, we entertain opinions extremely different from those which have been advanced.

We have shown that the common law knows but two sources of obligation on the part of the vendor, in regard to the *quality* of the article sold, viz. *fraud* and *express warranty;* and that no warranty can be inferred from the doctrine that a sound price insures a sound commodity, this principle forming no part of our jurisprudence. The only remaining source of obligation, therefore, is, that this is a sale by sample; but, to establish this, it will be necessary to maintain that *the naked presentation of a portion of the bulk of the commodity sold, is, per se, a warranty that the bulk shall agree in quality with the portion exhibited;* a doctrine by no means sustainable by any cases which have been, or can be cited, as to sales by sample. We fully admit, that a sale actually by sample, is tantamount to a warranty; but we differ materially from the counsel as to what constitutes a sample, which, we appre-

a 2 *Caines' R.* 202.

hend, is technical, and something very different from the mere exhibition, at the time of sale, of a part of the commodity offered for sale. 1824. The Monte Allegre.

A sample is a portion of the bulk of a commodity, exhibited by the owner or his agent, with the intention to induce persons to buy, expressing the owner or agent's knowledge of the general character of the whole, and his willingness to warrant to the purchaser that the bulk shall correspond in all material respects with the part exhibited. It is a *symbolical express warranty*, being conventional, and as much expressive of intention as words. Thus we preserve the harmony of the law, which excludes all *implied* warranty as to *quality*. We deny that sale by a portion exhibited, is necessarily sale by sample of *quality:* the *quo animo* is always matter of evidence; and we conceive the following to be essential circumstances in the creation of that warranty of quality which arises from the sale by sample: (1.) That the vendor be the *owner*, or have some privity or connexion with him; otherwise the vendee cannot presume him to be clothed with the authority to warrant, or possessed of that knowledge of the quality of the commodity requisite to do so. In such cases the portion exhibited is merely to enable the purchaser to form a reasonable judgment of the generic or specific character of the commodity; and if he be not satisfied of this, or of the fairness of the selection of the sample, he should demand an express warranty, which would *personally* obligate the person giving it, or he may refuse to purchase. If he do neither, *caveat*

1824. The Monte Allegre.

emptor. (2.) There must be a want of power in the purchaser to examine for himself; for, in the absence of such power, the presumption is greatly strengthened, that the portion exhibited is to serve in lieu of examination. (3.) It should appear that the purchaser was in search of *quality*, that he desired to exercise some judgment, and placed some reliance on the quality of the portion exhibited; since, if the sample had no operation in determining the mind to purchase, no such influence ought to be ascribed to it. (4.) There must be some further manifestation of intention to exhibit the portion as a sample of quality, than the mere fact of its presence: the minds of the seller and purchaser must have concurred on this point, and the part must be shown *animo warrantizandi*. (5.) What is declared in connexion with the exhibition of this portion, must be something more than mere opinion; for if a sample be given of what the purchaser knows the seller *has never seen*, it must, from the very nature of things, be matter *of opinion only* that the commodity will correspond in bulk with the part shown.

The sale in this case was under judicial authority; the purchaser well knew that the Court and its officers possessed little or no knowledge of this tobacco; they were neither the growers, packers, nor owners of the commodity; and, consequently, even supposing the Marshal competent to warrant, there would be no warranty of the quality, unless the purchaser had reason to suppose that the Marshal or auctioneer had nearly the same knowledge as the owner. The case of

1824.

The Monte Allegre.

Gardner v. Gray,[a] cited on the other side, fortifies this view of the subject, for there the specimen exhibited came direct from the owner, and the plaintiff had a verdict, not only because he had not opportunity to examine for himself, but because the commodity in bulk could not be sold at all under the denomination of *waste silk*, which the specimen certainly was. To the same effect is the case of *Laing v. Fidgeon*,[b] where the goods were manufactured by the defendant, to whom the plaintiff had sent *patterns* of the commodity he wanted, which, when sent, was found wholly unsaleable. Now, here the *purchaser* exhibited the sample, and the manufacturer, by shipping the article to him, adopted the sample, and the plaintiff fully relied on having an article fairly corresponding with it. In all the cases relied on by the appellant, it will be found that the plaintiff had no opportunity of judging for himself; whereas here the appellant, and every other purchaser, had full liberty to examine. The authorities are explicit, that the specimen exhibited must have been relied on as indicating the quality, and so are all the forms of pleading in such cases.[c] In *Bradford v. Davis*,[d] a case much relied on by the appellants, the Court expressly instructed the jury, that if they believed it was the *intention* of the defendant so to represent, by exhibiting the sample, then the plaintiff would be entitled to a ver-

a 4 *Camp.* 144.
b 6 *Taunt.* 108. 4 *Camp.* 160.
c 13 *Mass. Rep.* 140.
d *Ib.* 130.

1824.

The Monte Allegre.

dict; clearly showing the Court's opinion, that the mere exhibition of a specimen is not, *per se*, a sale by sample. To the same effect is the case of *Chapman v. March*.[a] But in the case under consideration, every circumstance combines to show that there was no *intention* to warrant, and these circumstances were perfectly well known to the purchaser.

The specimen exhibited, and what is declared in regard to it, may be evincive of *opinion* only, in which case all the authorities agree that there is no sale by sample.[b] *Hibbert v. Shee*[c] has been much relied on by the appellants' counsel. It must be recollected, however, to have been conceded in that case, that the sale was by sample, and the only question was, how far the commodity corresponded with the sample. The sugar had been purchased by a sample, which, after long exposure to the sun, had lost its colouring matter: the plaintiff supposed, therefore, that he was getting sugar nearly white, because he had a right to presume that the samples were fresh.

The *Attorney-General*, for the appellants, in reply, insisted upon the evidence to show that this was, in fact, a sale by sample. The jurisdiction of the Court below, as a Court of Admiralty, was admitted; the objection to it having been waived.

a 19 *Johns. Rep.* 291. 20 *Ib.* 196.

b 2 *Caines*, 55. 3 *T. R.* 57. 20 *Johns. Rep.* 203. 2 *Comyn. Cont.* 273.

c *Camp. Rep.* 113.

1824.

The Monte Allegre.

How ought this jurisdiction to have been exercised? The libellant's claim was *in rem*, and in the alternative, for the fair value of the property, if transmuted. He now asks vastly more. If the specific thing had been preserved in the custody of the Court, he would have received nothing but its real effective value. How, then, can he claim more, in consequence of the sale? How can a Court of justice permit such injustice to be done to an incidental suitor, who has purchased under its decree? A sale by sample is a symbolical warranty. A sale by sample is where a portion of the thing is shown, as a specimen of the entire commodity. The language of Mr. Chief Justice Parker, in *Bradford v. Manly*,[a] applies: "Among fair dealers, there could be no question, that the vendor intended to represent that the article sold was like the sample exhibited; and it would be to be lamented, if the law should refuse its aid to the party who had been deceived in a purchase so made." The sample could not have been exhibited merely to show the generic character. The principle of the legal rule is, the impression which is naturally produced on the mind of the vendee, by the production of the sample. The Marshal and auctioneer, although acting under the authority of the Court, must be considered as the agents of the owners of the goods. If these judicial agents proceed exactly as a merchant would have done, under the same circumstances, the purchaser has a right to draw the same inference as

[a] 13 *Mass. Rep.* 143.

1824. in the case of a private sale. The Court has power to relieve, and will relieve, upon the same principles which govern a Court of equity, while it is *in fieri*. The rules of the Roman law on this subject have never been incorporated into our municipal code, and we are rather to look to the analogous practice of the Courts of Equity. The circumstance of its being a judicial sale, so far from its disabling the Court, gives it the more authority to redress the party, in case of mistake or misrepresentation, even in a state of facts where relief would not be granted in a private sale. It has complete control over the whole subject, and may, therefore, do the most liberal justice. Even admitting that the officers of the Court have no authority to warrant expressly, or by legal implication, still the Court may interfere; and, pursuing the example of a Court of equity, may do justice to those who have suffered an incidental injury from judicial proceedings, which are entirely *in invitos*.

The Monte Allegre.

March 16th. Mr. Justice THOMPSON delivered the opinion of the Court, and after stating the case, proceeded as follows:

Upon the argument in this Court, the counsel for the respondent abandoned the objection to the jurisdiction of the Court. It becomes unnecessary, therefore, that we should notice that question.

In examining into the merits of the claim set up by the appellant, in his petition, it ought to be borne in mind, that the Monte Allegre and her cargo were illegally captured and brought within the United States, and that judgment of restitu-

1824.

The Monte Allegre.

tion has been awarded in favour of the original owners. (7 *Wheat. Rep.* 520.) Granting the claim now set up, will be throwing upon the owners an additional sacrifice of their property, without any misconduct of theirs, but, on the contrary, growing out of the illegal and wrongful acts of others. Such a result, in order to receive the sanction of a Court of justice, ought to be called for by some plain and well settled principles of law or equity. It may be said that the appellant is not chargeable with any of the misconduct imputable to those who have occasioned the loss upon the Monte Allegre and her cargo. But when one of two innocent persons must suffer, he to whom is imputable negligence, or want of the employment of all the means within his reach to guard against the injury, must bear the loss.

The proceedings to obtain the order of sale of the tobacco, were without the knowledge or consent of the owners, and their property exposed to sale against their will. The appellant became the purchaser voluntarily, and with full opportunity of informing himself as to the state and condition of the tobacco he purchased. The loss, therefore, for which he now seeks indemnity, has come upon him by his own negligence.

Keeping in view these considerations, we proceed to an examination of the appellant's claim, which, if sustained, must be on the ground of fraud, or warranty, or some principles peculiar to admiralty jurisdiction, and unknown to the common law.

1824.

The Monte Allegre.

If the appellant has sustained an injury, by a fraud not imputable in any manner to the appellee, it would be obviously unjust that he, or his property, should be made answerable for the damages. No part of the proof in the case affords the least countenance to the idea, that the appellee had any agency, directly or indirectly, in the sale of the tobacco; he, of course, cannot be chargeable with fraud, and this alone would be sufficient to reject any claim on this ground. But any allegation of fraud is not better supported against the Marshal or auctioneer. The petition does not allege directly, and in terms, fraudulent conduct in any one; but only states, that from the representations of the Marshal and auctioneer, the petitioner, and other purchasers, believed the tobacco to be sound and merchantable, and that under such belief he became a purchaser, at a fair price for sound and merchantable tobacco. Whether this allegation is sufficient to let in an inquiry at all upon the question of fraud, is unnecessary to examine, because, if sufficiently alleged, it is wholly unsupported by proof. No witness undertakes to say that the Marshal made any representations whatever respecting the tobacco; and the Marshal himself testifies that he was present at the sale, which was made by the auctioneer under his direction, and that he gave him no instructions, other than telling him it was public property, and was to be sold as it was, and by order of the Court. Nothing was, therefore, done by the Marshal, calculated to mislead or deceive purchasers. And the auctioneer testifies that he knew

No proof of fraud in the sale, to support the appellant's claim.

1824.

The Monte Allegre.

the property was sold by order of the Court, and that he received from the Marshal no instructions other than to sell for cash; that there was no deception intended or practised in the sale. And that this was true, so far as respected himself, is fully confirmed by the fact, that the house of which he was a partner, after the sale, and before the shipment to Gibraltar, purchased one third of the tobacco from the appellant.

There is, therefore, no colour for charging any one with fraudulent conduct in the sale of the tobacco. And, indeed, this did not seem, on the argument, to be relied upon as a distinct and independent ground for relief, but only to be brought in aid of the claim, on the ground of warranty, which we proceed next to examine.

It was made a question on the argument, by the counsel for the appellee, whether the evidence in the case warranted the conclusion, that the tobacco, at the time of the sale, was in as deteriorated a state as it was found at Gibraltar? According to the view taken by the Court of the case, this inquiry becomes wholly unnecessary. It would be very reasonable to conclude, that if the tobacco was in a decaying condition at the time of sale, it would become more injured by lapse of time. But, were the inquiry necessary, the agreement of the counsel, filed the 18th of May, 1822, would seem to put that question at rest, for it is there expressly admitted, that the tobacco sustained no damage on the voyage.

In support of the claim, on the ground of warranty, it is said, this was a sale by sample, and

Warranty.

1824.

The Monte Allegre.

that all such sales carry with them a guaranty, that the article, in bulk, is of the same quality, in all respects, as the sample exhibited. If the rules of law which govern sales by sample, are at all applicable to this case, it becomes necessary to ascertain by whom the warranty is made. In private transactions, no difficulty on this head can arise. A merchant, who employs a broker to sell his goods, knows, or is presumed to know, the state and condition of the article he offers for sale; and if the nature or situation of the property is such that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade that he should be permitted, to select a portion, and exhibit it as a specimen or sample of the whole; and that he should be held responsible for the truth of such representation. The broker is his special agent for this purpose, and goes into the market, clothed with authority to bind his principal. In such cases, if the article does not correspond with the sample, the injured purchaser knows where to look for redress; and the owner is justly chargeable with the loss, as he was bound to know the condition of his own property, and to send out a fair sample, if he undertook to sell in that way.

In judicial sales, there is no warranty.

But in judicial sales, like the present, there is no analogy whatever to such practice. The proceedings are, altogether, hostile to the owner of the goods sold, which are taken against his will, and exposed to sale without his consent. And it would be great injustice, to make him responsible for the quality of the goods thus taken from him.

1824.

The Monte Allegre.

Nor can the Marshal, or auctioneer, while acting within the scope of their authority, be considered, in any respect whatever, as warranting the property sold. The Marshal, from the nature of the transaction, must be ignorant of the particular state and condition of the property. He is the mere minister of the law, to execute the order of the Court; and a due discharge of his duty does not require more, than that he should give to purchasers a fair opportunity of examining, and informing themselves of the nature and condition of the property offered for sale. An auctioneer, in the ordinary discharge of his duty, is only an agent to sell; and in the present case, he acted only as the special agent of the Marshal, without any authority, express or implied, to go beyond the single act of selling the goods. And the Marshal, as an officer to execute the orders of the Court, has no authority, in his official character, to do any act that shall, expressly or impliedly, bind any one by warranty. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress. With that question, however, we have not, necessarily, any concern at present. But in that point of view, we see nothing in the present case, to justify the conclusion, that the Marshal went beyond what was strictly his official duty. This was not a sale by sample, according to the mercantile understanding of that practice, or the legal acceptation of the term. In such sales, the purchaser

1824.

The Monte Allegre.

trusts entirely to his warranty; and in general is not referred to, nor has he an opportunity of examining, the article in bulk; and, at all events, is not chargeable with negligence, if he omits to make the examination, which he has it in his power to do. Although most of the witnesses speak of the tobacco exhibited at the auction, as a sample, we must look at the whole transaction, and see what is the judgment of law upon it, and not be governed by what may be miscalled a sample. The Marshal denies that he ever authorized the auctioneer to sell by sample; he says he saw some seroons opened, but he supposed it was to show the description of property, or the species of goods offered for sale; that he never examined the tobacco himself, and knew nothing about it; that he never did sell by sample, and never conceived himself authorized so to do; and the auctioneer does not pretend to have had any authority or instructions from the Marshal to sell by sample. Whatever, therefore, from the testimony of the auctioneer, bears the appearance of a sale by sample, was of his own mere motion, and without authority; and if the appellant has been misled by any one, it must have been the auctioneer; and if he has exceeded his authority, so as to make himself personally responsible, redress, if at all to be had, must be from him alone; and in examining his testimony, it ought not to be lost sight of, that, after the sale, he became interested in the purchase, and probably looks to the event of this suit for indemnity for his own loss. But his testimony, when taken together, affords no just inference against

1824.

The Monte Allegre.

him. He states, that a part of the tobacco was stored at Fell's Point, a part on Smith's wharf, and from sixty to eighty seroons in the warehouse of himself and partner, *which was so announced at the time of the sale;* that fifteen or twenty seroons were taken into the street, out of which three or four were opened, as a sample of the whole parcel, by which the whole quantity was sold. But he also states, *that the mode in which this tobacco was sold, is the usual and ordinary mode in which merchandise is generally sold at auction*, when no specific directions to the contrary are given. This shows very satisfactorily, that he did not understand the sale to be *by sample*, in the legal sense of the term, so as to carry with it a warranty. For sales at auction, in the usual mode, are never understood to be accompanied by a warranty. Auctioneers are special agents, and have only authority to sell, and not to warrant, unless specially instructed so to do. Information was given to those who attended the auction, where the tobacco was stored, to give them an opportunity of examining it, if they were disposed to do it. Some who attended with a view of purchasing, did examine, and satisfied themselves that it was unsound. Not only that which was stored at a distance was found in this condition, but also that which was in the store house, where the auction was held, and under the immediate view of purchasers. The appellant had it, therefore, in his power, to obtain the same information with respect to the condition of the tobacco, if he had thought it worth while to give himself the trouble. So that

1824.

The Monte Allegre.

whatever loss he has sustained is attributable solely to his own negligence, without the fault or misconduct of any one; and the law will not, and ought not, to afford him redress. In sales of this description particularly, and generally in all judicial sales, the rule *caveat emptor* must necessarily apply, from the nature of the transaction; there being no one to whom recourse can be had for indemnity against any loss which may be sustained.

Judicial sales in Admiralty proceedings are to be governed by the same rules as in other Courts.

Is there, then, any thing peculiar in the powers of a Court of Admiralty that will authorize its interposition, or justify granting relief, to which a party is not entitled by the settled rules of the common law? We know of no such principle. Courts of Admiralty proceed, in many cases, *in rem*. But this does not alter the principles by which they are to be governed in the disposition of the *res*. It is true that the proceeds of the Monte Allegre and her cargo remain in the Circuit Court, and may be subject to the order of this Court, if a proper case was made out, which, in law or equity, fixed a charge upon this fund. These proceeds are in Court as the property of the original owners, and for distribution only. And if such owners would not be liable at law for the loss upon the tobacco, it is not perceived that any principles of justice or equity will throw such loss upon their property. The principle, if well founded, cannot depend upon the contingency, whether or not the proceeds shall happen to remain in Court until the defect in the article sold is discovered. If the proceeds are liable, they ought to be followed into the hands of the owner after distribution; and if

1824.

The Monte Allegre.

they cannot be reached, the remedy ought to be *in personam*. Such is the end to which the doctrine must inevitably lead, if well founded. But it is presumed no one would push it thus far.

Practice of the Courts of equity.

There is no rule in Courts of equity to sanction what is now asked for on the part of the appellant. The case of *Savile v. Savile*, (1 *P. Wms.* 746.) is not at all analogous. The application there, was to compel the purchaser of certain property to complete his contract, he wishing to forfeit his deposit, and go no farther; and the question was, whether he should be compelled to go on and complete the contract: and the Court permitted him to forfeit the deposit, considering it a hard bargain, not fit to be executed. But, in the case before us, the contract was executed. Every thing respecting it had been consummated months before the discovery of the damaged condition of the tobacco. The property had been delivered, and the consideration money paid; and the bargain was as much beyond the control of the Court, as if the discovery of the defect had been made years afterwards. We are, therefore, brought back to the question, whether, in sales like the present, the rule *caveat emptor* is to be applied; and thinking, for the reasons already suggested, that it is, the decree of the Circuit Court, dismissing the petition, must be affirmed.

Decree affirmed.

1824.

M'Iver v. Wattles.

[PRACTICE.]

M'IVER and others v. WATTLES.

Where the writ of error is dismissed, for want of jurisdiction, no costs are allowed.

ERROR to the Circuit Court for the District of Columbia.

Feb. 13*th.* Upon inspection of the record, it appeared that the sum in controversy was below one thousand dollars, and, thereupon, the Court directed the writ of error to be dismissed.

Mr. *Taylor*, for the defendant in error, moved for costs.

Mr. Chief Justice MARSHALL said, that in all cases where the cause is dismissed for want of jurisdiction, no costs are allowed.

Motion denied.

1824.

Walton v. U. States.

[Construction of Statute.]

Walton, *Plaintiff in Error*,
v.
The United States, *Defendants in Error*.

Under the 2d and 4th sections of the act of the 3d of March, 1797, ch. 368. a certified transcript from the books of the Treasury is evidence against the defendant; and no claim for any credit can be admitted at the trial, which has not been presented to, and disallowed by, the accounting officer of the Treasury, (unless in the cases excepted by the act,) although no proceedings have been had against the debtor, under the act of the 3d of March, 1795, ch. 289., by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers for settlement.

Quære, Whether the act of the 3d of March, 1795, ch. 289. is not virtually repealed by the act of the 3d of March, 1797, ch. 368.?

The official bond given by a Receiver of Public Moneys, does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for the balance of account, and an action of debt upon the bond against the principal and sureties, may be maintained at the same time.

In an action against the Receiver, not describing him in his official capacity, evidence may be given of moneys received in his official capacity; and, under a count for money had and received, evidence may be given of public stock received by him, where such stock is, by law, made receivable, at par, in payment for lands sold by the United States.

It is not necessary that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the Court, and may, afterwards, during the term, be reduced to form, and signed by the Judge. But, in such cases, it is signed *nunc pro tunc*, and purports, on its face, to be the same as if actually reduced to form, and signed during the trial. It would be a fatal error if it were to appear otherwise.

1824.

March 1st. THIS cause was argued by Mr. *Clay*, for the plaintiff in error, and by the *Attorney-General*, for the defendants in error.

March 17th. Mr. Justice DUVALL delivered the opinion of the Court.

The plaintiff in error in this case, who was defendant in the Court below, was a receiver of public money, in one of the land offices in the District of Mississippi, and being indebted to the United States in a large amount, an action of assumpsit was instituted against him, to recover the balance due, which was stated to be $102,478 85½, made up of cash and stock; viz. in cash, $93,639 93½, and in Mississippi stock, $8,838 92. The declaration contains only one count, which is for money lent and advanced, laid out and expended, and for money had and received. To this the general issue of *non assumpsit* was pleaded, and issue was joined. The attorney for the United States, to support the claim, offered in evidence a transcript from the books and proceedings of the Treasury, authenticated under the seal of the Department, pursuant to an act to provide more effectually for the settlement of accounts between the United States and receivers of public money, passed on the 3d of March, 1797; to the admission of which evidence the attorney for the defendant objected:

1. Because there had not been any proceedings against him under the act of the 3d of March, 1795, entitled, "An act for the more effectual recovery of debts due from individuals to the United

States," by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers, in order to a settlement, as directed by that act.

1824.

Walton v. U. States.

2. Because the account offered in evidence was against the defendant, as receiver of public money, west of Pearl river, and that the defendant, as such receiver, had executed a bond with security, according to law, for the faithful discharge of his duties as such; and that the remedy against him being upon his official bond alone, an action for money had and received would not lie.

3. Because the declaration was against him in his individual capacity, and the evidence offered showed that he was liable, if at all, in his public character as receiver of public money west of Pearl river, and not in his individual capacity. But the Court overruled the objection, and were of opinion that the transcript was evidence to support the declaration, and permitted the same to go to the jury: to which opinion of the Court, the defendant, by his counsel, excepted, and the proceedings were brought up to this Court by writ of error, for their revision.

In the argument of this cause, the counsel for the plaintiff in error has made no question which does not appear in the record. He contends that the act of 1795 is not repealed by that of 1797, and that the suit of the United States against Walton cannot be maintained, because, before a suit can be sustained by the United States against a debtor, he is entitled, according to the provisions of the act of 1795, to a notification from

1824.

Walton v. U. States.

the Comptroller of the Treasury, to appear before the Auditor, with his accounts and vouchers, affording him an opportunity of a just and fair settlement upon a full investigation of his accounts. That, without such investigation, many items, for which the debtor may claim a credit, may be rejected for want of the necessary explanations.

To this reasoning the *Attorney-General*, on behalf of the United States, replies, by insisting that the act of 1795 is virtually repealed by that of 1797, which contains similar and additional provisions, incompatible with those of the former act; and that the debtor has ample opportunity of a full and just examination of his accounts under the last mentioned act. The Court deem it unnecessary to decide the question, whether the act of 1795 is repealed by that of 1797, because the last mentioned act contains ample provision for this case. It is provided by the 2d section of that act, "that *in every case of delinquency*, where suit has been or shall be instituted, a transcript from the books and proceedings of the Treasury, certified by the Register, and authenticated under the seal of the Department, shall be admitted as evidence, &c." And by the 4th section it is enacted, "that in suits between the United States and individuals, no claim for a credit shall be admitted, upon trial, but such as shall appear to have been presented to the accounting officers of the Treasury for their examination, and by them disallowed, in whole or in part, unless it should be proved to the satisfaction of the Court, that the defendant is, at the time of trial, in possession of vouchers

not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury, by absence from the United States, or some unavoidable accident."

These positive provisions of the law must be disregarded, if we say that the authenticated transcript from the Treasury Department is not evidence. They are too plain to require argument; and the debtor has a fair opportunity of establishing his account, if just, without a notification from the Comptroller, according to the act of 1795. In the first place, he states his account, and when stated, it is rendered to the Auditor, who examines it, and makes a report to the Comptroller, by whom it is revised. Afterwards, in case of a suit, he has an impartial trial in Court, where an opportunity is again afforded him of supporting his claim; and if the Court and jury, before whom the cause is tried, should be of opinion that any item of his account has been improperly rejected, it is restored to his credit. On the trial of this cause in the Court below, it appears that the balance claimed was reduced by the verdict of the jury to 44,994 dollars and 57 cents; it is presumed, by the exhibition of vouchers under the 4th section of the act of 1797, which had not been rendered to the accounting officers of the Treasury.

It was also urged, on the part of the plaintiff in error, that the amount offered in evidence is against him, as receiver of public money; and that he had executed a bond with security, according to law, for the faithful discharge of his duties as such; and that, therefore, the account was merged

1824.

Walton v. U. States.

in the sealed instrument, on which alone the action can be sustained. It may be admitted, that a security under seal extinguishes a simple contract debt; but in the case under consideration, the account and the bond are distinct from each other. The official bond is not given for the balance due; it is a collateral security for the faithful performance of the official duties of the officer, and was executed long before the existence of the balance claimed. It may be asked, how could a bond, in a penalty of 10,000 dollars, extinguish a simple contract debt of more than 100,000 dollars? The balance claimed could not be recovered by a suit on the bond. In all similar cases, between the United States and their debtors, it is usual to institute a suit for the recovery of the balance struck on settlement of the account, and an action of debt on the official bond, to recover the penalty of the sureties. It is indispensably necessary, in every instance where the debtor is unable to pay.

The third and last objection made on behalf of the plaintiff in error, is on the ground that he is charged in the declaration in his individual capacity, and the evidence offered is against him in his public character; and further, that the account charges stock and money, and the claim is in money only; that on a count for money had and received, evidence cannot be given that the defendant received any thing but money. It is a full answer to this objection, to observe, 1. That the receiver is individually responsible for all the money he received in his public capacity; and, 2. That evidences of the public debt are made, by

1824.

Walton v. U. States.

law, payable at their nominal value, for lands sold by the United States; and, therefore, stock is receivable as money at par. And it appearing, by the account offered in evidence, that the far greater part of the balance claimed is in money, it was proper and legal evidence to support the declaration; and as the balance claimed was reduced by the verdict of the jury, which is for money only, and for less than the amount of cash claimed, the just inference is, that the stock balance was extinguished by the vouchers produced by the defendant, on the trial in the Court below.

An objection was made on the part of the United States, that the bill of exceptions in this case was not taken at the trial, but purports on the face of the record to have been taken and signed after judgment rendered in the case. It is true, that the bill of exceptions states, that the evidence was objected to at the trial; but it is not said that any exception was then taken to the decision of the Court. So that, in fact, it might be true, that the objection was made, and yet not insisted upon by way of exception. But the more material consideration is, that the bill of exceptions itself appears on the record not to have been taken at all, until after judgment. It is a settled principle, that no bill of exceptions is valid, which is not for matter excepted to at the trial. We do not mean to say, that it is necessary, (and in point of practice we know it to be otherwise,) that the bill of exceptions should be formally drawn and signed, before the trial is at an end. It will be sufficient, if the exception be taken at the trial, and noted by the

1824. The Fanny.

Court, with the requisite certainty; and it may, afterwards, during the term, according to the rules of the Court, be reduced to form, and signed by the Judge; and so, in fact, is the general practice. But in all such cases, the bill of exceptions is signed *nunc pro tunc;* and it purports on its face to be the same, as if actually reduced to form, and signed, pending the trial. And it would be a fatal error, if it were to appear otherwise; for the original authority, under which bills of exceptions are allowed, has always been considered to be restricted to matters of exception taken pending the trial, and ascertained before the verdict.

Judgment affirmed, with costs.

[Prize.]

The Fanny. The Consul-General of Portugal, *Libellant.*

Case of capture by an armed vessel, fitted out in the ports of the United States, in breach of the neutrality acts. Claim by an alleged *bonæ fidei* purchaser in a foreign port rejected, and restitution decreed to the original owners.

A *bonæ fidei* purchaser, without notice, in such case, is entitled to be reimbursed the freight which he may have paid upon the captured goods; and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods.

APPEAL from the Circuit Court of Maryland. 1824.

The Fanny.

This was the case of a libel filed by the Consul-General of Portugal, on behalf of certain Portuguese subjects, owners of a number of hides which had been brought from St. Thomas to Baltimore in the brig Fanny. The facts proved in the cause, which the Court considered to be material, are the following:

Some time in the year 1817, Robert M. Goodwin, Clement Cathill, James Halsey, and John R. Mifflin, all of them citizens of the United States, and denominated "The American concern," fitted out, at Buenos Ayres, a brig, called *La Republicana*, as a privateer to cruise against the subjects of Spain and Portugal, under a commission obtained for her from Jose Artigas. Thus prepared, she sailed under the command of Obadiah Chase, also a citizen of the United States, and, in February, 1818, she captured the Portuguese brig Aurora, which, with her cargo, were sent to St. Barts, and there sold as American property for about 20,000 dollars. With this money, thus raised, Goodwin proceeded to Baltimore, and there invested it in the purchase of a new brig, called the Athenea, which had been lately built at that port. Having changed her name to that of the New Republicana, both privateers shipped their crews at Baltimore, together with their munitions of war, except the cannon and carriages for the latter vessel, which, with a view of deceiving the custom-house officers, were put on board of a small schooner, and were transferred to this privateer, a few miles below the

1824.

The Fanny.

fort. The commission, together with other papers belonging to the Republicana, were delivered to the New Republicana, and both the privateers proceeded to sea; the latter under the command of the above mentioned Clement Cathill, one of the owners. She soon after fell in with the Portuguese ship Don Pedro de Alcantara, laden with a valuable cargo of hides, sugar, &c. which she captured on the 22d of September, 1818, and ordered in to the Five Islands, there to await the orders of Goodwin. At this place, Goodwin transhipped the principal part of the cargo into several small vessels, which proceeded to the island of St. Thomas, consigned to Souffron & Co., merchants of that place. The residue of the cargo, except a small part, which was afterwards taken, together with the Don Pedro, by Commodore Jolly, commanding a squadron belonging to the republic of Colombia, was also carried by Goodwin to St. Thomas, in the old privateer, at which place it is probable the whole or a great part of the captured property was sold. Nathaniel Levy, the American Consul at that island, purchased 4004 of the *hides*, which, together with 555 logs of *lignum vitæ*, he shipped in the brig Fanny to Baltimore, where she arrived in January, 1819, consigned to Lyde Goodwin. On the 21st of this month, the hides and *lignum vitæ* were libelled as Portuguese property, illegally taken on the high seas, and on the 27th of the same month, the *lignum vitæ* was released from the operation of the libel.

To this libel a claim was filed by Lyde Goodwin, as agent of Levy, in which it is asserted that

1824.

The Fanny.

the hides had been purchased by Levy, in the regular course of trade, from Souffron & Co., and all knowledge of the matters alleged in the libel is denied. On the 15th of March the hides were delivered upon stipulation, having been appraised at the sum of 12000 dollars.

In the progress of the cause in the District Court, the owners of the brig Fanny presented to the Judge a petition, setting forth, that on the 6th of October, 1818, Nathan Levy entered into a charter-party of affreightment with the petitioners for the brig Fanny, on certain terms stated in the petition, for a voyage from Baltimore to St. Lucie, and if required, to three other ports in the West Indies, and thence back to Baltimore. That, under this charter-party, the said brig took in a cargo at Baltimore, and sailed to St. Lucie, and to three other ports, and finally delivered the cargo to the said Levy, who afterwards shipped on board the said brig, at St. Thomas, 4000 hides and 555 sticks of lignum vitæ, to be carried to Baltimore, where she arrived on the 17th of January, 1819. That upon her arrival, and when the master was about to deliver the cargo to the consignee of Levy, this libel and claim were filed, and the cargo was taken from the possession of the master by the Marshal, under the process of the said Court. That there was then due to the petitioners, on the said charter-party, the sum of 2094 dollars 50 cents, as admitted by the said Levy, which they pray may be paid out of the proceeds of the hides and *lignum vitæ*. This petition was accompanied by an account, dated the 28th of December, 1818,

1824. signed by Nathan Levy, acknowledging a balance of 2094 dollars 50 cents to be due the said brig Fanny on the charter-party. Below this account is the following entry, not signed by any person: "The freight on the homeward cargo, consisting of 4004 hides and 555 sticks of *lignum vitæ*, $1047 25." The Court made an order that the agent of the claimant should pay the freight on the above goods to the amount of 1047 dollars 25 cents.

The Fanny.

The District Court decreed the claimants to pay to the libellant the appraised value of the hides, as mentioned in their stipulation, together with interest and costs, after deducting the amount of freight theretofore ordered to be paid. This decree being wholly affirmed by the Circuit Court, upon an appeal, both parties appealed from that decree to this Court.

Mr. *D. Hoffman*, for the libellant, argued, 1. That this was a piratical taking, there being no sufficient evidence of a valid commission.[a] But if the power granting the commission were valid, still the seizure is piratical, as the commission was not only *amortised*, but transferred to a new vessel and a new commander, by whom it was abused in the grossest acts of violence, evincive of an *animus depredandi*, and which constituted the captors trespassers *ab initio*.[b] Had the authority which granted the commission been competent,

a 7 *Wheat. Rep.* 476. 8 *Wheat. Rep.* 111.
b 3 *Wood. Lec.* 14 *Johns. Rep.* 273.

and the proceedings under it regular, as the laws of this country have been violated by the captors, who are American citizens, this Court will restore the *res capta*.[a] The appellant claims the protection of this Court, on the ground of his being a *bonæ fidei* purchaser, under a valid condemnation. If this could avail him in law, he has failed in his proof of *bona fides*. Every circumstance of evidence and probability is against him. Admitting, however, that there was a purchase in good faith, and under entire ignorance of the circumstances, the title of this claimant cannot be valid against that of the original owners, since there was no condemnation in point of fact; and if there had been, still, as the taking was either without a valid commission, or in virtue of an *amortised* or abused one, the condemnation would be inoperative.[b]

2. Levy, if free from all blame, cannot sustain his claim, under the doctrine of *market overt*. There can be no such protection for property taken *jure belli*, at least until after condemnation; and the doctrine of *market overt* is itself unknown to the *jus gentium*.[c]

3. A condemnation is produced, but it is wholly unnecessary to dwell on its operation, since a condemnation, in all respects valid as between belligerents, cannot deprive this Court of its power to

a 6 *Wheat. Rep.* 152. 7 *Wheat. Rep.* 496. 8 *Wheat. Rep.* 108.

b 2 *Bro. Civ. Law*, 55. 252, 253. 268. 461. 464. 1 *Johns. Rep.* 471. *Ree's Rep.* 308. 5 *Wheat. Rep.* 345, 346.

c 2 *Wood. Lec.* 429. 1 *Johns. Cas.* 471. *Martens on Priz.* 44. *Molt. de Jure Mar.* 57. 60. 68. 85. *God.* 193. *Hob.* 79. 7 *Wheat. Rep.* 490.

1824.

The Fanny.

restore, when the original taking was in violation of our laws. And, *secondly*, the condemnation now exhibited, cannot possibly apply to the property in question, as it will be found, on reference to the dates, that this decree of condemnation was some time after Levy's alleged purchase, and, indeed, only a few days prior to the filing of the libel in this cause. But,

4. The main point of inquiry regards the claim to *freight*. We contend, that the appellant is responsible to us for the entire value of the hides, as the same is ascertained by the stipulation, together with interest; and that the freight bill, though properly paid by the appellant to the innocent ship-owner, cannot now be deducted by this illegal captor, from the amount stipulated to be paid by him. Waiving all question which might be made, as to the power of this Court to decree freight in the case, on the ground of *incidental* jurisdiction, we insist that the present is not a claim by the ship-owner for his freight, but by the appellant, to have the same allowed to him *out of this fund*, as having been properly paid by him. If this Court reject the claim of the appellant to the property, on the ground of its having been illegally captured, and that this infirmity adheres to the property even in the hands of a *bonæ fidei* purchaser, we are at a loss to conceive how this purchaser can rightfully impose any charge or incumbrance whatever upon it. But when we advert to the real character of the appellant, and find him

a 8 *Wheat. Rep.* 108. 167. 174.

1824.

The Fanny.

an unworthy claimant, in truth as much so as the captor himself had been, we cannot suppose that he can be entitled to any favour at the hands of this Court. He brought this prize property into an American port, without the knowledge or privity of its owner, and surely ought not to claim either compensation or indemnity, for doing that which, as to the other party, is *in invitum*, and has proved, in fact, extremely prejudicial to him. If this be a claim on the fund, it is only so as regards the innocent owner. No lien can be created by one who has no property, *general* or *special*, in the thing. If a *malæ fidei* possessor cannot so mortgage or pledge the property, as that such mortgage or pledge shall be valid against the true proprietor, he is not competent to create any lien, nor to impose any charge or incumbrance whatever. But without pressing this point, we do not think that the appellant is entitled to be subrogated to the rights of the innocent ship-owner, if such right of lien even vested in him. If this claim to freight were one *in rem*, as well as *in personam*, and the illegal captors, or those claiming under them, have satisfied the personal obligation, it does not follow that they can now enforce that lien against the fund, which it might, *argumenti gratia*, be admitted that the ship-owner possessed. This is very unlike the case of a *neutral's* claim for freight on belligerent property captured from him by another belligerent. The neutral had a right so to employ his vessel, subject only to the belligerent's right to make the seizure; he, therefore, in such case, takes it *cum onere*, and must pay the

1824.

The Fanny.

neutral his freight. The object here, however, is to transfer the obligation of paying the freight from the illegal captor to the despoiled individual. If the controversy were now wholly between the Portuguese owners of the property and the innocent American ship-owner, the claim might deserve some consideration. In this case, the ship-owner is the agent of the captors, or those claiming under them, not of the Portuguese owner, and as such, must look to his employers, and not to the goods; and if, in fact, the illegal captor has paid the freight, he cannot thereby entitle himself to be refunded out of the fruits of his piratical taking. The claim to freight is always conventional; a claim even to *pro rata* freight, arises from some convention, and not from the simple fact of transportation. In this case, no consent of the owners to the shipment to Baltimore can be implied. Our claim to the property is disputed on all points; and if none of these is found tenable, but the taking is ascertained to be a gross act of piracy, it would be a strange anomaly, that an honest and lawful belligerent must pay freight to a neutral ship-owner, and yet that a piratical captor shall be exempt from charges voluntarily imposed by him on the property, and that these shall be cast on those whom he has endeavoured to despoil.

5. The Court below has, also, manifestly erred in allowing the entire freight bill, as this includes a charge on some *lignum vitæ*, which formed no part of that which is owned or demanded by the libellant. We, therefore, ask at the hands of this Court, the whole value of the property, as it is as-

certained by the stipulation, together with interest from its date, so that the claim to freight may be wholly rejected. The ship-owner is, indeed, the petitioner for freight in this case; but he has been since paid, and the claim, in truth, is now at the instance of the captor, who desires to be subrogated to the rights of the ship-owner, and to enforce his lien, if he had one. We have endeavoured to show, that no such right existed, and that if it ever did, the *captor* is not entitled to receive the benefit of such lien.

1824.

The Fanny.

Mr. *Winder*, contra, argued principally upon the facts, to show that the alleged purchase was *bona fide*.

Mr. Justice WASHINGTON, delivered the opinion of the Court; and after stating the case, proceeded as follows:

March 15th.

The above case presents two questions for the consideration of this Court. 1. Whether the Court below was correct, in restoring to the Portuguese owner that part of the cargo of the Fanny which was restored? And, 2. Whether the freight which was ordered by the Court to be paid to the owners of that vessel, ought, in whole or in part, to have been deducted from the appraised value of the hides?

Upon the first question, it is to be observed, that the facts above stated are incontestibly proved by the evidence in the cause. That the capturing vessel, the New Republicana, was built at Balti-

1824.

The Fanny.

more, purchased at that place by citizens of the United States, and there manned and fitted for sea, armed and equipped as a vessel of war, within the waters and jurisdiction of the United States; and with such equipments, left the United States, to cruise against the vessels and property of Spanish and Portuguese subjects on the high seas; and upon such cruise, captured the Don Pedro de Alcantara, with a valuable cargo, belonging to Portuguese subjects, were facts too clearly proved to be questioned; nor were they questioned by the counsel for the claimants. It is established, by evidence equally clear and uncontradicted, that the 4004 hides which were brought in the Fanny from St. Thomas to Baltimore, upon which the sentence of the Court below operated, formed a part of the cargo of the Don Pedro de Alcantara at the time of her capture, and that they were the property of Portuguese subjects.

This, then, is the case of property belonging to the subjects of a friendly power, captured on the high seas by a privateer, owned and commanded by citizens of the United States, fitted and equipped as a vessel of war, within the waters and jurisdiction of the United States; and, according to the uniform decisions of this Court in similar cases, as well as in others, where similar equipments have been made within the waters of the United States by foreigners, the property so illegally captured and brought within our jurisdiction, must be restored to the original owners, unless it could be maintained that the sale of it to the claimant devested those owners of their right

1824.

The Fanny.

to the same. But it is to be remarked, in the first place, that the asserted purchase of these hides by Levy is unsupported by any evidence whatever. He alleges in his claim, that he purchased the hides for a valuable consideration from Souffron & Co. in the regular course of trade; but this allegation is not upheld by any written document, or by the testimony of a single witness. The cause was depending more than two years in the Courts below, during all which time it was fully in the power of the claimant, a resident of the island of St. Thomas, to have proved the reality of this purchase, by the testimony of the vendors, or otherwise, if the fact had been as it was alleged.

But, admitting the truth of the asserted sale to Levy, he was, nevertheless, a purchaser from the agent of a tortious possessor of property to which he had no title whatever, and who, consequently, could transfer none to his vendee. The proceedings in the Vice-Admiralty Court of Margarita, by Commodore Jolly, against the Don Pedro de Alcantara and the small part of her cargo which had not been transhipped at the Five Islands, so far from amounting to a sentence of condemnation, even of the property libelled as prize of war, proceeded upon the ground of a recapture from a non-commissioned privateer, for which the recaptor was rewarded by a liberal salvage, and the residue of the sales of the property was decreed to the Portuguese owners, in case they should claim the same within the period of a year and a day. This Court is, therefore, of opinion that

1824.

The Fanny.

the decree of the Circuit Court, so far as it restores to the libellant the 4004 hides, or their proceeds, is right, and ought to be affirmed.

The second question respects the freight, which the decree of the Court below ordered to be deducted from the appraised value of the hides; and it is attended by no difficulty but such as arises from the confined and imperfect statement of the facts appearing in this record. That the freight of the *lignum vitæ*, which did not belong to the libellants, and against which the proceedings were abandoned, ought not to have been paid out of the proceeds of the hides, is a matter which we think is quite too clear to be disputed; and we think it probable that the mistake was occasioned by an oversight in the Judge of the District Court, from his not knowing, or recollecting, when the petition for freight was before him, that the *lignum vitæ* had been released from the operation of the libel. The decree, then, must, of course, be reversed, for this reason, and the cause remanded for further proceedings, in order to ascertain and separate the freight upon that article, from that due upon the hides.

But there is, apparently, error in the decree in respect to the whole of the freight, which, it is possible, may be explained and removed by a further examination of this subject in the Court below. The petition for freight claims the precise sum of 2094 dollars and 50 cents, as the balance acknowledged to be due by the claimant, and the account, signed by him on the 28th of December, 1818, which accompanied the petition, amounted

to an acknowledgment that that sum was then due. The items of that account are, freight on 1095 barrels of flour, out and home, per charter-party, 5 cases of furniture, 36 bags of corn, and 7 days demurrage. Below that account is stated the freight due upon the hides and lignum vitæ, amounting to 1047 dollars and 25 cents. It would seem, therefore, as if the freight upon the hides and *lignum vitæ*, which arrived in Baltimore some time in January, 1819, was not included in the account signed by the claimant, and if so, it was not claimed to be due, nor required by the petition to be paid. Yet the order of the Court was, that it should be paid, and it was accordingly deducted from the appraised value of the hides. If the case should turn out to be such as is above supposed, it would seem to warrant the conclusion, that the freight upon the hides had been paid by Levy, in which case it ought not to be deducted from their appraised value, unless the reality of the asserted purchase of the hides by Levy should be made to appear to the satisfaction of the Court below, without which, we are of opinion that he is to be considered as a *malæ fidei* possessor, and, consequently, as not entitled to be reimbursed the freight so paid, out of the property of the Portuguese owners. If, on the other hand, it should appear that the claimant was a *bonæ fidei* purchaser of the hides, without notice, or that the freight upon them had not been paid by him to the owners of the Fanny, then it was properly deducted.

1824. The Fanny. DECREE. This cause came on to be heard, &c. On consideration whereof, it is DECREED and ORDERED, that so much of the decree of the said Circuit Court as orders that the claimant pay to the libellant the appraised value of the hides, in the proceedings mentioned, together with interest and costs of suit, be, and the same is hereby affirmed, with costs, subject, however, to such deduction for freight as the said Circuit Court may hereafter direct, to be paid out of said appraised value, as may be hereafter decreed under the further proceedings in this cause: And as to so much of said decree of said Circuit Court, as directs the amount of freight to be deducted, agreeably to the previous order of said Circuit Court, the same is hereby reversed and annulled. And it is further ORDERED, that said cause be remanded to the said Circuit Court, for further proceedings to be had therein, according to law, for the purpose of ascertaining, upon further proof, whether the claimant had paid the freight of the hides to the owner of the Fanny; and, if so, whether the claimant was a *bonæ fidei* purchaser of said hides, without notice. And if the said Court should be satisfied from such further proof, that the said claimant, Nathan Levy, has paid the owner of the Fanny for said freight, or that he was not such *bonæ fidei* purchaser, without notice, then with instructions not to allow a deduction of freight from the said appraised value. But if the said claimant was such *bonæ fidei* purchaser, without notice, or if said freight had not been paid by said claimant to

the owners of the Fanny, then the freight for the hides, excluding the freight on the *lignum vitæ*, to be deducted from the appraised value of said hides.

1824.

Danforth v. Wear.

[Local Law.]

Danforth v. Wear.

The acts of Assembly of North Carolina, passed between the years 1783 and 1789, invalidate all entries, surveys, and grants, of land within the Indian territory, which now forms a part of the territory of the State of Tennessee. But they do not avoid entries commencing without the Indian boundary, and running into it, so far as respects that portion of the land situate without their territory.

The act of North Carolina, of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal, by implication, the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals are made, must be lands previously subjected to entry and survey.

ERROR to the Circuit Court of West Tennessee.

This cause was argued at the last term, and again argued at the present term, by the *Attorney-General* and Mr. *Swann*,[a] for the plaintiff, and by Mr. *Williams*, for the defendant. *Feb.* 15*th.*

[a] They cited 2 *Tenn. Rep.* 157. *N. C. Rep. in Confer.* 440. 1 *Tenn. Rep.* 30.

[b] He cited Preston v. Browder, 1 *Wheat. Rep.* 115. Danforth v. Thomas, *Id.* 155.

1824.

Danforth v. Wear. *March 1st.*

Mr. Justice JOHNSON delivered the opinion of the Court.

This is one of those cases which not unfrequently occur, in which, for want of the scrutinizing eye of the party interested to maintain a judgment below, the Court there is made to appear to have given a decision very different from that actually rendered. But, whatever may be the opinion of this Court, independently of the record, we are concluded by the bill of exceptions, and must decide according to those questions which the record presents.

The parties are citizens of the same State, but jurisdiction is given to the Courts of the United States, by the fact of their claiming title to the land in controversy, under grants from different States, to wit, the States of North Carolina and Tennessee.

The facts stated in the bill of exceptions, taken in connexion with the laws of the two States and public treaties, sufficiently exhibit to this Court, that the grant from the State of North Carolina, under which the plaintiff made title, although commencing in, and embracing, a tract of country, over which the Indian title had been extinguished, yet extended into, and included, a large body of land, over which the Indian title existed at the time of the survey, but has since been extinguished. Had the case, then, set forth that the land covered by the defendant's grant lay within the country which was subject to the Indian title, at the time of Danforth's grant, and bore date subsequent to the extinguishment of the Indian title, it would,

probably, have exhibited a true view of the case which the Court below was called on to decide.

But, so far from exhibiting this State of the case, the facts admitted, not only do not confine the controversy to the tract of country that lay within the Indian boundary, but, taken in their literal meaning, expressly admit the contrary.

The words of the admission are, "that the defendant was in possession of *the land claimed* by the plaintiff." And when we come to inquire what land the plaintiff claims in the suit, we find it to be the whole 100,000 acres, "the beginning corner of which, and a portion of the land covered thereby, lay in a tract of country to which the Indian title had been extinguished, prior to making the survey and issuing the grant.

Here, then, we have the parties, contrary to all the probable truth of the case, contending about a title to land lying without the Indian boundary at the time it was surveyed for the plaintiff in ejectment.

But we must take the case as we find it on the record, and decide accordingly.

It appears, then, that the plaintiff's grant was rejected in the Court below, and not permitted to be read to the jury. This rejection could only be sustained upon the ground that it was wholly void, or wholly inadmissible in that cause. For if the grant was good but for an acre of the land claimed in the action, the Court could not have withheld it from the jury.

As to lands surveyed within the Indian boundary, this Court has never hesitated to consider all

1824.

Danforth v. Wear.

such surveys and grants as wholly void; but as the total rejection of the grant, according to the case stated, goes to its validity as to that part of the land also which lay without the Indian boundary, there must be found some other ground for sustaining the decision, than that which invalidates surveys executed in the Indian territory.

In the present case, there can be but two such grounds supposed to exist; either that there was no law authorizing the survey in any part of the land granted, although without the Indian boundary, or, that the whole was affected by the illegality of that part which extended within that boundary.

It was in the first of these alternatives that the Court held the case under advisement from the last term. In the case of *Danforth v. Thomas*, (1 *Wheat. Rep.* 155.) this Court threw out the suggestion, that a grant of land must have some sanction created by statute. As relates to the present subject, it did not appear that any law had been passed, subsequent to the extinction of the Indian title, by which this recent purchase was authorized to be taken up under warrants.

But the Court, upon consideration, are satisfied, that under the laws and practice affecting the lands in question, the extension of the county line subjected the lands purchased of the Indians, to the general land laws of the State. By the 3d section of the act of 1777, entries are permitted within any county of the State, and the creation of counties has always, in that State, been held

to bring the vacant lands within the county under the operation of that act. 1824.

Danforth v. Wear.

On the second alternative, it was contended in argument, that the survey was not in its inception invalid; that it was good as to part, because out of the Indian boundary; and as to the residue, was made good under the general provisions of the laws of North Carolina in favour of removed warrants; that, at most, it was only suspended by the Indian title, and attached legally and effectually to the soil, as soon as the interposing title of the Indians was removed.

In the two cases of *Preston v. Browder*, and *Danforth v. Thomas*, decided in this Court in 1816, (1 *Wheat. Rep.* 115. 155.) the inviolability of the Indian territory is fully recognised. It was the law of the land, as adjudged in the case of *Avery v. Strother*, decided in the North Carolina Court of Conference, in 1802. Indeed, the State of North Carolina appears to have been sedulous in her efforts to prevent encroachments upon the Indian hunting grounds, and her laws are express and pointed in invalidating entries and grants made within such reservations.

But the present grant commences in a tract of country over which the Indian title was extinct; and whatever might be the state of right, were the beginning corner within that boundary, and a portion of the land beyond it, we see nothing in the laws of North Carolina or Tennessee, to avoid a grant in the whole, when it commences legally, and only covers in part the lands on which surveys are prohibited. For that part, therefore, which

1824.

Danforth v. Wear.

lies without the boundary, the grant must be held valid, and this alone entitles the plaintiff to a reversal. But as the cause must be again tried below, and the question on its validity as to the residue, as presented by the bill of exceptions, has been argued fully, and must arise again, we will now consider it.

The points made by the plaintiff's counsel are stated by himself thus:

1. That the State of North Carolina had a right to issue the grant in question, and the Court erred in not suffering it to be read.

2. That the grant was good as to that part of the land to which the Indian title was extinguished.

3. That the grant, being founded on a removed warrant, was good for the whole land.

To the first and second of these positions we have expressed our assent, and only the third remains to be disposed of.

This rests upon the sixth section of the act of North Carolina, of 1784, entitled, "an act to prevent the issuing of grants," &c.

By this section, the right is given to remove warrants which have been located upon lands previously taken up, so as to place them upon vacant lands; and the supposed operative words, in the present instance, are these: "Shall be at full liberty to remove his or their warrants to any other lands, on which no entry or entries have been previously specially located; and the Surveyor, or Surveyors, are hereby authorized and required to survey and make return thereof, in like manner as for other returns and surveys, as by law directed."

1824.

Danforth v. Wear.

Reference was had to the act of 1786, and the cession act on the same subject, but they add nothing to the provisions of the act of 1784.

The effort is to construe this act as virtually repealing the previously existing laws, that prohibit surveys of land within the Indian boundary, and as opening the whole State to the right of removing warrants.

We are of opinion, that there are several considerations, which repel this construction.

It is obvious, that the lands to which such removals are authorized, must be lands previously subjected to entry and survey, otherwise the absurdity occurs, of a reservation in favour of entries and surveys which the existing laws have declared to be nullities.

Again; "the Surveyors are authorized and required to survey and make return, in like manner as for other surveys and returns is by law directed." But does any law authorize or enjoin a survey of the Indian country? or shall this act be construed to enjoin as a duty, that which an existing act prohibits under a penalty?

These considerations remove all doubt, on the correct construction of the law respecting removed warrants; but if doubts did exist, the general policy and course of legislation of the State would forbid such a construction. The purport of the law is, to authorize removals to that land only, which might be at the time legally entered and surveyed by other warrants.

1824.

Miller v. Stewart.

We are of opinion, that there is error in the judgment of the Court below, in refusing to let the grant be read to the jury.

Judgment reversed.

[SURETY.]

MILLER v. STEWART and others.

The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms.

Where a bond was given, conditioned for the faithful performance of the duties of the office of Deputy Collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties, *held*, that the surety was discharged from his responsibility for moneys subsequently collected by his principal.

THIS was a case certified from the Circuit Court for the District of New-Jersey, upon a certificate of a division of opinion of the Judges of that Court. It was an action of debt upon bond, and the material facts disclosed in the pleadings were, that the plaintiff, Ephraim Miller, being Collector of the direct taxes and internal duties for the fifth Collection District of New-Jersey, by an instrument of appointment, under seal, and pursuant to law, appointed Stephen C. Ustick his Deputy Collector, for eight townships within his

1824.

Miller v. Stewart.

district. Upon that occasion, the defendant, Thomas Stewart, and certain other persons, as sureties, executed a writing obligatory, with Ustick, to Miller, in the penalty of 14,000 dollars, upon the following condition, viz. "The condition of the foregoing obligation is such, whereas Ephraim Miller, Esquire, Collector, as aforesaid, hath, by authority vested in him by the laws of the United States, appointed the said Stephen B. Ustick, Deputy Collector of direct taxes and internal duties, in the fifth Collection District of New-Jersey, for the townships of Nottingham, Chesterfield, Mansfield, Springfield, New-Hanover, Washington, Little Egg Harbour, and Burlington, in the county of Burlington; now, therefore, if the said Stephen C. Ustick, has truly and faithfully discharged, and shall continue truly and faithfully to discharge, the duties *of the said appointment*, according to law, and shall particularly faithfully collect and pay, according to law, all money assessed upon said townships, then the above obligation to be void, and otherwise, shall abide and remain in full force and virtue." After the execution of this bond, and before Ustick had, in any manner, acted under this appointment, or collected or received any moneys under the same, Miller, with the assent of Ustick, but without the assent or knowledge of the defendant, Stewart, altered the same instrument of appointment, by interlining in it another township, called, "Willingborough," thereby making it an appointment for *nine* instead of *eight* townships; and under the appointment, so altered, Ustick received, within the original

1824.

Miller v. Stewart.

eight townships, certain moneys, as taxes, which he omitted to account for, and this omission was the breach stated in the declaration. The question for the opinion of the Court, upon the special pleadings and demurrer, was, whether the alteration so made, without the consent of Stewart, discharged him from any responsibility for the moneys so subsequently collected by Ustick.

Mr. *Wood*, for the plaintiff, admitted the general doctrine, that where the contract is annulled without the assent of the surety, there is an end of the guaranty. So, if the contract is, in any material respect, changed by the contracting parties, (whether advantageously for the surety or not,) in respect to that part of it to which the guaranty extends, the surety is discharged: for he may, then, well say, *non hæc in fœdera veni*. But, if a change is made in the original contract, by the contracting parties, in a part of the contract to which the guaranty does not extend, such change will not discharge the surety, unless it disadvantageously affected the other part of the contract to which the guaranty does extend. Thus, where the defendant was surety to the plaintiffs, for the performance of duties by a clerk in their *banking house*, a change of partners was held not to discharge the surety, because, though such change had an important bearing upon the establishment, it did not come within the scope of the guaranty.[a] A mere *diminution* of that part of

[a] Barclay v. Lucas, 1 *T. R.* 291.

1824.

Miller v. Stewart.

the contract to which the guaranty extends, as a release of part, would not discharge the surety from the part remaining, it being a part of the thing guarantied, though not the whole. *Omne majus in se continet minus:* the surety, in such a case, could not say that he might be prejudiced by the diminution, for it is settled law, that a part payment of the debt is for the benefit of the obligor, and prejudicial to the obligee, and, therefore, it cannot be pleaded as an accord and satisfaction.[a]

1. There was no *surrender* by Ustick of his appointment as Deputy Collector, over the first eight townships. If there was a surrender, it must have been either in fact, or in law, that is, implied in the alteration of the instrument. There was no such surrender in fact; and the alteration of an instrument with consent of parties, does not, in law, imply such a surrender. There are no authorities to warrant the position, that such an alteration implies a surrender. On the contrary, they all say, an alteration of an instrument, with consent, does not vitiate it.[b] In *Pagot v. Pagot*,[c] when blanks in a deed were filled up after execution, the deed was held good, though not read again, nor re-executed. In *Markham v. Gonaston*,[d] and *Wooly v. Constant*,[e] the Court went on the ground not only

a Johnson v. Branna, 5 *Johns. Rep.* 270.

b Touch v. Clay, 2 *Lev.* 35. *Shep. Touch.* 68. Smith v. Crooker, 6 *Mass. Rep.* 539.

c 2 *Ch. Rep.* 187.

d *Moore*, 547.

e 4 *Johns. Rep.* 54.

1824.

Miller v. Stewart.

that an altered deed or instrument was good, but that there was no surrender and redelivery implied in the alteration, to devest the property.

There is nothing in principle to warrant the idea, that an alteration of an instrument implies a surrender and redelivery. A surrender is an executed contract. To constitute a surrender of an instrument by a vendee or obligee, to a vendor or obligor, two things are necessary: 1. An actual delivery of possession to the latter; and, 2. An understanding or agreement to part with the property in the instrument. The act and the intent must concur. A mere delivery of possession by the vendee of the deed, for a special purpose, to the vendor, or any other person, as to *keep* for him, or to do any other particular act in relation to it, is not a surrender. The vendee still has the property in the deed himself. The vendor, in such case, is only his bailee. Admit, for the sake of argument, that the alteration of a deed required a new delivery, in respect to the part altered, the vendee might then deliver possession of the deed to the vendor, for that particular purpose, viz. to enable the vendee to deliver it anew, to give effect to the altered part; but not surrender his property in the deed in respect to the parts not altered. Such an absolute surrender of the whole deed, is not essential; and if not essential, it should not, by a fiction of law, be required. Suppose the vendee should hand the deed to the vendor, to subjoin on a blank under it a new and distinct deed for another tract of land, which is done, does such a delivery of the deed, for such a purpose,

amount to a surrender of the old deed? If not, is there any difference, in reason and common sense, whether the conveyance of the second tract is contained in a distinct and separate deed subjoined on the same paper, or whether it is effected by an interlineation, with consent of parties, in the old deed? Fictions and subtilties should never be introduced into the law, which is a practical science, unless to subserve the purposes of justice. *In fictione juris semper subsistit equitas.* This fiction of a surrender is unnecessary; it may be injurious. A., pursuant to contract, conveys a tract of land to B.; they afterwards discover, that by mistake, a lot was omitted, and, by consent, it is interlined. Upon this doctrine of surrender, the deed and property, upon the interlineation, reverted to the vendor, and continued in him until the *new* delivery; and, of course, it is subjected to the intermediate judgments of other liens of the vendor. The rule of law may, and ought to correspond, in such cases, with the real fact; considering the lands originally contained in the deed as passing at the date, and the land inserted by interlineation, as passing at the time of the interlining.

2. There was no *cancellation* of the original instrument of appointment. An *alteration* affects an instrument in part; a cancellation destroys it altogether. When cancelled, a deed must be resealed and redelivered, to revive it.[a] It is nowhere

[a] *Shep. Touch.* 69.

1824.

Miller v. Stewart.

said, that a redelivery is necessary, in case of an *alteration* by consent.

3. The alterations did not cause a revocation of the old appointment. It is admitted, that the appointment to, and acceptance of, a new office, *incompatible* with the old, is a revocation of the latter, as, if a Coroner accepts the office of a *Sheriff*. So, if there had been an intermediate office, between the Collector and his Deputy, incompatible with the latter, its acceptance, by Ustick, might have been a revocation of his office of Deputy. In the present case, the alteration created no office. It continued the same office, only extended over an additional territory. Ustick had the same office and same power over the first eight townships *after*, as *before* the alteration. It is said, his sphere of action was enlarged. Be it so: it was enlarged only in respect to *territory;* his sphere of action over the first eight townships continued the same. It is said, that after the *alteration*, the nine townships constituted but *one office*, and that there was a *new* appointment consequently. The interlineation, as before shown, did not destroy or cause a surrender of the first appointment, with respect to the eight original townships. If, then, there was a new appointment of an office, it extended only to the ninth township, and that is a distinct office from the other eight. If there were not a new appointment, but simply an enlargement of the old office, and still constituting one office, it is an office consisting of different parts in respect to territory, which parts are easily *distinguished*, and were created at *different* times; the

former part, composing the first eight townships, being in no wise impaired by the latter, and of course, the *guaranty* is in no wise impaired by it. It is said, that it is impossible to distinguish the moneys paid in from the ninth township, from those collected in the other eight. The same objection might have been raised, and to the same effect, if the appointments had been by distinct instruments. The jury will distinguish; it is a question for them. It is said, that the responsibility of Ustick was increased; and so is the responsibility of every debtor increased, who contracts new debts; but that does not discharge a surety.

4. Though where, in a bond, a previous instrument is recited, the contents thus recited are a *part* of the bond; yet the instrument recited is no part of the bond. Suppose A. conveys a tract of land to B., and in order to explain the boundaries, a deed from A. to C. for a tract of land adjacent is recited, does the latter deed become a part of the former; and if destroyed, does it destroy the other? The dependency, or connexion between the instruments recited, and the obligation in which it is recited, must always depend upon the nature and object of the instruments, and the intent of the parties.

Again; if this alteration, as contended on the other side, amounted to a surrender of the instrument of appointment, it was necessarily a *revocation* of the appointment. Such a revocation cannot be made under the act of Congress, without public notice being given in the district.[a] No such

[a] 4 *U. S. L.* 557, 558. 520.

1824.

Miller v. Stewart.

notice was given in this case. If this alteration amounts to a revocation of the instrument, in law, and as such revocation cannot be made without public notice, the alteration must be void, and the original instrument stand good.

Mr. *Coxe*, contra, argued, (1.) That the alteration in the original instrument of appointment, by the interlineation in a material part, destroyed the bond as against such of the obligors as were not parties to the act. The appointment, being recited in the bond, became incorporated into it, and they, together, form *quasi* one instrument. The condition of a bond or defeasance, need not be contained in the same paper, but, though written on a distinct and separate piece, they together constitute but one instrument.[a]

If the condition of a bond, thus engrossed on a separate piece of paper, becomes invalidated by any act having that legal operation, the whole instrument, though disconnected, becomes void. As in the case put by Sheppard, if the obligation depend upon, or be necessary to, some other deed, and that deed become void, the obligation is become void also: as, if the condition of the obligation be to perform the covenants of an indenture, and, afterwards, the covenants be discharged, or become void, by this means the obligation is discharged and gone for ever.[b] The common case of arbitration bonds will illustrate this position:

a Shep. Touch. 367. 370. *Cro. Eliz.* 657.
b Ib. 394.

1824.

Miller v. Stewart.

if the award made be void in itself, or become void, or be performed, the obligee cannot recover upon the bond, but that becomes void. Had the plaintiff made such an interlineation in the body of the obligation itself, inserting the name of another township, the legal effect cannot be disputed. The whole bond would have been invalidated.[a]

The consequence, then, appears to be irresistible, that such must be the effect here. The appointment, originally made, became a nullity, and could only be revived by a new execution and delivery, and take effect only from that time. As to the original instrument to which the sureties of Ustick made themselves parties, by inserting it in their bond, it was wholly nullified.

It may, indeed, be said, that, the alteration in the appointment having been made with the consent and acquiescence of Miller and Ustick, who alone were parties to it, it remains a valid instrument of deputation.

But the appointment is to be regarded in two entirely distinct aspects: (1.) As the instrument of deputation solely. (2.) As made a part of the bond, by being incorporated into it.

1. As a simple instrument of deputation, like any other deed, it could operate only between the parties to it, and could affect no others. The alteration, made and concurred in by all those interested in it, would not avoid it, perhaps, according to the current of modern authorities, though even

[a] *Shep. Touch.* 68, 69. 71. 1 *Dall.* 67. 2 *Bac. Abr.* 650.

1824.

Miller v. Stewart.

as between them the law was formerly held otherwise.[a]

2. As being made a part of the bond by being incorporated into it. By this circumstance, the sureties of Ustick became parties to the act of appointment, and to the instrument of deputation. It became a part of their bond. By no act of the appointor and appointee could the interests of third persons be even incidentally affected. A. makes a bargain and sale to B., which cannot operate, because no pecuniary consideration is inserted. C. acquires, by a judgment, or in any other manner, a lien upon the property as belonging to A. The deed cannot be altered by the parties so as to devest any intervening right. As an original instrument, carrying its original date, it can have no operation. As a deed bearing the original date, it is void; its future validity can be only upon the idea of a surrender of the instrument, and a new delivery and execution.[b]

We contend, then, that by the alteration made in this instrument of deputation, it ceased to have any validity by virtue of its original execution and delivery; as such, it was annulled.

But, whether annulled or not by this act of interlineation; whether it continued to operate as from the time of its original delivery, or from the period of its second delivery, after the alteration was made; if it have any validity, even between the parties, it cannot operate as the appointment

a 2 *Roll. Abr.* 29. u. pl. 5.

b Eppes v. Randolph, 2 *Call*, 125. 4 *Binn.* 1. 4.

1824.

Miller v. Stewart.

recited in the bond. It is another and distinct appointment from that to which the bond referred, and these sureties are not responsible for any deficiencies existing under it. By the 20th section of the act of Congress, "Each Collector shall be authorized to appoint, by an instrument of writing under his hand and seal, as many deputies as he may think proper, assigning to each such deputy, by that instrument of writing, such portion of his collection district as he may think proper; and, also, to revoke the powers of any deputy, giving public notice thereof in that portion of the district assigned to such deputy." The power of appointment thus given, was exercised by the original instrument of deputation for the eight townships. It is recited in the bond, and, therefore, each party is estopped from denying it.[a] This instrument must have been made prior to the execution of the bond, because it is recited as already executed, and one of the conditions is, that he hath performed the duties of it. It must have been an appointment, bearing the date, and specially embracing the townships therein enumerated, and nothing more; otherwise it would be an appointment differing from that for the faithful performance of which this defendant became responsible. Supposing, then, it should now be made to appear that the original appointment included the township of Willingborough,

[a] Shelley v. Wright, *Willes*, 9. 1 *Phillips*, 356. 1 *Powell on Cont.* 236, 237.

1824.

Miller v. Stewart.

and that it was accidentally omitted in the recital of the bond, could a recovery be had in this action? The answer of the surety is *non hæc in fœdera veni*. The language of the Court, in *Clifton v. Walmesley*, (5 *T. R.* 564. 567.) would be conclusive against the plaintiff. This was the doctrine also in *Ludlow v. Simond*, (2 *Caines' Err.* 33. 42. 57.) The plea avers, and the demurrer admits, that the deficiency sought to be recovered, arose under an appointment including the township of Willingborough. The surety became responsible for the faithful performance of the duties of no such appointment; he, consequently, cannot be called on to respond them. But there is no pretence that any omission was made by fraud or mistake. Under the appointment thus made, Ustick did hold his office at the time the bond was executed. This office was as extensive as the eight townships enumerated in the appointment, but restricted within them. This limitation was of the very essence of the appointment, by the express terms of the statute.

The act of the 22d of July, 1813, ch. 16. s. 20. requires that the assignment of the portion of the collection district within which the deputy is to act, should be contained in the instrument of appointment. Such an appointment, then, being made, it could only lawfully cease, (1.) by the death of Ustick, the deputy; (2.) by surrender of the appointment; (3.) by a revocation without his consent; (4.) by a new appointment; (5.) by cancellation.

1824.

Miller v. Stewart.

The act which did take place, was, in substance, a surrender of the original appointment, and the acceptance of a new one. The appointment, being altered by the appointor, by inserting another assignment of a portion of the collection district; and after this alteration, being accepted and acted under by the appointee, became, from the date of such alteration and acceptance, a new and distinct instrument. A new and distinct office was created, the duties and responsibilities of which differed essentially from the former; the instrument of appointment included the entire portion of the collection district assigned to the deputy, as required by the statute. The legal inference is clear: the first appointment merged in the subsequent and more extensive one.[a] If it operated as a new appointment, it operated also as a complete revocation of the former one.[b] Here was, then, an appointment perfectly valid, complying with all the requisitions of the law under which the officer acted, under which his duties were performed, under which his responsibilities attached. This, however, was a totally distinct appointment from that which the bond in question was given to cover. The appointment recited in, and covered by the bond, was for eight townships; the appointment under which the delinquency occurred, was for nine. The defendant and his co-sureties never did undertake to become responsible for one cent,

a 5 *Bac. Abr.* 204.

b Bowerbank v. Morris, *Wallace*, 125. 129.

1824.

Miller v. Stewart.

under any other appointment than that set forth in their bond. The recital restricts the operation of the bond to that identical instrument of deputation therein specified.[a]

It can scarcely be necessary to cite the various cases which go to fix and limit the responsibilities of sureties, but a few of the most prominent may be referred to. *Lord Arlington v. Merrick*, (2 *Saund.* 411.) is a leading case, and establishes the principles, that a surety cannot be bound beyond the scope of his engagement; that the generality of the language is restrained by the recital; and that when a particular appointment is recited in the condition of the bond, the obligation covers only that appointment. So, where a bond was given to secure the faithful performance of the duties of collector of the society of musicians, and afterwards the society was incorporated, the obligor was held not liable for any default after the incorporation.[b] "The old obligation does not, in point of law, extend to the new corporation, and a surety has a right to avail himself of the objection." "A surety can only be held liable according to the plain and clear force of his contract."

The condition of a bond recited, that A. was, on such a day, appointed Collector, &c., and bound the sureties for his duly accounting, &c.: held, that the sureties were only answerable for that single appointment, and not for his appointment in the

a Pearsall v. Summersett, 4 *Taunt.* 593.
b Dance v. Gridler, 4 *Bos. & Pull.* 34. 41, 42.

ensuing year.[a] Other cases go to the establishment of the same principles.[b]

3. It is no answer to the objections that have now been considered, that the surety is not damnified. He says, this is not the contract into which I entered, and it is immaterial whether it be a more favourable one than that to which I became a party or not. I have no wish to speculate upon the subject of the relative duties and responsibilities. The question is simply what I have become responsible for. And, when you designate the deficiency sought to be recovered, and the office in which it occurred, my answer is, it is not in the bond. But the ground of increasing the duties and responsibilities, is another equally conclusive both in point of fact and law. If the original appointment be considered as still subsisting, if the words of the obligation would cover this deficiency, the surety is entitled to judgment in his favour, on the single ground that the duties and responsibilities are increased without his concurrence. Every enlargement of the duties of the Deputy Collector, by enlarging the sphere of his authority, increases his responsibility, and adds to the danger of the surety. The amount of moneys received is increased, and the consequent danger of defalcation augmented.[c]

a Wardens of St. Saviours v. Bostock et al. 5 *Bos. & Pull.* 175. 179.

b Wright v. Russel, 3 *Wils.* 530. Strange v. Lee, 3 *East*, 484. Rees v. Berrington, 2 *Ves. jr.* 540. Commonwealth v. Fairfax et al. 4 *Hen. & Munf.* 208.

c Rathbone et al. v. Warren, 10 *Johns. Rep.* 587. 591. 2 *Caines' Err.* 33. 35.

1824.

Miller v. Stewart.

Can it be contended that, in point of fact, the defalcation would not have been less, if the deputy's authority had not been extended to the township of Willingborough, and, consequently, if none of the moneys arising from that township had been received by him? Did the deficiencies now sought to be recovered occur, in whole or in part, in reference to the money received from Willingborough? Can we, in any manner, be called upon to meddle with the accounts of that township, by an act to which we never assented? If the accounts are intermingled, as they necessarily must be, and in fact are, we cannot be called on to disentangle them. In point of fact, then, the responsibility and duties of the principal have been increased, without the assent of the surety, and, in point of law, that operates to discharge him from any responsibility.

Mr. *Sergeant*, on the same side, stated, that the question presented upon the pleadings was, whether the defendant, Stewart, who was a *surety* for Ustick, had become liable for any default or neglect of Ustick, as a deputy of Miller, the Collector?

The bond recited an appointment, *previously made*, and the defendant was bound for the fidelity of Ustick, under the *said appointment*. By the terms of the contract, therefore, the appointment, antecedently made, was a part of the contract, as between Miller and Stewart, as completely as if it had been contained in the bond. The appointment, thus made, was by *deed*, and so re-

quired to be by law. If it had been made under colour of law, and not according to law, it would have been void. The appointment, moreover, was entire, not divided, or in parts; nor, as respected the bond, was it susceptible of division. The obligation of the bond, therefore, was, that as long as Ustick should continue to act under that identical appointment, under the very deed which had been sealed and delivered by Miller to Ustick, so long, and no longer, Stewart would be responsible for Ustick's conduct.

What is the legal import and meaning of the contract thus entered into?

1. As the appointment was by deed, and was required by law to be by deed, and as it is recited to have been already made, it follows, that it had already all the requisites of a perfect legal deed; that it had been signed, sealed, and delivered, and all was executed and done. This is not denied to be as true in fact, as it is in law.

2. That nothing remained to be done. The whole terminated in the execution of the bond; the state of the appointment was irrevocably fixed by it. If blanks had been left, to be afterwards filled, it might be deemed evidence of authority to fill them, from *all concerned*, and, therefore, prove consent, and relate back.

3. That, the reference in the bond being to the identical deed, thus perfected, Stewart became a party to the deed, as much as if he had signed it; had an interest in it; and it was a part of his contract, that it should not be altered, because it was *his contract*.

1824.

Miller v. Stewart.

These, then, are the rights of the parties, and their obligations towards each other, as established by themselves.

The plea avers, that after all this, and before Ustick had acted under the deed of appointment, Miller, with the assent of Ustick, altered the appointment, in a material part, and that Ustick acted under such altered or new appointment; all which is confessed by the demurrer.

1. We contend, that Miller was discharged, by the alteration of the deed being made without his consent. A deed is avoided by rasure, interlineation, or alteration, *in a material part*,[a] unless a memorandum thereof be made at the time of execution and attestation.[b] This is unquestionably the rule; and it is for those who claim the benefit of an exception, to show that it is an excepted case. Now, it is clear that the deed in question was altered, after the execution, in a *material part;* and it follows, of course, that it is *avoided*. If the deed is avoided, the obligation is at an end. It may be supposed, that the alteration here is *not material;* a suggestion, the value of which, as regards a surety, will be considered hereafter. But the inquiry, in such cases, is not whether the alteration is *material*, but whether it is in a *material part*. The inquiry never can be, whether the alteration is material; for no alteration can be

a 1 *Dall.* 67.

b 2 *Bl. Com.* 308. *Bul. N. P.* 267. *Shep.* 68, 69. *Chitty on Bills*, 130. and cases there cited.

said to be material, if you can perceive that it has been made, and how. An interlineation can never be material, for it may always be rejected. It is never incumbent upon the party, therefore, to show that he has been injured, or might have been injured; or that, in the particular case, the alteration is material. The principle in question is founded in policy, and intended to preserve the solemn evidences of transactions among men, by denouncing every alteration, as unhallowed and forbidden.

But it is contended, that an alteration, by consent of the parties, does not vitiate.[a]

Suppose the position, for the present, to be correct; then, as it is consent which neutralizes the poison of the alteration, the effect will only be co-extensive with the cause. It is not vitiated as to him who consents; but how stands it as to others? It produces its ordinary legal consequence.[b] It is, indeed, conceded, that if the contract is put an end to, or *altered*, the surety is discharged. It is conceded, too, that if the guaranty extends to part only, and that part is altered, the surety is discharged. But, it is contended, that if the guaranty be for part only, and other parts be altered, that does not discharge the surety. For this, no authority is cited, but the case in 1 *T. R.* 391. (note,) which has no analogy. That was simply

a 2 *Lev.* 35. *Shep.* 68. 6 *Mass. Rep.* 539. 2 *Cr.* 626.

b *Moore*, 547. 2 *Lev.* 35. 4 *Johns. Rep.* 54. 58, 59. 4 *Cranch*, 60.

1824. Miller v. Stewart.

a question of *intention*, or of *the true interpretation* of the surety's undertaking.

We answer, then, (1.) That the proposition is a very questionable one. If there be one contract, consisting of parts, and, the whole contract being recited in the engagement of the surety, as the ground and consideration of his undertaking, he engages for a part, the whole is to stand, or he cannot be charged. Else the Court must, in every case, undertake to decide, not only upon the dependence and connexion of the parts, but how far they entered into the views of the surety. (2.) It is not the case here. The undertaking was for the *whole deed*, as it originally stood, and an addition is afterwards made to it. If the appointment had been for nine townships, and the bond for eight of them, it would have been somewhat such a case. But could the deed, in that case, have been *altered* by striking out the ninth? The only question, then, is, whether this alteration was in a *material part* of the deed; for it is admitted, that it was done without the consent or knowledge of Stewart. It was evidently a material part, and, indeed, the *most* material part, of the appointment. It was, therefore, avoided as against all but those who consented.

2. Admitting the consent of Miller and of Ustick to be good, and binding between themselves, what is the legal operation of their conduct? We contend, that it put an end to the deed which previously existed, and created a new deed. Was the deed, after the alteration, the same

deed as before the alteration, or was it a different deed? If it was a different deed, then, what took place was equivalent to a surrender, a new acknowledgment, and a new delivery. That it was a different deed, is manifest, because it comprehended more than the first. Yet it was an entire deed, and the whole was one single appointment, undivided and indivisible. The first was also an entire deed, and, as we have seen from the pleadings, was consummated by delivery, and was in the possession of Ustick. What was the date of the deed after the alteration? Suppose it had been done on two different days, which would have been the date? It cannot have two dates, because it is one deed. A return for alteration, and an acceptance after alteration, is a surrender, for there must be a surrender, to enable a second execution. It may be admitted, that the deed might be put in his hands for a special purpose, and then it would not be a surrender; as, to read it, or to take a copy, or the like. And this may be done by parol.[a] A re-acknowledged deed dates from re-acknowledgment.[b] It cannot be divided, because it is an entire deed. The latest act, therefore, will give date to the whole. The appointment after the alteration, then, is not the appointment for which the defendant was bound.

3. This is the case of a surety.

a *Co. Litt.* 232. (*a.*)

b Eppes v. Randolph, 2 *Call*, 125.

1824.

Miller v. Stewart.

It is no answer to a surety, to say that the alteration is not material. He has a right to determine for himself whether he will or will not consent to the alteration; whether HE *thinks* it material or immaterial. Suppose he had been consulted, and refused his consent, no matter from what motive. Not consulting him, is, at least, equivalent to refusal. Who can tell what considerations might have *justly* influenced him? But the great objection to any latitude is this, that if the narrow limits, defined by numerous and uniform decisions, be not adhered to, there will be no limit at all. The limit is this: no power of man, or circumstances, can alter your engagement. You know exactly the extent of the engagement you enter into. There will be no equity against you, no intendment or legal construction. A surety cannot be held beyond the *precise terms* of his agreement.[a] It is upon the basis thus established, that suretyship stands, and it would not stand without it. It is a needful, but it is always a perilous undertaking; and its perils most frequently overwhelm those whom one could wish to see saved, the generous and the humane. It cannot be necessary or politic to increase its dangers.

March 10th. Mr. Justice STORY delivered the opinion of the Court, and, after stating the case, proceeded as follows:

Nothing can be clearer, both upon principle and

[a] 1 *Caines' Err.* 1. 10 *Johns. Rep.* 180.

1824.

Miller v. Stewart.

authority, than the doctrine, that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And Courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness. The class of cases which have been cited at the bar, where persons have been bound for the good conduct of clerks of merchants, and other persons, illustrate this position. The whole series of them, from *Lord Arlington v. Merrick*, (2 *Saund.* 412.) down to that of *Pearsall v. Summersett*, (4 *Taunt.* 593.) proceed upon the ground, that the undertaking of the surety is to receive a strict interpretation, and is not to be extended beyond the fair scope of its terms. Therefore, where an indemnity bond is given to partners, by name, it has constantly been held, that the undertaking stopped upon the admission of a new partner. And the only case, that of *Barclay v. Lucas*, (1 *T. R.* 291. note *a.*) in which a more extensive construction is supposed to have been given, confirms the general rule; for that turned upon the circumstance, that the security was given to the house, as a banking-house, and thence an intention was inferred, that

1824.

Miller v. Stewart.

the parties intended to cover all losses, notwithstanding a change of partners in the house.

Now, what is the purport of the terms of the present condition? The recital stated a special appointment, which had then been made by Miller, of his deputy for eight townships, particularly named. It was not a case of several distinct appointments for each township, but a single and entire appointment for all the townships; and the condition is, that Ustick has, and "shall continue, truly and faithfully to discharge the duties *of said appointment*, according to law." Of what appointment? Plainly the appointment stated in the recital, to which the condition refers, and to which it is tied up; that is to say, the appointment already made and executed for the eight townships. If this be the true construction of the condition, and it seems impossible to doubt it, then the only inquiry that remains is, whether any money unaccounted for was received under that appointment. To this the plea answers in the negative, unless the subsequent alteration of the instrument created no legal change in the appointment. To the consideration of this point, therefore, the attention of the Court will be addressed.

And, in the first place, upon principle, how does the case stand? Can it be affirmed, that the alteration wrought no change in the appointment? This will scarcely be pretended. In point of fact, the first appointment was for eight townships only; the alteration made it an appointment for nine townships. It is not like the case where an appointment is made for eight townships, and an-

1824.

Miller v. Stewart.

other distinct appointment is made for the ninth; for then there are, in legal contemplation, two distinct and separate appointments. But here, the original appointment is extended; it was one and entire, when it included eight townships; it is one and entire, when it includes the nine. Can it then be legally affirmed to remain the same appointment, when it no longer has the same boundaries? An appointment for A. is not the same as an appointment for A. and B. In short, the very circumstance, that there is an alteration in the appointment, *ex vi termini*, imports that its identity is gone. If an original appointment is altered by the consent of the parties to the instrument, that very consent implies, that something is added to or taken from it. The parties agree, that it shall no longer remain as it was at first, but that the same instrument shall be, not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. A familiar case will explain this. A. gives a note to B. for 500 dollars; the parties afterwards agree to alter it to 600 dollars. In such case, the instrument remains single; it is not a note for 500 dollars, and also for 600 dollars, involving separate and distinct liabilities, but an entire contract for 600 dollars; and the obligation to pay the 500 dollars is merged and extinguished in the obligation to pay the 600 dollars. To bring the case nearer to the present: suppose there was a bond given, as collateral security, to pay the note of 500 dollars; it will scarcely be pretended, that the alteration would not extinguish

1824.

Miller v. Stewart.

the liability under the bond. The instrument would, indeed, remain, but it would no longer possess its former obligation and identity. Nothing can be better settled, than the doctrine that, if an obligation be dependent on another obligation, (and, by parity of reasoning, upon the legal existence of another instrument,) and the latter be discharged, or become void, the former is also discharged. *Sheppard*, in his *Touchstone*, (p. 394.) puts the case, and illustrates it, by adding, "as, if the condition of an obligation be, to perform the covenants of an indenture, and afterwards the covenants be discharged, or *become void;* by this means, the obligation is discharged, and gone for ever." It is not denied at the bar, that the same would be the legal operation in the present case, if there had been an actual revocation of the first appointment, or an extinguishment of the instrument of appointment. But the stress of the argument is, that here there was an enlargement, and not an extinguishment, of the appointment; that, the consent of the immediate parties being given to the alteration, it remained in full force, with all its original validity, as to the eight townships. We cannot accede to this view of the case. After the alteration was made, it is, as between the parties, to be considered by relation back, either as an original appointment for the nine townships; or as a new appointment for the nine townships, from the time of the alteration. It is immaterial to the present decision, whether it be the one or the other, for in either case it is not that appointment which the defendant, Stewart, referred to in

1824.

Miller v. Stewart.

the condition of the bond, and in respect to which he contracted the obligation. It is no answer, to say, that it is not intended to make him liable for any money, except what was collected in the eight townships. He has a right to stand upon the terms of his bond, which confine his liability to money received under an appointment for eight townships; and the pleadings admit, that none was received, until the appointment was altered to nine. It will scarcely be denied, that if, upon the agreement to include the ninth township, the original instrument had been destroyed, and a new instrument had been executed, the obligatory force of the bond would, as to the surety, have been gone. And, in reason or in law, there is no difference between that and the case at bar. The alteration made the instrument as much a new appointment, as if it had been written and sealed anew. It is not very material, to decide whether the alteration operated by way of surrender, or as a revocation, or as a new appointment superseding the other. It was, to all intents and purposes, an extinguishment of the separate existence of the appointment for the eight townships.

This point is susceptible of still farther illustration, from considerations of a more technical nature. The act of Congress of the 22d of July, 1813, ch. 16. sec. 20. under which this appointment was made, provides, "that each Collector shall be authorized to appoint, by an instrument of writing under *his hand and seal*, as many deputies as he may think proper," &c. The appointment must, therefore, be by deed; and the

1824.

Miller v. Stewart.

effect of an alteration or interlineation of a deed, is to be decided by the principles of the common law. Now, by the common law, the alteration or interlineation of a deed, in a material part, at least, by the holder, without the consent of the other party, *ipso facto*, avoids the deed. It is the consent, therefore, that upholds the deed after such alteration, or interlineation. The reason is, that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must, then, take effect as a new deed, and that can only be by the consent of the party bound by it. Whether by such consent, the deed takes effect by relation back to the time of original execution, or only from the time of the alteration, need not be matter of inquiry, because such relation is never permitted to affect the rights or interests of third persons, and cannot change the posture of the present case. If the deed, after the alteration, is permitted to have relation back, it is not the same deed of appointment recited in the condition, and to which the obligation is limited, for that is an appointment for eight townships. If it has no such relation, then it is a deed of appointment made subsequent to the bond, and of course not included in its obligation. It cannot be, at one and the same time, a deed for eight, and also a deed for nine townships; and the very circumstance, that it is the one, excludes the possibility of assuming it as the other. In truth, the assent of the parties to the alteration, carries with it the necessary implication, that it shall no longer be deemed an ap-

pointment for eight townships only; and the same consent of parties which created, is equally potent in dissolving the deed, and changing its original obligation. It is no objection, that to constitute a new deed, a redelivery is necessary; for if it be so, the consent to the alteration is, in law, equivalent to a redelivery. Nor is it necessary, that a surrender or revocation should be by an instrument to that effect. It may be by matter in pais, or by operation of law. Every erasure and interlineation in the deed, by the obligee or appointee, without consent, is a surrender; and a revocation may be implied by law. The passage cited at the bar, from *Co. Lit.* 232. (*a.*) establishes, that if the feoffee, by deed of land, grants his deed by parol to the feoffor, it is a surrender of the property, as well as of the deed. And if, in this case, the deed of appointment had been delivered up to the Collector, it would, at once, have operated as a surrender by the Deputy, and a revocation by the Collector.

An objection has been urged at the bar, against this doctrine, that the act of Congress, giving the authority to the Collector, to appoint deputies, also authorizes him "to revoke the powers of any deputy, giving public notice thereof in that portion of the District assigned to such deputy." Hence it is argued, that no revocation can be, unless by public notice. But this is certainly not the true interpretation of the act. The very terms suppose, that the revocation is already made, as between the parties, and the notice is to be given of the fact. The object of the Legislature was,

1824.

Miller v. Stewart.

to protect the public from the mischief of payments to the deputy after his powers are revoked. It requires public notice to be given of the revocation, so that no future imposition shall be practised; and if the Collector should make a private revocation, without any public notice, the legal conclusion would be, that all payments made to his deputy, in ignorance of the revocation, ought to be held valid; for no man is entitled to make his own wrongful omission of duty a foundation of right. But, as between the parties, a revocation or surrender, if actually made, would be, to all intents and purposes, binding between them, and release the sureties to the bond from all future responsibility.

Upon the whole, the opinion of the Court is, that the fourth plea in bar is good, and that the demurrer thereto ought to be overruled; and this opinion is to be certified to the Circuit Court.

Mr. Justice JOHNSON. My brother TODD, and myself, are of opinion, that the merits of this cause have been misconceived, the points on which it turns misapprehended, and the law of razures, if correctly laid down according to the law of the present day, erroneously applied to this cause.

The condition of Stewart's bond to the plaintiff, recites no particular deed of appointment, under which Ustick was constituted Deputy Collector; nor is there an iota in the bond, or in the declaration, that can identify the deed set forth in the plea, with the deed under which Ustick held his deputation. The condition of the bond simply

states, "Whereas E. M., Collector, as aforesaid, hath, by virtue of authority vested in him by the laws of the United States, appointed U. Deputy Collector," &c. It is the *plea* that specifies a deed of a particular date, and then proceeds to set forth a razure in avoidance of that deed, but it contains no averment that the deed; so set forth is the same under which U. held the deputation under the plaintiff, referred to in the condition. That the plea is faulty, and, even with the averment, might have been the subject of a special demurrer, cannot now be doubted; for it amounts to the general issue; and the general issue was the legitimate plea in this case. (*Pigot's* case, and *passim.*) But, we also hold it bad, in its present form, upon a general demurrer; for, unless the deed, so pleaded, was duly identified by the pleadings, with that under which Ustick was constituted deputy, the plaintiff was not bound to answer it. We cannot conceive how the defendant can have judgment in the present state of the pleadings, unless under the idea that the demurrer cures the failure to identify the deeds. This, however, cannot be sustained, since the want of identification is, in itself, a sufficient ground of demurrer.

Indeed, we see no sufficient ground for admitting that the condition of the bond implies a deputation *by deed* at all. It is true, that the 20th section of the act under which this Collector was appointed, authorizes him to appoint deputies, under his hand and seal; and, as far as was necessary to enable the deputy to act against individuals, unquestionably the solemnities of a deed

1824.

Miller v. Stewart.

were requisite to constitute him a Deputy Collector. But the demand in this action is for money received by him, and not paid over; and, surely, a deputation of a less formal kind, would have enabled him to bind his principal as to the actual receipt of money; so that the words of the condition do not necessarily imply a deputation by deed. He is expressly authorized, in this 20th section, to act for himself in collecting the revenue, and he could, therefore, act by his servant or deputy, constituted in a less solemn way than by deed, so far as to involve himself with the government.

But if a deed is to be implied from the condition, surely not this particular deed; and though a deed, of a date *antecedent* to the bond, is to be implied, it may have preceded it by a month, and yet the act and the condition of the bond both be complied with. But what form shall be presumed or implied to the deed? Why may it not have been several as to each county, or have comprised two or more? and why may not a dozen deeds, of the very date and form of this, have been in existence at the same time? A defendant who, like the present, places his defence upon the very highest stretch of legal rigour, cannot complain, if he has the same measure meted out to himself.

But if this ground is to be got over, and we are to consider the bearing of the facts pleaded, upon the law of the case, we then say that they imply no revocation of the deputation to Ustick, against which this defendant entered into the contract of

1824.

Miller v. Stewart.

indemnity. It is the intent that gives effect to the acts of parties; nothing was farther from the minds of the parties here, than the distinction of the power of Ustick, as to the eight counties, at the time of this interlineation. *The plea avers no such intent*, and as well might a delivery of a deed for perusal be tortured into a surrender and extinction of it, and its return into a revocation, as the acts of these parties respecting this interlineation, be construed into a revocation and redelivery. *Non constat*, from any thing that appears in the plea, that the paper ever passed from the hands of the party legally holding it. It was unnecessary, upon the facts stated, that it should so pass; in fact, no redelivery is averred, in the plea, nor any one of the formalities necessary to re-execution. It cannot be denied, that this part of the defence savours too much of a perversion of the solemnities and rules of the law. It is a catch upon the unwary, an effort to attach to men's acts consequences which are directly negatived by their intentions.

As to the idea of the identity of this instrument being destroyed by the interlineation, we consider it as springing out of an incorrect view of the nature of the instrument and of the circumstances that fix its identity. It is not one entire thing, but a several deed for each county. A deputation as to the county of A., is not a deputation as to the county of B., although written on the same paper, and comprised within the same words; it is as much a several deed, as to each county, as if writ-

1824.

Miller v. Stewart.

ten on several sheets of paper; as much as a policy of insurance is the several contract of each underwriter, or as a bond would be the several deed of as many individuals as executed it, if it be so expressed, making them, if such be the letter of it, severally liable, and for various sums, no one for another. Interlining another county, then, left it still the original deed, as to each county taken severally, and only operated as the creation of a new power as to another county, if, in fact, as there is no averment of a subsequent delivery, it was any thing more than a mere nugatory act. Such is certainly the good sense of the law upon the subject; and it is supported, we conceive, by respectable opinions, and by adjudged cases. Chief Baron Gilbert, in treating on this topic observes, "but if any immaterial part of the contract be added after sealing and delivery, as, if A., with a blank left after his name, be bound to B., and after C. is added as a joint obligor, this does not avoid the bond, because this does not alter the contract of A.; for he was bound to pay the whole money without such addition."[a] And the case of *Zouch* v. *Clay*, which he quotes, as reported in *Ventris*, undoubtedly sustains his doctrine; for there the Court overruled the plea of *non est factum* on the interlineation, on the the ground that the bond remained the same as to him.

In this case, the bond emphatically remained

[a] 1 *Loft's Gilb.* 111. *Ventris*, 185. The note at the end of Pigot's case, 11 *Coke*, also recognises this distinction.

1824.

Miller v. Stewart.

the same as to this defendant, for he was still liable only as to the eight counties, and no more; and was so guarded, as to make it impossible that the interlineation of a thousand other counties could alter or increase his liability, since the names of the counties are inserted in the condition specifically. As to *his* liability, and as to its influence upon the power conferred in the eight counties, this interlineation was altogether insignificant, no more than a dash of the pen, and could have done him no more injury.

There is nothing in the argument which would attach importance to it, on the ground of producing difficulty and confusion—it has been said, even impracticability, in rendering the accounts of this Deputy. It is begging the question, and urging the very thing as a difficulty, which the plaintiff proffers to execute. He claims a sum collected in the eight counties specified, and no more; and unless he can prove so much collected in the eight original counties, it is very clear, that he cannot have a verdict. But is he to be prejudged? is he not to be permitted to make out the case which he offers to prove?

Nor is there any more weight in the argument, that, "although the defendant may have been willing to indemnify against eight counties, it does not follow, that he would undertake to indemnify against nine." No one pretends to charge him with nine counties. Surely there was nothing in the contract, to preclude the plaintiff from extending his deputation to this individual over his whole

1824.

Miller v. Stewart.

district, had he thought proper. Could a separate deed, as to the ninth county, have been pleaded as a defence?

There is no charge of positive injury in this plea, it will be observed; nor do the facts admit a suspicion of fraudulent intention. The sole effect of the interlineation, was to confide in U., to collect in another county, without giving security. The defence rests upon certain inferences from, or consequences imputed to, the naked act of interlining the word "Willingborough," without even averring the acts necessary to make the instrument a deed as to that county, or the intent to revoke or re-execute the deed as to the residue.

To us it appears, that it ought no more to affect the rights of the parties, than interlining the name of a region beyond the Atlantic, or a mere dash of the pen.

On the subject of razures we would remark, it is to be regretted that this plea had not been specially demurred to, that the question might have been taken from the Court and sent to the jury. There is no doubt, that they might have found this deed several in its nature as to each county, and, therefore, unaffected by the addition of another. The tendency of the decisions has been, to carry such questions to that tribunal; and, notwithstanding some contrariety of *dicta*, it is now clearly settled, that a razure must make a deed void, or it is immaterial; and, therefore, *non est factum* is held to be the proper plea. Chief Justice Holt has declared any other form of taking advantage of a razure impertinent; (6 *Mod.* 215.)

1824.

Miller v. Stewart.

and the rule is not now to be doubted. But as to the principle upon which a razure avoids a deed, it is not too much to say, that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own Courts, lean against the excessive rigour with which some writers and some cases disfigure it. In the case of the *United States v. Cutts*, (1 *Gall.* 69.) a bond, that had been cancelled and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, was still held, and rightly held, to be sustainable as the deed of the party. In the case of *Speak et al. v. United States*, (9 *Cranch*, 28.) a bond was sustained, notwithstanding the striking out of one joint and several co-obligor, in the absence of the others, and the insertion of another. And so, as to revenue bonds, there is not a Court of the United States which has not sustained them against the plea of *non est factum*, notwithstanding that both sum and parties have been inserted after the execution by one of the obligors, and this, in his absence, because the contract was not altered, and the good sense of the law prevailed against its technicalities.

There is a great paucity of decisions, in modern times, on the subject of razures and interlineations. If we mount to its origin, we find it, in the Year-Books, and in *Perkins*, who cites them, given as the ground of suspicion and inquiry. And so, unquestionably, it ought to be, and frauds or mutilations, to which the parties having the custody of deeds are privy, cannot be taken too strongly

1824.

Miller v. Stewart.

against them. But when we encounter the doctrine, as laid down in *Pigot's* case, "that when a deed is altered in a point material, by a stranger, without the privity of the obligee, even by drawing a pen through the midst of a material word, that it shall be void," without reference to the fraud, privity, or gross negligence of the obligor, it certainly is time to pause; and I highly approve of the hesitation of my brother STORY, in *Cutt's* case, as to the authority of *Pigot's* case. As an adjudication, the value of that case should be limited to the single point, "that an immaterial interlineation, without the privity or command of the obligee, does not avoid the bond." The case does not call for the decision of another point, for it is upon a special verdict, and that the only question submitted. Yet, the Reporter, who seldom lets an opportunity escape him, that furnishes an apology for exemplifying his indefatigable research, makes it authority for a score of positive decisions, and the introduction to a mass of law, upon questions totally distinct. But it should be noted of this learned Judge, that his reports, like the text of Littleton, are only to be considered as the occasion or excuse for displaying his acquirements in the law learning of his day, and expressing his opinions upon juridical topics.

It is certainly true, that some of the decisions in the books have carried this doctrine a great way. As, for instance, the case of the lease of the Dean of Pauls, in which the counterpart expressed a rent of 27 pounds, and the tenant al-

tered his deed from 26 to 27 pounds, to make it accord with the counterpart and the true contract. Yet it was held to avoid his lease. (1 *Roll.* 27. *Cro. Eliz.* 627.) But the utmost that can be made of these cases is, that they apply to those instances in which the deed is, necessarily, an entire thing; and the reason assigned is, that the witness can no longer testify to the deed, as the deed which he saw delivered. Surely this reason is not applicable to the present case; for, let the witness be examined upon this instrument, as to the county of A., as introductory to the proof of the money collected in A., and so on as to the counties B., C., and D., and what is to prevent his proving the execution of this deed? That which may just as well have been executed in as many detached sheets of paper as there are counties, certainly has nothing of necessary entirety or indivisibility in its nature. Any other rule, as applied to this case, would, we conceive, be permitting frauds to be covered by a principle which was intended to prevent frauds.

Certificate for the defendant.

1824.

U. States
v.
Kirkpatrick.

[Surety.]

The United States v. Kirkpatrick and others.

A bond, given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a Collector of direct taxes and internal duties, appointed (under the act of the 22d of July, 1813, ch. 16.) by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the Collection Acts passed antecedent to the date of the bond.

The second commission, issued under the appointment, with the advice and consent of the Senate, operates a revocation of the first commission, issued under the appointment by the President, which was to continue until the end of the next session of the Senate, and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission.

In general, laches is not imputable to the Government: and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties.

The case of *The People v. Jansen*, (9 *Johns. Rep.* 332.) distinguished; and, so far as it conflicts with the present case, overruled.

In general, the debtor has a right to make the appropriation of payments; if he omits it, the creditor may make it: but neither party has a right to make an appropriation after the controversy has arisen.

In cases of long and running accounts, where balances are adjusted, merely for the purpose of making rests, the law will apply payments to extinguish the debts, according to the priority of time.

ERROR to the District Court for the Western District of Pennsylvania.

1824.

U. States v. Kirkpatrick.

This was an action of debt, commenced by the United States, in the Court below, against the defendants in error, J. Kirkpatrick and others, as the obligees of a bond, given by them to the United States, on the 4th of December, 1813, conditioned for the true and faithful discharge of the duties of the office of Collector of direct taxes and internal duties, by Samuel M. Reed, who had been appointed to that office by the President, on the 11th of November, 1813, and, by the terms of his commission, was to hold his office during the pleasure of the President, "and until the end of the next session of the Senate of the United States, and no longer." On the 24th of January, 1814, he was re-appointed to the same office, by the President, by and with the advice and consent of the Senate, and by the new commission issued to him, was to hold his office "during the pleasure of the President of the United States, for the time being." The pleadings upon which the cause was tried in the Court below, were extremely informal and confused, but they resulted substantially in the following questions of law, upon which the Judge instructed the jury, and a bill of exceptions was taken.

1. Whether the liability of the sureties to the bond, was limited to the duties and obligations imposed upon the Collector by the act of the 22d of July, 1813, ch. 16, and other acts relating to the assessment and collection of direct taxes and internal duties, passed antecedent to the execution of the bond, thus excluding the liability for mo-

1824.

U. States v. Kirkpatrick.

neys collected under subsequent statutes? Upon this point, the Court below instructed the jury that the responsibility of the sureties did not extend to the obligations created by the subsequent statutes.

2. Whether the jury were at liberty to impute laches to the government, from the delay of the proper officers to call the Collector to account, at the periods prescribed by law, from the year 1814 to 1818? The Court left it to the jury to decide whether, under the circumstances of the case, the Government had not waived its resort to the sureties.

3. Whether the responsibility of the sureties extended beyond the duration of the first commission? Upon this point, the Court below charged the jury, that the responsibility of the sureties extended to the re-appointment of the Collector under the new commission, until his duties and obligations were varied by the statutes enacted subsequent to the date of the bond.

4. How the payments, which had been made by the Collector, were to be appropriated? The balance found due in each account, had been carried forward to the succeeding account, and the Court was of opinion, that the Government could not make the appropriation, at the time of the trial, so as to apply the payments to the extinguishment of debts due subsequent to the time when the sureties ceased to be liable.

Upon these instructions a verdict was found for the defendants, upon which a judgment was rendered in the Court below, and the cause was brought by writ of error to this Court.

1824.

U. States v. Kirkpatrick.

March 17th.

The *Attorney-General*, for the plaintiffs, mentioned the extreme laxity of the pleadings in the Court below, not with a view of preventing a decision upon the merits, which was very much desired by the Government, but in the hope of producing some reform. He argued, (1.) That the appointment of the Collector was permanent, neither limited in point of time, nor to the acts of Congress then in force, but extending to all laws on the subject of direct taxes and internal revenue, which might be passed during his continuance in office. The act of the 22d of July, 1813, ch. 544. [xvi.] makes a permanent partition of the whole territory of the United States into collection districts, preparatory to other distinct and separate laws, which were afterwards to follow. It looks to all future laws. There being, then, no existing law in force, all the laws to which the bond could refer were prospective. The case of the *People v. Jansen*,[a] which had been referred to in the Court below, was distinguishable, in several particulars, from the present. (2.) The instruction given to the jury, authorizing them to impute laches to the Government, was erroneous. Even in the case of private individuals, mere delay in proceeding against the principal debtor will not discharge a surety.[b] (3.) The charge of the Judge below was also erroneous, in authorizing the jury to apply the payments made by the Col-

[a] 9 *Johns. Rep.* 332. 340.

[b] The Trent Navigation Company v. Harley, 10 *East. Rep.* 34. Nares v. Rowles, 14 *East. Rep.* 510.

1824.

U. States v. Kirkpatrick.

lector to the balances due, under the acts in force when the bond was given. The rule is settled, that where debts are due on two different accounts, the debtor may make the application to either, at the time of payment. But, if he omit to do it, the creditor has a right to determine to which it shall be applied.[a]

Mr. *Alexander* and Mr. *Foster*, contra, contended, (1.) that the bond entered into by the defendants in error, was no farther obligatory on them, than for the faithful performance of the official duties of Reed, during the continuance of the appointment recited in the condition. The first commission was to continue in force, by its own terms, only until the end of the next session of the Senate; and the new commission was a revocation of it. Being with the advice and consent of the Senate, it is by a different authority, and the President might have nominated a different person. By carrying forward the balance due by Reed, under the first commission, to his account, as Collector under the second commission, it was shown, that his personal responsibility was looked to, and that no resort was intended to be had against the sureties. It has been held, that a guarantee of a partnership debt is not liable, where the partnership debt is discharged, by carrying the proportions of each partner to his separate account, without notice to

a Peters v. Anderson, 1 *Marsh. Rep.* 238. Newmarch v. Clay, 13 *East. Rep.* 239.

the guarantee.[a] This must be upon the principle, that the plaintiff had shown, by his own act, that he did not intend to resort to the surety, and that he looked to the debtors in a different capacity from that in which the guaranty was given. In *Lord Arlington v. Merrick*,[b] the action was debt on bond, dated the 1st of May, 18 *Car.* II., conditioned that, whereas, on the 30th of April, 1667, the plaintiff had deputed T. Jenkins to execute said office, from the 24th of June next for six months following, if said T. J. shall, &c., for and during all the time he shall continue Deputy Post Master, well, truly, and faithfully do, execute, and perform all the duties, &c. The defendant pleaded performance generally; and a breach was assigned on the last day of September, 22d of the King; and defendant demurred. The Court held, that the condition should refer to the recital only, by which the defendant was bound only for six months, and not longer.[c] This had been considered as a leading case ever since; and other analogous cases might be cited.[d] (2.) The subse-

a Cremer v. Higginson, 1 *Mason's Rep.* See also, 3 *Wheat. Rep.* 148. Note *a.* and the cases there collected. Commonwealth v. Fairfax, 4 *Hen. and Mumf.* 208., recognised by the Court to be law. Anderson v. Longden, 1 *Wheat. Rep.* 91.

b 3 *Saund.* 411.

c *Id.* 415. Sergt. Williams' Note (5.)

d Wright v. Russell, 3 *Wils.* 530. S. C. 2 *W. Bl. R.* 934. African Company v. Mason, cited in Stubbs v. Clough, *Str.* 227. Barker v. Parker, 1 *T. R.* 287. Barclay v. Lucas, 1 *T. R.* 291. Note *a.* Metcalf v. Bruin, 12 *East. Rep.* 400. The Wardens of St. Saviour v. Bostwick, 5 *Bos. & Pul.* 175. Commonwealth v. Baynton, 4 *Dall.* 282. Armstrong v. the United States, 1 *Peters' Rep. C. C.* 46. Liverpool Waterworks Company v. Atkinson, 6 *East Rep.* 507.

1824.

U. States v. Kirkpatrick.

quent acts of Congress on the same matter had so varied and enlarged the duties of the Collector, as created by the statutes in force at the time the bond was given, that the sureties were not liable for moneys received under those acts, even admitting that they were liable beyond the continuance of the first commission. The learned counsel entered into a critical examination of the acts, to show that the duties of the officer were thus varied and enlarged, and cited the authorities in the margin to support the legal principle, that such alteration in his official duties would discharge the sureties from further liability.[a] (3.) That laches might be imputed to the government, through the negligence of their officers.[b] In the case of mere private individuals, the surety, or guarantee, may pay the debt, and proceed in Chancery to compel the creditor to enforce his demand against the principal, which he could not do in the case of the Government; and that was a sufficient reason to justify the Court below in leaving it to the jury to say, whether the neglect of the officers of the treasury was not a waiver of the guaranty.[c] And even

a Bartlett v. the Attorney-General, *Parker*, 277. *Comyn. Dig.* tit. Chancery, (2.) Stratton v. Rastall, 2 *T. R.* 366 Ludlow v. Simond, 2 *Caines' Cas. in Err.* 3 *Wheat. Rep.* 155. Note *a.*, and cases there cited. 1 *Bos. & Pull.* 419. King v. Baldwin, 2 *Johns. Ch. Rep.* 554. 18 *Ves.* 20.

b The People v. Jansen, 7 *Johns. Rep.* 332. Hunt v. U. S. 1 *Gall.* 34.

c King v. Baldwin, 2 *Johns. Ch. Rep.* 56. Wright v. Russell, 2 *W. Bl.* 934. 5 *Vin.* 108. pl. 14. Paine v. Packard, 13 *Johns. Rep.* 174.

in the case of a private individual, gross laches, or fraud, on the part of the creditor, will discharge the surety.[a] (4.) The Court below were not bound to direct the jury, that the subsequent payments should be applied to discharge subsequent balances; nor did it appear by the record, that the United States Attorney made such an election. The rule as between a private debtor and creditor, as to the appropriation of payments, is not applicable where the receiver is a public officer.[b] Where the whole case is complicated of law and fact, the whole may be left to the jury, unless some particular point is selected by the counsel for the consideration of the Judge, and his opinion is asked upon that point.[c]

The *Attorney-General*, in reply, insisted, that there was no limitation to the obligation of a surety, unless expressed on the face of the bond, or implied in law. In *Lord Arlington v. Merrick*,[d] the condition of the bond was expressly limited to six months. So all the other cases cited would be found to have some distinguishing feature; such as that the condition was to be faithful to the plaintiff, and the breach assigned was, that the defendant had failed to pay the plaintiff and his partner,

a Philips v. Astling, 2 *Taunt.* 206. Warrington v. Forbes, 8 *East. Rep.* 245. Duval v. Trask, 13 *Mass. Rep.* 154. Hunt v. United States, 1 *Gall.* 34. 3 *Wheat. Rep.* 154, 155. Note *a*, and cases there collected.

b United States v. January, 7 *Cranch*, 575.

c Boorman v. Smith, 2 *Serg. & Rawl.* 464.

d 3 *Saund.* 411.

1824.

U. States v. Kirkpatrick.

whom he had subsequently taken into the firm. There it was held, that the surety was not liable for subsequent defaults.[a] In the case of the *People v. Jansen*,[b] the statute of New-York made it the express duty of the public officers to prosecute diligently, and with effect, the suits which had been commenced against the principal; and their neglect to perform this duty, actually occasioned the loss for which the sureties were sought to be made responsible. So, also, in the exchequer case of *Bartlett v. the Attorney-General*,[c] a new duty was laid upon coals, by a statute passed subsequent to the giving of the bond by the Collector, under which statute a new deputation was given, and new security taken; it was, therefore, very properly held, that the sureties on the first bond were not liable for the moneys received on account of this duty. But, in the present case, the bond is to continue during his continuance in office, and is to secure all duties collected during that term. If it were an annual office, it might have been different.[d] As to the two commissions, the practice of the Government has been, to consider them as one continuing commission. A different construction would render the bond practically ineffectual. The objection which seeks to impute laches to the Government, on account of the mere omission of its officers to proceed against the

a 3 *Wils.* 530.
b 9 *Johns. Rep.* 332. 340.
c *Parker*, 277.
d Curling v. Chalklen, 3 *Maul. & Selw.* 502.

principal, on every periodical omission to account, is entirely novel, and, if it were to prevail, would be equally fatal to the most important interests of the public, and injurious to the sureties themselves, as it may often happen that the balance consists of outstanding duty bonds, which may soon afterwards be collected, and liquidate the balance. The law does not create any obligation to sue, which does not exist in the case of a private guaranty.

1824.

U. States v. Kirkpatrick.

Mr. Justice STORY delivered the opinion of the Court.

March 20th.

In this case, the Court cannot but lament the extreme irregularity and laxity of the pleadings, if, indeed, the informal minutes upon the record be entitled, in any measure, to the appellation of pleadings. Some apology is, indeed, to be found in the asserted inaccurate local practice in the State Courts; but it is impossible, without breaking down the best settled principles of law, not to perceive that the very errors in the pleadings are, of themselves, sufficient to justify a reversal of the judgment, and an award of a repleader. The agreement of the parties, filed in the case, may, indeed, help the formal defects, but cannot be admitted to dispense with the substance of appropriate pleas; for, otherwise, it would be difficult to ascertain what was tried, or to be tried; and we might as well dispense with the declaration itself, as with the subsequent pleadings. It is to be hoped that, in future, a more cor-

1824.

U. States v. Kirkpatrick.

rect practice will find its way into the District Court.

Three errors have been insisted upon by the Government, as contained in the charge of the Court below. The first is, that the Judge limited the responsibility of the sureties upon the Collector's bond, to the duties and obligations imposed by the acts of Congress, antecedently passed, thus excluding the liability created by the subsequent statutes. The second is, the direction of the Judge, that the jury were at liberty to impute laches to the Government, from the delay to call the Collector to account, at the periods prescribed by law, and the consequent injury to the sureties. The third is, the direction, that the payments made by the Collector might, under the circumstances, be applied to the discharge of the balance due from collections made under the acts which were in force when the bond was given.

Liability of the sureties confined to the duties and obligations created by the acts passed antecedent to the date of the bond.

As to the first point. The Collector was appointed, under the act of the 22d of July, 1813, ch. 16., for the assessment and collection of direct taxes and internal duties. In the 2d section it provides, "That one Collector, &c. shall be appointed for each of the said collection districts, &c.; and if the appointment of the said Collectors, or any of them, shall not be made during the present session, the President of the United States shall be, and is hereby, empowered to make such appointment, during the recess of the Senate, by granting commissions, *which shall expire at the end of their next session.*" The 18th section of the same act further provides, "that each Collec-

1824.

U. States v. Kirkpatrick.

tor, &c. shall give bond, with one or more good and sufficient sureties, &c. in at least double the amount of the taxes assessed in the collection district for which he may be appointed, which bond shall be payable to the United States, with condition for the true and faithful discharge of the duties of his office, according to law, and particularly for the due collection and payment of all moneys assessed upon such district." The condition of this bond principally refers, as will appear on an inspection of the act, to assessments of *direct* taxes. But the subsequent acts, (act of the 24th of July, 1813, ch. 21. s. 14., and ch. 24. s. 6., and ch. 25. s. 3. and s. 10., and the act of the 3d of August, 1813, ch. 38. s. 2. and s. 5., and ch. 51. s. 13.) laying internal duties, contain provisions enlarging the authority of the Collector; and the act of 2d of August, 1813, ch. 55., expressly extends the liability under the bond, to the due collection and payment of all moneys accruing from the duties laid by these acts. So that there is no doubt that, as to bonds subsequently given, the language of the condition is to receive an interpretation which shall secure the fidelity of the Collector under all these acts. The Collector, whose bond is in question, was appointed by the President, on the 11th of November, 1813, and, by the terms of his commission, he was to hold his office during the pleasure of the President, "and until the end of the next session of the Senate of the United States, *and no longer*." The bond in question was given by the Collector, and by the defendants, as his sureties, on the 4th of

1824.

U. States v. Kirkpatrick.

December, of the same year; and it follows, in its terms, the requirements of the act of Congress. On the 24th of January, 1814, the President, with the advice and consent of the Senate, re-appointed the party Collector, &c.; and by his new commission, he was to hold his office "during the pleasure of the President of the United States for the time being." No new bond was taken under this commission. Under these circumstances, the District Judge held, that the liability of the sureties was strictly confined to the duties and obligations created by the acts passed antecedent to the date of the bond. And we are of opinion that this is the true construction of the condition of the bond. There is nothing in the original act, under which the appointment was made, which contemplates a permanent and continuing liability for all duties under all laws which might be subsequently passed. In its terms, the condition, as expounded by the other parts of the act, had a principal reference to the assessments of direct taxes; and it is extended farther in its operation, only by the express and positive directions of the act of 2d of August, 1813, ch. 55. s. 1. To this extent, therefore, it may well be of force; but to go beyond it, would be to exceed the legislative declaration, and create a general, where the act had fixed a limited, responsibility. If the argument on behalf of the Government were correct, the provision, so solicitously placed in this last act, was wholly unnecessary; for the liability would expand with the new duties imposed by every successive act of the Legislature. But the act itself

furnishes no ground for such an exposition; and we do not feel ourselves at liberty to give to contracts of this sort further efficacy than the laws and the parties must have had in their contemplation.

1824.

U. States v. Kirkpatrick.

The liability of the sureties confined to the duration of the first commission.

This point, however, becomes of comparatively small importance in the cause, if another, which has been argued in this connexion, cannot be maintained. We allude to the question as to the duration and force of the original commission of the Collector. Strictly speaking, this question does not arise upon the present record. For, although the Court below decided, that, in point of law, both commissions constituted but one continuing appointment, the second commission operating only as a confirmation of the first, yet, as the verdict was found for the defendants on another ground, and no exception was taken by them, it is not matter of error which can be assigned upon the present occasion. But, as it is manifest that the same question must arise upon any subsequent trial, if there should be a reversal of the judgment, and will form a most important, and, perhaps, decisive, ground of argument; and as all the parties are desirous of our opinion on this point, and it has been fully argued from its bearing on the other points in the cause, and might have been material, if our decision on the first point had been different, we have no hesitation in declaring our opinion, that the decision of the Court below was founded in mistake.

The act under which this appointment was made, authorizes the President, in the recess of the Se-

1824.

U. States v. Kirkpatrick.

nate, to make appointments, by granting commissions, *which shall expire at the end of their next session*. The first commission is, as has been already stated, in conformity to this provision of the act, and is, by express terms, limited to continue to the "end of the next session of the Senate, and *no longer*." It follows, therefore, both by the enactment of law and the form of the grant, that the first commission must have expired of itself at that period; and, as the next session of the Senate ended in April, 1814, that is the utmost extent to which it could reach. The bond in question was given with express reference to this commission; and its obligatory force was, consequently, confined to acts done while that commission had a legal continuance, and could not go beyond it. And here would have been the natural termination of the liability. But, in the mean time, a new appointment was made by the President, with the advice and consent of the Senate; and as soon as that was accepted by the Collector, it was a virtual superseding and surrender of the former commission. The two commissions cannot be considered as one continuing appointment, without manifest repugnancy. The commissions are not only different in date, and given under different authorities and sureties, but they are of different natures. The first is limited in its duration to a specified period; the second is unlimited in duration, and during the pleasure of the President. If the latter operated merely as a confirmation of the former, then it confirmed its existence only during the original period fixed by the law. But

such an effect is not pretended, and would be irreconcilable with the terms and intent of the commission. It has been suggested, that the practice of the Government has been, to consider such commissions as one continuing commission. But whatever weight the practice of the Government may be entitled to, in cases of doubtful construction, it can have no influence to change the clear language of the law. In short, if the nomination to, and approval by the Senate, was a mere confirmation, and not equivalent to a new appointment, there was no necessity for the second commission; and yet, the argument supposes, that it could not be dispensed with; for if no commission had been issued, the first, by its own limitation, would have expired.

Laches not imputable to the Government.

Then, as to the point of laches, we are of opinion that the charge of the Court below, which supposes that laches will discharge the bond, cannot be maintained as law. The general principle is, that laches is not imputable to the Government; and this maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities. On the other hand, the mischiefs to the agents and their sureties would be scarcely less tolerable. For if, where the laws, as in the

1824.

U. States v. Kirkpatrick.

present instance, require quarterly accounts and settlements, a mere omission to account is to be deemed a breach of the bond, for which a suit must be immediately brought, upon the peril of loss from imputed laches; the Collectors and their sureties would be oppressed with the most expensive and vexatious litigation; and their whole real estate, which by law is subjected to a lien, upon the commencement of a suit, would be perpetually embarrassed in its transfers. This consideration of public or private inconvenience, is not to overrule the settled principles of law, but it is certainly entitled to great weight, where a new doctrine is to be promulgated. It is admitted, that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature, between private individuals. Such is the clear result of the authorities. Why, then, should a more rigid principle be applied to the government? a principle which is at war with the general indulgence allowed to its rights, which are ordinarily protected from the bars arising from length of time and negligence? It is said, that the laws require, that settlements should be made at short and stated periods; and that the sureties have a right to look to this as their security. But these provisions of the law are created by the Government for its own security and protection, and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the surety. The surety may place confidence in the agents of the Government, and rely on their fidelity in office; but he has of this the same means

1824.

U. States v. Kirkpatrick.

of judgment as the Government itself; and the latter does not undertake to guaranty such fidelity. No case has been cited at the bar, in support of the doctrine, except that of *The People* v. *Jansen*, in 7 *Johns. Rep.* 332. In respect to that case, it may be observed, that it is distinguishable from the present in some of its leading circumstances. But if it were not, we are not prepared to yield to its authority. It is encountered by other authorities, which have been cited at the bar; and the total silence in the English books, in a case of so frequent occurrence, affords strong reason to believe, that it never has been supposed, that laches would be fatal in the case of the Government, where it would not affect private persons. Without going more at large into this question, we are of opinion, that the mere laches of the public officers constitutes no ground of discharge in the present case.

Appropriation of payments.

The last ground respects the manner in which the Court below laid down the law respecting the appropriation of payments. In our opinion, there is no error in the charge on this point. The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments, according to its own notions of justice. It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial. In cases like the present, of long and running accounts, where debits and credits are perpetually occur-

1824.

Osborn v. U. S. Bank.

ring, and no balances are otherwise adjusted than for the mere purpose of making rests, we are of opinion, that payments ought to be applied to extinguish the debts according to the priority of time: so that the credits are to be deemed payments *pro tanto* of the debts antecedently due.

Upon the whole, it is the opinion of the Court, that for the error of the District Court, on the question of laches, the judgment ought to be reversed, and a *venire facias de novo* awarded, with directions, also, to allow the parties liberty to amend their pleadings.

[Constitutional Law. Chancery.]

Osborn and others, *Appellants*,

v.

The President, Directors, and Company of the Bank of the United States, *Respondents*.

The act of incorporation of the Bank of the United States gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank.

This provision in the charter is warranted by the 3d article of the Constitution, which declares, that "the judicial power shall extend to *all cases*, in law and equity, arising under this Constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority."

It is unnecessary for an attorney or solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal.

Whatever authority may be necessary for an attorney or solicitor to appear for a natural or artificial person, it is not a ground of re-

versal for error, in an appellate Court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the Judiciary Act of 1789, ch. 20.

In general, the answer of one defendant in equity cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply.

Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him.

An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges.

In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the Court, (as in the case of a sovereign State,) the rule may be dispensed with.

A Court of equity will interpose by injunction to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks.

The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and, as the State itself cannot, according to the 11th amendment of the Constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws.

A State cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the Bank, may be restrained by injunction from the Circuit Court.

APPEAL from the Circuit Court of Ohio.

The bill filed in this cause, was exhibited in the Court below, at September term, 1819, in the name of the respondents, and signed by solicitors of the Court, praying an injunction to restrain Ralph Osborn, Auditor of the State of Ohio,

1824.

Osborn v. U. S. Bank.

from proceeding against the complainants, under an act of the Legislature of that State, passed February the 8th, 1819, entitled, "An act to levy and collect a tax from all banks, and individuals, and companies, and associations of individuals, that may transact banking business in this State, without being allowed to do so by the laws thereof." This act, after reciting that the Bank of the United States pursued its operations contrary to a law of the State, enacted, that if, after the 1st day of the following September, the said Bank, or any other, should continue to transact business in the State, it should be liable to an annual tax of 50,000 dollars on each office of discount and deposit. And that on the 15th day of September, the Auditor should charge such tax to the Bank, and should make out his warrant, under his seal of office, directed to any person, commanding him to collect the said tax, who should enter the banking house, and demand the same, and if payment should not be made, should levy the amount on the money or other goods of the Bank, the money to be retained, and the goods to be sold, as if taken on a *fi. fa.* If no effects should be found in the banking room, the person having the warrant was authorized to go into every room, vault, &c. and to open every chest, &c. in search of what might satisfy his warrant.

The bill, after reciting this act, stated, that Ralph Osborn is the Auditor, and gives out, &c. that he will execute the said act. It was exhibited in open Court, on the 14th of September, and, notice of the application having been given to the defen-

dant, Osborn, an order was made, awarding the injunction on the execution of bonds and security in the sum of 100,000 dollars; after which, a subpœna was issued, on which the order that had been made for the injunction was endorsed by the solicitors for the plaintiffs; and a memorandum, that bond with security had been given by the plaintiffs, was endorsed by the clerk; and a power to James M'Dowell to serve the same, was endorsed by the Marshal. It appeared, from the affidavit of M'Dowell, that both the subpœna and endorsement were served on R. Osborn, early in the morning of the 15th. On the 18th of the same month of September, a writ of injunction was issued on the same bill, which was served on R. Osborn and on John L. Harper. The affidavit of M'Dowell stated, that he served the writ on Harper, while on his way to Columbus, with the money and funds on which the same were to operate, as he understood; and that the writ was served on Osborn, before Harper reached Columbus.

In September, 1820, leave was given to file a supplemental and amended bill, and to make new parties.

The amended bill charges, that, subsequent to the service of the subpœna and injunction, to wit, on the 17th of September, 1819, J. L. Harper, who was employed by Osborn to collect the tax, and well knew that an injunction had been allowed, proceeded by violence to the office of the Bank at Chilicothe, and took therefrom 100,000 dollars, in specie and bank notes, belonging to, or in deposit with, the plaintiffs. That this money

1824.

Osborn v. U. S. Bank.

was delivered to H. M. Curry, who was then Treasurer of the State, or to the defendant, Osborn, both of whom had notice of the illegal seizure, and paid no consideration for the amount, but received it to keep it on safe deposit. That Curry did keep the same until he delivered it over to one S. Sullivan, his successor as Treasurer. That neither Curry nor Sullivan held the said money in their character as Treasurer, but as individuals. The bill prays, that the said H. M. Curry, late Treasurer, S. Sullivan, the present Treasurer, and R. Osborn, in their official and private characters, and the said J. L. Harper, may be made defendants; that they may make discovery, and may be enjoined from using or paying away the coin or notes taken from the Bank, may be decreed to restore the same, and may be enjoined from proceeding further under the said act.

The defendant, Curry, filed his answer, admitting that the defendant, Harper, delivered to him, about the 20th of September, 1819, the sum of 98,000 dollars, which, he was informed and believed, was a tax levied of the Branch Bank of the United States. He passed this sum to the credit of the State, as revenue; but, in fact, kept it separate from other moneys, until January or February, 1820, when the moneys in the treasury were seized upon by a committee of the House of Representatives; soon after which he resigned his office, and the moneys and bank notes, in the bill mentioned, still separate from other moneys in the treasury, came to the hands of S. Sullivan, the

present Treasurer, who gave a receipt for the same.

The defendant, Sullivan, failing to answer, an attachment for contempt was issued, on which he was taken into custody. He then filed his answer, and was discharged.

This answer denies all personal knowledge of the levying, collecting, and paying over, the money in the bill mentioned. It admits that he was appointed Treasurer, as successor to Curry, on the 17th of February, 1820, and that he entered the Treasury on the 23d, and began an examination of the funds, among which he found the sum of 98,000 dollars, which he understood was the same that is charged in the bill; but this was not a fact within his own knowledge. He gave a receipt as Treasurer, and the money has remained in his hands, as Treasurer, and not otherwise. The sum of 98,000 dollars remains untouched, out of respect to an injunction said to have been allowed by the Circuit Court, on a bill since dismissed. He admits the sum in his hands to correspond with the description in the bill, so far as that description goes, and annexes to his answer a description of the residue. He has no private individual interest in the money, and holds it only as State Treasurer; admits notice, from general report, and from the late Treasurer, that the said sum of 98,000 dollars was levied as a tax from the Bank, and that the Bank alleged it to be illegal and void.

The cause came on to be heard upon these answers, and upon the decrees *nisi*, against Osborn and Harper, and the Court pronounced a decree

1824.

Osborn v. U. S. Bank.

directing them to restore to the Bank the sum of 100,000 dollars, with interest on 19,830 dollars, the amount of specie in the hands of Sullivan. The cause was then brought, by appeal, to this Court.

Mr. *Hammond*, for the appellants, contended, that the decree was erroneous, for the following reasons:

1. Because, no authority is shown in the records, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because, the case made in the bill does not warrant the interference of a Court of Chancery by injunction or otherwise.

6. Because, if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes, that the Bank of the United States is not subject to the taxing

power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

1. A sufficient authority must be shown for the institution of every legal proceeding. This principle is peculiarly applicable to suits brought in the name of corporations; because, such a body must always appear by attorney, either to institute or defend a legal proceeding. It cannot appear in person, and it can only constitute an attorney by written power, under its common seal. This doctrine is not impugned by the decision of this Court in the case of the *Bank of Columbia v. Patterson.*[a] The old doctrine, that a corporation could not contract or promise, except by writing, under its common seal, is overruled in that case; and it was adjudged, that a contract made by a committee duly authorized for that purpose, binds the Corporation. It seems, also, to be intimated, that a Corporation may, by resolution, or other act, not under their common seal, duly appoint and authorize an agent, whose contracts would bind them; and the case of *Rex v. Bigg,*[b] is referred to as authority. But, upon looking into that case, it will be found, that the principle is merely laid down by counsel *arguendo;* and the counsel, by whom it is advanced, add, "But in case of any thing of consequence, or the employing any one to act in their behalf, in a matter which is not an ordinary service, a corporation

[a] 7 *Cranch*, 299.
[b] 3 *P. Wms.* 419.

1824.

Osborn v. U. S. Bank.

aggregate cannot do that without deed." Now, what can be of more consequence, than such a suit as this, commenced, in effect, against a sovereign State, by this corporation? In *Fleckner v. the Bank of the United States*,[a] the Court has gone no farther, than to determine that the board of Directors may, by resolution, authorize their Cashier to transfer bills or notes, the property of the Bank, and need not make a power under seal for that purpose. This is a very different matter from authority to prosecute such a suit as the present. It falls within the scope of the ordinary official duties of the Cashier. But even admitting that any express authority from the Bank, whether under the common seal or not, would have been sufficient in the present case, it is indispensable that such authority should be produced and filed. This has not been done, and therefore it must be concluded, that the suit is wholly unauthorized by the corporation, in whose name it has been commenced.

2. The answer of the defendant, Sullivan, contains no admission that the notes and coin were the property of the plaintiff, or that the injunction was violated in taking them from their possession. In *Hills v. Binney*,[b] the bill was filed by a creditor against an administrator, who, by his answer, stated, that he *believed* the debt was due. Mr. Fonblanque, for the plaintiff, expressed a doubt whether there was a sufficient foundation for a

a 8 *Wheat. Rep.* 338.
b 6 *Ves. jun.* 738.

decree. Lord Eldon inclined to think it sufficient; but Mr. Richards, as *amicus curiæ*, suggesting that it was doubtful, Mr. Fonblanque consented to exhibit an interrogatory. The admission there was much stronger than any in the answer of the defendant, Sullivan. He has no where said, that he believes the notes and coin to be the property of the plaintiffs; on the contrary, he avers that, personally, he knew nothing about the collection of the tax, except from general report, and the information of the late Treasurer. No proof whatever, of general report, or of the declarations of the late Treasurer, would be sufficient to establish any fact. Sullivan's admission of this general report, and of this information, gives it no higher character than it would be entitled to upon being proved. The admission does not support the decree, and there is no other proof in the case.

3. The decree against the defendants, Osborn and Harper, so far as it requires them to pay the amount of the coin and notes specified in the bill, to the plaintiffs, is erroneous, because the bill shows that the same were not in the possession of those defendants. The foundation upon which a Court of equity proceeds, is to redress the party under its protection, not to punish the wrongdoers. When punishment is the object, process for contempt is resorted to. Equity will look at the situation of all the parties, and will distinguish among the defendants, who can, and who cannot, comply with such decree, as, upon equitable principles, must be pronounced. A plaintiff in equity cannot

1824.

Osborn v. U. S. Bank.

fasten upon the specific subject for which he sues, and obtain an order retaining it in the hands of one defendant, subject to a final decree, and obtain a decree for restitution against other defendants, who, by his own showing, have not the subject in their power. Admitting that it was necessary to make all concerned in the transaction defendants, in order to ascertain who had possession of the subject, yet when that fact was ascertained, no decree (except as to costs) could be pronounced against those who were not in possession of it, and who claimed no interest in it. Where a party acts under an authority which he supposes valid, but which the Court adjudge to be void, he is not to be regarded as a principal wrongdoer, further than the purposes necessarily require. In a Court of equity, he is equitably, not vindictively, responsible.

4. Under the circumstances of the case, the defendants ought not to be chargeable with interest upon the coin in question. It may be admitted, that, in general, where a defendant has wrongfully possessed himself of the plaintiff's money, and thus deprived him of the use of it, equity may compel him to account for interest. But here, the injunction forbidding the use of the coin was obtained at the plaintiff's request. Its effect and operation were, to place it in the custody of the law. The defendants could not use it, and, consequently, cannot be charged with interest.

5. No case is made out in the original bill, warranting the interposition of a Court of equity by injunction. The injunction, if sustained at all,

1824.

Osborn v. U. S. Bank.

must be upon one of two principles; either that it was necessary to secure to the Bank the enjoyment of a franchise or exclusive privilege, or to protect it from an irreparable mischief.

All the cases where injunctions have been granted, to protect parties in the enjoyment of a franchise, proceed upon the principle, that the injury was consequential, not direct, and that it would be difficult, if not impossible, to estimate the damages. Thus, the proprietor of a machine, for which a patent has been granted, or of a book for which a copy-right has been obtained, may have an injunction to prevent others from using the machine, or vending the book. So, also, the proprietor of a toll-bridge or a turnpike road, may have an injunction to prevent others from constructing and using a bridge or road, where it would be contrary to the terms of the plaintiff's grant. But in all these cases, the injunction is granted upon the principle, that the act complained of is not only unlawful, and, therefore, unjustifiable, but that it is, in addition to its illegality, of a character for which compensation cannot be made in damages. But no case can be found of an injunction granted to protect the proprietor, in the instances mentioned, against the commission of a mere trespass, where the party could have redress in damages, and where the trespass would not interfere with the franchise, further than every wrong interferes with the right of the individual upon whom it is inflicted. Wherever an injunction is granted for the protection of a franchise, the case must show that the party has the sole and exclu-

1824.

Osborn v. U. S. Bank.

sive right to do the act, or transact the business, which he seeks to inhibit the defendant from performing. Thus, an injunction has been allowed to the *East India Company*, to prevent an interference witht he trade exclusively secured to them by their charter.[a] But, would an injunction be granted against seizing, by violence, the goods they may import, or doing injury to their ships when in port? So, a person entitled to an exclusive right of ferry, has been allowed an injunction to prevent ferrying by others.[b] But it does not follow that an injunction would be allowed, to prevent an injury which the proprietor might apprehend to his boats, or their tackle, or to the landing place. Here the original bill does not present a case for an injunction to secure the enjoyment of a franchise upon these principles. It seeks to be protected against an injury amounting to a trespass, and nothing more. The bill claims, that it is one of the corporate franchises of the Bank, to establish offices of discount and deposit, and transact banking business, any where, according to the discretion of the directors. But it is only when the franchise confers a sole and exclusive right, that the jurisdiction of a Court of equity attaches, and it then attaches only so as to prevent others from invading that right, by attempting an actual participation in its use and enjoyment. It cannot be pretended, that the charter of the Bank confers upon it any exclusive right to carry on the

a 1 *Ves.* 127.
b 1 *Ves.* 476.

trade of banking. It cannot, therefore, come into a Court of Chancery to seek protection against any person for violating an exclusive franchise. If it be said, that the privilege of exemption from State taxation is one of this nature, the answer is, that this privilege operates, not against individuals, but against the power authorized to lay and collect taxes. It does not operate against any individual, who is invested with no power of taxation, but who commits a trespass under colour of levying a tax.

Nor can the injunction be supported, upon the ground that the case presented required this extraordinary interference of the Court, to protect the Bank against irreparable mischief. It is but recently that injunctions have been issued to restrain the commission of an act amounting to trespass only. Lord Hardwicke says, "every common trespass is not a foundation for an injunction in this Court."[a] Lord Kenyon, M. R., asserts, that "a Court of Chancery will not interfere, when the matter is merely in damages."[b] And Lord Eldon says, "I remember when, in a case of trespass, unless it grew into a nuisance, an injunction would have been refused."[c] The first reported case of an injunction in trespass, is that of *Mitchel v. Dorrs*, where the defendant had begun to dig coal in his own ground, and worked into that of the plaintiff. Lord Eldon said, "That is trespass, not waste. But I will grant the injunction

a 3 *Atk.* 21.
b 2 *Bro. C. C.* 65.
c 7 *Ves. jr.* 307.

1824.

Osborn v. U. S. Bank.

upon the authority of a case before Lord Thurlow."[a] This last case was where the landlord owned two adjacent closes, and demised one. The tenant commenced mining for coal in the demised close, and continued to mine until he entered the close not demised. Lord Thurlow, after great hesitation, granted the injunction, upon the ground, as Lord Eldon himself asserts, of the irreparable ruin of the property as a mine, and it being a species of trade; and upon the principle of the Court enjoining in matters of trespass, where irreparable damage is the consequence.[b] The next case was that of *Hanson v. Gardiner*,[c] where an injunction was granted upon the application of a person claiming in different rights, one of which was as lord of the manor, under the statute of Merton, against trespass by the commoners, and, upon hearing, the injunction was dissolved. An application was afterwards made by the devisees of an equity of redemption, in receipt of the rents, for an injunction against the mortgagee, claiming, as heir, to restrain him from cutting timber; but it was refused.[d] An injunction was subsequently granted, at the application of the landlord, to restrain a person charged to be in collusion with the tenant, from cutting or removing timber, or committing any other waste. Lord Eldon puts this upon the ground, that it partakes more of

a 6 *Ves. jr.* 147.
b 7 *Ves. jr.* 307.
c 7 *Ves. jr.* 305.
d Smith v. Collyer, 8 *Ves.* 89.

waste than in general cases, and says, he will not be bound as to what is to be done upon a mere trespass; though, he adds, that it is strange if there cannot be an injunction in that case, to prevent irreparable mischief. The next case of an injunction in trespass, is *Crockford v. Alexander*.[a] The plaintiff contracted to sell an estate to the defendant, who got possession from the tenant, and began to cut timber. The injunction was allowed; but the Lord Chancellor says, "I will grant this protection against cutting timber, until the power of the Court to grant the injunction against trespass shall be fully discussed." It is singular, that in this case Lord Eldon should again state the case decided by Lord Thurlow, respecting the mines; and add, that Lord Thurlow considered it trespass, not waste, and refused the injunction. The injunction is justified by analogy; and reference is made to *Robinson v. Byron*,[b] which, upon examination, will be found not to be a case of trespass, but one where the defendant, having a command of the water, was about so to use it, within his own premises, as to throw it out and deluge the plaintiff: it was destruction. In *Thomas v. Oakley*,[c] the plaintiff was seised in fee of an estate, in which there was a stone quarry, and the defendant held a contiguous estate, with a right to enter the quarry and take stone for a special purpose, but was taking it for other purposes.

a 15 *Ves.* 137.

b 1 *Bro. C. C.* 588.

c 18 *Ves.* 185. See also Kinder v. Jones, 17 *Ves.* 110. and Earl Cowper v. Baker, *Id.* 127.

1824.

Osborn v. U. S. Bank.

The counsel insisted that it was the course of modern authority, to afford assistance in cases of coal mines, timber, &c. to prevent irremediable mischief and injury, which damages could not compensate. Lord Eldon held, that upon the decisions which had taken place, the bill must be sustained. He refers to the first case decided by Lord Thurlow, and his hesitation, and adds, "But I take it that Lord Thurlow changed his opinion upon that; holding, that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not all the relief to which, in equity, he was entitled. The interference of the Court is to prevent your removing that which is his estate. If this protection would be granted in the case of timber, coals, and lead ore, why is it not equally to be applied to a quarry?"

There is no analogy between these cases and the present. No estate of a stable and permanent character is to be injured. The naked suggestion in the bill is, that the plaintiffs verily believe that the defendant threatens to do an act amounting to a mere trespass. Lord Eldon says, "I never would grant an injunction, upon an affidavit stating that the deponent verily believes the defendant is about to cut timber."[a] Some act must be done, moving towards the commission of wrong; such as sending a surveyor to mark trees.[b] None of the cases stand upon a mere *quia timet*. But

a Etches v. Lance, 7 *Ves.* 417.
b Jackson v. Cator, 5 *Ves.* 690.

here, not even a belief that the defendant meant to commit the trespass is asserted. Regard the case as against Osborn only and individually; separate him from the State tax, and from his office as Auditor; and whether the bill is brought to protect a franchise or prevent a trespass, it cannot be maintained.

6. But, in fact, the bill is against the State, and as such, the Circuit Court has no jurisdiction of it. In this bill, all the component parts of a case against the State, are set out in their regular and proper order: the privilege; the measures set on foot to invade it; their unjust and oppressive character, and the prayer for relief against them. There is no allegation against any individual; no relief is prayed against any person in his private and individual character. The acts complained of, are the acts of the Legislature; the party charged with aggression on the plaintiff's right, is the Legislature; the relief prayed, is against the acts of the Legislature; the State is the sole party in interest. It is true, process is not prayed or awarded against the State; but the bill is substantially the same as it would have been, had the plaintiffs intended to make the State a formal party by process. In all ordinary cases, if the Court sees from the face of the bill, that the actual and principal party in interest is not before them, it will either dismiss the bill, or stay the proceedings until proper parties are made. A decree, vitally affecting the interests of a principal, will never be pronounced, where his agent is the only party to the bill. In *Vernon v. Blacker-*

1824.

Osborn v. U. S. Bank.

ly,[a] the suit was brought against the defendant, treasurer of the commissioners for building fifty new churches, to compel the payment of moneys claimed to be due from the commissioners. Lord Hardwicke dismissed the bill, saying, "it would be absurd that a bill should lie against a person who is only an officer, and subordinate to others, and has no discretionary power. It is absurd to make a party who acts ministerially, the sole party."

If, then, the State be the only party interested, and if the bill, in its terms, and in its effect, operates solely upon the State, the State ought to be made a party. If the Circuit Court cannot exercise jurisdiction where the State is a party direct, it ought not, it cannot, be permitted to obtain that jurisdiction, by an indirect mode of proceeding. This would be to disregard the substance of things, and found a jurisdiction upon arbitrary definition.

We maintain, that the State of Ohio is, in fact, the sole defendant in this cause; and that the jurisdiction of the Circuit Court is excluded, (1.) By the constitution of the United States; (2.) By the judiciary act.

We contend, further, that if the subject matter in controversy between the actual parties to this cause, presents a case within the jurisdiction of the federal judiciary, that jurisdiction is vested exclusively in the Supreme Court, both by the constitution and by the judiciary act.

The constitution, after defining the cases in which the federal judiciary shall take cognizance,

[a] 2 *Atk.* 144.

declares, that "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction."

According to the interpretation given to the constitution by this Court, in *Cohens v. Virginia*,[a] a State may be made a party, before the federal Courts, wherever the case arises under the constitution, or a law of the United States; or where the controversy is between two States, or one State and a foreign State.

In this case, the controversy arises under the constitution of the United States, or under the act of incorporation, or under both. It is a case of original jurisdiction; and by the express letter of the constitution, the Supreme Court alone are authorized to take jurisdiction.

In *Marbury v. Madison*,[b] this Court decided, that it was not competent for Congress to invest the Supreme Court with original jurisdiction, in any other cases than those described in the constitution. It is supposed, that the principle of this decision, and the reasoning of the Court in support of it, both conduce to the conclusion, that where original jurisdiction is given by the constitution to the Supreme Court, Congress cannot distribute any part of such original jurisdiction to an inferior federal tribunal. It would hardly seem rational to decide, that the framers of the constitution inserted this clause for no other purpose but that of

a 6 *Wheat. Rep.* 378.
b 1 *Cranch*, 174.

1824.

Osborn v. U. S. Bank.

limiting the power of Congress, as to the cases in which they should give the Supreme Court original jurisdiction. There could have been no just ground for apprehending, that the National Legislature would impose original jurisdiction upon the Supreme Court to a mischievous extent. Considering the character of the parties, between whom the constitution invests the Supreme Court with this jurisdiction, it is a much more rational inference, that it was intended to prevent Congress from subjecting them to the power of any inferior tribunal. "If the solicitude of the Convention, respecting our peace with foreign powers, induced a provision, that the Supreme Court should take original jurisdiction, in cases which might be supposed to affect them," the same solicitude would seem to require an interpretation, by which the original jurisdiction of other Courts should be excluded. If Congress be at liberty to give original jurisdiction to inferior Courts, where the constitution has given it to the Supreme Court, it will be the easiest thing in nature to defeat that object, which the solicitude of the Convention intended to secure. If these terms do not operate exclusively upon Congress, they cannot operate exclusively upon the States; so that the exemption of foreign ministers from liability in State tribunals, is not secured by the constitution, but depends upon an act of Congress, and may be put an end to whenever the National Legislature choose.

In the case of *Cohens v. Virginia*, it is said, that "when the constitution declares the jurisdiction, in cases where a State shall be a party, to be

original, and in all cases arising under the constitution or a law, to be appellate, the conclusion seems irresistible, that its framers designed to include in the first class, those cases in which jurisdiction is given, because a State is a party; and to include in the second, those in which jurisdiction is given, because the case arises under the constitution, or a law."

It is allowed, that "it may be conceded, that where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there;"[b] though it be immediately afterwards asked, "can it be affirmed that a State might not sue a citizen of another State in the Circuit Court?"[c] From the whole, this final conclusion is deduced: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised, in consequence of the character of the party; *and an original suit might be instituted in any of the Federal Courts*, not to those cases in which an original suit might not be instituted in a Federal Court."

The result of this reasoning seems to be, that where the jurisdiction of the Federal Court attaches, in consequence of the character of the party, in that case, no original suit can be brought against a State, except in the Supreme Court. But if a

a 6 *Wheat. Rep.* 393.
b *Id.* 395.
c *Id.* 396.

1824.

Osborn v. U. S. Bank.

State become liable to an action, in a case arising under the constitution, or a law of the United States, then any of the Federal Courts may entertain jurisdiction.

We cannot think, that the Court meant to assert this position; or that if they did, they will adhere to it. No good reason can be perceived, for sustaining a distinction of this kind. The policy which exempts the States from the jurisdiction of inferior Courts, is the same in both cases; and the terms of the constitution comprehend the one class of cases as well as the other. The words, "*all cases,*" embrace as fully a case against a State, arising under the constitution, or a law, as they do a case between two States, or between a State and a foreign State. The same terms are used in defining the extent of the judicial power in the first class of cases described, and the Court thus speak of their effect: "This clause extends the jurisdiction of the Court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article." The same may be said, with equal force, of the terms, when employed to define the original jurisdiction of the Supreme Court. The true reading and understanding are, "*in all cases* affecting ambassadors, other public ministers, and consuls, and *in all* those in which a State shall be a party, the Supreme Court shall have original jurisdiction." If there be any exception, by which a State can be sued in an original suit before an inferior federal tribunal, such

1824.

Osborn v. U. S. Bank.

exception must be implied against the express words of the article, and can only be sustained "upon the spirit and true meaning of the constitution; which spirit and true meaning must be so apparent, as to overrule the words which its framers have employed."

There is no difficulty in giving full force and effect to the constitutional distribution of jurisdiction, as we interpret it, without touching the appellate jurisdiction asserted in the case of *Cohens v. Virginia*. By that case, it is settled, that the judicial power of the United States extends to a class of cases which cannot originate in any federal tribunal, and that this jurisdiction must, of necessity, be appellate. The distribution of jurisdiction must be interpreted as if the judicial power was extended, by the letter of the constitution, to this class of cases, in express terms. The first member of the sentence must be understood as applicable only to cases in which original jurisdiction is vested in the federal judiciary. The second, to every description of appellate jurisdiction, whether it arise under the constitution, or be created by law. Thus, if a case arise under the constitution, or a law of the Union, in which an original suit may be sued against a State, the constitution requires such suit to be brought in the Supreme Court. If a State be plaintiff or defendant in a State Court, and a question arise under the constitution, or a law of the Union, and a case be made at the trial, upon which the federal judicial power attaches, the constitution authorizes the Supreme Court to exercise appellate jurisdiction.

1824.

Osborn v. U. S. Bank.

There is no occasion to confound the two classes of cases, or to bring the two kinds of jurisdiction into collision. The appellate jurisdiction of the Supreme Court may, consistently, be extended to the proper class of cases where a State is a party, without so interpreting the constitution, as to subject the States to original actions in the inferior national tribunals.

But whatever may be the correct interpretation of the constitution upon this point, it has long been settled, that the Circuit Courts can exercise no jurisdiction but what is conferred upon them by law. The judiciary act does not vest them with jurisdiction where a State is a party. On the contrary, in a case like the present, it vests exclusive jurisdiction in the Supreme Court.

The judiciary act of 1789, c. 20. sec. 13., provides, that "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens, and except also between a State and citizens of other States, or aliens; in which latter case, it shall have original, but not exclusive jurisdiction." This act, which distributes and defines the jurisdiction of the different federal Courts, does not, in terms, vest the Circuit Court with jurisdiction in any case arising under the constitution or the laws of the United States. And in *M'Intire v. Wood*,[a] this Court decided, that this portion of federal jurisdiction could not be exercised by the Circuit Courts, unless expressly confer-

[a] 7 *Cranch*, 505.

red by law. Neither does this act give jurisdiction to the Circuit Court, in any case where a State is a party; but, on the contrary, all original jurisdiction that is given to the federal judiciary, where a State is a party, is vested in the Supreme Court, and, with certain exceptions, in that Court exclusively. The case before the Court comes not within any of the exceptions; so that, if it be a case of federal jurisprudence, it is exclusively vested in the Supreme Court.

Should it be conceded, that the State cannot be sued in the Circuit Court, and an attempt made to sustain the case and the jurisdiction against the individuals, upon the ground of necessity, lest there should be a failure of justice, it may be answered: First, that the reasons which exempt the State from direct responsibility, operate at least equally strong to exempt her from indirect responsibility. No necessity can warrant a judicial tribunal in disregarding the maxim, that that which cannot legally be directly done, cannot rightfully be effected by indirection.

A second, and a more decisive answer, may be given: the supposed necessity does not exist. The case arises under the constitution and the charter. A suit direct against the States, may be prosecuted in the federal Courts. The constitution has made the State amenable to justice before the Supreme Court of the nation. The national Legislature have provided that this jurisdiction shall be exclusive. It cannot be defeated or evaded by the selection of improper parties, in subversion of established practice, and of correct and

1824.

Osborn v. U. S. Bank.

well settled principles. The bill might have been filed in the Supreme Court; the injunction might have been allowed by a Judge of that Court in vacation; the whole case might have been proceeded in as the framers of the constitution intended. The high and solemn measure of citing a sovereign State before a Court of judicature, to defend its attributes of sovereignty, and the exercise of its power, ought not to be permitted to any authority but the highest tribunal of the nation I say nothing of consequences; I look only to what is fit and proper in itself, adapted to the nature of man, to the organization of government, and consistent with the plain letter of the constitution.

If this were not the case, if the constitution had conferred jurisdiction, but Congress had omitted to make provision for exercising it by the Supreme Court, in an original form, still no necessity can justify an evasive assumption of it by any tribunal, much less by one to which the constitution never intended to intrust it. The Bank must take the consequences, as in the case of other men who transact business, where Congress have failed to make provision for vesting in the Courts all the jurisdiction conferred by the constitution.

In the case of *M'Intire v. Wood*, before cited, this Court said, "When questions arise under the constitution of the United States, in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the Legislature has thought *sufficient, at present,* for all the political purposes to be answered by

the clause of the constitution which relates to the subject." It must *remain sufficient* until the law is changed, whatever inconvenience may result to individuals.

If, then, the case made in the bill be, in fact, a case against the State, in which the State is the sole party interested, and the defendants only ministerial agents, then the decree is erroneous, (1.) because the proper parties are not before the Court; (2.) because the Circuit Court cannot, under either the constitution or laws of Congress, exercise jurisdiction over the proper party; (3.) because both the constitution and law vests *exclusive* jurisdiction of the case made in the Supreme Court.

7. The last and the most important point in the case remains yet to be considered. It is, that the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

Upon this point, we ask the Court to reconsider so much of their opinion in the case of *M'Culloch v. Maryland*, as decides that the States have no rightful power to tax the Bank of the United States.

The question, whether the Bank of the United States, as now constituted, is exempt, by the constitution of the Union, from the taxing power of the State, depends upon the nature and character of the institution. If it stands upon the same foundation with the mint and the post office; if its business can justly be assimilated to the process

1824.

Osborn v. U. S. Bank.

and proceedings of the federal Courts, we admit, without hesitation, that it is entitled to the exemption it claims. The States cannot tax the offices, establishments, and operations, of the national government. It is not the argument of the opinion, in *M'Culloch v. Maryland*, but the premises upon which that argument is founded, that we ask the Court now to re-examine and reconsider.

Banking is, in its nature, a private trade; and is a business in which individuals may at all times engage, unless the municipal law forbid it. Where this is not the case, it is competent for individuals to contract together, and create capital to be employed in lending money, and buying and selling coins, bullion, promissory notes, and bills of exchange. No law is necessary to authorize a contract between individuals for concentrating capital to be thus employed; nor does the business itself depend upon any special laws for its creation or existence. An association thus formed, may take to themselves a name, and may establish rules and regulations to govern them in the transaction of their business, and to determine their relative rights and duties among themselves. The general law not only recognises the obligation of this contract between the parties; it recognises also the capacity of the association thus formed, to make contracts in the name they have assumed, and the right of the individuals, as joint partners, or one party, to enforce those contracts. The whole is a private concern: the capital is private property; the business a private and individual trade; the

convenience and profit of private men the end and object. Such is the true character of a bank, constituted by individual stockholders. Its rights and privileges, its liabilities and disabilities, are all the rights, privileges, liabilities, and disabilities of private persons.

1824.

Osborn v. U. S. Bank.

If the individuals thus associated apply for and obtain, from the legislative power of the country, a special law, creating them a corporation, what change does it effect in their condition? A better answer cannot be given, than that contained in the definition of a corporation by this Court: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances, for the purpose of transmitting it from hand to hand. *It is chiefly for the purpose of clothing bodies of men with these qualities and capacities, that corporations were invented and are in use.*"[a]

[a] Dartmouth College v. Woodward, 4 *Wheat. Rep.* 634.

1824.

Osborn v. U. S. Bank.

If the character of a corporation, as here defined, be regarded in granting a charter to a banking company in the case stated, the change effected in the condition of a company by the charter, can be easily and readily comprehended. It relates to their character, not to their rights. It would not change the nature of their business, but would afford facility in transacting it. It would confer upon the whole one individual character, comprising, for particular purposes, the capacities of an individual; but it would exempt them from liabilities, only so far as an express exemption was stipulated or granted. By the charter, they would be constituted an invisible, intangible, and artificial being, capable of perpetual existence, and of acting as an individual in the management of their appropriate affairs. But this would operate only to change the form, it would not alter the substance of things. These would still consist of the individuals that composed the association, and of the business in which they were engaged.

This was distinctly decided in the case of the *United States Bank v. Deveaux.*[a] In that case it was contended, that the character of the individuals was completely merged in the charter of incorporation. But this Court adjudged otherwise; they determined that they could look behind the charter, and notice the character of individuals; and the cases and the principles upon which this decision is founded, also establish, that

[a] 5 *Cranch*, 84.

Courts may look beyond the charter for all substantial and beneficial purposes.

When individuals, associated to carry on the trade of banking, apply to the Legislature of the country for an act of incorporation, they found their application upon some benefit to be derived to the public from conferring upon them the character they ask. This public benefit may consist of the facilities afforded to the State, in the management of its fiscal concerns; or it may consist in the convenience to the community in the transaction of mercantile and other money affairs. It may arise from the payment of annual revenue, or a stipulated sum, into the public treasury. If the benefit to the public be considered a sufficient compensation for the faculty conferred, the corporation is created. But from this fact, in the language of this Court, "nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created."[a]

If, then, a banking association be formed, the capital collected, the mode of transacting the business settled, and the whole concern regulated and established, before any application be made for a charter, it is clear that the mere fact of enacting a law, creating the association a corporation, could not change its character. It was a company of

[a] Dartmouth College v. Woodward, 4 *Wheat. Rep.* 638.

1824.

Osborn v. U. S. Bank.

individuals, conducting a private trade, before it was incorporated, and it retained the same character afterwards. The charter was granted to give facility to the individuals in the management of their private affairs; not that, in virtue of that charter, they might share in the civil government of the country. For special purposes, it constituted them an immortal being; but of this being it has been correctly said, that "its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person."[a]

If in fact the incorporation be obtained before the association is formed, does it vary the principle? It is supposed and insisted that it does not. If the corporation be originated for the management of an individual concern; if it be based upon contract between individuals; if its great end and principal object be private trade and private profit, its character must be the same, whether the trade commenced precedent or subsequent to the incorporation; whether the individuals solicited the charter, or the Legislature invited the individuals. The character of the association must be ascertained by the same rules, and it must be subject to the same legal consequences.

We may suppose, then, that individuals resident in every part of the Union, and in foreign countries, have associated for the purpose of establishing a bank, with a capital of 28,000,000 of dollars; that they have actually collected this ca-

[a] 4 *Wheat. Rep.* 656.

pital together in the city of Philadelphia, and, no law prohibiting such a measure, have commenced trading as bankers. Not finding sufficient employment for their capital at that place, they establish a banking house in New-York, one in Boston, and one in Baltimore, where they carry on a profitable business. It is perfectly clear, that all this may be done, if no State law be contravened, by individuals in their natural capacities. But it is equally clear, that the capital thus employed, and the business thus transacted, must be subject to the regulations of the respective States, and that the parties must be subject to all the inconveniences and embarrassments resulting from the death of its members, and from the transfers of its shares and interests; from the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for transferring their property, as well as the still greater inconvenience of pursuing its rights and enforcing its contracts in Courts of justice.

Deriving great advantage from its trade, anxious to extend it into other States, and to be relieved from the embarrassments incident to a joint stock company not incorporated, the corporation apply to the Congress of the United States for an act of incorporation. But this Congress cannot confer, unless the association can be employed by the national government in the execution of some of the powers with which it is invested by the constitution. All the powers of the government must be carried into operation by individual agency, either through the medium of public officers, or contracts made with individuals. Can any public office be created,

1824.

Osborn v. U. S. Bank.

or does one exist, the performance of which may, with propriety, be assigned to this association, when incorporated? If such office exist, or can be created, then the company may be incorporated, that they may be appointed to execute such office. Is there any portion of the public business performed by individuals upon contracts, that this association could be employed to perform, with greater advantage and more safety to the public, than an individual contractor? If there be an employment of this nature, then may this company be incorporated to undertake it.

There is an employment of this nature. Nothing can be more essential to the fiscal concerns of the nation, than an agent of undoubted integrity and established credit, with whom the public moneys can, at all times, be safely deposited. Nothing can be of more importance to a government, than that there should be some capitalist in the country, who possesses the means of making advances of money to the government upon any exigency, and who is under a legal obligation to make such advances. For these purposes the association would be an agent peculiarly suitable and appropriate. There are also other minor employments, such as the transmission of the revenue from one place to another, for the performance of which this company would be a most safe and certain agent. As, then, this association may be thus connected with the public interest, and made useful and advantageous to the government, by conferring a charter upon them, the power of securing to the nation these benefits, advantages, and con-

veniences, results to the National Legislature. A just construction of their constitutional powers, invests them with authority to incorporate a banking company, upon the basis of contracting with the institution thus created, for the performance of certain public employments, beneficial to the nation, and necessary to be performed by some one.

The mere creation of a corporation, does not confer political power or political character. So this Court decided in *Dartmouth College v. Woodward*, already referred to. If I may be allowed to paraphrase the language of the Chief Justice, I would say, a bank incorporated, is no more a State instrument, than a natural person performing the same business would be. If, then, a natural person, engaged in the trade of banking, should contract with the government to receive the public money upon deposit, to transmit it from place to place, without charging for commission or difference of exchange, and to perform, when called upon, the duties of commissioner of loans, would not thereby become a public officer, how is it that this artificial being, created by law for the purpose of being employed by the government for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? because the government has given it power to take and hold property in a particular form, and to employ that property for particular purposes, and in the disposition of it to use a particular name? because the government has sold it a pri-

1824.

Osborn v. U. S. Bank.

vilege for a large sum of money, and has bargained with it to do certain things; is it, therefore, a part of the very government with which the contract is made?

If the Bank be constituted a public office, by the connexion between it and the government, it cannot be the mere legal franchise in which the office is vested; the individual stockholders must be the officers. Their character is not merged in the charter. This is the strong point of the *Mayor and Commonalty v. Wood*, upon which this Court ground their decision in the *Bank v. Deveaux*, and from which they say, that cause could not be distinguished. Thus, aliens may become public officers, and public duties are confided to those who owe no allegiance to the government, and who are even beyond its territorial limits.

With the privileges and perquisites of office, all individuals holding offices, ought to be subject to the disabilities of office. But if the Bank be a public office, and the individual stockholders public officers, this principle does not have a fair and just operation. The disabilities of office do not attach to the stockholders; for we find them every where holding public offices, even in the national Legislature, from which, if they be public officers, they are excluded by the constitution in express terms.

If the Bank be a public institution of such character as to be justly assimilated to the mint and the post office, then its charter may be amended, altered, or even abolished, at the discretion of the National Legislature. All public offices are crea-

ted purely for public purposes, and may, at any time, be modified in such manner as the public interest may require. Public corporations partake of the same character. So it is distinctly adjudged in *Dartmouth College v. Woodward*. In this point, each Judge who delivered an opinion concurred. By one of the Judges it is said, that "public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interest belongs also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank, created by the government for its own uses, whose stock is exclusively owned by the government, is, in the strictest sense, a public corporation. So, a hospital created and endowed by the government for general charity. *But a bank, whose stock is owned by private persons, is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature.* The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases, the uses may, in a certain sense, be called public, but the corporations are private; as much

1824.

Osborn v. U. S. Bank.

so, indeed, as if the franchises were vested in a single person."[a]

If the Court adopt this reasoning of one of themselves, the point is decided. The act of incorporation, in the case supposed, does neither create a public office, nor a public corporation. The association, notwithstanding their charter, remain a private association, the proprietors and conductors of a private trade, bound by contract, for a consideration paid, to perform certain employments for the government.

The qualities and capacities which are ordinarily conferred upon a private corporation, have already been stated. These Congress must have power to confer, for they cannot create a corporation, unless they can confer the qualities and capacities requisite to its constitution. It must be remembered, that this power in the National Legislature, to create a private corporation, is not a general, but a special power, limited to cases where the corporation, when created, may be employed by the government as an appropriate agent in the transaction of public affairs. It is not essential to the creation or existence of a corporation, that any uncommon or extraordinary privilege or exemption should be conferred upon it. It is, therefore, beyond question, that the admitted power of creating, in its strict and proper sense, does not include or imply a power to exercise discretion in conferring privileges. If this be attempted, it is

[a] 4 *Wheat. Rep.* 668.

open for inquiry, whether such privilege be compatible with the constitution.

Before the act of incorporation, the association, we have supposed, was necessarily subject to the law of the State in which it transacted business; that law, whatever it might be, entered into and operated upon all their contracts. By that law, their property was protected, and for that protection the property was subject to equal ratcable taxation. The ordinary qualities and capacities conferred upon a corporation, would not place the protection of the property under a different law, nor exempt it from bearing its proportion of legal burthens. To effect this, an extraordinary provision must be inserted in the charter. This kind of immunity is not incident to a corporation; the power to create one does not include the power to confer such immunity upon it. It is not essential to its creation or existence, and is not, therefore, within the sphere of national legislation.

A State is invested with constitutional power to levy a tax upon stamps, and may extend its operation to all the dealings of individuals. It cannot subject the transactions of the national government to the payment of such tax, because the operations of that government are national, and not subject to the power of any of its parts. If the nation borrow money, it is competent for the nation to decide upon the evidence to be given of the debt. It would be absurd to subject this national measure to the municipal regulations of one of its parts, and thus permit a part to assess a tax upon the whole. But if the national government

1824.

Osborn v. U. S. Bank.

incorporate a company of private bankers, who, before they received their charter, were subject to the payment of this tax, their subsequent exemption from it would not seem to be a necessary consequence, unless they were constituted a public institution. If they remained mere private dealers, with only increased facilities, and a new faculty conferred upon them, it would seem a rational inference, that their private duties and liabilities also remained. Supposing them to remain a private corporation of trade, the tax collected from them would be abstracted, not from the national treasury, but from the pockets of private men. The supposition, that this tax is incompatible with the capacity to trade, conferred in the charter, proceeds upon the hypothesis, that that capacity partakes of the character of the government that confers it, and is, therefore, supreme. Unquestionably such would be the fact, if the Bank were a public corporation; if it were created by the government for its own uses; and if the stock were exclusively owned by the government. But if it remain a private corporation, then the capacity given in the charter ought to be regarded as that which is adapted to the character of the party receiving it: a capacity properly appertaining to private individuals, which necessarily imports, that it is to be enjoyed like other individual rights, subject to the municipal law.

A stamp duty is one mode of collecting revenue from individuals engaged in private trade, but it is not the only mode. The principle which exempts the Bank of the United States from the

payment of a stamp duty imposed by a State, is supposed to exempt it from the payment of any tax assessed by State authority. It is deemed an incident attached to the charter, because that charter is conferred by the supreme authority. It is said, that if any other than the supreme authority that confers the faculty, is permitted to tax the trade or business to be carried on under it, the faculty itself may be rendered useless, and the object of granting it entirely defeated. The power to confer the faculty, and the power to tax the business, if vested in different hands, are thus held to be incompatible, and from this incompatibility the exemption is deemed a necessary incident to the charter, because, without it, it cannot exist. For we must here repeat, that this Court have said, that a corporation "possesses only those properties which the charter of its creation confers upon it, either expressly, or as *incidental to its very existence.*"[a]

This position involves several inquiries, which may be embraced in an examination of the reasons assigned for considering this exemption as an incident attached to the charter, and in an investigation of the powers of Congress to confer this exemption, in express terms, if it cannot be sustained as incidental to the very existence of the Bank.

The fact, that a private corporation, created by the sovereign or supreme power, is not, therefore, clothed with any portion of the political character

[a] 4 *Wheat. Rep.* 636.

1824.

Osborn v. U. S. Bank.

or political power of its creator, is asserted by the concurring opinions of the Judges of this Court, and is established by its judgment in the case of *Dartmouth College v. Woodward.* That an exemption from taxation for public purposes, by an inferior legislative power, is not incident to a corporation created by the supreme power, is a just inference from the doctrines laid down in the case just cited, and from the whole history of private corporations, down to the decision of this Court in *M'Culloch v. Maryland.*

The power of assessing taxes is always a legislative power; but in our government, and in that of England, from which many of our institutions, and most of our principles of jurisprudence are derived, this power is exercised by other authorities than the National and State Legislatures. Counties, cities, towns, boroughs, and townships, have bodies of magistracy authorized to assess taxes for various specific purposes. We have the high authority of Lord Coke himself, that the Justices of a city, shire, or riding, in England, might assess a tax upon the property of a corporation, for the repair of bridges.[a] And in *The King v. Gardner,*[b] it was decided by the Court of King's Bench, that a corporation was subject to be assessed for poor rates, even as a corporation. In these cases, it was not pretended that exemption from taxation was an incident to the corporation.

a 2 *Inst.* 697. 700.
b *Cowp.* 83.

1824.

Osborn v. U. S. Bank.

If a State Legislature incorporate a company to construct a turnpike road, such charter would be predicated upon the advantage the community would derive from the road; yet no man would suppose that the horses, cattle, carriages, and other implements employed and used by the company, would be exempt from county levies, poor rates, and other burthens to which the other property of the individuals was subject. And if a general tax upon business or income was assessed, it would not be pretended that the amount received for tolls would be exempt from this tax, upon the ground that a right to have the corporate property and corporate business exempt from taxation, was an incident of the charter. This argument is applicable to every species of individual business conducted by private corporations. If exemption from any particular tax be claimed, it is founded upon a privilege specifically granted in the charter, it is not claimed as an incident to the grant.

It is not uncommon, that almost every species of business carried on within the boundaries of a city, is subject to be taxed by the city magistracy, for city purposes. Should this general authority to tax, extend to bankers, money-lenders, brokers, and others trading in money, notes, stocks, bills of exchange, &c., would the mere fact, that the sovereign authority granted to the individual or individuals carrying on any one of these employments, a corporate character, operate to exempt such individual or individuals from the payment of a city tax, to which he was liable before the corporate character was bestowed upon him?

1824.

Osborn v. U. S. Bank.

Private corporations, emanating from State authority, and ultimately connected with the private and public welfare, are numerous in all our commercial cities. Such are fire and marine insurance companies. Are these regarded as exempt from taxes assessed by the city magistrates? Have they ever claimed such exemption? Has it ever been conceded to them? In all the cases put, it is evident, that the body of inferior magistracy, authorized to levy a tax, if they be not limited as to the amount, which is frequently not the case, may assess upon the corporation an amount which their business could not pay, and thus defeat the object for which the charter was obtained. That such exemption, as an incident of their charter, has never been claimed by such corporations, is strong proof that it was not supposed to exist.

It may be said, that the inferior magistracy and the corporations, in the cases supposed, both derive their authority from the same source, and that it is competent for the authority that created both, so to regulate and control their operations, as to prevent one from being destroyed by the other. This may be granted, without affecting the argument. If the exemption be incident to the corporation, regulations are unnecessary. The power of the national Legislature to confer this exemption, upon a corporation created by it, in express terms, is one thing. That it exists as an incident to the charter, without any express provision, is a very different proposition.

It is distinctly admitted, in the case of *M'Culloch v. Maryland*, that the real property of the

Bank may be taxed, and that the stock held by residents of the State may be taxed. But it is asserted, that the operations of the Bank are exempt, because they are the means of the national government; and it is only by the total exemption of the operations of the Bank from the taxing power of the States, that our institutions can be relieved from the absurdity of a power, in one government, to pull down what another may build up, and a right in one government to destroy what there is a right in another to preserve.

But if the real property of the Bank and its stock may be taxed, it is as completely within the power of the States to destroy it by taxation, as it is by taxing its operations. The States may tax the stock owned by its citizens, so high as to compel them to retain it at a loss. Every State in the Union, by adopting this course, may paralize the operations of the Bank, as effectually as in any other mode. If the States act in concert, there is an end of the Bank; and that which the national government have built up, is prostrated by the States. The concession, then, that the exemption is qualified, admits the very mischief which it is set up to prevent. Whatever misapprehension may have prevailed with respect to the operations of the Bank, it certainly never can be asserted, that the individual stock of the members, or the real estate of the company, are the means of the government, and, as such, exempt from taxation. And while these are subject to taxation by the States, it would seem difficult to sustain the position upon

1824.

Osborn v. U. S. Bank.

which the operations of the Bank are held to be exempt.

We can well understand, how an absolute exemption may be a consequence of the character of the corporation established. Certainly it would be an incident of this Bank, were it established solely for public use, and were the stock wholly owned by the nation. But a qualified exemption must, in its very nature, depend upon specific provision. It is so connected with considerations of policy, and interwoven with the exercise of discretion, that it cannot be conceived, how it is to exist otherwise than by special creation or enactment.

No such exemption, either general or qualified, has heretofore been regarded as an incident to the creation of a private corporation. On the contrary, every corporate privilege beyond the creation of individuality of character and of capacity, has been founded upon special grant. In the case of *Head v. the Providence Insurance Company*,[a] this Court declared, that a private company, "in its corporate capacity, is the mere creature of the act to which it owes its existence. It may correctly be said, to be precisely what the incorporating act has made it, and to be capable of exerting its faculties only in the manner in which that act authorizes." And this principle has been recognised in every case where the rights, privileges and powers of a corporation have been considered, except in respect to the Bank.

[a] 2 *Cranch*, 167.

1824.
Osborn
v.
U. S. Bank.

If we examine the claim of this particular corporation, to attach to itself this exemption, as incident to its charter, upon what ground is it to be distinguished from private corporations generally? It is said, that it is an instrument employed by the national government in the execution of its powers, and for that reason cannot be taxed; that, in this particular, it is distinguishable from all other corporations.

In what sense is it an instrument of the government? and in what character is it employed as such? Do the government employ the faculty, the legal franchise, or do they employ the individuals upon whom it is conferred? and what is the nature of that employment? does it resemble the post office, or the mint, or the custom house, or the process of the federal Courts?

The post office is established by the general government. It is a public institution. The persons who perform its duties are public officers. No individual has, or can acquire, any property in it. For all the services performed, a compensation is paid out of the national treasury; and all the money received upon account of its operations, is public property. Surely there is no similitude between this institution, and an association who trade upon their own capital, for their own profit, and who have paid the government a million and a half of dollars for a legal character and name, in which to conduct their trade.

Again: the business conducted through the agency of the post office, is not in its nature a private business. It is of a public character, and the

1824.

Osborn v. U. S. Bank.

charge of it is expressly conferred upon Congress by the constitution. The business is created by law, and is annihilated when the law is repealed. But the trade of banking is strictly a private concern. It exists and can be carried on without the aid of the national Legislature. Nay, it is only under very special circumstances, that the national Legislature can so far interfere with it, as to facilitate its operations.

The post office executes the various duties assigned to it, by means of subordinate agents. The mails are opened and closed by persons invested with the character of public officers. But they are transported by individuals employed for that purpose, in their individual character, which employment is created by and founded in contract. To such contractors no official character is attached. These contractors supply horses, carriages, and whatever else is necessary for the transportation of the mails, upon their own account. The whole is engaged in the public service. The contractor, his horses, his carriage, his driver, are all in public employ. But this does not change their character. All that was private property before the contract was made, and before they were engaged in public employ, remain private property still. The horses and the carriages are liable to be taxed as other property, for every purpose for which property of the same character is taxed in the place where they are employed. The reason is plain: the contractor is employing his own means to promote his own private profit, and the tax collected is from the individual, though assessed upon the

means he uses to perform the public service. To tax the transportation of the mails, as such, would be taxing the operations of the government, which could not be allowed. But to tax the means by which this transportation is effected, so far as those means are private property, is allowable; because it abstracts nothing from the government; and because, the fact that an individual employs his private means in the service of the government, attaches to them no immunity whatever.

It is only in this character, that the Bank is in public employ. The business it transacts for the government, originates in contract. It receives the public treasure upon deposit, and pays it out upon the checks of the proper officer. This is an individual business, transacted for the government precisely as if it were an individual concern. It receives the cash of individuals upon deposit in the same manner, and in the same manner pays it out. It is one department of its trade, by which it makes individual profit. Any private person, or moneyed corporation, may be employed to do the same thing; and as to that, would be in the employment of the government; would be an instrument used by the government: a means of executing its powers. Yet it has never been supposed, that such employment constituted a public office, or that the person employed was thereby invested with official character. All these contracts are made with a view to the profitable employment of individual exertion, and are performed by individual means, in the private personal character of the contractor. They are, of course, subject to

1824.

Osborn v. U. S. Bank.

the municipal law; by it they must be protected and enforced, and, therefore, cannot be exempt from its exactions.

The carriages and horses of the contractor for transporting the mail, is a stronger case than that of the Bank. The transportation of the mail is the principal object for which the team and vehicle are engaged; the business of carrying passengers and baggage, is merely incidental. Public service is the first great object; its employment as a means of travelling, by individuals, is but secondary. But in the case of the Bank, the private trade of the company is the great object of pursuit, and the end of their exertions; the public business is subordinate and incidental, and is, in reality, a very essential means of promoting that private gain, which is the principal, if not the sole object of the corporation.

Again—In the case of the mail, the contractor receives a stipulated sum, as a compensation for his services. He takes upon himself a burthensome and hazardous employment. But the Bank, on the contrary, receive a privilege, a substantial pecuniary advantage, resulting necessarily in the augmentation of the private individual wealth of the stockholders; of this advantage they are the purchasers, not for the public account, but for private use.

The post office, as such, that is, the mere legal entity created by the law, cannot be taxed, because it is a public institution. The moneys received for postage cannot be taxed, because they are public property. This immunity attaches to their pub-

lic character. But the building in which the post office is kept, is a proper subject of taxation, because it is private property; and the fact, that it is an instrument used or employed by the government, in the execution of its powers, attaches to it no immunity.

The mint, the custom house, the process of the federal Courts, bear still less analogy to the Bank than the post office. They partake less of the character of private business. The functions they perform are more palpably of a public nature, requiring the personal agency of individuals, rather than the employment of private property in their performance; especially the papers of the custom house, and the proceedings of the federal Courts. However much individuals may be interested in the existence and preservation of these documents, yet they are not, in their nature, subjects in which a right of property can be acquired. If it ever could have been supposed that these were subjects of taxation by the States, the argument of the opinion in the case of *M'Culloch v. Maryland*, demonstrates the absurdity of such supposition. Because to all these institutions exemption from State taxation is attached, as an incident essential to their very existence, it does not follow that the same exemption attaches to the Bank, unless its character, end, and object, are the same. It seems to us impossible that this can be maintained. If it cannot, what is there peculiar to the constitution of this corporation, that should attach to its charter an exemption not incident to other corporations? Surely some foundation for this very ex-

1824.

Osborn v. U. S. Bank.

traordinary character, unknown to other establishments of the same nature, ought to be made out by those who claim it.

I am aware, that an indefinite, indistinct, confused idea exists, by which the charter, and the private trade, and the stockholders, and the government, are combined together, and the whole made to produce a something which cannot well be defined, but which is called a public institution. This might produce some legal effect, if we were compelled to contemplate this something only as a creation of the national government, by the name of *the Bank of the United States.* If its legal envelope, and legal name, constituted its whole character, or if these could be used so as to shut out all further inquiry into that character, its claim to the incidents and immunities of a public institution might rest upon some sort of foundation. But this misconception of its character vanishes, when we are permitted to examine all its constituent parts. We have seen that the persons who compose it are not public officers; that the business it pursues is not a public business, and that its agency for the government is that of a private individual: from none of which it can derive any exemption not common to private corporations.

The charter itself, abstracted from the individuals upon whom it is conferred, must be without any operative effect. It is in the nature of a grant; but a grant is nothing, unless there be a grantee to take, as well as a subject to be granted. When an association of individuals is formed, and entitle themselves to a grant of corporate franchises,

so as to give operative effect to that grant, they acquire in it a private vested right; it becomes their private property; and so long as they comply with its terms, they can no more be disturbed in the possession of it, by the grantors, than by a third person or stranger. Such is the situation of the Bank. The charter is their property, derived, to be sure, from a public grant, but, nevertheless, as distinctly the private property of the individuals, as if derived from a contract or grant from individuals, its former proprietors. Why is it an incident to this species of property, that it should be exempt from taxation by the States?

One reason only is offered. It is granted by the national government; and if the States can tax it, they may, in effect, render it useless to the grantees. But the States may confessedly exercise this power over the employments and property of individuals. All property is held subject to it, when held by individuals, no matter whence it is derived. In Ohio, the State cannot tax the public lands, while owned by the government, nor for five years after they become the property of individuals. She is bound by compact on this point. But it never was conceived, that because it was once owned by the nation, and the title to the individual derived from a national grant, the States could not tax it. Restricted as this power of taxation is in the State of Ohio, yet there can be no possible difficulty in so employing it, as to defeat all future sales of public lands within that State. It is only to provide by law for assessing such tax upon all lands hereafter sold, to be collected after

1824.

Osborn v. U. S. Bank.

the expiration of five years from the sale, as would render the lands a burthen to the proprietor, and the object would be effected. Yet the power to do this would hardly be held a sufficient ground for attaching to lands thus sold, an exemption from State taxation as incident to the grant. Why should a grant of franchises be distinguished from a grant of land, when the grantee, in both cases, receives it in confirmation of a purchase from the government, to be held as his own individual property? We are warranted by the opinion of at least one of the Judges of this Court, in asserting, that "a grant of franchises is not, in point of principle, distinguishable from a grant of any other property."[a] If this be correct, then there can be no reason for attaching any exemption to a grant of franchises, because the grant is conferred by the national government. The grantee must hold the property subject to all the burthens which might be imposed upon it, had he obtained it from any other source.

It may be objected, that this doctrine asserts a power in the States to tax the patent rights granted by the national government. And why not? By the grant it is constituted individual property; but does the power conferred upon the national government, to secure to the authors of useful inventions the exclusive use of their machines, necessarily attach to the patent for such exclusive right an exemption from taxation also? Is it not enough, that the inventor of a new species of pro-

[a] 4 *Wheat. Rep.* 684.

perty may be secured in a monopoly of its employment? Does the mere fact of conferring such monopoly, of necessity imply a right to enjoy it exempt from the burthens to which other property is subject? How far is this exemption to be carried? Would it exempt a steam loom from a general tax upon looms? or a steam mill from a general tax upon mills? Would a barrel of flour be subject to taxation, if, in the process of manufactory, it were carried from the meal chest to the cooling room upon a miller's shoulder; but exempt if it were hoisted by elevators, or gathered to the bolt-hopper by a hopper boy? Does this exemption attach to the grant, only in the hands of the monopolist, or extend also to his grantees of the monopoly? Is the exemption to be withdrawn so soon as the invention passes into the hands of the mechanic for practical purposes? or does it adhere to the machinery, and attach to the fabric manufactured? At whatever point it is withdrawn, the same consequences may follow. The power of State taxation, if it attach at all, may be so used as to render the patent of very little value. If the patent itself, or the machinery when constructed, or the employment of such machinery, or the fabrics manufactured by it, may be taxed, an excessive tax can, in one way as well as another, affect the benefits derived by the patentee from the patent, and may even prevent its use. Still, in this respect, it stands upon the same footing with other private property, and there is no sound reason for conferring upon it any

1824.

Osborn v. U. S. Bank.

higher privilege. Every thing in the nature of property, produced by the labour of the husbandman and the mechanic, may be taxed. They have no other security that the tax may not be excessive and oppressive, than what is afforded by their weight in the government, and a sense of justice in legislative assemblies. If the powers of genius be so applied as to produce any thing in which the inventor claims a property, this product of labour must be treated as other productions of the same class. No special exemptions are necessary incidents of its invention or creation. So far, then, as there is a just analogy between the Bank and patent rights, so far they are alike to be looked upon as private property, and no exemption from taxation can be conceded to either, as an incident of the franchise conferred upon them by a grant from the National Legislature.

Last of all, this exemption from taxation is not an incident essential to the very existence of the Bank; the Bank may exist without it; may exist beneficially without it, as we contend, did exist for twenty years without it, and was extensively useful. This exemption may conduce much to its convenience, and, perhaps, very considerably to its profit. But many things may be convenient and beneficial in the account of mercantile profit or Bank dividends, which are not necessary to the very existence of the corporation. Certainly the exemption from taxation is of this character. It is not incident to the corporation. If necessary to secure to it the most beneficial uses of its corporate franchises, it must obtain it by a special

grant; it must be specially inserted. An inquiry, how far Congress have constitutional power to do this, were they to attempt it, would still further elucidate the erroneous character of the position, that it is an incident of the charter, independent of special grant.

1824.
Osborn v. U. S. Bank.

Mr. *Clay*, for the respondents, declined arguing the question of the right of the State of Ohio to tax the Bank, considering it as finally determined by the former decision of the Court, which was supported by irresistible arguments, to which he could add no farther illustration. But this was not, like the law of Maryland, a case of taxation. It was a law enacted for the purpose of expelling the branches of the Bank from the State of Ohio, by inflicting penalties amounting to a prohibition. It might be called a bill of pains and penalties. An examination of its provisions, would show, that the penalties were greater in amount than the entire dividends. It was unequal and unjust in its operations. It was a confiscation, and not a tax. It was the same on the branch at Cincinnati, which had a capital of one million and a half, with that at Chilicothe, which had only a capital of half a million of dollars. It was obvious, that if one State could, in this manner, expel one of the offices of discount and deposit from its territory, every State might do the same thing. If one State may expel a branch, another State may expel the parent Bank itself; and thus this great institution of the national government, would be extirpated and de-

1824.

Osborn v. U. S. Bank.

stroyed by the local governments, within whose territory it was established.

Is it possible, that against this highly penal law, there is no preventive, peaceable remedy? that the Bank must submit to the alternative of withdrawing its branches, or of paying the penalty? that it must do this, not for one year, but for the whole period of its existence? Is it possible, that our jurisprudence should be so defective, that the law of the whole may be defeated in its operation by a single part? that if a State should lay a duty on imports or tonnage, contrary to the express provisions of the constitution, no adequate means could be found to prevent its collection by the officers of the State government?

All these propositions must be maintained by our opponents, or they must surrender their cause. It is, accordingly, contended by them, that the remedy is misconceived, (1.) because the State is not made a party. But if such parties are before the Court, as will enable it to make an effectual decree, it will proceed, although there be improper parties made, or parties omitted, who might have been made. Such is the practice where jurisdiction is sustained in the Circuit Court against some parties, against whom an effectual decree can be made, although others are omitted, on account of their being absent, or citizens of the same State with the plaintiff. The true ground seems to be, that if the Court can give redress; if its decree can be rendered effectual; if the party can

be put in possession of the thing claimed, the Court will proceed. Here the party omitted, is a sovereign State, who is entirely exempt from jurisdiction. The Court will, therefore, proceed against the other proper parties.

But it is also insisted, that the remedy is misconceived, because a State is the real party defendant. We deny that a collateral or contingent interest, will necessarily make a party who must be joined.

The State is not a formal party on the record; and that the State is not necessarily a party, by reason of its incidental interest, is conceded by the admission, that the Bank might have recovered in trover, trespass, or detinue, against the defendants, who actually took the money. That the suit concerns the public acts of an officer of the State government, who is one of the defendants, does not make the State itself a necessary party. This is the settled law of the Court. In the case of the *United States v. Peters*,[a] it was held that, although the interests of a State may be ultimately affected by the decision of a cause, yet if an effectual remedy can be had, without making the State a defendant to the suit, the Courts of the United States are bound to exercise jurisdiction. So, in England, in the Grenada case, the fiscal rights of the sovereign were drawn directly in question, and finally determined, in a suit brought by an individual, to recover back from the collector of the customs of the island, the amount of duties unconsti-

[a] 5 *Cranch*, 115.

1824.

Osborn v. U. S. Bank.

tutionally levied by that officer.[a] The party there was not compelled to resort to his petition of right, or any other mode of proceeding peculiar to claims against the crown. The immunity of one of the States of this Union from suits in the Courts of justice, is not greater than that of the crown in England. The constitution merely ordains, that a State, in its sovereign capacity, shall not be sued. It does not ordain, that the citizen shall not have justice done him, because a State may happen to be collaterally interested. It does not ordain that a law of the United States shall be violated, to the prejudice of a citizen, because a law of the State happens to come under consideration. If the State of Ohio is a party, so is the government of the United States a party in its sovereign interests, which are more sacred and important than mere proprietary interests. But even if the State be a party, that circumstance would not oust the jurisdiction of the Court, in a case arising under the constitution and laws of the Union. There the nature of the controversy, and not the character of the parties, must determine the question of jurisdiction. Such is conceived to be the spirit and effect of the decision of the Court, in the case of *Cohens v. Virginia*. It is competent for Congress to determine what Court shall have jurisdiction in this class of cases, which it has done as to the Bank, by giving it the right of suing in the Circuit Courts of the Union.

Again; if the State is to be considered a party,

[a] Campbell v Hall, *Cowp.* 204.

1824.

Osborn v. U. S. Bank.

it is a party plaintiff. The State is the actor, and the Bank is a defendant. In form it may not be so, but the substance is to be regarded. The injunction is essentially a defensive proceeding. Suppose the State, or even the United States, had recovered a judgment against the Bank, might not the proceedings upon that judgment be enjoined? And is the nature of the case varied, because the proceeding is here *in pais*? Suppose the State had proceeded by distraining for the tax, and the Bank had replevied, who would have been both the real and technical plaintiff in that case? The whole case is to be considered according to its true nature and character, which is, that of a proceeding by the State to recover a tax or penalty; and the Bank resorts to its natural protector for defence, by means of an injunction, which is a parental, preventive, peaceable remedy.

It is said that this is a case of trespass only, and that the party ought to have been left to his appropriate remedy at law. But this is not a case of a solitary remediable trespass. It is one of annual, of repeated, vexatious occurrence, for which an injunction is the appropriate remedy. All injunctions are discretionary, and granted upon the peculiar circumstances of the case. The jurisdiction of a Court of equity as to injunctions, has been always considered a most useful one, and, of late years, they have been dispensed with a much more liberal hand than formerly. They are granted to prevent fraud or injustice; to stay proceedings in other Courts; to restrain the infringement of patent and copy rights; to restrain the

1824.

Osborn v. U. S. Bank.

transfer of negotiable instruments, where the transfer will defeat the object of the suit; to stay waste, in which case they have superseded the common law remedy by writ of estrepement. In the case of patents and copyrights, it is not necessary to establish previously the right at law, for it is grounded on an act of parliament, and appears by record.[a] The principle on which injunctions in all these cases are granted, is to prevent a wrong where damages would not give adequate relief. So, there are cases where bills of peace have been brought, though a mere general right was claimed by the plaintiff, and no privity between him and the defendants, nor any general rights on the part of the defendants, and where many more might be concerned than those brought before the Court. Such are bills for duties, as in the case of the *City of London v. Perkins*. In the present case, it is quite clear that it would be an idle mockery to compel the parties to resort to their legal remedy, which would be wholly inadequate to prevent the destruction of their franchise.

As to the formal objection of the defect of a warrant of attorney from the Bank, authorizing these proceedings, it is now too late to take that objection, even if it could have been available at any stage of the suit. It is matter of form only, which should have been pleaded in abatement. It is cured by the provisions of the Judiciary Act of 1789, ch. 20. s. 34.

a 1 *Madd. Ch.* 113. 123. 128. and the cases there cited.

1824.

Osborn v. U. S. Bank.

Mr. *Wright*, for the appellants, in reply, insisted, that a special authority must be shown for the institution of the suit in the name of a corporation, which could only appear by attorney, under its common seal. Admitting, however, that the corporation might, by a mere resolution of the board of directors, authorize the suit, following the analogy of the cases of *The Bank of Columbia v. Patterson*, and *Fleckner v. The Bank of the United States*, such resolution must appear on the record, in the same manner as a warrant of attorney. Nor are the defendants precluded by the appeal from taking advantage of this defect. A decree is a judicial act. Its validity depends upon there being a party before the Court, legally competent to ask it. A corporation can only appear by its attorney or solicitor, duly authorized; and if this authority is not apparent upon the face of the record, the decree is erroneous, and cannot be supported.

There are no proofs or admissions sufficient to charge the defendant, Sullivan. He knows nothing of his own knowledge. The information from his predecessor in office, Currie, is no proof. The bill charges, that he received the money as a deposit, without any interest in it. The answer states, that he receives and holds it as a public officer, and has no private interest in it. The case in 6 *Ves. jr.* 738. was a much stronger admission than this, and yet it was held insufficient. The answer of one defendant cannot affect another. The answer of a party having no interest, cannot affect a person having an interest. The

1824.

Osborn v. U. S. Bank.

answer of Sullivan and Currie could not affect the State of Ohio, against which the decree operated, and whose treasury was entered, in order to execute the writ of sequestration.

It is impossible to determine, whether the injunction is meant to be supported upon the ground of preventing an irreparable injury, or of protecting the franchise of the plaintiffs. No case has been shown of an injunction to prevent a mere trespass on chattels, or where the injury intended is not an interference in the enjoyment of the plaintiff's exclusive privileges, but only a trespass upon their property, for which they have an adequate remedy, by suit at law, in various forms of action. Mere general principles, upon which Courts of equity may have proceeded a certain length in interposing by injunction, will not warrant the extending this extraordinary remedy still further. Some analogous case must be found to support this injunction.

An injunction binds no person but the parties to the suit.[a] Here the sole interest is in the State of Ohio. She is, therefore, an indispensable party to the bill. But she cannot be made a party, because she cannot be sued. The inevitable consequence is, that the Court below cannot take jurisdiction of the cause. Where, indeed, the proceeding is *in rem*, or operates upon the subject matter in controversy, disconnected from the persons interested; if it can be shown that any person interested, who is subject to the jurisdiction of

[a] 7 *Ves.* 255. 4 *Johns. Ch. Rep.* 25.

1824.

Osborn v. U. S. Bank.

the Court, is absent beyond the reach of its process, it is not necessary to make such person a party. But here the party omitted is a sovereign State, who is within reach of process, but is not subject to the jurisdiction, and cannot be brought before the Court. The case of *Cohens v. Virginia* does not apply. That case relates exclusively to the appellate jurisdiction of the Supreme Court, and merely establishes the doctrine, that where the State commences a suit in its own Courts, and a question arises under the constitution, laws, and treaties of the Union, the defendant may bring the cause before this Court by appeal or writ of error. The appellate process is not considered as a suit against the State, within the meaning of the 11th amendment. The *Grenada* case, in England, is equally inapplicable.[a] It was an action of assumpsit, brought to recover back the amount of certain duties paid to the Collector of the island, and which had been retained in his hands, *by the consent of the Attorney-General*, for the express purpose of trying the question, as to the validity of the King's proclamation, by which the duties were imposed. The Court determined, that the King had precluded himself from the exercise of his power of prerogative legislation over a conquered country, by previously authorizing the establishment of a colonial Legislature, and, therefore, gave judgment for the plaintiff. The present suit is substantially a suit against the State. The 11th amendment to the constitution was intended to protect the State effectually

[a] *Comp.* 204.

1824.

Osborn v. U. S. Bank.

from the suit of an individual, not to permit its sovereign rights to be drawn in question, and its property to be taken indirectly by suing its officers. In the case of the *United States v. Peters*, the interference of the State was by a law passed subsequent to the decree, and intended to operate directly upon it, and defeat its execution. A Court of law, from necessity, sometimes allows suits to be maintained against mere agents, who are the active parties, in cases of trespass or other torts; but it is the invariable practice of the Court of Chancery to proceed against the parties really interested, and the omission of any of them is a fatal defect. The policy which exempts the States from being sued in the Courts of the Union, is the same, whether the case arise under the constitution and laws of the United States, or whether the jurisdiction is founded upon the character of the parties. The terms of the exemption equally comprehend both classes of cases.

March 11th. The Court having expressed a wish that the cause should be re-argued upon the point of the constitutionality and effect of the provision in the charter of the Bank, which authorizes it to sue in the Circuit Courts of the Union, it was this day again argued upon that point, (in connexion with the case of the *Bank of the United States v. The Planters' Bank of Georgia*, in which the same question was involved,) by Mr. *Clay*, Mr. *Webster*, and Mr. *Sergeant*, for the jurisdiction, and by Mr. *Harper*, Mr. *Brown*, and Mr. *Wright*, against it.

1824.

Osborn v. U. S. Bank.

In favour of the jurisdiction, it was argued, (1.) that the jurisdiction was expressly and unequivocally conferred by the act of 1816, s. 7. incorporating the Bank. The terms used were free from all ambiguity, and they were introduced for the avowed purpose of giving jurisdiction to the Circuit Courts. In the case of the *Bank of the United States v. Deveaux*,[a] it had been decided, that the former national Bank had not, by virtue of its charter, a right to sue in the federal Courts. That charter gave it a right "to sue and be sued, in Courts of record, or any other place whatsoever," which it was determined did not confer the privilege of suing in the Courts of the Union, they not being expressly mentioned. But no doubt was intimated, that those Courts would have had jurisdiction, if they had been mentioned in the act. It was to supply this defect, that Congress adopted the phraseology which is contained in the present charter, giving the Bank power "to sue and be sued in all State Courts having competent jurisdiction, and *in any Circuit Court of the United States*." Power in the party "to sue," confers jurisdiction on the Court. Jurisdiction is always given for the sake of the suitor, never for the sake of the Court. It was most natural to give the privilege to the suitor, and that necessarily carries with it the jurisdiction; for without the jurisdiction, he cannot enjoy the right. To authorize the bringing of a suit, is to authorize a suit to be entertained. The patent laws, and many other sta-

[a] 5 *Cranch*, 61. 85, 86.

1824.

Osborn v. U. S. Bank.

tutes of Congress, have been construed to give jurisdiction by the use of similar terms.

2. That Congress had constitutional authority to confer this jurisdiction on the Circuit Courts. It was "a case arising under the constitution and laws of the United States." Every case, in which the Bank of the United States is a party, is, in the strictest literal interpretation of the clause, a *case* arising under a *law* and the constitution of the United States. But for the *law*, the *case* would never have existed. But for the continued existence of the law, it could not continue to exist. If, by any conceivable means, the law were to be determined, the case must be at an end. There is, therefore, an inseparable, indissoluble connexion between the law and the case, as cause and effect. The case owes its being to the law, and only to the law. The establishment of a corporation is a legislative creation of a faculty, of a moral being, invisible and intangible, but with capacities, powers, and privileges, rights and duties. The rights it may acquire, the wrongs it may suffer, the obligations it may incur, the injuries it may inflict, the acts it may do, its power to do, or to endure, are all derived from, and dependent upon, the charter. To the charter it owes its being, its continued existence, its qualities and properties. The charter defines its duties, and affords the only measure of its responsibilities. Every act it performs, derives its validity from the charter only; and whenever it deals with another, it deals under and according to the charter. In the same manner, whoever deals with it, deals under and according to the charter.

1824.

Osborn v. U. S. Bank.

Its capacity to contract, and to sue and be sued, all are derived from that source. It cannot come into Court, without bringing the law in its hand. It is bound in every case to show, that it is acting within the limits of its corporate powers, as defined in that law. There can be no case, where the Bank is a party, in which questions may not arise under the laws of the United States. In every such case, it must appear, that it was duly created, continues to exist, has power to contract, and to bring the suit. All these are matters arising under the laws of the United States, and under no other. Suppose an officer created by act of Congress, could not Congress confer on him the privilege of suing and being sued, in his official capacity, in the Courts of the Union? Such an officer has two capacities, private and official, and may be subject to different jurisdictions, according as either is affected. But a corporation has but one capacity, and its faculties cannot be divided. Wherever an authority is given, all that is done by virtue of that authority, is done under it. Every thing done by the Bank, is done under the charter.

If it should be contended, that the character of the case depends upon the questions to arise in it, the answer is, that it is not so restricted by the constitution; and that it cannot be previously known, what particular questions may arise in the progress of the cause. The principal draws to it the incident, or accessory. The character of the case depends upon its general nature. Every suit brought by the Bank, is for the funds placed in its charge, under a law of the United States.

1824.

Osborn v. U. S. Bank.

But the question here, is about the exercise of a sovereign power, given for great national purposes. Those who framed the constitution, intended to establish a government complete for its own purposes, supreme within its sphere, and capable of acting by its own proper powers. They intended it to consist of three co-ordinate branches, legislative, executive, and judicial. In the construction of such a government, it is an obvious maxim, "that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature."[a] The judicial authority, therefore, must be co-extensive with the legislative power.[b] It would be quite as reasonable to leave the execution of the laws of the Union to the State executives, as to leave the exposition of them to the State judiciaries. It was intended, that the federal judiciary should expound all the laws of the government, and that the federal executive should execute them all. This association is so inseparable, that the power of legislation carries with it the power of establishing judicial tribunals. It is so with respect to the power of exclusive legislation within the District of Columbia. So the power of establishing post offices and post roads, involves that of providing judicial means for the punishment of mail robbers. Most of the statutes for the punishment of crimes, are founded on the same basis. The great object, then, of the

a Cohens v. Virginia, 6 *Wheat. Rep.* 414.

b The *Federalist*, No. 80. Cohens v. Virginia, 6 *Wheat. Rep.* 384.

1824.

Osborn v. U. S. Bank.

constitutional provision, respecting the judiciary, must make it co-extensive with the power of legislation, and to associate them inseparably, so that where one went, the other might go along with it. The first part of the article, where the jurisdiction is made to depend upon the nature of the controversy, is employed for this purpose, not to limit and restrain. But it was necessary, for great purposes of public policy, to extend it to other cases, where the jurisdiction is made to depend upon the character of the parties. These are the subject of the remaining part of the article. In that part of it which relates to cases arising under the constitution, laws, and treaties of the Union, there is a redundancy in the language: "ALL cases." The pleonasm is here meant to perform its usual office, to be emphatic. It marks the intention, and affords a principle of construction. The additional terms, "all cases in *law and equity*," also serve to heighten the effect, and to show that nothing of this essential power was to be put to hazard. Surely such a clause must be construed liberally. It is a maxim applicable to the interpretation of a grant of political power, that the authority to create must infer a power effectually to protect, to preserve, and to sustain.[a] It is no less a maxim, that the power to create a faculty of any sort, must infer the power to give it the means of exercise. A grant of the end is necessarily a grant of the means. The constitutional power of Congress to create a Bank, is derived altogether

[a] M'Culloch v. Maryland, 4 *Wheat. Rep.* 426.

1824.

Osborn v. U. S. Bank.

from the necessity of such an institution, for the fiscal purposes of the Union. It is established, not for the benefit of the stockholders, but for the benefit of the nation. It is part of the fiscal means of the nation. Indeed, "the power of creating a corporation, is never used for its own sake, but for the purpose of effecting something else."[a] The Bank is created for the purpose of facilitating all the fiscal operations of the national government. All its powers and faculties are conferred for this purpose, and for this alone; and it is to be supposed, that no other or greater powers are conferred than are necessary to this end. The collection and administration of the public revenue is, of all others, the most important branch of the public service. It is that which least admits of hindrance or obstruction. The Bank is, in effect, an instrument of the government, and its instrumental character is its *principal* character. That is the end; all the rest are means. It is as much a servant of the government as the treasury department. The two faculties of the Bank, which are essential to its existence and utility, are, its capacity to hold property, and that of suing and being sued. The latter is the necessary sanction and security of the former, and of all the rest. The former must be inviolable, and the latter must be sufficient to secure its inviolability. But it is not so, if Congress cannot erect a forum, to which the Bank may resort for justice. A needful operation of the government becomes dependent upon foreign sup-

[a] M'Culloch v. Maryland, 4 *Wheat. Rep.* 411.

port, which may be given, but which may also be withheld. There is no unreasonable jealousy of State judicatures; but the constitution itself supposes that they may not always be worthy of confidence, where the rights and interests of the national government are drawn in question. It is indispensable, that the interpretation and application of the laws and treaties of the Union should be uniform. The danger of leaving the administration of the national justice to the local tribunals, is not merely speculative. In Ohio, the Bank has been outlawed; and if it cannot seek redress in the federal tribunals, it can find it no where. Where is the power of coercion in the national government? What is to become of the public revenue while it is going on? Congress might not only have given original, but it might have given exclusive jurisdiction, in the cases mentioned in the 25th section of the Judiciary Act of 1789, c. 20.; instead of which, it has contented itself with giving an appellate jurisdiction, to correct the errors of the State Courts, where a question incidentally arises under the laws and treaties of the Union. But here the question is, whether the government of the United States can execute one of its own laws, through the process of its own Courts. The right of the Bank to sue in the national Courts, is one of its essential faculties. If that can be taken away, it is deprived of a part of its being, as much as if it were stripped of its power of discounting notes, receiving deposits, or dealing in bills of exchange.

Against the jurisdiction, it was said, that by the act incorporating the old Bank of the United

1824.

Osborn v. U. S. Bank.

States, authority is given to the corporation "to sue, &c. in Courts of record, or any other place whatsoever." By the present charter, it is empowered "to sue, &c. in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." No difference is perceived in the legal effect of these two acts. Both give the same privileges. The Circuit Courts of the Union are "Courts of record;" and an authority to sue in Courts of record, or any other place whatsoever, is an authority to sue in the Circuit Courts. So that, if Congress were competent, under the constitution, to vest such a jurisdiction in the federal Courts, it was vested by the first act of incorporation. But in the case of the *Bank of the United States v. Deveaux*,[a] the Court says, that "by the judiciary act, the jurisdiction of the Circuit Courts is extended to cases where the constitutional right to plead and be impleaded in the Courts of the Union, depends on the *character of the parties;* but where that right depends on *the nature of the case,* the Circuit Courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State claiming lands under grants from different States. Unless, then, jurisdiction over this cause has been given to the Circuit Court, by some other than the Judiciary Act, the Bank of the United States had not a right to sue in that Court, upon the principle that the case arises under a law of the United States." The Court then proceeds to consider,

[a] 5 *Cranch*, 85.

1824.

Osborn v. U. S. Bank.

whether jurisdiction had been given to the Circuit Court by the act incorporating the Bank, and determines that it had not. The Judiciary Act, nor no other law of Congress, can extend the jurisdiction of the federal Courts beyond the constitutional limits. The charter attempted to confer jurisdiction on the State Courts, in cases where the Bank is a party. This provision, and that empowering it to sue in the Circuit Courts of the Union, are both equally void. The act must, therefore, be restricted, so as to give the corporation authority to sue and be sued in such Courts only as are competent to take jurisdiction. This Court has determined, that the right of a corporation to litigate in the Courts of the Union, depends upon the character (as to citizenship) of the members which compose the body corporate, and that a corporation, as such, cannot be a citizen, within the meaning of the constitution.[a] There is here no averment on the record, that the plaintiffs have a right to sue, upon the ground of the corporation being citizens of a different State from the defendants; nor could such averment have been made, consistently with the truth of the fact.

It had been said, that every suit brought by the Bank, arises under the laws of the United States, because the Bank, with all its powers and faculties, was created, and existed, by a law of the United States. So it might be said of an alien who is naturalized by the laws of the Union, that

[a] Hope Insurance Company v. Boardman, 5 *Cranch*, 61.

1824.

Osborn v. U. S. Bank.

he derives his citizenship from those laws. But, could Congress, therefore, authorize all naturalized citizens to sue in the Courts of the Union? A clear distinction exists between a party and a cause; the party may originate under a law with which the cause has no connexion. A revenue officer may commit a trespass while executing his official duties, and if he justifies under the statutes of the United States, a question will arise under them, in which an appellate jurisdiction is given to this Court, to correct the errors of the State Courts. But could Congress give additional jurisdiction to the federal Courts, in all suits brought by or against the revenue officers? In *M'Intyre v. Wood*,[a] this Court says, "when questions arise under the constitution of the United States, in the State Courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the Supreme Court; and this provision the Legislature has thought *sufficient at present* for all the political purposes to be answered by the clause of the constitution which relates to the subject." And it may be added, that it must remain sufficient until the law shall be changed by some unequivocal provision within the constitutional competency of Congress to make.

It was also contended, that every right that accrues to the Bank in its corporate character, upon which a suit can be maintained, is to be regarded as arising under the charter, and, consequently, under a law of the United States. But the juris-

[a] 7 *Cranch*, 505.

diction of the federal Courts, if it attach at all, must attach either to the *party* or to the *case*. The party and his rights cannot be so mixed together, as that the legal origin of the first shall give character to the latter. A controversy regarding a promissory note or bill of exchange cannot be said to arise under an act of Congress, because the Bank, which is created by an act of Congress, has purchased the note or bill. Neither the rules of evidence, nor the law of contract, can be regulated by the National Legislature. But, in the case supposed, no question can arise, except under the law of contract and the rules of evidence. No law of Congress is drawn into question, and its correct decision cannot possibly depend upon the construction of such law. The Bank cannot come into the federal Courts as a party suing for a breach of contract or a trespass upon its property; for, neither its character as a party, nor the nature of a controversy, can give the Court jurisdiction. The case does not arise under its charter. It arises under the general or local law of contract, and may be determined without opening the statute book of the United States. The privilege conferred upon the Bank in its charter, to sue in the Circuit Courts, must be limited, not only by the criterion indicated; it must also be limited by the general provisions of the Judiciary Act, regulating the exercise of jurisdiction in the Circuit Courts. It cannot sue upon a *chose in action* assigned to it, unless the jurisdiction would have attached between the original parties; it cannot sue a party in the Circuit Court.

1824.

Osborn v. U. S. Bank.

over whom the existing laws give the Supreme Court exclusive jurisdiction. The privilege must be enjoyed, subject to existing laws. As to the legislation of Congress in giving to the Courts of the Union cognizance of criminal offences, that depended on the plain principle, that where a power is granted, all its incidents pass. Congress has power to legislate on various subjects. It is an incident, that they may enforce obedience to the laws they make on those subjects, by punishing offences against them. Thus, for example, the right to punish perjury, and the falsification of judicial records, is essential to the administration of justice. Hence, Congress has assumed the power of punishing those offences, when connected with the proceedings in the Courts of the Union. So, in the case of patents, the grant creates the right; and the power to secure to inventors the exclusive benefit of their discoveries, could not be executed without giving the patentees a right to sue in those Courts.

March 19th. Mr. Chief Justice MARSHALL delivered the opinion of the Court, and, after stating the case, proceeded as follows:

At the close of the argument, a point was suggested, of such vital importance, as to induce the Court to request that it might be particularly spoken to. That point is, the right of the Bank to sue in the Courts of the United States. It has been argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

1824.

Osborn v. U. S. Bank.

The appellants contest the jurisdiction of the Court on two grounds:

1st. That the act of Congress has not given it.

2d That, under the constitution, Congress cannot give it.

The Circuit Courts have jurisdiction of suits by and against the Bank.

1. The first part of the objection depends entirely on the language of the act. The words are, that the Bank shall be "made able and capable in law," "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State Courts having competent jurisdiction, and in any Circuit Court of the United States."

These words seem to the Court to admit of but one interpretation. They cannot be made plainer by explanation. They give, expressly, the right "to sue and be sued," "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this Court, in *The Bank of the United States v. Deveaux*, (5 *Cranch*, 85.) In that case it was decided, that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the federal Courts. The words of the 3d section of that act are, that the Bank may "sue and be sued," &c. "in Courts of record, or any other place whatsoever." The Court was of opinion, that these general words, which are usual in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the

1824.

Osborn v. U. S. Bank.

Courts of the United States; and this opinion was strengthened by the circumstance that the 9th rule of the 7th section of the same act, subjects the directors, in case of excess in contracting debt, to be sued in their private capacity, "in any Court of record of the United States, or either of them." The express grant of jurisdiction to the federal Courts, in this case, was considered as having some influence on the construction of the general words of the 3d section, which does not mention those Courts. Whether this decision be right or wrong, it amounts only to a declaration, that a general capacity in the Bank to sue, without mentioning the Courts of the Union, may not give a right to sue in those Courts. To infer from this, that words expressly conferring a right to sue in those Courts, do not give the right, is surely a conclusion which the premises do not warrant.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

The clause in the charter of the Bank, which authorizes it to sue in the Circuit Courts, is constitutional.

2. We will now consider the constitutionality of the clause in the act of incorporation, which authorizes the Bank to sue in the federal Courts.

In support of this clause, it is said, that the legislative, executive, and judicial powers, of every well constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All govern-

ments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The 2d article vests the whole executive power in the President; and the 3d article declares, "that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn and others*, is a case, and the question is, whether it arises under a law of the United States?

The appellants contend, that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

If this were sufficient to withdraw a case from

1824.

Osborn v. U. S. Bank.

the jurisdiction of the federal Courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action, be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the Court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, which seem designed to give the Courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this Court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior Courts is ex-

cluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say, that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable.

The constitution establishes the Supreme Court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate, that in any such case, the power cannot be exercised in its original form by Courts of original jurisdiction. It is not insinuated, that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the Courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained, that Congress is incapable of giving the Circuit Courts original jurisdiction, in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some

1824.

Osborn v. U. S. Bank.

of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the Courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those Courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal Courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has

received that shape which may be given to it by another tribunal, into which he is forced against his will.

1824.

Osborn v. U. S. Bank.

We think, then, that when a question to which the judicial power of the Union is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the Bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

Take the case of a contract, which is put as the strongest against the Bank.

When a Bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, has this legal entity a right to sue? Has it a right to come, not into this Court particularly, but into any Court? This depends on a

1824. Osborn v. U. S. Bank.

law of the United States. The next question is, has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided for ever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so, because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not, in the defence, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defence which the defendant may choose to set up. His right to sue is anterior to that defence, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say, that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is

compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the Bank a right to sue in the Circuit Courts of the United States, stands on the same principle with the acts authorizing officers of the United States who sue in their own names, to sue in the Courts of the United States. The Postmaster General, for example, cannot sue under that part of the constitution which gives jurisdiction to the federal Courts, in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the Courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said, that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the Bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends abso-

1824.

Osborn v. U. S. Bank.

lutely on that law, and cannot exist a moment without its authority.

If it be said, that a suit brought by the Bank may depend in fact altogether on questions unconnected with any law of the United States, it is equally true, with respect to suits brought by the Postmaster General. The plea in bar may be payment, if the suit be brought on a bond, or non-assumpsit, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster General to sue in the Courts of the United States, has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts, in cases arising under a law of the United States.

The clause in the patent law, authorizing suits in the Circuit Courts, stands, we think, on the same principle. Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defence exclusively on the fact, that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause, cannot oust the jurisdiction of the Court, or establish the position, that the case does not arise under a law of the United States.

It is said, that a clear distinction exists between

the party and the cause; that the party may originate under a law with which the cause has no connexion; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the Courts of the United States, as give that right to the Bank.

This distinction is not denied; and, if the act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the Bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the Bank grows out of this law, and is tested by it. To use the language of the constitution, every act of the Bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature, is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The constitution then takes him up, and, among other rights, extends to him the capacity of suing in the Courts of the United States, precisely under the same circumstances under which a native might sue. He is

1824.

Osborn v. U. S. Bank.

distinguishable in nothing from a native citizen, except so far as the constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the Bank, and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion, that the clause in the act of incorporation, enabling the Bank to sue in the Courts of the United States, is consistent with the constitution, and to be obeyed in all Courts.

We will now proceed to consider the merits of the cause.

The appellants contend, that the decree of the Circuit Court is erroneous—

1. Because no authority is shown in the record, from the Bank, authorizing the institution or prosecution of the suit.

2. Because, as against the defendant, Sullivan, there are neither proofs nor admissions, sufficient to sustain the decree.

3. Because, upon equitable principles, the case made in the bill, does not warrant a decree against either Osborn or Harper, for the amount of coin and notes in the bill specified to have passed through their hands.

4. Because, the defendants are decreed to pay interest upon the coin, when it was not in the power of Osborn or Harper, and was stayed in the hands of Sullivan by injunction.

5. Because, the case made in the bill does not

warrant the interference of a Court of Chancery, by injunction.

6. Because, if any case is made in the bill proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

7. Because, the decree assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio, the execution of which is enjoined, is unconstitutional.

These points will be considered in the order in which they are made.

How far a warrant of attorney, or other authority, must be shown, to enable an attorney or solicitor to prosecute a suit.

1. It is admitted that a corporation can only appear by attorney, and it is also admitted, that the attorney must receive the authority of the corporation to enable him to represent it. It is not admitted that this authority must be under seal. On the contrary, the principle decided in the cases of the *Bank of Columbia v. Patterson*, &c. is supposed to apply to this case, and to show that the seal may be dispensed with. It is, however, unnecessary to pursue this inquiry, since the real question is, whether the non-appearance of the power in the record be error, not whether the power was insufficient in itself.

Natural persons may appear in Court, either by themselves, or by their attorney. But no man has a right to appear as the attorney of another, without the authority of that other. In ordinary cases, the authority must be produced, because there is, in the nature of things, no *prima facie* evidence that one man is in fact the attorney of another.

1824.

Osborn v. U. S. Bank.

The case of an attorney at law, an attorney for the purpose of representing another in Court, and prosecuting or defending a suit in his name, is somewhat different. The power must indeed exist, but its production has not been considered as indispensable. Certain gentlemen, first licensed by government, are admitted by order of Court, to stand at the bar, with a general capacity to represent all the suitors in the Court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our Courts, and no departure from it has been made in those of any State, or of the Union.

The argument supposes some distinction, in this particular, between a natural person and a corporation; but the Court can perceive no reason for this distinction. A corporation, it is true, can appear only by attorney, while a natural person may appear for himself. But when he waives this privilege, and elects to appear by attorney, no reason is perceived why the same evidence should not be required, that the individual professing to represent him has authority to do so, which would be required if he were incapable of appearing in person. The universal and familiar practice, then, of permitting gentlemen of the profession to appear without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation, as for a natural person. Were it even otherwise, the practice is

1824.

Osborn v. U. S. Bank.

as uniform and as ancient, with regard to corporations, as to natural persons. No case has ever occurred, so far as we are informed, in which the production of a warrant of attorney has been supposed a necessary preliminary to the appearance of a corporation, either as plaintiff or defendant, by a gentleman admitted to the bar of the Court. The usage, then, is as full authority for the case of a corporation, as of an individual. If this usage ought to be altered, it should be a rule to operate prospectively, not by the reversal of a decree pronounced in conformity with the general course of the Court, in a case in which no doubt of the legality of the appearance had ever been suggested.

In the statutes of jeofails and amendment, which respect this subject, the non-appearance of a warrant of attorney in the record, has generally been treated as matter of form; and the 32d section of the Judiciary Act may very well be construed to comprehend this formal defect in its general terms, in a case of law. No reason is perceived why the Courts of Chancery should be more rigid in exacting the exhibition of a warrant of attorney than a Court of law; and, since the practice has, in fact, been the same in both Courts, an appellate Court ought, we think, to be governed in both by the same rule.

The answer of one defendant, when evidence against another.

2. The second point is one on which the productiveness of any decree in favour of the plaintiffs most probably depends; for, if the claim be not satisfied with the money found in the possession of Sullivan, it is, at best, uncertain whether

1824.

Osborn v. U. S. Bank.

a fund, out of which it can be satisfied, is to be found elsewhere.

In inquiring whether the proofs or admissions in the cause be sufficient to charge Sullivan, the Court will look into the answer of Currie, as well as into that of Sullivan. In objection to this course, it is said, that the answer of one defendant cannot be read against another. This is generally, but not universally, true. Where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule is not admitted to apply. Thus, if an ancestor die, pending a suit, and the proceedings be revived against his heir, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. So, a *pendente lite* purchaser is bound by the decree, without being even made a party to the suit; *a fortiori*, he would, if made a party, be bound by the testimony taken against the vendor.

In this case, if Currie received the money taken out of the Bank, and passed it over to Sullivan, the establishment of this fact, in a suit against Currie, would seem to bind his successor, Sullivan, both as a privy in estate, and as a person getting possession *pendente lite*, if the original suit had been instituted against Currie. We can perceive no difference, so far as respects the answer of Currie, between the case supposed, and the case as it stands. If Currie, who was the predecessor of Sullivan, admits that he received the money of

1824.

Osborn v. U. S. Bank.

the Bank, the fact seems to bind all those coming in under him, as completely as it binds himself. This, therefore, appears to the Court to be a case in which, upon principle, the answer of Currie may be read.

His answer states, that on or about the 19th or 20th of September, 1819, the defendant, Harper, delivered to him, in coin and notes, the sum of 98,000 dollars, which he was informed, and believed to be the money levied on the Bank as a tax, in pursuance of the law of the State of Ohio. After consulting counsel on the question, whether he ought to retain this sum within his individual control, or pass it to the credit of the State on the books of the treasury, he adopted the latter course, but retained it carefully in a trunk, separate from the other funds of the treasury. The money afterwards came to the hands of Sullivan, the gentleman who succeeded him as treasurer, and gave him a receipt for all the money in the treasury, including this, which was still kept separate from the rest.

We think no reasonable doubt can be entertained, but that the 98,000 dollars, delivered by Harper to Currie, were taken out of the Bank. Currie understood and believed it to be the fact. When did he so understand and believe it? At the time when he received the money. And from whom did he derive his understanding and belief? The inference is irresistible, that he derived it from his own knowledge of circumstances, for they were of public notoriety, and from the information of Harper. In the necessary course of things, Harper, who was sent, as Currie must have known, on this

1824.

Osborn v. U. S. Bank.

business, brings with him to the treasurer of the State, a sum of money, which, by the law, was to be taken out of the Bank, pays him 98,000 dollars thereof, which the treasurer receives and keeps, as being money taken from the Bank, and so enters it on the books of the treasury. In a suit brought against Mr. Currie for this money, by the State of Ohio, if he had failed to account for it, could any person doubt the competency of the testimony to charge him? We think no mind could hesitate in such a case.

Currie, then, being clearly in possession of this money, and clearly liable for it, we are next to look into Sullivan's answer, for the purpose of inquiring whether he admits any facts which show him to be liable also.

Sullivan denies all personal knowledge of the transaction; that is, he was not in office when it took place, and was not present when the money was taken out of the Bank, or when it was delivered to Currie. But when he entered the treasury office, he received this sum of 98,000 dollars, separate from the other money of the treasury, which, he understood from report, and was informed by his predecessor, from whom he received it, was the money taken out of the Bank. This sum has remained untouched ever since, from respect to the injunction awarded by the Court.

We ask, if a rational doubt can remain on this subject.

Mr. Currie, as treasurer of the State of Ohio, receives 98,000 dollars, as being the amount of a tax imposed by the Legislature of that State on

the Bank of the United States; enters the same on the books of the treasury; and, the legality of the act by which the money was levied being questioned, puts it in a trunk, and keeps it apart from the other money belonging to the public. He resigns his office, and is succeeded by Mr. Sullivan, to whom he delivers the money, informing him, at the same time, that it is the money raised from the Bank; and Mr. Sullivan continues to keep it apart, and abstains from the use of it, out of respect to an injunction, forbidding him to pay it away, or in any manner to dispose of it. Is it possible to doubt the identity of this money?

Even admitting that the answer of Currie, though establishing his liability as to himself, could not prove even that fact as to Sullivan; the answer of Sullivan is itself sufficient, we think, to charge him. He admits that these 98,000 dollars were delivered to him, as being the money which was taken out of the Bank, and that he so received it; for, he says, he understood this sum was the same as charged in the bill; that his information was from report, and from his predecessor; and that the money has remained untouched, from respect to the injunction. This declaration, then, is a part of the fact. The fact, as admitted in his answer, is not simply that he received 98,000 dollars, but that he received 98,000 dollars, as being the money taken out of the Bank—the money to which the writ of injunction applied.

In a common action between two private individuals, such an admission would, at least, be sufficient to throw on the defendant the burthen of

1824.

Osborn v. U. S. Bank.

proving that the money, which he acknowledges himself to have received and kept as the money of the plaintiff, was not that which it was declared to be on its delivery. A declaration, accompanying the delivery, and constituting a part of it, gives a character to the transaction, and is not to be placed on the same footing with a declaration made by the same person at a different time. The answer of Sullivan, then, is, in the opinion of the Court, sufficient to show that these 98,000 dollars were the specific dollars for which this suit was brought. This sum having come to his possession with full knowledge of the fact, in a separate trunk, unmixed with money, and with notice that an injunction had been awarded respecting it, he would seem to be responsible to the plaintiff for it, unless he can show sufficient matter to discharge himself.

Responsibility of the parties against whom the bill was taken *pro confesso*.

3. The next objection is, to the decree against Osborn and Harper, as to whom the bill was taken for confessed.

The bill charges, that Osborn employed John L. Harper to collect the tax, who proceeded by violence to enter the office of discount and deposit at Chilicothe, and forcibly took therefrom 100,000 dollars in specie and bank notes; and that, at the time of the seizure, Harper well knew, and was duly notified, that an injunction had been allowed, which money was delivered either to Currie or Osborn.

So far as respects Harper and Osborn, these allegations are to be considered as true. If the act of the Legislature of Ohio, and the official

character of Osborn, constitute a defence, neither of these defendants are liable, and the whole decree is erroneous; but if the act be unconstitutional and void, it can be no justification, and both these defendants are to be considered as individuals who are amenable to the laws. Considering them, for the present, in this character, the fact, as made out in the bill, is, that Osborn employed Harper to do an illegal act, and that Harper has done that act; and that they are jointly responsible for it, is supposed to be as well settled as any principle of law whatever.

We think it unnecessary, in this part of the case, to enter into the inquiry respecting the effect of the injunction. No injunction is necessary to attach responsibility on those who conspire to do an illegal act, which this is, if not justified by the authority under which it was done.

Interest will not be decreed against a party, upon money which he is enjoined from using.

4. The next objection is, to the allowance of interest on the coin, which constituted a part of the sum decreed to the complainants. Had the complainants, without the intervention of a Court of equity, resorted to their legal remedy for the injury sustained, their right to principal and interest would have stood on equal ground. The same rule would be adopted in a Court of equity, had the subject been left under the control of the party in possession, while the right was in litigation. But the subject was not left under the control of the party. The Court itself interposed, and forbade the person, in whose possession the property was, to make any use of it. This order having been obeyed, places the defendant in the same

1824.

Osborn v. U. S. Bank.

situation, so far as respects interest, as if the Court had taken the money into its own custody. The defendant, in obeying the mandate of the Court, becomes its instrument, as entirely as the Clerk of the Court would have been, had the money been placed in his hands. It does not appear reasonable, that a decree which proceeds upon the idea, that the injunction of the Court was valid, ought to direct interest to be paid on the money which that injunction restrained the defendant from using.

Case made in the bill, proper for an injunction, and other equitable relief.

5. The fifth objection to the decree is, that the case made in the bill does not warrant the interference of a Court of Chancery.

In examining this question, it is proper that the Court should consider the real case, and its actual circumstances. The original bill prays for an injunction against Ralph Osborn, Auditor of the State of Ohio, to restrain him from executing a law of that State, to the great oppression and injury of the complainants, and to the destruction of rights and privileges conferred on them by their charter, and by the constitution of the United States. The true inquiry is, whether an injunction can be issued to restrain a person, who is a State officer, from performing any official act enjoined by statute; and whether a Court of equity can decree restitution, if the act be performed. In pursuing this inquiry, it must be assumed, for the present, that the act is unconstitutional, and furnishes no authority or protection to the officer who is about to proceed under it. This must be assumed, because, in the arrangement of his argu-

ment, the counsel who opened the cause, has chosen to reserve that point for the last, and to contend that, though the law be void, no case is made out against the defendants. We suspend, also, the consideration of the question, whether the interest of the State of Ohio, as disclosed in the bill, shows a want of jurisdiction in the Circuit Court, which ought to have arrested its proceedings. That question, too, is reserved by the appellants, and will be subsequently considered. The sole inquiry, for the present, is, whether, stripping the case of these objections, the plaintiffs below were entitled to relief in a Court of equity, against the defendants, and to the protection of an injunction. The appellants expressly waive the extravagant proposition, that a void act can afford protection to the person who executes it, and admits the liability of the defendants to the plaintiffs, to the extent of the injury sustained, in an action at law. The question, then, is reduced to the single inquiry, whether the case is cognizable in a Court of equity. If it is, the decree must be affirmed, so far as it is supported by the evidence in the cause.

The appellants allege, that the original bill contains no allegation which can justify the application for an injunction, and treat the declarations of Ralph Osborn, the Auditor, that he should execute the law, as the light and frivolous threats of an individual, that he would commit an ordinary trespass. But surely this is not the point of view in which the application for an injunction is to be considered. The Legislature of Ohio had passed

1824.

Osborn v. U. S. Bank.

a law for the avowed purpose of expelling the Bank from the State; and had made it the duty of the Auditor to execute it as a ministerial officer. He had declared that he would perform this duty. The law, if executed, would unquestionably effect its object, and would deprive the Bank of its chartered privileges, so far as they were to be exercised in that State. It must expel the Bank from the State; and this is, we think, a conclusion which the Court might rightfully draw from the law itself. That the declarations of the Auditor would be fulfilled, did not admit of reasonable doubt. It was to be expected, that a person continuing to hold an office, would perform a duty enjoined by his government, which was completely within his power. This duty was to be repeated until the Bank should abandon the exercise of its chartered rights.

To treat this as a common casual trespass, would be to disregard entirely its true character and substantial merits. The application to the Court was, to interpose its writ of injunction, to protect the Bank, not from the casual trespass of an individual, who might not perform the act he threatened, but from the total destruction of its franchise, of its chartered privileges, so far as respected the State of Ohio. It was morally certain, that the Auditor would proceed to execute the law, and it was morally certain, that the effect must be the expulsion of the Bank from the State. An annual charge of 100,000 dollars, would more than absorb all the advantages of the privilege, and would consequently annul it.

1824.

Osborn v. U. S. Bank.

The appellants admit, that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But, although the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. The interference of the Court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the Court rather strengthened than weakened? Had the privilege of the Bank been exclusive, the argument admits that any other person, or company, might have been enjoined, according to the regular course of the Court of Chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury, the appellants say, cannot be estimated in damages. It requires no argument to prove, that the injury is greater, if the whole privilege be destroyed, than if it be divided; and, so far as respects the estimate of damages, although precise accuracy may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the Court and Jury. It will not be pretended, that, in such a case, an action at law could not be maintained, or that the materials do not exist on which a verdict might be

1824.

Osborn v. U. S. Bank.

found, and a judgment rendered. But in this, and many other cases of continuing injuries, as in the case of repeated ejectments, a Court of Chancery will interpose. The injury done, by denying to the Bank the exercise of its franchise in the State of Ohio, is as difficult to calculate, as the injury done by participating in an exclusive privilege. The single act of levying the tax in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in Chancery, which prevents its repetition, and protects the privilege. The same conservative principle, which induces the Court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this. Indeed, trespass is destruction, where there is no privity of estate.

If the State of Ohio could have been made a party defendant, it can scarcely be denied, that this would be a strong case for an injunction. The objection is, that, as the real party cannot be brought before the Court, a suit cannot be sustained against the agents of that party; and cases have been cited, to show that a Court of Chancery will not make a decree, unless all those who are substantially interested, be made parties to the suit.

This is certainly true, where it is in the power of the plaintiff to make them parties; but if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself

1824.

Osborn v. U. S. Bank.

above the law, be exempt from all judicial process, it would be subversive of the best established principles, to say that the laws could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit. It is admitted, that the privilege of the principal is not communicated to the agent; for the appellants acknowledge that an action at law would lie against the agent, in which full compensation ought to be made for the injury. It being admitted, then, that the agent is not privileged by his connexion with his principal, that he is responsible for his own act, to the full extent of the injury, why should not the preventive power of the Court also be applied to him? Why may it not restrain him from the commission of a wrong, which it would punish him for committing? We put out of view the character of the principal as a sovereign State, because that is made a distinct point, and consider the question singly as respects the want of parties. Now, if the party before the Court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the Court? The appellants found their distinction on the legal principle, that all trespasses are several as well as joint, without inquiry into the validity of this reason, if true. We ask, if it be true? Will it be said, that the action of trespass is the only remedy given for this injury? Can it be denied, that an action on the case, for money had and received to the plaintiff's use, might be maintained?

1824. Osborn v. U. S. Bank.

We think it cannot; and if such an action might be maintained, no plausible reason suggests itself to us, for the opinion, that an injunction may not be awarded to restrain the agent, with as much propriety as it might be awarded to restrain the principal, could the principal be made a party.

We think the reason for an injunction is much stronger in the actual, than it would be in the supposed case. In the regular course of things, the agent would pay over the money immediately to his principal, and would thus place it beyond the reach of the injured party, since his principal is not amenable to the law. The remedy for the injury, would be against the agent only; and what agent could make compensation for such an injury? The remedy would have nothing real in it. It would be a remedy in name only, not in substance. This alone would, in our opinion, be a sufficient reason for a Court of equity. The injury would, in fact, be irreparable; and the cases are innumerable, in which injunctions are awarded on this ground.

But, were it even to be admitted, that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill and those proceedings support the decree.

The case they make, is, that the money and

notes of the plaintiffs, in the Circuit Court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all other money and notes. It is admitted, that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a Court of equity.

We think it a case in which a Court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

One, which appears to be ample for the purpose, is, that a Court will always interpose, to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus, the holder of negotiable securities, indorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them.[a] Thus, too, a transfer of stock will be restrained in favour of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books, than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a Court of equity, in such cases, to arrest the injury, and prevent the wrong. The remedy is more beneficial and complete, than the law can give. The money of the Bank, if mingled with the other mo-

[a] 1 *Mad.* 154, 155.

1824.

Osborn v. U. S. Bank.

ney in the treasury, and put into circulation, would be totally lost to the owners; and the reason for an injunction is, at least, as strong in such a case, as in the case of a negotiable note.

The exemption of the State from suability, no objection to the proceedings against its officers, for executing an unconstitutional law.

6. We proceed now to the 6th point made by the appellants, which is, that if any case is made in the bill, proper for the interference of a Court of Chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

The bill is brought, it is said, for the purpose of protecting the Bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the Court to restrain the officers of the State from executing the law. It is, then, a controversy between the Bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the Court, though not directed against the State by name, acts directly upon it, by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the Court ought not to proceed without making the State a party. If this cannot be done, the Court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and, had it been in the power of the Bank to make it a party, perhaps no decree ought to have been pronounced in the cause, until the

State was before the Court. But this was not in the power of the Bank. The eleventh amendment of the constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the Court may act upon the agents employed by the State, and on the property in their hands.

Before we try this question by the constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exercise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts, that the agents of a State, alleging the authority of a law void in itself, because repugnant to the constitution, may arrest the execution of any law in the United States. It maintains, that if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own Courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous

1824.

Osborn v. U. S. Bank.

penalties, from the performance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the performance of his duty, may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs, while the nation stands naked, stripped of its defensive armour, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and, if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the Bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer for the performance of his duty, than by the infliction of this penalty on a Bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power

to restrain him is denied as positively in the one as in the other.

The distinction between any extreme case, and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears, when considering the question of jurisdiction; for, if the Courts of the United States cannot rightfully protect the agents who execute every law authorized by the constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union, from the attempts of a particular State to resist the execution of those laws.

The State of Ohio denies the existence of this power, and contends, that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent; of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the 11th amendment of the constitution.

That the Courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted. Is a suit, brought against an individual, for any cause whatever, a suit against a State, in the sense of the constitution?

1824.

Osborn v. U. S. Bank.

The 11th amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

The words of the constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a State shall be a party."

The words of the 11th amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign state."

The Bank of the United States contends, that in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

The appellants admit, that the jurisdiction of the Court is not ousted by any incidental or consequential interest, which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State, through its officers.

If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced, where any person has been considered as a party, who is not made so in the record. But the Court will not review those decisions, because it is thought a question growing out of the constitution of the United States, requires rather an attentive consideration of the words of that instrument, than of the decisions of analogous questions by the Courts of any other country.

Do the provisions, then, of the American constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

The first in the enumeration, is a controversy between two or more States.

There are not many questions in which a State would be supposed to take a deeper or more immediate interest, than in those which decide on the extent of her territory. Yet the constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered, by the framers of the constitution, as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves, that the constitu-

1824.

Osborn v. U. S. Bank.

tion does not consider the State as a party in such a case.

Jurisdiction is expressly granted, in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the Court takes jurisdiction for that reason. Still, the right of the State to grant, is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the constitution will be construed to forbid the Circuit Courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

We are aware, that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the Court, where its judgment does not act directly upon the property or interests of the State; but we deemed it of some importance to show, that the framers of the constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest, without being a party on the record.

In cases where a State is a party on the record, the question of jurisdiction is decided by inspection. If jurisdiction depend, not on this plain fact, but on the interest of the State, what rule has the constitution given, by which this interest

is to be measured? If no rule be given, is it to be settled by the Court? If so, the curious anomaly is presented, of a Court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in the enumeration, is a controversy between a State and the citizens of another State.

Can this case arise, if the State be not a party on the record? If it can, the question recurs, what degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual? Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New-York and New-Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the federal Court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted, that in such a case the action would lie, because the officer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act, may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead in bar the judgment of a Court of

1824.

Osborn v. U. S. Bank.

competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State, in the hands of its officer. And yet the argument admits, that the action, in such a case, would be sustained. But, suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But, before we review them, we will notice one where the nature of the controversy is, in some degree, blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his se-

cretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the Court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the constitution in the two cases is different. This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is, "controversies to which the United States shall be a party."

Does this provision extend to the cases where the United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are

1824. for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet, these suits could not be instituted in the Courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the Court jurisdiction over them, as being cases arising under a law of the United States.

Osborn v. U. S. Bank.

The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided, that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the federal Courts could be ousted by the fact, that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined, in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted, that this interest in

no manner affects the jurisdiction of the Court? The plain and obvious answer is, because the jurisdiction of the Court depends, not upon this interest, but upon the actual party on the record.

Were a State to be the sole legatee, it will not, we presume, be alleged, that the jurisdiction of the Court, in a suit against the executor, would be more affected by this fact, than by the fact that any other person, not suable in the Courts of the Union, was the sole legatee. Yet, in such a case, the Court would decide directly and immediately on the interest of the State.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the 2d section of the 3d article, the Supreme Court could never take original jurisdiction, in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect, if the constitution be construed as it

1824.

Osborn v. U. S. Bank.

would have been construed, had the jurisdiction of the Court never been extended to suits brought against a State, by the citizens of another State, or by aliens.

The State not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is, not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the officers of the State for the money taken out of the Bank, was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is, to its being enforced against the specific article taken, and by the decree of this Court. But, it has been shown, we think, that an action of detinue might be maintained for that article, if the Bank had possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the Bank against the individual in possession of it. The judgment in such a suit might have been enforced, had the article been found in possession of the individual defendant. It has been shown, that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a Court of equity. It was in a

1824.

Osborn v. U. S. Bank.

Court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the constitution, or to a law of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

The decision of the Court in *M'Culloch v. Maryland*, reviewed and confirmed.

This point was argued with great ability, and decided by this Court, after mature and deliberate consideration, in the case of *M'Culloch v. The State of Maryland*. A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favour of the right of a State to tax the Bank, is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being

1824.

Osborn v. U. S. Bank.

employed by the government in the transaction of its fiscal affairs, would no more exempt its private business from the operation of that power, than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The Bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connexion with the government, is admitted; but the Bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of *M'Culloch v. The State of Maryland*, is founded on, and sustained by, the idea that the Bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. It is, undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavour to distinguish between this trade and its

agency for the public, between its Banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, &c. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be any thing in this distinction, it would tend to show that so much of the act as incorporates the Bank is constitutional, but so much of it as authorizes its Banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a Bank? This question was answered in the case of *M'Culloch v. The State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject,

1824.

Osborn v. U. S. Bank.

the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a Bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its faculties, its trade, and occupation, is to tax the Bank itself? To destroy or preserve the one, is to destroy or preserve the other.

It is urged, that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated, or restrained, when conducted by an individual, it may, likewise, be taxed, regulated, or restrained, when conducted by a corporation.

The general correctness of these propositions need not be controverted. Their particular application to the question before the Court, is alone to be considered. We do not maintain that the corporate character of the Bank exempts its operations from the action of State authority. If an individual were to be endowed with the same fa-

culties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the Secretary of the Treasury to be authorized, by law, to appoint agencies throughout the Union, to perform the public functions of the Bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the Bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labour, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each State in the Union possess a right to

1824.

Osborn v. U. S. Bank.

control these operations? The question on which this right would depend must always be, are these faculties so essential to the fiscal operations of the government, as to authorize Congress to confer them? Let this be admitted, and the question, does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary, to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national Legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government, is too obvious for controversy; and who will venture to affirm, that the suppression of them would not materially affect those operations, and essentially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government, than it could otherwise be; and, if this be true, the capacity to carry on this trade, is a faculty indispensable to the character and objects of the institution.

The appellants admit, that, if this faculty be necessary, to make the Bank a fit instrument for the purposes of the government, Congress possesses the same power to protect the machine in

this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The Court has already stated its conviction, that without this capacity to trade with individuals, the Bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

It is contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the Court.

It is not unusual, for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted, that all who are employed in them, are protected, while in the line of duty; and yet this protection is not expressed in any act of Congress. It is in-

1824.

Osborn v. U. S. Bank.

cidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them, by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will, in any case. If the sound construction of the act be, that it exempts the trade of the Bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, Courts are as much bound to give it that construction, as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge; always for the purpose of giving effect to the will of the Legislature; or, in other words, to the will of the law.

The appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the Bank. The connexion of the government with the Bank, is likened to that with contractors.

It will not be contended, that the directors, or

other officers of the Bank, are officers of government. But it is contended, that, were their resemblance to contractors more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character, as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions, be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the Bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.

If the trade of the Bank be essential to its character, as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine; as well upon the faculty of collecting and transmitting the money of the nation, as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking, as an important feature in the character of this corporation, which was necessary, to make it a fit instrument for the objects for which it was created, the Court adheres to its decision in the case of *M'Culloch* against *The State*

1824.

Osborn v. U. S. Bank.

of Maryland, and is of opinion, that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States, made in pursuance of the constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self respect, to pretend, that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

It being then shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the constitution, the State being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the Court in pronouncing a decree against the defendants? That this question is attended with great difficulty, has not been concealed or denied. But when we reflect, that the defendants, Osborne and Harper, are incontestably liable for the full amount of the money taken out of the Bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the property of the Bank, unless the form of having made an entry on the books of the treasury can countervail the fact, that it was, in truth, kept untouched, in a trunk, by itself, as a deposit, to await

1824.

Osborn v. U. S. Bank.

the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money, having reached the hands of all those to whom it afterwards came with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury, nor put into circulation. Were it to be admitted, that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the Court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the Bank had been taken, without authority, by some of the defendants, and was detained by the only person who was not an original wrong doer, in a specific form; so that detinue might have been maintained for it, had it been in the power of the Bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances, we think, a Court of equity may afford its aid, on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes, from putting them into circulation; or a person having the apparent ownership of stock really belonging to another, from transferring it. The suit, then, might be as well sustained in a

1824.

Osborn v. U. S. Bank.

Court of equity as in a Court of law, and the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued—of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt v. Gelston*, in the case of *The Apollon*, and in the case of *Doddridge's Lessee v. Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in Court. But a friend of the Court comes in, and, by suggestion, gives it to understand, that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff, and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The Court must proceed to investigate the assertion, and examine the title. In the case at bar, the tribunal established by the constitution, for the purpose of deciding, ultimately, in all cases of this description, had solemnly determined, that a State law imposing a tax on the Bank of the United States, was unconstitutional and void, before the wrong was committed for which this suit was brought.

We think, then, that there is no error in the de-

cree of the Circuit Court for the district of Ohio, so far as it directs restitution of the specific sum of 98,000 dollars, which was taken out of the Bank unlawfully, and was in the possession of the defendant, Samuel Sullivan, when the injunction was awarded, in September, 1820, to restrain him from paying it away, or in any manner using it; and so far as it directs the payment of the remaining sum of 2000 dollars, by the defendants, Ralph Osborne and John L. Harper; but that the same is erroneous, so far as respects the interest on the coin, part of the said 98,000 dollars, it being the opinion of this Court, that, while the parties were restrained by the authority of the Circuit Court from using it, they ought not to be charged with interest. The decree of the Circuit Court for the district of Ohio is affirmed, as to the said sums of 98,000 dollars, and 2000 dollars; and reversed, as to the residue.

1824.

Osborn v. U. S. Bank.

Mr. Justice JOHNSON. The argument in this cause presents three questions: 1. Has Congress granted to the Bank of the United States, an unlimited right of suing in the Courts of the United States? 2. Could Congress constitutionally grant such a right? and 3. Has the power of the Court been legally and constitutionally exercised in this suit?

I have very little doubt that the public mind will be easily reconciled to the decision of the Court here rendered; for, whether necessary or unnecessary originally, a state of things has now grown up, in some of the States, which renders all

1824.

Osborn v. U. S. Bank.

the protection necessary, that the general government can give to this Bank. The policy of the decision is obvious, that is, if the Bank is to be sustained; and few will bestow upon its legal correctness, the reflection, that it is necessary to test it by the constitution and laws, under which it is rendered.

The Bank of the United States, is now identified with the administration of the national government. It is an immense machine, economically and beneficially applied to the fiscal transactions of the nation. Attempts have been made to dispense with it, and they have failed; serious and very weighty doubts have been entertained of its constitutionality, but they have been abandoned; and it is now become the functionary that collects, the depository that holds, the vehicle that transports, the guard that protects, and the agent that distributes and pays away, the millions that pass annually through the national treasury; and all this, not only without expense to the government, but after paying a large bonus, and sustaining actual annual losses to a large amount; furnishing the only possible means of embodying the most ample security for so immense a charge.

Had its effects, however, and the views of its framers, been confined exclusively to its fiscal uses, it is more than probable that this suit, and the laws in which it originated, would never have had existence. But it is well known, that with that object was combined another, of a very general, and not less important character.

The expiration of the charter of the former Bank, led to State creations of Banks; each new Bank in-

creased the facilities of creating others; and the necessities of the general government, both to make use of the State Banks for their deposits, and to borrow largely of all who would lend to them, produced that rage for multiplying Banks, which, aided by the emoluments derived to the States in their creation, and the many individual incentives which they developed, soon inundated the country with a new description of bills of credit, against which it was obvious that the provisions of the constitution opposed no adequate inhibition.

A specie-paying Bank, with an overwhelming capital, and the whole aid of the government deposits, presented the only resource to which the government could resort, to restore that power over the currency of the country, which the framers of the constitution evidently intended to give to Congress alone. But this necessarily involved a restraint upon individual cupidity, and the exercise of State power; and, in the nature of things, it was hardly possible for the mighty effort necessary to put down an evil spread so wide, and arrived to such maturity, to be made without embodying against it an immense moneyed combination, which could not fail of making its influence to be felt, wherever its claimances could reach, or its industry and wealth be brought to operate.

I believe, that the good sense of a people, who know that they govern themselves, and feel that they have no interests distinct from those of their government, would readily concede to the Bank, thus circumstanced, some, if not all the rights here

1824.

Osborn v. U. S. Bank.

contended for. But I cannot persuade myself, that they have been conceded in the extent which this decision affirms. Whatever might be proper to be done by an amendment of the constitution, this Court is only, at present, expounding its existing provisions.

In the present instance, I cannot persuade myself, that the constitution sanctions the vesting of the right of action in this Bank, in cases in which the privilege is exclusively personal, or in any case, merely on the ground that a question might *possibly* be raised in it, involving the constitution, or constitutionality of a law, of the United States.

When laws were heretofore passed for raising a revenue by a duty on stamped paper, the tax was quietly acquiesced in, notwithstanding it entrenched so closely on the unquestionable power of the States over the law of contracts; but had the same law which declared void contracts not written upon stamped paper, declared, that every person holding such paper should be entitled to bring his action "in any Circuit Court" of the United States, it is confidently believed that there could have been but one opinion on the constitutionality of such a provision. The whole jurisdiction over contracts, might thus have been taken from the State Courts, and conferred upon those of the United States. Nor would the evil have rested there; by a similar exercise of power, imposing a stamp on deeds generally, jurisdiction over the territory of the State, whoever might be parties, even between citizens of the same State—jurisdiction of suits instituted for the recovery of legacies

or distributive portions of intestates' estates—jurisdiction, in fact, over almost every possible case, might be transferred to the Courts of the United States. Wills may be required to be executed on stamped paper; taxes may be, and have been, imposed upon legacies and distributions; and, in all such cases, there is not only a possibility, but a probability, that a question may arise, involving the constitutionality, construction, &c. of a law of the United States. If the circumstance, that the questions which the case involves, are to determine its character, whether those questions be made in the case or not, then every case here alluded to, may as well be transferred to the jurisdiction of the United States, as those to which this Bank is a party. But still farther, as was justly insisted in argument, there is not a tract of land in the United States, acquired under laws of the United States, whatever be the number of mesne transfers that it may have undergone, over which the jurisdiction of the Courts of the United States might not be extended by Congress, upon the very principle on which the right of suit in this Bank is here maintained. Nor is the case of the alien, put in argument, at all inapplicable. The one acquires its character of individual property, as the other does his political existence, under a law of the United States; and there is not a suit which may be instituted to recover the one, nor an action of ejectment to be brought by the other, in which a right acquired under a law of the United States, does not lie as essentially at the basis of the right of action, as in the suits brought by this Bank.

1824.

Osborn v. U. S. Bank.

It is no answer to the argument, to say, that the law of the United States is but ancillary to the constitution, as to the alien; for the constitution could do nothing for him without the law: and, whether the question be upon law or constitution, still if the possibility of its arising be a sufficient circumstance to bring it within the jurisdiction of the United States Courts, that possibility exists with regard to every suit affected by alien disabilities; to real actions in time of peace—to all actions in time of war.

I cannot persuade myself, then, that, with these palpable consequences in view, Congress ever could have intended to vest in the Bank of the United States, the right of suit to the extent here claimed. And, notwithstanding the confidence with which this point has been argued, an examination of the terms of the act, and a consideration of them with a view to the context, will be found to leave it by no means a clear case, that such is the legal meaning of the act of incorporation. To be sure, if the act had simply and substantively given the right "to sue and be sued in the Circuit Courts of the United States," there could have been no question made upon the construction of those words. But such is not the fact. The words are, not that the Bank shall be made able and capable in law, to sue, &c., but that it shall, "by a certain name," be made able and capable in law to do the various acts therein enumerated. And these words, under the force of which this suit is instituted, are found in the ordinary incorporating clause of this act, a clause

1824.

Osborn v. U. S. Bank.

which is well understood to be, and which this Court, in the case of *Deveaux*, has recognised to be, little more than the mere common place or formula of such an act. The name of a corporation is the symbol of its personal existence; a misnomer there is fatal to a suit, (and still more fatal as to other transactions.) By the incorporating clause, a name is given it, and, with that name, a place among created beings; then usually follows an enumeration of the ordinary acts in which it may personate a natural man; and among those acts, the right to sue and be sued, of which the Court, in *Deveaux's* case, very correctly remarks, that it is "a power which if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular Court, but to give a capacity to the corporation to appear as a corporation in any Court which would by law have cognizance of the cause if brought by individuals." With this qualification, the clause in question will be construed, as an enumeration of incidents, instead of a string of enactments; and such a construction is strongly countenanced by the concluding sentence of the section; for, after running through the whole routine of powers, most of which are unquestionably incidental, and needed no enactment to vest them, it concludes thus: "and generally to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." And, in going over the act, it will be found, that whenever it is contemplated to vest a power not incidental, it is done by a specific provision, made

1824.

Osborn v. U. S. Bank.

the subject of a distinct clause; such is that power to transact the business of the loan-office of the United States. And, indeed, there is one section of the act, which strikingly exhibits the light in which the law-makers considered the incorporating clause. I mean the tenth; which, notwithstanding that the same clause in the seventh section, which is supposed to confer this sweeping power *to sue*, confers also, in terms equally comprehensive, the power to make laws for the institution, and "to do and execute all and singular the matters and things, which to them it shall and may appertain to do," contains an enactment in the following words: "that they shall have power to appoint such officers, clerks, and servants, under them, for executing the business of the corporation, and to allow them such compensation for their services respectively, as shall be reasonable; and shall be capable of exercising such other powers and authorities for the well governing and ordering the officers of the said corporation, as shall be prescribed by the laws, regulations, and ordinances, of the same;" a section which would have been altogether unnecessary, had the seventh section been considered as enacting, instead of enumerating and limiting. I consider the incorporating clause, then, not as purporting the absolute investment of any power, but as the usual and formal declaration of the extent to which this artificial should personate the natural person, in the transactions incident to ordinary life, or to the peculiar objects of its creation; and, therefore, not vesting the right to sue in the Courts of the United

States, but only the right of personating the natural man in the Courts of the United States, as it might, upon general principles, in any other Courts of competent jurisdiction. And this, I say, is consonant to the decision in *Deveaux's* case, and sustained by abundant evidence on the face of the act itself. Indeed, any other view of the effect of the section, converts some of its provisions into absolute nonsense.

It has been argued, and I have no objection to admit, that the phraseology of this act has been varied from that incorporating the former Bank, with a view to meet the decision in *Deveaux's* case. But it is perfectly obvious, that in the prosecution of that design, the purport of *Deveaux's* case has been misapprehended. The Court there decide, that the jurisdiction of the United States depended, (1.) on the character of the cause, (2.) on the character of the parties; that the Judiciary Act confined the jurisdiction of the Circuit Courts to the second class of cases, and the incorporating act contained no words that purported to carry it further. Whether the legislative power of the United States could extend it as far as is here insisted on, or what words would be adequate to that purpose, the case neither called on the Court to decide, nor has it proposed to decide. If any thing is to be inferred from that decision on those points, it is unfavourable to the sufficiency of the words inserted in the present act. For, the argument of the Court intimates, that where the Legislature propose to give jurisdiction to the Courts of the United States, they do

1824.

Osborn v. U. S. Bank.

it by a separate provision, as in the case of the action of debt for exceeding the sum authorized to be loaned. And on the words of the incorporating section, it makes this remark, "that it is not understood to enlarge the jurisdiction of any particular Court, but to give a capacity to the corporation to appear as a corporation in any Court, which would by law have cognizance of the cause if brought by individuals. If jurisdiction is given by this clause to the federal Courts, it is equally given to all Courts having original jurisdiction, and for all sums, however small they be." Now, the difference of phraseology between the former act and the present, in the clause in question, is this: the former has these words, "may sue and be sued, &c. in Courts of record or any other place whatsoever;" the present act has substituted these words, "in all State Courts having competent jurisdiction, and in any Circuit Court of the United States." Now, the defect here could not have been the want of adequate words, had the intent appeared to have been, to enlarge the jurisdiction of any particular Court. For, if the Circuit Courts were *Courts of record*, the right of suit given was as full as any other words could have made it. But, as the Court in its own words assigns the ground of its decision, the clause could not have been intended to enlarge the jurisdiction of the State Courts, and therefore could not have been intended to enlarge that of the federal Courts, much less to have extended it to the smallest sum possible. Therefore it concludes, that the clause is one of mere enumeration, con-

taining, as it expresses it, "the powers which, if not incident to a corporation, are conferred by every incorporating act, and are not understood to enlarge," &c. If, then, this variation had in view the object which is attributed to it, the words intended to answer that object have been inserted so unhappily as to neutralize its influence; but, I think it much more consistent with the respect due to the draftsman, who was known to have been an able lawyer, to believe that, with such an object in view, he would have pursued a much more plain and obvious course, and given it a distinct and unequivocal section to itself, or at least have worded it with more marked attention. This opinion is further supported, by considering the absurdities that a contrary opinion would lead to.

A literal translation of the words in question is impossible. Nothing but inconsistencies present themselves, if we attempt to apply it without a reference to the laws and constitution of the United States, forming together the judicial system of the Union. The words are, "may sue and be sued, &c., in any State Court having competent jurisdiction, and in any Circuit Court of the United States." But why should one member of the passage be entitled to an enacting effect, and not the residue? Yet, who will impute to the Legislature or the draftsman, and intention to vest a jurisdiction by these words in a State Court? I do not speak of the positive effect; since the failure of one enactment, because of a want either of power to give or capacity to receive, will not con-

1824.

Osborn v. U. S. Bank.

trol the effect as to any other enactment. I speak of the intent or understanding of the law-maker; who must have used these words, as applicable to the State Courts, in an enacting sense, if we suppose him to have used them in that sense, as to the Courts of the United States. Yet I should be very unwilling to impute to him, or to the Legislature of the country, ignorance of the fact, that such an enactment, if it was one, could not give a right to sue in the State Courts, if the right did not exist without it. Or, in fact, that such enactment was altogether unnecessary, if the legislative power, which must give effect to such an enactment, was adequate to constitute effectually this body corporate.

But why should this supposed enactment go still farther, and confer the capacity to be sued, as well as to sue, either in the Courts of the one jurisdiction or the other? Did the lawgivers suppose that this corporation would not be subject to suit, without an express enactment for that purpose also? Or was it guilty of the more unaccountable mistake, of supposing that it could confer upon individuals, indiscriminately, this privilege of bringing suits in the Courts of the United States against the Bank? that too, for a cause of action originating, say, in work and labour, or in a special action on the case, or perhaps, ejectment to try title to land mortgaged by a person not having the estate in him, or purchased of a tortious holder for a banking house? I cannot acquiesce in the supposition; and yet, if one is an enactment, and

takes effect as such, they are all enactments, for they are uttered *eodem flatu*.

1824.

Osborn v. U. S. Bank.

My own conclusion is, that none of them are enactments, but all merely declaratory; or, at most, only enacting, in the words of the Court, in the case of *Deveaux*, that the Bank may, by its corporate name and metaphysical existence, bring suit, or personate the natural man, in the Courts specified, as though it were in fact a natural person; that is, in those cases in which, according to existing laws, suits may be brought in the Courts specified respectively.

Indeed, a more unrestricted sense given to the words of the act, could not be carried into execution; a literal exercise of the right of suit, supposed to be granted, would be impossible. Can the Bank of the United States be sued (in the literal language of the act) "in any Circuit Court of the United States?" in that of Ohio, or Louisiana, for instance? Locality, in this respect, cannot be denied to such an institution; or, at least, it is only incidentally, by distress infinite, or attachment, for instance, that such a suit could be maintained. Nor, on the other hand, could the Bank sue literally in any Circuit Court of the United States. It must, of necessity, be confined to the Circuit Court of that district in which the defendant resides, or is to be found. And thus, at last, we circumscribe these general words, by reference to the judicial system of the United States, as it existed at the time. And why the same restriction should not have been imposed as to amount, which is imposed as to all other suitors,

1824.

O'Neal
vs.
U. S. Bank.

to wit, 500 dollars and upwards, is to me inscrutable, except on the supposition that this clause was not intended for any other purpose than that which I have supposed. The United States have suffered no other suitors to institute a suit in its Courts for less than that sum, and it is hard to conceive why the Bank should be permitted to institute a suit to recover, if it will, a single cent. This consideration is expressly drawn into notice by this Court, in the case of *Deveaux*, and if it was entitled to weight then, in fixing the construction of the incorporating section, I see no reason why it should be unnoticed now.

I will dwell no longer on a point, which is in fact secondary and subordinate; for if Congress can vest this jurisdiction, and the people will it, the act may be amended, and the jurisdiction vested. I next proceed to consider, more distinctly, the constitutional question, on the right to vest the jurisdiction to the extent here contended for.

And here I must observe, that I altogether misunderstood the counsel, who argued the cause for the plaintiff in error, if any of them contended against the jurisdiction, on the ground that the cause involved questions depending on general principles. No one can question, that the Court which has jurisdiction of the principal question, must exercise jurisdiction over every question. Neither did I understand them as denying, that if Congress could confer on the Circuit Courts appellate, they could confer original jurisdiction. The argument went to deny the right to assume jurisdiction on a mere hypothesis. It was one of

description, identity, definition; they contended, that until a question involving the construction or administration of the laws of the United States did actually arise, the *casus federis* was not presented, on which the constitution authorized the government to take to itself the jurisdiction of the cause. That until such a question actually arose, until such a case was actually presented, *non constat*, but the cause depended upon general principles, exclusively cognizable in the State Courts; that neither the letter nor the spirit of the constitution sanctioned the assumption of jurisdiction on the part of the United States at any previous stage.

1824.

Osborn v. U. S. Bank.

And this doctrine has my hearty concurrence in its general application. A very simple case may be stated, to illustrate its bearing on the question of jurisdiction between the two governments. By virtue of treaties with Great Britain, aliens holding lands were exempted from alien disabilities, and made capable of holding, aliening, and transmitting their estates, in common with natives. But why should the claimants of such lands, to all eternity, be vested with the privilege of bringing an original suit in the Courts of the United States? It is true, a question might be made, upon the effect of the treaty, on the rights claimed by or through the alien; but until that question does arise, nay, until a decision against the right takes place, what end has the United States to subserve in claiming jurisdiction of the cause? Such is the present law of the United States, as to all but this one distinguished party; and that law was

1824.

Osborn v. U. S. Bank.

passed when the doctrines, the views, and ends of the constitution, were, at least, as well understood as they are at present. I attach much importance to the 25th section of the judiciary act, not only as a measure of policy, but as a cotemporaneous exposition of the constitution on this subject; as an exposition of *the words* of the constitution, deduced from a knowledge of its views and policy. The object was, to secure a uniform construction and a steady execution of the laws of the Union. Except as far as this purpose might require, the general government had no interest in stripping the State Courts of their jurisdiction; their policy would rather lead to avoid incumbering themselves with it. Why then should it be vested with jurisdiction in a thousand causes, on a mere possibility of a question arising, which question, at last, does not occur in one of them? Indeed, I cannot perceive how such a reach of jurisdiction can be asserted, without changing the reading of the constitution on this subject altogether. The judicial power extends only to "cases arising," that is, actual, not potential cases. The framers of the constitution knew better, than to trust such a *quo minus* fiction in the hands of any government.

I have never understood any one to question the right of Congress to vest original jurisdiction in its inferior Courts, in cases coming properly within the description of "cases arising under the laws of the United States;" but surely it must first be ascertained, in some proper mode, that the cases are such as the constitution describes. By possibility, a constitutional question may be raised in

1824.

Osborn v. U. S. Bank.

any conceivable suit that may be instituted; but that would be a very insufficient ground for assuming universal jurisdiction; and yet, that a question has been made, as that, for instance, on the Bank charter, and may again be made, seems still worse, as a ground for extending jurisdiction. For, the folly of raising it again in every suit instituted by the Bank, is too great, to suppose it possible. Yet this supposition, and this alone, would seem to justify vesting the Bank with an unlimited right to sue in the federal Courts. Indeed, I cannot perceive how, with ordinary correctness, a question can be said to be involved in a cause, which only may possibly be made, but which, in fact, is the very last question that there is any probability will be made; or rather, how that can any longer be denominated a question, which has been put out of existence by a solemn decision. The constitution presumes, that the decisions of the supreme tribunal will be acquiesced in; and after disposing of the few questions which the constitution refers to it, all the minor questions belong properly to the State jurisdictions, and never were intended to be taken away in mass.

Efforts have been made to fix the precise sense of the constitution, when it vests jurisdiction in the general government, in "cases arising under the laws of the United States." To me, the question appears susceptible of a very simple solution; that all depends upon the identity of the case supposed; according to which idea, a case may be such in its very existence, or it may become such in its progress. An action may "live, move, and have

1824.

Osborn v. U. S. Bank.

its being," in a law of the United States; such is that given for the violation of a patent-right, and four or five different actions given by this act of incorporation; particularly that against the President and Directors for over-issuing; in all of which cases the plaintiff must count upon the law itself as the ground of his action. And of the other description, would have been an action of trespass, in this case, had remedy been sought for an actual levy of the tax imposed. Such was the case of the former Bank against *Deveaux*, and many others that have occurred in this Court, in which the suit, in its form, was such as occur in ordinary cases, but in which the pleadings or evidence raised the question on the law or constitution of the United States. In this class of cases, the occurrence of a question makes the case, and transfers it, as provided for under the twenty-fifth section of the Judiciary Act, to the jurisdiction of the United States. And this appears to me to present the only sound and practical construction of the constitution on this subject; for no other cases does it regard as necessary to place under the control of the general government. It is only when the case exhibits one or the other of these characteristics, that it is acted upon by the constitution. Where no question is raised, there can be no contrariety of construction; and what else had the constitution to guard against? As to cases of the first description, *ex necessitate rei*, the Courts of the United States must be susceptible of original jurisdiction; and as to all other cases, I should hold them, also, susceptible of original jurisdiction, if it were prac-

1824.

Osborn v. U. S. Bank.

ticable, in the nature of things, to make out the definition of the case, so as to bring it under the constitution judicially, upon an original suit. But until the plaintiff can control the defendant in his pleadings, I see no practical mode of determining when the case does occur, otherwise than by permitting the cause to advance until the case for which the constitution provides shall actually arise. If it never occurs, there can be nothing to complain of; and such are the provisions of the twenty-fifth section. The cause might be transferred to the Circuit Court before an adjudication takes place; but I can perceive no earlier stage at which it can possibly be predicated of such a case, that it is one within the constitution; nor any possible necessity for transferring it then, or until the Court has acted upon it to the prejudice of the claims of the United States. It is not, therefore, because Congress may not vest an *original* jurisdiction, where they can constitutionally vest in the Circuit Courts *appellate* jurisdiction, that I object to this general grant of the right to sue; but, because that the peculiar nature of this jurisdiction is such, as to render it impossible to exercise it in a strictly original form, and because the principle of a possible occurrence of a question as a ground of jurisdiction, is transcending the bounds of the constitution, and placing it on a ground which will admit of an *enormous accession*, if not an *unlimited assumption*, of jurisdiction.

But, dismissing the question of possibility, which, I must think, would embrace every other case as well as those to which this Bank is a party, in what

1824.

Osborn v. U. S. Bank.

sense can it be predicated of this case, that it is one arising under a law of the United States? It cannot be denied, that jurisdiction of this suit in equity could not be entertained, unless the Court could have had jurisdiction of the action of trespass, which this injunction was intended to anticipate. And, in fact, there is no question, that the Bank here maintains, that the right to sue extends to common trespass, as well as to contracts, or any other cause of action. But suppose trespass in the common form instituted; the declaration is general, and the defendant pleads not guilty, and goes to trial. Where is the feature in such a cause that can give the Court jurisdiction? What question arises under a law of the United States? or what question that must not be decided exclusively upon the *lex loci*, upon State laws? Take also the case of a contract, and in what sense can it be correctly predicated of that, that in common with every other act of the Bank, it arises out of the law that incorporates it? May it not with equal propriety be asserted, that all the crimes and all the controversies of mankind, arise out of the fiat that called their progenitor into existence? It is not because man was created, that he commits a trespass, or incurs a debt; but because, being indued with certain faculties and propensities, he is led by an appropriate motive to the one action or the other. Sound philosophy attributes effects to their proximate causes. It is but pursuing the grade of creation from one step to another, to deduce the acts of this Bank from State law, or even divine law, with as much correctness as from the law of

its immediate creation. Its contracts arise under its own acts, and not under a law of the United States; so far from it, indeed, that their effect, their construction, their limitation, their concoction, are all the creatures of the respective State laws in which they originate. There is a satisfactory illustration of the distinction between contracts which draw their existence from statutes, and those which originate in the acts of man, afforded by this act of incorporation itself. It will be unnecessary to look beyond it. The action of debt before alluded to, given by the ninth clause of the seventh section, against the directors, to any one who will sue, is one of those factitious or statute contracts which exist in, and expire with, the statute that creates it. Not so with the ordinary contracts of the Bank; upon the expiration of the charter, they would be placed in the state of the credits of an intestate before administration; there is no one to sue for them; but the moral obligation would remain, and a Court of equity would enforce it against their debtors, at the suit of the individual stockholders. Nor would this be on the principle of contracts executed under power of attorney; for, the law applicable to principals would govern every question in such causes. All the acts of the corporation are executed *in their own* right, and not in *the right of another*. A personal existence, with all its incidents, is given to them, and it is in right of that existence that they are capable of acting, and do act.

1824.

Osborn v. U. S. Bank.

Nor, indeed, in another point of view, is it strictly predicable of this Bank, that its acts arise

1824.

Osborn v. U. S. Bank.

out of, because its existence is drawn from, a law of the United States. It is because it is *incorporated*, not because incorporated by a *law of the United States*, that it is made capable of exercising certain powers incidentally, and of being vested with others expressly. The same effects would follow, if incorporated by any other competent legislative power. The law of the United States creates the Bank, and the common law, or State law more properly, takes it up and makes it what it is. Who can deny, that in many points the incidents to such an institution may vary in different States, although its existence be derived from the general government? It is the case with the natural alien, when adopted into the national family. His rights, duties, powers, &c., receive always a shade from the *lex loci* of the State in which he fixes his domicil.

If this right to sue could be vested at all in the Bank, it is obvious that it must have been for one or more of three causes: 1. That a law of the United States incorporated it; 2. That a law of the United States vested in it the power to sue; or, 3. That the power to defend itself from trespasses as applicable to this case strictly, or to contract debts as applicable to the Georgia case, was conferred on it by a law of the United States expressly.

The first I have considered. On the second, no one would have the hardihood to contend, that such a grant has any efficacy, unless the suits come within the description of cases arising under a law of the United States, independently of the

grant of the right to sue; and it only remains to add a few more remarks on the third ground.

1824.

Osborn v. U. S. Bank.

Of the power to repel trespasses, and to enter into contracts, as mere incidents to its creation, I trust I have shown, that neither comes within the description of a case arising under a law of the United States. But where will we find, in the law in question, any express grant of power relative to either? The contracts on which the Georgia case is founded, are declared on as common promissory notes, payable to bearer. Now, as mere incidents, I have no doubt of an action being sustainable in a State Court in both cases. But if an express grant is relied on, as bringing this, or the case of a contract, within the description of "a case arising under a law of the United States," then I look through the law in vain for any express grant, either to make the contract, or repel the trespass. It is true, the sweeping terms with which the incorporating section concludes, import, that "by that name it shall and may be lawful for the Bank to do and execute all and singular the acts, matters, and things, which to them it shall and may appertain to do." But this contains no grant of either, since the inquiry, at last, must be into the incidents of such an institution, and, as incidents, they needed not these words to sustain them; nor could those words give any more force to the right. So that, at last, we are referred to the mere fact of its corporate existence, for the basis of either of the actions, or either of the powers here insisted on, as bringing this cause within the constitutional definition. Having a le-

1824.

Osborn v. U. S. Bank.

gal existence as an incorporated banking institution, it has a right to security in its possessions, and to the performance of its contracts; but that right will be precisely the same, if incorporated by a State law, or even, as was held in the case of *Terrett v. Taylor*, if having a common law corporate existence. The common law, or the State law, is referred to by the law of the United States, as the source of these incidents, when it speaks of the acts which are appurtenant to it; and I know of no other law that can define them, or confer them as incidents. Suppose a naturalization act passed, which, after specifying the terms and conditions upon which an alien shall become a citizen, proceeds to declare, "that, as a citizen, he shall lawfully do and execute all and singular the acts, matters, and things, which to 'a citizen,' or 'to him as a citizen,' it shall and may appertain to do," would not these words be a mere nullity? His new existence, and the relations with the society into which he is introduced, that grow out of that connexion, give him the right to defend his property or his existence, (as in this case,) and to enter into and enforce those contracts which, as an alien, he would have been precluded from. He was no more a citizen, without an act of Congress, than this was a Bank. Finally, after the most attentive consideration of this cause, I cannot help thinking, that this idea of taking jurisdiction upon an hypothesis, or even of assuming original, unlimited jurisdiction, of all questions arising under a law of the United States, involves some striking inconsistencies. A Court may take cognizance of a ques-

tion in a cause, and enter a judgment upon it, and yet not have jurisdiction of the cause itself. Such are all questions of jurisdiction, of which every Court, however limited its jurisdiction, must have cognizance in every cause brought before it. So, also, I see not why, upon the same principle, a law expressly violating the constitution, may not be made the groundwork of a transfer of jurisdiction. Cases may arise, and would arise, under such a law; and if the simple existence, or possibility of such a case, is a sufficient ground of jurisdiction, and that ground sufficient to transfer the whole case to the federal judiciary, the least that can be said of it is, that it was not a case within the mischief intended to be obviated by the constitution. I shall say no more on this subject, but proceed to one which also acts forcibly on my judgment in forming my opinion in this cause.

I will not undertake to define the limits within which the discretion of the Legislature of the Union may range, in the adoption of measures for executing their constitutional powers. It is very possible, that in the choice of means as "proper and necessary" to carry their powers into effect, they may have assumed a latitude not foreseen at the adoption of the constitution. For example, in order to collect a stamp duty, they have exercised a power over the general law of contracts; in order to secure debts due the United States, they have controlled the State laws of estates of deceased persons and of insolvents' estates; in the distributions and the powers of individuals themselves, when insolvent, in the assignment of their

1824.

Osborn v. U. S. Bank.

own estates; in the exercise of various powers, they have taken jurisdiction over crimes which the State laws took cognizance of; and all this, being within the range of their discretion, is aloof from *judicial* control, while unaffectedly exercised for the purposes of the constitution. Nor, indeed, is there much to be alarmed at in it, while the same people who govern the States, can, where they will, control the Legislature of the United States.

Yet, certainly, there is one limit to this chain of implied powers, which must lie beyond the reach of legislative discretion. No one branch of the general government can new model the constitutional structure of the other.

Much stress was laid, in the argument, upon the necessity of giving co-ordinate extent to the several departments of a government; but it was altogether unnecessary to bring this consideration into the present case. As a ground of policy, this is not its proper place; and as a ground of construction, it must be needless, when applied to a constitution in which the judicial power so very far transcends both the others, in its acknowledged limits.

The principle is, that every government should possess the means of protecting itself; that is, of construing and enforcing its own laws. But this is not the half of the extent of the judicial power of the Union. Its most interesting province, is to enforce the equal administration of laws, and systems of laws, over which the legislative power can exercise no control. And thus, the judicial power is distributed into the two

classes: 1. That which is defined by the circumstances of the case; and, 2. That which depends upon the circumstances of the person. On the first, I have endeavoured to show, that the end is adequately effected by the provisions of the 25th section of the Judiciary Act, and, practically, can be exercised in no other way. But with regard to the second class, the argument turns against the United States; and every reason that may be urged in favour of eking out the jurisdiction in the first class of cases, reacts forcibly to confine the jurisdiction strictly within its constitutional limits, as to the second class. When the alien, or the citizen of another State, or the grants of another State, are implicated, the State Courts open their tribunals to the judiciary of the United States, and recognise their power as co-ordinate. Their citizens, their territory, their laws, all are subjected to a power quite foreign to the States, and judicial power is literally poured out upon the Courts of the Union, without stint.

How interesting, then, is it to the States, that the number of those *persons* who claim the privilege of coming into the Courts of the United States should be strictly limited! *Cases*, since they arise out of laws, &c. of the United States, must be very limited in number; but *persons* may bring into the Courts of the United States any question and every question, and, if this law be correctly construed, for any, the very smallest possible amount.

But if the plain dictates of our senses be relied on, what state of facts have we exhibited here?

1824.

Osborn v. U. S. Bank.

Making a person, makes a case; and thus, a government which cannot exercise jurisdiction unless an alien or citizen of another State be a party, makes a party which is neither alien nor citizen, and then claims jurisdiction because it has made a case. If this be true, why not make every citizen a corporation sole, and thus bring them all into the Courts of the United States *quo minus?* Nay, it is still worse, for there is not only an evasion of the constitution implied in this doctrine, but a positive power to violate it. Suppose every individual of this corporation were citizens of Ohio, or, as applicable to the other case, were citizens of Georgia, the United States could not give any one of them, individually, the right to sue a citizen of the same State in the Courts of the United States; then, on what principle could that right be communicated to them in a body? But the question is equally unanswerable, if any single member of the corporation is of the same State with the defendant, as has been repeatedly adjudged.

One of the counsel who argued this cause in behalf of the Bank, has denominated it a bundle of faculties. This is very true; but those faculties are substituted for the organization of a natural person; and it is perfectly certain, that when it comes into this Court, it must be treated as a person. It is altogether inadmissible, to refine away the principles of jurisprudence, so as to consider it in any other light than that of a person. As such, it sues out a writ, declares, pleads, takes judgment, and levies an execution. If it is not a

person, it has no standing in this Court; it must, therefore, abandon this suit, or be subjected to personal disabilities. Gentlemen have a right to take what ground here they please, to sustain this action; but it is perfectly clear to me, that the act of Congress was intended to vest this right as a personal right, or not at all. Let any one look through this act, and notice the unrestricted latitude that has been assumed in vesting the right to sue both by and against this Bank, and he will see, that either there is no general right to sue given in the seventh section, now relied on, or that it is given under the general power granted to pass all laws necessary to carry the powers of the general government into execution. The proviso to the 17th section is a remarkable proof of this. It puts the limits of judicial power altogether out of view. If Congress, in legislating on this subject, did intend such a grant as is here contended for, it must be presumed that they did not advert to the consideration, that granting to an individual a right to sue, was enlarging the jurisdiction of the Court. It never can be supposed, that they meant to assume the power of adding to the number of persons who might constitutionally become suitors in the Courts of the United States. But every difficulty vanishes, when we limit the meaning of the language of the act, by a reference to the context. In fact, a general power to bring actions in the Courts of the United States, is so peculiarly and explicitly personal on the face of the constitution, that it is hard to perceive how Congress could have for a moment lost sight of the restric-

1824.

Osborn v. U. S. Bank.

tions imposed, in this respect, upon the judicial power.

Nor had the Bank any idea that this power was vested in it, upon the ground that every possible case in which it might be involved in litigation, came within the constitutional definition of cases arising under laws, &c. of the United States. In its averments, those on which it claims jurisdiction, it simply takes two grounds: 1. That it was incorporated by an act of Congress; 2. That the right to sue was given it by an act of Congress. But there is no averment, that the cause of action was a case arising under a law of the United States. It well knew, that it was a case emphatically arising out of an act of the State of Ohio, operating upon the domicil of the Bank, which, although purchased in right of an existence metaphysically given it by Congress, was acquired and held according to the laws of Ohio, acting upon its own territory. Technically, these averments cover only two grounds; they affirm, 1. That the Bank, being incorporated by Congress, had, therefore, a right to sue; 2. That being incorporated, and having the right to sue conferred upon it by an act of Congress, therefore, it could maintain this action. But yet neither, nor both of these, could give the right, unless in one of the cases defined in the constitution, which case is not the subject of an averment. I would not willingly place the case on the ground of mere technicality; and, therefore, only make the observation to show, that the ground assumed in argument, is an afterthought. I believe that, until this argument, the

1824.

Osborn v. U.S. Bank.

ground now made was never thought of; and I am at a loss to conceive how it is possible to maintain the position, that all possible cases in which this Bank shall sue or be sued, come within the description now contended for. Take, for instance, a trespass or a fraud committed by the Bank, and suit brought by the injured party, in what sense could they be said to be cases arising under a law of the United States? Or, take the case of ejectment, suppose to recover part of the premises of the banking house in Philadelphia, and not a question raised in the suit, but what arises under the territorial laws of the country, and what circumstances characterize that as a case of the proper description to give this Court jurisdiction? If this cause of action arises under a statute, why is not the statute referred to, and the provision particularly relied on, if there is any other than what the averments specify?

Various instances have been cited and relied on, in which this right of suit in the Courts of the United States has been given to particular officers of the United States. But on these I would remark, that it is not logical to cite as proofs, the exercise of this right, in instances which may themselves be the subject of constitutional questions. It cannot be intended to surprise this Court into the recognition of the constitutionality of the laws so cited. But there is a stronger objection; no such instance is in point, until it be shown that Congress has authorized such officers to bring their private contracts and private controversies into the Courts of the United States. In all the

1824.

Osborn v. U. S. Bank.

cases cited, the individual is acting distinctly as the organ of government; but let them take the character of a mere contractor, a factor, a broker, a common carrier, and then let laws authorizing them to sue in the Courts of the United States be passed, and I will acknowledge the cases to be in point; though I will still dispute the principle, that a repetition of error can convert an act into law or truth. The distinction is a clear one between all these cases and the Bank. The latter is a mere agent or attorney, in some instances; in others, and especially in the cases now before the Court, it is a private person, acting on its own account, not clothed with an official character at all. But the acts of public officers are the acts of government; and emphatically so, in suits by the Postmaster-General; the money to be recovered being the property of the United States, it may be considered that they are parties to the suit, just as those States are to the suits by or against their Attorney-General, where he is by law authorized to bring and defend suits in his own name officially. When the United States are parties, the grant of jurisdiction is general. But, there is express law also for every contract that the Postmaster enters into, or it will be in vain for him to bring his suit in his own name or otherwise. It would be in vain for him to rely simply on his being made Postmaster under an act of Congress; in which point alone, there would seem to exist any analogy between his case and that of the Bank.

As to the instance of the action given under the patent law, it has been before remarked, that so

entirely is its existence blended with an act of Congress, that to prosecute it, it is indispensable that the act should be set forth as the ground of action. I rather think it an unfortunate quotation, since it presents a happy illustration of what we are to understand by those cases arising under a law of Congress, which in their nature admit of an exercise of original jurisdiction. The plaintiff must recover, must count upon the act of Congress; the constitutional characteristic appears on the record before the defendant is called to answer; and the repeal of the statute before judgment, puts an end to his right altogether. Various such cases may be cited. But how the act of Congress is to be introduced into an action of trespass, ejectment, or slander, before the defendant is called to plead, I cannot imagine.

Upon the whole, I feel compelled to dissent from the Court, on the point of jurisdiction; and this renders it unnecessary for me to express my sentiments on the residue of the points in the cause.

Decree affirmed, except as to interest on the amount of the specie in the hands of the defendant, Sullivan.

1824.

U. S. Bank v. Planters' Bank.

[Constitutional Law.]

The Bank of the United States v. The Planters' Bank of Georgia.

The Circuit Courts of the United States have jurisdiction of suits brought by the Bank of the United States against another Bank, incorporated under a law of a State, and of which the State itself is a stockholder, together with private individuals, who are citizens of the same State with some of the stockholders of the Bank of the United States.

The Bank of the United States may sue in the Circuit Courts, as endorsee or bearer of a promissory note, although the original payee or endorser could not sue in the same Courts, being a citizen of the same State with the defendants.

The circumstance that a State is a member of a private corporation, will not give this Court original jurisdiction of suits where the corporation is a party, or oust the Circuit Courts of the jurisdiction vested in them by law.

March 11th. THIS cause was brought up on a certificate of a division of opinion between the Judges of the Circuit Court of Georgia, upon the questions arising in it, and was argued by the same counsel with the preceding case of *Osborn v. The Bank of the United States.*

March 20th. Mr. Chief Justice Marshall delivered the opinion of the Court.

In this case, the petition of the plaintiffs, which, according to the practice of the State of Georgia, is substituted for a declaration, is founded on promissory notes, payable to a person named in the note, "*or bearer*," and states, that the notes were

1824.

U. S. Bank v. Planters' Bank.

"duly transferred, assigned and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," &c.

The Planters' Bank pleads to the jurisdiction of the Court, and alleges, that it is a corporation, of which the State of Georgia, and certain individuals, who are citizens of the same State with some of the plaintiffs, are members. The plea also alleges, that the persons to whom the notes mentioned in the petition were made payable, were citizens of the State of Georgia, and, therefore, incapable of suing the said Bank in a Circuit Court of the United States; and being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that Court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the Judges were divided on two questions:

1. Whether the averments in the declaration be sufficient in law to give this Court jurisdiction of the cause?

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment?

The first question was fully considered by the Court in the case of *Osborne* v. *The Bank of the United States*, and it is unnecessary to repeat the reasoning used in that case. We are of opinion, that the averments in the declaration are sufficient to give the Court jurisdiction of the cause.

1824.

U. S. Bank v. Planters' Bank.

2d. The second point is understood to involve two questions:

1. Does the circumstance that the State is a corporator, bring this cause within the clause in the constitution which gives jurisdiction to the Supreme Court where a State is a party, or bring it within the 11th amendment?

2. Does the fact that the note is made payable to a citizen of the State of Georgia, or bearer, oust the jurisdiction of the Court?

1. Is the State of Georgia a party defendant in this case? If it is, then the suit, had the 11th amendment never been adopted, must have been brought in the Supreme Court of the United States. Could this Court have entertained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the State must be plaintiff or defendant as a State, and must, as a State, be a party on the record. A suit against the Planters' Bank of Georgia, is no more a suit against the State of Georgia, than against any other individual corporator. The State is not a party, that is, an entire party, in the cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show, that it is within the 11th amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the constitution; and if this case be not one of which the Supreme Court could have taken original jurisdiction, it is not within the amend-

ment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the Court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the federal Courts, but because the plaintiff has a right to sue any defendant in that Court, who is not withdrawn from its jurisdiction by the constitution, or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

It is, we think, a sound principle, that when a government becomes a partner in any trading company, it devests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. Thus, many States of this Union who have an interest in Banks, are not suable even in their own Courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the Bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character, so far as respects the transactions of the Bank, and waives all

1824.

U. S. Bank v. Planters' Bank.

the privileges of that character. As a member of a corporation, a government never exercises its sovereignty. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation, than are expressly given by the incorporating act.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the federal Courts, by the circumstance that the State is a corporator.

2. We proceed next to inquire, whether the jurisdiction of the Court is ousted by the circumstance, that the notes on which the suit was instituted, were made payable to citizens of the State of Georgia.

Without examining whether, in this case, the original promise is not to the bearer, the Court will proceed to the more general question, whether the Bank, as endorsee, may maintain a suit against the maker of a note payable to a citizen of

the State. The words of the Judiciary Act, section 11. are, "nor shall any District or Circuit Court have cognizance of any suit, to recover the contents of any promissory note, or other chose in action, in favour of an assignee, unless a suit might have been prosecuted in such Court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

This is a limitation on the jurisdiction conferred by the Judicary Act. It was apprehended that bonds and notes, given in the usual course of business, by citizens of the same State, to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the federal Courts. To remove this inconvenience, the act which gives jurisdiction to the Courts of the Union over suits brought by the citizen of one State against the citizen of another, restrains that jurisdiction, where the suit is brought by an assignee to cases where the suit might have been sustained, had no assignment been made. But the Bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States.

If the Bank could not sue a person who was a citizen of the same State with any one of its members, in the Circuit Court, this disability would defeat the power. There is, probably, not a commercial State in the Union, some of whose citizens

1824.

U. S. Bank v. Planters' Bank.

are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the Bank, for which a suit could be maintained in a federal Court, did the jurisdiction of the Court depend on citizenship. A general power to sue in any Circuit Court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

We think, then, that the charter gives to the Bank a right to sue in the Circuit Courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favour of the plaintiff.

Mr. Justice JOHNSON. This cause is one in which, from the great importance of the questions it gave rise to, was certified to this Court, on a *pro forma* difference of opinion, that it might undergo the fullest investigation, and give time for the maturest reflection.

The first of the points certified, involved the question of jurisdiction; for my opinion on which, I must refer to the case of *Osborn et al. v. The Bank of the United States*, argued in conjunction with this, and decided this term.

That opinion is final on the judgment which I must give in the cause; but there were other questions, which, although not touched upon in the argument here, were very ably argued in the Court below, and on which, having formed an opinion, I will make some remarks.

1824.

U. S. Bank v. Planters' Bank.

The case of *The Bank v. Deveaux*, having decided that this Court will look into the individual characters of the corporators plaintiffs, in order to give jurisdiction, where it depends on circumstances of the person, it was contended in the Court below, that this Court was bound, in justice, to look behind the charter of the Bank defendant, in order to determine the individual characters of the corporators defendants also. And the pleas were so drafted, as to exhibit to the Court two grounds on which to decide against the jurisdiction of the Circuit Court, as depending on individual character. The one was, that a citizen of one State was suing a citizen of the same State; the other, that the State of Georgia was a defendant, being a member of the corporation defendant, and was exempt from suit under the 11th amendment. And on both these grounds, I see not how I can refuse my assent to the doctrine of the pleas. The case of *Deveaux* forms, I presume, one of the canons of this Court. On no other ground can that decision be law, but that the individual corporators were the real parties plaintiffs. The same principle, when applied to the corporation defendant, will make the individual corporators here the real defendants to the suit. If, then, the real plaintiffs and the real defendants are so related in personal character, as to preclude this Court from taking jurisdiction, I see no ground on which we can sustain the demurrer, unless we reverse the decision in *Deveaux's* case.

So, also, with regard to the State of Georgia. An original suit against that State for the recovery

1824.

U. S. Bank v. Planters' Bank.

of a debt, could not be maintained. Yet, if an original suit against a corporation, be an original suit against each corporator, I see not wherein the case differs from that of a direct suit against the State. Suppose the case of a joint bond, given by a State and individuals, to an individual contractor, citizen of another State, what would except a suit on such a bond from the operation of the 11th amendment of the constitution? If it be said that the amendment alluded to has regard only to suits instituted against States in their sovereign capacity, I would ask, in what other capacity can a State appear, or even exist? In every possible form and shape, it is a sovereign State, or it is nothing. And this very stock, held in this Bank, is the property of the people of Georgia, held by them in the name and capacity of the State of Georgia. If any dispute were to arise on the title to the stock, in what capacity could they sue or be sued for the interest held by them in the stock, unless in their sovereign capacity? It is not because it imparts its own immunities to the other stockholders, that this action cannot be maintained, but because that the judicial power must reach each and every defendant, in order to bring a case within the prescribed limits of the constitution. Each defendant occupies his own peculiar rank, claims his own peculiar immunities; but they are not suable in the Courts of the United States, as long as any one of them is exempted from suit in those Courts.

I am here expressing a technical opinion, founded on the authority of the case of *The Bank v.*

1824.

U. S. Bank v. Planters' Bank.

Deveaux. That decision brings it strictly within the letter of the 11th amendment; although I am ready to admit, that, unaffected by that decision, it is not within its purview. Although not responsible for that decision, I acknowledge its obligation, until overruled.

The last question which the pleadings in this cause present, arises out of the nature of the contract, the form of the declaration, and that provision of the Judiciary Act, which precludes suits by an assignee of choses in action, when the suit could not be brought in the Courts of the United States, as between the original parties.

The plaintiff counts upon a number of promissory notes, payable to A. B. or bearer, commonly called bank notes, delivered to A. B., and by him "transferred, assigned, and set over" to the plaintiffs in this action. The plea states, that, as between the original promisor and promisee, suit could not have been brought in the Circuit Courts of the United States; and, therefore, it cannot, as between the present parties, the promisor and assignee. As all the facts are admitted by the demurrer, it is difficult to see on what ground this case is to be excepted from the operation of the provisions of the Judiciary Act on this subject. Whatever difficulties may be suggested, on the technical meaning of the term *assignment*, it is very clear that he who acquires a chose in action, by mere delivery, has been recognised in the laws of the United States as an assignee. If any considerations could be introduced into the case, besides what the pleadings bring out, there might be

1824.

U. S. Bank v. Planters' Bank.

much reason to doubt, whether the case of Bank bills, properly so called, and particularly so declared on, came within the general law applicable to promissory notes; but here, *non constat*, that the notes declared upon were ever thrown into circulation, as the representative of property, as a currency, a substitute for gold and silver.

But the case does not rest here. This ground of defence depends not on a constitutional provision, but on an act of Congress; and if it be true, that the unrestricted right to sue on all its contracts, be vested in the Bank of the United States, whatever their origin, or whatever their amount, it follows, that such a provision amounts to a repeal of the law here relied on. I rather think, that the improbability of such a provision being intended by the Legislature, operates against the construction that would sustain it. But if such be the legal construction of the incorporating act, there can be no doubt of its being fatal to this plea.

CERTIFICATE. This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the district of Georgia, and on the questions in said cause, on which the Judges of the said Circuit Court were divided in opinion, and was argued by counsel: On consideration whereof, this Court is of opinion, 1. That the averments in the declaration in said cause, are sufficient in law to give the said Circuit Court jurisdiction in said cause.

2. That, on the pleadings in the same, the plaintiffs are entitled to judgment.

All which is ordered to be certified to the said Circuit Court.

INDEX

TO

THE PRINCIPAL MATTERS

IN THIS VOLUME.

A.

ADMIRALTY.

1. A decree of acquittal, on a proceeding *in rem*, without a certificate of probable cause of seizure, and not appealed from with effect, is conclusive, in every inquiry before any other Court, that there was no justifiable cause of seizure. *The Appollon*, 362. 367
2. The French Tonnage Duty Act of the 15th of May, 1820, c. 125. inflicts no forfeiture of the vessel for the non-payment of the tonnage duty. The duty is collectable in the same manner as by the Collection Act of 1799, c. 128. *Id.* 367
3. The 29th section of the Collection Act of 1799, c. 128. does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such territory. *Id.* 369
4. The municipal laws of one nation do not extend, in their operation, beyond its own territory, except as regards its own citizens. *Id.* 370
5. A seizure for the breach of the municipal laws of one nation, cannot be made within the territory of another. *Id.* 371
6. *It seems*, that the right of visitation and search for enforcing the revenue laws of a nation, may be exercised beyond the territorial jurisdiction upon the high seas, and on vessels belonging to such nation, or bound to its ports. *Id.* 371
7. A municipal seizure cannot be justified or excused, upon the ground of probable cause, unless under the special provisions of some statute. *Id.* 372
8. The probable profits of a voyage, either upon the cargo or freight, do not form an item for the computation of damages, in cases of marine torts. *Id.* 376
9. Where the property is restored, after a detention, demurrage is allowed for the detention of the ship, and interest upon the value of the cargo. *Id.* 377
10. Where the vessel and cargo have been sold, the gross amount of the

sales, with interest, is allowed; and an addition of 10 per cent. sometimes made, where the property has been sold under disadvantageous circumstances. *Id.* 377

11. Counsel fees may be allowed, either as damages or costs, both on the Instance and Prize side of the Court. *Id.* 379

12. A libel or information does not require all the technical precision of an indictment at common law. If the allegations describe the offence, it is all that is necessary; and if founded upon a statute, it is sufficient if it pursues the words of the law. *The Emily and the Caroline,* 331

13. An information, under the Slave Trade Act of 1794, c. 187. [xi.] s. 1. which describes, in one count, the two distinct acts of *preparing a vessel* and of *causing her to sail*, pursuing the words of the law, is sufficient. *Id.* 387

14. Stating a charge *in the alternative*, is good, if each alternative constitutes an offence for which the thing is forfeited. *Id.* 387

15. Under the above act, it is not necessary, in order to incur the forfeiture, that the vessel should be completely fitted and ready for sea. As soon as the preparations have proceeded so far as clearly to manifest the intention, the right of seizure attaches. *Id.* 388

16. The former decision of this Court, in the case of the *Emily and the Caroline*, (7 *Cranch*, 496.) reconciled with its determination in the present case. *Id.* 387

17. The technical niceties of the common law are not regarded in Admiralty proceedings. It is sufficient, if an information set forth the offence so as clearly to bring it within the statute upon which the information is founded. It is not necessary that it should conclude *contra formam statuti. The Merino et al.* 391. 401

19. The District Court of the district where the seizure was made, and not where the offence was committed, has jurisdiction of proceedings *in rem*, for an alleged forfeiture. *Id.* 402

19. If the seizure is made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the Court of the district where the property is carried and proceeded against. *Id.* 402

20. A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the District Court into whose district the property may be carried for adjudication. *Id.* 402, 403

21. The prohibitions in the Slave Trade Acts of the 10th of May, 1800, c. 205. [li.] and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying them from one port to another of the same foreign empire, as well as from one foreign country to another. *Id.* 403, 404

22. Under the 4th section of the act of the 10th of May, 1800, c. 205. [li.] the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a Court of the United States, although they may be held in servitude according to the laws of his own country. But if, at the time of the capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim; the section only applying to per-

sons interested in the enterprise or voyage in which the ship was employed *at the time of such capture*. *Id.* 407

23. A question of fact, under the Slave Trade Acts. Condemnation pronounced. *Id.* 409

24. The claim of seamen, for wages, on a voyage undertaken in violation of the Slave Trade Acts, out of the proceeds of the forfeited vessel in the registry, rejected. *Id.* 414, 415

25. The claims of seamen, for wages, and of material men, for supplies, where the parties were innocent of all knowledge of, or participation in, the illegal voyage, preferred to the claim of forfeiture on the part of the government. *Id.* 416

26. Material men have a lien, which may be enforced by a proceeding in the Admiralty, *in rem*, for necessaries or supplies, furnished in a port to which the vessel does not belong. *Id.* 417

27. A transfer of a registered vessel of the United States, to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former owner, works a forfeiture of the vessel, under the 16th section of the Ship Registry Act of the 31st of December, 1792, c. 1. unless the transfer is made known in the manner prescribed by the 7th section of the act. *The Margaret*, 421

28. The statute does not require a beneficial or *bona fide* sale; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient. *Id.* 424

29. *Quære*, Whether, in such a case, a reconveyance would be decreed by a Court of justice in this country? *Id.* 424

30. The proviso in the 16th section of the Ship Registry Act, being by way of exception from the enacting clause, need not be taken notice of in a libel brought to enforce the forfeiture. It is matter of defence to be set up by the party in his claim. *Id.* 425, 426

31. The proviso applies only to the case of a *part owner*, and not to a *sole owner* of the ship. *Id.* 426

32. The trial, in such a case, is to be by the Court, and not by a jury, in seizures on waters navigable from the sea by vessels of ten tons burthen and upwards. *Id.* 427, 428

33. A registered vessel, which continues to use its register, after a transfer under the above circumstances, is liable to forfeiture under the 27th section of the act, as using a register without being actually entitled to the benefit thereof. *Id.* 429

34. In a libel of information, under the 67th section of the Collection Act of 1799, c. 128. against goods, on account of their differing in description from the contents of the entry, it is not necessary that it should allege an intention to defraud the revenue. 200 *Chests of Tea*, 430. 436

35. A question of fact, as to the rate of duties payable upon certain teas, imported as *bohea*. That term is used in the duty act in its known commercial sense; and the bohea tea of commerce is not usually a distinct and simple substance, but is a compound, made up in China, of various kinds of the lowest priced *black* teas. *Id.* 436

36. But, by the duty acts, it is liable

to the same specific duty, without regard to the difference of quality and price. *Id.* 486

37. In judicial sales, there is no warranty, express or implied. *The Monte Allegre*, 616. 644

38. Upon a sale by the Marshal, under an order of Court, no warranty is implied. *Id.* 645

39. Neither the Marshal, nor his agent, the auctioneer, has any authority to warrant the article sold. *Id.* 645

40. *Quære*, How far the Marshal is responsible to the vendee, in his private capacity, if he undertake to warrant, or to do what would imply a warranty in a private sale? *Id.* 645

41. Upon an Admiralty proceeding, *in rem*, where the proceeds of the sale are brought into Court, they are not liable to make good a loss sustained by the purchaser, in consequence of a defect being discovered in the article sold. *Id.* 648, 649

ALIEN.

1. Under the 9th article of the treaty between the United States and Great Britain, of 1794, it is not necessary for the alien to show that he was in the actual possession or seisin of the land, at the date of the treaty, which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens. The title of an alien mortgagee is protected by the treaty. *Hughes* v. *Edwards*, 489. 496

2. But, independent of the stipulations of the treaty, an alien mortgagee has a right to come into a Court of equity, and have the property, which has been pledged for the payment of the debt, sold for the purpose of raising the money. His demand is merely a personal one, the debt being considered as the principal, and the land as an incident. *Id.* 497

B.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In a declaration upon a promissory note, the omission of the place where it is payable is fatal. *Sebree* v. *Dorr*, 558. 561, 562

2. By the custom of the Banks in the District of Columbia, payment of a promissory note is to be demanded on the *fourth* day after the time limited for the payment thereof, in order to charge the endorser, contrary to the general law merchant, which requires a demand on the *third* day. *Renner* v. *Bank of Columbia*, 581—584

3. Evidence of such a local custom is admissible, in order to ascertain the understanding of the parties, with respect to their contracts made with reference to it. *Id.* 587

4. Cases in which evidence of commercial usage is admissible, in order to ascertain the meaning of contracts. *Id.* 585

5. The declaration against the endorser, in such a case, must lay the demand on the *fourth*, and not on the *third* day. *Id.* 594

6. *Quære*, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer? *Id.* 594

7. Secondary evidence of the contents of a lost note is admissible, wherever it appears that the original is destroyed, or *lost* by accident, without any fault of the party. *Id.* 596

8. In the case of a lost note, it is not necessary that its contents should be proved by a *notarial* copy. All that is required is, that it should be the best evidence the party has it in his power to produce. *Id.* 597
9. To admit secondary evidence of a lost note, it is not necessary that there should be a special count in the declaration upon a lost note. *Id.* 597
10. Where the maker of the note has removed into another State, or another jurisdiction, subsequent to the making of the note, a personal demand upon him is not necessary to charge the endorser, but it is sufficient to present the note at the former place of residence of the maker. *M'Gruder* v. *Bank of Washington*, 598

C.

CHANCERY.

1. A bill in equity, brought to rescind a purchase made under the decree of this Court, in *Terrett* v. *Taylor*, (9 *Cranch*, 43.) upon the ground, that the title to the property was defective, and could not be made good by the Vestry and other persons, who were parties to the former suit. Bill dismissed. *Mason* v. *Muncaster*, 445
2. Where the mortgage deed contained a defeasance that the mortgagor should pay the debt, according to the condition of a bond recited in the deed, by which it was payable on a day already past, at the time of the execution of the deed: *Held*, that this circumstance did not avoid the mortgage deed in equity, where it was to be considered as a conveyance, absolute at law, but intended as a security merely, and to be treated in the same manner as an ordinary mortgage. *Hughes* v. *Edwards*, 489—493
3. A Court of equity looks to the substantial object of the conveyance, and will consider an absolute deed as a mortgage, wherever it is shown to have been intended merely as a security for the payment of a debt. *Id.* 495
4. In the case either of a legal or equitable mortgage, the mortgagee may pursue his legal remedy by ejectment, and, at the same time, file his bill to foreclose the equity of redemption. *Id.* 494
5. A mortgagor cannot redeem after a lapse of twenty years, after forfeiture and possession by the mortgagee, (which period has been adopted in equity by analogy to the statute of limitations,) no interest having been paid in the mean time, and no circumstances appearing to account for the neglect. *Id.* 497
6. Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged, unless circumstances can be shown to repel the presumption, as, payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still subsisting, and the like. *Id.* 497, 498
7. A *bonæ fidei* purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself, by the lapse of time, or other equity, under the same circumstances which would afford a protection to the mortgagor. *Id.* 499
8. Such a purchaser is not entitled to have the value of the improvements made by him deducted

from the proceeds of the sale of the mortgaged premises. *Id.* 500

9. Practice of Courts of Equity on judicial sales. *The Monte Allegre*, 616. 649

10. In all cases of concurrent jurisdiction, the Court which first has possession of the subject, must determine it conclusively. *Smith v. M'Iver*, 532

11. Although Courts of equity have concurrent jurisdiction with Courts of law, in all matters of fraud, yet, where the cause has already been tried and determined by a Court of law, a Court of equity cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction. *Id.* 534

12. In such a case, some defect of testimony, or other disability, which a Court of law cannot remove, must be shown, as a ground for resorting to a Court of equity. *Id.* 534

13. In general, the answer of one defendant in equity, cannot be read in evidence against another. But where one defendant succeeds to another, so that the right of the one devolves on the other, and they become privies in estate, the rule does not apply. *Osborn v. Bank of the United States*, 738

14. Where the defendant is restrained by an injunction, from using money in his possession, interest will not be decreed against him. *Id.* 837

15. An injunction will be granted to prevent the franchise of a corporation from being destroyed, as well as to restrain a party from violating it, by attempting to participate in its exclusive privileges. *Id.* 838

16. In general, an injunction will not be allowed, nor a decree rendered, against an agent, where the principal is not made a party to the suit. But if the principal be not himself subject to the jurisdiction of the Court, (as in the case of a sovereign State,) the rule may be dispensed with. *Id.* 842

17. A Court of equity will interpose by injunction, to prevent the transfer of a specific thing, which, if transferred, will be irretrievably lost to the owner, such as negotiable securities and stocks. *Id.* 845

CONSTITUTIONAL LAW.

1. The acts of the Legislature of the State of New-York, granting to Robert R. Livingston and Robert Fulton, the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the constitution of the United States, which authorizes Congress to regulate commerce, so far as the said acts prohibit vessels licensed, according to the laws of the United States, for carrying on the coasting trade, from navigating the said waters by means of fire or steam. *Gibbons v. Ogden*, 1. 186.

2. The power of regulating *commerce*, extends to the regulation of *navigation*. *Id.* 189

3. The power to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations, and among the several States. It does not stop at the external boundary of a State. *Id.* 193

4. The power to regulate commerce is general, and has no limitations, but such as are prescribed in the constitution itself. *Id.* 196

5. The power to regulate commerce, so far as it extends, is exclusively

vested in Congress, and no part of it can be exercised by a State. *Id.* 198

6. State inspection laws, health laws, and laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c. are not within the power granted to Congress. *Id.* 203

7. The laws of New-York, granting to R. R. L. and R. F. the exclusive right of navigating the waters of that State with steam boats, are in collision with the acts of Congress regulating the coasting trade, which being made in pursuance of the constitution, are supreme, and the State laws must yield to that supremacy, even though enacted in pursuance of powers acknowledged to remain in the States. *Id.* 210

8. A license under the acts of Congress, for regulating the coasting trade, gives a permission to carry on that trade, and is not merely intended to confer the national character. *Id.* 212. 214

9. The power of regulating commerce extends to navigation carried on by vessels exclusively employed in transporting passengers. *Id.* 215, 216

10. The power of regulating commerce, extends to vessels propelled by steam or fire, as well as to those navigated by the instrumentality of wind and sails. *Id.* 219

11. The act of incorporation of the Bank of the United States, which gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank, is warranted by the 3d article of the constitution, which declares, that "the judicial power shall extend to *all cases*, in law and equity, arising under this constitution, *the laws of the United States*, and treaties made, or which shall be made, under their authority." *Osborn v. U. S. Bank*, 738

12. The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchises, which are threatened to be invaded, under the unconstitutional laws of a State; and, as the State itself cannot, according to the 11th amendment of the constitution, be made a party defendant to the suit, it may be maintained against the officers and agents of the State, who are intrusted with the execution of such laws. *Id.*

13. A State cannot tax the Bank of the United States; and any attempt, on the part of its agents and officers, to enforce the collection of such tax against the property of the Bank, may be restrained by injunction from the Circuit Court. *Id.*

CONSTRUCTION OF STATUTE.

1. The French Tonnage Duty Act of the 15th of May, 1820, c. 125. inflicts no forfeiture of the vessel, for non-payment of the tonnage duty. The duty is collectable in the same manner as by the Collection Act of 1799, c. 128. *The Appollon*, 362. 367

2. The 29th sec. of the Collection Act of 1799, c. 128. does not extend to the case of a vessel arriving from a foreign port, and passing through the conterminous waters of a river, which forms the boundary between the United States and the territory of a foreign State for the purpose of proceeding to such territory. *Id.* 369

3. Under the SLAVE TRADE ACT of 1794, c. 187. [xi.] s. 1. an in-

formation, which describes, in one count, the two distinct acts of *preparing a vessel* and of *causing her to sail*, pursuing the words of the law, is sufficient. *The Emily and the Caroline*, 379. 381

4. Under the above act, it is not necessary, in order to incur the forfeiture, that the vessel should be completely fitted and ready for sea. As soon as the preparations have proceeded so far, as clearly to manifest the intention, the right of seizure attaches. *Id.* 388
5. The prohibitions in the Slave Trade Acts of the 10th of May, 1800, c. 205. [li.] and of the 20th of April, 1818, extend as well to the carrying of slaves on freight, as to cases where the persons transported are the property of citizens of the United States; and to the carrying of them from one port to another, of the same foreign empire, as well as from one foreign country to another. *The Merino and others*, 391. 403
6. Under the 4th sec. of the act of the 10th of May, 1800, c. 205. [li.] the owner of the slaves transported contrary to the provisions of that act, cannot claim the same in a Court of the United States, although they may be held in servitude, according to the laws of his own country. But if, at the time of capture by a commissioned vessel, the offending ship was in possession of a non-commissioned captor, who had made a seizure for the same offence, the owner of the slaves may claim: the section only applying to persons interested in the enterprise or voyage in which the ship was employed *at the time of such capture*. *Id.* 407
7. Under the 16th sec. of the Ship Registry Act of the 31st of December, 1792, c. 1. a transfer of a registered vessel of the United States, to a foreign subject, in a foreign port, for the purpose of evading the revenue laws of the foreign country, with an understanding that it is to be afterwards reconveyed to the former owner, works a forfeiture, unless the transfer is made known in the manner prescribed by the 7th sec. of the act. *The Margaret*, 421
8. The statute does not require a beneficial or *bona fide* sale; but a transmutation of ownership, "by way of trust, confidence, or otherwise," is sufficient. *Id.* 424.
9. In a libel of information under the 67th sec. of the Collection Act of 1799, c. 128. against goods, on account of their differing from the contents of the entry, it is not necessary that it should allege an intention of defrauding the revenue. 200 *Chests of Tea*, 430. 436
10. The term "*bohea* tea," is used in the duty act in its known commercial sense; and the *bohea* of commerce is not usually a distinct and simple substance, but is a compound, made up in China, of various kinds of the lowest priced *black* teas. But, by the Duty Acts, it is liable to the same specific duty, without regard to the difference of quality and price. *Id.* 436
11. Under the 2d and 4th sections of the act of the 3d of March, 1797, c. 368. a certified transcript from the books of the Treasury is evidence against the defendant; and no claim for any credit can be admitted at the trial, which has not been presented to, and disallowed by the accounting officer of the Treasury, (unless in the cases excepted by the act,) although no proceedings have been had against the debtor, under the act of the

3d of March, 1795, c. 289. by notification from the Treasury Department, requiring him to render to the Auditor of the Treasury his accounts and vouchers for settlement. *Walton v. United States*, 651

12. *Quære*, Whether the act of the 3d of March, 1795, c. 289. is not virtually repealed by the act of the 3d of March, 1797, c. 368? 7

13. The statute of 11 and 12 Wm. III. c. 6. which is in force in Maryland, removes the common law disability of claiming title through an *alien ancestor*, but does not apply to a *living alien ancestor*, so as to create a title by heirship, where none would exist by the common law, if the ancestor were a natural born subject or citizen. *M'Creery v. Somerville*, 354

14. Thus, where A. died seised of lands in Maryland, leaving no heirs, except B., a brother, who was an alien, and had never been naturalized as a citizen of the United States, and three nieces, the daughters of the said B., who were native citizens of the United States: it was *held*, that they could not claim title by inheritance, through B., their father, he being an alien, and still living. *Id.* 354

See LOCAL LAW.

CONTRACT.

See ADMIRALTY, 24, 25, 26, 27, 28, 29, 30, 31. 37, 38, 39.
BILLS OF EXCHANGE AND PROMISSORY NOTES.
CHANCERY.
EVIDENCE.

D.

DEED.

1. Although the *Church-Wardens* of a parish are not capable of holding *lands*, and a deed to them and their successors in office, for ever, cannot operate by way of *grant*; yet, where it contains a covenant of general warranty, binding the grantors and their heirs for ever, it may operate *by way of estoppel*, to confirm to the church and its privies the perpetual and beneficial estate in the land. *Mason v. Muncaster*, 445. 455

DEVISE.

1. R. B. being seised of lands in Maryland, made three instruments of writing, each purporting to be his will. The first, dated in 1789, gave his whole estate to his nephew, J. T. M., after certain pecuniary legacies to his other nephews and nieces. In the second will, dated in 1800, the testator gave his whole real estate to J. T. M., during his life; and after his death, to his eldest son, A., in tail, on condition of his changing his name to *A. Barnes*, with remainder to the heirs of his nephew, J. T. M., lawfully begotten, for ever, on their changing their surnames to Barnes. The third will, which was executed after the others, and probably in 1803, after some small bequests, proceeded thus: "I give the whole of my property, after complying with that I have mentioned, to the male heirs of my nephew, J. T. M., *lawfully begotten, for ever*, agreeably to the law of England, which

was the law of our State before the revolution, that is, the oldest male heir to take all, on the following terms: that the *name of the one that may have the right*, at the age of twenty-one, with his consent, be changed to A. Barnes, by an act of public authority of the State, without any name added, together with his taking an oath, before he has possession, before a magistrate of St. Mary's county, and have it recorded in the office of the Clerk of the county, that he will not make any change, during his life, in this my will, relative to my real property. And on his refusing to comply with the above mentioned terms, to the next male heir, on the above mentioned terms; and so on, to all the male heirs of my nephew, J. T. M., as may be, on the same terms; and all of them refusing to comply, in a reasonable time after they have arrived at the age of twenty-one, say, not exceeding twelve months, *if in that time it can be done*, so that no act of intention to defeat my will shall be allowed of; and on their refusing to comply with the terms above mentioned, if any such person may be, then to the son of my late nephew, J. T. M., named A. T. M., on the above mentioned terms; and on his refusal, to his brother, J. T. M.; and on his refusing to comply with the above mentioned terms, to the heirs male of my nephew, A. B. T. M., lawfully begotten, on the above mentioned terms; and on their refusal, to the male heirs of my niece, Mrs. C., lawfully begotten, on their complying with the above mentioned terms; and on their refusal, to the daughter of my nephew, J. T. M., named Mary, so on to any daughter he may have or has." The testator then appoints J. T. M. his sole executor, with a salary of 1600 dollars per annum, for his life, and adds, "and my will is, that he shall keep the whole of my property in his possession, during his life." He then empowers his executor to manage the estate at his discretion, to employ agents, and to pay them such salaries as he shall think proper; to repair the houses, and build others, as he may think necessary; to reside at his plantations, and to use their produce for his support; and adds, "after which to be the property of the person that may have a right to it, as above mentioned." *Held*, that the conditions annexed to the estate, devised to the oldest male heir of J. T. M., were *subsequent* and not *precedent*, and that, consequently, the contingency on which the devise was to take effect, was not too remote, the estate vesting on the death of J. T. M.; to be devested, on the non-performance of the condition. *Taylor v. Mason*, 325

2. *Quære*, Whether J. T. M. took an estate tail? *Id.* 353

3. *Quære*, Whether the last will revoked those which preceded it? *Id.* 353

DUTIES.

See ADMIRALTY, 2, 3. 34, 35, 36.

E.

EVIDENCE.

1. Secondary evidence of the contents of written instruments is not admissible, where the originals are within the control or custody of the party. *Sebree v. Dorr*, 558. 563

2. Secondary evidence of the contents of written instruments is admissible, wherever it appears that the original is destroyed, or *lost*, by accident, without any fault of the party. *Renner v. Bank of Columbia*, 581. 596

3. In the case of a lost note, it is not necessary that its contents should be proved by a *notarial* copy. All that is required is, that it should be the best evidence the party has it in his power to produce. *Id.* 597

4. The English practice of requiring a special count in the declaration, as upon a lost note, in order to let in secondary evidence of its contents, has not been adopted in the United States. *Id.* 597

5. If a party intend to use a written instrument in evidence, he must produce the original, if in his possession. But if it is in the possession of the other party, who refuses to produce it, after notice, or if the original is lost or destroyed, secondary evidence (being the best which the nature of the case allows) will be admitted. *Riggs v. Taylor*, 488

6. The party, in such case, may read a counterpart; or, if there is no counterpart, an examined copy; or, if no such copy, may give parol evidence of the contents. *Id.* 486

7. Where a writing has been voluntarily destroyed, for fraudulent purposes, or to create an excuse for its non-production, secondary evidence of its contents is not admissible. But where the destruction or loss (although voluntary) happens through mistake or accident, such evidence will be admitted. *Id.* 486

8. In an action against the receiver, not describing him in his official capacity, evidence may be given of moneys received in his official capacity; and, under a count for money had and received, evidence may be given of public stock received by him, where such stock is, by law, made receivable, at par, in payment for lands sold by the United States. *Walton v. United States*, 651

EXTINGUISHMENT.

1. A covenant, under seal, to come to a settlement within a limited time, and to pay the balance which might be found due, is merely collateral, and cannot be pleaded as an extinguishment of a simple contract debt, the period within which the settlement was to be made, having elapsed before the commencement of the suit, and the plea not averring that any such settlement had been made. *Baits v. Peters*, 556

2. The official bond given by a receiver of public moneys, does not extinguish the simple contract debt arising from a balance of account due from him to the United States. An action of assumpsit for the balance of account, and an action of debt upon the bond against the principal and sureties, may be maintained at the same time. *Walton v. United States*, 651

J.

JURISDICTION.

1. The District Court of the district where the seizure was made, and not where the offence was committed, has jurisdiction of proceedings *in rem*, for an alleged forfeiture. *The Merino et al.* 391. 402

2. If the seizure is made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the Court of the district where the property is carried and proceeded against. *Id.* 402

3. A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the District Court, into whose district the property is brought for adjudication. *Id.* 402, 403

4. Where Courts of equity have concurrent jurisdiction with Courts of law, as in matters of fraud, if the cause has already been tried and determined by a Court of law, a Court of equity cannot take cognizance of it, unless there be the addition of some equitable circumstance to give jurisdiction. The Court, which first has possession of the subject, must determine it conclusively. *Smith* v. *M'Iver*, 532. 534

5. In such a case, some defect of testimony, or other disability, which a Court of law cannot remove, must be shown, as a ground for resorting to a Court of equity. *Id.* 534

6. An endorsee of a promissory note, who resides in a different State, may sue, in the Circuit Court, his immediate endorser, residing in the State in which the suit is brought, although that endorser be a resident of the same State with the maker of the note. *Mollan v. Torrance*, 537

7. But where the suit is brought against a remote endorser, and the plaintiff, in his declaration, traces his title through an intermediate endorser, he must show that this intermediate endorser could have sustained his action in the Circuit Court. *Id.* 537

8. A plea to the jurisdiction of the Circuit Court, must show that the parties were citizens of the same State, at the time the action was brought, and not merely at the time of the plea pleaded. The jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties. *Id.* 539

9. *Quære*, As to the authority of this Court to interfere, by mandamus, in the case of the removal or suspension of an Attorney of the District and Circuit Courts. *Ex parte Burr*, 529

10. Whatever may be the authority of this Court in that respect, it will not be exercised, unless where the conduct of the Court below has been grossly irregular and unjust. *Id.* 530

11. In a regular complaint against an attorney, charges cannot be received and acted on, unless made on oath. But he may himself waive the preliminary of an affidavit, and the Court may proceed, at his instance, to investigate the charges upon testimony, which must be on oath, and regularly taken. *Id.* 530

12. In replevin, if it be of goods distrained for rent, the amount for which avowry is made, is the value of the matter in controversy; and if the writ be issued to try the title to property, it is in the nature of detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to this Court upon a writ of error. *Peyton v. Robertson*, 527

13. The act incorporating the Bank of the United States, gives the Circuit Courts of the United States jurisdiction of suits by and against the Bank, and this provision is warranted by the constitution.

Osborn v. Bank of the United States, 738

14. The Circuit Courts of the United States have jurisdiction of a bill brought by the Bank of the United States, for the purpose of protecting the Bank in the exercise of its franchise, which are threatened to be invaded under the unconstitutional laws of a State, and the suit may be maintained against the officers and agents of the State, who are entrusted with the execution of such laws. *Id.*

L.

LEX LOCI.

1. The disposition of real property, by deed or will, is subject to the laws of the country where it is situated. *Kerr v. Moon*, 565
2. Where the devisor was entitled to warrants for land in the Virginia Military District in the State of Ohio, under the laws and ordinances of Virginia, on account of his military services, and made a will in Kentucky, devising the lands, which was duly proved and registered, according to the laws of the State: *Held*, that although the title to the land was merely equitable, and that not to any specific tract of land, it could not pass, unless by a will proved and registered according to the laws of Ohio. *Id.* 565
3. Even admitting it to have been personal property, a person claiming under a will proved in one State, cannot intermeddle with, or sue for, the effects of a testator in another State, unless the will be proved in the latter State, or it is permitted by some law of that State. *Id.* 571
4. Letters testamentary give to an executor no authority to sue for the personal estate of his testator, out of the jurisdiction of the State by which they were granted. *Id.* 571
5. Under the statute of Ohio, which permits wills made in other States, concerning property in that State, to be proved and recorded in the Court of the county where the property lies, it must appear that the requisitions of the statute have been pursued, in order to give the will the same validity and effect as if made within the State. *Id.* 572

LIMITATION.

1. Where a mortgagor comes to redeem, the Court of equity has, by analogy to the statute of limitations, fixed upon 20 years as the period, after forfeiture, and possession taken by the mortgagee, no interest having been paid in the mean time, and no circumstances appearing to account for the neglect, beyond which a right of redemption shall not be favoured. *Hughes* v. *Edwards*, 489. 497
2. Where the mortgagee brings his bill of foreclosure, the mortgage will, after the same length of time, be presumed to have been discharged, unless circumstances can be shown to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still subsisting, and the like. *Id.* 497, 498
3. A *bona fide* purchaser under the mortgagor, with actual notice of the mortgage, or constructive notice by means of a registry, can only protect himself in equity by the lapse of time, under the same circumstances which would afford a protection to the mortgagor. *Id.* 499

See LOCAL LAW, 2, 3. 12, 13.

LOCAL LAW.

1. The act of Pennsylvania, of 1779, "for vesting the estates of the late proprietaries of Pennsylvania, in this Commonwealth," did not confiscate lands of the proprietaries which were within the lines of manors; nor were the same confiscated by the act of 1781, for establishing a land office. *Kirk v. Smith*, 241

2. The statute of limitations of Pennsylvania, of 1705, is inapplicable to an action of ejectment, brought to enforce the unpaid purchase money, for lands of the proprietaries within the manors, for which warrants had issued. *Id.* 286

3. Nor is the statute of limitations of 1785, a bar to such an action. *Id.* 293

4. The Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry, in succession, of the parish of Fairfax, and, in connexion with the Minister, has the care and management of all the temporalities of the parish within the scope of their authority. A sale by them of the Church lands, with the assent of the Minister, under the former decree of this Court, conveys a good title to the purchaser. *Mason v. Muncaster*, 445. 454

5. The parishioners have, individually, no right or title to the glebe lands; they are the property of the parish in its aggregate or corporate capacity, to be disposed of, for parochial purposes, by the Vestry, who are the legal agents and representatives of the parish. *Id.* 468

6. Under the reserve contained in the session act of Virginia, and under the acts of Congress of August 10th, 1790, ch. 67. [xl.] and of June 9th, 1794, ch. 238. [lxii.] the whole country *lying between the Sciota and Little Miami rivers*, was subjected to the military warrants, to satisfy which the reserve was made. *Doddridge v. Thompson*, 469

7. The territory lying between two rivers, is the whole country from their sources to their mouths; and if no branch of either of them has acquired the name, exclusive of another, the main branch, to its source, must be considered as the true river. *Id.* 473

8. The act of June 26th, 1812, ch. 432. [cix.] to ascertain the western boundary of the tract reserved for the military warrants, and which provisionally designate *Ludlow's line* as the western boundary, did not invalidate the title to land between that line and *Robert's line*, acquired under a Virginia military warrant, previous to the passage of that act. *Id.* 476

9. The land between Ludlow's and Robert's line was not withdrawn from the territory liable to be surveyed for military warrants, by any act of Congress passed before the act of June 26th, 1812, ch. 432. [cix.] *Id.* 430

10. The land law of Virginia, of 1779, makes a pre-emption warrant superior to a treasury warrant, whenever they interfere with each other, unless the holder of the pre-emption warrant has forfeited that superiority, by failing to enter his warrant with the surveyor of the county, within twelve months after the end of the session at which the land law was enacted; and on that period having expired, and being prolonged by successive acts, during which time there was one interval between the expiration of the law and the act of revival, the original right of the holder of the pre-emption warrant was preser-

ved, notwithstanding that interval, the entry of the holder of the treasury warrant not having been made during the same interval. *Stevens v. M'Cargo*, 502

11. A question, under the registry acts of Tennessee, whether a junior conveyance registered, should take precedence of a prior unregistered deed: *Held*, that the registry did not, under the circumstances, vest the title against the elder deed. *Love v. Simms*, 515

12. By the statute of limitations of Tennessee, of 1797, a possession of seven years is a protection, only when held under a grant, or under mesne conveyances which connect it with a grant. *Walker v. Turner*, 541

13. A Sheriff's deed, which is void for want of jurisdiction in the Court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations. *Id.* 545

14. Secondary evidence of the contents of written instruments is not admissible, when the originals are within the control or custody of the party: and this rule of evidence is not dispensed with by the local statutes of Kentucky, which provide that no person shall be permitted to deny his signature, as maker or assignor of a note, in a suit against him, unless he will make an affidavit denying the execution or assignment. These statutes do not dispense with proof of the existence of the instrument, or of the right of the party to hold it by assignment. *Sebree v. Dorr*, 558

15. Under the following entry, "H. R. enters 2000 acres in Kentucky, by virtue of a warrant for military services performed by him in the last war, in *the fork of the first fork of Licking*, running up each fork for quantity;" it appeared in evidence, that at the first fork of Licking, the one fork was known and generally distinguished by the name of the south fork, and the other by the name of the main Licking, or the Blue Lick fork, and that some miles above this place the south fork again forked: *Held*, that the entry could not be satisfied with lands lying in the first fork. *Meredith v. Picket*, 573

16. In such a case, the entry could not be explained, and the survey supported, by oral testimony. The notoriety and names of places may be shown by such testimony, but the words of an entry are to be construed by the Court as any other written instrument. *Id.* 575

17. The acts of Assembly of North Carolina, passed between the years 1783 and 1789, invalidate all entries, surveys, and grants of land within the Indian territory, which now forms a part of the territory of the State of Tennessee. But they do not avoid entries commencing without the Indian boundary, and running into it, so far as respects that portion of the land situate without their territory. *Danforth v. Wear*, 673

18. The act of North Carolina, of 1784, authorizing the removing of warrants which had been located upon lands previously taken up, so as to place them upon vacant lands, did not repeal, by implication, the previously existing laws, which prohibited surveys of land within the Indian boundary. The lands to which such removals are made, must be lands previously subjected to entry and survey. *Id.* 678

See CONSTRUCTION OF STATUTE, 13, 14.

LEX LOCI.

P.

PAYMENT.

1. In general, the debtor has a right to make the appropriation of payments; if he omits it, the creditor may make it: but neither party has a right to make an appropriation after the controversy has arisen. *United States* v. *Kirkpatrick*, 720. 737
2. In cases of long and running accounts, where balances are adjusted, merely for the purpose of making rests, the law will apply payments to extinguish the debts, according to the priority of time. *Id.* 738

PLEADING.

1. In a declaration upon a promissory note, the omission of the place where it is payable is fatal. *Sebree* v. *Dorr*, 558. 561, 562
2. Where, by the local law and usage, payment of a promissory note is demandable on the *fourth* day of grace, in order to charge the endorser, the declaration against the endorser must lay the demand on the *fourth*, and not on the *third* day. *Renner* v. *Bank of Columbia*, 581. 594
3. *Quære*, Whether a declaration, in such a case, not averring the local usage, would be good upon demurrer? *Id.* 594
4. To admit secondary evidence of a lost note, it is not necessary that there should be a count in the declaration as upon a lost note. *Id.* 597

PRACTICE.

1. A *certiorari*, upon a suggestion of diminution in the record, may be made by the clerk, and need not be made by the Judge of the Court below. *Stewart* v. *Ingle*, 526
2. Under the Judiciary Act of 1789, ch. 20. s. 22. the security to be taken from the plaintiff in error, by the Judge signing a citation on a writ of error, must be sufficient to secure the whole amount of the judgment, and is not to be confined to such damages as the appellate Court may adjudge for the delay. *Catlett* v. *Brodie*, 553
3. In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the Court. *Walden* v. *Craig*, 576
4. But a writ of error will not lie, in a case where the Court below has denied a motion for this purpose. *Id.* 578
5. The discharge of the jury from giving a verdict in a capital case, without the consent of the prisoner, the jury being unable to agree, is not a bar to a subsequent trial for the same offence. *United States* v. *Perez*, 579
6. The Court is invested with the discretionary authority of discharging the jury from giving any verdict, in cases of this nature, whenever, in their opinion, there is a manifest necessity for such an act, or the ends of public justice would otherwise be defeated. *Id.* 580
7. Under the 10th section of the Patent Act of the 21st of February, 1793, ch. 11. upon granting a rule, by the Judge of the District Court, upon the patentee, to show cause why process should not issue to repeal the patent, the patent is not repealed, *de facto*, by making the rule absolute; but the process to be awarded is in the

nature of a *scire facias* at common law, to the patentee to show cause why the patent should not be repealed, with costs of suit; and upon the return of such process, duly served, the Judge is to proceed to try the cause, upon the pleadings filed by the parties, and the issue joined thereon. If the issue be an issue of fact, the trial thereof is to be by a jury; if an issue of law, by the Court, as in other cases. *Ex parte Wood and Brundage*, 603

8. In such a case, a record is to be made of the proceedings, antecedent to the rule to show cause why process should not issue to repeal the patent, and upon which the rule is founded. *Id.* 603

9. It is not necessary that a bill of exceptions should be formally drawn and signed before the trial is at an end. The exception may be taken at the trial, and noted by the Court, and may, afterwards, during the term, be reduced to form, and signed by the Judge. But, in such cases, it is signed *nunc pro tunc*, and purports, on its face, to be the same as if actually reduced to form, and signed during the trial. It would be a fatal error if it were to appear otherwise. *Walton* v. *United States*, 651

10. Where the writ of error is dismissed for want of jurisdiction, no costs are allowed. *M'Iver* v. *Wattles*, 650

11. It is unnecessary for an Attorney or Solicitor, who prosecutes a suit for the Bank of the United States, or other corporation, to produce a warrant of attorney under the corporate seal. *Osborn* v. *Bank of the United States*, 738

12. Whatever authority may be necessary for an Attorney or Solicitor to appear for a natural or artificial person, it is not a ground of reversal for error, in an appellate Court, that such authority does not appear on the face of the record. It is a formal defect, which is cured by the statute of jeofails, and the 32d section of the Judiciary Act of 1789, ch. 20. *Id.*

See ADMIRALTY.
CHANCERY, 13, 14, 15, 16, 17.
EVIDENCE.
PRIZE, 2.

PRIZE.

1. Case of capture by an armed vessel, fitted out in the ports of the United States, in breach of the neutrality acts. Claim by an alleged *bonæ fidei* purchaser in a foreign port rejected, and restitution decreed to the original owners. *The Fanny*, 658

2. A *bonæ fidei* purchaser, without notice, in such case, is entitled to be reimbursed the freight which he may have paid upon the captured goods; and the innocent neutral carrier of such goods, the same having been transhipped in a foreign port, is entitled to freight out of the goods. *Id.* 671

See ADMIRALTY, 37, 38, 39, 40.

S.

SURETY.

1. The contract of a surety is to be construed strictly, and is not to be extended beyond the fair scope of its terms. *Miller v. Stewart*, 680

2. Where a bond was given, conditioned for the faithful performance of the duties of the office of Deputy Collector of direct taxes for

eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties: *Held*, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. *Id.* 704

3. A bond, given on the 4th of December, 1813, for the faithful discharge of the duties of his office, by a Collector of direct taxes and internal duties, appointed (under the act of the 22d of July, 1813, c. 16.) by the President, on the 11th of November, 1813, to hold his office until the end of the next session of the Senate, and no longer, and subsequently appointed by the President, with the advice and consent of the Senate, on the 24th of January, 1814, is to be restricted (as to the liability of the sureties) to the duties and obligations created by the Collection Acts passed antecedent to the date of the bond. *United States v. Kirkpatrick*, 720. 730
4. The second commission, issued under the appointment, with the advice and consent of the Senate, operates a revocation of the first commission, issued under the appointment by the President, which was to continue until the end of the next session of the Senate, and no longer; and the liability of the sureties in the bond did not extend beyond the duration of the first commission. *Id.* 734
5. In general, laches is not imputable to the government; and where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit, upon the neglect of the officer or agent to account, will not discharge his sureties. *Id.* 735
6. The case of *The People v. Jansen*, (9 *Johns. Rep.* 332.) distinguished; and, so far as it conflicts with the present case, overruled. *Id.* 737

T.

TREATY.

See ALIEN.

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