



4217

25 U.S. REPORTS

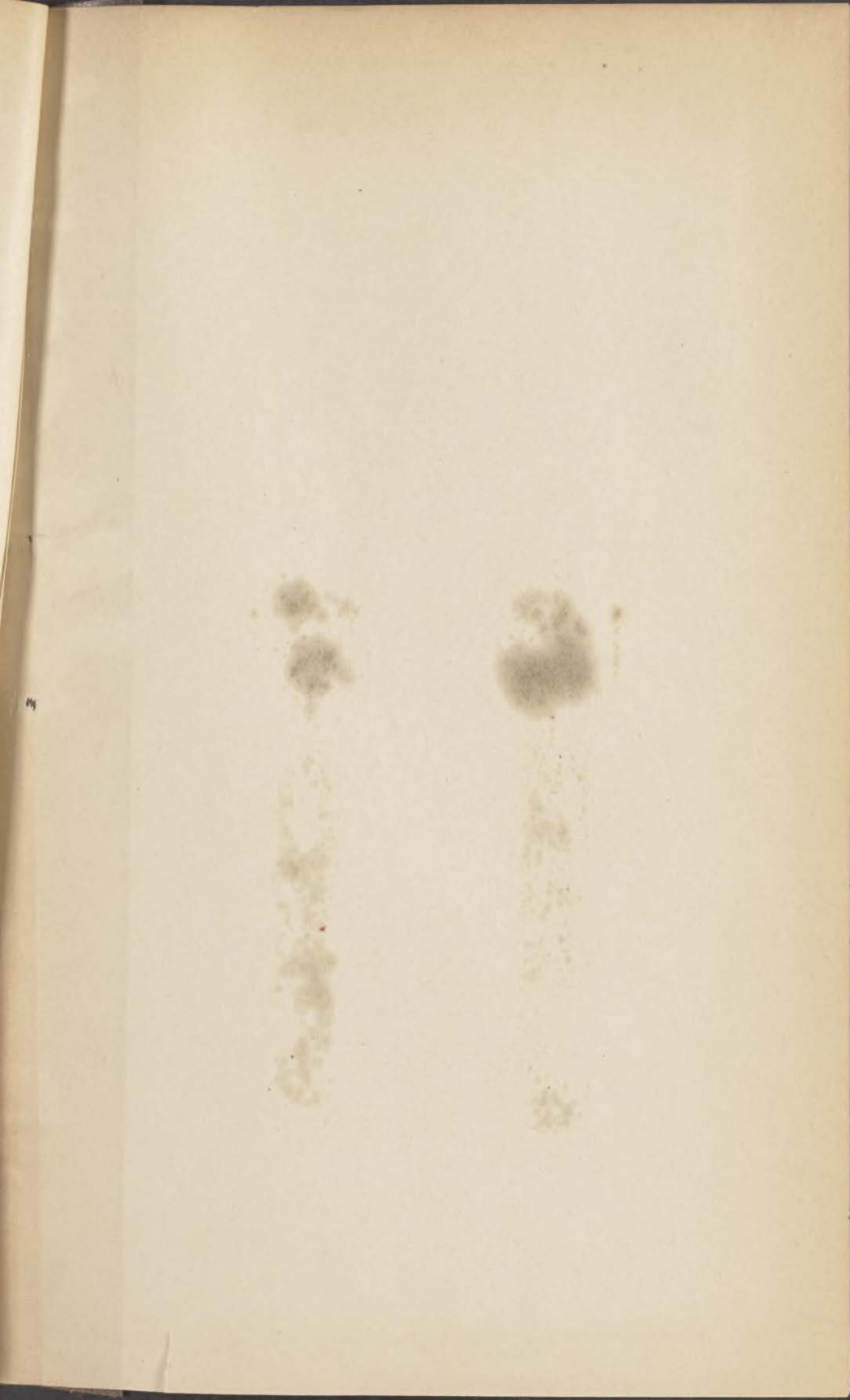
c. 4

U.S. Department of Justice



Criminal Division Library
Washington, D.C. 20530





REPORTS OF CASES
ARGUED AND ADJUDGED
IN THE
SUPREME COURT
OF THE
UNITED STATES,

JANUARY TERM 1827.

By HENRY WHEATON,
COUNSELLOR AT LAW.

VOL. XII.
FOURTH EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY
FREDERICK C. BRIGHTLY,
AUTHOR OF THE "FEDERAL DIGEST," ETC.

THE BANKS LAW PUBLISHING CO.
NEW YORK
1911

Entered according to Act of Congress, in the year 1883,

By BANKS & BROTHERS,

In the office of the Librarian of Congress, at Washington.

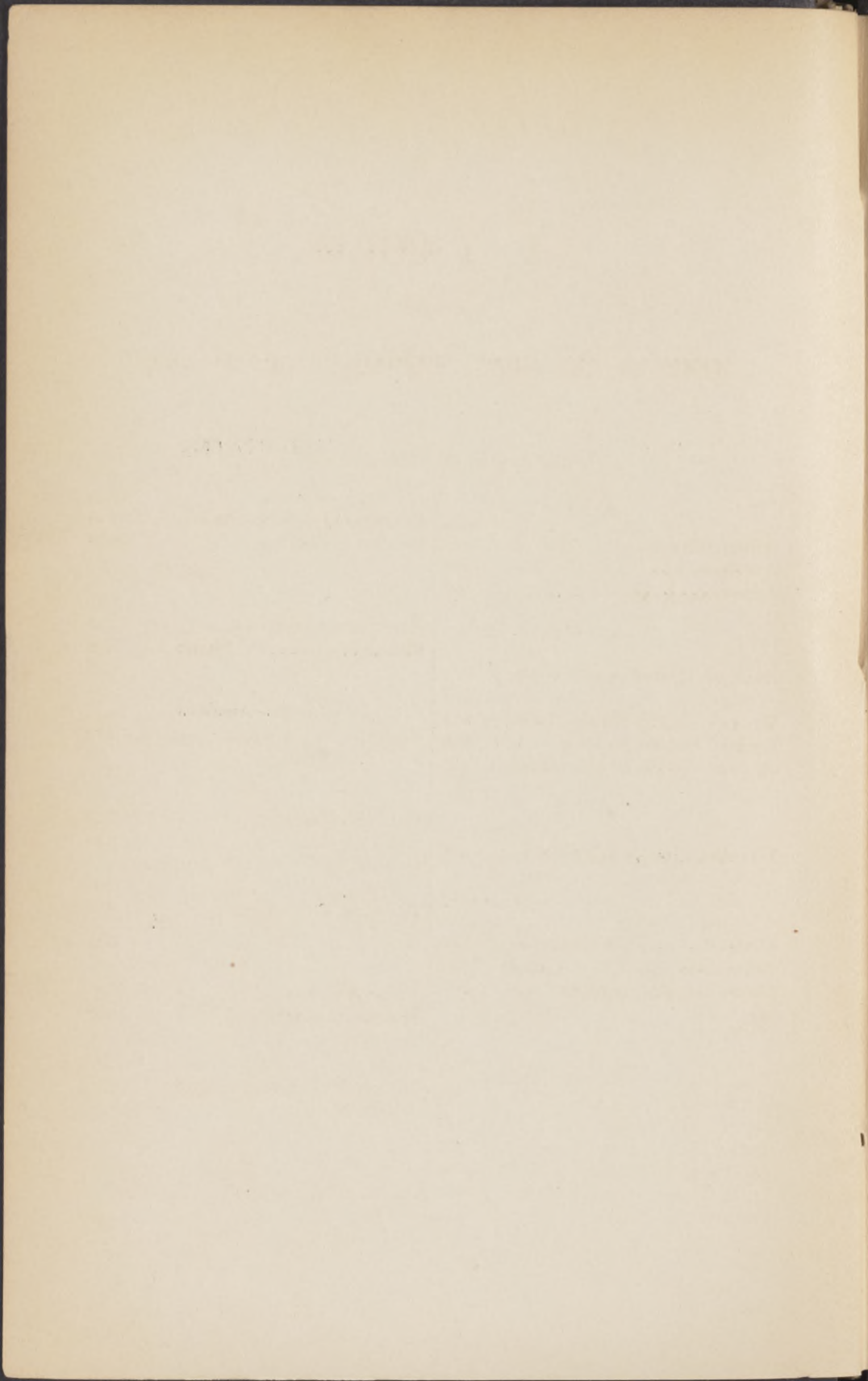
JUDGES
OF THE
SUPREME COURT OF THE UNITED STATES,
DURING THE PERIOD OF THESE REPORTS.

Hon. JOHN MARSHALL, Chief Justice.

" BUSHROD WASHINGTON,	}	Associate Justices.
" WILLIAM JOHNSON,		
" GABRIEL DUVALL,		
" JOSEPH STORY,		
" SMITH THOMPSON,		
" ROBERT TRIMBLE, (1)		

WILLIAM WIRT, Esq., Attorney-General.

(1) Appointed May 9th, 1826.



A TABLE

OF THE

NAMES OF THE CASES REPORTED IN THIS VOLUME.

The references are to the STAR *pages.

A			
	*PAGE		*PAGE
Allegre, Ramsay <i>v</i>	611	Drummond <i>v</i> . Prestman.....	515
Antelope, The.....	546	Dunlap <i>v</i> . Dunlap.....	574
Armstrong <i>v</i> . Lear.....	169		
B		E	
Bank of United States <i>v</i> . Dand-		Early, Postmaster-General <i>v</i> ...	136
ridge.....	64	Edwards's Lessee <i>v</i> . Darby.....	206
Bank of United States, McGill <i>v</i> .	511		
Barker, United States <i>v</i>	559	F	
Brown <i>v</i> . State of Maryland....	419	Featherstone, Connor <i>v</i>	199
C			
Chamberlain, De la Croix <i>v</i>	599	G	
Chew, Jackson, ex dem. St.		Gaillard, Harcourt <i>v</i>	523
John, <i>v</i>	153	Gardner, Potter <i>v</i>	498
Chotard <i>v</i> . Pope.....	586	General Interest Ins. Co. <i>v</i> . Rug-	
Clark <i>v</i> . City of Washington...	40	gles.....	408
Columbian Ins. Co. <i>v</i> . Catlett..	283	Gooding, United States <i>v</i>	460
Connor <i>v</i> . Featherstone.....	199		
D		H	
Dandridge, Bank of United		Haile, Mason <i>v</i>	370
States <i>v</i>	64	Harcourt <i>v</i> . Gaillard.....	523
Daniel, Williamson <i>v</i>	568	Henderson <i>v</i> . Poindexter's Les-	
Darby, Edwards's Lessee <i>v</i>	206	see	530
Davidson <i>v</i> . Taylor.....	604	Hernandez, Montgomery <i>v</i>	129
De la Croix <i>v</i> . Chamberlain....	599	Hinde, Mallow <i>v</i>	193
Devereaux <i>v</i> . Marr.....	212		
		J	
		Jackson, ex dem. St. John, <i>v</i> .	
		Chew.....	153

	*PAGE
Jackson, Newman <i>v.</i>	570
Jackson, Winn <i>v.</i>	135

L

Lear, Armstrong <i>v.</i>	169
Lidderdale <i>v.</i> Robinson.....	594

M

McConnell <i>v.</i> Town of Lexington.....	582
McGill <i>v.</i> Bank of United States.....	511
McLemore <i>v.</i> Powell.....	554
Mallow <i>v.</i> Hinde.....	193
Marchant, United States <i>v.</i>	480
Marr, Devereaux <i>v.</i>	212
Martin <i>v.</i> Mott.....	19
Mason <i>v.</i> Haile.....	370
Mason <i>v.</i> Matilda.....	590
Montgomery <i>v.</i> Hernandez.....	129

N

Newman <i>v.</i> Jackson.....	570
Nicholl, United States <i>v.</i>	505
Norris, Williams <i>v.</i>	116

O

Ogden <i>v.</i> Saunders.....	213
-------------------------------	-----

P

Palmyra, The.....	1
Parker <i>v.</i> Judges of the Circuit Court of Maryland.....	561
Peter, Thompson <i>v.</i>	565
Poindexter's Lessee, Henderson <i>v.</i>	530
Pope, Chotard <i>v.</i>	586

	*PAGE
Postmaster-General <i>v.</i> Early...	136
Potter <i>v.</i> Garnder.....	498
Powell, McLemore <i>v.</i>	554
Prestman, Drummond <i>v.</i>	515

R

Ramsay <i>v.</i> Allegre.....	611
Rankin <i>v.</i> Schatzell.....	177
Robinson, Lidderdale <i>v.</i>	594
Ruggles, General Interest Ins. Co. <i>v.</i>	408

S

Saunders, Ogden <i>v.</i>	213
Schatzell, Rankin <i>v.</i>	177
Scott <i>v.</i> Shreeve.....	605

T

Taylor, Davidson <i>v.</i>	604
Thompson <i>v.</i> Peter.....	565
Thornton <i>v.</i> Winn.....	183
Tillotson, United States <i>v.</i>	180

U

United States <i>v.</i> Barker.....	559
United States <i>v.</i> 350 Chests of Tea.....	486
United States <i>v.</i> Gooding.....	460
United States <i>v.</i> Marchant.....	480
United States <i>v.</i> Nicholl.....	505
United States <i>v.</i> Tillotson.....	180

W

Williams <i>v.</i> Norris.....	117
Williamson <i>v.</i> Daniel.....	569
Winn <i>v.</i> Jackson.....	135
Winn, Thornton <i>v.</i>	183

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

The references are to the STAR *pages.

A

	*PAGE
Abraham v. Mathews.....6 Munf. 159.....	592
Alleyne v. Maryland Ins. Co.....6 Har. & Johns. 408.....	393
Anderson v. Jackson.....16 Johns. 382, 405, 424.....155, 157, 159, 161-3, 165-6	393
Andrews v. Marine Ins. Co.....9 Johns. 32.....	416
Anson v. Bailey.....Bull. N. P. 276.....	188
Apollon, The.....9 Wheat. 362.....	7, 17
Apthorp v. North.....14 Mass. 167.....	85
Arundel Bank v. Goble.....Chit. on Bills 379 n.....	558

B

Badnal v. Samuel.....3 Price 521.....	558
Baillie v. Modigliani.....Marsh. Ins. 628.....396, 402, 405-6	362, 364
Baker v. Wheaton.....5 Mass. 509.....	629
Ball v. Trelawny.....Cro. Car. 603.....	232, 298, 342
Bank of Columbia v. Okely.....4 Wheat. 235.....	74, 100-2, 104, 106, 114
Bank of Columbia v. Patterson.....7 Cr. 299.....	81, 89
Bank of Northern Liberties v. Cres- son.....12 S. & R. 306.....	142
Bank of United States v. Deveaux, 5 Cr. 85.....	157, 160
Barlow v. Salter.....17 Ves. 479.....	81
Bassett v. Marshall.....9 Mass. 312.....	158
Beachcroft v. Broome.....4 T. R. 441.....	522
Beall v. Beck.....3 Har. & McHen. 242.....	84
Beatty v. Marine Ins. Co.....2 Johns. 109.....	481
Beauchamp's Case.....9 Edw. IV. 27, 40.....	168
Blight v. Rochester.....7 Wheat. 550.....	187
Borradaile v. Lowe.....4 Taunt. 93.....	413
Boucher v. Lawson.. ..Cas. temp. Hardw. 85.....	

		*PAGE
Boyfield v. Brown.....	2 Str. 1065.....	400
Brice v. Smith.....	Willes 1.....	159
Bridgeman's Case.....	Hob. 11.....	632
Burrows v. Jemino.....	2 Str. 733.....	365
Burrows v. McWhann.....	1 Desauss. 409.....	597
Bushnel v. Suel.....	1 Ves. 155.....	624
Butler v. Palmer.....	1 Salk. 191.....	71

C

Calder v. Bull.....	3 Dall. 386.....	216, 373
Camfranque v. Burnell.....	1 W. C. C. 341.....	298
Canal Bridge v. Gordon.....	1 Pick. 297.....	73, 107
Caze v. Baltimore Ins. Co.....	7 Cr. 358.....	396, 402-5, 406
Chadock v. Cowley.....	Cro. Jac. 695.....	156, 158
Charnock's Case.....	2 Salk. 631.....	485
Clay v. Snelgrave.....	1 Ld. Raym. 576.....	615
Clinton v. The Hannah.....	Bee 419.....	618
Concord, The.....	9 Cr. 388.....	422
Cradock's Case.....	2 Brownl. 37.....	618, 623
Crane v. Pell.....	4 Inst. 139.....	622
Crooke v. De Vandes.....	9 Ves. 197.....	156
Curling v. Thorton.....	1 Addams 21.....	173

D

Daly v. James.....	8 Wheat. 535.....	168
Dansey v. Griffiths.....	4 M. & S. 61.....	156
Dartmouth College v. Woodward, 4	Wheat. 518.....	217, 298
Dash v. Van Kleeck.....	7 Johns. 477, 500.....	221
Dawes v. Shea.....	15 Mass. 6.....	521
Dedham Bank v. Chickering.....	3 Pick. 335.....	86
De Lovio v. Boit.....	2 Gallis. 400.....	638
Denn v. Slater.....	5 T. R. 335.....	159
Der Mohr, The.....	3 Rob. 108 ; 4 Id. 256.....	405
Doe v. Ellis.....	9 East 382.....	159
Doe v. Fonnercau.....	1 Doug. 487.....	159
Doe v. Rivers.....	7 T. R. 276.....	159
Doe v. Tompkinson.....	2 M. & S. 165.....	160
Doe v. Woodman.....	8 East 226.....	72
Donaldson v. Means.....	4 Dall. 109.....	187
Dorr v. New England Ins. Co....	4 Mass. 232.....	391
Dugan v. United States.....	3 Wheat. 172.....	139, 143
Dunn v. St. Andrew's Church....	14 Johns. 118.....	75

E

Elmendorf v. Taylor.....	10 Wheat. 167.....	197
Emily, The.....	9 Wheat. 381.....	473
English v. Darley.....	2 Bos. & Pul. 61.....	557

*PAGE

Episcopal Charitable So. v. Episcopal Church.....	1	Pick. 372.....	74
Eppes v. Randolph.....	2	Call 125.....	597
Essex Turnpike Co. v. Collins.....	8	Mass. 292.....	106
Evans v. Beatie.....	5	Esp. 26.....	522

F

Farmer v. Davies.....	1	T. R. 108.....	625
Farmers' & Mechanics' Bank v. Smith.....	6	Wheat. 131.....	215, 333
Fitzherbert v. Mather.....	1	T. R. 12.....	415
Fleckner v. Bank of United States, 8	8	Wheat. 338.....	102
Fletcher v. Peck.....	6	Cr. 87.....	125, 217, 294
Forth v. Chapman.....	1	P. Wms. 663.....	158
Fortune v. Lingham.....	2	Camp. 416.....	193
Fosdick v. Cornell..	1	Johns. 440.....	161, 163-5
Foster v. Essex Bank.....	17	Mass. 479.....	73, 86
Fotheringham v. Prince.....	3	Mass. 563.....	401
Fowle v. Alexandria.....	11	Wheat. 320.....	46, 389

G

Gardner v. The New Jersey.....	1	Peters' Adm. 223.....	626, 633
Garnett v. Sam.....	5	Munf. 542.....	592-3
General Knox, The.....		Bee 419.....	626
General Smith, The.....	4	Wheat. 438.....	612, 614, 635, 639, 641
Gibbons v. Ogden.....	6	Wheat. 448.....	136
Gibbons v. Ogden.....	9	Wheat. 1.....	433, 446, 452
Gibbs v. Ongier.....	12	Ves. 413.....	596
Gibson v. Philadelphia Ins. Co....	1	Binn. 405.....	405
Gill v. Jacobs.....		MS.....	286
Gladstone v. King.....	1	M. & S. 35.....	416
Golden v. Prince.....	3	W. C. C. 313.....	215, 295
Green v. Biddle.....	8	Wheat. 1.....	217, 223
Green v. New River Co.....	4	T. R. 590.....	520

H

Hanbury v. Cockrill.....	1	Roll. Abr. 835.....	164
Harper v. Charlesworth.....	4	B. & Cr. 575.....	68
Harriscn v. Sterry.....	5	Cr. 298, 302.....	361, 363
Hartwell v. Root.....	19	Johns. 345.....	69
Hauer v. Shitz.....	3	Yeates 205.....	159
Hayden v. Middlesex Turnpike Co.	10	Mass. 397.....	106
Head v. Providence Ins. Co.....	2	Cr. 127.....	68, 98, 101
Hingham v. Ridgway.....	10	East 122.....	522
Hoar v. Clement.....	2	Show. 338.....	624, 629
Hope v. Taylor.....	1	Burr. 263.....	159
Hore v. Unton.....	4	Inst. 138.....	622

			*PAGE
Houston v. Moore.....	5	Wheat. 1.....	33-4
Hudson v. Harrison.....	3	B. & B. 97.....	391
Hunter v. Haynes.....	1	Wash. 71.....	159

I

Ide v. Ide.....	5	Mass. 500.....	159
Inglee v. Coolidge.....	2	Wheat. 363.....	117

J

Jackson v. Blanshaw.....	3	Johns. 292.....	161, 163
Jackson v. Staats.....	11	Johns. 337.....	161, 164
John, The.....	3	Rob. 288.....	626, 633
Johnson v. Shippin.....	1	Salk. 35.....	629
Jones v. Rice.....	3	Desauss. 165.....	159
Justin v. Ballam.....	2	Ld. Raym. 805.....	624, 637

K

Keating v. Reynolds.....	1	Bay 80.....	159
King v. Anery.....	1	T. R. 575.....	71
King v. Bigg.....	1	Str. 18.....	94
King v. Chipping Norton.....	5	East 240.....	75
King v. Netherseal.....	4	T. R. 258.....	175
King v. Rumball.....		Cro. Jac. 448.....	156, 159
Kirkpatrick v. Kirkpatrick.....	13	Ves. 476.....	159

L

Lanusse v. Barker.....	3	Wheat. 147.....	117
Leffingwell v. White.....	1	Johns. Cas. 99.....	188
Levi Dearborne, The.....	4	Hall L. J. 97.....	637, 641-2
Lewis v. Cosgrave.....	2	Taunt. 2.....	192
Lillibridge v. Adie.....	1	Mason 236.....	156
Lion v. Burtiss.....	20	Johns. 483 ; 2 Cow. 333.....	165-6
Lippitt v. Hopkins.....	1	Gallis. 460.....	158
Locke v. United States.....	7	Cr. 339, 348.....	5

M

McCulloch v. Maryland.....	4	Wheat. 316.....	433, 449, 457
McKeen v. Delancy.....	5	Cr. 32.....	167
McMillan v. McNeill.....	4	Wheat. 209.....	215, 255, 272, 315, 333
Magill v. Cauffman.....	4	S. & R. 317.....	72
Manro v. Almeida.....	10	Wheat. 473.....	631
Marianna Flora, The.....	11	Wheat. 1.....	5, 6, 17
Martin v. Hunter.....	1	Wheat. 304.....	117
Massey v. Hudson.....	2	Meriv. 135.....	157, 160
Mather v. Bush.....	16	Johns. 233, 249.....	219
Mayor of Thetford's Case.....	1	Salk. 192.....	95
Menetone v. Gibbons.....	3	T. R. 267.....	632, 639

*PAGE

Miller v. Nicholls.....	4	Wheat. 311.....	117, 124
Moffat v. Strong.....	10	Johns. 12.....	161, 164

N

New Jersey v. Wilson.....	7	Cr. 164.....	217
Newlin v. Francis.....	3	T. R. 189.....	71

O

Ogden v. Saunders.....	12	Wheat. 213.....	373, 379
Oliver v. Maryland Ins. Co.....	7	Cr. 487.....	390
Olney v. Arnold.....	3	Dall. 308.....	373
Ongier v. Jennings.....	1	Camp. 505.....	391
Osborn v. United States Bank.....	9	Wheat. 738, 902.....	137, 139, 143
Ouston v. Hebden.....	1	Wils. 101.....	630

P

Pawling v. United States.....	4	Cr. 219.....	380
Payne v. Whale.....	7	East 274.....	192
Pells v. Brown.....		Cro. Jac. 590.....	155-6, 158-9
Phillips v. Hunter.....	2	H. Bl. 402.....	364
Plattsburg, The.....	10	Wheat. 133.....	473
Polk v. Wendell.....	9	Cr. 98.....	168
Porter v. Bradley.....	3	T. R. 143.....	156, 158-9, 164
Powell v. Milbourne.....	3	Wils. 355.....	69
Power v. Wells.....		Cowp. 818.....	190

R

Ray v. Enslin.....	2	Mass. 554.....	159
Renner v. Bank of Columbia.....	9	Wheat. 581.....	232, 298
Respublica v. Davis.....	3	Yeates 128.....	521
Rex v. Borosky.....	9	How. St. Tr. 1.....	483
Rex v. Champion.....	1	How. St. Tr. 1050.....	484
Rex v. Conigsmarke.....	9	How. St. Tr. 1.....	483
Rex v. Cook.....	13	How. St. Tr. 311.....	483
Rex v. Grahme.....	12	How. St. Tr. 646.....	483
Rex v. Gray.....	9	How. St. Tr. 127.....	483
Rex v. Hawkins.....	10	East 211.....	69
Rex v. Horne Tooke.....	25	How. St. Tr. 1, 24.....	484
Rex v. Noble.....	15	How. St. Tr. 731.....	485
Rex v. Stapleton.....	8	How. St. Tr. 502.....	483
Rich v. Coe.....		Cowp. 636.....	624, 625
Richardson v. Noyes.....	2	Mass. 56.....	159
Robinson v. Wilson.....	2	Madd. 434.....	596
Roe v. Jeffery.....	7	T. R. 589.....	156, 158-9, 164
Roe v. Scott.....	2	Fearne (4 ed) 203.....	157, 159
Rogers v. Stevens.....	2	T. R. 713.....	188
Romilly v. James.....	6	Taunt. 263.....	159
Royall v. Eppes.....	2	Munf. 479.....	159

S

		*PAGE
Salem Bank v. Gloucester Bank...	17 Mass. 1.....	73
Salvador v. Hopkins.....	3 Burr. 1707.....	391
Sheriffs of London v. Tindall.....	1 Esp. 394.....	521
Shrewsbury v. The Two Friends..	Bee 433.....	619
Smart v. Wolf.....	3 T. R. 323.....	630-1
Smith v. Folwell.....	1 Binn. 546.....	169
Society, &c. v. New Haven.....	8 Wheat. 464.....	217
Solomon v. Turner.....	1 Stark. 51.....	193
St. Jago de Cuba, The.....	9 Wheat. 409.....	632
St. Louis, The.....	2 Dods. 210.....	6, 17
Stevens v. The Sandwich.....	1 Peters' Adm. 233.....	626
Stewart v. Dunlop.....	4 Bro. P. C. 320.....	415
Sturges v. Crowninshield.....	4 Wheat. 122....215, 218, 223, 227, 230, 237-9, 250, 255, 257, 262, 272-3, 296, 302, 304, 307, 312, 315, 317, 333, 349, 359, 372, 378-9	
Sutton v. Cole.....	3 Pick. 232.....	107
Sutton v. Wood.....	Cam. & Norw. 203.....	159

T

Taylor v. Jones.....	2 Camp. 105.....	188
Tenny v. Agar.....	12 East 213.....	159
Terrett v. Taylor.....	9 Cr. 43.....	217
Thatcher v. Powell.....	6 Wheat. 127.....	168
Tinsley v. Anderson.....	3 Call 329.....	598
Tophan v. Chapman.....	1 Mill's Const. 253.....	364
Towers v. Barrett.....	1 T. R. 133.....	191
Town of Pawlet v. Clark.....	9 Cr. 292.....	217
Townsend v. Townsend.....	Peck 1.....	296

U

United States v. January.....	7 Cr. 572.....	511
United States v. Kirkpatrick.....	9 Wheat. 720.....	81, 89, 509
United States v. La Coste.....	2 Mason 129.....	478
United States v. Smith.....	2 Mason 143.....	478
United States v. Vanzandt.....	11 Wheat. 184.....	81, 89, 509

V

Vallance v. Dewar.....	1 Camp. 503.....	391
Vanderheyden v. Young.....	11 Johns. 150.....	32
Vos v. Robinson.....	9 Johns. 192.....	393

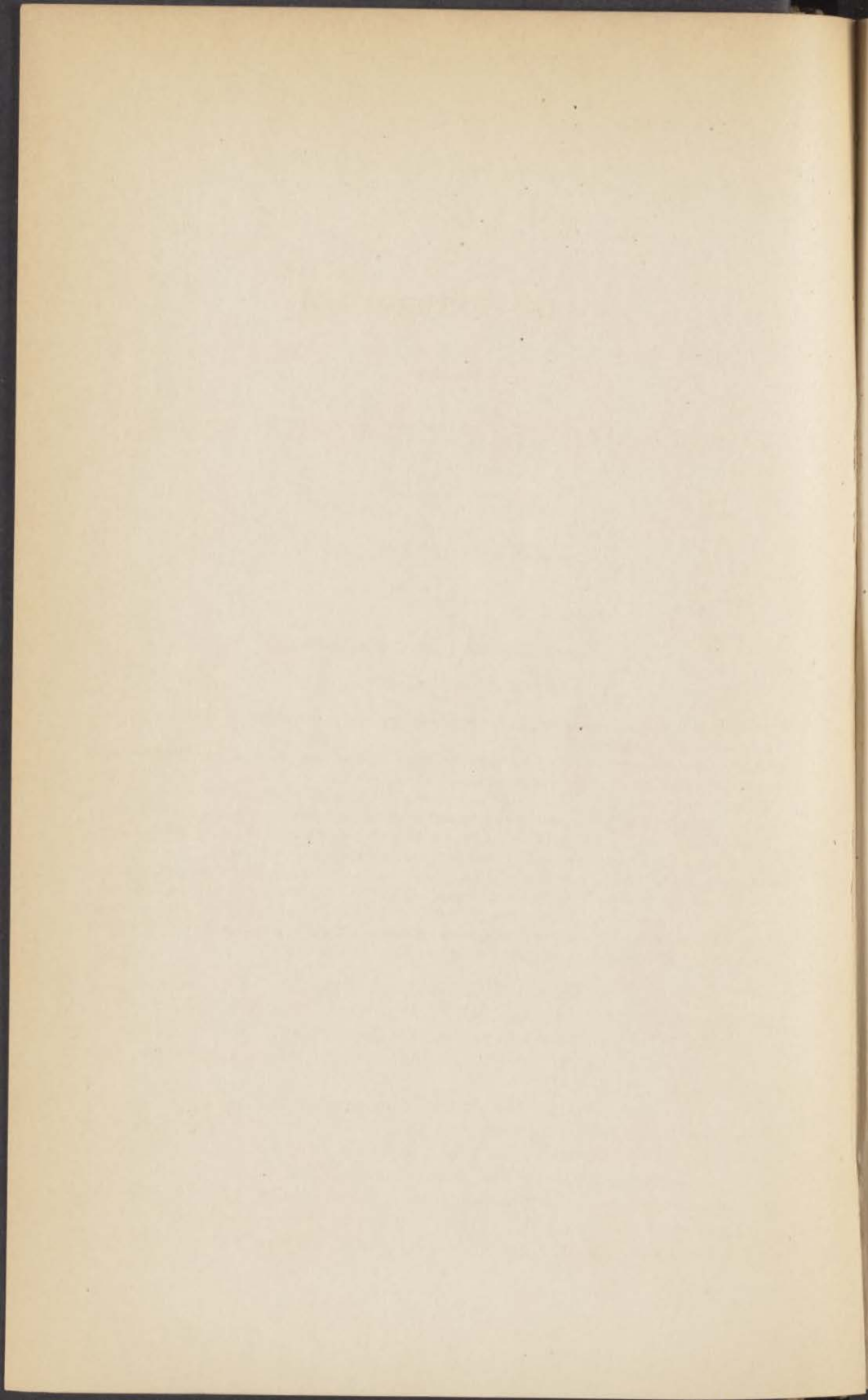
W

Waller v. Andrews.....	2 Bing. 126.....	160
Walwyn v. St. Quintin.....	1 Bos. & Pul. 652.....	557
Watkinson v. Barnardiston.....	2 P. Wms. 367.....	624, 626

	*PAGE
Watson v. Bourne.....	10 Mass. 337..... 363
Webb v. Hearing.....	Cro. Jac. 415..... 156, 159
Westerdell v. Dale.....	7 T. R. 306..... 625
Weston v. Downes.....	1 Doug. 23..... 190-1
Wilkes v. Lion.....	2 Cow. 333..... 161
Wilkins v. Carmichael.....	1 Doug. 101..... 625
Wood v. Tate.....	5 Bos. & Pul. 246..... 71

Y

Yarborough v. Bank of England..	16 East 6..... 96
---------------------------------	-------------------



CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1827.

The PALMYRA : ESCURRA, Master.

Captures.—Probable cause.

A question of probable cause of seizure, under the piracy acts of the 3d March 1819, ch. 75, and the 15th of May 1820, ch. 112.

In such a case, although the crew may be protected by a commission *bond fide* received and acted under, from the consequences attaching to the offence of piracy by the general law of nations, although such commission was irregularly issued; yet, if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly-founded suspicion, it is sufficient, under the act of congress, to justify the captors in bringing in the vessel for adjudication, and to exempt them from costs and damages.

Although probable cause of seizure will not exempt from costs and damages, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, this principle does not extend to captures *jure belli*, nor to marine torts generally, nor to acts of congress, authorizing the exercise of belligerent rights to a limited extent, such as the piracy acts of the 3d of March 1819, c. 75, and the 15th of May 1820, c. 112.

*APPEAL from the Circuit Court of South Carolina. This was a libel of information, under the act of congress of the 3d of March 1819, c. 75, entitled, "an act to protect the commerce of the United States, and punish the crime of piracy," continued in force by the act of the 15th of May 1820, c. 112. [*2

The libel was filed by the district-attorney, as well in behalf of the United States, as of the captors; and alleged, that the brig Palmyra, *alias* the Panchita, was a vessel, from which a piratical aggression, search, depredation, restraint and seizure, had been attempted and made, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in upon the master, officers and crew of the said schooner Coquette, citizens of the United States; and in and upon

The Palmyra.

the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States; and also in and upon other vessels of the United States, their officers and crews, citizens of the United States; and in and upon other vessels of various nations, states and kingdoms, their officers and crews, citizens and subjects of the said states and kingdoms.

The vessel in question was an armed vessel, ostensibly cruising as a privateer, under a commission from the King of Spain, and was captured on the high seas, on the 15th of August 1822, by the United States vessel of war, the Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man was killed, and six men were wounded. The captured vessel was sent into the port of Charleston, South Carolina, for adjudication. A libel was filed, and a claim interposed; and upon the proceedings in the district court, a decree was pronounced, restoring the brig to the claimants, without damages for the capture, injury or detention. From this sentence, an appeal was interposed by both parties to the circuit court; and upon the hearing in that court, a decree was pronounced, affirming so much of the decree as acquitted the *3] brig, and reversing so much of *it as denied damages; and the circuit court proceeded finally to award damages, to the amount of \$10,288.58. From this decree, an appeal was interposed in behalf of the United States and the captors, to the supreme court. The cause coming on to be heard in this court, at February term 1825, it not appearing that there had been any final decree in the circuit court, ascertaining the amount of damages, the cause was dismissed. (10 Wheat. 502.) But at the last term, it being discovered that in point of fact there had been a final award of damages, which was omitted, by mistake, in the transcript of the record certified by the clerk of the court below, this court, on motion of the appellants, ordered the cause to be reinstated.

At the hearing in the court below, it appeared, that the commission of the Palmyra was numbered 38, and entitled in the margin, "*Real Passaporte de Corso para los Mares de Indias*"—that is, "A royal cruising passport for the Indian seas." The great seal of Spain was affixed to it, and it was signed with the royal sign-manual with the usual formula: "Yo el Rey." It was afterwards countersigned by the secretary of state and marine affairs, and dated at Madrid, the 10th of February 1816. The blanks in the passport or commission, were filled up to Don Pablo Llanger, an inhabitant of Cadiz, to arm for war his Spanish schooner (goleta) called the Palmyra, of ninety-three tons, one twelve-pound cannon, and eight carronades, ten-pounders, with a crew of one hundred men. A printed note on the back of the commission, signed by Juan Dios Robiou, lieutenant in the national navy, and captain of the port of Porto Rico, dated on the 5th of February 1822, renewed the commission in favor of Llanger, as captain of the Palmyra, for a new cruise of three months, it having been originally granted for the term of three months, which had expired. The vessel, on board of which the commission was found, was in fact a brig of one hundred and sixty tons, commanded by Captain Escura. Various testimony was taken as *4] to the *acts of piracy committed by the Palmyra upon the Coquette and the Jeune Eugenie, as to the insubordination and predatory

The Palmyra.

spirit of the crew of the Palmyra, and as to the nature and circumstances attending the encounter between the Palmyra and the Grampus, which gave rise to a question of fact, in respect to the justifiableness of the cause of capture. But it has not been thought necessary to analyze the testimony, as the most material facts are stated in the opinion of the court.

January 9th. The *Attorney-General* and *Hayne*, for the appellants, argued, that the Palmyra was not lawfully and regularly commissioned; and that, admitting the vessel was so commissioned, she had forfeited her character by the misconduct of the officers and crew, and acquired that of a pirate.

1. A commission to cruise is a delegated authority, and can only proceed from the sovereign. Martens, Priv. 11-38; 2 Azuni 353 (Johnson's Transl.). Subordinate agents may be employed to execute the will of the sovereign in that respect, but the actual delegation of the power must clearly appear. The original commission being issued by the King of Spain to Captain Llanger, for a cruise of three months, which had expired, the commission was *functus officio*. Its subsequent extension to Captain Escura, by the port-captain of Porto Rico, was without any authority from the king for that purpose.

2. A commission to cruise is given, not to the armed vessel, but to the officer commanding the vessel; and though the officer next in rank may, in his absence, succeed to his rights, he does so by becoming captain for the time being. It has, therefore, been expressly determined, that if in the absence of the master, a privateer makes a capture, it is not such a capture as vests a prize interest in the captors, but it must be condemned as a *droit*. 3 Rob. 195, 224; 5 Ibid. 230.

3. It has become an established rule, and made necessary *by the laws of all nations, that every privateer, before she is permitted to [*5 cruise, shall give security, and this fact must appear on the face of the commission itself. Wheat. Capt. 41, 320; Martens 4, 6; Bynk. Q. J. Pub. Du Ponceau's Transl. 147; 2 Bro. Civ. & Adm. Law 339; Molloy 49. Such security is required by the laws of Spain, but was not given in this case.

4. The learned counsel entered into a minute examination of the facts, to show that the vessel ought to have been condemned as a piratical vessel, under the law of nations, or as having committed a piratical aggression, under the acts of congress, which were in conformity with the law of nations. They then proceeded to argue, that however this might be, there was, at all events, probable cause for the capture of the Palmyra, and for sending her in for adjudication. Probable cause had been defined to be less than evidence which would justify condemnation. In its legal sense, it means, a seizure made under circumstances which warrant suspicion. *Locke v. United States*, 7 Cranch 339, 348. The term must receive the same exposition in matters of prize, and is applied to a captor as well as a seizer. 1 Mason 27; 3 Cranch 458, 491. In all captures, made *jure belli*, circumstances of strong suspicion will justify the captors, and the same circumstances must equally justify a seizure made under this act of congress, which authorizes hostilities against those, who, by their conduct, have acquired the piratical character, and forfeited the protection of their own country. Indeed, this must now be considered as a settled principle in this court, since the decision of the

The Palmyra.

case of *The Marianna Flora*, 11 Wheat. 1; every circumstance of which would find its parallel in the present case. The court having determined that it will not look beyond the act of congress for a description of piratical vessels, and that no damages will be given for bringing in for adjudication, after capture of a vessel falling within that description, if the seizing officer *6] acted *bonâ fide* in the honest discharge of his duty under the law, and the instructions of the president, although the court itself might be of opinion, that he ought to have released the vessel, nothing remains but to apply these principles to the facts of the present case. The same doctrine had also been laid down by Sir W. SCOTT, in a case which this court cite with approbation in the judgment in *The Marianna Flora*. (*The Louis*, 2 Dods. 210.)

The learned counsel further insisted, that the seizing officer was fully justified in capturing, and sending in for adjudication, the Palmyra, upon the following, among other grounds: 1. Because the vessel had, in the very words of the statute, committed various acts "of piratical aggression, search, restraint, depredation and seizure," on American and other vessels. 2. Because the conduct of the vessel, in searching American ships, in violation of the treaty between the United States and Spain, and all the other circumstances of the case, warranted the worst suspicions respecting her character and conduct. 3. Because the conduct of the commander of the Palmyra, after the capture, and the unsatisfactory explanations given by him of the above circumstances, confirmed those suspicions; and the seizing officer not being, according to his instructions, "satisfied that she was acting under a regular commission, and not piratically," he was bound to send her in for adjudication.

Tazewell, for the respondents, argued: 1. That the court had no authority to reinstate the cause, after it was dismissed at a former term: 1st. Because it might operate to the prejudice of the sureties, to whom the property had been delivered, on bail, in the court below; and 2d. Because the cause might be heard in this court, upon the appeal, in respect to the sentence of restitution, that being the only decree in which the United States had any interest as a party; and that, as to damages, the captors were the only persons responsible for damages, and they alone had a right *of appeal *7] respecting that subject; so that the original cause had thus become divided into two causes, in which each party was an actor.

2. The learned counsel also insisted, that the libel was defective, in not charging, with sufficient precision, the particular acts of piratical aggression, and in omitting to allege a previous prosecution and conviction of the captured persons, of the crime of piracy, which, it was insisted, was an essential pre-requisite to the proceeding *in rem*.

3. As to the general merits, he argued, with greath minuteness and ability, upon the facts, to show that the vessel had not been guilty of a piratical aggression, within the meaning of the acts of congress, and that no such probable cause existed as justified the captors in the original seizure, and in bringing in the vessel for adjudication. The evidence was not sufficient to establish any acts of sea-robbery, constituting a piratical character, or general habit of piracy; and so far from having committed a piratical aggression on the *Grampus*, the Palmyra had merely acted in self-

The Palmyra.

defence, the avowed purpose of Lieutenant Gregory being to capture her upon suspicion. The case presented was that of a hostile attack, made by a vessel of war of the United States, on a foreign vessel, known to be regularly commissioned, and sent in for adjudication, after her character was satisfactorily explained. But even supposing there was probable cause for the seizure and detention, that would not excuse, unless it was followed by an actual condemnation. Probable cause will not excuse from remunerative damages, in any case, unless of a capture *jure belli*, or where it is expressly provided as a justification by some municipal law. This doctrine was clearly recognised by the court in the case of *The Apollon*, 9 Wheat. 362.

January 15th, 1827. STORY, Justice, delivered the opinion of the court. —This is the case of a proceeding *in rem*, by a libel of information, founded on the act of congress of the 3d of *March 1819, ch. 75, as continued [*8 in force by the act of congress of the 15th of May 1820, ch. 112. The second section of the former act authorizes the president “to instruct the commanders of public armed vessels of the United States, to seize, subdue and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel.” The fourth section declares, “that whenever any vessel or boat from which any piratical aggression, search, restraint, depredation or seizure, shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought, and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.”

The brig Palmyra is an armed vessel, asserting herself to be a privateer, and acting under a commission of the King of Spain, issued by his authorized officer at the Island of Porto Rico. She was captured on the high seas, on the 15th of August, A. D. 1822, by the United States vessel of war Grampus, commanded by Lieutenant Gregory, after a short resistance, and receiving a fire from the Grampus, by which one man was killed, and six men were wounded. She was sent into Charleston, South Carolina, for adjudication. A libel was duly filed, and a claim interposed; and upon the proceedings in the district court of that district, a decree was pronounced by the court, that the brig be acquitted, without any damages for the capture, injury or detention. From this decree, an appeal was made, by both parties, to the circuit court; and upon the hearing in that court, where, for the first time, the officers of the privateer were examined as witnesses, the circuit court pronounced a decree, affirming *so much of the decree of the district [*9 court, as acquitted the brig, and reversing so much of it as denied damages, and proceeded finally to award damages to the claimants, to the amount of \$10,288.58. From this decree, there was an appeal, interposed on behalf the United States and the captors, to the supreme court. The cause came on to be heard upon this appeal, at February term 1825, and upon

The Palmyra.

inspection of the record, it did not then appear that there had been any final decree, ascertaining the amount of damages. The court were of opinion, that if there had been no such decree, the case was not properly before the court upon the appeal, there not being any final decree, within the meaning of the act of congress. The court considered, that the damages were but an incident to the principal decree ; that the cause was but a single one ; and that the cause could not, at the same time, be in the circuit court for the purpose of assessing damages, and in this court upon appeal, for the purpose of an acquittal or condemnation of the vessel. The questions indeed were different ; but the cause was the same. Upon this ground, the appeal was dismissed. But at the last term of the court, it appearing that, in point of fact, there had been a final award of damages, and that the error was a mere misprision of the clerk of the circuit court, in transmitting an imperfect record, the court, upon motion of the appellants, at the last term, ordered the cause to be reinstated.

It is now contended, that this court had no authority to reinstate the cause, after such a dismissal : 1. Because it may operate to the prejudice of the stipulators or sureties, to whom the privateer was delivered, upon stipulation, in the court below ; and 2. Because the cause was capable of being heard in this court, upon the appeal, in respect to the decree of acquittal, that being the only decree in which the United States had any interest as a party ; and that as to the damages, the captors were the only persons responsible for damages, and they alone had a right of appeal respecting the *10] same ; so that by operation of law, the cause had become *divided into two separate and distinct causes, in which each party was an actor.

This court cannot concur in either objection. Whenever a stipulation is taken in an admiralty suit, for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court, which it could properly exercise, if the thing itself were still in its custody. This is the known course of the admiralty. It is quite a different question, whether the court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously ; that is a subject addressed to its sound discretion. In the present case, there was no ground for surprise or injury to the stipulators, nor, indeed, to any party in interest. If there had been no final award of damages, the cause would not have been properly before this court, and the appeal itself, being a nullity, would have left the cause still in the circuit court. But as such an award was made, the appeal was rightfully made ; and the dismissal, being solely for a defect of jurisdiction apparent on the record, and founded on a mistake, constituted no bar to a new appeal, even if a general dismissal might. The appeal, then, might, at any time within five years, have been lawfully made, and have bound the parties to the stipulation, to all its consequences. The difference between a new appeal, and a reinstatement of the old appeal, after a dismissal from a misprision of the clerk, is not admitted by this court justly to involve any difference of right as to the stipulators. Every court must be presumed to exercise those powers belonging to it, which are necessary for the promotion of public justice ; and we do not doubt, that this court possesses the power to reinstate any cause, dis-

The Palmyra.

missed by mistake. The reinstatement of the cause was founded, in the opinion of this court, upon the plain principles of justice, and is according to the known practice of other judicial tribunals in like cases.

The other objection has not, in our opinion, a more solid *founda-
 tion The libel was filed by the district-attorney, as well in behalf of [*11
 the United States, as of the captors, and prayed, as usual, a condemnation of the vessel, and distribution of the proceeds. This fact is noticed, for the purpose of answering the observation made at the bar, as to the parties to the libel. It has been supposed, that the United States, and the captors, are to be deemed severally libellants, having distinct rights, both of prosecution and appeal. But this proceeds upon a mistake. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether the same be cases of prize, strictly *jure belli*, or upon public acts in the nature of captures *jure belli*, the proceedings are in the name and authority of the United States, who prosecute for themselves as well as for the captors. The captors cannot, without the authority of the government, proceed to enforce condemnation. The suit is, in form and substance, a proceeding by and in the name of the United States, for the benefit of all concerned. And whether the question respect the point of condemnation, or of damages, the United States have a right of appeal co-extensive with the whole matter in litigation, and may interpose their protection, to guard their agents and officers against injury and damages. These agents and officers are, indeed, in a certain sense, parties to the suit, as the seizing officer is, in cases of mere municipal seizures; and when the claimant makes himself, by a demand of damages, an actor in the suit, no doubt exists, that the court may proceed to decree damages against them, and thus entitle them to a separate right of appeal, if the government should feel that it had no further interest to pursue the suit. But still the right to damages must always be dependent upon the question of condemnation or acquittal, for it can never be successfully contended, that if a condemnation be finally adjudged, a decree for damages can be maintained. And on the other hand, in a case of acquittal, the whole circumstances of the case must be taken into consideration, in order to ascertain that the case is one which justifies an award of damages. *In the present case, there [*12
 was an appeal entered by the district-attorney, for the United States, and also for the captors, from the decree of the circuit court. If this decree was final, such an appeal brought up the whole cause, as to all the parties; and would, in point of law, have produced the same effect, if, in form, the appeal had only been in the name of the United States. If the decree was not final (as upon the original record it appeared to this court not to be), then it was void as to all parties. Either way, then, there never was any separation of the parties libellants, so as to give rise to the point of separate independent causes. We are, then, of opinion, that the whole cause is now rightfully before us.

It is contended on behalf of the appellees, that the present suit cannot be maintained, because the libel itself is fatally defective in its averments. It is said to be too loose, inartificial and general in its structure, to give a just foundation for any judgment of condemnation. If this were admitted to be true, the only effect would be, supposing the merits, on the evidence, appeared to be in favor of the libellants, that the court would, accord-

The Palmyra.

ing to its known course of practice, remand the cause to the circuit court, with directions to allow an amendment of the libel, and ulterior proceedings consequent thereon. But there is asserted to be another fatal defect in the averments of the libel, which is incapable of being cured, because it cannot be established in point of fact; and that is, that the offenders are not alleged to have been convicted, upon any prosecution *in personam*, of the offence charged in the libel. The argument is, that there must be a due conviction upon a prosecution and indictment for the offence *in personam*, averred and proved, in order to maintain the libel *in rem*.

In respect to the first objection, it must be admitted, that the libel is drawn in an inartificial, inaccurate and loose manner. The strict rules of the common law as to criminal prosecutions, have never been supposed by this court to be required in informations of seizure in the admiralty for forfeitures, which are deemed to be civil proceedings *in rem*. Even on *13] indictments at the common law, it is often sufficient to state the offence in the very terms of the prohibitory statute; and the cases cited by the attorney-general are directly in point. In informations in the exchequer for seizures, general allegations bringing the case within the words of the statute, have been often held sufficient. And in this court, it has been repeatedly held, that in libels *in rem*, less certainty than what belongs to proceedings at the common law, will sustain a decree of condemnation, if the words of the statute are pursued, and the allegations point out the facts, so as to give reasonable notice to the party, to enable him to shape his defence. There is, indeed, in admiralty proceedings, little ground to insist upon much strictness of averment, because, in however general terms the offence may be articulated, it is always in the power of the court to prevent surprise, by compelling more particular charges as to the matters intended to be brought forward by the proofs. In general, it may be said, that it is sufficient, in libels *in rem*, for forfeitures, to allege the offence in the terms of the statute creating the forfeitures. There may be exceptions to this rule, where the terms of the statute are so general as naturally to call for more distinct specifications. Without pretending to enumerate such exceptions, let us look at the allegations in the amended libel in the present case. It charges, "that the said brig, called the Palmyra, &c., was, and is, a vessel from which a piratical aggression, search, depredation, restraint and seizure, has been first attempted and made, to wit, upon the high seas, in and upon the schooner Coquette, a vessel of the United States, and of the citizens thereof, and in and upon the master, officers and crew of the said schooner Coquette, citizens of the United States; and also in and upon the Jeune Eugenie, a vessel of the United States, and of the citizens thereof, and in and upon Edward L. Coffin, the master, and the officers and crew of the said vessel, being citizens of the United States, and also in and upon other vessels of the United States, their officers and crews, citizens of the United States, *14] and in and upon other vessels of various nations, states and kingdoms." Now, whatever may be said as to the looseness and generality, and consequent insufficiency of the latter clauses of this allegation, the former specifying the Coquette and Jeune Eugenie (upon which alone the proofs mainly rely for condemnation), have, in our opinion, reasonable and sufficient certainty. It was not necessary to state in detail the particular acts consti-

The Palmyra.

tuting the piratical aggression, search, depredation, restraint or seizure. The general words of the statute are sufficiently descriptive of the nature of the offence ; and the particular acts are matters proper in the proofs. We may, then, dismiss this part of the objection.

The other point of objection is of a far more important and difficult nature. It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the crown. The forfeiture did not, strictly speaking, attach *in rem* ; but it was a part, or, at least, a consequence, of the judgment of conviction. It is plain, from this statement that no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offence ; but the right attached only by the conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction. But this doctrine never was applied to seizures and forfeitures created by statute, *in rem*, cognisable on the revenue side of the exchequer. The thing is here primarily considered as the offender, or rather the offence is attached primarily to the thing ; and this, whether the offence be *malum prohibitum*, or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam* ; many cases exist, where there is both a forfeiture *in rem* and a personal penalty. *But in neither class of cases, has it ever been decided, that the prosecutions [*15 were dependent upon each other. But the practice has been, and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by, any criminal proceeding *in personam*. This doctrine is deduced from a fair interpretation of the legislative intention, apparent upon its enactments. Both in England and America, the jurisdiction over proceedings *in rem*, is usually vested in different courts from those exercising criminal jurisdiction. If the argument at the bar were well founded, there could never be a judgment of condemnation pronounced against any vessel coming within the prohibitions of the acts on which the present libel is founded ; for there is no act of congress which provides for the personal punishment of offenders, who commit "any piratical aggression, search, restraint, depredation or seizure," within the meaning of those acts. Such a construction of the enactments, which goes wholly to defeat their operation, and violates their plain import, is utterly inadmissible. In the judgment of this court, no personal conviction of the offender is necessary, to enforce a forfeiture *in rem*, in cases of this nature.

Having disposed of these questions, which are preliminary in their nature, we may now advance to the consideration of those which turn upon the merits of the cause. These questions are : 1. Whether the present be, upon the facts, a case for condemnation ? and if not, 2. Whether it be a case of remunerative damages ? for vindictive damages are and must be disclaimed.

Upon the first point, it is unnecessary to go into any examination at large of the various facts preceding and accompanying the capture, because the judges are divided in opinion ; and consequently, according to the known practice of

The Palmyra..

the court, the decree of the circuit court, so far as it pronounces a decree of acquittal, must be affirmed.

In respect to the second point, we are all of opinion, that the case is clearly not a case for damages. The whole circumstances present such well-founded grounds for suspicion *of the piratical character and conduct *16] of the privateer, as required Lieutenant Gregory, in the just exercise of his instructions from the president, under the acts of congress, to subdue and send her in for adjudication. That her crew were guilty of plunder from the *Coquette* and the *Jeune Eugenie*, is established by proofs entirely competent and satisfactory. Her exercise of the right of search on these vessels was irregular and unjustifiable, and indicated on the part of the boarding-officers no disinclination to petty thefts, if they avoided forcible robbery. Her commission is itself liable to much suspicion and criticism. It varies essentially in the description of the brig, the size and the denomination of the vessel from that on board of which it is found. It purports to be for a schooner of 93 tons, under the command of Don Pablo Llangar; it is found on board of a brig of 160 tons, commanded by Captain Escurra. It was originally granted for a three months' cruise, which had expired; and it purports to be renewed by the port-captain of Porto Rico, a subordinate agent of the King of Spain, for a new cruise, by an indorsement of it, without any known authority. We do not advert to these circumstances, to establish the position that the commission was utterly void, or rendered the exercise of belligerent rights piratical. Whatever may be the irregularities in the granting of such commissions, or the validity of them, so far as respects the King of Spain, to found an interest of prize in the captors, if the *Palmyra* *bond fide* received it, and her crew acted *bond fide* under it, it ought, at all events, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy. But the defects of the commission, connected with the almost total want of order and command on board of the privateer, and the manifest insubordination, and predatory spirit, of the crew, could not but inflame to a high degree every other just suspicion. In short, taking the circumstances together, the court think that they presented, *prima facie*, a case of piratical aggression, search, restraint and depredation, within the acts of congress, open to explanation, indeed, but if unexplained, *pressing heavily on the vessel, for the purpose *17] of forfeiture. Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation.

It has been argued at the bar, that probable cause of seizure in this case constitutes no ground of defence against the claim of damages. It has been truly stated, as the settled doctrine of this court, that in cases of seizures under mere municipal laws, probable cause, unless so made by statute, constitutes no ground for denying damages, or justifying the seizure. But it is supposed, that probable cause is not an excuse or justification of any seizure or capture, except in cases of *jure belli*; and the case of *The Apollon*, in this court (9 Wheat. 362), is relied on, to establish this position. That case contains no doctrine leading justly to any such conclusion. It was a case of seizure under our revenue laws, and in the opinion of the court, the point is examined, how far probable cause constituted, in that case, a ground of exemption from damages. On that occasion, the court said, that the argument

The Palmyra.

has not distinguished between probable cause, as applied to cases of capture *jure belli*, and as applied to cases of municipal seizures; and then proceeded to state the distinction. There was no intimation, that in cases of marine torts generally, or under laws authorizing the exercise to a limited extent of belligerent rights, or *quasi* belligerent rights, probable cause might not be a sufficient excuse. In the case of the *Marianna Flora*, at the last term (11 Wheat. 1), the very point was before the court, and it was in that case held, that probable cause was a sufficient excuse for a capture, under circumstances of hostile aggression at sea. Indeed, in cases of marine torts, arising under the general maritime law, probable cause often is a complete excuse for the act, and always goes in mitigation of damages. In the admiralty, the award of damages always rests in the sound discretion of the court, under all the circumstances. The case of *The St. Louis*, in 2 Dods. 210, is a strong illustration of the doctrine. But in cases like the present, where the public armed ships *of the United States are authorized to make captures to a limited extent, the authority so exercised by them must be deemed [*18 to stand upon the same analogy as captures strictly *jure belli*. And the doctrine of the prize courts, as to the denial of damages, where there is probable cause for the capture, furnishes the proper rule to govern the discretion of the court. We are, then, of opinion, that in the present case, there was strong probable cause for the capture, and that the decree of the circuit court, so far as it awards damages to the claimants, ought to be reversed.

It remains only to remark upon one or two points made against the competency of some of the testimony in the cause. It is objected, that Lieutenant Gregory is not a competent witness, because he is, notwithstanding his release of his interest as captor, interested to defeat the claim for damages. However well founded this objection may be as to his competency on the point of damages, having been admitted both in the district and circuit courts, as a witness, without objection, we think there was a waiver of the objection, and it cannot now be insisted on. As to the depositions of Captains Souther and Coffin, they were taken under commission duly issued from the circuit court, according to the rule of this court, and are, therefore admissible, upon the strictest principles.

DECREE.—This cause came on, &c.: On consideration whereof, it is adjudged, ordered and decreed, that so much of the decree of the circuit court as decrees restitution of the brig Palmyra to the claimants, be and the same is hereby affirmed: and that so much of the decree of the said circuit court as awards damages to the claimants, be and the same is hereby reversed and annulled; and it is further ordered, that said cause be remanded to said circuit court for further proceedings according to law.

**MARTIN*, Plaintiff in error, *v. MOTT*, Defendant in error.

State militia.—Courts-martial.

The authority to decide whether the exigencies contemplated in the constitution of the United States, and the act of congress of 1798, ch. 101, in which the president has authority to call forth the militia, to execute the laws of the Union, suppress insurrections and repel invasions," have arisen, is exclusively vested in the president, and his decision is exclusive upon all other persons.¹

Although a militia-man, who refused to obey the orders of the president, calling him into the public service, under the act of 1795, is not, in the sense of that act, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet he is liable to be tried, for the offence, under the fifth section of the same act, by a court-marshal called under the authority of the United States.²

Where; in an action of replevin, the defendant, being a deputy marshal of the United States, avowed and justified the taking of plaintiff's goods, by virtue of a warrant issued to the marshal of the district, to collect a fine imposed on him by the judgment of a court-martial, described as a general court-martial, composed of officers of the militia of the state of New York, in the service of the United States (six in number, and naming them), duly organized and convened, by general orders issued pursuant to the act of congress of February 28th, 1795, ch. 101, for the trial of those of the militia of the state of New York, ordered into the service of the United States, in the third military district, who had refused to rendezvous and entered into the service of the United States, in obedience to the orders of the commander in chief of the state of New York, of the 4th and 29th of August 1814, issued in compliance with the requisition of the president, made in pursuance of the same act of congress, and alleging that the plaintiff, being a private in the militia, neglected and refused to rendezvous, &c., and was regularly tried by the general court-martial, and duly convicted of the said delinquency: *Held*, that the avowry was good.

ERROR to the Court for the Trial of Impeachments and Correction of Errors of the State of New York. *This was an action of replevin, *20] originally brought in the supreme court of New York, by the defendant in error, Mott, against the plaintiff in error, Martin, to which an avowry was filed, containing, substantially, the following allegations:

That on the 18th of June 1812, and from thence until the 25th of December 1814, there was public and open war between the United States of America and the United Kingdom of Great Britain and Ireland, and its dependencies, and the citizens and subjects of the said countries respectively; and that during the continuance of the said war, to wit, on the 4th day of August 1814, and also, on the 29th day of the same month, in the same year, at the city of New York, to wit, at Poughkeepsie, in the county of Dutchess, his excellency Daniel D. Tompkins, Esq., was then and there governor of the state of New York, and commander in chief of the militia thereof, and being so governor and commander in chief, he, the said Daniel D. Tompkins, as such governor and commander in chief, on the several days last aforesaid, and in the year aforesaid, and at the place aforesaid, upon the previous requisitions of the president of the United States, for that purpose made, and to him directed, as such governor and commander in chief, did issue two several general orders, bearing date respectively on the said 4th and 29th days of August, in the year aforesaid, in and by which said two general orders, among other things, the said Daniel D. Tompkins, as governor and commander in chief as aforesaid, pursuant to such requisitions, and

¹ See *Luther v. Borden*, 7 How. 44-5.

² Overruling *Mills v. Martin*, 19 Johns. 7; and *Rathburn v. Martin*, 20 Id. 343.

Martin v. Mott.

in compliance therewith, did detail certain parts and portions of the militia of the state, as he was required to do, in and by the requisitions of the president of the United States, as aforesaid, and did order the militia so detailed into the service of the United States of America, at the city of New York, within the third military district of the said United States, as in and by the said two general orders may more fully appear. That the said Jacob E. Mott, on the several days, and in the year aforesaid, and until the 25th day of December, in the same year, being a white citizen of the said state of New York, inhabiting and residing within the same, and between the ages of eighteen *and forty-five years, was liable to do military duty in the militia of the said state, and was a private in the militia of the said state that was so detailed and ordered into the service of the United States aforesaid, and as such private in said militia, was bound to do military duty in the militia of the said state, so detailed and ordered into the service of the United States, in the third military district of the United States. That on the 24th of September 1814, Morgan Lewis, Esq., was a major-general, commanding the army of the United States, of the third military district of the said United States, in which district the militia of the state of New York, detailed and ordered into the service of the United States as aforesaid, had been ordered to do military duty, in the service of the United States. And the said Morgan Lewis, so being a major-general, and commanding as aforesaid, did, on the day and in the year last aforesaid, as such major-general and commander, issue general orders to convene a general court-martial for the purpose in the said orders expressed, composed of so many and such militia officers in the service of the United States, in the said third military district, as in the said orders are mentioned ; it having been then and there considered and adjudged by the said Morgan Lewis, that a greater number of officers than those detailed on the said court-martial, could not be spared from the service of the United States, without manifest injury to the said service ; which said general orders are in the words and figures following, to wit : " Adjutant General's office, 3d M. D. New York, 24th September 1814. General Orders. A general court-martial, under the act of congress of the 28th of February 1795, for the trial of those of the militia of the state of New York, ordered into the service of the United States, in the third military district, who have failed to rendezvous pursuant to orders, will convene on Monday the 26th instant, at Harmony Hall, and will consist of the following members " (enumerating them, being six in number). Which general court-martial was continued (although varied as to its members), by various general orders set out in the avowry, *until the 13th of May 1818. That the said J. E. Mott, being so liable, &c., did fail, neglect and refuse to rendezvous and enter into the service of the United States, in obedience to the orders issued by the governor of the state, on the requisition of the president of the United States, and in compliance therewith. That on the 30th of May 1818, the said court-martial convened at Poughkeepsie, within the said third military district, at which time and place, the said Jacob E. Mott was duly summoned to appear before the said court-martial ; and did then and there appear before the said court-martial, and make his defence to the charges alleged against him as aforesaid. That the said general court-martial then and there tried the said Jacob E. Mott for having failed, neglected and refused to rendezvous and

Martin v. Mott.

enter into the service of the United States, in obedience to the orders aforesaid, issued in compliance with the requisition aforesaid ; and after hearing the proofs and allegations, as well on the part of the United States, as on the part of the said Jacob E. Mott, then and there convicted the said Jacob E. Mott of the said delinquency ; and thereupon, the said general court-martial imposed the sum of \$96 as a fine, on the said Jacob E. Mott, for having thus failed, neglected and refused to rendezvous and enter into the service of the United States, when thereto required as aforesaid. That before the said last-mentioned day, to wit, on the 25th of December 1814, a treaty of peace was made and concluded between the United States and the United Kingdom of Great Britain and Ireland and its dependencies ; and that the said Morgan Lewis and Daniel D. Tompkins, the major-generals who issued the orders organizing, convening and continuing the said general court-martial as aforesaid, were not continued as such major-generals as aforesaid, in the service of the United States aforesaid, at the time herein next afterwards mentioned, nor was there any other officer of equal grade with the said last-mentioned major-generals in the service of the United States, commanding in the military district aforesaid, at the time the said court *23] imposed the fine and sentence aforesaid, *on the said plaintiff as aforesaid, by whom the said sentence could be approved ; but that the said fine, sentence and proceedings of the said court-martial, so far as they related to the case of the said Jacob E. Mott, were duly approved by the president of the United States, before the same were certified by the president of the court-martial aforesaid, to the marshal of the southern district of the state of New York, as hereinafter mentioned, and before the 4th day of June 1814. That the president of the said general court-martial, afterwards, to wit, on the day and year, and at the place last aforesaid, in pursuance to the statute of the United States, in such case made and provided, did make a certificate in writing, whereby he did, under his hand, certify to the marshal of the southern district of New York, that the sum of \$96 was imposed as a fine on said Jacob E. Mott, for having thus failed, neglected and refused to enter the service of the United States, when hereunto required as aforesaid, and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of said fine imposed on him, to twelve months' imprisonment. The avowry then proceeded to state the authority of the plaintiff in error, Martin, as deputy-marshal, to execute such certificate, and that, in the execution thereof, he took the said goods, &c.

To this avowry, the plaintiff in replevin demurred, and assigned the following causes of demurrer :

1. The said defendant, in his said avowry, does not allege that the president of the United States had adjudged that there was an invasion or imminent danger of an invasion ; or that any of the exigencies had occurred, in which the president is empowered to call out the militia, by the constitution of the United States.

2. The said defendant, in the said avowry, does not aver that any such previous requisition upon the governor was, in fact, made by the president of the United States ; no such requisition is set forth, nor is the date or *24] substance thereof, *or the number of militia thereby required, stated in the said avowry.

Martin v. Mott.

3. The said avowry does not state that the said militia were ordered into actual service, in compliance with such requisition ; nor does it appear that the militia were required by said requisition to rendezvous or act within the territory of the United States.

4. The said avowry does not sufficiently show or set forth either the particulars or substance of the said orders of the governor of the state of New York, in the said avowry mentioned, in such manner that it can appear whether the said orders, or either of them, directed all those of the militia called out thereby, to rendezvous or enter the service of the United States upon the requisition of the said president, solely, or whether the said orders also called out a part of the same militia, by, under and pursuant to the authority and laws of the state of New York, without the requisition of the said president, and without designating which were ordered to rendezvous and enter the service by the said respective authorities.

5. The said avowry does not show that the two said several orders of the governor were cumulative, explanatory of, auxiliary to, or in any way connected with each other ; nor whether both of the said orders embraced the same or different persons, and required the same or different duties ; nor with such certainty that it can appear whether a disobedience of either or both of the said orders would be the same, a different, or an additional offence, subject to the same or different jurisdiction ; nor does it state the number of the militia called out by the said orders, so that it can appear whether in that respect the said orders were in compliance with the requisitions of the president, nor by which of the said orders the said plaintiff was called forth into the service of the United States ; in all which the said avowry is uncertain and insufficient.

6. The said avowry is double and uncertain, inasmuch as therein the said plaintiff is charged with having committed two several offences in the disobedience of two several *orders of the governor, without showing that both offences were necessary for the trial and conviction [*25 of the said plaintiff ; or any reason why the said orders should be so blended together ; and because the said orders are so blended together, without showing any dependence upon each other or any connection between them.

7. The general orders in the said avowry set forth, under and by virtue of which the said court-martial was convened, and tried, convicted and fined the said plaintiff, are deficient, uncertain, vague, inoperative, void, and of no effect, and conferred upon the said court-martial, or the members thereof, no jurisdiction over the said plaintiff, or the offence with which he is charged in the said avowry, inasmuch as the said last-mentioned general orders convened said court-martial for the trial of those of the militia of the state of New York, ordered into the service of the United States, in the third military district, who had failed to rendezvous pursuant to orders, without specifying in any manner, when, by whom, to whom, or by what authority, or in what manner, such orders should have been issued in regard to the said militia, or when such militia had failed to rendezvous, or whether the orders pursuant to which said militia should have failed to rendezvous, were the same orders calling said militia into service, in said third military district, or required them to rendezvous elsewhere or otherwise.

8. The said defendant, in his said avowry, states, that the said court-martial was duly convened, in pursuance of the said several general orders,

Martin v. Mott.

in the said avowry set forth, on the 24th day of October 1814; a day long before the last of the said general orders, by which the said court is stated to have been duly convened, was issued, as appears by the said avowry, all which is repugnant and contradictory.

9. The orders for convening the said court-martial, as in the said avowry set forth, are further uncertain, because by the said orders, the said court-martial is stated to have been convened under the act of congress of the 28th day of February 1795, without showing which of the acts of congress of that date is intended.

*26] *10. The trial of the said plaintiff by the said court-martial, as appears by the said avowry, was in a time of profound peace.

11. The said court-martial had no power or authority, under the said general orders by which they were convened, to try, convict and fine the said plaintiff, for having failed, neglected and refused to rendezvous and enter the service of the United States, in obedience to the orders aforesaid, issued in compliance with the requisitions aforesaid.

12. The said court-martial, consisting of less than thirteen members, had no power or authority to try, convict and fine the said plaintiff, at the time said trial was had, it being a time of peace, without showing that thirteen militia officers could not at that time be spared, without manifest injury to the service.

13. By the said avowry, it doth not appear, whether all or how many of the persons detailed by the said general orders, as members of the said court-martial, continued to remain in the service of the United States, at the time when the said plaintiff was tried; or that the places of such as had resigned were supplied by others appointed in their stead; or in what manner the said court was duly convened; or of how many members it was then composed; and whether all the persons who acted as members of the said court-martial, at the time when the said plaintiff was tried, were then commissioned officers of the militia, of competent rank, and in the service of the United States.

14. The said avowry does not allege that the orders by which the said court-martial was continued in service until further orders, remained still unrevoked, at the time when the said plaintiff was tried.

15. The said avowry does not show in what manner, when, or by whom, the said plaintiff was duly summoned to appear before the said court-martial.

16. The said avowry does not show at what time the said Morgan Lewis and Daniel D. Tompkins were discontinued; nor but that they were such major-generals commanding as aforesaid, on the said 13th day of May 1818; *27] nor *but that, at the time of the said trial, there was a major-general, of equal rank with the said Morgan Lewis and Daniel D. Tompkins, commanding an army in the service of the United States, or some other officer of competent authority, in some military division of territory comprising the said third military district, by whom the sentence of said court-martial could have been approved.

17. By the said sentence of the said court-martial, as the same is in the said avowry set forth, the said Gerard Steddiford, president of the said court, had no power or authority to issue such a certificate as is in the said

Martin v. Mott.

avowry mentioned, inasmuch as the said certificate is variant from the said sentence.

18. The said defendant does not, in his said avowry, allege that the said plaintiff ever was in the service of the United States, before, at the time when, or after, the said orders of the governor, of the 4th and 29th days of August 1814, were issued, or at the time when the said orders for detailing the said court-martial were issued, when said court-martial convened, or when the said trial took place, and the said fine was imposed.

19. The said certificate of the said Gerard Steddiford, as in the said avowry set forth, does not show with sufficient certainty, by what court, or by whom, or by what authority the said fine was imposed; nor does it appear that the said Gerard Steddiford made the said certificate, as such president of the said court-martial, or signed the same in his official capacity. And also, that the said avowry is, in other respects, uncertain, informal and insufficient, &c.

The defendant in replevin (now plaintiff in error) joined in demurrer; and judgment was rendered in behalf of the plaintiff in replevin, in the supreme court, which was affirmed by the court for the trial of impeachments and correction of errors. The cause was then brought before this court, by writ of error, under the 25th section of the judiciary act of 1789, c. 20.

*January 17th, 1827. The cause was argued by the *Attorney-General* and *Coxe*, for the plaintiff in error; and by *D. B. Ogden*, for the defendant in error. But as the grounds of argument are fully stated in the opinion of the court, it has not been thought necessary to insert it. [*28]

February 2d. STORY, Justice, delivered the opinion of the court.—This is a writ of error to the judgment of the court for the trial of impeachments and the correction of errors of the state of New York, being the highest court of that state, and is brought here in virtue of the 25th section of the judiciary act of 1789, ch. 20. The original action was a replevin for certain goods and chattels, to which the original defendant put in an avowry, and to that avowry there was a demurrer, assigning nineteen distinct and special causes of demurrer. Upon a joinder in demurrer, the supreme court of the state gave judgment against the avowant; and that judgment was affirmed by the high court to which the present writ of error is addressed.

The avowry, in substance, asserts a justification of the taking of the goods and chattels, to satisfy a fine and forfeiture imposed upon the original plaintiff, by a court-martial, for a failure to enter the service of the United States as a militia-man, when thereto required by the president of the United States, in pursuance of the act of the 28th of February 1795, c. 101. It is argued, that this avowry is defective, both in substance and form; and it will be our business to discuss the most material of these objections: and as to others, of which no particular notice is taken, it is to be understood that the court are of opinion, that they are either unfounded in fact or in law, and do not require any separate examination.

For the more clear and exact consideration of the subject, it may be necessary to refer to the constitution of the United States, and some of the provisions of the act of 1795. The constitution declares, that congress shall

Martin v. Mott.

have power "to provide for calling forth the militia, to execute the laws of the Union, suppress insurrections, and repel invasions ;" *and also *29] "to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States." In pursuance of this authority, the act of 1795 has provided, "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the president of the United States to call forth such number of the militia of the state or states most convenient to the place of danger, or scene of action, as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper." And like provisions are made for the other cases stated in the constitution. It has not been denied here, that the act of 1795 is within the constitutional authority of congress, or that congress may not lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. In our opinion, there is no ground for a doubt on this point, even if it had been relied on, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil.

The power thus confided by congress to the president, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service, is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without a correspondent responsibility. It is, in its terms, a limited power, confined to cases of actual invasion, or of imminent danger of invasion. If it be a limited power, the question arises, by whom is the exigency to be judged of and decided? Is the president the sole and exclusive judge whether the exigency has arisen, or is it to be considered as an open question, upon which every officer to whom the orders of the *president are addressed, may de- *30] cide for himself, and equally open to be contested by every militiaman who shall refuse to obey the orders of the president? We are all of opinion, that the authority to decide whether the exigency has arisen, belongs exclusively to the president, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command, of a military nature; and in such cases, every delay, and every obstacle to an efficient and immediate compliance, necessarily tend to jeopard the public interests. While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the facts upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished, without the means of

Martin v. Mott.

resistance. If "the power of regulating the militia, and of commanding its services in times of insurrection and invasion, are (as it has been emphatically said they are) natural incidents to the duties of superintending the common defence, and watching over the internal peace of the confederacy" (Federalist, No. 29), these powers must be so construed as to the modes of their exercise, as not to defeat the great end in view. If a superior officer has a right to contest the orders of the president, upon his own doubts as to the exigency having arisen, it must be equally the right of every inferior officer and soldier; and any act done by any person in furtherance of such orders, would subject him to responsibility in a civil suit, in which his defence must finally rest upon his ability to establish the facts by competent proofs. Such a course *would be subversive of all discipline, and expose the best-disposed officers to the chances of ruinous litigation. [*31 Besides, in many instances, the evidence upon which the president might decide that there is imminent danger of invasion, might be of a nature not constituting strict technical proof, or the disclosure of the evidence might reveal important secrets of state, which the public interest, and even safety, might imperiously demand to be kept in concealment.

If we look at the language of the act of 1795, every conclusion drawn from the nature of the power itself, is strongly fortified. The words are, "whenever the United States shall be invaded, or be in imminent danger of invasion, &c., it shall be lawful for the president, &c., to call forth such number of the militia, &c., as he may judge necessary to repel such invasion." The power itself is confided to the executive of the Union, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. He is necessarily constituted the judge of the existence of the exigency, in the first instance, and is bound to act according to his belief of the facts. If he does so act, and decides to call forth the militia, his orders for this purpose are in strict conformity with the provisions of the law; and it would seem to follow as a necessary consequence, that every act done by a subordinate officer, in obedience to such orders, is equally justifiable. The law contemplates that, under such circumstances, orders shall be given to carry the power into effect; and it cannot, therefore, be a correct inference, that any other person has a just right to disobey them. The law does not provide for any appeal from the judgment of the president, or for any right in subordinate officers to review his decision, and in effect defeat it. Whenever a statute gives a discretionary power to any person, to be exercised by him, upon his own opinion of certain facts, it is a sound rule of construction, *that the statute constitutes him the sole and exclusive judge of the existence of those facts. And in the present case, we [*32 are all of opinion, that such is the true construction of the act of 1795. It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, of public virtue, and honest devotion to the public interests, the frequency

Martin v. Mott.

of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

This doctrine has not been seriously contested upon the present occasion. It was, indeed, maintained and approved by the supreme court of New York, in the case of *Vanderheyden v. Young*, 11 Johns. 150, where the reasons in support of it were most ably expounded by Mr. Justice SPENCER, in delivering the opinion of the court. But it is now contended, as it was contended in that case, that notwithstanding the judgment of the president is conclusive as to the existence of the exigency, and may be given in evidence as conclusive proof thereof, yet that the avowry is fatally defective, because it omits to aver that the fact did exist. The argument is, that the power confided to the president is a limited power, and can be exercised only in the cases pointed out in the statute, and therefore, it is necessary to aver the facts which bring the exercise within the purview of the statute. In short, the same principles are sought to be applied to the delegation and exercise of this power intrusted to the executive of the nation for great political purposes, as might be applied to the humblest officer in the government, acting upon the most narrow and special authority. It is the opinion of the court, that this objection cannot be maintained. When the president exercises an authority confided to him by law, the presumption *is, that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and, *a fortiori*, this presumption ought to be favorably applied to the chief magistrate of the Union. It is not necessary to aver, that the act which he might rightfully do, was so done. If the fact of the existence of the exigency were averred, it would be traversable, and, of course, might be passed upon by a jury; and thus the legality of the orders of the president would depend, not on his own judgment of the facts, but upon the finding of those facts, upon the proofs submitted to a jury. This view of the objection is precisely the same which was acted upon by the supreme court of New York, in the case already referred to, and, in the opinion of this court, with entire legal correctness.

Another objection is, that the orders of the president are not set forth; nor is it averred, that he issued any orders, but only that the governor of New York called out the militia, upon the requisition of the president. The objection, so far as it proceeds upon a supposed difference between a requisition and an order, is untenable; for a requisition calling forth the militia is, in legal intendment, an order, and must be so interpreted in this avowry. The majority of the court understood and acted upon this sense, which is one of the acknowledged senses of the word, in *Houston v. Moore*, 5 Wheat. 1. It was unnecessary to set forth the orders of the president at large; it was quite sufficient to state that the call was in obedience to them. No private citizen is presumed to be conversant of the particulars of those orders; and if he were, he is not bound to set them forth *in hæc verba*.

The next objection is, that it does not sufficiently appear in the avowry, that the court-martial was a lawfully constituted court-martial, having jurisdiction of the offence, at the time of passing its sentence against the original plaintiff. Various grounds have been assigned in support of this objection. In the first place, it is said, that the original plaintiff was never employed in the service of the United States, but refused to enter that service, and that,

Martin v. Mott.

consequently, he was not liable to the rules and articles of war, *or to be tried for the offence by any court-martial organized under the authority of the United States. The case of *Houston v. Moore*, 5 Wheat. 1, affords a conclusive answer to this suggestion. It was decided in that case, that although a militia-man, who refused to obey the orders of the president, calling him into the public service, was not, in the sense of the act of 1795, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet that he was liable to be tried for the offence, under the 5th section of the same act, by a court-martial called under the authority of the United States. The great doubt in that case was, whether the delinquent was liable to be tried for the offence, by a court-martial organized under state authority.

In the next place, it is said, the court-martial was not composed of the proper number of officers required by law. In order to understand the force of this objection, it is necessary to advert to the terms of the act of 1795, and the rules and articles of war. The act of 1795, § 5, provides, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the president of the United States," &c., shall forfeit a sum not exceeding one year's pay, and not less than one month's pay, to be determined and adjudged by a court-martial." And it further provides (§ 6), "that courts-martial for the trial of militia shall be composed of militia officers only." These are the only provisions in the act on this subject. It is not stated by whom the courts-martial shall be called, nor in what manner, nor of what number, they shall be composed. But the court is referred to the 64th and 65th of the rules and articles of war, enacted by the act of 10th of April 1806, ch. 20, which provide, "that general courts-martial may consist of any number of commissioned officers from five to thirteen inclusively; but they shall not consist of less than thirteen, where that number can be convened without manifest injury to the service;" and that "any general officer commanding an army, or colonel commanding a separate department, may appoint general courts-martial when necessary." Supposing these clauses applicable to the court-martial in question, it is very clear, *that the act is merely directory to the officer appointing the court, and that his decision as to the number which can be [35 convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive. But the present avowry goes further, and alleges, not only that the court-martial was appointed by a general officer commanding an army, that it was composed of militia officers, naming them, but it goes on to assign the reason why a number short of thirteen composed the court, in the very terms of the 64th article; and the truth of this allegation is admitted by the demurrer. Tried, therefore, by the very test which has been resorted to in support of the objection, it utterly fails.

But, in strictness of law, the propriety of this resort may admit of question. The rules and articles of war, by the very terms of the statute of 1806, are those "by which the armies of the United States shall be governed;" and the act of 1795 has only provided, "that the militia employed in the service of the United States (not the militia ordered into the service of the United States) shall be subject to the same rules and articles of war as the troops of the United States;" and this is, in substance, re-enacted by

Martin v. Mott.

the 97th of the rules and articles of war. It is not, therefore, admitted, that any express authority is given by either statute, that such a court-martial as is contemplated for the trial of delinquents, under the 5th section of the act of 1795, is to be composed of the same number of officers, organized in the same manner, as these rules and articles contemplate for persons in actual service. If any resort is to be had to them, it can only be to guide the discretion of the officer ordering the court, as matter of usage, and not as matter of positive institution. If, then, there be no mode pointed out for the formation of the court-martial in these cases, it may be asked, in what manner is such court to be appointed? The answer is, according to the general usage of the military service, or what may not unfitly be called the customary military law. It is by the same law, that courts-martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments. Upon *36] any other principle, courts-martial would be left without any adequate means to exercise the authority confided to them; for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.

The act of the 18th of April 1814, ch. 141, which expired at the end of the late war, was, in a great measure, intended to obviate difficulties arising from the imperfection of the provisions of the act of 1795, and especially to aid courts-martial in exercising jurisdiction over cases like the present. But whatever may have been the legislative intention, its terms do not extend to the declaration of the number of which such courts-martial shall be composed. The first section provides, "that courts-martial, to be composed of militia officers alone, for the trial of militia drafted, detached, *and* called forth (not *or* called forth) for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, when necessary, be appointed, held and conducted, in the manner prescribed by the rules and articles of war, for appointing, holding and conducting courts-martial for the trial of delinquents in the army of the United States." This language is obviously confined to the militia in the actual service of the United States, and does not extend to such as are drafted and refuse to obey the call. So that the court are driven back to the act of 1795 as the legitimate source for the ascertainment of the organization and jurisdiction of the court-martial in the present case. And we are of opinion, that nothing appears on the face of the avowry, to lead to any doubt that it was a legal court-martial, organized according to military usage, and entitled to take cognisance of the delinquencies stated in the avowry.

This view of the case affords an answer to another objection which has been urged at the bar, viz., that the sentence has not been approved by the commanding officer, in the manner pointed out in the 65th of the rules and articles of war. That article cannot, for the reasons already stated, be drawn in aid of the argument; and the avowry itself shows that the sentence has been approved by the president of the United States, who is the *37] commander-in-chief, and that there was not any other officer of equal grade with the major-generals by whom the court-martial had been organized and continued, within the military district, by whom the same could be approved. If, therefore, an approval of the sentence were necessary, that approval has been given by the highest, and indeed only,

Martin v. Mott.

military authority competent to give it. But it is by no means clear, that the act of 1795 meant to require any approval of the sentences imposing fines for delinquencies of this nature. The act does not require it, either expressly or by necessary implication. It directs (§ 7) that the fines assessed shall be certified by the presiding officer of the court-martial to the marshal, for him to levy the same, without referring to any prior act to be done, to give validity to the sentences. The natural inference from such an omission is, that the legislature did not intend, in cases of this subordinate nature, to require any further sanction of the sentences. And if such an approval is to be deemed essential, it must be upon the general military usage, and not from positive institution. Either way, we think, that all has been done, which the act required.

Another objection to the proceedings of the court-martial is, that they took place, and the sentence was given, three years and more after the war was concluded, and in a time of profound peace. But the opinion of this court is, that a court-martial, regularly called under the act of 1795, does not expire with the end of a war then existing, nor is its jurisdiction to try these offences in any shape dependent upon the fact of war or peace. The act of 1795 is not confined in its operation to cases of refusal to obey the orders of the president, in times of public war. On the contrary, that act authorizes the president to call forth the militia to suppress insurrections, and to enforce the laws of the United States, in times of peace. And courts-martial are, under the 5th section of the act, entitled to take cognisance of, and to punish delinquencies, in such cases, as well as in cases where the object is to repel invasion in times of war. It would be a strained construction of the act, to limit the authority of the court to the mere time of *the existence of the particular exigency, when it might be thereby unable to take cognisance of, and decide upon a single offence. It is [*38 sufficient for us to say, that there is no such limitation in the act itself.

The next objection to the avowry is, that the certificate of the president of the court-martial is materially variant from the sentence itself, as set forth in a prior allegation. The sentence as there set forth is, "and thereupon, the said general court-martial imposed the sum of \$96 as a fine, on the said Jacob, for having thus failed, neglected and refused to rendezvous and enter in the service of the United States of America, when thereto required as aforesaid." The certificate adds, "and that the said Jacob E. Mott was sentenced by the said general court-martial, on failure of the payment of said fine imposed on him, to twelve months' imprisonment." It is material to state, that the averment does not purport to set forth the sentence *in hæc verba*; nor was it necessary in this avowry to allege anything more than that part of the sentence which imposed the fine, since that was the sole ground of the justification of taking the goods and chattels in controversy. But there is nothing repugnant in this averment to that which relates to the certificate. The latter properly adds the fact which respects the imprisonment, because the certificate constitutes the warrant to the marshal for his proceedings. The act of 1795 expressly declares, that the delinquents "shall be liable to be imprisoned by a like sentence, on failure of payment of the fines adjudged against them, for one calendar month for every five dollars of such fine." If, indeed, it had been necessary to set forth the whole sentence at large, the first omission would be helped by the certainty of the

Martin v. Mott.

subsequent averment. There is, then, no variance or repugnance in these allegations; but they may well stand together.

Of the remaining causes of special demurrer, some are properly matters of defence before the court-martial, and its sentence being upon a subject within its jurisdiction, is conclusive; and others turn upon niceties of pleading, to which no separate answers are deemed necessary. In general,

*39] *it may be said of them, that the court do not deem them well-founded objections to the avowry.

Upon the whole, it is the opinion of the court, that the judgment of the court for the trial of impeachments and the correction of errors ought to be reversed, and that the cause be remanded to the same court, with directions to cause a judgment to be entered upon the pleadings in favor of the avowant.

JUDGMENT.—This cause came on, &c.: On consideration whereof, it is considered and adjudged, that there is error in the judgment of the said court for the trial of impeachments and the correction of errors, in this, that upon the pleadings in the cause, judgment ought to have been rendered in favor of the avowant, whereas, it was rendered in favor of the original plaintiff; and it is, therefore, further considered and adjudged, that the same judgment be and the same hereby is reversed and annulled; and also, that the judgment of the supreme court of judicature of the state of New York, which was affirmed by the said court for the trial of impeachments and the correction of errors, be reversed and annulled; and that judgment be rendered, that the said avowry is good and sufficient in law to bar the plaintiff's action, and that the plaintiff take nothing by his writ; and that the cause be remanded to the said court for the trial of impeachments and the correction of errors, if the record be now in the said court, and if not, then to the supreme court of judicature of the state aforesaid, to which the same has been remitted, with directions to cause judgment to be entered, upon the pleadings, in favor of the avowant.

*CLARK v. The MAYOR, ALDERMEN and COMMON COUNCIL OF THE CITY OF
WASHINGTON.

Municipal corporations.

Municipal corporations, acting within the limits of the powers conferred upon them by the legislature, in the exercise of a special franchise granted to them, and the performance of a special duty imposed upon them, are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations and private individuals are responsible on their promises, express and implied.¹

Where, by the charter granted by congress to the city of Washington, the corporation was empowered "to authorize the drawing of lotteries," for effecting certain improvements in the city, and upon certain terms and conditions: *Held*, that the corporation was liable to the holder of a ticket in such a lottery, for a prize drawn against its number, although the managers appointed by the corporation to superintend such lottery were empowered to sell, and had sold, the entire lottery, to a lottery-dealer, for a gross sum, who was, by his agreement with them, to execute the details of the scheme, as to the sale of the tickets, the drawings, and the payment of the prizes.

It seems, that the power granted in the charter "to authorize the drawing of lotteries," cannot be exercised so as to discharge the corporation from its liability, either by granting the lottery or selling the privilege to others, or in any other manner; but the lotteries to be authorized by the corporation must be drawn under its superintendence, for its own account, and on its own responsibility.

Clark v. Corporation of Washington, 2 Cr. C. C. 502, reversed.

ERROR to the Circuit Court for the District of Columbia. This was an action of *assumpsit*, brought by the plaintiff in error, to recover of the defendants the amount of a prize drawn in a lottery called "the fifth class of the National Lottery." A verdict was found for the plaintiff, in the court below, subject to the opinion of the court, on a case agreed; on which, judgment was rendered for the defendants, and the cause was brought by writ of error to this court.

By the constitution of the United States, congress has *power to exercise exclusive legislation, in all cases whatsoever, over the district, [*41 which being ceded by particular states, may become the seat of the government of the Union. The district of Columbia having been ceded for that purpose, congress passed an act, creating a municipal corporation for the city of Washington; and by the act of the 4th May 1812, for amending the charter, gave the corporation "full power and authority to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of \$10,000; and provided also, that the object for which the money is intended to be raised, shall be first submitted to the president of the United States, and shall be approved by him." For the purpose of carrying this power into execution, ten successive resolutions were passed by the corporation, the first of which was approved by the president of the United States on the 23d of November 1812, and the last on the 21st of May 1821, each of them for raising \$10,000 by lottery, for the several objects of endowing two public school-houses, on the Lancasterian system; of building a work-house and penitentiary, and a town-house or city hall. On the 24th of July 1815, the

¹ Williams v. Dunkirk, 3 Lans 44; Memphis v. Brown, 20 Wall. 289.

Clark v. City of Washington.

corporation passed an ordinance for carrying into effect the first three of the above resolutions, and appointed certain managers by name, viz., John Davidson, Thomas H. Gillis, Andrew Way, jr., Moses Young, William Brent, Daniel Rapine and Samuel N. Smallwood, whose duty it was made to agree on and propose a scheme or schemes of a lottery or lotteries, to raise the sum of \$30,000 (clear of all expenses), and to sell and dispose of the tickets therein to the best advantage, with the least possible delay, and diligently to attend the drawing of the said lottery or lotteries, which should be in the city of Washington; and within 60 days after the drawings of the same, respectively (the time of each drawing not to exceed two years), to pay and satisfy the fortunate adventurers for prizes; and within 70 days, to pay over the balance, after deducting all necessary expenses, into the city treasury; and giving to said managers full power and authority to *42] appoint all necessary *agents, clerks and servants, to do and perform all such acts and things as might be necessary to carry into effect the provisions of the ordinance. Another ordinance was passed on the 17th of November 1818, for the purpose of carrying into effect the 4th, 5th, 6th and 7th of the aforesaid resolutions, by which (*inter alia*) the mayor was authorized to appoint seven citizens to act as managers for the purpose aforesaid, whose duty was declared to be, to agree on a scheme of a lottery to raise the sum of \$40,000 (clear of expenses), and to sell the said lottery, or dispose of the tickets therein to the best advantage, with the least possible delay, and diligently to attend the drawing of the said lottery, which should be in the city of Washington; provided, however, that if the said managers, or a majority of them, should sell the said lottery, the individual or individuals purchasing the same, should have the power of making a scheme for the aforesaid lottery, and within 60 days after the drawing (the time of drawing not to exceed one year), to pay and satisfy the fortunate adventurers for prizes; and within 70 days, to pay over the balance, after deducting all necessary expenses, into the city treasury, with the like power and authority to the managers, as in the former act, to appoint all necessary agents, clerks and servants, &c. The mayor appointed, under the authority of the last mentioned act, seven citizens to act as managers for the purposes aforesaid, the same as those appointed by name in the former act, except that, in the last, Roger C. Weightman took the place of Samuel N. Smallwood. On the 25th of October 1819, another ordinance was passed, by which the managers appointed under the ordinance of 1815, were empowered to sell and dispose of the lotteries to which that ordinance referred, or so much thereof as yet remained to be drawn, in such classes, and on such terms and conditions, as should appear to them right and expedient.

In pursuance of the ordinances of 1815 and 1819, the managers sold to David Gillespie, of New-York, a lottery called the "Fifth class of the Grand National lottery," for the sum of \$10,000, to be paid before the commencement of the drawing thereof; and the following articles of agreement were entered into for that purpose.

*43] *"Memorandum of an agreement, made and entered into this 14th day of May 1821, between Roger C. Weightman, John Davidson, Thomas H. Gillis, Andrew Way, jun., Moses Young, William Brent and Daniel Rapine, as managers of the lotteries authorized by an act of the Board of Aldermen and Board of Common Council of the city of Washington, for

Clark v. City of Washington.

the purposes therein mentioned, approved July 24th, 1815, of the one part, and David Gillespie, of the city of New York, in the state of New York, of the other part : Whereas, by an act of the Board of Aldermen and Board of Common Council of the said city of Washington, approved October 25th, 1819, supplementary to the act aforesaid, the said managers are authorized and empowered to sell and dispose of the said lotteries, in such classes, and on such terms and conditions, as shall appear to them right and expedient, and according to the true intent and meaning of the act aforesaid ; and that the said managers, for the purpose of raising the sum of \$10,000, in conformity with the provisions of the said first-mentioned act, and in pursuance of the power and authority in them vested by the said supplementary act, have agreed to sell and dispose of, to the said David Gillespie, a lottery, denominated the fifth class of the Grand National lottery, to be drawn according to the scheme hereunto annexed ; and the said David Gillespie, in consideration thereof, hereby agrees to pay to the said managers the sum of \$10,000, before the commencement of the drawing the said lottery or class, at his own proper cost, charge and expense ; to pay and defray all, and all manner of costs, charges and expenses of the said lottery or class, excepting the expense of drawing the same, and to draw the same in the city of Washington, in the presence of the said managers, and to finish and conclude the said drawing, within two years from the date hereof, and to pay all the prizes, within sixty days from the completion of the said drawing. It is further understood and agreed, by and between the said parties, that the said David Gillespie is to provide, at his own cost and expense, two competent clerks, to assist in the drawing of the said lottery or class ; and to execute and deliver, before the commencement of the drawing of the said lottery or class, and within thirty days from the date hereof, to the said managers, a bond, with such security *as may be approved by them, in the penal sum of \$35,000, conditioned for the true, fair and faithful drawing of [*44 the said lottery or class, and according to the said scheme ; for the punctual payment of all prizes, and for conducting the said lottery or class, fairly and honestly, and according to this agreement, and the true intent and meaning of the said acts of the said Board of Aldermen and Board of Common Council."

The bond with security, as required by the above agreement, was given by Gillespie on the 28th of May 1821. On the 22d of the same month, an ordinance of the corporation was passed, authorizing the managers to appoint a president, whose duty it should be, in addition to the duties imposed by the ordinances of 1815 and 1819, to sign all contracts, with the concurrence of a majority of the managers, and to sign all the lottery-tickets, in every scheme or schemes sold by them. The 2d section of the ordinance allowed each of the managers of the city lotteries three dollars each day he had been, or should be, employed ; and the 7th section enacted, that this compensation, "except for the class now contracted for," should be provided for and paid out of the proceeds of lotteries thereafter contracted for.

Under this authority, Thomas H. Gillis was appointed president, who signed the following ticket, No. 2929, on which the suit was brought, and which was indorsed, "Undrawn, 29th day over. D. Gillespie, per J. James." The ticket was purchased by the plaintiff, from an agent of Gillespie, at

Clark v. City of Washington.

Richmond, Virginia, and drew the prize of \$100,000, in the fifth class of the lottery.

FIFTH CLASS.	\$100,000 <i>Highest Prize.</i>		For erecting two Public School-houses, a Penitentiary, and Town-Hall.	
	William Brent, John Davidson, Thomas H. Gillis, Andrew Way, Jun. Moses Young, Daniel Rapine, R. C. Weightman,	} <i>Managers.</i>		No. 2929
	NATIONAL LOTTERY.			
	This ticket will entitle the possessor to such prize as may be drawn to its Number, if demanded within twelve months after the completion of the drawing: subject to a deduction of fifteen per cent. Payable sixty days after the drawing is finished. Washington City, February 1821.			
	By Authority of Congress.	Thos. H. Gillis, Manager.		

*45] The drawing of the lottery was advertised in two newspapers printed in the city of Washington; in the National Intelligencer, from the 18th of May 1821, and in the Washington City Gazette, from the 17th of July 1821, until the completion of the lottery. These advertisements exhibited the scheme agreed upon between the managers and Gillespie, and annexed to their contract, gave notice of the time when the drawing would take place, of the number of days to be employed in the drawings, and that they would be completed as soon as possible, under the superintendence of the managers, whose names were annexed. To each of these advertisements was appended an advertisement, signed by Gillespie, as "agent for the managers," for the sale of tickets, at his "Fortunate office, Pennsylvania Avenue, Washington City." The lottery was drawn in pursuance of the advertisements, and the managers superintended the drawing. In its progress, a postponement took place; and an advertisement appeared, purporting to be signed by three of the managers, giving notice of the postponement, and its cause. Another advertisement soon afterwards followed, purporting to be signed by the president, by order of the board, giving notice when the drawing would recommence.

As soon as the scheme was agreed on, all the tickets, amounting to 50,000 in number, were delivered by the managers to Gillespie, some of them signed, and others unsigned, by the president, the latter of which it was necessary to take to him to be signed, before they could be sold. Some time after the drawing commenced, the president refused to sign tickets, unless an equivalent in prize-tickets, either paid or taken in by Gillespie, or drawn on hand, or unless the notes of individuals which Gillespie had taken, payable to himself, for tickets sold, were deposited with them. When Gillespie's clerk and agent, Webb, presented tickets to be signed, he was obliged, at the same time, to deposit such prize-tickets or promissory notes; and, on some occasions, when tickets were called for, and wanted, the managers refused to sign the same, for want of such equivalent. The amount of the prize-tickets so deposited with the managers was about \$141,779. The

*46] managers, on such occasions, objected to trusting Gillespie with the disposal of the tickets, much beyond the penalty of his bond, and

Clark v. City of Washington.

Webb, who was a witness in the cause, understood, from the conversations and transactions between the parties at the time, that this precaution arose from doubts which had been circulated respecting Gillespie's solvency.

January 26th. This cause was argued by the *Attorney-General* and *Webster*, for the plaintiff; and *Jones*, for the defendants.

On the part of the *plaintiff*, it was insisted, that the power of authorizing the drawing of lotteries, was a franchise, which the city corporation could not sell, so as to avoid their liability for the abuse of the trust and confidence reposed in them by the legislature. It was admitted, that, in general, municipal corporations are not liable to be sued on contracts made by their agents. The suit must be brought against the agents. But that proceeds on the ground, that these *quasi* corporations have no funds; but where a grant is made, conferring a special franchise, and imposing special duties, there is the same responsibility in them, as in any incorporated banking or insurance company. Here, the contract was with the managers, as the agents of the corporation, acting within the scope of their authority. 15 Johns. 1; 7 Cranch 299; 2 Taunt. 595; 1 Ves. 352. Where special duties are imposed upon corporations, which can only be performed through the instrumentality of their agents, the law will raise an implied *assumpsit*, under the same circumstances as in dealings with private individuals. It is enough, to show a ratification of the acts of the agents, by receiving the benefit of the act, or otherwise. In short, they are responsible, under these circumstances, for their promises, whether express or implied, in writing or by parol. 7 Mass. 169; 16 East 6; 3 Mass. 364; 7 Cranch 299; 2 Livermore Agency 198; 1 Bro. C. C. 469; 18 Mass. 372; 15 Johns. 1; 10 Mass. 397; 15 Ibid. 125; *Fowle v. Corporation of Alexandria*, 11 Wheat. 320; 2 Taunt. 595; 15 East 408; 3 P. Wms. 423; Cowp. 86; 4 Taunt. 576, in note; 2 Vern. 146; Paley Agency 143-45; 3 Stark. Ev. 1621. And it was contended, that the fact of their contract *being clothed with the forms of a legislative or political act of the corporation, or the authority being conferred on their agents by such an act, could make no difference in respect to their liability. But as the principal grounds of the argument on the part of the plaintiff are fully stated in the opinion of the court, it has been deemed superfluous to enlarge upon them. [*47]

On the part of the *defendants*, it was argued, that the documentary evidence given by the plaintiff was inadmissible, and incompetent to charge the defendants in the present action. 1st. Because, if the papers given in evidence imported any contract chargeable on the corporation, through their supposed agents, the managers, or through their supposed agent, Gillespie, no foundation was laid for their admission, by any preliminary evidence to authenticate them as the acts either of the managers or of Gillespie, far less of the corporation; but the papers (all that are any wise essential, being taken from newspapers, or other printed papers) were left to their own internal and unvouched evidence of their authenticity, as the acts of the persons whom they purport to implicate. 2d. Because, if authenticated as the acts of Gillespie, there is nothing to connect him with the managers, in the relation of principal and agent; but that relation is assumed from the mere acts of the supposed agent himself. 3d. Because, whatever privacy

Clark v. City of Washington.

may be inferred, as between those persons, there is nothing to connect the corporation with the supposed managers, in the relation of principal and agent. The authority of the mayor to appoint seven managers of a certain lottery, described in the law which gives him that authority, is shown ; seven persons are afterwards found professing to act as managers of a lottery, in the terms and description of which no reference whatever is made to any lottery authorized by the corporation ; and from these premises alone are inferred, (1) the actual appointment by the mayor of these same managers ; and (2) the identity of the lottery contemplated by the corporation law, and that promulgated in the scheme of the managers, and their alleged agent, Gillespie. 4th. Because, setting aside all the preceding objections, the alleged agency of the managers, or of any agents, clerks or servants, of *48] *their appointment, purports not, from the terms of their authority, as shown by the plaintiff himself, to have extended to the making of contracts for and in behalf of the corporation, or in any manner to bind the corporation as the guarantor or insurer of the due payment of prizes ; far less of the solvency or punctuality of any lottery contractor or undertaker ; but such agency is plainly and necessarily excluded by the nature of the official relation between them, and by the terms of the only authority for predicated the existence of any kind of agency. The authority of the managers is clearly limited to the performance of certain public duties, and to the exercise of certain ministerial functions prescribed by law to the officers or ministers of the law ; the true and only relation between them and the corporation, is that which subsists between the legislative or paramount authority that enacts the law, and the ministerial functionaries who execute it ; not that of principal and agent in a commercial sense. 5th. The same objections lies to the nature and extent of the alleged agency of Gillespie for the managers ; which must be presumed to have been limited to the official and prescribed duties of the latter, as ministerial functionaries of the law.

No privity of contract, as between the plaintiff and the corporation, could be inferred from the evidence ; but such privity was clearly and positively excluded : 1st. By the nature and objects of the power communicated to the corporation by the amended charter ; a power to authorize, not to exhibit and draw lotteries, at the risk and charge of their constituents ; and for important objects of public improvement, to which the ordinary revenues were inadequate ; not as a source of revenue, or fiscal aggrandizement, far less as a gulf to swallow up all the subsisting sources of revenue in lottery speculations. 2d. By the terms, intent and spirit of all the corporate acts in execution of the power ; all of which strictly conform to the scope and policy of the paramount law, by which the authority was vested. 3d. By the fact that Gillespie had purchased the privilege, *in integro*, to exhibit and draw the lottery, at his own risk and charge, and for his own exclusive emolument ; for which he had paid a gross sum, neither to be enlarged or *49] *diminished by, nor in any manner dependent upon the event of the lottery. The entire scheme was his, and at his disposal ; subject merely to a superintending vigilance and control of municipal police, intended to protect the public from frauds and impositions in the conduct of the lottery ; but, by no means, to guaranty the payment of prizes, or, in other words, the solvency and punctuality of Gillespie. 4th. By another

Clark v. City of Washington.

fact, that the plaintiff purchased his ticket of one James, the keeper of a miscellaneous lottery-office in Richmond, for Gillespie, and having no sort of connection with the corporation or its managers, nor with any lottery authorized by the one, and conducted by the other, but as a general vendor of lottery-tickets, who might, in the course of his trade, occasionally buy or sell tickets in this as in other lotteries; and so the contract was solely between the plaintiff and James, who sold the ticket and received the price, not as the agent of the corporation or its managers, but as the agent of Gillespie individually. The lottery-ticket, on which the plaintiff founds his claim, imports, *in terminis*, no contract whatever between the corporation and the possessor; nor any assurance or invitation to the ticket-buying public to trust the corporate funds or credit for the payment of "such prize as may be drawn to its number;" nor, indeed, the remotest allusion to any interest or concern of the corporation in the scheme. If any such contract, invitation or allusion be involved in the terms, it must be completely latent, and only to be developed by extrinsic facts and circumstances. All the facts and circumstances adduced to explain the relations and bearings of those terms, concur in fixing upon Gillespie the primary obligation to pay the prize, in virtue of his contract, express or implied, as the exhibiter and proprietor of the lottery, and vendor of the ticket. Then, if there be any contract, express or implied, between the corporation, or the managers and vendee, to see to the payment of the prize, it must be as collateral guarantor for Gillespie. But no fact is deducible, from the evidence, which goes to fix either upon the managers, or, through their agency, upon the corporation, the relative duties and obligation of such collateral guarantee.

*As to the managers; if they be under any obligation to see to the payment of prizes, it must be either because it was one of the [*50 official duties prescribed to them by the terms of their appointment, under the law from which they derive their authority, or because they voluntarily assumed it, in addition to the duties devolved on them *virtute officii*. Then, 1st. No such duty is imposed upon them by the nature of their office and functions; 2d. If it be, it is not in the nature of an absolute obligation or duty, that makes them liable, in all events, for any failure to fulfil its end and aim, but of a relative duty, which, by the express terms of the law that creates it, exacts of them nothing but "that they will diligently and impartially exercise and perform the duties and authority vested in them." 3d. No breach of this duty, arising either from negligence or design, is imputed to them; but, on the contrary, by the plaintiff's own showing, they exerted great care, zeal and diligence (if, indeed, they did not take upon themselves gratuitous labor and trouble), in order to secure the rights and interests of adventurers in the lottery; all that is imputed to them is, the mere failure to accomplish the end and aim of their exertions. 4th. But if the grossest breach of this duty, in act and intent, were imputed to them, they would be amenable, for their official misdemeanor, to the corporation only; or, if at all responsible to third persons, it could not be as collateral guarantors of Gillespie's contract, nor for any other duty *ex contractu*, but *ex delicto*, for consequential damage, unless in possession of the fund out of which the prizes should have been paid; and then they might have been liable, jointly or severally, according to the nature of their possession, to an action for money had and received for the use of the persons entitled to prizes. But this can-

Clark v. City of Washington.

not be pretended in the present case. 5th. No voluntary assumption of any obligation upon themselves, beyond the limits of their prescribed authority and duties, can be presumed; and any express contract, beyond those limits, is not pretended.

*51] As to the corporation; if there be any contract in *the case, it must impose an obligation, either primary and absolute, to pay the prize, or secondary and contingent, as collateral guarantor for Gillespie. The plaintiff's declaration lays a contract of the first description only, and ties him down to the proof of such a contract, made through the agency of these managers, and in no other form; while his actual proof, and every circumstance in the case, exclude and repudiate it, by fixing upon Gillespie the primary and absolute obligation; and, indeed, equally exclude and repudiate any contract of the second description. If the managers held out any assurance or invitation to the ticket-buying public, or otherwise contracted any obligation, absolute or contingent, to see to the payment of prizes, it must have been either *virtute officii*, as one of the specific duties prescribed to them by the law of their appointment, or as one gratuitously undertaken by them, and not inherent to the nature of their office and functions; either way, it was an obligation contracted, *proprio jure*, and attaching responsibility to them personally and individually. Then, 1st. For the due performance of the prescribed duties, inherent to the nature of their office, they are directly responsible, on their bond, to the corporation, from which it is impossible to infer such an inversion in the order of responsibility, as that the managers should have made that every corporation, to which they are themselves amenable, liable for their own transgressions of such duties. 2d. If (as is quite clear from the plaintiff's own showing) no action lay against the managers, either because the seeing to the payment of prizes was no part of their prescribed duties, or because they "diligently and impartially exercised and performed the duties and authority vested in them," it follows, necessarily, that no action lies against the corporation. Though the converse of the proposition be utterly untenable, since they may have contracted an obligation, either inherent to the nature of their office, or voluntarily superinduced, the violation of which was either an official misdemeanor, or a breach of contract; for neither of which could the corporation have been held anywise responsible. 3d. If the corporation were chargeable, under any circumstances, *or in any form of action, *52] for the misconduct of the managers, in the course of their official or ministerial duties, it could only be *ex delicto*, or *quasi ex contractu*, in an action for consequential damages, and not in an action, like the present, purely *ex contractu*. 4th. But no action could be conceived, to make the corporation responsible to third persons for a wrong done to itself; for a transgression by its own officers against its own authority, in the breach of a positive duty to itself, voluntarily prescribed, in the exercise of its own legislative discretion, to its own officers, and enforced by adequate sanctions of its own institution. 5th. As an obligation not strictly imposed upon the managers, *virtute officii*, it is impossible to contend, that the corporation can be responsible, in this or any other conceivable form of action, for that or any other act of its officers, without the prescribed limits and sphere of their duties and authority.

Clark v. City of Washington.

February 7th, 1827. MARSHALL, Ch. J., delivered the opinion of the court.—This cause depends on the liability of the corporation to pay the ticket on which the suit was instituted. In considering this question, that part of the charter which contains a grant of power on the subject of lotteries, the ordinances of the corporate body, in execution of the power, and the proceedings of its agents, must be reviewed. The charter enacts, "that the corporation shall have full power and authority" "to authorize the drawing of lotteries, for effecting any important improvement in the city, which the ordinary funds of revenue thereof will not accomplish; provided, that the amount to be raised in each year shall not exceed the sum of \$10,000. And provided also, that the object for which the money is intended to be raised, shall be first submitted to the president of the United States, and shall be approved of by him."

Some doubt has been expressed whether this power is to be exercised by drawing the lottery, on account and at the risk of the corporation, or by selling the privilege to individuals, and authorizing them to draw it on their own account. This doubt is founded on the word "authorize." Congress, we are told, has not granted the power to draw lotteries, but to "authorize" their being drawn. *We cannot admit the correctness of this criticism. We do not admit the justice of that construction, which [*53 denies to the corporation the power of causing the lottery to be drawn on its own account. A corporation aggregate can legislate within its prescribed limits, but can carry its laws into execution only by its agents. Any legislative act directing a lottery to be drawn, is literally an act "to authorize the drawing of lotteries."

The object for which the lottery may be authorized, is "any important improvement in the city." It produce is to come in aid of the ordinary funds or revenue thereof; and "the amount to be raised in each year shall not exceed the sum of \$10,000." The language of the charter is not that the sum to be brought into the treasury of the city shall not exceed the sum of \$10,000, but that "the amount to be raised shall not exceed that sum." This language, it is admitted, comprehends the net proceeds of the lottery, but it comprehends all those net proceeds, and does not allow a partition of profit, so as to retain \$10,000 for the treasury, and reserve a residue for others. The single object, for which the lottery can be drawn, is "any important improvement in the city," not the emolument of individuals. The motive with congress for this restriction on the amount is, not to limit the sum to come into the city treasury, but to limit the extent of gaming, which the corporation may authorize. Congress must have perceived, that to bring \$10,000 into the treasury, either "the amount raised must exceed that sum," or the lottery must be drawn on account of the city; for no man will purchase a lottery from which he can make nothing.

The counsel of the plaintiff in error have remarked, and the remark is certainly entitled to attention, that, in describing the power, congress has used no words indicating the idea, that the corporation might grant or sell lotteries. "To authorize the drawing of lotteries," is, as has been said, an appropriate term for a corporate act, instituting a lottery for the benefit of the city; but if the granting a lottery to others, or a sale of the privilege to others, had been in the mind of congress, it is to be presumed, that some words would have been used, indicating the idea. *There is [*54

Clark v. City of Washington.

great weight, too, in the argument, that it is a trust, and an important trust, confided to the corporation itself, for the purpose of "effecting important improvements in the city," and ought, therefore, to be executed under the immediate authority and inspection of the corporation. It is reasonable to suppose, that congress, when granting a power to authorize gaming, would feel some solicitude respecting the fairness with which the power should be used; and would take as many precautions against its abuse, as was compatible with its beneficial exercise. Accordingly, we find a limitation on the amount to be raised, and on the object for which the lottery may be authorized. It is to be for "any important improvement in the city, which the ordinary funds or revenue thereof will not accomplish;" and is subjected to the judgment of the president of the United States. The power thus cautiously granted, is deposited with the corporation itself, without an indication that it is assignable. It is to be exercised, like other corporate powers, by the agents of the corporation, under its control. While it remains where congress has placed it, the character of the corporation affords some security against its abuse; some security that no other mischief will result from it, than is inseparable from the thing itself. But if the management, control and responsibility may be transferred to any adventurer who will purchase, all the security for fairness, which is furnished by character and responsibility, is lost. We think, then, that the most obvious, if not the exclusive construction of the charter, is, that the lotteries to be authorized by the corporation, are to be drawn under its superintendence and on its own account.

We will next advert to the measures which have been adopted for carrying this power into execution. Ten successive resolutions were passed, the first approved on the 23d of November 1812, and the last on the 21st of May 1821, each of them for raising the sum of \$10,000, by lottery, for particular improvements mentioned in the resolution. The ordinance of the 24th of July 1815, which was passed for carrying the first three of these resolutions into effect, contemplates and authorizes lotteries to be drawn *55] entirely under the management, for the benefit, and on the responsibility of the corporation. Seven managers are appointed by the ordinance, and they, or a majority, are authorized to employ agents, fill up vacancies in their own body, and to do every act which may be necessary for carrying its provisions into effect. The ordinance passed on the 17th of November 1818, for carrying the 4th, 5th, 6th and 7th resolutions into effect, authorizes the mayor to appoint seven managers, whose duty it was to agree on a scheme, to sell the said lottery, or dispose of the tickets to the best advantage. A proviso is inserted, that, should the lottery be sold, the purchasers may make the scheme; but the ordinance enacts generally (and the enactment makes no distinction between a sale of the lottery itself, and a disposition of the tickets), that it shall be the duty of the managers to attend diligently to the drawing of the lottery, and to pay the fortunate adventurers for prizes drawn by them. The ordinance, however, adds the farther duty of paying over the balance, after deducting all necessary expenses, into the city treasury. From this it has been inferred, that these provisions are made for the contingency that the tickets should be disposed of, for the benefit of the city, and are entirely inapplicable to the contingency of an entire sale. Certainly, in the event of an entire sale, the balance, after deducting all necessary expenses, would not be payable into the treasury, unless we sup-

Clark v. City of Washington.

pose it to mean the balance of the sum for which the lottery might be sold. But this is the only part of the clause which is inapplicable to a lottery sold out, and drawn for the benefit of the purchaser.

In October 1819, the managers appointed under the act of 1815, were empowered to dispose of the lotteries to which that act refers, or so much thereof as yet remained to be drawn, in such classes, and on such terms and conditions, as shall appear to them right and expedient. The duty of the managers to superintend the drawing, and to pay the prizes, is not changed by this act, unless the mere power to sell implies such change. The managers sold to David Gillespie, of New York, in pursuance of the acts of 1815 and 1819, a lottery denominated *the 5th class of the Grand National lottery, for the sum of \$10,000, to be paid before the commencement of [*56 the drawing the said lottery or class ; and articles of agreement, in pursuance thereof, were executed on the 14th day of May 1821. The ticket held by the plaintiff is in this class.

On the 22d of the same month, an ordinance was passed, authorizing the managers to appoint a president, whose duty it should be, in addition to the duties imposed by the acts of 1815 and 1819, to sign all contracts, with the concurrence of a majority of the said managers, and to sign all the lottery-tickets in every scheme or schemes sold by them. This ordinance recognises the duties prescribed by the acts of 1815 and 1819. Its 2d section allows each of the managers of the city lotteries three dollars for each day he has been or shall be employed ; and the 7th section enacts that this compensation, "except for the class now contracted for," shall be provided for and paid out of the proceeds of lotteries hereafter contracted for. This act is understood to recognise it as a part of the duty of the managers, to continue their superintendence of the drawing of the very class which had been sold, and which comprehended the ticket that drew the prize for which this suit is brought.

The defendant has excepted to the admissibility, as well as sufficiency, of the testimony offered by the plaintiff in the circuit court, and the objection is made in general terms. We presume, however, that it cannot apply to the charter, or to the resolutions and ordinances of the corporation. Nor do we suppose, that any exception was intended to be made to the testimony which establishes the ownership of the tickets, or to the admissibility of the deposition of Mr. Webb. The first document on which a question can arise, is the ticket itself. Is this admissible, in a suit against the corporation ? In considering this question, we must inquire into the connection between the ostensible managers and the corporation. The persons who were held out as managers to superintend the drawing of the lottery comprehending this ticket, *were, with one exception, the same persons who were [*57 appointed in the ordinance of 1815, as managers for the lotteries established by that act. The name of R. C. Weightman, is substituted for that of S. N. Smallwood ; no other change appears. It is in proof, that S. N. Smallwood was elected mayor ; and, as the managers have, by the ordinance, a right to fill up vacancies in their own body, their acting uniformly with R. C. Weightman, is a proof that they had chosen him to fill the vacancy made by Mr. Smallwood.

But it is contended, that this lottery was drawn under the act of 1818, and there is no proof that the individuals who appeared and acted as

Clark v. City of Washington.

managers, had any authority under that act. There is undoubtedly some confusion in this part of the case, and there is not much difficulty in ascribing it to its real cause. The mayor was authorized, by the ordinance of 1818, to appoint managers to carry that act into execution, and the probability is, that he appointed the persons who were in office under the appointment of the corporation. The fitness of this proceeding renders it probable; and the subsequent proceedings of the corporation itself, turn this probability almost into certainty. In a case where written evidence of appointment is not in the power of the plaintiff, if indeed it exists, circumstances must be relied on to prove the fact, should it be deemed necessary. The act of 1821 takes no notice of any appointment under the act of 1818, and makes it the duty of the managers, created under the act of 1815, to elect a president to sign all contracts, "and to sign all the lottery-tickets, in every scheme or schemes sold by the said managers." Class No. 5, was then sold by these managers. Lotteries, under seven resolutions, to raise the sum of \$70,000, were either sold, or for sale, either in mass or in detail, under the acts of 1815, 1818 and 1819. The language of this ordinance appears to extend to them all; and if it does, certainly, admits the authority of the managers appointed under the act of 1815, to extend to all. The 7th section of the act of 1821, which provides the fund for their compensation, expressly excepts "the class now contracted for." The contract for the 5th class was executed a few days before the passage of this ordinance, *58] and it is difficult to resist the conviction, that the allusion is to this contract. These provisions in the ordinance of 1821 go far to establish the authority of these managers, in this very case. The receipt of the purchase-money under this very contract, is also a strong circumstance in support of the authority of those who made it. But we think the corporation has waived all exception to the authority of the managers, by producing and relying on their contract for the sale of this very lottery. That body defends itself from the claim of the plaintiff, by alleging that their managers sold this lottery. Their attorney produces the contract in court, and insists that it exempts his clients from all liability. Can he, in the same cause, deny the authority of those who made it? We think the connection between the managers and the corporation is established beyond controversy.

If the persons who made this contract, are the persons appointed under the authority of the corporation, as managers for class No. 5, no doubt exists whether the ticket has emanated from them. The ordinance of the 21st of May 1821, authorizes them to appoint a president from their own body, whose duty it shall be "to sign all the lottery-tickets in every scheme or schemes sold by the said managers." The scheme for the 5th class was annexed to the agreement between Gillespie and the managers, and has been produced in court with it. Mr. Webb proves that the ticket 2929, on which this suit was brought, was signed by T. H. Gillis, whose name is subscribed to it; and that T. H. Gillis was at that time president of the board of managers. It is, then, satisfactorily proved, that the ticket was issued and sold under the authority of the corporation, and was, consequently, admissible in a suit brought against that body. The remaining inquiry is, does it bind the defendants to pay the prize it has drawn in the lottery?

Had the managers, instead of selling the whole scheme in mass, sold the tickets in the usual manner, and received the purchase-money of the several

Clark v. City of Washington.

tickets, instead of a sum in gross, for the use of the city, this question could not have arisen. No person would have denied the liability of the *corporation. The sole inquiry then is, whether the agreement of [59 the 14th of May 1821, has discharged this liability. If the exposition of the charter, in the early part of this opinion, be correct, this question is answered. If the corporate body was not empowered to vest in an individual the independent right of drawing lotteries for himself, and on his own responsibility, uncontrolled by the city government, then the agreement with Gillespie can operate only as a sale of the profits, for a given sum, leaving the responsibility of the corporation as if that agreement had never been made. The contract would be between the corporation and the ticket purchaser; and although the price of the ticket was paid to Gillespie, yet the corporation had consented that he should receive it, for the purpose of performing their engagements to such ticket-holders as should draw prizes, and had consented to receive from him \$10,000, as full compensation for that portion of it which would remain, after satisfying those engagements.

If the charter did grant the power to the corporation which is now claimed, the whole transaction must be considered, in order to determine its actual character. We must inquire whether the corporation has so acted as to divest itself entirely of all connection with, control over, and responsibility for, this lottery, and substituted the purchaser in their place.

In its origin, the lottery was a city lottery. It was to be managed by persons appointed by the city, drawn under their superintendence, and, so far as the public was informed, for the benefit, and on the responsibility, of the city. Tickets were prepared under the authority of the corporation, bearing on their face the city improvements for which the lottery was to be drawn, the names of the managers appointed by the city, and the words "national lottery," and "by authority of congress." Before these tickets were disposed of, in the usual way, the managers entered into an agreement with David Gillespie, to sell him a lottery denominated the fifth class of the Grand National lottery, to be drawn according to the scheme annexed, at the costs of the said Gillespie, except the expense of drawing the same. The stipulations of this contract show that it was not intended *to dis- [60 solve the connection between the city and the lottery, and to give the absolute property in it, and control over it, to Gillespie; nor to exhibit him to the world as its owner, with whom alone the purchasers of tickets were to contract, and to whom the fortunate adventurers were to look for the payment of their prizes. He engages to draw the lottery, in the city of Washington, in the presence of the managers; to finish the drawing within two years from the date of the contract; to pay all the prizes within sixty days from its completion; to provide two clerks to assist at the drawing; and to execute, within thirty days, and before the drawing should commence, a bond to the managers, with such security as they should approve, in the penal sum of \$35,000, conditioned for the faithful drawing of the lottery, according to the scheme, for the punctual payment of the prizes, and for conducting the lottery, fairly and honestly, according to the scheme, and according to the true intent and meaning of the acts of the aldermen and board of common council. A bond was executed in pursuance of this agreement.

These provisions are in the spirit of a contract made to secure the city

Clark v. City of Washington.

from the hazard of a continuing responsibility ; a responsibility which they were induced to continue by the consideration of the \$10,000 paid by Gillespie. Why else stipulate that the lottery should be drawn in the city? Why, that it should be completed within a limited time, and drawn in the presence of the managers appointed by the corporation? Why, that the prizes should be paid? and why take a bond to the managers, conditioned, among other things, for their payment? Had the corporation felt no further interest in the lottery, the purchaser might have been permitted to exercise his own direction with the article he had purchased, and to appear to the world as its owner. But the nature of the case justifies the opinion, that such a sale could not have been made. No purchaser could have been found who would have given \$10,000 for the privilege of drawing a lottery on his own account and responsibility, having no connection with the city. The probability is strong, that the aspect which the lottery still continued

*61] to bear, was a necessary part of the contract, *without which it would never have been made, and that these precautions were used to diminish the hazard of a responsibility which was unavoidably continued. We find the appearance of this responsibility carefully preserved by the corporation itself, and by its managers. In the ordinance of the 22d of May 1821, it is enacted, that the tickets shall be signed by the president of their board of managers, and that their managers shall receive a daily allowance for attending the drawing of the lottery. The tickets were signed in conformity with this ordinance. The manner in which the lottery was advertised, confirms the opinion that the contract of sale was made with a view to the continuing the responsibility of the city. Exception is taken to the admission of these advertisements, and we will not affirm, that their appearance in the city papers, one of which was published by a member of the corporate body, is evidence that the publication was made by authority of the managers ; but the advertisements prove the fact, that the lottery was ushered to the world, in the form and character which those advertisements represent. It is proved, that they were published in two papers in the city, in the National Intelligencer, from the 18th of May 1821, and in the Washington City Gazette, from the 17th of July 1821, until the completion of the lottery. These advertisements exhibited the scheme which was agreed on between the managers and Gillespie, which was annexed to their contract ; give notice of the time when the drawing would take place ; of the number of days to be employed in the drawings, and that they would be completed as soon as possible, under the superintendence of the managers. To this advertisement the names of the managers are annexed. The lottery is drawn in pursuance of it, and the managers superintend the drawing. In its progress, a postponement takes place. An advertisement purporting to be signed by three of the managers appears, giving notice of this postponement, and of its cause. Another advertisement soon follows, purporting to be signed by the president, by order of the board, giving notice when the drawing would recommence. It does recommence under the superintend-

*62] ence of the managers. *It is not, we think, within the compass of human credulity, to believe, that the managers did not see these advertisements, or did not believe that they would be received by the public as being accredited by their names. Not to contradict them, was to sanction them. To appear in pursuance of them, and superintend the drawings

Clark v. City of Washington.

of which they had given notice, was to adopt them. It is not to be believed, that this concurrence of circumstances, all tending to assure the public that these advertisements were published by authority of the managers, could have been produced by accident. To sit daily superintending the drawing of a lottery, in pursuance of notice published every day under their names, verifies that publication, and must be considered as a ratification of it.

The proceedings which took place between the managers and Gillespie, after the contract, still further corroborate the opinion that this continuing responsibility of the corporation, which was held out to the public, was not a fraudulent representation, for the purpose of enabling Gillespie to sell the tickets, but a representation of the fact as then understood. It appears, from the deposition of Mr. Webb, that all the tickets, amounting to 50,000, were put into the possession of Gillespie; but these tickets were not vendible, until signed by the president of the board of managers. Those unsigned could not more be used by him, than if they had not been in his possession. As soon as the scheme was agreed on, three or four thousand tickets were signed, and afterwards tickets were occasionally signed, so as to make the additional number of 17,208. Why were these tickets thus withheld from him, if he had become the absolute and unconditional proprietor upon them? The conduct of the managers, as disclosed in the subsequent part of Webb's deposition, will inform us. He says, that some time after the drawing of the lottery commenced, the president of the managers refused to sign tickets, unless an equivalent in prize-tickets, either paid, and taken in by Gillespie, or drawn on hand, or the notes of individuals which Gillespie had taken, payable to himself, for tickets sold, were deposited with them; and accordingly, when the witness, as the *clerk and agent of Gillespie, presented tickets to be signed, he was obliged, at the same time, to [63 deposit such prize-tickets or promissory notes; and on some occasions, when tickets were called for, and wanted, the managers have refused to sign the same for want of such equivalent; that the amount of such prize-tickets so deposited with the managers was about the sum of \$141,779; that the managers, on such occasions, objected to trusting Gillespie with the disposal of tickets, much beyond the penalty of his bond, and the witness understood, from the conversations and transactions between the parties at the time, that this precaution arose from doubts which had been circulated respecting Gillespie's solvency. The whole number of tickets actually signed was 30,960. This conduct of the managers is explained by the supposition, that they considered the city as still responsible for prizes, but is irreconcilable with the idea of an entire transfer of responsibility to Gillespie. Such entire transfer would have entitled him to the free use of all the tickets. That the parties who made the contract so understood it, would go far in its construction, were it even in the power of the corporation to transfer its responsibility.

We think, then, that the contract of May 1821, can be considered only as a sale of the profits of the lottery, and could not, under all the circumstances of the case, affect the responsibility of the corporation. The ticket was, in fact, what it purports on its face to be, a ticket in the National Lottery, by authority of congress, sold under the direction of the corporation, and signed by the person who was authorized by an act of the corporate body to sign it. It asserts, that it shall entitle the possessor to such prize as

United States Bank v. Dandridge.

may be drawn to its number ; and this is, we think, in such a case, the promise of the corporation, made by its authorized agent, to pay such prize.

The judgment of the circuit court, then, on the verdict found in the cause, and on the case agreed, to which that verdict refers, ought to have been for the plaintiff. The judgment is to be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the plaintiff.

Judgment reversed.

*64] * The PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES v. DANDRIDGE, and others.

Official bonds.

In a suit brought by the president, directors and company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, evidence of the execution of the bond, and of its approval by the board of directors (according to the rules and regulations contained in the charter of the bank), is admissible notwithstanding there was no record of such approval ; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation.¹

Where, in such a case, the cashier is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official bond should be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or to make his sureties responsible for the non-performance of those duties : the charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent.

ERROR to the Circuit Court of Virginia.

February 6th and 7th, 1827. This cause was very elaborately argued by the *Attorney-General* and *Webster*, for the plaintiffs ; and by *Tazewell*, for the defendants. But as the arguments are very fully stated, and the authorities cited and commented on, in the opinions of the learned judges, it has not been thought necessary to insert them.

February 28th. *STORY*, Justice, delivered the opinion of the court.— This is a writ of error to the circuit court for the district of Virginia. The original action was debt on a bond, purporting to be signed by Dandridge, as principal, and Carter B. Page, Wilson Allen, James Brown, Jr., Thomas Taylor, Harry Heth and Andrew Stevenson, as his sureties, and was brought jointly against all the parties. The condition *of the bond, after *65] reciting that Dandridge had been appointed cashier of the office of discount and deposit of the Bank of the United States, at Richmond, Virginia, was, that if he should well and truly, and faithfully discharge the duties and trust reposed in him as cashier of the said office, then the obligation to be void, otherwise to remain in full force and virtue. The declaration set forth the condition, and assigned various breaches. Dandridge made no defence ; and the suit was abated, as to Heth, by his death. The other defendants severed in their pleas. It is not thought necessary to state the pleadings at large ; it is sufficient to state, that Stevenson and Allen

¹ See *Broome v. United States*, 15 How. 155 ; *Postmaster-General v. Norvell*, Gilpin 106-21 ; *Commonwealth v. Read*, 2 Ash. 261.

United States Bank v. Dandridge.

pleaded, among other pleas *non est factum* generally, and also special pleas of *non est factum*, on which issues were joined; and that all the defendants, in various forms, pleaded, that the instrument was not the deed of Stevenson; and further pleaded, that the bond had never been approved, according to the provisions of the 30th article of the rules and regulations of the bank. Issues were also taken on these pleas; and the cause came on for trial upon all the issues of fact.

At the trial, evidence was offered for the purpose of establishing the due execution of the bond by the defendants, and particularly by Stevenson and Allen, and its approval by the plaintiffs. The evidence was objected to, on behalf of the defendants, as not sufficient to be left to the jury, to infer a delivery of the bond, and the acceptance and approval thereof by the directors of the bank, according to the provisions of their charter; and the objection was sustained, the court being of opinion, that although the scroll affixed by Allen to his name, is, in Virginia, equivalent to a seal of wax, and although proof of the handwriting of Stevenson, and the bond being in possession of the plaintiffs, and put in suit by them, and the introduction of Dandridge into the office of cashier, and his continuing to act in that office, would, in general, be *prima facie* evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted; yet it was not evidence of that fact, or of the obligation of the bond, in this case; because, under the act of congress, incorporating the Bank of the United States, the bond ought to be *satisfactory* to the board of directors, before *the cashier can legally enter on the duties of his office, and consequently, [*66 before his sureties can be responsible for his non-performance of those duties; and that the evidence in this case did not prove such acceptance and approbation of the bond, as is required by law for its completion. This opinion constitutes the subject-matter of the first bill of exceptions.

Further evidence was then offered by the plaintiffs, for the same purpose, the particulars of which are not now necessary to be enumerated; to which the defendants took various objections, and contended, among other things, that the whole of the evidence, if legal, was not sufficient to go to the jury, upon which to infer the delivery of the paper, as the act and deed of the defendants, and its acceptance and approbation by the directors of the bank, pursuant to their charter; which objection was sustained; and the court excluded the whole, and every part of the said evidence from the jury, being of opinion, that the board of directors keep a record of their proceedings, which record, or a copy of it, showing the assent of the directors to this bond, was necessary to show that such assent was given; and if such assent had not been entered on the record of the proceedings of the said directors, the bond was ineffectual, and no claim in favor of the plaintiffs could be founded thereon, against the defendants in these issues. This opinion of the court constitutes the subject-matter of the second bill of exceptions.

It has become the duty of this court, upon the present writ of error, to decide whether these opinions of the circuit court, or either of them, can be maintained in point of law. It is material to state, that the rejection of the evidence did not proceed upon the ground, that it was of a secondary nature, leaving behind, in the possession of the plaintiffs, evidence of a higher and more satisfactory nature. On the contrary, the whole structure of the case shows, that there was, in the understanding of both the parties, no record

United States Bank v. Dandridge.

ever made of the approval or acceptance of the bond in question ; and the principal controversy was, whether it could be established by any evidence short of such record proof.

*67] *The propositions maintained by the circuit court were, in substance, these : First, that the cashier could not legally enter upon the duties of his office, nor make his sureties responsible for his non-performance of those duties, before his official bond was accepted as *satisfactory* by the board of directors, according to the terms of the charter. Secondly, that such acceptance, could be established only by proof drawn from the records of the board of directors ; and if no record had been kept of such assent and acceptance, the bond was ineffectual, and no secondary evidence could be admitted to establish the fact.

The last proposition will be first considered. The correctness of it in a great measure depends upon the soundness of the distinction taken between the acts of private persons and the acts of corporations. It is admitted, in the opinion of the circuit court, that the evidence offered would, in common cases, between private persons, have been *prima facie* evidence, to be submitted to the jury, as proof that the bond was fully executed and accepted. But it is supposed, that a different rule prevails in cases of corporations ; that their acts must be established by positive record of proofs ; and that no presumptions can be made, in their favor, of corporate assent or adoption, from other circumstances, though in respect to individuals, the same circumstances would be decisive. The doctrine, then, is maintained from the nature of corporations, as distinguished from natural persons ; and from the supposed incapacity of the former to do any act, not evidenced by writing, and if done, to prove it, except by writing.

Little light can be thrown on this subject, by considerations drawn from corporations existing by the common law, or dependent upon prescription. To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose ; such as the power to plead and be impleaded, to purchase and alien, to make a common seal, and to pass by-laws. Com. Dig. Franchise, F, 10, 13. In ancient times, it was held, that corporations aggregate could do nothing but by deed under their common seal. *68] *But this principle must always have been understood with many qualifications ; and seems inapplicable to acts and votes passed by such corporations at corporate meetings. It was probably, in its origin, applied to aggregate corporations at the common law, and limited to such solemn proceedings as were usually evidenced under seal, and to be done by those persons who had the custody of the common seal, and had authority to bind the corporation thereby, as their permanent official agents. Be this as it may, the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now, as a general proposition, be supported. Mr. Justice BAYLEY, in *Harper v. Charlesworth*, 4 B. & C. 575, said, "A corporation can only grant by deed ; yet there are many things which a corporation has power to do, otherwise than by deed. It may appoint a bailiff, and do other acts of a like nature." And it is now firmly established, both in England and America, that a corporation may be bound by a promise, express or implied, resulting from the acts of its authorized agent, although such authority be only by virtue of a corporate vote, unaccompanied with the corporate seal.

United States Bank v. Dandridge.

But whatever may be the implied powers of aggregate corporations, by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself. The doctrine of this court, in *Head v. Providence Insurance Company*, 2 Cranch 127, on this subject, is believed to be entirely correct.

It was there said by the chief justice, in delivering the opinion of the court that "without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said, to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in a manner which that act authorizes." In that case, the act of incorporation prescribed the mode in which contracts should be made, in order to bind the corporation, which was not complied *with; and the court held, that there was no binding contract, for the corpora- [*69
tion could only act in the manner prescribed by law; and when their agents do not clothe their proceedings with those solemnities which are required by the incorporating act to bind the company, they cannot be deemed as more than proposals or preparatory negotiations. We do not perceive anything in this doctrine which fairly admits of controversy. But this case has been pressed upon us, at the present argument, as justifying, to its full extent, the reasoning of the defendants on the present occasion. The question there was not, whether every corporate act must be evidenced by writing; but whether certain acts, which by law were to bind only when done and verified in a particular manner, ought to bind, although those forms were not adopted. We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid, merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence, or to give them an obligatory force. If the statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine to establish it by the principles of the common law, and by decisive authorities. None such have, in our judgment, been produced.

By the general rules of evidence, presumptions are continually made, in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. In aid of this salutary principle, the law itself, for the purpose of strengthening the infirmity of evidence, and upholding transactions intimately connected with the public peace, and the security of private property, indulges its own presumptions. It presumes, that every man, in his private and official character, does his duty, until the contrary is proved (See *Rea v. Hawkins*, 10 East 211; *Powell v. Milbourne*, 3 Wils. 355; *Hartwell v. Root*, 19 Johns. 345); it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, *according [*70
to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur in contrarium*. Thus, it will presume that a man, acting in a public office, has been rightly appointed; that entries found in public books have been made by the proper officer; that, upon proof of title, matters collateral to that title shall be deemed to have been done; as, for instance,

United States Bank v. Dandridge.

if a grant or feoffment has been declared on, attornment will be intended, and that deeds and grants have been accepted, which are manifestly for the benefit of the party. The books on evidence abound with instances of this kind, and many of them will be found collected in Mr. Starkie's late valuable Treatise on Evidence. (3 Starkie's Evid. part iv., 1234, 1241, 1248, and note 1250, &c.)

The same presumptions are, we think, applicable to corporations. Persons acting publicly as officers of the corporation, are to be presumed rightfully in office; acts done by the corporation, which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter. Grants and proceedings beneficial to the corporation are presumed to be accepted; and slight acts on their part, which can be reasonably accounted for, only upon the supposition of such acceptance, are admitted as presumptions of the fact. If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. If a person acts notoriously as cashier of a bank, and is recognised by the directors, or by the corporation, as an existing officer, a regular appointment will be presumed; and his acts, as cashier, will bind the corporation, although no written proof is or can be adduced of his appointment. In short, we think, that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right, or matters of duty.

*71] *It may not be without use, to advert to a few cases where corporate acts have been the subject of presumptions. In the first place, we may advert to the known fact, that a charter may be presumed to have been given to persons who have long acted as a corporation, and assumed the exercise of the powers of a corporate body, whether of an ordinary or extraordinary nature. This is the case in respect to all corporations existing by prescription. Yet the very case supposes that no written proof can be adduced of a charter, or of a vote of the corporators to accept the charter. Yet, both a charter and acceptance are vital to the existence of the corporation. They are, however, presumed, not merely from the lapse of time, but from the continued exercise of corporate powers, which presuppose their existence. So, in relation to the question of acceptance of a particular charter, by an existing corporation, or by corporators already in the exercise of corporate functions, the acts of the corporate officers are admissible evidence from which the fact of acceptance may be inferred. It is not indispensable, to show a written instrument or vote of acceptance on the corporation books. It may be inferred from other facts which demonstrate that it must have been accepted. Upon this point, it is not necessary to do more than to refer to the general course of reasoning in the *King v. Amery*, 1 T. R. 575; s. c. 2 Ibid. 515, as applied to the circumstances of that case. (a) In *Wood v. Tate*, 5 Bos. & Pul. 246, which was replevin upon a distress made by the bailiff of the borough of Morpeth, for rent, it appeared in evidence, that the tenant went into possession under a lease, void for not being

(a) See also *Newling v. Francis*, 3 T. R. 189; *Butler v. Palmer*, 1 Salk. 191.

United States Bank v. Dandridge.

executed under the corporate seal, even if made by proper officers ; yet the court held, that though the lease was void, the tenant was to be deemed tenant from year to year, under the corporation, and his payment of rent, from time to time, to the officers of the corporation (though not proved to be by virtue of any written authority), was sufficient proof of tenancy under the corporation, on which the corporation *might distrain for the rent in arrear. In *Doe v. Woodman*, 8 East 228, where certain premises [*72] had been demised by the plaintiff to the corporation, as tenant from year to year, at an annual rent, though it does not appear in what manner the demise had been accepted, except by the payment of rent, by the bailiff, as such, it seems to have been taken for granted, that it was proper evidence of a holding by the corporation. In *Magill v. Kauffman*, 4 Serg. & Rawle 317, which was an ejectment for land claimed by a Presbyterian congregation, before incorporation, under a purchase by their trustees, and after their incorporation claimed in their right as a corporation, the supreme court of Pennsylvania held, that evidence of the acts and declarations of the trustees and agents of the corporation, both before and after the incorporation, while transacting the business of the corporation, and also evidence by witnesses of what passed at the meetings of the congregation, when assembled on business, were admissible, to show their possession of the land, and the extent of their claim of its boundaries. This must necessarily have proceeded upon the ground, that the acts of corporate agents, and even of aggregate bodies, corporate or unincorporated, might be established, independent of written minutes of their proceedings.

In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to, and acceptance of the same, may not be inferred from their acts, as well as in the case of individuals. Suppose, a deed poll, granting lands to a corporation, can it be necessary to show, that there was an acceptance by the corporation, by an assent under seal, if it be a corporation at the common law ; or by a written vote, if the corporation may signify its assent in that manner ? Why may not its occupation and improvement, and the demise of the land by its agents, be justly admitted, by implication, to establish the fact, in favor and for the benefit of the corporation ? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained in virtue of such actual assent ? The validity of such a grant depends upon the acceptance, not upon the mode by which *it is proved. It is no [*73] implied condition, that the corporation shall perpetuate the evidence of its assent in a particular way. At least, if it be so, we think it is incumbent on those whose maintain the affirmative, to point out the authorities which sustain it. None such have been cited at the bar. On the contrary, there are highly respectable decisions, made upon great consideration, which assert a different doctrine. The case of the *Proprietors of the Canal Bridge v. Gordon*, 1 Pick. 297, is directly in point. There, the object was, to impose an onerous duty, and to discharge or limit the right of toll of the plaintiffs ; and the court held, that the corporation could bind itself, and did, in fact, in that case, bind itself, to a surrender of its valuable rights, by implications from corporate acts, without vote or deed. The learned chief justice of Massachusetts, on that occasion, in delivering the opinion of the court, said, "it is true, that the acts, doings and declarations of individual

United States Bank v. Dandridge.

members of the corporation, unsanctioned by the body, are not binding upon it ; but it is equally true, that inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as in the case of an individual ; and that a vote is not always necessary to establish such contract or promise. This has been settled in several cases in this country and in England." And afterwards, addressing himself to the facts of that case, he added, "the question, then, is narrowed to this : have the proprietors of the canal bridge assented to this proposition, and acted under it ? We find no vote to this effect ; but we do find, that the cross bridge was suffered to unite with theirs, pursuant to this proposition, and that for four years all were suffered to pass without toll, who came from Charlestown to Cambridge, or *vice versâ*. Now, corporations can be bound by implication as well as individuals, as has been before stated ; and no acts could be stronger to show an assent to a proposition, an agreement or bargain, than those which have been mentioned." Nor was this doctrine new at that time in that court. It may be clearly inferred from the prior cases of the *President, &c. of the Salem Bank v. President, &c. of the Gloucester Bank*, 17 Mass. 1; and *Foster v. President, &c. of the Essex Bank*, 17 Ibid. 479. And *74] it has been more recently confirmed in the *Episcopal Charitable Society v. Episcopal Church in Dedham*, 1 Pick. 372. It may, therefore, be considered as conclusively settled in Massachusetts. The case of the *Bank of Columbia v. Patterson's Adm'r*, in this court (7 Cranch 299), did not call for any expression of opinion upon the particular point now under consideration ; but the court there held, that from the evidence in that case, the jury might legally infer an express or an implied promise of the corporation. The court there said, "the contracts were for the exclusive use and benefit of the corporation, and made by their agents, for purposes authorized by the charter. The corporation proceed, on the faith of those contracts, to pay money, from time to time, to the intestate. Although, then, an action might have lain against the committee personally (for the contract was a personal contract by them, under their private seals), upon their express contract, yet, as the whole benefit resulted to the corporation, it seems to the court, that from this evidence, the jury might legally infer, that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the intestate had accepted their engagement." Here, then, secondary evidence and presumptive proof was admitted in a suit against the corporation, to fix its responsibility. A vote of the corporation was presumed from other acts, though there was no proof of such a vote being on record. If the corporation had shown that no such vote had been on record, would the presumption have been completely repelled ? Would the omission of the corporation to record its own doings, have prejudiced the rights of the party relying upon the good faith of an actual vote of the corporation ? If such omission would not be fatal to the plaintiff, in suits against the corporation (as in our opinion it would not be), it establishes the fact, that acts of the corporation, not recorded, may be established by parol proofs, and, of course, by presumptive proofs. In reason and justice, there does not seem any solid ground, why a corporation may not, in *75] case of the omission of its officers to preserve a written record, give such proofs to support its rights, as would be *admissible in suits

United States Bank v. Dandridge.

against it, to support adverse rights. The true question in such case would seem to be, not which party was plaintiff or defendant, but whether the evidence was the best the nature of the case admitted of, and left nothing behind in the possession or control of the party, higher than secondary evidence. The case of *Dunn v. St. Andrew's Church*, 14 Johns. 118, proceeded upon like reasoning. There, the plaintiff had performed services as clerk of the church, for the corporation, for which he had received some payments. The records of the corporation contained entries of the payment of moneys, at several times, to the plaintiff, for his services; but no resolution was entered on the minutes or records of the corporation, appointing the plaintiff clerk of the church. The court held such vote unnecessary to be shown, and that there was sufficient evidence of an implied promise of the corporation to make the compensation. In the *King v. Inhabitants of Chipping Norton*, 5 East 240, there was a demise, by a verbal agreement of the corporation, at a court leet, of certain tolls belonging to the corporation. The court held, that the corporation could demise only under seal, and that the agreement amounted to a mere license to collect the tolls, though it might be a ground to apply to a court of equity, to enforce it as an equitable interest. The ground there was not, that the proceeding, being verbal, was a nullity, but that it did not operate as a demise of the tenement, at law. It was conceded, that the verbal agreement bound the corporation as a license.

But the present question does not depend upon the point, whether the acts of a corporation may be proved otherwise than by some written document. The reasoning upon it, however, was very ably gone into at the bar, and as it furnishes very strong illustrations upon the point now in judgment, it could not be passed over with propriety.

In the present case, the acts of the corporation itself, done at a corporate meeting, are not in controversy. In corporations existing at the common law and by charter, there are great diversities both of powers and organization. In some corporations, the whole powers rest in a select body, or in select bodies, with powers to perpetuate their own corporate *existence, by filling up vacancies in their own body; and such body or [*76 bodies constitute the corporation itself, and the meetings and acts done thereat are the meetings and acts of the corporation itself. In short, they constitute the corporation, so far as it has life or organization exclusively. Such are many of the boroughs and other municipal corporations in England, familiarly shown by the name of *quasi* corporations. There are corporations of another sort, where the aggregate body of corporators meet and assemble to discharge corporate functions, and have authority also to perform certain acts and duties, by means of different agents, sometimes designated in the statutes creating them, and sometimes left to their own choice. Of this nature are the townships in New England, where the inhabitants are corporators, and assemble to exercise corporate powers, and have authority to appoint various officers to perform public duties, under the guidance and direction of the corporation. Such are the selectmen, for the ordinary municipal concerns; overseers of the poor, school committees, assessors of taxes, and various other functionaries. In these cases, the various officers form different boards for the performance of different duties, subordinate to the corporation; their acts, lawfully done, bind the corpora-

United States Bank v. Dandridge.

tion ; but they do not constitute the corporation, nor are their meetings the meetings of the corporation. In the latter cases, the records of the officers are properly records of their own proceedings, and not of the proceedings of the corporation itself.

It will be at once seen, upon an inspection of the charter creating the Bank of the United States, that it is not a corporation of the former description. The charter, in the first section, declares, that a Bank of the United States of America shall be established, with a capital of \$35,000,000, of which \$7,000,000 shall be subscribed by the United States, and the residue by individuals and corporations. It proceeds to enact, in the 7th section, that the subscribers to the said Bank of the United States, their successors and assigns, shall be and hereby are created a corporation and body politic, by the name and style of "the President, Directors and Company of the Bank of the United States," and by that name shall be capable in law to

*77] have, *purchase, receive, &c., lands, &c., goods, chattels and effects, &c., to an amount not exceeding \$55,000,000, including their capital stock ; and the same to sell, grant, &c. ; to sue and be sued, &c. ; to make, have and use a common seal, and to alter the same at pleasure ; to ordain and establish, and put in execution, such by-laws and ordinances as they shall deem necessary and convenient for the government of the said corporation ; and generally to do and execute all and singular the acts, matters and things which to them it shall or may appertain to do, subject to the other provisions of the act. It proceeds to enact, that for the management of the affairs of the corporation, there shall annually be chosen twenty-five directors, by the stockholders ; and the board of directors shall appoint a president of the corporation. The directors have further authority given to them to appoint such officers, clerks and servants, as they shall deem necessary for executing the business of the corporation, and to exercise such other powers and authorities for the well-governing and ordering of the officers of the corporation, as shall be prescribed by the laws, regulations and ordinances of the same. The directors have further authority given them to establish offices of discount and deposit, wheresoever they shall think fit, within the United States, or the territories thereof, and to commit the management of the said offices, and of the business thereof, respectively, to such persons, and under such regulations, as they shall deem proper, not being contrary to law or the constitution of the bank ; and annually to choose the directors of such offices. Among the rules, which the act prescribes as fundamental articles of the constitution of the corporation, are the following : "that not less than seven directors shall constitute a board for the transaction of business, of whom the president shall always be one, except in case of sickness or necessary absence ;" that sixty stockholders, who are proprietors of 1000 shares in the stock, "shall have power, at any time, to call a general meeting of the stockholders, for purposes relative to the institution ;" "that each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction

*78] of the directors, in a sum not less *than \$50,000, with condition for his good behavior, and the faithful performance of his duties to the corporation ;" that the total amount of the debts of the corporation shall not exceed a limited sum ; and if it does, the directors shall, in their natural and private capacities, be liable to any creditor therefor, with the exception that

United States Bank v. Dandridge.

any director, who shall have been absent when the excess was contracted or created, and who shall have dissented from the resolution or act authorizing it, and shall give notice of the fact in a particular manner, shall be exonerated; that the secretary of the treasury shall be furnished, from time to time, as often as he may require, &c., with statements of the amount of the capital stock, of debts due, of moneys deposited, of notes in circulation, and of specie on hand; and shall have a right to inspect such general accounts of the bank, as shall relate to the said statement. The act further provides, that a committee of either house of congress, appointed for that purpose, shall have a right to inspect the books, and to examine into the proceedings of the corporation, and to report whether the provisions of the charter have been violated or not.

Such is a summary of the most important provisions of the act constituting the charter of the bank, and material to the present cause. It is most manifest, that the corporation is altogether a distinct body from the directors, possessing all the general powers and attributes of an aggregate corporation, and entitled to direct and superintend the management of its own property, and the government of the institution, and to enact by-laws for this purpose. So far as the act delegates authority to the directors, the latter possess it, and may exercise it, not as constituting the corporation itself, but as its express statute agents, to act in the ordinary business of the institution. The directors are created a board, and not a corporate body. If the authority delegated to them, can only be exercised by them, when assembled as a board, with a proper *quorum*, and not by the separate assent of a majority of the whole body (on which it is unnecessary here to express any opinion), still it is clear, that their meetings and acts are but the meetings and acts of a board of agents, acting *ex officio*, and not the meetings and acts of the corporation itself. The whole structure of the charter, [*79 and the whole proceedings under it, as well as the by-laws and regulations which have come under our review, demonstrate that this has been the uniform construction of the corporation itself, and of the directors. Indeed, this is believed to be so universally acted upon, in all the cases respecting banks, which have been judicially decided, that it is not thought necessary to do more than express our opinion, that such is the true interpretation of this charter.

It is not necessary to consider whether the sixth of the fundamental articles of the constitution of the bank, which directs that such cashier or treasurer shall be required to give bond, &c., to the satisfaction of the directors, might have applied, by its own force, to the cashiers of offices established as offices of discount and deposit. In the first place, that point is not put in the pleadings; in the next place, the directors are, by the charter, authorized to establish such offices, subject to such regulations as they shall deem proper; and, in virtue of that authority, they have prescribed regulations on this very subject, in the 30th article of the rules and regulations adopted by them for the government of such offices, which are set forth at large in the transcript of the record. The fourth of these articles declares, that the directors of the Bank of the United States shall appoint the cashiers of the offices of discount and deposit; the fifth declares the duties of the cashier, and, among other things, his duty "to attend all meetings of the board" of directors of the office, and "to keep a fair and regular record

United States Bank v. Dandridge.

of its proceedings." The sixteenth directs, that all notes and bills discounted shall be entered in a book to be called the credit book, in such manner as to discover to the board, at one view, on each discount day, the amount which any person is discounted, or is indebted to the office, either as payer or indorser. The thirteenth directs, that "the cashier of each office shall give bond to the President, Directors and Company of the Bank of the United States, with two or more approved securities, with a condition for his good behavior and faithful performance of his duties to the corporation." By whom the approval is to be made, whether by the directors of the parent bank, or by the directors, *of the office, is not stated. If the directors *80] of the parent bank might, by the charter, have committed it to the local directors, being found in a system of by-laws for their regulation, it would seem a natural inference, that it was their intention to commit it to the latter. When, as in the fourth rule, they reserve the appointment of the cashier to themselves, the language directly reserves it to "the directors of the Bank of the United States." If such authority could not, by the charter, be delegated, then it must be deemed to belong to the directors of the parent bank. It is in the latter point of view, that it has been argued at the bar, and in that view, it will be considered by this court.

Assuming, then, that the directors of the parent bank were, as a board, to approve of the bond, so far as it respects the sureties, in what manner is that approval to be evidenced? Without question, the directors keep a record of their proceedings as a board; and it appears by the rules and regulations of the parent bank, read at the bar, that the cashier is bound "to attend all meetings of the board, and to keep a fair and regular record of its proceedings." If he does not keep such a record, are all such proceedings void, or is the bank at liberty to establish them by secondary evidence? In the present case (we repeat it), the whole argument has proceeded upon the ground, as conceded, that no such record exists of the approval of the present bond.

The charter of the bank does not, in terms, require that such an approval shall be by writing, or entered of record. It does not, in terms, require that the proceedings of the directors shall generally be recorded, much less, that all of them shall be recorded. It seems to have left these matters to the general discretion of the corporation, and of the directors; and though it obviously contemplates, that there will be books kept by the corporation, which will disclose the general state of affairs, it is not a just inference, that it meant that every official act of the directors should be recorded, of whatever nature it might be. And if it had, it would deserve consideration, whether such provisions ought to be deemed conditions precedent, without which the act was void, or only directory to the officers in the performance of their duty, the omission of which might subject *themselves to 81] responsibility, and the corporation itself to the imputation of a violation of its charter. There are many cases where an act is prescribed by law to be done, and record made thereof, and nevertheless, if left unrecorded, the act is valid. By the English marriage act, registers of marriages are required to be kept in public books, in every parish, and signed by the parties and the minister, and attested by two witnesses. Yet, it has been decided, that such an entry is not necessary to the validity of the marriage, and that an erroneous entry will not vitiate it. 1 Phil. Ev. c. 5, § 2, p. 326. So,

United States Bank v. Dandridge.

where a magistrate omits to record an oath of office taken before him, parol evidence of the fact is admissible, though it is an omission of duty. *Bassett v. Marshall*, 9 Mass. 312. That some of the provisions of the charter and by-laws may well be deemed directory to the officers, and not conditions without which their acts would be utterly void, will scarcely be disputed. What are to be deemed such provisions, must depend upon the sound construction of the nature and object of each regulation, and of public convenience, and apparent legislative intention. If a regulation be merely directory, then any deviation from it, though it may subject the officers to responsibility both to the government and the stockholders, cannot be taken advantage of by third persons. *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Vanzandt*, 11 Ibid. 184. In the case of the *Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle 306, the directors were required by their own by-laws, to take a bond of the book-keeper, with sureties, and they took a bond from sureties, without joining the principal. The court held the bond valid, notwithstanding the by-law, and took notice of the distinction between such provisions of a statute as are essential to the validity of an act, and such as are merely directory. Mr. Justice DUNCAN said, that it was a matter between the directors and the stockholders, and that the obligors, who had voluntarily entered into the stipulation, could not withdraw themselves from their obligation.

*But waiving, for the present, this inquiry, we ask, upon what ground it can be maintained, that the approval of the bond by the directors must be in writing? It is not required by the terms of the charter, or the by-laws. In each of them, the language points to the fact of approval, and not to the evidence by which it is to be established, if controverted. It is nowhere said, the approval shall be in writing, or of record. The argument at the bar, upon the necessity of its being in writing, must, therefore, depend for its support, upon the ground, that it is a just inference of law from the nature and objects of the statute, from the analogy of the board of directors to a corporate body, from principles of public convenience and necessity, or from the language of authorities, which ought not to be departed from. Upon the best consideration we can give the subject, we do not think that the argument can be maintained, under any of these aspects. [*82.]

If the directors had been a board, constituted by an unincorporated company, or by a single person, for the like purposes, and with the like powers, it would scarcely occur to any person, that the acts of the board must, of necessity, be reduced to writing, before they would bind their principal. The agents of private persons are not usually in the habit of keeping regular minutes of all their joint proceedings, and hitherto there has been no adjudication, which requires such a verification of their joint acts. Yet, innumerable cases must have arisen, in which such a principle might have been applied with success, if it had ever been supposed to possess a legal existence. The acts of private and public trustees, of joint agents for commercial purposes, of commissioners for private objects, and of public boards, must have presented many occasions for passing upon such a doctrine. The silence of the books, under such circumstances, would form no inconsiderable answer to the argument, connected, as it must be, with the knowledge of the loose and inartificial manner in which much of the business of agencies

United States Bank v. Dandridge.

is generally conducted. There may be, and undoubtedly there is, some convenience in the preservation of minutes of proceedings by agents ; but their subsequent acts are often just as irresistible proof of the existence of prior *dependent acts and votes, as if minutes were produced. If a *83] board of directors were created to erect a bridge, or make a canal or turnpike, and they proceeded to do the service, and under their superintendence, there were persons employed, who executed the work, and the board proceeded to pay them therefor, out of funds in their hands, the facts of public notoriety would be as irresistible evidence of the due execution of their authority, and of due contracts made, and proceedings had by the board, as if the proceedings were recorded in the most formal and regular manner. Can there be a doubt, that, in the cases put, many contracts are so varied and rescinded, many acts done and assented to by the board, which never are reduced to formal votes, and declarations, and written proofs? We think, we may safely say, that the sense of the profession, and the course of private business, have never, hitherto, in respect to private agencies and boards, recognised the existence of any rule which required their acts and proceedings to be justified by written votes.

What foundation is there for a different rule in relation to agencies for corporations? The acts of a single duly authorized agent of a corporation, within the scope of his authority, bind the corporation, although he keeps no minutes of such acts. They may be, and they are, daily, proved *aliunde*. In what respects do the acts of a board of agents differ from those of a single agent, in their operation as evidence? A board may accept a contract, or approve a surety, by vote, or by a tacit and implied assent. The vote or assent may be more difficult of proof, by parol evidence, than if it were reduced to writing. But surely, this is not a sufficient reason for declaring, that the vote or assent is inoperative. If a board of directors agree to build a banking-house, and it is accordingly built, and paid for by their cashier, with their assent, is the whole proceeding to be deemed void, because, in the progress of the undertaking, from accident or negligence, the votes and the payments have not been verified by regular minutes? But it is said, that in the present case, the cashier is required to keep a fair and regular record of the proceedings of the directors. But if this be admitted, *84] it does not establish the purpose for *which it is used. It is a by-law of the corporation, directory to its officers, enacted for its own security and benefit, and not for the purpose of restricting the acts of the directors. If the cashier should neglect to keep such records, or should omit any single vote, the by-law has not declared that the vote shall be void, and the proceedings nugatory. Suppose, no such by-law had been passed, would not the votes of the board have bound the corporation? If they had discounted notes, taken mortgages, advanced money, and bought stock, by faith of *viva voce* unrecorded votes, and evidence of the existence of these acts and votes necessarily resulted from the other proceedings of the bank, could it be the intention of the legislature, that they should be utterly void? or of the stockholders, that any by-law should operate a legal extinguishment of their title to the property? It seems to us difficult to imagine, that such could be the legislative or corporate intention. If, in ordinary cases, such an intention could not be inferred, in order to produce a very strict and inconvenient construction of the charter, there is still less reason

United States Bank v. Dandridge.

to apply it to the cases of approval of official bonds. These are taken exclusively for the security and benefit of the bank itself, and not of mere strangers. The approval is matter of discretion in the directors, and that discretion once being exercised, it is of very little consequence to the bank, whether a written minute of the vote be made or not. All that the bank is interested in, is, that there shall be an approval; and it matters not, whether the fact is established by a direct record, or by acts of the directors, which recognise its prior existence.

It has been supposed by the defendant's counsel, that the case of *Beatty v. Marine Insurance Company*, 2 Johns. 109, is in point, in his favor. Upon an examination of the facts of that case, we think it is otherwise. In that case, the incorporating act provided, that no losses should be paid, without the approbation of at least four of the directors, with the president and his assistants, or a majority of them. The attempt was to charge the company with a total loss, upon a verbal agreement made by the president and assistants, to accept an abandonment, and pay a total loss, at a meeting, when it did not appear that a single director *was present. The board therefore was not so constituted as to bind the company. Mr. Justice THOMPSON, in delivering the opinion of the court, said, "no part of the case will warrant an inference that any of the directors were present at the time of the alleged acceptance. When the plaintiff's agent called to know the determination of the company, in relation to the payment of the loss, he says, the secretary went into the room where the president and assistants were convened, and the answer returned was, that the president and assistants had agreed to pay a total loss; but no mention is made of any of the directors being present, or assenting to it. When the testimony is positive as to the persons by whom the acceptance is made, there is no room left for presumption. If any of the directors were present, so as to make the act binding on the company, the plaintiff ought to have shown it affirmatively. We are, of opinion, therefore, that the acceptance, not having been made by the agents constituted by the act of incorporation, cannot be binding on the company." The case, therefore, so far as it goes, is against the defendants. It carries an almost irresistible inference, that the court did not think a written vote of acceptance necessary, and that parol proof would have been sufficient. No other authority has been produced, to sustain the argument; and it cannot be doubted, that if any did exist, the researches of the counsel would have brought it before the court. We may, therefore, consider that it is a new doctrine, unsupported by prior cases, and to be established now for the first time. We think, that the reasons of public convenience and individual safety and protection, would not be promoted by establishing it.

On the other hand, every case, which has been adduced to show that corporate acts need not always be reduced to writing, but may be proved by presumptions, is, *à fortiori*, an authority against the argument. There are, however, some cases, which confirm in a very clear manner, the doctrine for which we contend, and which have not been yet particularly adverted to. In the case of *Apthorp, Treasurer of the Commonwealth, v. North*, 14 Mass. 167, a suit was brought on the official bond of a coroner. By the laws of Massachusetts, the bond was required to be approved by *the court of common pleas of the county. It was delivered into the court of

[*55]

[*86]

United States Bank v. Dandridge.

common pleas, by the first justice thereof, and remained on its files for some time. No record was ever made of its approval by the court of common pleas; and at the trial, contradictory evidence was offered, of a presumptive nature, as to its approval and rejection by that court. It was held, that notwithstanding there was no record of any approval, the bond might well, upon the circumstances, be deemed to have been duly delivered and approved. Chief Justice PARKER, in delivering the opinion of the court, said, "a formal act, or certificate of approbation by the court, is not made necessary by the statute;" and after commenting on the terms of the statute, he added, "it is not then, required, expressly, that any record or certificate should be made, that the bond given was approved. But if such bond is found upon the files, without any evidence accompanying it, that it has been rejected, and the principal has proceeded to execute the duties of his office, the presumption is violent, if not conclusive, that the bond was received by the court as the security required by the statute." In *Foster v. Essex Bank*, 17 Mass. 479, there was no clause in the charter respecting the receipt of special deposits, and no by-law had ever been made by the corporation or the directors on the subject. But the practice had long prevailed, to receive such deposits, and was known to the directors, though no vote could be found recognising them. The court held the bank liable for the safe-keeping of such deposits, like a common bailee, without hire, upon the ground, that there was a plain adoption of them, from the knowledge and acquiescence of the directors. The case of the *Dedham Bank v. Chickering*, 3 Pick. 335, approaches still nearer the present case, and discussed the very point now in judgment. It was the case of an official bond, given by the cashier of the bank, with sureties. The charter required, that the cashier, before he entered upon the duties of his office, should give bond, with two sureties, to the satisfaction of the directors. After the cashier was elected, the directors passed a vote, that A. B. and C. D. be accepted as sureties in a bond to be given by the cashier for the faithful discharge of the duties of his office. The bond in question was dated before this vote; but *87] it seems to have had but one surety. That circumstance, however, was not relied on at the argument; but the principal ground was, that there had been no approval of the bond, by the board of directors. It was found on their files, and the cashier had been frequently re-elected. Chief Justice PARKER, in delivering the judgment of the court, said, "We should have supposed, that in the case as well of a corporation as of an individual, a paper intended for their benefit, and found on their files, would be considered as accepted by them;" and after alluding to the decision of the circuit court in this case, which required the record of a vote of the directors, he added, "We think, however, that the case before us may be decided, without touching that principle, for, admitting it to be correct, we are, nevertheless, of opinion, that the vote to accept the sureties, and the bond being in possession of the president, are a sufficient acceptance of the bond." It is impossible, we think, to doubt, that the real opinion of the court was, that the acceptance might be proved, without any record of a vote, and that the very facts of the case brought the point of implied and presumptive acceptance from other acts of the directors, completely in judgment. So far, then, as authorities entitled to very great respect and deference go, we are of

United States Bank v. Dandridge.

opinion, that they are against the reasoning assumed on behalf of the defendants.

To all the authorities cited at the bar on this point, the counsel for the defendants has made one answer, which he deems applicable to all of them. It is this, that where no particular form for the expression of the corporate will is prescribed by law, there it may be inferred from corporate acts ; but that where such a form is prescribed, it must be followed. This distinction, he supposes, will reconcile all the cases. The distinction, if admitted, will not aid the argument. It may be, and, indeed, is conceded, that no corporate act can be valid, if done differently from the manner prescribed by law, as essential to its validity. If, in the present case, the statute had prescribed that nothing but a written vote on record should be deemed an approval of the bond, or that the cashier should not be deemed, for any purpose, in *office, until such approval, the consequence contended for would have followed. His acts would have been utterly void, and [*88 any unrecorded vote of approval, nugatory. But the very point in controversy is, whether such written record be necessary, by the charter or by-laws, not as a matter of convenience or discreet exercise of authority, but as a *sine qua non* to the validity of the act. The cases which have been commented on by the court, do not deny the distinction, but proceed upon the ground, that unless positively required by law, a written vote is not to be deemed indispensable. The court then is called upon, not to administer a doctrine of strict, and settled, and technical law, but to introduce a new rule into the law of evidence ; and to exclude presumptive evidence, not only of the acts of corporations, but of their unincorporated agents. If such a rule be fit to be adopted, it must be upon the foundation of some clear and unequivocal analogy of law, and public policy and convenience. We are not prepared to admit, that it has any such foundation. On the contrary, we are persuaded, that the introduction of the rule itself would be attended with serious public mishiefs, and shake many titles and rights, which have been consummated in entire good faith, and the confidence that no such written record was necessary to their validity. We cannot, therefore, assent to the doctrine decided in the circuit court on this point.

In respect to a collateral argument urged at the bar, upon the point whether the terms of the charter and by-laws would be complied with, without an express vote that the bond was "to the satisfaction of the directors," or that the sureties of the bond were "approved" by the directors, we are of opinion, that in either case there need not be express votes of approval and satisfaction. An acceptance of the bond by the directors would, necessarily, in intendment of law, include the approval of it, and be conclusive of it.

The remaining point is, as to the opinion of the court delivered in the first bill of exceptions. If that opinion meant to state, what it seems to import, that the cashier was not legally cashier, so as to bind the bank in its rights and interests by his acts, if permitted to enter upon the duties of his office, before a satisfactory bond was given, we think, it cannot *be maintained. The cashier was duly appointed, and he was permitted to act in his office, under the express sanction of the directors, [*89 for several years. If he had never given any bond whatsoever, during this period, yet his acts, within the scope of his authority, would have bound the

United States Bank v. Dandridge

bank. Notes signed by him would be lawful notes ; moneys paid by him would be irrecoverable ; records kept by him would be bank records. Indeed, it is conceded by the defendant's counsel, that the bank would, under such circumstances, be bound by his acts in favor of third persons, acting upon the faith of his public character. The same principle, in our opinion, applies in favor, as against the bank. If he could legally perform the duties of the office, for any purposes, he could for all. He was either an agent, capable of binding the bank in all his official acts, or those acts were void as to third persons as well as the bank. If he was held out as an authorized cashier, that character was equally applicable to all who dealt with the bank, in transactions beneficial as well as onerous to the bank. It seems to us, that the charter and the by-laws must be considered in this respect as directory to the board, and not as conditions precedent. The language is not more strong than that of the laws which came under the consideration of this court, in the *United States v. Kirkpatrick*, 9 Wheat. 720, and *United States v. Vanzandt*, 11 Ibid. 184. Our view of this matter is in exact coincidence with that entertained by the supreme court of Pennsylvania, in the *Bank of the Northern Liberties v. Cresson*, 12 Serg. & Rawle 306. The directors might have been responsible for their neglect of duty ; but it was a matter wholly between themselves and the stockholders, and between the latter and the government, as a violation of the charter and by-laws. So far, indeed, as respects the sureties to the bond, they may not be responsible for any breaches of official duty by the cashier, before their obligation has been accepted. But this is a very different consideration from that which respects the legal effects of the acts of the cashier himself upon the interests and transactions of the bank itself.

*90] This is the substance of what we deem it necessary to *say upon the present occasion. We do not go into the consideration of the admissibility of every part of the documents and testimony offered in evidence. Perhaps, some of them were in a shape not exactly fit to be admitted as formal evidence, without further verification and proofs. But much of it was of a nature unexceptionable, as conducing to proof of the issues joined, if anything short of record proof were admissible, as competent to establish the approval or acceptance of the bond. It is not understood, that the circuit court entertained any doubt as to its general competency, except upon the ground already stated. We are of opinion, that the evidence was competent, in point of law, to go to the jury, notwithstanding there was no record of approval of the bond ; it being in its nature competent, its sufficiency to establish the issues was matter of fact, the decision of which belonged to the jury ; and upon which they ought to have been allowed to pass their verdict.

The judgment of the circuit court must be reversed, and a mandate awarded, with directions to the circuit court to award a *venire facias de novo*.

MARSHALL, Ch. J. (*Dissenting*).—I should now, as is my custom, when I have the misfortune to differ from this court, acquiesce silently in its opinion, did I not believe that the judgment of the circuit court of Virginia gave general surprise to the profession, and was generally condemned. A full conviction that the commission of even gross error, after a deliberate

United States Bank v. Dandridge.

exercise of the judgment, is more excusable, than the rash and hasty decision of an important question, without due consideration, will, I trust, constitute some apology for the time I consume in stating the reasons, and the imposing authorities, which guided the circuit court in the judgment that has been reversed.

The case before that court depended on the question whether the official bond of the cashier, on which the suit was brought, bound the defendants. As preliminary to the investigation of this question, I shall state some propositions belonging to it, which are supposed to be incontrovertible. All admit, that delivery is essential to the validity of a deed, and that acceptance is essential to a complete delivery. If this be true, they must *be [*91 proved, in every case where they are put in issue by the pleadings. This proof varies according to circumstances. If there be subscribing witnesses to the instrument, it can be proved only by them, if attainable. If unattainable, or if there be no subscribing witnesses, other proof may be admitted; but in every case, a delivery and acceptance must be legally proved.

If, in transactions between individuals, where a deed is without a subscribing witness, proof of the signature of the maker, accompanied with the facts that the instrument has passed out of his hands, and is in the possession of the person for whose benefit it was made, be *primâ facie* evidence of its delivery, it is, because delivery by mere manual tradition, without witnesses, is good; and the assertion of title under it, is proof of acceptance, because that requires only the assent of the mind, which assent is legally manifested by asserting a claim to it. That a plaintiff may maintain his action, by this evidence, does not show that delivery and acceptance are unnecessary, or that proof of them can be dispensed with; but that, in ordinary cases, this evidence amounts to such proof. If, however, a case should occur, in which the possession of the instrument by the party claiming under it, does not afford legal *primâ facie* evidence of delivery and acceptance, because such party is incapable of receiving and assenting to the instrument, in a form which can be legally proved or inferred from those facts, then such other facts must be shown on the trial, as will establish a lawful delivery and acceptance. I state these legal axioms, at the hazard of being thought tedious, because they appear to me to have a direct bearing on the case before the court.

The plaintiff is a corporation aggregate; a being created by law; itself impersonal, though composed of many individuals. These individuals change at will; and even while members of the corporation, can, in virtue of such membership, perform no corporate act, but are responsible in their natural capacities, both while members of the corporation, and after they cease to be so, for everything they do, whether in the name of the corporation or otherwise. The corporation being one entire impersonal entity, distinct *from the individuals who compose it, must be endowed with a [*92 mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature. Can such a being speak, or act, otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can

United States Bank v. Dandridge.

imagine no other than writing. The will to be announced is the aggregate will; the voice which utters it, must be the aggregate voice. Human organs belong only to individuals; the words they utter are the words of individuals. These individuals must speak collectively, to speak corporately, and must use a collective voice; they have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing. A corporation will generally act by its agents; but those agents have no self-existing power. It must be created by law, or communicated by the body itself. This can be done only by writing.

If, then, corporations were novelties, and we were required now to devise the means by which they should transact their affairs, or communicate their will, we should, I think, from a consideration of their nature, of their capacities and disabilities, be compelled to say, that where other means were not provided by statute, such will must be expressed in writing. But they are not novelties. They are institutions of very ancient date; and the books abound with cases, in which their character, and their means of action, have been thoroughly investigated. In Brooke's Abridgment (title Corporation), we find many cases, cited chiefly from the Year Books, from which the general principle is to be extracted, that a corporation aggregate can neither give nor receive, nor do anything of importance, without deed. Lord Coke, in his commentary on Littleton (66 b), says, "but no corporation aggregate *93] of many persons capable" * "can do homage." "And the reason is, because homage must be done in person, and a corporation aggregate of many cannot appear in person; for, albeit, the bodies natural, whereupon the body politic consists, may be seen, yet the body politic or corporate itself, cannot be seen, nor do any act, but by attorney." So too, a corporation is incapable of attorning, otherwise than by deed (6 Co. 386), or of surrendering a lease for years (10 Ibid. 676), or of presenting a clerk to a living (Bro. Corp. 83), or of appointing a person to seize forfeited goods (1 Vent. 47), or agreeing to a disseisin to their use (Bro. Corp. 34). These incapacities are founded on the impersonal character of a corporation aggregate, and the principle must be equally applicable to every act of a personal nature.

Sir William Blackstone, in his Commentaries (vol. 1, p. 475), enumerates, among the incidents to a corporation, the right "to have a common seal." "For," he adds, "a corporation being an invisible body, cannot manifest its intention by any personal act or oral discourse. It, therefore, acts and speaks only by a common seal. For though the particular members may express their private consents to any acts, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that alone, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole." Though this general principle, that the assent of a corporation can appear only by its seal, has been in part overruled, yet it has been overruled so far only as respects the seal. The corporate character remains what Blackstone states it to be. The reasons he assigns for requiring their seal as the evidence of their acts, are drawn from the nature of corporations, and must always exist. If the seal may be exchanged for something else, that something must yet be of the same character, must be equally capable of "uniting the several assents of the individuals who compose the community, and of making one joint assent

United States Bank v. Dandridge.

of the whole." The declaration, that a seal is indispensable, is equally a declaration of the necessity of writing ; for the sole purpose of a seal is to give full faith and credit to the writing to which it is appended. The seal, in itself, not affixed *to an instrument of writing, is nothing ; is meant as nothing, and can operate nothing. The writing is the substance, and the seal appropriates it to the corporation. [*94]

Though the rule stated by Blackstone may not be so universal as his language indicates, it is certainly of extensive application, and the exceptions prove its extent. Mr. Hargrave, in his notes on Co. Litt. 99, says, "In general, a corporation aggregate cannot take or pass away any interest in lands, or do any act of importance, without deed ; but there are several exceptions to the rule." The question before the court depends very much on the extent of these exceptions, and on the manner in which this invisible impersonal being must act and speak, when it may act and speak without using its seal.

It is stated in the old books (Bro. Corp. 49), that a corporation may have a ploughman, butler, cook, &c., without retaining them by deed ; and in the same book (p. 50), WOOD says, "small things need not be in writing, as to light a candle, make a fire, and turn cattle off the land." FAIRFAX said, "A corporation cannot have a servant but by deed ; small things are admissible, on account of custom, and the trouble of a deed in such cases, not by strict law." Some subsequent cases show that officers may be appointed without deed, but not that they may be appointed without writing. Every instrument under seal was designated as a deed, and all writings not under seal were considered as acts by parol. Consequently, when the old books say a thing may be done without deed, or by parol, nothing more is intended than that it may be done without a sealed instrument. It may still require to be in writing. In 2 Bac. Abr. 13, it is said, "aggregate corporations, consisting of a constant succession of various persons, can regularly do no act without writing ; therefore, gifts by and to them, must be by deed." In page 340, it is said, "if a corporation aggregate disseise to the use of another, they are disseisors in their natural capacity," "as a corporation they can regularly do no act without writing."

In the case of the *King v. Bigg*, 1 Str. 18, the prisoner was convicted for erasing an indorsement on a bank-note. The indictment and verdict are set forth at large by *Peere Williams (vol. 3, p. 419), and it appears, [*95] that the note was signed by Joshua Adams, who was intrusted and employed by the Bank of England to sign bank-notes, but not under their common seal. It was contended by Peere Williams, in an able argument, that the appointment was not valid, because not made under their common seal ; and his argument contains an enumeration of decisions previously made, which go far in support of his proposition. The prisoner, however, was condemned, and consequently, the appointment was held valid. But there is no reason to suppose, that it was not made by writing. The verdict finds "that he was entrusted and employed by the governor and company of the Bank of England, but not under their common seal." Consequently, his employment was evidenced by writing, if it was necessary ; and the negative finding that it was not under their common seal, strengthens the presumption that it was in writing. Peere Williams has reported his argument, and would certainly have taken this objection, had the case afforded

United States Bank v. Dandridge.

it. I consider the appointment of Adams, then, as having been made in writing, though not under seal.

Mr. Fonblanque says (vol. 1, p. 296, note o), "And the agreement of the major part of the corporation, being entered in the corporation books, though not under the corporate seal, will be decreed in equity." The inference is strong, that it will not be decreed, unless it be entered on the corporation books. Consequently, unless it be so entered, it is not an agreement, for every lawful agreement which is in itself equitable, will be decreed in equity. In the *Mayor of Thetford's Case*, 1 Salk. 192. Lord Holt said, that though a corporation cannot do an act *in pais*, without their common seal, they may do an act on record, and that is the case with the City of London, which make an attorney in court annually, by warrant; and the reason is, they are estopped by the record. Upon the same principle, a return to a *mandamus* is good, though not under the common seal. In these exceptions to the general rule, the substitute for the common seal must be writing; and the exceptions are stated in terms which exclude every idea that the act can be evidenced otherwise.

*96] *Yarborough v. Bank of England*, 16 East 6, was an action of trover and conversion, in which, after verdict for the plaintiff, it was moved in arrest of judgment, that the action would not lie, because a corporation was incapable of committing a tort. The action was sustained; and Lord ELLENBOROUGH, in delivering the opinion of the court, said, that a corporation can act only through the instrumentality of others; and wherever they can act, or order any act to be done on their behalf, which, as by their common seal they may do, they are liable to the consequences of such acts. "A corporation cannot be aiding to a trespass, nor give a warrant for a trespass, without writing." His lordship cited several old cases, showing the incompetency of a corporation to act in important matters otherwise than by deed; and added, "but many little things require no special command, as to chase cattle out of their land; those things are incident to the appointment." Several cases are put, in which a corporation may be liable for a trespass; but they are all consistent with his first proposition, that the liability of a corporation must be founded on writing. "If," he says, "the mayor and commonalty disseise me, and I release to 20 or 200 of the commonalty, this will not save the corporation, and the reason is, because the disseisin is in their corporate character, and the release to individuals." So, in trespass against the Mayor and Commonalty of York, they cannot justify under a right of the inhabitants to common, because the right in natural persons gave no right to a corporation. Nor could the corporation give a warrant, without writing, to commit a trespass. The foundation of this action is, was the authority in writing given by the corporation? It stands on the same principle with the action of *assumpsit* made by an agent acting under a written power. The idea that their seal was indispensable to the validity of all corporate acts, which is laid down in such strong terms by Blackstone, and by others, on whom he relied, probably

¹ A corporation is liable for the frauds and torts of its agent, in the course of his employment, to the same extent as an individual. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars.

180. A corporation is liable for the acts of its authorized agents, though not appointed by a formal vote of the board of directors. *Bank of Lyons v. Demmon*, Lalor 398.

United States Bank v. Dandridge.

grew out of the state of the times in which it originated ; seals were then more frequent and better known than signatures. An instrument was much more certainly authenticated by the seal, than by the name of the maker. This circumstance would bring seals into common use ; and as *every corporation possessed a seal of extensive notoriety, and any other [*97 mode of authenticating its acts would, in those simple times, be attended with difficulties and perplexities, it is not matter of surprise, that this rule should prevail. As writing has become more common, and seals are less distinguishable from each other, the good sense of mankind gradually receives the writing, without the seal, in all the less formal and less important transactions of the corporate body. All the reasons derived from the corporate character, which have been assigned for requiring the seal, are satisfied by the writing, without it.

The English cases on this subject are very well summed up by Mr. Kyd, p. 259. The result of the whole appears to be, that in England, the general rule is, that a corporation acts and speaks by its common seal, at least, so far as respects the appointment of officers, whose duties and powers are important. In those transactions, where the use of the seal would be unnecessary, and extremely inconvenient, it is frequently dispensed with ; but in all of them, I think, writing is indispensable. In almost every case which I can imagine, there ought to be, and is, a record in the corporation books. With respect to the necessity of a seal, the difference is certainly great between ancient and modern times ; and between corporations, whose principal transactions respected land, and those which are commercial in their character. This distinction may, and ought to influence the use of the seal, but not the use of writing. The inability of a corporation aggregate to speak or act otherwise than by writing, is constitutional, and must be immutable, unless it be endowed by the legislature with other qualities than belong to the corporate character. The English cases, so far as I have had an opportunity of examining them, concur in the principle, that a corporation aggregate can act only by writing. A case from 4 B. & Cr. has been cited at the bar, and undoubtedly deserves attention. I regret, that it has not been in my power to examine it. As far, however, as I could judge of it from the statement made at the bar, I did not think that it had overturned what appears to me to be the settled law of England.¹ *I will [*98 now inquire whether the decisions of this court vary in principle from those of England. *Head & Amory v. Providence Insurance Company*, 2 Cranch 127, was an action on a policy of insurance, which the defendants contended, had been vacated by a subsequent agreement ; and the validity of this agreement constituted the sole question in the cause. The plaintiffs had proposed terms for vacating the policy, and some communications had taken place through Brown & Ives, their correspondents, which showed a misunderstanding between the parties, and that mutual propositions had been mistaken by the plaintiffs for an acceptance of the terms they had proposed. This produced a letter from the plaintiffs, of the 3d of September 1800, which was understood by the defendants, and was considered by the

¹ Neither the use of the corporate seal, nor a resolution of the managers is necessary, to make the contract of a corporation valid. *Hoag v.*

Lamont, 60 N. Y. 96. And see *Eureka Co. v. Bailey Co.*, 11 Wall. 488.

United States Bank v. Dandridge.

court, as amounting to a renewal of propositions for vacating the policy. The secretary of the company delivered to Brown & Ives, on the 6th of September, the following note :

"Sept. 6th, 1800.

"As there appears to have been a misunderstanding in the business, as it respects the first propositions of the company, the directors are willing to accede to Messrs. Head & Amory's proposition (viz.), to settle the policy on the merchandise at 25 per cent., although it was their intention and expectation to have both policies included in the settlement. Messrs. Head & Amory will please to forward the policy, and have it annulled immediately. Premium due 12-15 September. You will please to govern yourself accordingly, and we will attend to your wishes."

This paper was in the handwriting of the secretary, but without signature. Testimony was given at the trial, to show the usage of the insurance companies, to consider an agreement to do an act as equivalent to the performance of the act. This paper was forwarded by Brown & Ives, on the 9th of September, to the house of Head & Amory, in Boston, and its receipt was acknowledged by their clerks, on the 12th, they being at the time absent.

*90] On the 17th of September, the plaintiffs wrote to Brown & Ives, informing them that, previous to their seeing the letter of the 9th, intelligence was received of the capture of the vessel, which would, of course, prevent any further negotiation on the subject. The circuit court determined, that the agreement to vacate the policy was complete ; and the jury found for the defendants. The judgment was brought before this court, and was reversed; because this informal paper did not amount to an acceptance of the terms proposed by the plaintiffs. The act incorporating the company enacted, that policies of insurance, and other instruments, made and signed by the president of the said company, or any other officer thereof, according to the ordinances, by-laws," &c., "shall be good and effectual," &c. The court considered the company as the mere creature of the incorporating act, and as being capable of exerting its faculties only in the manner which the act authorizes. This paper, not being executed in the form prescribed by law, could not be considered as the act of the company.

On the testimony of the witness concerning usage, the court observed, that "if he was to be understood as stating that an assent to the formation or dissolution of a policy, if manifested according to the forms required by law, is as binding as the performance of the act agreed to be done, it is probable, that the practice he alludes to is correct. But if he means to say, that this assent may be manifested by parol, the practice cannot receive the sanction of this court. It would be to dispense with the formalities required by law, for valuable purposes, and to enable these artificial bodies to act and to contract, in a manner essentially different from that prescribed for them by the legislature." "An individual," the court added, "has an original capacity to contract and bind himself in such manner as he pleases." "He who acts by another, acts by himself. He who authorizes another to make a writing for him, makes it himself ; but with these bodies, which have only a legal existence, it is otherwise. The act of incorporation is, to

*100] them an enabling act ; it gives them all the power they possess. It enables them to contract ; and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more

United States Bank v. Dandridge.

creates a contract, than if the body had never been incorporated." The court considered the note of the 6th of September, "as a mere informal paper, which might perhaps amount to notice of an act, if such act was really performed but which is not in itself an act of any legal obligation on the company. That if the proposition contained in the letter of the 3d of September, had been regularly accepted, this note might possibly have been considered as notice of that acceptance, but is not in itself an acceptance."

I have gone the more fully into this case, because, both the decision itself, and the reasoning by which it is supported, appear to me to apply, throughout, to the case now before the court.

This subject came on to be again considered in *Bank of Columbia v. Patterson's Administrators*, 7 Cranch 299. That was an action of *assumpsit*, brought by Patterson's administrators, for work and labor done by their intestate for the bank. It was founded on an agreement in writing between Patterson and "a duly authorized committee of the directors of the bank," in their own names. Judgment was given in favor of the administrators, upon which the cause was brought by a writ of error into this court; and, among other objections to the proceedings below, it was contended, that a corporation aggregate could not promise otherwise than under its seal. In considering this objection, the court did not controvert the ancient rule. But this rule, if it ever existed to the extent claimed by the plaintiffs in error had been relaxed; and it seems at length to have been established, that though corporations could not contract directly, except under their corporate seal, yet, they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. It being conceded, that the committee were authorized to make agreements, there could be no doubt, that a contract made by them, in the name of the corporation, would be *binding on the corporation. But as this promise is made [*101 in their own name, if the principle stopped here, the remedy would be only against the committee. The court proceeds to consider it as a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation. In applying this rule of law to the case then under consideration, the court reviewed the evidence from which the jury might legally infer, "that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiffs' intestate had accepted the engagement." The *Bank of Columbia v. Patterson's Administrators* differed from the case of the *Providence Insurance Company v. Head & Amory*, in two essential circumstances. The contract which was sustained against the bank was made through the instrumentality of a legally constituted agent; that which the insurance company attempted to set up, purported to be a direct contract between the company and the plaintiffs in the cause. In the case of *The Bank of Columbia*, the court said, "At length, it seems to have been established, that though they (corporations) could not contract directly, except under their corporate seal, yet, they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation."

United States Bank v. Dandridge.

The obligation on which this suit was instituted, if it be an obligation, purports to be a direct contract between the bank and the individuals who signed the instrument. It is not alleged, that any agent was authorized to act for the bank.

Another very essential difference between the two cases cited from Cranch is this: In that of the *Providence Insurance Company*, the corporation attempted to set up an agreement, which, if it existed, was in its own possession. It claimed to imply that an act had been performed by *102] itself, *the evidence of which was in its own possession, and might be produced. The court disallowed this implication. In the case of the *Bank of Columbia*, as in that of the insurance company, the act to be implied was an act performed by the corporation in its own office, without witnesses, the evidence of which remained in its own possession; but it was set up against, not by the corporation. The court was not of opinion, that the suit could be maintained, without the existence of this act. No such idea is indicated. On the contrary, the language of the opinion shows very clearly, that the act was necessary. If, in order to charge the bank, it was necessary, that the corporation should have "adopted the contracts of the committee," and should have "voted to pay the whole sum which should become due under the contracts;" the court enumerates circumstances which were deemed sufficient to justify a jury in implying against the corporation that the bank had performed these acts. In the case at bar, the suit is brought by the corporation, and the corporation asks the court to imply that it has performed those acts which are necessary to the validity of the bond on which it sues, although the evidence of its having performed them in its own possession.

Fleckner v. Bank of the United States, 8 Wheat. 338, was a writ of error to a judgment given by the court of the United States for the district of Louisiana, in favor of the bank, in a suit instituted against Fleckner, on a note given by him, and indorsed to the Bank of the United States, by the president, directors and company of the Planters' Bank of New Orleans, through their cashier, as their agent. One of the errors alleged in the proceedings of the court below was, that the cashier of the Planters' Bank had no authority to make the transfer. The authority was given by a vote of the board of directors, to the president and cashier, and the act itself was afterwards affirmed by an instrument of writing, under the corporate seal. It was contended, that the original vote, empowering the president and cashier to perform the act, ought to have been a power under the corporate *103] seal. In noticing this objection, *the court said, "Whatever may be the original correctness of this doctrine, as applied to corporations existing by the common law, in respect even to which it has been certainly broken in upon in modern times, it has no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a special body or board of directors. And the acts of such body or board, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts under the corporate seal." The court then proceeded, in a very elaborate and well-digested opinion, to maintain that the indorsement was within the official duty of the cashier, that it was within the original power given to the president and cashier, and that, were

United States Bank v. Dandridge.

this otherwise, it was sanctioned by the concluding act under the corporate seal. The whole of this case, as of the two preceding cases, turns upon the idea, that a writing, in due form, on the part of the corporation, is indispensable to the validity of its contracts.

According to the decisions of the courts of England, then, and of this court, a corporation, unless it be in matters to which the maxim *de minimis non curat lex* applies, can act or speak, and, of course, contract, only by writing. This principle, which seems to be an essential ingredient of its very being, has been maintained by all the judges who have ever discussed the subject. Upon this principle, and the authority of these cases, I have supposed, that a corporation cannot receive and assent to a deed of any description, unless this assent be expressed regularly in writing. It ought to be entered on the books of the corporation.

The counsel for the plaintiffs in error insist, that the proof offered in the circuit court was sufficient to establish the full execution of the bond; and they support this proposition upon principle, upon convenience, upon usage, and upon the authority of cases decided in the different states of the Union. It is, we are told, a general rule, that the acceptance by a corporation is a fact which may be proved before a jury, and the acceptance of a new charter is mentioned to illustrate the rule. *Without question, acceptance is a fact, and is to be proved before a jury; but the inquiry is, [*104 by what evidence may it be proved? I have supposed, that it must be proved by testimony which shows that the corporation has acted in the form in which alone it is capable of acting; that it has expressed its acceptance in the mode in which such a being is capable of expressing it. I receive readily the case put, of the acceptance of a new charter, as an apt illustration of the principle we are investigating, and should be surprised, indeed, if a new charter were to be accepted, without a vote of acceptance entered upon the record. The case cited from 1 T. R. 575, does not appear to me to sanction the doctrine it is adduced to support.

We are told, too, that there was never a time when a corporation might not take by a deed poll. But if this be admitted, I cannot perceive its influence on the case. A deed poll is in writing, and there is the same necessity that its acceptance should be evidenced by writing, as if it were an indenture. The general assertion which we find in all the books, that a corporation can take only by deed, that is, as I understand it, that the act of taking must be by deed, applies as well to conveyances by deed poll, as by indenture.

We have been also referred to a time anterior to writing, and are asked how corporations then acquired property? We have no knowledge of such a time.¹ Since Europe was subdued and civilized by the arms and literature

¹ In Gen. xiii. is related the purchase by Abraham, of the field of Machpelah, for a burial place; and in verse 20, it is said, the field was made sure to Abraham. But in the apocryphal Book of Jasher, ch. xiv. it is said, that the contract was reduced to writing and testified by four witnesses, who are named. The terms of the contract are given, and that Abraham placed it in his treasures. So, in ch. lvi, it is

stated, that the written contract was produced, on the occasion of the burial of the patriarch Jacob, which was opposed by Esau, who claimed the property. But the claim was insisted on, and it was shown, that the field of Machpelah was specially mentioned, in the sale by Esau to Jacob, of his birthright, which is also stated to have been reduced to writing (ch. xxvii. v. 14), and ratified by a subsequent written agreement

United States Bank v. Dandridge.

of Rome, the science of writing, though rare, has never been entirely lost. So much of it as remained, was found most generally in corporate bodies. If the corporation was not entirely ecclesiastical, which, in early times, was most frequent, yet there can be little reason to doubt their having, among themselves, or being able to command, a scribe. Be this as it may, the earliest information we have on the subject tells us that corporations aggregate could only take or grant by deed, under their corporate seal. Even when land passed from man to man by livery, a corporation could not so grant or take. Livery could not be made by, or to, a corporation aggregate, because they are personal acts, and it is an impersonal being. These acts *105] were to be performed *through the agency of an individual, having a power to perform them, under the corporate seal.

We are also told, that the title of the bank to the ground purchased for a banking-house, and to all mortgages taken for the security of its debts, will be put in hazard by the principle which I have endeavored to maintain; that it is probable, not a single conveyance will stand the test by which the defendant in error proposes to try its validity, and that the usage is, to receive and deposit them among the papers of the institution, without taking any notice of them on its records. I can scarcely suppose it possible, that so loose a practice can have prevailed. I can scarcely suppose it possible, that, on points of such vital importance, and of such rare occurrence, the plain requisites of law can have been so entirely disregarded. Deeds of mortgage, as well as of ground for necessary buildings, are conveyances of lands, and if any one legal proposition is laid down, without a single exception, it is this, that a corporation aggregate cannot take lands otherwise than by deed. To me it would appear very incautious, to take such conveyances otherwise than as is prescribed in the books, that is, by appointing an attorney under the corporate seal to receive them; but, however this may be, I can scarcely suppose it possible, that an act, so easily performed, as to enter their assent in their own books, should be habitually neglected. That the current business of the bank should sometimes want the requisite forms, might be excused, but that the same failure should take place in single transactions, which seldom take place, and are yet of great importance, seems to me to be scarcely possible. I should not be inclined to act judicially on the presumption that the fact exists. If it does, the mischief may be corrected by correcting the practice.

The counsel for the plaintiff rely very much on the cases which have been decided in the states of Pennsylvania, New York and Massachusetts. In the case mentioned at the bar, from Pennsylvania, a demurrer was filed to a plea in bar of the action on a cashier's bond, which brought up the very question in consideration before this court. The argument was opened by *106] the counsel *for the plaintiff, but he stopped in the midst of it, and withdrew his demurrer, without submitting the point to the court. The cases in New York have not, I think, gone further than the *Bank of Columbia v. Patterson's Administrators*. Those of Massachusetts have, I admit, gone the full length for which the plaintiffs contend, and the point is probably settled in that state. It would be presumptuous in me, to place my

between the parties, ch. xlvii. v. 27-29. The work; it is quoted twice in the Old Testament, Book of Jasher is certainly a very ancient Joshua x. 13, and 2 Samuel i. 18.

United States Bank v. Dandridge.

understanding of those decisions in opposition to that of professional gentlemen from that state, but to me it seems, that even there the doctrine has not been uniformly maintained. Bigelow's Digest of Massachusetts cases contains this passage: "Aggregate corporations cannot make a parol contract, unless by the intervention of some agent or attorney duly authorized by a corporate vote to contract on their part, because there is no other way in which they can express their assent." He cites 7 Mass. 102, in which Chief Justice PARSONS said, "we cannot admit, that a corporation can make a parol contract, unless by the intervention of some agent or attorney duly authorized to contract on their part." In the *Essex Turnpike Company v. Collins*, 18 Mass. 292, the court said, "aggregate corporations cannot contract without vote, because there is no other way in which they can express their assent."

In the case of *Hayden v. Middlesex Turnpike Corporation*, 10 Mass. 397, the work for which the action was brought was performed on the road. The committee appointed to contract for, and superintend it, was frequently present, while it was going on, and directed the workmen. Other directors were also present, and one of them swore, that he supposed the work to be going on by order of the directors. But the contract was not in exact conformity with the written authority under which the committee acted. A verdict taken for the plaintiff, subject to the opinion of the court, was set aside, and the court said, "No individual member can represent the corporation in their aggregate capacity, but in consequence of their consent. The requisite evidence of this, at common law, was a deed under the seal of the corporation. Aggregate corporations, established *by statute, are not restricted to that formality. They have power given them to order [*107] their affairs, and to appoint and employ agents, by votes, or in such other manner as the corporation may by their by-laws appoint." Again, "nor can a parol declaration, made to the corporators, at a corporate meeting, by any individual, amount to a contract between such individual and the corporation."

In the *Proprietors of the Canal Bridge v. Gordon*, 1 Pick. 297, the court decided, that a corporation could be bound, without a vote, by implication from corporate acts. This, however, was in a suit brought against a corporation, and attended with circumstances extremely well calculated to strengthen every presumption against them. The corporation might have passed the vote, though it was not in the power of the plaintiff to produce it, and their acts afforded the strongest probability in favor of the implication that they had passed it. I should not consider this case as conclusive evidence that the same court would have drawn the same inference, from the same circumstances, in a case in which the corporation was plaintiff. But in the case of the *Inhabitants of the First Parish in Sutton v. Cole*, the corporation was plaintiff, and the validity of an entry into land was one of the points made in the cause. The corporation had appointed two agents for the purpose, but the entry was made by one only. This entry was held to be made, not in pursuance of the authority, but it was also held, that the action brought by the corporation was a ratification of the entry. This I admit to be a decision expressly in point. But, thinking it a case in opposition to the whole course of decisions in England, as well as in this court, and not supported by decisions in other states, or by a long course of decisions even in the state

United States Bank v. Dandridge.

of Massachusetts, I should not, perhaps, highly respectable as it undoubtedly is, and as I certainly think it, have felt myself warranted in yielding to it, had it even been known to me.

It has been contended, that the act of congress incorporating the bank, does not, in terms, require that it shall keep a record of its proceedings; and *108] from this omission, it has *been inferred, that a record is unnecessary. I cannot assent to the correctness of this inference. When a being is created, without the organs of speech, and endowed only with the faculty of communicating its will by writing, we need not look in the laws given by its creator, for a prohibition to speak, or a mandate to write. These are organic laws which it is compelled to observe. If we find, in the act of its creation, an enumeration of duties and powers, which are to be performed and exercised by writing, it is evidence that the creator considered it as certain, that the creature would write, and that the evidence of its conformity to the will of the creator would be found in writing. It is equivalent to a declaration that it shall act by writing.

Let the charter be examined, with this principle in our minds. The 8th section empowers the stockholders to choose directors for the management of their affairs, but does not require that the election shall be evidenced by writing. Is it to be believed, that congress could have intended, that an act, on which all the operations of the corporation depended, which might be controverted in every action it should institute, might rest upon the uncertain, and, perhaps, contradictory recollection of the individuals who were present? The fairness of an election may be contested; the mode of voting is prescribed by law. Can it be, that congress supposed no provision was made which secured written testimony, by which such contests might be tried? The directors are to elect one of their body as president; is no record to be kept of this election? Can we presume so much carelessness in congress, as to suppose it possible, that matters of such consequence should be left to the loose proof which the memory of individuals might furnish? The act prescribes the notice which shall be given of the time and place of holding the election; and adds, "it shall be lawful for such election to be then and there made." The legality of the election depends on time and place. Did congress mean that these facts should rest on memory? The *109] 10th section empowers the directors for the time being, *to appoint officers, and to allow them a compensation; and to exercise such other powers for the well-governing of the officers of the corporation, as shall be prescribed by its laws. May all these acts be found only in the frail memory of individuals? The 4th rule of the fundamental articles provides, that not less than seven directors, of whom the president, or some person deputed by him, shall be one, shall constitute a board for the transaction of business; but there is no clause in the charter requiring a board. Can it be pretended, that not less than seven directors may make a board, and yet, that the directors may act without being assembled as a board? Congress has not thought it necessary to forbid their acting otherwise than as a board, because the whole law of corporations forbids it. In the event of making unlawful loans, the directors are made personally responsible; but those are exempted who were absent, or who dissented from the resolution or act whereby the same was so contracted or created. No clause in the charter directs that loans shall be created only by writing.

United States Bank v. Dandridge.

The bond of the debtor may be said to be sufficient. Yet this clause is obviously drawn in the idea, that all the proceedings on the subject would necessarily be in writing. The absentees and dissentients are excused. How is this absence or dissent to be proved? Is it to depend on vague and uncertain memory? The same observations apply to the limitations and restrictions which are found in the 9th and 10th rules of the fundamental articles. The 13th rule declares, that semi annual dividends shall be made, but does not direct that they shall be declared in writing. May the bank so manage its affairs, that no trace of these dividends shall be found on its books? The 16th rule declares, that no stockholder, unless he be a citizen of the United States, shall vote in the choice of directors, but does not direct that written lists shall be taken. May they be dispensed with? Is the question who has voted to depend on recollection solely? The 23d section subjects the books of the corporation to the inspection of a committee of either house of congress. *But there is no clause in the charter which directs the [110 corporation to keep any books. May this be set up as an excuse for not opening books containing their transactions, for the inspection of a committee of congress?

How are we to account for all these strange omissions? Strange and unaccountable they would certainly be, on any other hypothesis, than that the law of its being, required that it should speak and act by writing. Aware of this, congress did not deem it necessary to enjoin upon it, that it should act in the only mode in which its organs enabled it to act, and that it should abstain from what its organs did not enable it to do.

It may be said, that although certain things ought to appear in writing, it is not necessary that all the transactions of a bank should so appear; and the assent of the directors to the bonds given by their cashiers, need not appear. Such grave acts or omissions as may justify the suing out a *scire facias*, to vacate the charter, ought to be evidenced by their records; but such unimportant acts as taking bonds from their officers, need not appear; these may be inferred. I do not concur in this proposition. I neither admit the distinction which has been alleged, nor do I admit, that the bond of a cashier is to be classed with unimportant transactions. Congress has not prescribed the intrinsic importance which shall entitle any transaction of a bank to a place on its record, but has legislated on the idea that a record of its proceedings will be kept. And if such a distinction could be found, the bonds of officers, entrusted with all the money of the bank, are among the most interesting of its duties. Congress has manifested this opinion, by enacting, that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors in a sum not less than \$50,000, with a condition for his good behavior, and the faithful performance of his duties to the corporation." Congress, then, considered the bonds to be given by the cashiers as a subject of real importance; and congress was right in this opinion. It requires very little knowledge of the interior of banks, to know that the interests of the stockholders *are committed, [111 to a very great extent, to these and other officers. It was, and ought to have been, the intention of congress, to secure the government, which took a deep interest in this institution, and to secure individuals, who embarked their fortunes in it, on the faith of government, so far as possible,

United States Bank v. Dandridge.

from the malpractices of its officers. One of the means employed for this purpose is the bond required from the cashier. Are the directors at liberty to dispense with this requisition? I think they are not. Should a committee of congress, on inspecting the books of the corporation, find that cashiers were acting without bonds, would not such gross negligence, such utter disregard of the positive mandate of the law, furnish serious cause for a *scire facias* to vacate the charter?

It has been urged that the rule for which the defendants contend, would break in upon all the usages of the bank, invalidate all the notes they have discounted, and destroy their liability for deposits. I do not think so. I do not profess to understand banking operations; but I think the counsel for the defendants has plainly shown, that not a single note is discounted, without evidence, in writing, on the note itself, or on the books of the bank, or on both. It is admitted that the official acts of the officers of the bank are binding, and, of course, written memorandums, made by such officer, in pursuance of orders of the board, whether on the note itself, or in a book, is a corporate act—is written evidence of such order of the board of directors as the writing imports. The counsel for the defendant has, I think, shown from "the rules and regulations for conducting the business of the Bank of the United States," as well as from the practice under those rules, that all transactions of that character are, as they ought to be, in writing. He has shown also, conclusively, as I think, that full provision is made both for general and special deposits; and in my judgment, every difficulty of this description is removed by the 23d rule, which shows that a regular record is, as it ought to be, kept of all the proceedings of the board of directors. So much of that rule as applies to this subject is in these words:

"The proceedings of the board of directors, when conducting *their
*112] business as a deliberative body, shall be governed by the following articles: 1st. When the president takes the chair, the members shall take their seats. 2d. The minutes of the preceding meeting shall be read, before the board proceeds to any other business; and no debate shall be admitted, nor question taken at such reading, except as to errors and inaccuracies. The state of the bank shall then be read, and the discounts settled."

The board, then, does act as a deliberative body, and does keep a minute of its proceedings, which are to be read over and corrected. On what subject does the board deliberate, if not on the measures which are to be taken for the security of its debts, and on the sufficiency of the sureties in the bonds given by the officers who have the management of its funds? Most especially, it is bound to deliberate on the bonds to be given by the cashiers of the bank. This is a subject on which the directors are particularly commanded to exercise their judgment, by one of the fundamental articles of the constitution of the corporation. That article requires, that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in the sum of \$50,000, with a condition, &c. Is not the sufficiency of this bond, then, most especially a subject for deliberation? If it be, how is this deliberation to be conducted? The rules prescribe the mode with precision, and go so far as to direct, that "at the request of any two of the board, the names of the members who make and second a motion, shall be entered on the minutes." The bond must be offered, and the question ought to be put

and must be put, whether it shall be accepted. The acceptance is necessary to the completion of delivery, and is the only proof which can be given of that fact, unless it be delivered to an attorney, previously appointed by a board to receive it. Acceptance, undoubtedly, includes approbation, but is the deliberate act of the board, and must appear in their minutes. If it must, a copy of those minutes is, in a suit brought by the bank, the only admissible evidence of the fact.

*I think it worthy of remark, that among these rules and regulations not one is found, which ordains that a record shall be kept, in [*113 which the proceedings of the directors shall be inserted. They are framed upon the idea, that one must be kept. We find them speaking of the minutes, as if their existence was indispensable, and need not be prescribed. Imitating the charter, in this respect, it was deemed unnecessary to ordain, that a being should write, whose organization gave it not the means of transacting business otherwise than by writing.

The counsel for the plaintiffs has sought to escape the almost insuperable difficulties which must attend any attempt to maintain the proposition, that a corporation aggregate can act without writing, by insisting that the directors are not the corporation, but are to be considered merely as individuals who are its agents. If this proposition can be successfully maintained, it becomes a talisman, by whose magic power the whole fabric which the law has erected respecting corporations, is at once dissolved. In examining it, we encounter a difficulty in the commencement. Agents are constituted for special purposes, and the extent of their power is prescribed, in writing, by the corporate body itself. The directors are elected by the stockholders, and manage all their affairs, in virtue of the power conferred by the election. The stockholders impart no authority to them, except by electing them as directors. But we are told, and are told truly, that the authority is given in the charter. The charter authorizes the directors to manage all the business of the corporation. But do they act as individuals, or in a corporate character? If they act as a corporate body, then the whole law applies to them as to other corporate bodies. If they act as individuals, then we have a corporation which never acts in its corporate character, except in the instances of electing its directors, or instructing them. The corporation possesses many important powers, and is, as a corporation, to perform many important acts, scarcely one of which is to be performed in a corporate character. They are all to be performed by agents, acting as individuals, under general powers conferred by the charter.

*It cannot escape notice, that this rule, if it be one, would apply to [*114 almost all corporations aggregate, and would abolish the distinction which has been taken between those which act by an individual, and those which act by an aggregate of persons. The first partakes of the qualities of a sole corporation, the last of a corporation aggregate. This rule would apply to almost every corporation aggregate which exists, or which ever has existed. The exceptions are the very few, in which all the members are active, or in which the corporation acts by a single individual who is its head. All others act by boards, usually described in the charter. If the president and directors of the Bank of the United States act as individuals, then it would seem, that the managers of every other corporations, being in like manner created by charter, and being in like manner empowered by

United States Bank v. Dandridge.

charter to transact all the affairs of the corporation, would likewise act as individuals, and the whole doctrines of the law upon the subject, would find nothing to which they are applicable.

But these doctrines grow out of adjudged cases, and courts have always considered those official agents, whose powers are described in the charter, and who act collectively, as acting in a corporate character. The idea has, I believe, never before been suggested, that their acts were to be treated as the acts of individuals. They do not appear as individual acts ; they are not in the name of individuals, but of the corporate body. In all the cases which have come before this court, that of the *Bank of Columbia v. Patterson's Administrators*, as well as all others, directors are considered as acting in their corporate character. In the cases in England, where the Bank of England has been a party, and in all others, the same view has always been taken of the subject. The president and directors form, by the charter, a select body, in which the general powers of the corporation are placed. This body is, I think, the acting corporation ; and, according to the 4th article of the fundamental rules, seven of them, including the president or the director deputed by the president, are necessary to constitute a board. The act of the major part of the board, is the act of the whole, and binds the *115] corporation ; but this act must, on general *principles, be done at one and the same time, and at a regular meeting held for the purpose. (Kyd Corp. 309.) Its validity depends on the legal constitution of the board, and on its being the act of the body. These essential requisites must be shown ; and to show them, the board must keep a record of its proceedings. Were the by-laws silent on the subject, this would be, as I think, rendered indispensable, by the fact, that it is the act of a corporation aggregate.

If there must be a record of their proceedings, and even were this necessity not absolute, if the by-laws show that there is one, it follows, that this record, not the oral testimony of the members, or of bystanders, must prove their acts. Their acceptance of any deed, or their assent to any contract, if it be their own act, must appear on this record ; if it be by agents, authorized for the purpose, the vote giving the authority must appear in like manner.

The 6th article of the fundamental rules directs, that "each cashier or treasurer, before he enters upon the duties of his office, shall be required to give bond, with two or more sureties, to the satisfaction of the directors, in a sum not less than \$50,000, with a condition," &c. As the bond is to be given, before the cashier enters upon the duties of his office, it must be given, before he can rightfully perform any official act ; and it will be admitted, that the sureties to an official bond are responsible only for the official acts of the officer. This bond cannot be given till it is received, for they are different, and equally necessary parts of one and the same act ; but if it could, the law specially requires that it shall be "to the satisfaction of the directors." The "satisfaction" must be as to the sufficiency of the sureties, for the amount of the penalty is fixed by law. This is a subject on which the judgment of the directors must be exercised, and it can be exercised only at a regular meeting of a board, legally constituted. This must appear by the record. Any opinion given otherwise, is the opinion of individual members, but is not the corporate opinion of the board—is not a corporate

United States Bank v. Dandridge.

act, binding on the corporation, or of which the corporation can avail itself.

It appears to me, that the bond must be received and approved by the board, before the cashier can regularly perform any official act. This reception and approbation are *required by the law which enables the corporation to act. They cannot be dispensed with. That they have [*116 been performed, must be proved or presumed. If they have been performed, they are upon record, for the very act of performance places them upon record. This record, or an authentic copy of it, must, according to the rules of evidence, be produced, that it may prove itself. May its existence be presumed in this case? The corporation, which claims this presumption, keeps the record, and is now in possession of it, if it exists. No rule of evidence, is more familiar to the profession, than that a paper cannot be presumed, under such circumstances.

I have stated the view which was taken by the circuit court of this case. I have only to add, that the law is now settled otherwise, perhaps, to the advancement of public convenience. I acquiesce, as I ought, in the decision which has been made, though I could not concur in it.

JUDGMENT.—This cause came on, &c. : On consideration whereof, it is ordered and adjudged, that there was error in the circuit court in rejecting the evidence offered by the plaintiffs in the first bill of exceptions stated, and not suffering the same to go to the jury in support of the issues joined in the case; and also, that there was error in the said court, in rejecting the evidence offered by the plaintiffs in the second bill of exceptions, and not suffering the same to go to the jury in support of the same issues; this court being of opinion, that the evidence was admissible in favor of the plaintiffs, notwithstanding there was no record of any approval of the bond stated in said bill of exceptions, by the board of directors of the bank aforesaid, and that the plaintiffs were at liberty to prove the fact of such approval by the said board, by presumptive evidence, in the same way and manner as such fact might be proved in the case of private persons not acting as a corporation, or as the agents of a corporation. And it is further ordered and adjudged, that for the error aforesaid, the judgment of the said circuit court be, and hereby is, reversed and annulled, and that the same be remanded to the said circuit court, with directions to award a *venire facias de novo*.

*WILLIAMS v. NORRIS.

Jurisdiction.—Error to state court.

Under the 25th section of the judiciary act of 1789, c. 20, where the construction of any clause in the constitution, or any statute of the United States, is drawn in question, in any suit in a state court, the decision must be against the title or right set up by the party under such clause of the constitution or statute, or this court has no appellate jurisdiction in the case. It is not sufficient, that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute.

Where, in such a case, the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision has been in favor of its validity, it is necessary to the exercise of the appellate jurisdiction of this court, that it should distinctly appear, that the title or right of the party depended upon the statute. The opinion of the court, or the reasons given for its judgment (unless in the case of instruction, to the jury, spread upon the record by a bill of exceptions), form no part of the record within the meaning of the above 25th section.¹ Nor are they made a part of the record, in Tennessee, by the local law of that state, requiring the judges to file their opinions in writing among the papers in the cause.

No orders in the state court, after the removal of the record into this court (not made by way of amendment, but introducing new matter), can be brought into the record here. The cause must be heard and determined upon the record, as it stood when removed.

ERROR to the Supreme Court of Errors and Appeals of the State of Tennessee.

January 11th, 1827. This cause was argued by *White* and *Eaton*, for the plaintiff; (a) and by *Benton* and *Polk*, for the defendant. (b)

January 19th. MARSHALL, Ch. J., delivered the opinion of the court.—

*118] This is a writ of error to a judgment rendered in the *highest court for the state of Tennessee; consequently, this court can exercise no other jurisdiction in the case than is given by the 25th section of the judiciary act. The counsel for the plaintiff in error contend, 1st. That an act of congress has been drawn into question in the state court, and that the decision has been against that act. 2d. That an act of the legislature of Tennessee, which impairs the obligation of a contract, has been drawn into question, and that the decision has been in favor of the party claiming under that act.

As preliminary to a consideration of these points, it is necessary to inquire, whether some additional papers, which have been brought up by a *certiorari*, constitute a part of the record. These papers are, the opinion of one of the judges, which is supposed to have been delivered and filed as the opinion of the court that decided the cause; and some proceedings which took place in the same court, after the record had been removed into this court by writ of error.

(a) *Miller v. Nicholls*, 4 Wheat. 311.

(b) *Martin v. Hunter*, 1 Wheat. 304; *Inglee v. Coolidge*, 2 Id. 363; *Lanusse v. Barker*, 3 Id. 147.

¹ *Davis v. Packard*, 6 Pet. 41; *Medbury v. Ohio*, 24 How. 413; *Rector v. Ashley*, 6 Wall. 142. But under the act of 1867, the certified opinion of the court below may be looked into, to determine the question of jurisdiction. *Murdock v. Memphis*, 20 Wall. 591. If, however, the record show upon its face, that a federal

question was not necessarily involved, and do not show that one was raised, the court will not go outside of it, to the opinion or elsewhere, to ascertain whether one was in fact decided. *Moore v. Mississippi*, 21 Id. 638; *Citizens' Bank v. Board of Liquidation*, 98 U. S. 140.

Williams v. Norris.

1. Is the opinion a part of the record? As a general proposition, every gentleman of the profession will, without hesitation, answer this question in the negative. An opinion, not given to the jury, pronounced after a verdict was rendered, and, consequently, having no influence on that verdict, which states merely the course of reasoning which conducted the court to its judgment, may explain the views and motives of the court, but does not form a part of its judgment, and cannot constitute a part of the record.

The counsel for the plaintiff does not contend for the general principle, but insists that an act of the legislature of Tennessee makes the opinion a part of the record in the courts of that state. An act passed in the year 1809, "to establish circuit courts, and a supreme court of errors and appeals," enacts, "that the judges of the court of errors and appeals, as well as the circuit court judges, shall, as to the decisions on all material points, file their opinions in writing among the papers of the cause in which such opinion may be given, within ten days from the delivering of the same." *This [*119 sentence amounts to no more than a provision that the opinion of the judges shall appear, and shall be preserved with the other papers; but does not make that opinion a part of what is technically denominated "the record," more than the other papers in the cause among which it is filed. Depositions, and exhibits of every description, are papers in the cause, and in one sense of the word, form a part of the record. In some states, they are recorded, by direction of law. But in a jury cause, they constitute no part of the record on which the judgment of an appellate court is to be exercised, unless made a part of it by bill of exceptions, or in some other manner recognised by law. But the plaintiff relies on the succeeding sentence as making the opinions of the judges a part of the record. That sentence is in these words: "And where a writ of error shall be allowed to reverse the judgment of any circuit court, in any cause, the clerk thereof shall send a transcript of the opinion of the judge to the court of errors and appeals, with the balance of the record in the cause, properly certified." It is contended, that the words "balance of the record," show the intention of the legislature that the opinion of the judge shall constitute a part of that which is technically the record.

The capacity of a legislature to control the proceedings of courts is not questioned, and if its will be unequivocally declared, that will must be obeyed; but in construing a law, implications are not to be drawn from careless expressions, which would produce unreasonable results, and subvert the usual course of legal proceedings. Can the opinion of the judge introduce any fact into the cause? Where a judgment is rendered on a special verdict, for example, can he, by an opinion, filed ten days afterwards, control the facts found in that verdict? Or can he, by anything inserted in his opinion, warrant any legal inferences which the verdict itself would not justify, or in any manner change the legal effect of the finding? If the opinion cannot produce these results, for what purpose is it introduced into the record? It can be introduced for no other purpose, than to suggest to the superior court those arguments which might otherwise *escape its [*120 notice, which operated in producing the judgment, and which, in the opinion of the legislature, ought to be weighed by the superior court, before that judgment should be reversed or affirmed. If the judgment should be correct, although the reasoning by which the mind of the judge was con-

Williams v. Norris.

ducted to it, should be deemed unsound, that judgment would certainly be affirmed in the superior court. We cannot, therefore, imply from the loose expressions which have been cited, so extraordinary a result, as that the opinion of the court, filed after judgment, as an argument, should be considered as a part of what is technically denominated the record, or should be a supplement to the verdict. In the present case, the opinion which was filed, has been inspected, and seems to have been founded on a construction of the laws of the state, without calling into question the constitution of the United States or any act of congress. This, however, is not relied on, because, as has been stated, the opinion has no other influence on the cause, than it would have had, if published in a book of reports.

If the court could have been doubted on the proper construction of this section, the fact that it has never been understood in the courts of the state, in the sense for which the counsel for the plaintiff in error now contends, would be conclusive on the question. It is also not entirely unworthy of remark, that so much of the section as requires the judges of the circuit court to file their opinions in writing, was repealed, before the judgment in this case was pronounced; consequently, that part of the section which contains the words by which the doubt was created, form no longer a part of the law.

The *certiorari* has also brought up a supplemental record, which contains a motion made in the state court, by the plaintiff in error, after the cause had been removed into this court, to amend the record or entries of the judgment, by inserting the questions which were decided by the judges. The reasons for and against this motion are spread upon the record; and the facts which would give jurisdiction to this court, are asserted by the one *121] party and denied by the *other. The court took time for advisement, and does not appear to have granted or rejected the motion.

This court is decidedly of opinion, that no orders made in the court of the state, after the removal of the record into this court by writ of error, not made by way of amendment, but introducing new matter, could be brought into it, or could in any manner affect it. The cause must be tried on the record as it stood when removed, not upon the subsequent proceedings, which were pressed in the state court, after its final judgment was given. In the present case, nothing is before the court but the original record.

That record exhibits a *caveat* against the issue of a grant on a survey, made for the defendant, and assigns various causes why it should not be issued. The plaintiff claimed under a patent from the state of Tennessee; and the *caveat* was the proper process to contest the right of the defendant. On the trial, a jury, in pursuance of the act of the legislature of that state of 1807, ch. 1, § 8, was "impanelled and sworn, for finding such facts as are material to the cause, and not agreed on by the parties." The jury found, 1st, that on the 3d day of May 1784, Ezekiel Norris made his entry in the office of John Armstrong, entry-taker of western lands, reciting the words of the entry. In the margin, the following words are inserted, "detained for non-payment." 2d. That on the 18th of November 1815, a duplicate warrant of survey was issued by the commissioner of West Tennessee to the said Norris, a copy of which is annexed. The 3d fact is, that the entry was special; and the 4th, that the tract of land, which the

Williams v. Norris.

entry called to adjoin, was notorious. 5th. That the original warrant, No. 2047, to Ezekiel Norris, issued and was filed in the comptroller's office of North Carolina, without any indorsement thereon; that it was detained for non-payment. The copy of the warrant is found, and is incomplete, being without the signature of John Armstrong, the entry-taker.

The caveatee required the jury to find, as a fact, that the purchase-money was paid by Norris, and that the memorandum in the margin, "detained for non-payment," was a *fraudulent entry. The jury refuse to find this fact, and in its stead, find, "that it is not proved to them, that the [*122 consideration, at the rate of 10¢ per hundred for every hundred acres, for the entry of the said Ezekiel Norris, in question, was duly paid to John Armstrong, entry-taker, &c., and that afterwards it was falsely and fraudulently inserted in the margin of the entry-book containing said entry, and opposite to the same, by some person, 'detained for non-payment.'"

The act of North Carolina, which authorized entries to be made in John Armstrong's office, contains the following enactment: That every person claiming, before he shall be entitled to enter a claim for any of the said lands, shall pay into the hands of the entry-taker, at the rate of ten pounds in specie, or in specie certificates at their nominal value, &c., for every hundred acres so entered. The 19th section directs every entry-taker within the state, to make out and deliver to the surveyor, on or before the first day of April and the first day of October, annually, the warrants for the several entries (which are not disputed) made in his office, with an indorsement prescribed by law, showing the number and date of the entry.

The circuit court for the county of Lincoln decided, that Williams, the caveator, had the better right. This judgment was carried to the court of errors and appeals by writ of error, where it was reversed, and the *caveat* dismissed. That judgment is now before this court; and in considering it, we are confined to the inquiry, whether the record shows any misconstruction of an act of congress, or of the constitution of the United States.

In 1789, North Carolina ceded her western territory to the United States, reserving to herself the right of perfecting titles, in all cases where entries had been made according to law. Under this reservation, several acts were passed, directing warrants of survey to be issued on entries made in John Armstrong's office, where the purchase-money had been or should be paid. In 1796, Tennessee was erected into a state. In 1803, North Carolina entered into a compact with the state of *Tennessee, in which the former ceded to the latter the power to issue grants, and perfect [*123 titles to all claims of land lying in the said state, which power had been reserved to herself by North Carolina, in her acts ceding her then western territory to the United States. This compact was assented to by congress. In 1806, congress passed an act, ceding to the state of Tennessee all the rights of congress to lands lying east and north of a line described in the act. The land in controversy is within the territory thus ceded by congress.

If any stipulation in the compact between North Carolina and Tennessee could have affected the controversy between Williams and Norris, it must have been, because the title of Norris came within the reservation made by the state of North Carolina in her act of cession to congress. That reservation was the subject of the compact. As the controversy was not between two persons, claiming under North Carolina, but between a person claiming

Williams v. Norris.

under North Carolina, and one claiming under the state of Tennessee, and the decision was in favor of the title set up under North Carolina, we cannot perceive how that decision can be considered as a violation of the compact. North Carolina stipulates that titles should be issued by the state of Tennessee for lands to which there were valid claims under her laws, and for which patents might have been issued by her, had the compact not been made. If the title of Norris was valid, according to the laws of North Carolina, then the decision in his favor is in pursuance of the compact; if it was not valid, according to those laws, then the case is not within the compact. In either view of it, the compact has not been violated.

The act which gives the sanction of congress to this agreement, also cedes to Tennessee a large territory, comprehending the lands in controversy. This cession is made on several conditions, one of which respects all existing claims to lands under the state of North Carolina. Its operation is understood to be, so far as it can affect the case now before the court, precisely the same with that of the compact between the two states. The same *124] observations *apply to it as were applied to that instrument. The title, for the benefit of which it was intended, if it has any influence in the case, has prevailed. Consequently, neither the compact between the states, nor the act of congress which assents to that contract, and which confers on the state of Tennessee the power to perfect titles in the district of country which comprehends the lands in controversy, can have been violated.

A point of rather more difficulty remains to be considered. It is contended, that the validity of a statute of the state of Tennessee has been drawn into question in this case, on the ground of its being repugnant to the constitution, and the decision has been in favor of its validity. The act supposed to be unconstitutional is, "an act for the relief of Ezekiel Norris."

It is not stated in the record, that the constitutionality of this act was drawn in question; and the 25th section of the judiciary act declares, that "no error shall be assigned or regarded, but such as appears on the face of the record, and immediately respects the before-mentioned questions of validity, or construction of the said construction," &c. The case of *Miller v. Nicholls*, 4 Wheat. 311, has been relied on, to prove that it is not necessary to the jurisdiction of the court, that the record should, in terms, state a misconstruction of the act of congress, or that it was drawn in question. It is sufficient to give the court jurisdiction, that the record should show that an act of congress was applicable to the case. The case of *Miller v. Nicholls*, was a claim filed by Mr. Dallas, the attorney of the United States, for a sum of money brought into a state court of Pennsylvania to be disposed of by the court. The money belonged to a debtor of the United States, who was also indebted to the state of Pennsylvania. The court decreed the money to the state, in pursuance, it is presumed, of an act of the legislature, giving the state a preference. The case was brought, by writ of error, into this court, upon the allegation that the judgment was in violation of the act of congress, which gives priority to the United States in all cases of insolvency. This court dismissed the writ of error, because the fact of *125] *insolvency not having been shown, it did not appear from the record, that the act of congress, or the constitutionality of the state law, was

drawn into question. The court added, that the record need not state, in terms, a misconstruction of the act of congress, or that it was drawn in question. The act of congress applies to every insolvent debtor of the United States, and gives them priority as to all the property of the debtor which he possessed when the insolvency took place ; but it applies only to cases of insolvency. Had the record shown, that this was a case of insolvency, so that the act of congress applied to it, that act must have been misconstrued, or its obligation denied, when the court decreed the money to the state of Pennsylvania ; and the court was of opinion, that the act could not have been evaded, by the omission to refer to it in the judgment, or to spread it on the record.

To apply the principle of that case to this, it will be necessary to show that the title of Norris depended on the act passed in his favor by the legislature of Tennessee, and that the act was repugnant to the constitution. That act is in these words : " Be it enacted," &c., " that the commissioner of West Tennessee be and he is hereby authorized to issue to Ezekiel Norris, certificates or warrants to the amount of 2280 acres, being the amount of two entries, No. 2046, for 1000 acres, and No. 2047, for 1280 acres, on which no warrants or grants were issued ; provided that the said Ezekiel Norris shall produce sufficient evidence to the said commissioner, that the consideration for said entries was paid, and that no warrant or grant ever issued on said entries." When this act passed, a patent had been granted by the state of Tennessee to the plaintiff in error, comprehending a part of the land covered by the entry of Norris. If its effect was, to annul that patent, and to give a new title to Norris, the act would come within the the decision of this court in the case of *Fletcher v. Peck*, as a law impairing the obligation of contracts. In determining whether such was its effect, it is necessary to inquire, whether Norris's entry was absolutely void, or gave an incipient title, capable of being *carried into grant. If the purchase-money was paid, the entry was valid. If not paid, the entry [*126 might be void, or only voidable. The words of the act under which it was made have been cited, and may admit of either construction. It is a question for the legislature and courts of the state, and its decision the one way or the other would not be repugnant to the constitution of the United States. It is apparent, that the legislature of North Carolina has not considered these entries, where the purchase-money was not paid at the time, as being absolutely void, but has supposed them to be capable of being perfected, and carried into grant, as the legislature might direct.

In 1794, the comptroller was directed to issue warrants in all cases in which the purchase-money had been paid. In 1796, it was enacted, that no grants should issue on warrants on entries made in John Armstrong's office, unless it should appear by Armstrong's books, or other sufficient testimony, that the purchase-money had been paid. The next succeeding section of the same act authorizes any person entitled to such entry to pay into the treasury the amount or balance of the purchase-money, upon which a warrant may be issued. In 1798, the legislature appointed commissioners to investigate the frauds suggested to have been committed in the secretary's office, and directed that no grant should issue on warrants obtained on entries which the commissioners might deem fraudulent. The act of 1799,

Williams v. Norris.

ch. 7, § 16, directs warrants to issue on all entries, where the requisites of the law have been, or shall be, complied with.

The legislation of North Carolina, to the year 1803, proceeds upon the idea, that the entries made in John Armstrong's office, for which the purchase-money had not been paid, were not absolutely void, but might be made good, by paying the purchase-money, or such part of it as remained due. The right seems to have been considered as preserved and suspended, until the purchase-money should be paid. In this state of things, the power of perfecting titles, which had been retained by North Carolina in her cession act, was transferred to Tennessee, on condition that titles *should *127] be perfected, or entries made, under the laws of that state, according to the requisites of those laws.

In 1806, c. 1, § 45, the legislature of Tennessee appointed commissioners to decide on the validity of entries, with directions to admit no warrants on entries made in John Armstrong's office, if it may appear to the said commissioners that the purchase-money has not been paid. By the act of 1807, c. 20, §§ 25, 29, it is enacted, that where it shall appear to either of the commissioners, that entries have been made in John Armstrong's office, on which the purchase-money has been paid, in whole or in part, warrants may issue for so much land as has been paid for. But it is provided, that the person exhibiting such claim, shall produce a certificate from the comptroller of North Carolina, showing what sum was paid on the said entry. This act was continued in force till the 1st of January 1815. In October 1815, an act passed, directing that there should be one commissioner in East, and one in West Tennessee, each of whom should exercise the powers which had been vested in commissioners by the act of 1806.

We do not understand, that the propriety or obligation of these acts has ever been questioned by the courts of either North Carolina or Tennessee. We do not understand, that the courts of either state have ever questioned the legislative construction of the act, opening the office in which this entry was made. That construction is, that entries received by John Armstrong, though not accompanied by the purchase-money, were not absolutely void, but would become valid, should the purchase-money be afterwards paid; and that such proof of payment might be received as the legislature should prescribe. It cannot be doubted, that numerous titles are held under this construction of the law. Its correctness or incorrectness does not seem to involve any constitutional question, or any question which can give this court jurisdiction in a cause which has been determined in a state court.

Had the claim of Ezekiel Norris been decided by the commissioners, acting under the general law, it would probably never have been contested. What difference is there, so far as respects its constitutionality, between the *act passed in his particular case, and the act containing a general *128] reference of all cases of the same description to the commissioner? The difference consists solely in this: the general act admits no other proof of payment than a certificate from the comptroller of North Carolina; the particular act authorizes the commissioner to establish the claim on sufficient evidence; that is, we presume, on such evidence as is generally admissible in a court of justice. We know of no principle which could impose on the legislature of the state the necessity of exacting from the claimant, under an entry made in John Armstrong's office, as indispensable to the establishment

Williams v. Norris.

of his claim, a certificate from the comptroller of North Carolina, that the purchase-money had been paid. The act of 1794 left the fact of payment open to legal proof. The act of 1798 required that it should appear by Armstrong's books, or other legal testimony. If, then, the general act of Tennessee had allowed the commissioner to issue warrants, on sufficient proof, such act might have been questioned on the ground of policy, but not of right. If this be correct, if the legislature might have dispensed with this testimony in a general law, why may it not be dispensed with in a particular law, where its effect on the cause is precisely the same as if it had been general? There are, undoubtedly, great and solid objections to legislation for particular cases. But these objections do not necessarily make such legislation repugnant to the constitution of the United States.

The act "for the relief of Ezekiel Norris," did not authorize the commissioner to grant him a certificate or warrant on his entry, unless he should prove that the purchase-money had been paid. The laws had preserved such entries, and, consequently, an act to enable the proprietor of one of them to prosecute his claim, is not necessarily an act impairing the obligation of a contract.

The question whether the judgment of the commissioner was conclusive evidence that the purchase-money had been paid, is entirely distinct from the constitutionality of the law, and the decision of the state court upon it cannot be revised in this court.

*We are of opinion, that this record does not exhibit a case of which this court can take jurisdiction, and that the writ of error [*129 ought, therefore, to be dismissed.

JUDGMENT.—This cause came on, &c. : On consideration whereof, this court is of opinion, that there is no error apparent on the face of the record, of which this court can take jurisdiction : It is, therefore, considered by this court, that the writ of error be dismissed, and that the cause be remanded to the supreme court of errors and appeals of the state of Tennessee.

MONTGOMERY, Plaintiff in error, v. HERNANDEZ and others, Defendants in error.

Error to a state court.

Under the 25th section of the judiciary act of 1789, ch. 20, this court has no appellate jurisdiction from the final judgment of the highest court of a state, in a suit where is drawn in question the construction of a statute of, or a commission held under, the United States, unless some title, right, privilege or exemption, under such statute, &c., be specially set up by the party, and the decision be against the claim so made by him.¹

Where a suit was brought in a state court, upon a marshal's bond, under the act of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defence to the action, that the suit ought to have been brought in the name of the United States, and the court decided that it was well brought, by the party injured, in his own name: *Held*, that the exemption here set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants, under the act of congress, this court had no authority to re-examine the judgment, so far as respected the construction of that part of the act, which provides, that suits on marshal's bonds, "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards."

Under the 4th section of the same act, although the condition of the marshal's bond, is broken by his neglecting to bring money into *court, directed to be so brought in, or to pay it
*130] over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it, if not commenced within six years.

ERROR to the Supreme Court of Louisiana.

February 24th, 1827. This cause was argued by *D. B. Ogden*, for the plaintiff in error; and by *Key*, for the defendants in error, citing Pothier, des Oblig., No. 655; de Prescription, No. 22-3; 8 Cranch 91-2.

February 28th. *TRIMBLE*, Justice, delivered the opinion of the court.—This case is brought up by writ of error from the highest court of law of the state of Louisiana. The case is, that the defendants in error instituted a suit, in their own names, in the district court of the state, for the first judicial district, upon the bond given by Michael Reynolds to the United States, as marshal of the district of Louisiana, conditioned to be void, upon his "well and faithfully executing the duties of his said office;" and the plaintiff in error having executed the bond, as one of the marshal's sureties, and the marshal having since died, the suit was brought against the plaintiff in error and the said Reynolds's personal representative.

The breach of the condition of the bond alleged, is, that by the order of the district court of the United States for the district of Louisiana, in a suit in admiralty, wherein the defendants in error were libellants, against the schooner *Estrella* and her cargo, the vessel and cargo were directed, by the court, to be sold by the marshal, and the proceeds of the sale held by the marshal, subject to the order of the court; that the marshal, in pursuance of that order, sold the vessel and cargo, and received the money; that the court of admiralty, by its final decree in the cause, directed the vessel and cargo, or the proceeds thereof, to be restored to the libellants; and that the marshal had failed to pay over to the libellants, \$3126, part of the proceeds, as was his duty, under the final order and decree of the court.

¹ Crowell v. Randell, 10 Pet. 368. The act of 1837, re-enacted by the Revised Statutes, § 709, does not affect this rule; the court has often

since re-affirmed it. Citizens' Bank v. Board of Liquidation, 98 U. S. 142.

Montgomery. v. Hernandez.

The suit having been commenced and prosecuted, by petition, according to the practice of the civil *law, which prevails in Louisiana, the respondent, Montgomery, put in his answer, admitting the execution of the bond, but insisting, that as the bond was executed to the United States, and the defendants in error no parties to it, they had no right or interest in the bond, and could not sue for a breach of the condition thereof ; and denying the breaches alleged in the petition. By a supplemental answer, in the nature of a plea of the act of limitations, Montgomery alleged, if any breach had taken place, that more than six years had intervened since the cause of action, before the institution of the suit. [*131]

The record states, that the jury sworn in the cause, after hearing testimony, and receiving a charge from the court, returned a verdict for the defendants in error for the sum of \$3126 ; for which sum judgment was rendered upon the verdict in their favor. From this judgment, Montgomery appealed to the supreme court of the state, where the judgment of the district court was affirmed ; and this judgment is sought to be reversed in this court upon the present writ of error.

On the trial of the cause in the district court, Montgomery objected to the admission, as testimony, to the jury, of certain documents, purporting to be accounts of the marshal's sales of the Estrella and cargo ; and his objections being overruled, he excepted to the opinion of the court, admitting the papers offered ; and his exception was sealed, and made part of the record.

The appellate jurisdiction of this court, in cases decided in the state courts, is very special and limited in its character. By the 25th section of the judiciary act, made in pursuance of the constitution, it is provided, " That a final judgment or decree, in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such *validity ; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or [*132] commission held under, the United States, and the decision is against the title, right, privilege or exemption, specially set up by either party, under such clause of the constitution, treaty, statute or commission, may be re-examined, and reversed or affirmed, by the supreme court of the United States." Under these provisions, we have no authority to re-examine the whole case. We can re-examine so much, and such parts of it only, as come within some one or other of the classes of questions enumerated in the act of congress, and so much of the case as must necessarily be decided to arrive at such question.

It has been insisted, for the plaintiff in error, that the question raised upon the record, whether Hernandez, not being a party to the marshal's bond given to the United States, could maintain a suit upon it in his own name only, without suing in the name of the United States, for his use, is a question which can be re-examined in this court. We are not of that opinion. It is not every misconception of an act of congress by a state

Montgomery v. Hernandez.

court, that will give this court appellate jurisdiction. It is where the party claims some title, right, privilege or exemption, under an act of congress, and the decision is against such right, title, privilege or exemption. In this case, the plaintiff in error did not, and could not, claim any right, title, privilege or exemption, by or under the marshal's bond, or any act of congress giving authority to sue the obligors for a breach of the condition; or, at most, his claim to exemption rests upon form, and not substance, as the law expressly charges him, and the objection is only that the name of the United States should have been inserted for the use of the plaintiff. However we might be inclined to the opinion that, regularly, and in point of form, the suit should have been in the name of the United States, for the use of Hernandez, we have no jurisdiction or authority to re-examine, and either reverse or affirm, the decision of the state court, on that ground.

*133] *The only part of the case over which we can rightfully exercise appellate jurisdiction, is that raised by the supplemental answer, pleading the prescription or bar of six years; in which the party claims an exemption under the laws of the United States, from liability as surety of the marshal; the decision in the state court being against the exemption so specially set up by him. The act of congress passed in 1806, relating to bonds given by marshals, enacts, "that all suits on marshals' bonds, if the cause of action has already accrued, shall be commenced and prosecuted within three years after the passage of this act, and not afterwards; and all such suits, in case the right of action shall accrue hereafter, shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards," &c. (2 U. S. Stat. 374.)

It is obvious, that whether this act of congress exempts the plaintiff in and from responsibility or not, must depend upon the time when the right of action accrued to Hernandez & Co., for any injury sustained by reason of the marshal's failure to perform his duty. It was the duty of the marshal, under the order of the court of admiralty, directing him to sell the Estrella and cargo, and hold the proceeds subject to the future order of the court, to bring the money into court as soon as received by him, in order that it might be deposited in the branch Bank of the United States. The order of the court directing the marshal to hold the proceeds until the further order of the court, can only be construed to mean, that he should hold them in the manner prescribed by law. The law directs the money to be deposited in the name of, and to the credit of, the court; and provides, that the money so deposited shall not be drawn out of the bank, without the order of the court. The object of the law was, to prevent the officers of the court from holding money, in such cases, in their own hands, and converting it to their own use. It was only a partial execution of the precept of the court, to sell the vessel and cargo; its mandate was not faithfully performed, until the proceeds were brought into court by him, in order to be deposited according to law, or until he paid it over to Hernandez, as

*135] *directed by the final decree and order of the court. The marshal's failure to bring in the money, or to pay it over to Hernandez & Co., was a violation of his duty, and a breach of the condition of his bond.

The supreme court of the state decided, that although the breach of the condition of the bond took place more than six years before the institution of this suit, yet the plaintiff's right of action did not accrue until within the

Winn v. Jackson.

six years ; and that, consequently, the act of limitations, constituted no bar to the action. This court perfectly accords in opinion with the supreme court of the state.

If it be true, that the condition of the bond was broken, at the time the marshal failed to bring the money into court, to be deposited in the bank, or pay it over to Hernandez & Co.; and if it be true, that the breach of the condition of the bond was to the injury of Hernandez & Co., yet, it is not true, that Hernandez & Co. had, at that time, any right of action. The record of the proceedings in the court of admiralty shows that the Estrella and cargo were sold, and the proceeds received by the marshal ; and that the suit was finally decided in the district court, on the — day of —, 1817 ; by which final decree the proceeds were ordered to be paid over to Hernandez & Co. An appeal was presented from that decree in this court ; where it was affirmed at the February term in the year 1819, within less than six years before the institution of this suit. It is perfectly clear, that Hernandez & Co. had no right to demand of the marshal the proceeds of the sales, or to sue for the recovery thereof, until after the affirmance in this court. The right of action was suspended, during the pendency of the appeal in this court ; and during such suspension, the statute of limitations did not run against him.

We are, therefore, of opinion, that the supreme court of Louisiana have misconstrued neither the act of congress limiting actions upon marshals' bonds to six years from the time the right of actions accrues, nor any other act of congress, to the prejudice of the plaintiff in error.

Judgment affirmed, with costs and six per cent. damages.

*WINN'S Heirs v. JACKSON and others.

[*136]

Final judgment.

The judgment of the highest court of law of a state, deciding in favor of the validity of a statute of a state, drawn in question on the ground of its being repugnant to the constitution of the United States, is not a final judgment, within the 25th section of the judiciary act of 1789, ch. 20, if the suit has been remanded to the inferior state court, where it originated, for further proceedings, not inconsistent with the judgment of the highest court.

ERROR to the Court of Appeals of Kentucky. This was an ejectment, originally brought in the Harrison circuit court of the state of Kentucky, by the plaintiffs in error, against the defendants in error, and judgment being rendered for the plaintiffs, the cause was carried, by writ of error, to the court of appeals, being the highest court of law and equity of that state. The judgment was reversed in the court of appeals, and the cause remanded to the Harrison circuit court, for further proceedings, not inconsistent with the decision of the court of appeals. Whereupon, the plaintiffs sued out their writ of error, under the 25th section of the judiciary act of 1789, c. 20, and brought the cause before this court, as being a suit where was drawn in question the validity of a statute of the state of Kentucky, on the ground of its being repugnant to the constitution of the United States, and the decision being in favor of its validity.

Postmaster-General v. Early.

February 1st, 1827. *Wickliffe* moved to quash the writ of error, upon the ground, that although the decision of the court of appeals was in favor of the validity of the statute which had been drawn in question, as being repugnant to the constitution of the United States, the judgment of that court was not "a final judgment," within the true meaning of the 25th section *of the judiciary act of 1789, ch. 20, the case having been *136] remanded to the circuit court of Harrison for further proceedings. (a)

Motion allowed.

The POSTMASTER-GENERAL OF THE UNITED STATES v. EARLY and others.

Suits by the postmaster-general.—Postmaster's bond.

The circuit courts of the Union have jurisdiction, under the constitution, and the acts of April 30th, 1810, ch. 262, § 29, and of March 3d, 1815, ch. 782, § 4, of suits brought in the name of "the postmaster-general of the United States," on bonds given to the postmaster-general, by a deputy postmaster, conditioned "to pay all moneys that shall come to his hands for the postages of whatever is by law chargeable with postage, to the postmaster-general of the United States for the time being, deducting only the commission and allowances made by law for his care, trouble and charges, in managing the said office," &c.

The postmaster-general has authority to take such a bond, under the different acts establishing and regulating the post-office department, and particularly under the act of April 30th, 1810, ch. 262, § 29, 42.¹

CERTIFICATE of Division from the Circuit Court of Georgia. This was an action of debt, commenced in the circuit court for the district of Georgia, by the district-attorney of the United States for that district, in the name of the postmaster-general of the United States, against the defendants, on a bond executed by them, in June 1820, to the postmaster-general of the United States, the condition of which, after reciting that Eleazer Early (one of the co-obligors and defendants in the suit) is postmaster, at Savannah, provides, that if he shall perform the duties of his office, "and shall pay all moneys that shall come to his hands for the postages of whatever is by law chargeable *with postage, to the postmaster-general of the United *137] States for the time being, deducting only the commission and allowances, made by law, for his care, trouble and charges, in managing the said office," &c., "then the above obligation shall be void."

(a) He cited *Gibbons v. Ogden*, 6 Wheat. 448.

¹ Postmaster-General v. Reeder, 4 W. C. C. 678; Postmaster-General v. Rice, Gilpin 554; Postmaster-General v. Appleback, 16 Haz. Pa. Reg. 8. This last case was a suit in the district court for the eastern district of Pennsylvania, upon the bond of the postmaster of Cherryville, to recover a balance in his hands. The action was brought in 1831, and the defendant set up the presumption of payment arising from lapse of time. On the 19th of May 1835, the following opinion was delivered by—

HOPKINSON, J.—When the bond was taken, there was no law requiring one; it was customary to take it, and the supreme court have decided, that the postmaster-general had a right to

take such bond. Lapse of time is alleged by the defendants; but it has not been such, in this case, as to raise a presumption of payment. The next question is, what is the effect of the proviso in the 3d section of the act of 1825. The law of 1825 is the first which requires a bond, and that proviso, or clause fixing two years for suit, applies to such bonds only. If otherwise, the plaintiff would be disabled from recovering, because he had not brought a suit, when he was not bound to do it. Before the act of 1825, he was not required to sue within two years, yet, for not suing within that time, he would, by the defendant's construction, lose his remedy. Verdict for plaintiff.

Postmaster-General v. Early.

The breach assigned was, that the said E. Early did not pay to the postmaster-general the moneys which came to his hands, as postmaster at Savannah, but that the sum of \$7736.64 was still in arrear and unpaid. The defendants pleaded to the jurisdiction of the court, that this was "not a suit in which the United States are a party, nor is the debt declared on, one contracted, authorized, or arising under a law of the United States, and over which jurisdiction has been given to this honorable court." On the argument of the cause in the court below, the opinions of the judges of that court were opposed upon the question of jurisdiction, and it was certified to this court for a final decision.

March 9th. The cause was argued by the *Attorney-General* and *Wheaton*, for plaintiff; and by *Webster* and *Berrien*, for the defendants.

On the part of the *plaintiff*, it was contended: 1. That the laws of the United States gave, and were intended to give, the jurisdiction now in question. *Osborn v. Bank of the United States*, 9 Wheat. 738, 825, 901, 902. If there was any apparent discrepancy in the laws on the subject, it grew out of the fact, that the post-office department existed long before the establishment of the present constitution, and congress had dealt with it as an existing institution of the government. The laws now in force, and the usage which had grown up under them, of the postmaster-general taking bonds to secure the official good conduct of his deputies, and bringing suits on them in the courts of the Union, would be best explained by a recurrence to this historical fact. The post-office act of April 30th, 1810, ch. 262, § 29, which is a consolidation of the former laws on the subject, directs the postmaster-general to "cause a suit to be commenced against any postmaster who does not *render his quarterly accounts, and pay over the balance to the postmaster-general;" and provides, "that all suits which shall [138 hereafter be commenced for the recovery of debts or balances due to the general post-office, whether they appear by bond or obligations made in the name of the existing, or any preceding, postmaster-general, or otherwise, shall be instituted in the name of the postmaster-general of the United States." The 42d section of the same act repeals the former post-office laws, with a proviso, saving suits and the bonds given by deputy postmasters for the faithful execution of their several duties and offices. The act of the 3d of March, 1815, ch. 782, § 4, declares, "that the district courts of the United States shall have cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim or matter in dispute, shall not amount to \$100." It was admitted, that the clause giving the jurisdiction to the circuit courts, was awkwardly expressed in this last section, which seemed to have been drawn upon the supposition that the jurisdiction already resided in those courts; yet it was insisted, that this was equivalent to a declaration of the legislative will, that it should be exercised by them, since the district courts could not have a concurrent jurisdiction with the circuit courts in such suits, unless the latter had, by law, cognisance of the same. If it should be objected, that though the circuit courts might have cognisance of actions where any officer of the United States sues under the authority of any act of congress, yet there is

no such act authorizing the postmaster-general to take the bond, on which this suit was brought ; it was answered, that the authority to sue on such a bond, given in the 29th section of the act of 1810, is an implied authority to take it, and a legislative recognition of the notorious pre-existing practice of office, which is also strongly confirmed by the proviso in the 42d section, saving all suits and the bonds given by postmasters. Even if it were doubtful, whether he could take a bond for the faithful discharge, by his deputies, of their official duties, without an *express authority by law, a *139] bond might certainly be taken to secure the payment of moneys due to the government in the post-office department, as well as to an individual, or to a corporation. *Dugan v. United States*, 3 Wheat. 172. A mere voluntary bond, taken at common law, for a purpose not unlawful, and adapted as means to attain the end contemplated by the statute, would be valid, and a suit might be maintained upon it in a court of competent jurisdiction. 2 Ld. Raym. 1459 ; s. c., 2 Str. 745 ; 2 Dall. 122 ; 6 Binn. 292 ; 12 Mass. 367 ; Pet. C. C. 47.

2. If, then, the bond was a lawful bond, and the postmaster-general was authorized to cause a suit to be commenced on it, in his official name, and if the intention of congress to vest jurisdiction over such suit in the circuit courts was sufficiently manifested, the only remaining question would be, whether the laws conferring this jurisdiction were consistent with the constitution, by which the judicial power is extended to "all cases in law and equity arising under the laws of the United States," and to controversies to which the United States shall be a party." That this was a case arising under the laws of the Union, was self-evident ; and that it was a controversy to which the United States is a party, would appear from an examination of the record. The suit is brought by the district-attorney of the United States, in the name of the postmaster-general, not for his own benefit, but as the public agent of the government, and a trustee for the United States. The acts of public officers, within the sphere of their authority, are the acts of the government ; and the money to be recovered being the property of the United States, when recovered, the United States are parties to the suit. *Osborn v. Bank of the United States*, 9 Wheat. 902. There was a distinction between a formal party to the suit, and a substantial party to the controversy. This distinction might be illustrated by the ordinary principle applicable to assignments of *choses in action*, where the suit is brought by the assignee, in the name of the assignor, but the latter cannot control it." 1 Wheat. 235 ; 5 Ibid. 277. So *also, the assignee of the crown has *140] a right to sue in the name of the crown. Cro. Jac. 82. There, the crown is no party to the controversy, though a party to the suit ; here, the postmaster-general is the nominal party on the record, but the United States is the real party to the controversy. In the case of *Brown v. Strode*, 5 Cranch 303, where the suit was brought in the name of "the justices of the peace for the county of Stafford," who were citizens of Virginia, against the defendant, a citizen of the same state, to recover a debt due to a British subject, the alien was there considered as the substantial party to the suit, it being brought for his benefit. So, in England, many suits in which the public is concerned, are not brought in the name of the crown. Thus, at common law, independent of any statutory provision, the attorney-general exhibits, in his own name, an information of debt, which is called the king's

Postmaster-General v. Early.

action of debt ; or, if a discovery is wanted, an English information in the exchequer, called the king's bill in equity. Here, the attorney-general is the nominal party, whilst the crown is the substantial party for whose benefit the suit is brought. Bunb. 225, 262, 558, 223 ; Parker 37, 279 ; HALE, in Harg. L. Tr. 216 ; 2 Anstr. 558 ; Coop. Eq. Pl. 21-2 ; Mitf. Eq. Pl. 22 ; Barton's Eq. 59. And the prosecutions under the revenue laws are frequently brought by the commissioners of excise and the customs, or by their order, in the name of the attorney-general ; or, in minor cases, by the inferior officers of the revenue ; but the public is always considered as the substantial party to the suit. 2 East 362 ; 1 Chit. Com. Law 801, 824.

For the *defendants*, it was argued, that whatever might be the extent of the judicial power, as defined in the constitution, the tribunals inferior to the supreme court, and created by congress, could only exercise such jurisdiction as was expressly conferred upon them by statute. But it was insisted, that this was not "a case arising under the laws of the United States," nor "a controversy to which the United States are a party." And in this view, it was *insisted: 1. That there was no law of congress which, in terms, required or authorized the postmaster-general to take the bond [*141 on which the suit was brought. There was, indeed, no express inhibition of such a bond, but the supposed implied authority to take it was negated by the obvious policy of the post-office laws. That policy was to secure the collection of the dues to the department, by requiring prompt settlements, enforced by the personal responsibility of the postmaster-general, as provided in the 29th section of the act of 1810. It was not meant to rely upon this provision as constituting a ground of defence for a deputy-postmaster sued by the postmaster-general for official negligence, upon the primary obligation imposed on him by accepting the office, and not accounting for the public moneys received in his official capacity. It was only contended, that it excluded the idea of the postmaster-general being authorized to take a security not expressly authorized by the law, from an agent appointed by him, removable by him, and accountable to him. This inference was supported by the new provision inserted in the 3d section of the amended post-office act of 1815, expressly authorizing and requiring him to take such a bond. This was a legislative declaration, negating the right under any pre-existing statute. The question here was not, whether this might not be good, as a voluntary bond at common law. Without stopping to inquire whether the United States have a system of unwritten law, to which an official bond, not authorized by any statute of congress, can be referred for its validity, it was said, that the cases cited to show that the bond might be sustained at common law, were foreign to the present inquiry. This was a question of jurisdiction, which depended upon the other question, whether this bond (admitting it to be valid at common law), when made the foundation of an action, presented a case arising under the laws of the United States. To make it a case arising under those laws, the bond must not only be valid, but must be authorized by statute ; and the case could no more be said to arise under the laws of the United States, than that of a voluntary bond taken by the marshal, or the collector, from their deputies.

*2. But even supposing the bond in question was authorized to be taken by the laws of the United States, jurisdiction of a suit brought [*142

Postmaster-General v. Early.

upon it could only be vested in the circuit court, by some express legislative enactment. Though the case may be included in the constitutional grant of jurisdiction, some act of congress is necessary to enable the courts to exercise it. *Bank of the United States v. Deveaux*, 5 Cranch 85; *McIntire v. Wood*, 7 Ibid. 503. So far from congress having conferred this jurisdiction on the circuit courts, the post-office act, whilst it is silent as to the courts of the Union, expressly confers it on the state courts. As to the judiciary act of 1815, § 4, the title of that act shows the intention of congress to limit its operation to the state courts and to the district courts of the United States. If it can be construed to extend to the circuit courts of the Union, its effect is merely to give them jurisdiction in the specified cases, where "the debt, claim or matter in dispute, shall not amount to \$100." The words "concurrent with the circuit courts," were not intended to give jurisdiction to those courts. Similar expressions are found in the 9th and 11th sections of the judiciary act of 1789, but it had never been supposed, that such was their effect. It is possible, that the act was passed, upon the mistaken supposition that the jurisdiction was already vested in the circuit court. But this could not make the law; and the court would not construe this particular act, contrary to its plain intent, however erroneous the opinion which produced it.

3. The remaining question was, whether the United States were a party to the suit. And even admitting that the proceeds would accrue to their benefit, that the money which the bond was given to secure, was their money for which *assumpsit* could have been maintained against the principal obligor, in their name; still, as it regarded the co-obligors or sureties, this was a new contract, not depending on any pre-existing debt, liability or obligation from them to the United States. Their obligation arises exclusively from the bond, which binds them to the postmaster-general alone; *143] no action could be maintained against them by the *United States, upon the bond, nor in the form of an express or implied *assumpsit*, to recover the money, the payment of which the bond was intended to secure. Could, then, the United States be considered as parties to the suit, for the purpose of giving the court a jurisdiction, which it would not take, if they were, in fact, parties to the suit, or (in the words of the judiciary act of 1789) "plaintiffs or petitioners?" The jurisdiction, as derived from the character of the parties, must depend, not on the question who is the substantial party in interest, but who is the formal party on the record. *Osborn v. Bank of the United States*, 9 Wheat. 855-7. Independent of the circumstance, that the United States had no interest, on the face of the bond, which would entitle them to maintain an action on it, they are inhibited from being parties to the suit, even as against the principal obligor, by the express provisions of the post-office act of 1810, § 29, which directed that all such suits "shall be commenced in the name of the postmaster-general of the United States." Even supposing, therefore, that congress has legislated upon the unfounded assumption that the jurisdiction was already vested in the circuit court, or supposing that the case is a *casus omissus*, can the judicial power correct the mistake, or supply the defect? Even in the case of *choses in action*, assigned to the United States as collateral security for debts due to the government, the defect of jurisdiction was incontestible, and attended with great practical inconveniences; and yet congress has

Postmaster-General v. Early.

recently refused to supply it, by authorizing suits upon such securities to be brought in the courts of the Union. The case of *Dugan v. United States*, 3 Wheat. 172, went upon the ground, that in all cases of contract with the United States, they had a right to enforce it, by an action in their own names, unless a different mode of suit was prescribed by law. But if, in that case, the treasurer of the United States had been authorized and required to sue, in his official name, on all bills which should be indorsed to him for account of the government, would this court have sustained jurisdiction of an action brought on such bills by the United States in their own name?

*March 15th, 1827. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—The [*144 post-office department was established at the commencement of the revolution, under the superintendence of a postmaster-general, who was authorized to appoint his deputies, and was made responsible for their conduct. Soon after the adoption of the present government, in September 1789, congress passed a temporary act, directing that a postmaster-general should be appointed, and that his powers, and the regulations of his office, should be the same as they last were, “under the resolutions and ordinances of the last congress.” The power of appointing deputies, therefore, and the responsibility for their conduct, still remained with the postmaster-general.

This act was continued until the first day of June 1792. In February 1792, an act was passed, detailing the duties and powers of the postmaster-general, and fixing the rates of postage. It directs his deputies to settle at the end of every three months, and to pay up the moneys in their hands; on failure to do which, it becomes the duty of the postmaster-general “to cause a suit to be commenced against the person or persons so neglecting or refusing. And if the postmaster-general shall not cause such suit to be commenced, within three months from the end of every such three months, the balances due from every such delinquent shall be charged to and recoverable from him.” This act was to take effect on the first of June 1792, and to continue for two years. In May 1794, a permanent act was passed. It retains the provision requiring the postmaster-general to settle quarterly with his deputies, but omits that which makes it his duty to cause suits to be instituted within three months after failure.

In March 1799, the subject was again taken up, and congress passed an act, which retains the clause making it the duty of the deputy-postmasters to settle their accounts quarterly, and reinstates that which directs the postmaster-general to cause suits to be instituted against delinquents; substituting six months in the place of three, after the expiration of the quarter, under the penalty of being himself chargeable with the arrears due from such delinquent. This *act declares, that all causes of action arising under [*145 it may be sued before the judicial courts of the several states, and of the several territories of the United States. In April 1810, congress passed an act for regulating the post-office establishment, which enacts, among other things, that all suits thereafter to be brought for the recover of debts or balances due to the general post-office, should be instituted in the name of “the postmaster-general of the United States.” This act also authorizes

Postmaster-General v. Early.

all causes of action arising under it to be sued in the courts of the states and territories.

In March 1815, congress passed "an act to vest more effectually in the state courts, and in the district courts of the United States, jurisdiction in the cases therein mentioned." This act enables the state courts to take cognisance to all suits arising under any law for the collection of any direct tax or internal duties of the United States. The 4th section contains this clause : "And be it further enacted, that the district court of the United States shall have cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits at common law, where the United States, or any officer thereof, under the authority of any act of congress, shall sue, although the debt, claim or other matter in dispute, shall not amount to one hundred dollars." On these several acts, the question of jurisdiction depends.

The suit is brought for money due to the United States ; and, at any time previous to the act of 1810, the suit for the money, had no bond been taken, might have been brought in the name of the United States. It is not certain, that, independent of the bond, it could have been instituted in the name of any other party. The courts of the United States, had, of course, jurisdiction. The laws make it the duty of the postmaster-general to "cause suits to be instituted," not to bring them ; and it was not until March 1799, that congress authorized these suits to be instituted in the state courts. It is obvious, that the right to institute them in those courts, anterior to the passage of that act, was doubted ; at any rate, was not exercised ; for it *146] could not have *been deemed necessary to give expressly the power to sue in those courts, had the power been admitted to exist, and been commonly exercised. We must suppose, then, that these suits were usually instituted in the courts of the United States ; and no doubt could be entertained on the question of jurisdiction, if they were brought, as they certainly might have been, in the name of the United States.

The act of 1810 directed, that all suits for debts, or balances due to the general post-office, should be brought in the name of the postmaster-general. The manner in which this change in the style of the suit might affect jurisdiction, was not noticed, and no provision was made for this new state of things. These debts and balances which were due to the general post-office, were not due to the officer personally, but to the office, and were to be sued for, and collected, for the United States. The money belonged to the nation, not to the individual by whose agency it was to be brought into the treasury. The whole course of opinion, and of legislation, on this subject is, that, although for convenience, and to save expense to the debtors, recourse may be had to the state courts for the recovery of small sums, yet a right to resort to the courts of the Union in suits for money due to the United States, was never intended to be relinquished. If the effect of any provision in a statute be to abolish this jurisdiction, it must be an effect which was neither intended nor foreseen. That construction which will produce a consequence so directly opposite to the whole spirit of our legislation, ought to be avoided, if it can be avoided, without a total disregard of those rules by which courts of justice must be governed.

If the question had rested solely on the act of 1810, it is probable, that the aid of the legislature might have been thought indispensable to the juris-

Postmaster-General v. Early.

diction of the federal courts over suits brought for the recovery of debts and balances due to the general post-office. But it does not rest solely on that act. The act of 1815 contains a clause which does, we think, confer this jurisdiction. It cannot be doubted, that this clause vests jurisdiction expressly in the district courts, in all suits at common law, where any officer of the United States sues under the authority of any act of congress.

*147] "The postmaster-general is an officer of the United States, who sues under the authority of the act of 1810, which makes it his duty to sue for debts and balances due to the office he superintends, and obliges him to sue in his own name.

It has been contended, that this clause, if it gives jurisdiction, gives it only where the demand is under one hundred dollars. We do not think the words will sustain this criticism. The right to take cognisance of suits brought by any officer of the United States, under authority of any act of congress, is first given in general words, comprehending sums to any amount. The limitation which follows is not a proviso that the sum shall not exceed the sum of one hundred dollars; it is no restriction on the previous grant, but an enlargement of it, if an enlargement should be thought necessary. This act might be construed, in connection with the judiciary act of 1789, and a general clause giving jurisdiction might be limited as to amount, to the sum mentioned in the 9th section of that act. The subsequent words, therefore, of the section we are considering, were introduced for the purpose of obviating this construction, and removing the doubt, which might otherwise exist, of the right to take cognisance of sums less than one hundred dollars. After giving the jurisdiction generally, the words are, "although the debt, claim or other matter in dispute, shall not amount to one hundred dollars." These words do not confine the jurisdiction previously given to one hundred dollars, but prevent it from stopping at that sum.

The jurisdiction of the district courts, then, over suits brought by the postmaster-general for debts and balances due the general post-office, is unquestionable. Has the circuit court jurisdiction? The language of the act is, that the district court shall have cognisance, concurrent with the courts and magistrates of the several states, and the circuit courts of the United States, of all suits," &c. What is the meaning and purport of the words "concurrent with" the circuit courts of the United States? Are they entirely senseless? Are they to be excluded from the clause in which the legislature has inserted *them, or are they to be taken into view, and allowed the effect of which they are capable? The words are certainly not senseless. They have a plain and obvious meaning. And it is, we think, a rule, that words which have a meaning, are not to be entirely disregarded in construing a statute. We cannot understand this clause, as if these words were excluded from it. They, perhaps, manifest the opinion of the legislature, that the jurisdiction was in the circuit courts; but ought, we think, to be construed to give it, if it did not previously exist. Any other construction would destroy the effect of those words. The district court cannot take cognisance, concurrent with the circuit courts, unless the circuit courts can take cognisance of the same suits. For one body to do a thing concurrently with another, is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other. The

Postmaster-General v. Early.

phrase may imply, that power was previously given to that other ; but if, in fact, it had not been given, the words are capable of imparting it. If they are susceptible of this construction, they ought to receive it, because they will otherwise be totally inoperative, or will contradict the other parts of the sentence, which show plainly the intention, that the district court shall have cognisance of the subject, and shall take it to the same extent with the circuit courts.

It has been said, and perhaps truly, that this section was not framed with the intention of vesting jurisdiction in the circuit courts. The title of the act, and the language of the sentence, are supposed to concur in sustaining this proposition. The title speaks only of state and district courts. But it is well settled, that the title cannot restrain the enacting clause. It is true, that the language of the section indicates the opinion, that jurisdiction existed in the circuit courts, rather than an intention to give it ; and a mistaken opinion of the legislature concerning the law, does not make law. But if this mistake be manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The legislature may pass a declaratory act, which, though inoperative on the *149] past, may act *in future. This law expresses the sense of the legislature on the existing law, as plainly as a declaratory act, and expresses it in terms capable of conferring the jurisdiction. We think, therefore, that in a case plainly within the judicial power of the federal courts, as prescribed in the constitution, and plainly within the general policy of the legislature, the words ought to receive this construction.

So far as the suits brought by the postmaster-general were referred to in argument, in the case of *Osborn v. Bank of the United States*, this construction was assumed as unquestionable. As the act was referred to for the sole purpose of illustrating the argument of the point then under consideration, it was not examined with the attention which has since been bestowed upon it ; but the opinion then expressed, that the section we have been considering conferred jurisdiction on the courts of the United States over suits brought by the postmaster-general, was correct.

Had this suit been brought to recover the balance due from the deputy-postmaster, on his original liability to pay the money in his hands, no doubt would have been felt respecting the jurisdiction of the court. The act of 1810 gives the postmaster-general a right to sue for such balances, and the act of 1815 enables him to sue in the circuit or district courts of the United States. But it is contended, that he has no right to secure such balances by bond ; and, consequently, the bond being unauthorized, the act of congress cannot be construed to authorize a suit upon it. Were it even true, that an official bond cannot be taken in a case where it is not expressly directed by law, we do not think, that a bond taken to secure the payment of a sum of money is void, because it is also an official bond. Even supposing this bond to be void, so far as it is intended to stipulate for the performance of official duties, it is not necessarily void, so far as it stipulates for the payment of money of the United States, which might come to the hands of the deputy postmaster. That part of the condition which shows the bond was taken to secure the payment of money which should be received for the United States, is not vitiated by that part of it which shows that it was

Postmaster-General v. Early.

also taken *to secure the general official conduct of the deputy.¹ Now, a part of the condition is expressly, "that if he shall pay all moneys that shall come to his hands, for the postages of whatsoever is by law chargeable with postage," then the obligation is to be void. The obligation itself, on which the suit is brought, was intended to secure the payment of money collected for the United States, as well as the official conduct of the deputy; and as no law prohibited such an official bond, we cannot think, although it might not in itself be valid, that it would destroy an obligation taken for a legitimate purpose. As the breach assigned is altogether in the non-payment of the money collected, we do not think that, if a bond would be good, taken for this single object, it is made bad by being extended also to the official conduct of the obligor.

The inquiry then is, whether, under a fair construction of the acts of congress, the postmaster-general may take bonds to secure the payment of money due, or which may become due, to the general post-office. All the acts relative to the post-office, make it the duty of the postmaster-general to superintend the department, to regulate the conduct and duties of his deputies, and to collect the moneys received by them for the general post-office. May not these powers extend to taking bonds to the officer who is to perform them? May not these bonds be considered as means proper to be used in the collection of debts, and in securing them? If this interpretation of the words should be too free for a judicial tribunal, yet if the legislature has made it, if congress has explained its own meaning too unequivocally to be mistaken, their courts may be justified in adopting that meaning.

The 22d section of the act of 1799, after directing the postmaster-general to sue for all balances due from his deputies, within six months after the expiration of the three months within which they ought to have been paid, enacts, "that all suits, which shall be hereafter commenced for the recovery of debts or balances due to the general post-office, whether they appear by bond or obligation made in the name of the existing or any preceding postmaster-general, *or otherwise, shall be instituted in the name of the postmaster-general of the United States." These words follow imme- [*151
diately the clause which makes it the duty of the postmaster-general to sue for the money due from his deputies, and are obviously applied to the moneys in their hands. They show the sense of the legislature, that this money may be a "debt" or a "balance," may "appear by bond or obligation," or otherwise; and are, we think, a legislative exposition of the words, describing the power and duty of the postmaster-general in the superintendence of his department, and the means he may employ for collecting the money due from his deputies.

The 31st section of the same act, repeals the previous laws for establishing the post-office department, after the 1st day of the ensuing May; and adds a proviso to the repealing clause, that as to "all bonds, contracts, debts, demands, rights, penalties or punishments, which have been made, have arisen, or have been incurred," &c., "the said acts shall have the same effect, as if this act had not been made." It is said by the counsel for the defendants, that these words do not give efficacy to the bonds to which they refer,

¹ United States v. Bradley, 10 Pet. 343; Speck v. Commonwealth, 3 W. & S. 324; Shunk v. Miller, 5 Penn. St. 250.

but leave them as they were anterior to the repealing act. This is true. But they explain the sense of the legislature, respecting the powers of the postmaster-general, and the manner in which he might execute those powers.

An additional proviso extends even to official bonds. After continuing the postmaster-general and all his deputies in office, it adds, "and also the bonds which they or either of them have or may give for the faithful execution of their several duties, shall continue to have the same force and effect, to all intents and purposes, after the 1st day of May next, as though this act had not been made." This proviso also is no more than a recognition of the validity of those bonds; but it is a recognition of it, and goes the full extent of showing the legislative opinion that they might be taken. The act of 1810 repeals former acts, and contains the same provisions on this subject with the act of 1799.

The court has felt the pressure of this part of the case. *There *152] is always difficulty in extending the operation of the words beyond their plain import; but the cardinal rule of construction is, that where any doubt exists, the intent of the legislature, if it can be plainly perceived, ought to be pursued. It is also a rule, that the whole law is to be taken together, and one part expounded by any other, which may indicate the meaning annexed by the legislature itself to ambiguous phrases. The words describing the power and duty of the postmaster-general, may be expounded by other parts of the act showing the legislative opinion as to their extent; and if this be true, the sections which have been cited cannot be misunderstood. They show plainly that the legislature supposed it had given the postmaster-general authority to take these bonds.

A case cannot exist, in which effect may be given to the legislative intent more safely than in this. The bonds are taken in a case where no doubt can exist respecting the right and propriety of giving authority to take them; they are for money due to the United States; and the opinion of the legislature that authority was given, is expressed in as plain words as can be used. The acts of congress sustain the opinion, that they have been taken with the knowledge and approbation of the legislature, from the first establishment of the offices; and provision is made by law for their being put in suit. The courts of the United States have, until very lately, uniformly given judgments on them. Under these circumstances, we think ourselves justified in continuing to sustain them, and to certify, in this case, that the circuit court has jurisdiction of the cause.

Certificate accordingly.

*JACKSON *ex dem.* ST. JOHN *v.* CHEW.

Executory devise.—Local decisions.

E. being seised of lands in the state of New York, devised the same, by his last will and testament, to his son Joseph, in fee, and other lands to his son Medcef, in fee, and added, "It is my will, and I do order and appoint, that if either of my said sons should depart this life, *without lawful issue*, his share or part shall go to the survivor; and in case of both their deaths, *without lawful issue*, then I give all the property to my brother John E., and my sister Hannah J., and their heirs;" Joseph, one of the sons, died without lawful issue, in 1812, leaving his brother Medcef surviving, who afterwards died without issue: *Held*, that Joseph took an estate in fee, defeasible in the event of his dying without issue, in the lifetime of his brother; that the limitation over was good as an executory devise; and on the death of Joseph, vested in his surviving brother Medcef.¹

This court adopts the local law of real property as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of its unwritten law.²

The court, therefore, considered it unnecessary to examine the question arising upon the above devise, as a question of general law; or to review, and to attempt to reconcile, the cases in the English courts upon similar clauses in wills, the construction of this clause having been long settled by a uniform series of adjudications in New York, and having become a fixed rule of property in that state.

Anderson *v.* Jackson, 16 Johns. 382, and Wilkes *v.* Lion, 3 Cow. 333, followed.

ERROR to the Circuit Court for the Southern District of New York. The question presented by the special verdict in this case, arose upon the will of Medcef Eden, the elder, bearing date the 29th day of August 1798, by which will, the testator devised to his son Joseph, certain portions of his real and personal property, among which were the premises in question in this cause, "to have and to hold the same to him, his heirs, executors and administrators for ever." In like manner, he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and, after making some other provisions, added the following clause: "Item. It is *my [*154 will, and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths, without lawful issue, then I give all the property aforesaid to my brother, John Eden, of Loftus, in Cleveland, in Yorkshire, and my sister, Hannah Johnson, of Whitby, in Yorkshire, and their heirs." And the question was, what estate Joseph Eden (under whom the lessor of the plaintiff claimed) took in the premises in question.

The testator died soon after making his will, leaving his two sons, Joseph and Medcef, living. Joseph died in August 1812, without issue, leaving his brother Medcef alive. The lessor of the plaintiff claimed title derived from

¹ An executory devise over on the death of the devisee in fee, without heirs, when it is evident that by the word "heirs" is meant the children of the first taker, is good; the contingency is not too remote. *Berg v. Anderson*, 72 Penn. St. 87. The word "issue," is *prima facie* one of limitation, but the construction will yield to an intention apparent on the face of the will. *Kleppner v. Laverty*, 70 Id. 70. The words "dying without leaving issue," may be shown by the context to mean a dying without

issue, living at the death of the first taker. *Ingersoll's Appeal*, 86 Id. 240.

² *Bell v. Morrison*, 1 Pet. 352; *Henderson v. Griffin*, 5 Id. 151; *Green v. Neal*, 6 Id. 291; *Brashear v. West*, 7 Id. 609; *Beauregard v. New Orleans*, 18 How. 497; *Suydam v. Williamson*, 24 Id. 427; *Chicago v. Robbins*, 2 Black 419; *Sumner v. Hicks*, Id. 532; *Williamson v. Suydam*, 6 Wall. 723; *Williams v. Kirtland*, 13 Id. 306; *Walker v. State Harbor Commissioners*, 17 Id. 648; *Barrett v. Holmes*, 102 U. S. 655.

St. John v. Chew.

Joseph Eden, under the sale of the premises in question, by virtue of a judgment and execution against him, and sundry conveyances thereafter made of such title as set out in the special verdict. The defendant claimed under a title, derived from Medcef Eden, under the above-mentioned clause in his father's will, he having survived his brother. If Joseph Eden took an estate-tail, it was, by operation of the statute of the state of New York abolishing entails, converted into a fee-simple absolute, and the subsequent limitation became inoperative. That statute (passed the 23d of February 1786) declares, "that in all cases where any person would, if this act had not been passed, at any time hereafter, become seised in fee-tail of any lands, by virtue of any devise before made, or hereafter to be made, such person, instead of becoming seised thereof in fee-tail, shall be deemed and adjudged to become seised thereof in fee-simple absolute." So that if Joseph would have taken an estate-tail under the will, if the act of 1786 had not been passed, by operation of the statute, he became seised of an estate in fee-simple absolute, which was liable to be sold on the judgment against him, and the title under which the lessor claimed would be complete. But if Joseph took an estate in fee, defeasible in the event of his dying without issue, in the lifetime of his brother (which event happened), then Joseph's interest in the land became extinct on his death, and the limitation *155] over to his brother Medcef was *good, as an executory devise, and the defendant would consequently be entitled to judgment.

A judgment was entered upon the special verdict in the court below, for the defendant, *pro formâ*, by consent of parties, for the purpose of bringing the cause before this court.

January 25th. The cause was argued by the *Attorney-General* and *D. B. Ogden*, for the plaintiff; and by *Webster* and *Wheaton*, for the defendant.

On the part of the *plaintiff*, it was insisted, that Joseph Eden took an estate-tail under the devise to him, which, by the operation of the statute of 1786, was converted into a fee-simple absolute. The general rule that the words "dying without issue" import an indefinite failure of issue, was relied on to support this construction of the will. (a) And, although it was admitted, that there were circumstances which would limit those words to a definite failure of issue, yet it was denied, that there were any qualifying expressions in this devise, which would have that effect. There were certainly none such, unless the words, "his share or part shall go to the survivor," could be considered as having that effect. The earliest case, which would probably be relied upon to show that these expressions limited the failure of issue to issue living at the death of Joseph Eden, was that of *Pells v. Brown*, Cro. Jac. 590, where the testator devised to "Thomas, his son, and his heirs, for ever, paying to his brother Richard 20 pounds, at the age of 21 years; and if Thomas died without issue, living William, his brother, that then William, his brother, should have those lands to him, his heirs and assigns, for ever, paying the said sum as Thomas should have paid." Thomas having died without issue, and William having survived him, it was

(a) The counsel here referred to all the cases cited, and commented on, by Mr. Chancellor KENT, in *Anderson v. Jackson*, 16 Johns. 405-24.

St. John v. Chew.

determined, that this was a contingent fee to William, by way of executory devise. Now, to test the authority of this case as to the effect of the word *survivor, it was only necessary to refer to *King v. Rumball*, Cro. [*156 Jac. 448 (s. p. *Webb v. Hearing*, Ibid. 415), decided three years before, in which a devise to three daughters, and if they all died without issue, then over, was held to create an estate-tail; and to the case of *Chadock v. Cowley*, Ibid. 695, determined four years subsequently to *Pells v. Brown*, where the same court held, that the word *survivor* had no such effect as is here attributed to it. In that case, the testator devised all his lands in Bradmere, to Thomas, his son, and his heirs, for ever, and his lands in Eastleak, to Francis, his son, and his heirs, for ever, and then added: "Item. I will that the survivor of them shall be heir to the other, if either of them die without issue." This was held to be an estate-tail in Thomas. As to the more modern cases of *Porter v. Bradley*, 3 T. R. 143, and *Roe v. Jeffery*, 7 Ibid. 589 which would be relied upon to show that the term *survivor* had this effect the remarks of Mr. Justice STORY, in *Lillibridge v. Adie*, 1 Mason 236, might be applied to these cases, and would, at the same time, illustrate the general question. "In respect to terms of years, and other personal estates, courts have very much inclined to lay hold of any words to tie up the generality of the expression, dying without issue, and to confine it to dying without issue living at the time of the person's decease. But in respect to freeholds, the rule has been rigidly enforced, and rarely broken in upon, unless there were strong circumstances to repel it. Fearn's Ex. Dev. 357-61 (Butler's ed. 471-6); *Crooke v. De Vandes*, 9 Ves. 197; *Dansey v. Griffiths*, 4 Maule & Selw. 61. The cases of *Porter v. Bradley*, and *Roe v. Jeffery*, have gone a great way, but they turn on distinctions, which, though nice, clearly recognise the general rule." In a recent English case, the word *survivors* was relied upon to raise an inference of restrictive intention; but Sir W. GRANT held, that the word had the same sense as the word *others*, "as (says he) has *been frequently decided." *Barlow v. Salter*, 17 Ves. 479. So, in *Massey v. Hudson*, 2 Meriv. 135, in a case of personal [*157 property, the presumption that a bequest over to the survivor of two persons, after the death of one without issue, was meant as a personal benefit to the survivor, was held to be repelled by the addition of the words, executors, administrators or assigns. *Roe v. Scott and Smart*, Fearn's Ex. Dev. (4th ed.) 203, presented precisely the same case with that before the court; and yet it was there held, that the indefiniteness was not restricted, by force of the word survivor. In the present case, it could not be considered as having that effect, because the testator, in using the term survivor, did not intend the individual brother surviving, but the surviving branch; consequently, if Medcef had died, having issue, in the lifetime of Joseph, and Joseph had afterwards died without issue, the issue of Medcef would have taken Joseph's share; and so also, in case of any more remote failure.

As to the local decisions in the state courts of New York, giving a construction to this and other similar clauses in wills, it was said, that the present question did not turn upon the interpretation which the local tribunals had given to the statute of 1786, or upon any other law peculiar to the state; but that the sole question was, whether Joseph Eden took an estate-tail, which was a question of general law; and if he did, it was incontestible, that the statute converted his estate into a fee-simple, and, conse-

St. John v. Chew.

quently, the plaintiff was entitled to recover. The decisions of the state courts would receive no more respect in the present case, than in any other question of common law which might come before this court; and to show that the state decisions had proceeded upon mistaken grounds, the arguments and authorities urged by Mr. Chancellor KENT, in *Anderson v. Jackson*, 16 Johns. 397, 424, were relied upon, and enforced with a great variety of illustrations.

*[158] On the part of the *defendant*, it was admitted, that a devise, to take effect after a preceding estate in fee-simple, upon an indefinite failure of issue, or (which is the same thing) where there are no expressions restricting that failure to a life in being, and the usual allowance for minority and gestation, cannot operate as an executory devise, because it would tend to a perpetual restriction of alienation, and is, therefore, void. But where the failure of issue is definite, and by plain words, or necessary implication, declared to take effect, if at all, within a life in being, a limitation by executory devise is valid, and would be sustained both in England and New York. But the peculiar state of the law of real property in England, would account for the application of a different rule to the construction of these limitations, when applied to real property, from what would prevail in the case of personal property (*Forth v. Chapman*, 1 P. Wms. 663); whilst the institutions of this country might justify and require the application of the same rule to both. 1 N. C. Law Rep. 544; 1 Hen. & Munf. 301; 20 Johns. 483.

It was not, however, deemed necessary to resort to this distinction, since it was insisted, that the construction put upon this devise was sustained by the general current of decisions in Westminster Hall, ever since *Pells v. Brown*, Cro. Jac. 590, which had been called by Lord KENYON "*the magna charta* of this branch of the law," and had never been departed from. *Porter v. Bradley*, 3 T. R. 143. (*Lippitt v. Hopkins*, 1 Gallis. 460.) In that case, the devise over was in the event of the first taker dying without issue, living his brother William; in this case, the devise over is to the survivor of the two brothers. In grammatical and legal construction, it is impossible to distinguish between a brother surviving, and a brother living at the death of the first taker. All the modern cases confirm the authority of *Pells v. Brown*, and it was also sustained by the general principles and analogies of the law. 1 P. Wms. 534, 565; *Porter v. Bradley*, 3 T. R. 143; *Roe v. Jeffery*, 7 Ibid. 589; *Beachcroft v. Broome*, 4 Ibid. 440. As to the anomalous case of *Chadock v. Cowley*, Cro. Jac. 695, it was directly contrary to the authority of *Pells v. Brown*, and the long series of decisions following it, and therefore, could not be law, even supposing it to be correctly reported, which might well be doubted. The case states, that if the devise had been, "that if he died without issue, in the life of the other, or before such an age, that then it should remain to the other, then, peradventure, it should be a contingent devise in tail, if it should happen, and not otherwise." No lawyer would pretend, at this day, that a devise to one and his heirs, and in case he die without issue, in the life of another, or if he died before the age of 21, then over, is an estate-tail, either vested or contingent. It is, like the present case, an estate in fee-simple, defeasible on the event happening, with a valid executory devise over. The other cases

St. John v. Chew.

cited by Mr. Chancellor KENT (*Anderson v. Jackson*, 16 Johns. 397-424), would all be found to range themselves under one of the following classes : 1. Where there are no words to control the indefinite failure of issue. *Tenny v. Agar*, 12 East 213 ; *Romilly v. James*, 6 Taunt. 263 ; *Brice v. Smith*, Willes 1 ; *Doe v. Fonnereau*, 2 Doug. 487 ; *Denn v. Slater*, 5 T. R. 335 ; *Doe v. Ellis*, 9 East 382 ; *Hunters v. Haynes*, 1 Wash. 71 ; *Ide v. Ide*, 5 Mass. 500 ; *Royall v. Eppes*, 2 Munf. 479. 2. Where the first estate is only for life, and enlarged by implication to an estate-tail, by the limitation over, or failure of issue. *Webb v. Hearing*, Cro. Jac. 415 ; *King v. Rumball*, Ibid. 448 ; *Sutton v. Wood*, Cam. & Norw. 202. 3. Where the first taker left issue, and the executory devise, in consequence, could not take effect. *Roe v. Scott*, 2 Fearn 259 ; *Hope v. Taylor*, 1 Burr. 268 ; *Doe v. Rivers*, 7 T. R. 276 ; *Denn v. Slater*, 5 Ibid. 335. 4. Several cases cited against the construction insisted on by the defendant in the present case, which are manifestly in favor of that construction. *Kirkpatrick v. Kirkpatrick*, 13 Ves. 476 ; *Richardson v. Noyes*, 2 Mass. 56 ; *Porter v. Bradley*, 3 T. R. 143 ; *Roe v. Jeffery*, 7 Ibid. 585 ; *Hauer v. Shitz*, 3 Yeates 205 ; *Ray v. Enslin*, 2 Mass. 554 ; *Keating v. Reynolds*, 1 Bay 80 ; *Jones v. Rice*, 3 Desauss. 165. *In *Massey v. Hudson*, 2 Meriv. 130, the master of the rolls considers the words, executors, administrators and assigns, [*160 as showing the intent of the testator to vest the interest, and make it transmissible. But in the present case, there are no words of limitation annexed ; and if it be said, they are implied, the same might be said of every legatee, who, if no words of restriction are added, takes an absolute interest, transmissible to his executors, &c. But here, the interest was neither vested nor transmissible. *Barlow v. Salter*, 17 Ves. 479, cannot be reconciled with the general course of English adjudications in cases of personal property, and is entirely inconsistent with the American authorities. Fearn 431 n. ; 1 S. & R. 144-59 ; 3 Ibid. 470. As to the notion of the word survivor being used to indicate the surviving branch or stock ; in the recent case of *Waller v. Andrews*, 2 Bing. 126, it is expressly laid down, that "survivor or survivors," mean not the surviving stocks, but the surviving children. And Mr. Fearn (Ex. Dev., 6 Lond. ed., 545) observes, that though the authorities have established on solid ground, the power of testamentary dispositions of contingent and executory estates, and possibilities coupled with an interest, and such as would be descendible to the heir of the object of them, dying before the contingency or event on which the vesting or acquisition of the estate depended ; yet the decisions do not appear to reach those cases, where the contingent interest is not transmissible from any person, until the contingency decides him to be the object of the limitation. Now, it has been decided, that a testamentary disposition of an estate, devised to the survivor of two persons, while both are alive, is not valid, although the person making the disposition becomes the survivor ; because, till by the death of the other, he so becomes the survivor, he has no interest whatever in the land. *Doe v. Tompkinson*, 2 M. & S. 165. So also, Mr. Preston observes, that mere possibilities, to persons not ascertained, as to the survivor of several persons, are not coupled with an *interest, and are not devisable, [*161 nor, he apprehends, transferrible to assignees under a commission of bankruptcy. 1 Preston on Estates 76. So again, "titles under possibilities or expectancies are of two descriptions : 1. Possibilities coupled with an inter-

St. John v. Chew.

est. 2. Possibilities without any interest. Those possibilities which are not coupled with an interest are not devisable, but all titles under them may be barred, excluded, or bound by estoppel. Such are the expectancies of an heir apparent or presumptive, or of persons where the gift is to the survivor, and both are living." Preston's Abst. Tit. 204. So, a power given to the survivor of two persons, cannot be well executed by both of them, while alive. Sugd. Powers 162; 3 Bro. C. C. 310.

In addition to the argument upon the case, as a question of general law, the counsel referred to the decisions of the state courts of New York, as conclusively establishing the construction contended for on the part of the defendant in error, as a settled rule of property in that state, *Fosdick v. Cornell*, 1 Johns. 440; *Jackson v. Blanshan*, 3 Ibid. 292; *Moffat v. Strong*, 10 Ibid. 12; *Jackson v. Staats*, 11 Ibid. 337; *Anderson v. Jackson*, 16 Ibid. 382; *Wilkes v. Lion*, 2 Cow. 333; and to the decisions of this court, showing that the law thus established by a long series of adjudications in the local tribunals, would be respected here. 5 Cranch 32; 9 Ibid. 93; 6 Wheat. 127; 7 Ibid. 550; 8 Ibid. 535-42; 10 Ibid. 159; 11 Ibid. 367-8.

February 8th, 1827. THOMPSON, Justice, delivered the opinion of the court, and after stating the case, proceeded as follows:—Questions growing out of devises of this description, are among the most difficult and intricate doctrines of the law; and from the numerous cases that have arisen, as found reported in the books, it will be seen, that nice and almost imperceptible distinctions have been resorted to, with the avowed object of carrying into effect the intention of the testator. To review the cases that have arisen in the English *courts on these questions, would be an arduous, *162] and to reconcile them, a difficult, if not a fruitless, undertaking. Nor are the decisions of the state courts in our own country in perfect harmony with each other. It is not deemed necessary, however, in the present case, to enter into an examination of these various decisions, either for the purpose of attempting to reconcile them, or to extract from them principles, which might be applicable to the case now before the court, if the question was considered entirely an open question. The inquiry is very much narrowed, by applying the rule which has uniformly governed this court, that where any principle of law, establishing a rule of real property, has been settled in the state courts, the same rule will be applied by this court, that would be applied by the state tribunals. This is a principle so obviously just, and so indispensably necessary, under our system of government, that it cannot be lost sight of.

The inquiry, then, is, whether the question arising in this case, has been so settled in the state courts of New York, as to be considered at rest there. Numerous cases have come before those courts upon this question; some on the very clause in the will now under consideration; others on wills containing clauses very analogous, and which, in those courts at least, have been considered identical with the present. I shall proceed to notice some of the leading cases there decided, to see how the law on this question is held to have been settled in that state.

In the case of *Anderson v. Jackson*, 16 Johns. 382, decided in the court for the trial of impeachments and correction of errors, in the year 1819, the decision turned solely upon the construction of this very clause in the

St. John v. Chew.

will of Medcef Eden, the elder, affirming the judgment of the supreme court which had been given without argument, the court considering the question raised to have been settled by former cases; and the court of errors, in affirming the judgment of the supreme court, put it principally upon the same ground, and considered the question at rest, by the repeated and uniform decisions of the supreme court for the last twelve or fourteen years. It may be useful to recur to the progress of *these decisions, to see [*163 the steady and uninterrupted course of the courts upon the question, and how firmly the principle has become ingrafted in the law of that state, as a rule of landed property.

The first case that arose, was that of *Fosdick v. Cornell*, 1 Johns. 440, in the year 1806. By the will there in question, the devise over was, "My mind and will is, that if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die without heirs male of their own bodies, than that the lands shall return to the survivors, to be equally divided between them." And it was held by the court, unanimously, that this clause did not create an estate-tail, but was to take effect as an executory devise. In the case of *Anderson v. Jackson*, the doctrine of that case was considered applicable to the Eden will, and to govern its construction, And it was not pretended by the dissenting members of the court of errors but that if the case of *Fosdick v. Cornell* was correctly decided, it would govern the case then before the court. And the whole strength of the argument in the very elaborate opinions given by the dissenting members, was applied to the purpose of endeavoring to show, that the decision in that case, and in those which rested upon it, had proceeded upon incorrect views of the law, as decided both in the English and American courts. Chancellor KENT here took occasion to announce his change of opinion on this question, and to say, that although he did not deliver the opinion of the court, he would not shelter himself under his silence, but partook of the error; but that he had discovered, years ago, that the case of *Fosdick v. Cornell* was decided on mistaken grounds. If this should be admitted (which I certainly do not mean to admit), it is an error which has been so repeatedly sanctioned by all the courts of that state, for the last twenty years, that it has ripened into a settled rule of law. And a reference to the cases which followed that of *Fosdick v. Cornell*, will show, that it has become a rule so fastened upon the law of real property in that state, as to make it unwise and unsafe to disturb it.

In the case of *Jackson v. Blanshan*, 3 Johns. 289, decided in the year 1808, the question before the court *arose upon a will, where the testator devised "all his estate, real and personal, to his six children, [*164 to be equally divided between them, share and share alike; but if any of them died, before arriving at full age, or without lawful issue, that then his, her or their part, should devolve upon and be equally divided among the surviving children, and to their heirs and assign, for ever." This was held to be a good devise over, by way of executory devise; and Chief Justice KENT, in delivering the opinion of the court, refers to the case of *Fosdick v. Cornell*, and observes, that the court there reviewed the leading authorities, and held, that the devise over was a good executory devise, and that the true construction was, a devise over to take effect on failure of male issue, during the life of the first taker. That the ancient case of *Hanbury*

St. John v. Chew.

v. *Cockrill*, 1 Roll. Abr. 835, was quite analogous, in favor of the executory devise. The devise there was to the two sons in fee, with a proviso, that if either died, before they should be married, or before they should attain the age of 21 years, and without issue of their bodies, then his share should go to the survivor. That Lord KENYON, in the two cases of *Porter v. Bradly*, and *Roe v. Jeffery*, 3 T. R. 143, 7 Ibid. 589, supported this established construction in a very forcible manner; and that the case before the court could not be distinguished in principle from those in which this rule of law is settled beyond controversy.

Again, in the case of the *Executors of Moffat v. Strong*, 10 Johns. 12, decided in the year 1813, the testator, after giving certain specific parts of his real and personal estate to his sons, adds this provision: "And if any of my sons aforesaid should die, without lawful issue, then let his or their part or parts be divided equally among the survivors." Although this was a case of personal property, the judgment of the court did not rest upon that distinction. Chief Justice KENT, in delivering the opinion of the court, says, "the greatest difficulty that arises in starting the main point for consideration, is to avoid being overwhelmed and confounded by the multitude of cases. Lord THURLOW said, there were fifty-seven cases on this point, and we know they have greatly increased since." And after *165] reviewing many of the leading cases, the chief justice observes, if the limitation rested solely on the words, dying without issue, it would fail; but the will proceeds, and gives the part of the son so dying without issue, to the survivors. The term survivors will be found to rescue the limitation from the operation of the general principle, and to bring it within the reach of other cases, which have adjudged that expression to be the cause of a different construction, and for the reason, that it could not have been intended that the survivor was to take only after an indefinite failure of issue, as that event might happen long after the death of all the survivors. Thus stood the question, when the chief justice was transferred to the court of chancery, no diversity of opinion having existed on the bench upon the question, according to the reported cases.

The next case that came before the court was that of *Jackson v. Staats*, 11 Johns. 337, in the year 1814; and the construction of a similar clause in a will was under consideration. SPENCER, J., in delivering the opinion of the court, observes, that "the point, whether the limitation over operates as an executory devise, or to create an estate-tail, admits of very little difficulty. The case of *Fosdick v. Cornell* is in point, that this is a good executory devise;" and adds, "I believe none of us have ever doubted the correctness of the decision in that case, and it would be a waste of time to review the authorities there cited." So that the law on this point was considered settled, and not open to argument, until it was again stirred, in the case of *Anderson v. Jackson*, in the court of errors, upon the clause in Eden's will, now under consideration; and the rule of construction settled in the supreme court, was considered applicable to this will, and governed the decision in the court of errors.

Again, in the year 1823, the construction of the same clause in Eden's will came before the supreme court, in the case of *Lion v. Burtiss*, 20 Johns. 483; and SPENCER, Ch. J., in delivering the opinion of the court, referred to the case of *Anderson v. Jackson*, in the court of errors, and said, it was

St. John v. Chew.

there decided, that the devise to Joseph Eden did not create an estate-tail, but that the devise over, upon the event of his dying without issue, was a limitation over, as an executory devise, to Medcef, the survivor. That the opinion *of the court was, that the devise over to the survivor did not depend on an indefinite failure of issue, but only on a failure of issue at the time of Joseph's death. "This, then," said the chief justice, "is the law of the land, and must govern every other case coming within the same principle. And I must be allowed to say, that subsequent reflection has confirmed my conviction of the soundness of the decision in the court of errors. *Stare decisis* is a maxim essential to the security of property. The decisions of courts of law become a rule for the regulation of the alienation and descent of real estate; and when that rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless manifestly wrong and unjust."

Other questions were, however, embraced in this case, and it was afterwards brought before the court of errors (2 Cow. 333), and a preliminary question was made, whether the court would hear an argument on the point decided in the case of *Anderson v. Jackson*. But as that question was so involved with other questions in the cause, it was found difficult entirely to separate them, and the argument proceeded; the president of the court, at the same time, observing, that he should suppose counsel would not question any point plainly decided in *Anderson v. Jackson*, both in its principle and object, and that he had no doubt, the court would abide by its decision in that case. In the course of the argument, when the bearing of the case of *Anderson v. Jackson* was fully understood, it was proposed to stop the counsel, so far as the decision in that case was called in question; and the chancellor (SANFORD) expressed his determination to adhere to that decision. That he understood it to fix distinctly a construction upon the clause which devises to Joseph Eden, and was prepared to say, it did not carry an estate-tail, but a fee determinable on his death without issue then living. And although the counsel were allowed to proceed, and the question again fully argued, the court, when they came to pronounce judgment, disclaimed, in very strong language, any intention to call in question the decision of *Anderson v. Jackson*. CRAMER, Senator, observes: "The court has been called upon, in a very solemn manner, to review its decision on an important *rule of law affecting titles to real property. But we have not, in my view of the subject, the power (and by power I mean right) [*167 now to question or impeach that judgment rendered by this court, and founded on the uniform decisions of the supreme court, during a period of more than seventeen years. Wills have been made, and estates settled, on the principle of these cases, which have been deemed and treated as the settled law of the land." And the judgment of the supreme court was unanimously affirmed, with the exception of one senator.

After such a settled course of decisions, and two of them in the highest court of law in the state, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate-tail, a contrary decision by this court would present a conflict between the state courts and those of the United States, productive of incalculable mischief. If, after such an uninterrupted series of decisions for twenty years, this question is not at rest in New York, it is difficult to say, when any question can be so

St. John v. Chew.

considered. And it will be seen, by reference to the decisions of this court, that to establish a contrary doctrine here, would be repugnant to the principles which have always governed this court in like cases.

It has been urged, however, at the bar, that this court applies this principle only to state constructions of their own statutes. It is true, that many of the cases in which this court has deemed itself bound to conform to state decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases ; and there can be no good reason assigned, why it should not be, when it is applying settled rules of real property. This court adopts the state decisions, because they settle the law applicable to the case ; and the reasons assigned for this course, apply as well to rules of construction growing out of the common law, as the statute law of the state, when applied to the title of lands. And such a course is indispensable, in order to preserve uniformity ; otherwise, the peculiar constitution of the judicial tribunals of the states and of the United States, would be productive of the greatest mischief and confusion.

*168] The case of *McKeen v. Delancy's Lessee*, 5 Cranch 32, arose upon the construction of a statute. And the court say, "If the act then in question was for the first time to be construed, the opinion of the court would be, that the deed was not properly proved, and therefore, not legally recorded. But in construing the statutes of a state, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state." And whether these rules of land titles grow out of the statutes of a state, or principles of the common law adopted and applied to such titles, can make no difference. There is the same necessity and fitness in preserving uniformity of decisions in the one case as in the other. So also, in the cases of *Polk's Lessee v.*

Wendell, 9 Cranch 98, and *Thatcher v. Powell*, 6 Wheat. 127, the construction of state statutes respecting real property was under consideration ; and the court say, they will adopt, and be governed by the state construction, when that is settled, and can be ascertained, especially, where the title to lands is in question. But in the case of *Blight's Lessee v. Rochester*, 7 Wheat. 550, which arose in Kentucky, the question was not upon the construction of any statute, but related to the doctrine of estoppel, between vendor and vendee ; and it was urged at the bar, that the question was settled by authority in Kentucky, and cases cited to establish the point. The authorities were examined, and considered by the court as not deciding the question ; but no intimation is given that they were inapplicable, because the question did not involve the construction of a statute. And the case of *Daly v. James*, 8 Wheat. 535, which arose in Pennsylvania, is directly in point. The question there was upon the interpretation of a clause in a will, which had received a judicial construction by the supreme court of that state. And it was urged, as it has been here, that it was not one of those cases where the decisions of state courts, on questions of local law, established rules of property which this court could not disturb. But the court said, they always listened with respect to the adjudications of the different states, when they apply. And in a question of so much doubt, they were

*169] disposed, *upon this point, to acquiesce in the decision of the supreme court of that state (*Smith v. Fohwell*, 1 Binn. 546), that the word "heirs" in the will, is to be construed to be a word of limitation.

Armstrong v. Lear.

In that case, this court adopted a single decision of the state court upon the question. But, in the case now under consideration, there have been two decisions in the two highest courts of law in the state, upon the identical question now in judgment, and which were in conformity to a settled course of adjudications for twenty years past. After such a series of adjudications for such a length of time, in the state courts, upon the very point now before us, and relating to a rule of landed property in that state, we do not feel ourselves at liberty to treat it as an open question.

Judgment affirmed, with costs.

ARMSTRONG v. LEAR, Administrator, with the will annexed, of KOSCIUSZKO.

Will.—Probate.

A testamentary paper, executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters.

APPEAL from the Circuit Court for the District of Columbia. The bill, filed on the chancery side of the circuit court, stated, that Thaddeus Kosciuszko, on the 5th of May 1798, placed a fund in the hands of Thomas Jefferson, and executed a will, as follows :

"I, Thaddeus Kosciuszko, being just on my departure from America, do hereby declare and *direct, that, should I make no other testamen- [*170
tary disposition of my property in the United States, I hereby author-
ize my friend, Thomas Jefferson, to employ the whole thereof in purchasing
negroes, from among his own, or any others, and giving them liberty, in my
name, in giving them an education, in trade or otherwise, and in having
them instructed for their new condition, in the duties of morality, which
may make them good neighbors, good fathers or mothers, husbands and
wives, in their duty as citizens, teaching them to be defenders of their
liberty and country, and of the good order of society, and in whatsoever
may make them happy and useful. And I make the said Thomas Jefferson
my executor of this. (Signed,) T. KOSCIUSZKO. 5th May 1793."

The bill further stated, that the said Kosciuszko, about the 18th of June 1806, being then domiciled in Paris, executed a certain will or writing testamentary, as follows :

"Know all men by these presents, that I, Thaddeus Kosciuszko, formerly an officer of the United States of America, in their revolutionary war against Great Britain, and a native of Liloane, in Poland, at present residing at Paris, do hereby will and direct, that, at my decease, the sum of 3704 dollars, current money of the aforesaid United States, shall of right be possessed by, and delivered over to the full enjoyment and use of Kosciuszko Armstrong, the son of General John Armstrong, minister plenipotentiary of the said states at Paris ; for the security and performance whereof, I do hereby instruct and authorize my only lawful executor in the United States, Thomas Jefferson, president thereof, to reserve, in trust for that special purpose, of the funds he already holds belonging to me, the aforesaid sum of 3704 dollars in principal, to be paid by him, the said Thomas Jefferson, immediately after my decease, to him, the said Kosciuszko Armstrong, and in

Armstrong v. Lear.

case of his death, to the use and benefit of his surviving brother. Given under my hand and seal, at Paris, this 28th day of June 1806.

(Signed,) THADDEUS KOSCIUSZKO."

[Seal.]

"In presence of CHARLES CARTER : JAMES M. MORRIS."

*[171] *That the said testator, on the day of the date of said writing, signed and sealed it, in presence of two competent witnesses, who attested the same, and acknowledged it, on the same day, as his act and deed, before Fulwar Skipwith, commercial agent, and agent for prize causes for the said United States, at Paris, and delivered it to the said John Armstrong. That the complainant is advised, that the said paper is a last will and testament, and must operate as such, and revokes, *pro tanto*, the bequests and appropriation made in the will first mentioned. That General Kosciuszko died the 15th of October 1817, leaving said testament unrevoked. That said Jefferson refused to take letters testamentary under said will, and that the defendant was duly appointed administrator with the will annexed; that the estate has come to his hands, and that he has been often requested to pay to complainant the \$3704 aforesaid, with interest, and refuses to pay, until an order or decree of this court in the premises. The bill prayed for a discovery of the funds in defendant's hands, and whether the said writing made at Paris is authentic, and payment of said legacy, with interest, and for general relief.

The answer of the defendant admitted that he was administrator with the will annexed of General Kosciuszko, and that the instrument mentioned in complainant's bill, and exhibited with it, was executed and acknowledged as it purports to be, and that said Kosciuszko was at the time domiciled and resident at Paris; but submitted, whether he was bound to pay said legacy upon an instrument so executed and acknowledged, inasmuch as Mr. Jefferson received a letter from General Kosciuszko dated as late as the 15th of September 1817, in which he thus affirms his first will. "After my death, you know its invariable destination" (speaking of this fund). The answer admitted, that Mr. Jefferson renounced, and that the defendant was appointed administrator, with the will annexed, as stated in the bill. The defendant admitted funds to have come to his hands to an amount larger than stated in the bill. The answer further stated, that among the papers received by the defendant from Mr. Jefferson, was a letter from Mr. Politica to said Jefferson, inclosing a despatch from the vice-roi of Poland

*[172] *to him, by which it appears that the whole estate of said Kosciuszko may hereafter be claimed by a Major Estko, as the heir-at-law of said Kosciuszko; that there were also two letters from a Mr. Zeltner to Mr. Jefferson, by which it appears that Kosciuszko had disposed of the greater part of his fortune, in favor of the children and other relations of Zeltner.

The cause was set down for a hearing in the court below, upon the bill and answer, and a *pro formâ* decree, dismissing the bill, was entered by consent, and an appeal taken to this court.

February 6th. *E. Livingston and Wheaton*, for the appellant, argued : 1. That the testamentary paper of 1806 was a revocation of the will of 1798 *pro tanto*. 2 Atk. 86; 2 Philimore 35-51; 1 Bro. Civ. & Adm. Law 293, 333; Swinb. pt. 1, p. 74, note 75, and cases cited by Powell, Ed.

2. That the will of 1798 was to be considered as wholly void, as being contrary to the laws and policy of Virginia and Maryland, and the defendant considered as a trustee for the first will. 4 Wheat. 1; 5 Har. & Johns. 392; Bridg. Duke on Ch. Uses 349, 466; Com. Dig. tit. Charitable Use, N. 1.

3. That supposing the case was to be determined by any peculiar law, as affecting the testator, or his property, it must be, either the law of France, where he was domiciled in 1806, when the will was made; or of this country, where he had placed the fund in question, and of which he might be considered a citizen; or the conventional law between France and the United States.

The rule of international law as to personal property appeared to be settled by the general current of authority, that as to successions *ab intestato*, they are to be governed by the law of the country where the party was domiciled at the time of his death; and in the case of a will, by the law of the place where it was made. Huber. tom. 2, l. t. 3; 2 Bos. & Pul. 229, note *a*; 6 Bro. P. C. 566; 5 Ves. jr. 785; 1 Binn. 336, 349, note *a*; 1 Mason 381, 408; 3 Ves. jr. 201. But in a recent case in the ecclesiastical *court in England, Sir J. NICOLL had considered the authorities as [*173 rather applying between different parts of the same empire, than between different countries entirely foreign to each other. *Curling v. Thornton*, 2 Addams 21. If the law of France was to be applied, although the will was not executed in strict and literal conformity with the forms provided by the Code Napoleon, it might be sustained as a donation *mortis causâ*; a species of donation which the best commentators were of opinion was not abolished by the code, it having been preserved in Chancellor D'Aguesseau's ordinance of 1731. Merlin, Repertoire, tom. 4, p. 144; Paillet, Droit Français, p. 159. And perhaps, it might also be considered a valid donation *mortis causâ*, by our law. 1 Swinb. 54; Prec. in Ch. 300; 2 Bro. C. C. 612; 2 Ves. jr. 120; Lowndes on Legacies, 449; 1 P. Wms. 406, 441; 2 Ves. 437. In the case above cited, determined by Sir J. NICOLL, he refers to the *Dutchess of Kingston's Case*, and confirms it, where a will, "though made in France, where she was domiciled, being made by an English subject, in the English language, and according to English forms, and to be executed in England, was valid as to personal property in England, though (neither being holographic nor made before a notary) it would, by the French law, have been of no validity. Nay, not only was it held good, but if the opinion of an eminent lawyer (M. Targat), as stated in the *Collectanea Juridica*, be correct, it was good, and would operate on the property in France." 2 Addams 21. But it was further insisted, that the execution of the testamentary paper before the consul at Paris, was conclusive of its validity, and dispensed with the necessity of probate in the courts of this country. This was inferred from the conclusive effect attributed to what are termed "authentic acts," by the law of France, taken in connection with the provisions in the convention of 1800 between France and the United States (art. 7, 10), and the statute of congress of April 1792, ch. 126, § 2, relating to the powers of consuls *in the [*174 verification of such acts, among which testamentary papers are included. Pothier, Oblig. pt. 4, ch. 1; Code Napoleon, art. 1317-19; Paillet, p. 159, note 2.

Armstrong v. Lear.

The *Attorney-General* and *Lear*, for the respondent, contended, that the question whether the paper of 1806 was to be considered as a revocation *pro tanto* of the will of 1798, depended upon its being authenticated as a testamentary disposition, in the manner prescribed by the laws of this country. They referred to the well-known rule, which had been frequently recognised in this court, that foreign laws must be proved as facts, or they could not be taken notice of judicially by our courts. 2 Cranch 237. That consequently, it was a case for the application of the ordinary principle, that a suit could not be maintained in a court of equity for a legacy, without first showing a probate, in the proper court, of the will under which it was claimed. The admission in the defendant's answer did not dispense with this preliminary, because it was merely intended to admit that "the instrument was executed and acknowledged as it purports to be," submitting its effect and operation to the judgment of the court. Nor did the treaty and the act of congress, which had been referred to, dispense with the necessity of probate of the will in the appropriate local tribunal, where all parties interested would have a right to contest its validity. The utmost effect that could be attributed by the conjoint operation of the law of France, the treaty, and the statute of congress, to the execution and acknowledgment of such an act, as a will or a codicil, before the consuls of the United States, in France, would be, to make it conclusive evidence, on which a court of probates in the United States might proceed; but it could not be considered as dispensing with all the local laws of the states on the probate of wills, and inverting the whole order of proceeding in cases of this sort, by which the paper must be ascertained, by the court having peculiar jurisdiction of testamentary causes, to be a will, before a court of equity can be called on to give a construction to it, and to decree a legacy under it. Nor *175] could it be considered as a **donation mortis causâ*, and therefore, not requiring probate; since, to constitute such a donation, the gift must be made *in extremis*, and must be accompanied with an actual delivery. 2 Bl. Com. 514; Just. Inst. lib. 2, tit. 7, § 1; Dig. l. 39, t. 6; Prec. in Ch. 269; 1 P. Wms. 406, 441; 3 Ibid. 357; 2 Ves. 431.

February 21st, 1827. STORY, Justice, delivered the opinion of the court. —The bill in this case is brought against the administrator, with the will annexed, of General Kosciuszko, for the purpose of establishing a right of the plaintiff to receive payment out of the assets of the testator, of a certain bequest to him, contained in a supposed testamentary writing, executed by the testator, at Paris, in France, in June 1806. This supposed testamentary writing is set forth in the bill, and averred to be in the nature and of the effect of a last will or writing testamentary; but it does not appear to have been admitted to probate, either in France, or in the proper orphans' court of this district. The answer admits the existence and authenticity of the instrument, and submits to the court its import and legal effect, and whether it is to be deemed a last will and testament; and it also admits assets in the hands of the administrator sufficient to discharge the bequest. The cause was heard in the court below, upon the bill and answer, and from the decree dismissing the bill, the present appeal has been brought to this court. The cause has been argued here upon several points, involving a good deal of learning, and some doctrines of international law. We do not enter into an

Rankin v. Scott.

examination of them, because our judgment proceeds upon a single point, and will, in no event, prejudice the merits of the plaintiff's claim.

By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical courts; and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those courts. Lord KENYON, in the *King v. Inhabitants of Netherseal*, 4 T. R. 258, said, "we cannot receive any other evidence of there being a will in this case, than such as would be sufficient, in all other cases, where titles *are derived under a will; and nothing but the probate or letters of administration, with the will annexed, are legal [*176 evidence of the will, in all questions respecting personalty." This principle of the common law is supposed to be in force in Maryland, from which this part of the District of Columbia derives its jurisprudence; and the probate of wills of personalty to belong exclusively to the proper orphans' court here, exercising ecclesiastical jurisdiction. If this be so, and nothing has been shown which leads us to a different conclusion, then it is indispensable to the plaintiff's title, to procure, in the first instance, a regular probate of this testamentary paper, in the orphans' court of this district, and to set forth that fact in his bill. The treaty stipulations, the act of congress, and the principles of the law of France, which have been cited at the argument, attributing to them the full force which that argument supposes to establish the validity of the instrument, do not change the *forum* which is entitled, by the local jurisprudence, to pronounce upon it as a testamentary paper, and to grant a probate. It is one thing, to possess proofs, which may be sufficient to establish that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; and quite a different thing, to ascertain what is the proper tribunal here, by which those proofs may be examined, for the purpose of pronouncing a judicial sentence thereon.

For this reason, the decree of the court below is to be affirmed, but without prejudice, so that the instrument may be submitted to the decision of the proper probate court.

Decree affirmed.

*RANKIN and SCHATZELL, Plaintiffs in error, v. SCOTT, Defendant in error. [*177

Lien of judgment.

The lien of a judgment on the lands of the debtor, created by statute, and limited to a certain period of time, is unaffected by the circumstance of the plaintiff not proceeding upon it (during that period), until a subsequent lien has been obtained, and carried into execution.

Universal principle, that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity. Mere delay in proceeding to execution is not such an act.

Distinction created by statute, as to executions against personal chattels, and reasons on which it is founded.

ERROR to the District Court of Missouri. This was an action of eject-

¹ See *Armstrong v. Lear*, 8 Pet. 52.

Rankin v. Scott.

ment, brought in the court below, by the defendant in error, Scott, to recover the possession of a house and lot, in the town of St. Louis.

At the trial, a special verdict was found, stating, that in the year 1816, John Little married Marie Antoinette Labadie, who was then seised in fee of the house and lot in question. She died without issue, leaving the husband seised in fee of a moiety of the premises. He soon afterwards died, without issue, and intestate. In April 1821, judgment was rendered in the circuit court of the county where the premises lay, against the administrator of Little, in favor of Schatzell and another, for \$2747.19. In March following, another judgment was rendered against the same, in favor of B. Pratte, for \$1241. Execution was immediately issued upon the latter judgment, and the premises in question sold under it to Scott, the plaintiff in ejectment; and soon afterwards, another execution issued upon the first judgment, and the same premises were sold to Schatzell, one of the defendants below, and conveyed to him by the sheriff's deed. Rankin, who was tenant to Little, *178] in his lifetime, remained in possession of the premises, after his death, *and attorned to Schatzell.

The question raised upon these facts was, whether the sale by the sheriff, under the second judgment and first execution, divested the lien of the first judgment? The court below determined it in the affirmative; and the cause was brought, by writ of error, before this court.

January 15th, 1827. *Benton*, for the plaintiffs in error, relied upon the express provisions of the statute of Missouri, to show that the local law made the first judgment a lien upon the land, for the term of five years, within which time it was enforced, and Shatzell purchased under it. *Geyer's Dig. Laws Missouri*, 264, 267. For the general effect of a judgment lien, he cited 1 Johns. Cas. 224; 13 Johns. 463, 533; 1 Dall. 481, 486; 4 *Ibid*. 450.

Talbot, contra, cited 1 T. R. 729; 1 *Ld. Raym.* 251; 1 *Burr.* 20; 8 *Co.* 171; *Cro. Eliz.* 181; 1 *Salk.* 320.

January 23d. MARSHALL, Ch. J., delivered the opinion of the court, and after stating the case, proceeded as follows:—The act of the then territorial government of Missouri, on which this question depends, is in these words: "Judgments obtained in the general court shall be a lien on the lands and tenements of the person or persons against whom the same has been entered, situate in any part of this territory; and judgments obtained in a court of common pleas of any district, shall be a lien on the lands and tenements of the person against whom the same has been entered, situate in such district." The act contains a proviso, "that no judgment hereafter entered in any court of record within this territory, shall continue a lien on the lands and tenements against whom the same has been entered, during a longer term than five years from the first return-day of the term of which such judgment may be entered, unless the same shall have been revived by *scire* *179] *facias*," &c. *Since the territory of Missouri was erected into a state, the general court has received the appellation of the superior court, and the court of common pleas for the district has been denominated the circuit court for the county.

The execution on the first judgment was issued within a short time after

Rankin v. Scott.

it was rendered, and while the lien it created was in full force, unless it was removed by the execution and sale under the second judgment. There is no expression in the law of Missouri which can suggest a doubt on this subject. By that law, judgments are to be a lien on all the lands of the debtor. This lien commences with the judgment, and continues for five years. The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him, in a court of law or equity, to a subsequent claimant. The single circumstance of not proceeding on it, until a subsequent lien has been obtained and carried into execution, has never been considered as such an act. Take the common case of mortgages. It has never been supposed, that a subsequent mortgage could, by obtaining and executing a decree for the sale of the mortgaged property, obtain precedence over a prior mortgage, in which all the requisites of the law had been observed. If such a decree should be made, without preserving the rights of the prior mortgagee, the property would remain subject to those rights in the hands of the purchaser. So, in cases of judgment, where an *elegit* may be sued out against the lands of the debtor. The implied lien created by the first judgment, retains the preference over the lien created by a second judgment, so long as an *elegit* can issue on the first. A statutory lien is as binding as a mortgage, and has the same capacity to hold the land, so long as the statute preserves it in force.

The cases cited of executions against personal property, do not, we think, apply. In those cases, the lien is not created by the judgment, or by any matter of record. The purchaser of the goods cannot suppose that the officer has committed any impropriety in the performance of his duty, *and this circumstance has induced parliament to secure him. It is [180 stated by ASHHURST, Justice, in 1 T. R. 731, that this was the sole object of that part of the statute of frauds which relates to this subject. In the case at bar, the judgment is notice to the purchaser of the prior lien, and there is no act of the legislature to protect the purchaser from that lien.

We think, then, that the deed made by the sheriff to the purchaser, under the first judgment, conveyed the legal title to the premises; and that the judgment on the special verdict ought to have been in favor of the plaintiff.

Judgment reversed.

UNITED STATES *v.* TILLOTSON and another.*Error.—Binding charge.*

Where the burden of proof of certain specific defences set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the court, that the matters produced and read in evidence on the part of the defendant were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favor of the defendant, is erroneous; and a judgment rendered upon a verdict purporting to have been given under such a charge, will be reversed, although the record was made up as upon bill of exceptions taken at a trial before the jury upon the matters in issue—no such trial ever having taken place, and the case having assumed that shape, by the agreement of the parties, in order to take the opinion of the court upon certain questions of law.

ERROR to the Circuit Court for the Southern District of New York.

February 24th, 1827. This cause was argued by the *Attorney-General* and *Coxe*, for the plaintiffs; and by *Webster* and *Wheaton*, for the defendants.

March 2d. STORY, Justice, delivered the opinion of the court.—This cause comes before us from the circuit court for the southern district of New York, as upon a bill of exceptions *taken to the opinion of the
*181] court, upon a trial before a jury upon the matters in issue. In reality, no such trial was had; but the case assumed this shape, by the agreement of the parties, in order to have the opinion of the court upon certain questions of law.¹ We must, however, consider the case exclusively upon principles applicable to it as a bill of exceptions taken at a real trial. (a)

Upon the argument in this court, various important questions have been elaborately discussed by counsel, upon which we forbear to express any opinion, as our judgment of reversal proceeds upon a ground, which renders any decision on them unnecessary.

The bill of exceptions admits the due execution of the bond in controversy, and the breaches stated in the declaration are answered by special notices of defence set up as bars to the suit. The burden of proof of these defences, in point of fact, rested on the defendants. The court is supposed to have charged the jury, that the matters produced and read in evidence on the part of the defendants were sufficient in law to maintain the issue on their part, and that the jury ought to render their verdict in favor of the defendants. This charge can be maintained, in point of law, only upon the supposition, that the evidence presented no contested facts; for otherwise, it would withdraw from the jury their proper functions, to determine the facts upon the evidence in the cause.

Upon examining the record, we think, that there is contradictory evidence, or rather evidence conducing to opposite results, in respect to a point material to many of the specifications of defence, and particularly as to the matters in the third, fifth, sixth, seventh, eighth and ninth. It is this: whether the contract of the 7th of June 1820, between Col. Gadsden,

(a) The cause was argued and determined in the court below, upon a case agreed upon between the parties, containing a state of facts; but as the state of facts was not annexed to the transcript of the record, this court could not take notice of it.

¹ See 1 Paine 305, 311.

United States v. Tillotson.

as agent of the war department, and Samuel Hawkins, was ever a consummated agreement, binding on the United States, in virtue of an original authority given to him, *or was a preliminary agreement, dependent for its validity upon the ratification of the war department ; and if that [*182 was withheld (which there was direct evidence to prove), the agreement was a mere nullity. The bill of exceptions does not in terms find, that the agreement was such a consummated agreement. It merely states, that "on or about the 7th of June 1820, Col. James Gadsden, then acting as the agent for fortifications at Mobile Point, and thereto duly authorized by the said war department, did enter into an agreement or contract with the said Samuel Hawkins, touching the foregoing contract with the said Benjamin W. Hopkins, and the erection of the fort therein provided for," etc. The word "thereto" may be applied either to the next antecedent, the agency of fortifications, or to the subsequent clause, stating the agreement. It may mean, having a due authority, as agent for fortifications, or having a due authority to enter into the agreement. The recital in the agreement itself, that Col. Gadsden entered into it, "in pursuance of the instructions of the secretary of the war department," would not be decisive of the point, supposing it to be entitled to the fullest weight, as matter of recital. But the case does not rest here : in another part of the record, evidence is introduced on the part of the United States, to establish, that the agreement so made had never been ratified on the part of the war department ; and also to show, that it was understood by that department, that without such ratification, the contract was not obligatory. We allude to that part of the record, where it is stated, that the agreement, as soon as executed at Mobile Point, was transmitted to the war department, and that a letter was written by the authority of that department, under date of the 10th July 1820, to the defendants, as Hawkins's sureties, inclosing a copy of the agreement, and requesting them, if they would sanction it, to send certificates of the fact, and "signify their approval, and authorize it to be carried into effect"—and it is added, "should you object, the contract will be carried on as before," that is, the original contract. It is further found by the case, that the agreement "was not ratified by the secretary of war, nor ever acted upon, except so far as it may appear to have *been ratified and acted upon by the said transcript" (of the treasury accounts) con- [*183 tained in the record.

It appears to us, that, taking this evidence together, it was not a conceded point, but a matter of controversy between the parties, whether the agreement was obligatory upon the United States, and had become absolute by the assent of all the persons who had authority to perfect the same. This being so, it was a matter of fact, to be decided by the jury, and the charge of the court was erroneous, in withdrawing it from the consideration of the jury. For this reason, it is our opinion, that the judgment of the circuit court was erroneous, and ought to be reversed and the cause be remanded, with directions to award a *venire facias de novo*.

Judgment reversed.

THORNTON, Plaintiff in error, v. WYNN, Defendant in error.

Promissory notes.—Promise by discharged indorser.—Warranty on sale of horse.

An unconditional promise, by the indorser of a bill or note, to pay it, or the acknowledgment of his liability, after knowledge of his discharge from his responsibility by the *laches* of the holder, amounts to an implied waiver of due notice of a demand from the drawee, acceptor or maker.¹ Upon a sale, with a warranty of soundness, or where, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it, is equivalent to an offer accepted by the vendor; and the contract being thereby rescinded, it is a defence to an action for the purchase-money, brought by the vendor, and will entitle the vendee to recover it back, if it has been paid.

So, if the sale be absolute, and the vendor afterwards consent, unconditionally, to take back the article, the consequences are the same.

But if the sale be absolute, and there be no more subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action upon the warranty, unless it be proved, that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it, within a reasonable time.²

*184] *ERROR to the Circuit Court for the District of Columbia.

This cause was argued by *C. C. Lee*, for the plaintiff in error; (a) and by *Worthington*, for the defendant in error. (b)

January 21st, 1827. WASHINGTON, Justice, delivered the opinion of the court.—This was an action brought by the defendant in error against the plaintiff in error, in the circuit court for the district of Columbia, and county of Washington, upon a promissory note given by one Miller to Thornton, and by him indorsed to Wynn. The declaration contains a count upon the note, and also the common counts for money laid out and expended, and for money had and received.

At the trial of the cause, upon the general issue, the defendant below took two exceptions to the opinion of the court, which are to the following effect. The first states, that the plaintiff gave in evidence the note and indorsement mentioned in the declaration, and in order to dispense with the proof of the

(a) 2 H. Bl. 609; 1 Moore 535; 3 Camp. 57; 11 East 114; 4 Dall. 109; 4 Taunt. 93; 1 Esp. 261; 6 East 110; 1 H. Bl. 17.

(b) 1 T. R. 405; 2 Id. 703; 1 Esp. 302; 12 East 171; 4 Cranch 141; 2 Johns. 1; 7 Mass. 449; 5 Id. 170; 11 Johns. 180; Peake's Cas. 203; 1 Taunt. 12; 2 T. R. 713; 15 East 275; Cowp. 888; 1 Doug. 24; 1 T. R. 183; 7 East 274; 2 Taunt. 2; 14 Johns. 416; 2 East 320.

¹ Sigerson v. Matthews, 20 How. 495; Sherman v. Clark, 3 McLean 91; Morris v. Gardner, 1 Cr. C. C. 213; Perry v. Rhodes, 2 Id. 47; Bank of Columbia v. Marshall, Id. 631; Ross v. Hurd, 71 N. Y. 14. But such promise will not render the indorser liable, unless made with full knowledge of the fact, that he has been discharged. Crain v. Colwell, 8 Johns. 384; Griffin v. Goff, 12 Id. 423; Baer v. Leppert, 5 Hun 453; Richard v. Boller, 6 Daly 460. Whether the promise was made, with such knowledge, is a question of fact, upon the evidence. Moyer's Appeal, 87 Penn. St. 129. And such promise casts upon the indor-

ser the burden of proving that it was made, without knowledge of his discharge by the plaintiff's *laches*. Loose v. Loose, 36 Id. 538.

² Where a horse is sold with warranty, the purchaser has no right to rescind and return the animal to the vendor, on the ground of a breach of warranty, in the absence of fraud; his only remedy is by action for the breach of the warranty. Freyman v. Knecht, 78 Penn. St. 141. If, however, the vendor artfully conceal a known defect, with intent to deceive, this is such a fraud as entitles the purchaser to rescind and recover back the price. Croyle v. Moses, 90 Id. 250.

Thornton v. Wynn.

ordinary steps of diligence in presenting and demanding the note of the maker, and giving notice to the indorser, the plaintiff offered evidence to prove, that, a few weeks before the institution of this suit, the note in question was presented to the defendant, who, being informed that Miller, the maker, had not paid the note, said, "he knew Miller had not, and that Miller was not to pay it; that it was the concern of the defendant alone, and Miller had nothing to do with it; that the note had been given for part of the purchase-money of a certain race-horse called Ratler, and that the defendant offered to take up the said note if the plaintiff's agent would give time, and receive other notes mentioned in payment;" to the admission and competency of which evidence the defendant objected; but the court overruled the objection, and *admitted the evidence as competent to support [*185 this action, without any further proof of demand upon the maker or notice to the indorser.

That the said evidence being so admitted by the court, the defendant offered evidence to prove, that the said note was given for part of the purchase-money of the said race-horse, then celebrated for his performances on the turf, sold by the plaintiff to the defendant, and the said Miller, the drawer of the note, for \$3000, of which \$2000 had been paid; that the plaintiff, at the time of so selling this horse, warranted him sound, and declared him capable of beating any horse in the United States, and recommended the purchasers to match him against a celebrated race-horse in New York, called Eclipse; that he also gave a representation of his pedigree, which he described as unexceptionable, and promised to produce his pedigree and send it to the defendant. And the defendant then offered evidence to prove, that the said horse, at the time of the said sale, was utterly unsound, and broken down, and had been broken down, whilst in the plaintiff's possession, and was reputed and proven by persons in the neighborhood of the plaintiff, who afterwards communicated the same to the purchaser; and was wholly unfit for, and incapable of, the action and fatigue necessary to a race-horse; and that the plaintiff had wholly failed to procure and furnish the pedigree of the horse, as he had agreed, and that a pedigree was an essential term in the purchase of the horse, or ordinarily is so, in the purchase of such horses, without which this horse was worth nothing; and that the said Miller, as soon as it had been ascertained by repeated trials that the horse was incurably unsound, offered to return him to the plaintiff, who refused to take him back, although the former offered to lose what he had already paid for the horse, which offer was made after the note fell due. Whereupon, the court instructed the jury, at the prayer of the plaintiff, that if they should be of opinion, from the said evidence, that the said horse was, at the time of the said sale, utterly unsound and broken down, and had been broken down, whilst in the plaintiff's possession, and was wholly unfit for, and incapable to, the action and fatigue necessary *to a race-horse, [*186 but that the said facts were not known to the plaintiff, at the time of the said sale, the said facts are not a sufficient defence in this action to prevent the plaintiff from recovering.

Upon these instructions of the court, the jury found a verdict for the plaintiff, and the cause now comes before this court upon a writ of error.

This bill of exceptions presents two questions for the decision of this court. The first is, whether the evidence offered by the plaintiff, and

Thornton v. Wynn.

admitted by the court, dispensed with the necessity of proving a demand of payment of the maker of the note, and due notice to Thornton of non-payment; and, secondly, whether the court below erred or not, in stating to the jury that the alleged breach of the warranty of the horse, if proved to their satisfaction, was not a sufficient defence in this action, to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff at the time of the sale.

In the argument of the first question, the counsel on both sides considered the evidence offered by the plaintiff as presenting a double aspect. 1st. As authorizing a conclusion, in point of fact, that the note of hand on which the suit is brought, was made and passed to Thornton, without consideration, and merely for his accommodation; and 2d, As amounting to a promise to pay the note, or at least to an admission by Thornton of his liability to pay it, and of the right of the plaintiff to resort to him, whether it was made solely for his accommodation, or was given for value in the ordinary course of trade.

As to the first, the counsel treated the note throughout as an accommodation note, and submitted to the decision of this court the question, whether the indorser of such a note was entitled to call for proof of a demand of payment of the maker, and notice to himself? Whether this question was ever raised in the court below, or in what manner it was there treated, does not appear from the bill of exceptions. It is possible, that that court may have intended nothing more by their direction to the jury, than to sanction the admissibility of the evidence, and its sufficiency to authorize a verdict *187] for the plaintiff, *without other proof of demand and notice, provided the jury should be of opinion, that it warranted the conclusion that the note was given without consideration. But such is not the language of the court, as stated in the bill of exceptions. The jury were informed, that the evidence was competent to support the action, without such further proof of demand and notice, without leaving the inference of fact that the note was given without consideration to be drawn by the jury. Had the court distinctly stated to the jury, that this was such a note, and therefore, that further proof of demand and notice was unnecessary, the incorrectness of the direction could have been doubted by no person, since the court would, in that case, have inferred a fact from the evidence, which it was competent to the jury alone to do. And yet it seems difficult to distinguish the supposed case, from the one really presented by the bill of exceptions, upon the hypothesis, that the court below decided anything as to the particular character of this note, since it is very obvious, that no question of fact was submitted to the consideration of the jury. It is, therefore, due from this court to the one whose decision we are revising, to conclude, that that decision did not proceed upon the assumption that this was a note drawn for the accommodation of the indorser.

It remains to be considered, whether the direction was correct upon the other aspect of the evidence. It is now well settled, as a principle of the law-merchant, that an unconditional promise by the drawer or indorser of a bill, to pay it, after full knowledge of all the circumstances necessary to apprise him of his discharge from his responsibility, by the *laches* of the holder, amounts to an implied waiver of due notice of a demand of the drawer or acceptor, and dispenses with the necessity of proving it. Such

Thornton v. Wynn.

are the cases of *Borradaile v. Lowe*, 4 Taunt. 93 ; *Donaldson v. Means*, 4 Dall. 109 ; and others which need not be cited. So if, with the knowledge of these circumstances, he answer, that the bill "must be paid," "that when he comes to town, he would set the matter right," "that his affairs were then deranged, but that he would be glad to pay it, as soon as his accounts with his agents was settled," or "that he would see it paid," or if he pay a part of the bill ; in all *these cases, it has been decided, that proof of regular notice is dispensed with. 2 T. R. 713 ; Bull. N. P. [*188 276 ; 2 Camp. 188 ; 6 East 16 ; 2 Str. 1246. The principle upon which these decisions proceed is explained in many of the above cases, and particularly in that of *Rogers v. Stevens*, 2 T. R. 713. It is this, that these declarations and acts amount to an admission of the party, that the holder has a right to resort to him on the bill, and that he had received no damage for want of notice. See also Stark. on Evid. 272.

The same principle applies with equal force to promissory notes, which, after indorsement, partake of the character of bills of exchange, the indorser being likened to the drawer, and the maker to the acceptor of a bill. The case of *Leffingwell and Pearpoint v. White*, 1 Johns. Cas. 99, is that of a promissory note, where the indorser, before it became due, stated, that the maker had absconded, and that, being secured, he would give a new note, and requested time. The court say, that the defendant had admitted his responsibility, treated the note as his own, and negotiated for further time for payment, by which conduct he had waived the necessity of demand of the maker, and notice to himself. *Taylor v. Jones*, 2 Camp. 105 ; *Vaughan v. Fuller*, 2 Str. 1246 ; and *Anson v. Bailey*, Bull. N. P. 276, were all cases of actions on promissory notes against the indorser. In this case, the defendant below, upon being informed that Miller, the maker of the note, had not paid it, observed, that he knew he had not, and that he was not to pay it ; that it was the concern of the defendant alone, and that Miller had nothing to do with it, it having been given for part of the purchase-money of a horse. These declarations amounted to an unequivocal admission of the original liability of the defendant to pay the note, and nothing more. It does not necessarily admit the right of the holder to resort to him on the note, and that he had received no damage from the want of notice, unless the jury, to whom the conclusion of the fact from the evidence ought to have been submitted, were satisfied, that the defendant was also apprised of the *laches* of the holder, in not making a regular demand of payment of the note, by which he was discharged *from his responsibility to pay it. The [*189 knowledge of this fact formed an indispensable part of the plaintiff's case, since, without it, it cannot fairly be inferred, that the defendant intended to admit the right of the plaintiff to resort to him, if, in point of fact, he had been guilty of such *laches* as would discharge him in point of law. For anything that appeared to the court below, from the evidence stated in the bill of exceptions, the admissions of the defendant may have been made, upon the presumption that the holder had done all that the law required of him, in order to charge the indorser. That due notice was not given to the defendant, he could not fail to know ; but that a regular demand had been made of the maker of the note, could not be inferred by the court from the admissions of the defendant. For the reasons above

Thornton v. Wynn.

stated, the judgment of the court below must be reversed, and the cause remanded for a new trial.

But since the second question before mentioned has been distinctly brought to the notice of this court, has been fully argued, and must again be decided by the court below, it becomes necessary that this court should pass an opinion upon it. That question is, whether the alleged breach of the warranty of the horse, the price of which formed part of the consideration of the note, if proved to the satisfaction of the jury, was a sufficient defence in this action, to prevent the plaintiff from recovering, unless the facts stated in the bill of exceptions were known to the plaintiff below, at the time of the sale. The question is not, whether the purchaser of a horse which is warranted sound, has a remedy over against the vendor, upon the warranty, in case it be broken, but whether, in an action against him for the purchase-money, he can be permitted to defend himself, by proving a breach of the warranty.

The cases upon this subject are principally those where the vendee, having executed the contract on his part, by paying the purchase-money, brought an action of *indebitatus assumpsit* against the vendor, as for money had and received to his use. But it is perfectly clear, that the reasoning of *190] the court in those cases applies with equal force to a case where the breach of the warranty is set up by the vendee, as a defence against an action against him to recover the purchase-money.

The first case we meet with on this subject, is that of *Power v. Wells*, of which a very imperfect report is to be seen in a short note in 1 Doug. 24, and in Cowp. 818. There, the plaintiff gave a horse and 20 guineas to the defendant, for another horse, which he warranted to be sound, but which proved otherwise. The plaintiff offered to return the horse, which was refused, and the plaintiff brought two actions, one for money had and received, to recover back the 20 guineas which he had paid, and an action of trover for the horse, possession of which the plaintiff had delivered to the defendant. The court decided, that neither action could be maintained; not the second, because the property had been changed. This case was referred to by the judge who had decided it at *nisi prius*, in the case of *Weston v. Downes*, 1 Doug. 23, which soon after came before the court of king's bench. That was an action for money had and received, and the case was, that the plaintiff had paid a certain sum to the defendant for a pair of horses, which the defendant agreed, at the time, to take back, if they were disapproved of, and returned within a month. They were returned accordingly, within the stipulated period, and another pair was sent in their stead, without any new agreement. These were likewise returned, and accepted by the vendor, and a third pair were sent, which being likewise offered to be returned, the vendor refused to take them back. Lord MANSFIELD was against the action, because the contract, being a special one, the defendant ought to have notice by the declaration that he was sued upon it. ASHHURST, J., was of the same opinion; but added, that if the plaintiff had demanded his money, on the return of the first pair of horses, this action would have lain, but that the contract was continued; from which expression, nothing more is understood to have been meant, than that the contract remained open. The ground upon which BULLER, J., thought that the action could not be maintained was, that, by refusing to take back the horses, the defen-

Thornton v. Wynn.

dant had not precluded himself from entering into *the nature of the contract, and that, whenever that is open, it must be stated specially.

The meaning of these latter expressions is distinctly stated by the court, and particularly by this judge, in the case of *Towers v. Barrett*, 1 T. R. 133, which followed next in order of time ; that was also an action for money had and received. The money was paid for a horse and chaise, to be returned, in case the plaintiff's wife should not approve of them. They were accordingly sent back to the defendant, in three days after the sale, and left on his premises, against his consent to receive them. Lord MANSFIELD, Ch. J., and WILLES, J., distinguish this case from that of *Weston v. Downes*, upon the ground, that that was an absolute, and this a conditional agreement, which was at an end, by the return of the horse and chaise, and was no longer open. Both the judges treat the case as if the vendor had taken back the property, although, in fact, he had not consented to do so. ASHHURST, J., was of opinion, that this case would have resembled that of *Weston v. Downes*, if, in that, the plaintiff had returned the horses. It is very clear, from what was said by the same judge in that case, that his meaning in this was, if the plaintiff had returned the first pair of horses, and then demanded his money; for, he adds, that in that case, there was an end of the first contract, by the plaintiff's taking other pairs, and this constituted a new contract, not made on the terms of the first. But in this case, the contract was conditional, and when the horse and chaise were returned, the contract was at an end, and the defendant held the money against conscience. BULLER, J., is still more explicit : he says, that the defendant, by the contract, had put it in the power of the plaintiff to terminate it, by returning the horse and chaise, and that the plaintiff had no option to refuse to take them back ; and that, being bound to receive them, the case was the same as if he had actually accepted them. He adds, that the distinction between those cases where the contract is open, and where it is not, is, that if it be rescinded, either by the original terms of the contract, as in this case, where no act remains to be done by the defendant, or by a subsequent assent by him, the plaintiff may recover back his whole *money, and then this [*192 action will lie. But if it be open, the plaintiff's demand is only for damages arising out of the contract.

The court proceeded upon this distinction, in deciding the case of *Payne v. Whale*, 7 East 274, which followed the one just noticed. The action was to recover back money paid to the defendant for a horse, sold by him to the plaintiff, which he warranted sound. The plaintiff offered to return the horse, upon an allegation of his unsoundness, which the defendant denied, and refused to take him back, but agreed that, if he was in fact unsound, he would take him back, and return the purchase-money. The unsoundness was proved at the trial ; but the court was of opinion, that the action could not be supported, and distinguished this case from the preceding one, by observing, that in that, the plaintiff had an option, by the original contract, to rescind it, on a certain event ; but here, it was no part of the original contract that the horse was to be taken back ; and that the subsequent promise amounted to no more than that he would take him back, if the warranty were shown to be broken, which still left the question of warranty open for discussion, and then the form of the action ought to give the defendant notice of it, by being brought upon the warranty.

Thornton v. Wynn.

The case of *Lewis v. Cosgrave*, 2 Taunt. 2, was precisely like the present, in which the same distinction, and the same principles, were recognised by the judge who tried the cause at *nisi prius*. It was an action on a bill drawn for the price of a horse, which, on the sale of him, was warranted sound, but turned out not to be so. The defendant offered to return the horse, which was refused, and the defendant left him in the plaintiff's stable, without his knowledge. The judge decided, that as the plaintiff had refused to take back the horse, the contract of sale was not rescinded, and, consequently, that the defendant must pay the bill, and take his remedy by action for the deceit. But upon a rule to show cause why a new trial should not be granted, the court said, that it was clear, the plaintiff knew of the unsoundness of the horse, which was clearly a fraud, and that no man can *193] recover the price of an article sold under a *fraud. See also the cases of *Fortune v. Lingham*, 2 Camp. 416, and *Solomon v. Turner*, 1 Stark. 51.

The result of the above cases is this : if, upon a sale with a warranty, or if, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it is equivalent to an offer accepted by the vendor, and in that case, the contract is rescinded and at an end, which is a sufficient defence to an action brought by the vendor for the purchase-money, or to enable the vendee to maintain an action for money had and received, in case the purchase-money has been paid. The consequences are the same, where the sale is absolute, and the vendor afterwards consents, unconditionally, to take back the property ; because, in both, the contract is rescinded by the agreement of the parties, and the vendee is well entitled to retain the purchase-money, in the one case, or to recover it back, in the other. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open, and the vendee is put to his action upon the warranty, unless it be proved, that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it, within a reasonable time. We are, therefore, of opinion, that the direction of the court in this case, upon the second exception, was entirely correct. The judgment is to be reversed, and the cause remanded to the court below for a new trial.

Judgment reversed.

MALLOW and others v. HINDE.

Equity.—Parties.

Where an equity cause may be finally decided as between the parties litigant, without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed with in the circuit court, if its process cannot reach them, or if they are citizens of another state.

*But if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them, without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties.¹ [*194]

But the court may, in its discretion, where the purposes of justice require it, retain jurisdiction of the cause, on an injunction bill, as between the parties regularly before it, until the plaintiffs have had an opportunity of litigating their controversy with the other parties, in a competent tribunal, and if it finally appear by the judgment of such tribunal, that the plaintiffs are equitably entitled to the interest claimed by the other parties, may proceed to a final decree upon the merits.

APPEAL from the Circuit Court of Ohio.

February 12th, 1827. This cause was argued by *Bond* and *Brush*, for the appellants ; and by *Doddridge* and *Scott*, for the respondents.

February 20th. TRIMBLE, Justice, delivered the opinion of the court.—This is an appeal from the decree of the circuit court for the district of Ohio, dismissing, generally, with costs, the bill of the appellants, who were plaintiffs in that court.

The suit was a contest for land in the district set apart on the north-west side of the Ohio, for the satisfaction of the bounty lands due to the officers and soldiers of the Virginia line, or continental establishment, in the revolutionary war. The plaintiffs set up claim to the land by virtue and under a survey, No. 537, in the name of John Campbell. It appears, that John Campbell, before his death, made his last will and testament, whereby he devised his land-warrants, entries and surveys in the military district, to Col. Richard Taylor and others, his executors, in trust for the children of the testator's sister, Sarah Beard ; and that Taylor alone qualified as executor, and took upon himself the trust. Taylor never conveyed or assigned the warrants, entries or surveys, to Mrs. Beard's children, but permitted them, as the bill charges, to take the management of them, into their own hands. Elias Langham made sundry executory contracts with Mrs. Beard's children, after they arrived at full age, which contracts are set out in the bill, whereby, as the complainants allege, Langham became equitably entitled to survey No. 537 ; and afterwards sold, and made deeds [*195] of conveyance for the land to the complainants ; who, in consequence of their purchases from Langham, took possession of, and improved the land.

Thomas S. Hinde, having purchased and produced an assignment of a military warrant from Col. Richard Taylor, and belonging to him in his own right, made an entry thereof in Hinde's own name, in the principal surveyor's office ; and having caused a survey to be made thereupon, covering survey No. 537, in the name of Campbell, Hinde obtained a patent for the

¹ Ripon v. Railroad Companies, 16 Wall. 446 ; Society v. Hartland, 2 Paine 536 ; Joy v. Wirtz, 1 W. C. C. 517 ; Young v. Cushing, 4 Biss. 456.

Mallow v. Hinde.

land from the government. Being thus clothed with the legal title, Hinde instituted actions of ejectment in the circuit court, against the appellants, and obtained judgments of eviction against them. They filed their bill, praying for an injunction against the judgments at law ; and also praying that Hinde should be decreed to release and convey to them his legal title, and for general relief.

The bill charges, that Col. Richard Taylor, with full notice that the appellants were, in virtue of Langham's contract with the *cestuis que trust*, and Langham's sale to them, equitably entitled to, and in possession of, survey No. 537, fraudulently combined with Hinde and others, and improperly and without authority, withdrew the entry on which survey No. 537 had been made, and re-entered and caused it to be surveyed elsewhere; and that Hinde, availing himself of such improper and unauthorized withdrawal, had entered, surveyed and patented the land in his own name, he also having notice of all the circumstances attending the claim of the appellants ; and that Taylor and the Beards refuse to perfect the survey, by obtaining a patent, and refuse to convey or transfer it to the appellants. The bill also alleges, that Langham had become equitably and legally entitled to the survey No. 537, as a purchaser thereof for taxes due thereon to the state of Ohio.

Hinde filed his answer, in which he denies the charges of fraud and collusion ; insists the land had become vacant by the withdrawing of the entry in the name of Campbell, and by surveying it elsewhere ; and that he had *196] legally appropriated *it by his entry, survey and grant ; he neither admits nor denies the execution of the contracts alleged between Langham and the Beards, and puts the complainants upon proof ; and he further insists, that such contracts, if made, conferred upon Langham no equitable title : first, because the Beards had no power to sell, without the concurrence of Taylor, the trustee ; and, secondly, because Langham had obtained the contracts by fraud, and had not paid the consideration stipulated.

Neither Taylor, the trustee, nor the *cestuis que trust*, with whom the complaints allege Langham contracted for the land, are made defendants, they being out of the limits of the jurisdiction of the court. No attempt has been made in the argument, to support the validity of the tax sale, and it may be laid out of the case.

For the appellees, it is insisted, that the proper parties are not before the court, so as to enable the court to decree upon the merits of the conflicting claims. And we are all of that opinion. It is plain, that the appellants cannot set up the survey No. 537, against the appellees' title, without first showing themselves entitled to that survey. They claim that survey, not by any assignment, or other instrument, investing them with a legal right to it, but by executory agreements, the validity and obligation of which the parties to them have a right to contest. We cannot try their validity, and decide upon their efficacy, by affirming they confer upon the appellants an equitable right, without manifest prejudice to the rights of those not before the court. The complainants can derive no claim in equity to the survey, under or through Langham's executory contracts with the Beards, unless these contracts be such as ought to be decreed against them specifically by a court of equity. How can a court of equity decide that these contracts ought to be specifically decreed, without hearing the parties to them ? Such

Mallow v. Hinde.

a proceeding would be contrary to all the rules which govern courts of equity, and against the principles of natural justice.

Taylor, too, is the legal proprietor of the warrant, by virtue of which the entry and survey No. 537 was made, and in general, the right of removal is incidental to the right of property. But it is alleged, *he has parted with that incidental right, although the general legal title of ownership remains in him ; or that he has exercised this incidental right fraudulently and improperly, to the prejudice of the appellants. Can any court justly strip him of this incidental right, or convict him of fraud, unheard ? Besides, if the court should, by its decree, compel Hinde to release his legal title to the complainants, upon the grounds, that the entry and survey No. 537 are superior to his title, it would be giving to the complainants that which belongs to Taylor as trustee, and to his *cestuis que trust*, unless by their acts and agreements they have parted with their right to the survey.

If the courts of the United States were courts of general jurisdiction, it could not be doubted, that Taylor, William and Joseph Beard and Mr. McGowan and wife, would be necessary and indispensable parties, without whom no decree upon the merits could be made. But it is contended, that the rule which prevails in courts of equity, generally, that all the parties in interest shall be brought before the court, that the matter in controversy may be finally settled, ought not to be adopted by the courts of the United States, because from the peculiar structure of their limited jurisdiction over the persons, the application of the rule in its full extent would often oust the court of its acknowledged jurisdiction over the persons and subject before it. It is true, this equitable rule is framed by the court of equity itself, and is subject to its sound discretion. It is not, like the description of parties, an inflexible rule, the failure to observe which turns the party out of court, merely because it has no jurisdiction over his cause ; but being introduced for the purposes of justice, is susceptible of considerable modifications for the promotion of these purposes. Accordingly, this court, in the case of *Elmendorf v. Taylor*, 10 Wheat. 167, has said, "That the rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But if the case may *be completely decided, as between the litigant parties, the circumstance that an interest exists in some other person, [*198 whom the process of the court cannot reach, as, if such party be the resident of some other state, ought not to prevent a decree upon its merits."

This doctrine was applied to the case where a small interest was outstanding in one not before the court, as tenant in common. In that case, the right of the party before the court did not depend upon the right of the party not before the court ; each of their rights stood upon its own independent basis ; and the ground upon which it was necessary, according to the general principle, to have both before the court, was to avoid multiplicity of suits, and to have the whole matter settled at once. In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the court lie at the very foundation of the claim of right by the plaintiffs, and a final deci-

Connor v. Featherstone.

sion cannot be made between the parties litigant, without directly affecting and prejudicing the rights of others, not made parties.

We do not put this case upon the ground of jurisdiction, but upon a much broader ground, which must equally apply to all courts of equity, whatever may be their structure as to jurisdiction. We put it on the ground, that no court can adjudicate directly upon a person's right, without the party being either actually or constructively before the court. We have no doubt, the circuit court had jurisdiction between the complainants and the defendant, Hinde, so far as to entertain the bill, and grant an injunction against the judgments at law, until the matter could be heard in equity. And if it had been shown to the circuit court, that from the incapacity of that court to bring all the necessary parties before it, that court could not decide finally the rights in contest, the court, in the exercise of a sound discretion, might have retained the cause, and the injunction, on the application of the complainants, until they had reasonable time to litigate the matters of controversy between them, and Taylor and the Beards, in the courts of the *199] state, or *such other courts as had jurisdiction over them; and if then it was made to appear by the judgment of a competent tribunal, that the complainants were equitably invested with the rights of Taylor, the trustee, and the *cestuis que trust*, in the survey No. 537, the circuit court could have proceeded to decree upon the merits of the conflicting surveys. Such a proceeding would seem to be justified by the urgent necessity of the case, in order to prevent a failure of justice; and the cause would have remained under the control of the circuit court, so as to have enabled it to prevent unreasonable delay, by the negligence or design of the parties, in litigating their rights before some competent tribunal.

The cause having been brought to a hearing before the circuit court in its present imperfect state of preparation, that court could not do otherwise than dismiss the bill; but as no final decision of the rights of parties could properly be made, the dismissal, instead of being general, ought to have been, without prejudice. So much of the decree as dismisses the bill generally, must be reversed, and the decree, in all things else, affirmed; and the cause is to be remanded to the circuit court, with directions to dismiss the bill, without prejudice.

Decree accordingly.

CONNOR and others, Appellants, v. FEATHERSTONE and others, Respondents.

Fraud in fact.

A question of fact, upon a bill filed to set aside the sale and assignment of a land-warrant, on the ground, that it was obtained by fraudulent misrepresentation, and taking undue advantage of the party's imbecility of body and mind. Evidence deemed insufficient, and bill dismissed.

APPEAL from the Circuit Court of West Tennessee.

January 15th, 1827. This cause was argued by *White*, for the appellants; and by *Isaacks*, for the respondents.

*200] *February 1st. TRIMBLE, Justice, delivered the opinion of the court.—This case comes before the court by appeal from the decree

Connor v. Featherstone.

of the circuit court for the western district of Tennessee. The suit was instituted by James Hibbits, in his lifetime, and after his death, was it revived in the names of the appellees, his heirs-at-law, after which the defendants, now appellants, appeared and answered.

The object of the suit was, to have delivered up to the complainant a land-warrant of 5000 acres, which had been issued in the name of James Hibbits, upon an entry made by him in John Armstrong's office, No. 394, and to restrain James and Henry W. M. Connor, and each of them, from procuring a grant upon a survey which had been made and returned for the use of James Connor, by virtue of the warrant, under color of certain assignments alleged by James and Henry Connor to have been made by Hibbits, and to have those assignments set aside. It appears, that James Connor held a writing, under seal, dated the 25th of September 1796, purporting to be signed and executed by James Hibbits, to the following effect :

"I, James Hibbits, of the county of Iredell, and state of North Carolina, for and in consideration of the sum of ninety-three pounds, ten shillings, of the state aforesaid, have granted, bargained and sold to James Connor, of Mecklenburgh county, and state aforesaid, a 5000 acre warrant entered in Colonel John Armstrong's office, No. 394, and I do authorize Colonel William Polke, or any of his deputies, or any other surveyor, to issue the returns, when the land is surveyed, in the name of James Connor."

The execution of this assignment is contested by the bill, which suggests, that a mere order for the delivery of the warrant was given, without any terms of transfer ; but its due execution is expressly averred by the answer, and clearly sustained by evidence.

It appears, from the statements of the bill and answer of James Connor that although this assignment purports to be general and absolute, there was a parol agreement and understanding between the parties, at the time of its execution, qualifying its general import. But the parties *differ very materially as to the character and extent of this parol agreement. [*201 Both admit, that Hibbits was indebted to Connor, a sum of money, which it was not convenient then to pay, but they differ as to its amount. Both agree, that the sum so due from Hibbits to Connor, and Connor's agreement to pay to government a balance, due upon the entry, of about twenty-four pounds, with the interest thereon due to the state, and for which the warrant was detained, was the consideration of the assignment. Hibbits insists, that by the agreement and understanding of the parties, the assignment was intended as a mortgage or security for the debt, together with the advance to be made to the government ; but Connor, in his answer, expressly denies such was the character of the agreement, and insists it was, that Connor should be proprietor of the warrant, so far as these sums would go, at the rate of sixty pounds per thousand acres, and that the residue should be held by him in trust for Hibbits. It appears, that Connor paid to the government 45*l.* 17*s.* 4*d.*, the balance due upon the entry, with interest, and procured the warrant to issue, and be delivered to him, on the 29th of November 1797. It appears, that the adjustment and settlement of their respective interests in the warrant, was the subject of occasional correspondence and negotiation between them, from that time until 1817 ; but that, as the land lay in the Indian country, and could not lawfully be surveyed, until the Indian title

Connor v. Featherstone.

should be extinguished by the general government, the matter lay over until that period.

It appears, that in June 1817, James Connor sent his son, Henry W. M. Connor, with a power of attorney, and instructions, from North Carolina, to James Hibbits, in Tennessee, to adjust the business within, either by selling to Hibbits, Connor's interest in the warrant, or purchasing Hibbits's interest in it. That on the —— day of June 1817, at Hibbits's own house, a contract was made by Henry Connor, as agent of James Connor, with Hibbits, by which Hibbits agreed to transfer and assign to James Connor, or his agent, for his use, all Hibbits's interest in the warrant, for which Connor agreed to convey to Hibbits, by deeds with special warranty, Connor's right in two grants of 1000 acres, *in Connor's name, calling to *202] lie on Swift creek; and also give a bond for the conveyance of 150 acres in Bedford county; in execution of which agreement, an assignment of the whole warrant was accordingly executed by Hibbits, and deeds for the two grants of 1000 acres each, on Swift creek, and a bond for the 150 acres in Bedford county, were executed by Henry W. M. Connor, as agent for James Connor.

The bill charges, that this assignment was procured by Henry W. M. Connor, "most fraudulently, and in the following manner:"—"that Hibbits was confined to his bed by a severe and long spell of sickness, under the influence of which he had labored several months; that his intellect and his faculties were so much debilitated and impaired, that he scarcely knew anything he was doing; that Henry Connor represented all the lands he proposed giving for the warrant as good and valuable lands; and he moreover represented that the land called for in said warrant lay south of, and without the limits of, the state of Tennessee; all of which assertions and allegations of said Henry were false, and known by him to be so at the time. He had been correctly informed, that the land lay in this state (Tennessee), and that it was very valuable; he had been offered for part of it, six dollars per acre, and he also knew, that the two tracts of 1000 acres each on Swift creek had never been surveyed; and that the 150 acres in Bedford county had been taken by a better claim." This is the substance of the charges of fraud and misrepresentation made in the bill, all of which are substantially denied by the answer.

At the hearing of the cause, the circuit court decreed that the assignment of the —— day of June 1817, should be set aside and held for nought; that neither of the Connors should hold any interest in the warrant, by virtue of that assignment, and then proceeded to direct what interest the parties should respectively hold in the warrant, under the assignment and contract of 1796, and directed a release of the proportion allotted by the decree to the complainants accordingly.

It is plain, that if the assignment of 1817 ought not to be set aside, the decree must be considered not only erroneous, *but there can be no *203] necessity for inquiring what interest each party should hold in the warrant, under the contract and assignment of 1796, independently of the assignment of 1817. That matter was adjusted by the contract and assignment of 1817; and unless that assignment should be set aside for fraud and imposition, we cannot go behind it.

It is argued, that James Hibbits was so diseased in mind and body, as

Connor v. Featherstone.

to be incapable of controlling his own conduct, and that undue advantage was taken of his imbecility by Henry W. M. Connor. We do not think the allegation supported by sufficient proof. The answer denies it; and William Cawley is the only witness who speaks directly to the purpose. William Alexander swears, he was once at Hibbits's house, in the summer of 1817; that Hibbits was in great agony, and then incapable of transacting business; but whether from the excess of bodily pain only, or conjointly from that and mental imbecility, he is silent. The former we think the fair and only import of his evidence, as he says nothing of the state of Hibbits's mind, but speaks expressly of bodily disease. Besides, it is uncertain, whether this was before or after the contract; and cannot, therefore, furnish a circumstance in aid of Cawley's statements. Many other witnesses depose as to Hibbits's mental condition, whose statements are irreconcilable with Cawley's impressions.

A letter written by Henry W. M. Connor to Adam Miller, in which he says, "Mr. Hibbits has found out that I made an advantageous trade with him, that the land was in the state of Tennessee, contrary to his expectation, and complains heavily that I took an advantage of him, that he was a little deranged at the time," is greatly relied on in argument, not only to prove Hibbits's insanity, but to prove Henry W. M. Connor misrepresented the situation of the entry of 5000 acres, and thereby deceived and defrauded Hibbits. So far as the letter alludes to the state of Hibbits's mind at the time of the contract, and to "an advantage" having been taken of him, the writter evidently means to state only Mr. Hibbits's subsequent complaints, and not the facts or circumstances actually attending the transaction. The letter cannot, then, prove that Hibbits was deranged, or that Connor took advantage of him, unless it is inferrible from other parts *of the letter. He says, Hibbits had found out that Connor had made [204 an advantageous trade; but it would be a very strained construction of this language, to suppose Connor meant anything more by it than a good bargain. He says, Hibbits had found out the land lay in Tennessee, contrary to his expectation; and it has been insisted in argument, that this fixes decisively upon Henry Connor the imputation of fraud and misrepresentation, as to the situation and value of the 5000 acres of land. We do not think so. In the very doubtful state of the question, where the state boundary would run, when ascertained by public authority, the various conjectures and opinions then existing on the subject, the near proximity of the land to the line, as afterwards established, no inference unfavorable to the fairness of Connor's conduct can justly be drawn from Hibbits's expectation, at the time of the contract, that the land was not in Tennessee, unless it were shown that Connor, by his representations, superinduced that expectation. There is nothing in the letter, and we can discover nothing elsewhere in the evidence, conducing to prove that Connor, at the time of the contract, made any representation on the subject of the land being without or within Tennessee. In the existing state of circumstances, in relation to the position of the state line, which was not fixed nor known until long after, it could, at most, be but matter of opinion or conjecture, whether the land would or would not fall within Tennessee. It is not shown, that Henry W. M. Connor expressed even an opinion to Hibbits on the subject; and if Hibbits entertained an erroneous opinion, it would be

Connor v. Featherstone.

going too far, in a matter, apparently involved, at the time, in uncertainty, to hold Connor responsible for that error.

The bill charges Connor with falsely representing the value of the 5000 acres ; but that is also denied by the answer, and there is no proof in support of the bill.

It is further argued, that the deeds made by Connor to Hibbits, for the two tracts of 1000 acres each, calling to be on Swift creek, being drawn by Henry W. M. Connor, and containing only a clause of special warranty, is evidence of the fraud and undue advantage taken of Hibbits's situation.

The clause of warranty in the conveyances is to the following *effect, *205] to wit : "That he, the said James Connor, for himself and heirs, shall and will warrant and defend the above-named grant from the lawful claim or claims of any person or persons whatever ; but it is hereby understood, that the said Henry W. M. Connor, as agent for James Connor, does not obligate himself to warrant the land called for in the grant, but only to warrant the grant itself from all legal claims of any person or persons." Whatever singularity may, at first blush, appear in this clause of warranty it vanishes, when the state of the country, and the titles in it, are understood. The 5000 acre entry of Hibbits, and the land given in exchange for it, in the contract of 1817, at that time, all lay in the Indian country, and the Indian title thereon had not been extinguished. Although the warrant upon the 5000 acre entry had issued, it had not been surveyed, and could not be lawfully surveyed, until the Indian title should be extinguished by the general government. Although grants had issued for the two tracts of 1000 acres each, calling to lie on Swift creek, it was very probable, that they had issued, as is understood to have been the case, in many instances, without actual surveys having been executed on the grant. By the laws and usages of the state, as understood to exist at the time, duplicate warrants could be procured, and located on other lands, whenever it appeared the land granted could not be identified, for want of a survey, or was lost by a superior interfering claim. In such a state of things, it was evidently a risking bargain on both sides ; and the peculiar clause of warranty must be presumed to secure to Hibbits the benefit of procuring warrants for the grants, if the land could not be held by the grants themselves. The same remark may be applied to the 150 acres in Bedford county, with this additional observation, that as Henry W. M. Connor did not execute a deed of conveyance for it, at the time of the contract, but a bond for a conveyance, if the 150 acres was lost, or he is otherwise unable to convey, he is liable upon his bond, unless he afterwards made a conveyance agreeable to his bond ; and in that case, Hibbits would derive the same advantage of being entitled to *206] a warrant for that quantity, notwithstanding *the opinion of Henry W. M. Connor, as expressed in his letter to Miller to the contrary.

The only remaining ground of argument relied upon in support of the decree of the circuit court is, that the consideration agreed to be given for the last assignment has failed, and the assignment ought, therefore, to be set aside. But the consideration agreed upon has not failed. Hibbits, as must be inferred from the deeds for the two tracts of 1000 acres each, was not to have a good and indefeasible title ; but such title only as the grants might give, with the incidental advantages resulting from them by the laws

Edwards v. Darby.

of the country. The 150 acres may constitute a claim for damages, but furnishes no ground for setting aside the assignment of 1817.

This court is of opinion, there is not sufficient evidence to show that the assignment, dated the ——— day of June 1817, was procured by fraud, or undue advantage taken of the situation of Hibbits; and that the said assignment ought not to have been set aside. The decree of the circuit court is, therefore, deemed erroneous, and must be reversed, and the cause remanded to the circuit court, with directions to dismiss the bill, with costs.

Decree reversed.

EDWARDS'S Lessee v. DARBY.

Land-law of Tennessee.

Under the act of North Carolina of 1782, for the relief of the officers and soldiers in the continental line, &c., the commissioners having determined that the French lick was within the reservations of the statute, as public property, and having surveyed the said reservation in 1784, the same was protected from individual survey and location, although it exceeded the quantity of 640 acres.

The French lick reservation, has not been since subjected to appropriation, by entry and survey, as vacant land, by any subsequent statute of North Carolina or Tennessee.

*ERROR to the Circuit Court of West Tennessee.

[*207

January 24th, 1827. This cause was argued by *Talbot*, for the plaintiff; and by *Eaton*, for the defendant.

January 29th. TRIMBLE, Justice, delivered the opinion of the court.— This is a writ of error to a judgment of the circuit court for the western district of Tennessee. The plaintiff prosecuted an action of ejectment in that court, to recover possession of a small tract of 20 or 30 acres of land, which had been laid out in lots and squares, as part of the town of Nashville, the tenants in possession being the owners or occupiers of such lots.

In the year 1818, Patrick H. Darby appropriated, by entry and survey, all that part of the town, from lot No. 141, to lot No. 165, the latter inclusive; and having obtained a grant therefor from the state of Tennessee, he, before the institution of the suit, conveyed the land by deed to Edwards. This was the plaintiff's title.

The legislature of North Carolina, by an act passed in the year 1782, entitled, "an act for the relief of the officers and soldiers in the continental line, and for other purposes therein mentioned," enacted, that certain bounties in land should be granted to the officers and soldiers in the line of that state, on continental establishment. The seventh section of the act, after reciting that, "Whereas, in May 1780, an act passed reserving a certain tract of country to be appropriated to the aforesaid purposes, and that it had been represented to the assembly, that sundry families had, before the passing of the said act, settled on the said tract of country; enacts, that 640 acres of land shall be granted to each family, or head of a family, and to every single man of 21 years or upwards (to include their improvements), settled on said land before the first day of June 1780, for which they shall have the right of pre-emption; provided, no such grant shall include any salt-licks or salt springs, which are hereby declared to be reserved as public

Edwards v. Darby.

property, together with 604 acres of the adjoining lands, for the common use and benefit of the inhabitants of that country, and not subject to future appropriations ; and all the remainder of the aforesaid tract of *coun-
 *208] try shall be considered as subject to partition as by this act directed." The eighth section appoints commissioners in behalf of the state, "to examine and superintend the laying off the land, in one or more tracts, allotted to the officers and soldiers." The eleventh section authorizes the commissioners to appoint one or more surveyors, for the more speedy and effectual laying off and surveying said lands.

The commissioners, in the exercise of their powers in carrying this act into effect, determined the French lick to be within the scope of its provisions, and a proper object of such reservation, and caused a survey to be made of said reservation, as early as 1784, which turns out to include 667 $\frac{3}{4}$ acres, instead of 640, and embraces within its limits the whole of the lots laid off in the town of Nashville, and the land covered by the grant to Patrick H. Darby.

In the year 1784, the legislature of North Carolina, by its act, appropriated 200 acres, part of said reservation, for the establishment of the town of Nashville, to be laid off at the bluff on the Cumberland river, nearest the French lick ; and commissioners are designated in the act to lay out the proposed town in streets, lots and squares ; to cause a plan thereof to be made out ; and to sell and dispose of the lots in the town, when thus laid off.

Upon the trial of the general issue, in the circuit court, after the plaintiff had given in evidence the grant to Darby, and conveyance from Darby to Edwards, already recited, the defendants gave evidence conducing to prove, that the survey made of the reservation around the French lick, by the commissioners, as early as 1784, included the whole of the land granted to Darby, and then in controversy ; and also, that the commissioners or trustees for laying off the town of Nashville, had, in the year —, laid off and disposed of a part of the town lots ; and that, afterwards, the commissioners had laid off and disposed of the additional lots, to 165 inclusive, about the year 1789 or 1790 ; but it appeared, that the quantity of 200 acres was
 *209] thereby exceeded by 20 or 30 acres, such excess covering the lots *from 141 to 165 inclusive, but the whole of which lay within the French lick reservation, as laid off by the commissioners, about the year 1784.

The court instructed the jury, that if they found the land in controversy, and within Darby's grant, was also within the boundary of the town, as actually laid off, although that boundary exceeded the quantity of 200 acres, or if they found it was within the actual survey of the French lick reservation, as laid off in 1784, although it exceeded the quantity of 640 acres, the land was protected from individual appropriation by entry and survey, both by being so within the town boundary, as laid off, and within the reservation as laid off, or if not by both, it was so protected by being included within the latter ; and that, consequently, the grant to Darby was void. To this opinion and instruction, the plaintiff excepted, and his exception was sealed, and made part of the record.

It is not necessary to decide, whether the land in controversy would, or would not, have been protected from individual appropriation, by being actually laid off and disposed of as town lots, beyond the quantity of 200

Edwards v. Darby.

acres, as we are all of opinion, it was so protected by being within the French lick reservation, as laid off.

It is argued, that the commissioners, appointed by the act of 1782, were not authorized to cause surveys to be made of the reservations of 640 acres around the reserved salt-licks and springs, that the reservation was by quantity only, and that no legal effect can therefore be attributed to the survey. We admit, the statute does not give the authority to survey the reservations, in express terms, but do not admit, that the authority may not, and does not, result, by necessary implication, from the duties they were expressly required to perform, and from the general provisions of the statute. They were not expressly required by the statute to determine what licks and springs were proper objects for reservation, and came within the provisions of the statute; but they were required to lay off and cause to be surveyed the lands granted to the officers and soldiers, subject to, and so as not to interfere with, these reservations. The right of pre-emption granted by law to the settlers, of 640 acres each, including *their settlements, were also to be avoided. It seems to result necessarily from these provisions, that the commissioners must [*210 first determine what were the proper subjects of reservation, and having determined, that a given salt-lick or spring came within the provisions of the law, the power and duty of laying off by survey the 640 acres reserved, and to be avoided, around the lick, seems, necessarily and irresistibly, to result to the commissioners, in all cases where they might deem it necessary to do so, in order to enable them to lay off the lands for the officers and soldiers, so as to avoid these reservations. The adjacency of pre-emption rights, too, might render it both necessary and proper, that they, as well as the reservations, should be laid off, because both were to be avoided. But more especially, it was indispensable, wherever the commissioners were about to lay off lands for the officers and soldiers, adjacent to a salt-lick or spring, to have a survey made of the reservation, to give it figure and fixed locality; otherwise, the reservation being of quantity only, without boundary, one of two consequences must have resulted, namely, that it might, lawfully, be encroached upon on one side, and if on one, on any other side; or that, practically, its uncertainty must have excluded a much larger quantity than was intended by law to be reserved from the satisfaction of the claims of the officers and soldiers.

In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.¹ The law was not only thus construed by the commissioners, but that construction seems to have received, very shortly after, the sanction of the legislature. By the third section of an act passed by the legislature of North Carolina in 1789, entitled, "an act directing the sale of the salt-licks and springs, with the adjoining land, within the district of Mero," it is enacted, that the commissioners appointed to carry that act into effect, "shall cause to be surveyed, where such surveys have not already been made, all the said salt-licks and springs, with the six hundred and forty

¹ This rule only applies to cases of ambiguity and doubt. *Swift Co. v. United States*, 105 U. S. 695.

Edwards v. Darby.

acres of adjoining land." This provision must be construed as recognising the validity *of, and as ratifying, the surveys which had been made *211] by the commissioners under the act of 1782.

The circumstance of the survey containing a considerable surplus, we think immaterial. It was a public act, done by a public authorized agent of the government, and afterwards recognised by the government itself. None but the government itself ought, therefore, to be permitted to call it in question. It is argued, that, however this may be, the legislature, by the act of 1789, above recited, have declared the whole of the reservation, not otherwise appropriated to the Davison academy, the 200 acres vested in the town, and the land granted to John McNairy, to be vacant unappropriated land, subject to individual appropriation by entry, survey and grant, in the ordinary mode; and that as the land granted to Darby is not embraced by either of these prior appropriations, his grant is valid. We are not of that opinion. The second section of the act of 1789, directs the county courts to make out lists "of all the salt-licks and springs in their respective counties, which said courts shall deem fit for the purpose of manufacturing salt, including all such licks and springs as were set apart by commissioners heretofore appointed for that purpose, as public property, viz., Heaton's lick, Denton's lick, the French lick, &c., which lists shall be entered on the records of said courts, and copies thereof delivered to the commissioners appointed by this act; and all other salt-licks and springs, with the adjoining lands, not deemed by the court fit for the manufacturing of salt, be and they are hereby declared vacant land, and liable to be located and entered in the same manner as other vacant land." The act then proceeds to direct how the commissioners appointed by that act shall proceed to sell the salt-licks and springs, with the adjoining lands, listed as deemed fit for manufacturing salt. From these provisions, it was obviously the intention of the legislature, that all the salt-licks and springs deemed fit for the manufacturing of salt, with the adjoining lands to each, shall be sold in the manner specially directed by the act; and the French lick is, by the act *212] itself, enumerated as one belonging to that class. *It was only those not deemed fit for the manufacture of salt, with the reserved lands adjoining them, that were declared vacant land, subject to be appropriated by location and entry. We can discover no other law of North Carolina, or of Tennessee, which subjects the reservation about any of the licks deemed fit for manufacturing salt, to appropriation by entry and survey, as vacant land. We, therefore, accord in opinion with the circuit court, that the grant to Patrick H. Darby is void.

The circuit court, as appears by the bill of exceptions, permitted evidence to be given, for the purpose of showing the court had no jurisdiction; and instructed the jury, that if they believed the facts which this evidence conduced to prove, the court had no jurisdiction ever the cause. This was certainly irregular and improper. The jury were sworn to try the general issue, and the facts involved in it, not to try facts involved in a question of jurisdiction. The instructions of the court were calculated to lead and divert the attention of the jury, from the subjects of inquiry properly before them, to others in no way connected with the issue. For this error, the judgment of the circuit court must be reversed, the cause remanded to the circuit court, with directions to set aside the verdict, and

Ogden v. Saunders.

for new proceedings to be had therein, not inconsistent with the judgment of this court.

Judgment reversed.

DEVEREAUX v. MARR.

Division of opinion.

This court cannot take jurisdiction of a question, on which the opinions of the judges of the circuit court are opposed, where the division of opinion arises upon some proceeding subsequent to the decision of the cause in that court.

IN this case, the judges of the Circuit Court of West Tennessee, after a judgment had been rendered in that court, *divided in opinion upon the question as to the amount of the security bond, to be given by [213] the party applying for a writ of error, whether the amount of the bond ought to be sufficient to cover the whole debt, or only for the costs and increased damages on the party failing to prosecute his writ of error with effect. Whereupon, the division of opinion was certified to this court, under the 6th section of the judiciary act of the 29th April 1802, ch. 291.

January 17th, 1827. The cause was argued by *Eaton*, for the plaintiff; and by *White*, for the defendant.

THIS COURT was of opinion, that it had no jurisdiction of the question on which the opinions of the judges of the circuit court were opposed, the division of opinion having arisen after the decision of the cause in that court.

Certificate accordingly.

OGDEN, Plaintiff in error, v. SAUNDERS, Defendant in error.

State bankrupt laws.

The power of congress "to establish uniform laws of the subject of bankruptcies throughout the United States," does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress, and the state laws conflict with those of congress.

A bankrupt or insolvent law of any state, which discharges both the person of the debtor, and his future acquisitions of property, is not "a law impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such laws.¹

But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States, or of any other state than that where the discharge was obtained.²

¹ *Mather v. Bush*, 16 Johns. 233; *Roosevelt v. Kellogg*, 20 Id. 208; *Raymond v. Merchant*, 3 Cow. 147; *Jaques v. Marquand*, 6 Id. 497; *Sebring v. Mersereau*, 9 Id. 344; *Hicks v. Hotchkiss*, 7 Johns. Ch. 297; *Wheelock v. Leonard*, 20 Penn. St. 440.

² *Boyle v. Zacharie*, 6 Pet. 348, 635; *Suydam v. Broadnax*, 14 Id. 67; *Cook v. Moffat*, 5 How. 295; *Baldwin v. Hall*, 1 Wall. 223; *Baldwin v. Bank of Newburg*, Id. 234; *Gilman v. Lockwood*, 4 Id. 409. Misapprehension existed, it seems, for a time, whether the second

opinion delivered by Mr. Justice JOHNSON in this case, was, in point of fact, the opinion of a majority of the court; but it is difficult to see any ground for such a doubt. The learned judge explicitly states, that he was instructed to dispose of the cause, and he goes on to explain, that the majority on the occasion is not the same as that which determined the general question previously considered. Ample authority exists for regarding that opinion as the opinion of the court, independently of what appears in the published report. When

Ogden v. Saunders.

ERROR to the District Court of Louisiana. This was an action of *assumpsit*, brought in the court below, *by the defendant in error, Saunders, *214] a citizen of Kentucky, against the plaintiff in error, Ogden, a citizen of Louisiana. The plaintiff below declared upon certain bills of exchange, drawn on the 30th of September 1806, by one Jordan, at Lexington, in the state of Kentucky, upon the defendant below, Ogden, in the city of New York (the defendant then being a citizen and resident of the state of New York), accepted by him at the city of New York, and protested for non-payment. The defendant below pleaded several pleas, among which was a certificate of discharge under the act of the legislature of the state of New York, of April 3d, 1801, for the relief of insolvent debtors, commonly called the three-fourths act. The jury found the facts in the form of a special verdict, on which the court rendered a judgment for the plaintiff below, and the cause was brought by writ of error before this court.

The question, which arose under this plea, as to the validity of the law of New York as being repugnant to the constitution of the United States, was argued at February term 1824, by *Clay, D. B. Ogden and Haines*, for the plaintiff in error; and by *Webster and Wheaton*, for the defendant in error, and the cause was continued for advisement, until the present term. It was again argued, at the present term, February 19th to 22d (in connection with several other causes standing on the calendar, and involving the general question of the validity of the state bankrupt or insolvent laws), by *Webster and Wheaton*, against the validity; and by the *Attorney-General, E. Livingston, D. B. Ogden, Jones and Sampson*, for the validity. The editor has endeavored to incorporate the substance both of the former and the present argument, into the following summaries.

Wheaton argued, that the state laws now in question were repugnant to the constitution of the United States, upon two grounds: 1st. That the *215] power of establishing "uniform laws on *the subject of bankruptcies throughout the United States," was exclusively vested in congress. 2d. That the state laws in question were "laws impairing the obligation of contracts," the power of passing which was expressly prohibited to the states.

1. The state laws, the validity of which is now drawn in question, are, the act of the legislature of New York of the 3d of April 1801, for the relief of insolvent debtors, on the application of three-fourths of their creditors, by discharging their persons and future property from liability for their

the subsequent case of *Boyle v. Zacharie*, 6 Pet. 348, was first called for argument, inquiry was made by the court, whether the opinion in question was adopted by the other judges who concurred in the judgment; to which, Chief Justice MARSHALL replied, that the judges who were in the minority upon the general question, concurred in that opinion, and that whatever principles were therein established, were to be considered as no longer open for controversy, but the settled law of the court. And Judge STORY delivered the unanimous opinion of the court in that

case, in the course of which he repeated the explanation previously given by the Chief Justice. 6 Pet. 643. Explanations to the same effect were also made by Chief Justice TANAY, in *Cook v. Moffat*, 5 How. 31; he had ruled the case in the court below, in obedience to what he considered as the settled doctrine of the court, and a majority of the court affirmed the judgment. Taken together, these several explanations ought to be regarded as final and conclusive. CLIFFORD, J., in *Baldwin v. Hall*, 1 Wall. 230-31. And see *Witt v. Follett*, 2 Wend. 457.

Ogden v. Saunders.

debts, upon a *cessio honorum*, and the act of the 3d of April 1813, granting the same relief upon the application of two-thirds of the creditors. The judgment of one of the learned judges of this court, in the case of *Golden v. Prince*, was referred to in this part of the argument, and its reasoning relied upon, to show that the power of establishing uniform laws on the subject of bankruptcies throughout the Union was, from its nature, an exclusive power, and that the exercise of a similar power, on the part of the states was inconsistent. (3 W. C. C. 313.)

2. These legislative acts are laws impairing the obligation of contracts. That they are such, in respect to contracts in existence when the laws are passed, has already been determined by the court, upon solemn argument. *Sturges v. Crowninshield*, 4 Wheat. 122; *Farmers' & Mechanics' Bank v. Smith*, 6 Ibid. 131. It was also supposed to have been decided, that, in such a case, it was immaterial, whether the contract was made before or after the passage of the law. *McMillan v. McNeill*, 4 Wheat. 209. But the whole question might now be considered as open for discussion.

To determine it, the nature and terms of the constitutional prohibition must be examined. "No state," &c., "shall coin money, emit bills of credit, make anything but gold and silver coin a tender in the payment of debts, pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." These are comprehensive terms, studiously designed to restrain the state legislatures from *acts of injustice, both in criminal and civil matters. 1. The prohibition of issuing bills of credit, or making anything but gold and silver coin a tender in the payment of debts, was intended to cut up paper-money by the roots. The commercial credit of the nation had severely suffered from this fatal scourge; and the anxiety to be relieved from it, was one of the most pressing motives which induced the formation of the new constitution. It might, perhaps, be doubted, whether the power of coining money, which was given to congress, and denied to the states, taken in connection with the prohibition to them to emit bills of credit, or make anything but gold and silver coin a tender in the payment of debts, was not intended to give to congress the exclusive power of regulating the whole currency of the country;¹ although the framers of the constitution probably did not foresee how completely this provision would be evaded by the multiplication of banking corporations in the different states. The term "bills of credit," alone, would reach the ordinary case of paper-money; but the prohibition of tender laws was meant to expand the same thought, so as to reach valuation and appraisement laws, and all that prolific brood of similar pernicious enactments, which disfigure the pages of our history, from the peace of 1783 until the establishment of the present constitution in 1789. 2. "Bills of attainder, and *ex post facto* laws," were prohibited, in order to restrain the state legislatures from oppressing individuals by arbitrary sentences, clothed with the forms of legislation, and from making retrospective laws applicable to criminal matters. *Calder v. Bull*, 3 Dall. 386. 3. The prohibition of "laws impairing the obligation of contracts," was intended to prevent the remaining mischiefs which experience had shown to flow from legislative interference with contracts, and to establish a

¹ It has been decided, that congress has power to issue an irredeemable paper currency, and to make it a legal tender in payment of pre-existing debts. *Knox v. Lee*, 12 Wall. 457.

Ogden v. Saunders.

great conservative principle, under which they might be protected from unjust acts of legislation in any form.

To give complete effect to this last salutary prohibition, the court has constantly given it an interpretation, sufficiently broad and liberal to accomplish *217] the ends which the framers *of the constitution had in view. For this purpose, the prohibition has been considered as extending to contracts executed, as well as executory ; to conveyances of land, as well as commercial contracts ; to public grants from the state to corporations and individuals, as well as private contracts between citizens ; to grants and charters in existence when the constitution was adopted, as well as those existing previously, and even before the revolution ; and to compacts between the different states themselves. *Fletcher v. Peck*, 6 Cranch 87 ; *New Jersey v. Wilson*, 7 Ibid. 164 ; *Terrett v. Taylor*, 9 Ibid. 43 ; *Town of Pawlet v. Clark*, Ibid. 292 ; *Dartmouth College v. Woodward*, 4 Wheat. 518 ; *Society, &c. v. New Haven*, 8 Ibid. 464, 481 ; *Green v. Biddle*, Ibid. 1. In most of these cases, the impairing act was applied to a specific contract or grant, and affected only the rights of particular individuals. But the principles laid down by the court apply to whole classes of contracts ; and surely it will not be pretended, that a law repealing all charters of a certain description, or impairing a general description of contracts, or abolishing all debts of a certain nature, would not be reached by the prohibition. The constitution necessarily dealt in general terms ; and such is the intrinsic ambiguity of all human language, that it could not entirely avoid difficulties of interpretation. But the fault of tautology has never been imputed to this instrument, and terms of such significant import would hardly have been added to this clause, if it had been intended merely to repeat and amplify the same thought which had already been expressed in the prohibition of paper-money, and other tender laws. On the other hand, if it had been intended merely to prohibit those particular species of laws, impairing the obligation of contracts, which the history of the times shows to have been the object of peculiar censure, they would have been mentioned by name. Paper-money and tender laws may be, and undoubtedly are, laws impairing the obligation of contracts ; but they were such notorious and flagrant evils, that it was deemed necessary to prohibit them expressly, and by name. But *218] the convention would have stopped there, had they not *intended to include any, and every law, impairing the obligation of contracts. And if they had intended to include only such as instalment and suspension laws, they would have mentioned them specifically. It is believed, that the reasoning of the court in *Sturges v. Crowninshield* is conclusive on his head. This reasoning receives confirmation from the historical fact, that in the original draughts of the proposed constitution, this prohibition of laws impairing the obligation of contracts was not included, although the other prohibitions were contained both in Mr. C. Pinckney's draught, and in that of the committee of nine. The prohibition now in question was subsequently added in the in the revised draught, which shows, at least, that it was studiously inserted. Journ. Fed. Convention 79, 227, 359.

Since, then, the convention intended to prohibit every possible mode in which the obligation of contracts might be violated by state legislation, the question recurs, are state bankrupt laws within the prohibition ? The clause must be construed in connection with other parts of the constitution, and

Ogden v. Saunders.

must be considered with reference to those extrinsic circumstances, in the then condition of the country, which affect the question. One of the great objects of the constitution was, to restore violated faith, and to raise the country from that state of distress and degradation into which it had been plunged, by the want of a regular administration of justice in the relation of debtor and creditor. The motives for giving the power of establishing bankrupt laws to congress are explained in the contemporaneous expositions of the constitution. Federalist, No. 42. Had not this power been granted to the Union, it might have been argued, with more show of reason, that the states were not meant to be prohibited from exercising the power, so as to impair the obligation of contracts. In enumerating the prohibitions to the states, each particular class of laws was not specified, for the reasons before mentioned. The plan of the framers of the constitution excluded this proximity of detail. Even in *the Federalist, the authors have only com- [*219
mented upon such parts as were subjected, at the time, to popular
discussion. Their observations upon the present subject are very general
and concise ; not, as has been supposed, because the concession by the states
was not so extensive as we now contend, but because it was almost univers-
ally regarded as indispensably necessary.

It is said, in a learned judgment delivered from a tribunal entitled to great respect, that all contracts are to be construed and executed according to the *lex loci contractus*, and the obligation of the contract is what the law of the place makes it. Hence, it is inferred, that the insolvent laws of the state in which any contract is made, form a part of the obligation of the contract. *Mather v. Bush*, 16 Johns. 233, per SPENCER, Ch. J. The principle may be admitted, without conceding the inference. It is sought to be illustrated, by supposing the law incorporated into the agreement of the parties. But it is only to suppose the clause of the constitution now in question to be also inserted in their agreement, and it will be seen, that this imaginary reference of the contracting parties to any particular law, leaves the question just where it found it. To this reasoning may be opposed the authority of another learned judge of the same state, who, though he expresses an opinion that the prohibition ought to be applied to retrospective laws only, repudiates this argument. "For," says he, "if parties are to be presumed to contract with reference to existing laws, they must be presumed to mean laws made in pursuance of the constitution." KENT, Ch., 7 Johns. Ch. 376. And it may be added, that the same argument would apply with equal force to a law making paper-money, or anything else but gold and silver coin, a tender in the payment of debts. But it will hardly be pretended, that the existence of such a law, at the time and place where the debt was contracted, would prevent the creditor from recovering it in specie.

It may, indeed, be admitted, that there is a difficulty in distinguishing between the obligation of a contract, and the remedy given by the law to enforce it. It may be admitted, *that the states have a right to [*220
modify the remedy, so far as respects their own courts ; that the *lex*
fori may be changed in many respects ; that the process for the collection
of debts may be altered ; still it does not follow, that a law taking away all
remedy whatever, and, in effect, abolishing the debt, would be a valid act.
Unless such an act be a law impairing the obligation of contracts, it is dif-

Ogden v. Saunders.

ficult to conceive of such a law. Wherever there is a right, there must be a remedy. 3 Bl. Com. 23. The remedy may be modified, but it may not be so modified as to impair or destroy the obligation. A discharge of the person only, upon a *cessio bonorum*, under a state insolvent law, may not impair the obligation of his contracts, and may be effectual within the territory of the state, and in the state courts. But a discharge of the person, and the future acquisitions of property of the debtor, under a state bankrupt law, absolutely extinguishes the debt, and cannot, therefore, be valid in any place where the authority of the constitution of the United States extends. The distinction between bankrupt and insolvent laws is sufficiently clear for all practical purposes. Both in Great Britain and on the European continent, the bankrupt laws are limited to merchants and traders, and the discharge is absolute. On the other hand, both by the insolvent system of England, and the *cessio bonorum* of the countries governed by the Roman civil law, the benefit of the cession is extended to all classes of persons; but it discharges the person only, leaving the subsequent acquisitions of the debtor liable to the demands of his creditors. Inst. de Act. § 40; Dig. l. 4, de *cessione bonorum*; 3 Pothier, Pandect. Just. in Nov. Ord. Dig. 174, B. 42; Encyclop. Meth. art. Jurisprudence, Cession; Code du Commerce, art. 568; Kent's Com. vol. 1, p. 396; 16 Johns. 244, 245, notes *a, b*. The *cessio bonorum* does not, therefore, impair the obligation of the contract. It only suspends and modifies the remedy. "Neither a civil nor a natural obligation (says Ayliffe) is dissolved by a *cessio bonorum*; though it produces a good exception in law, and suspends the force of an obligation for a time; the *221] extinguishment of an obligation being one thing, and the cessation *of it another; for when an obligation is once extinct, it never revives again." Ayliffe's Civ. Law, lib. 4, tit. 1.

Supposing, then, that the prohibition ought to be construed as extending to state bankrupt laws, what reason is there to believe that the convention meant to restrict it to laws operating upon existing contracts only? They had already expressly prohibited retrospective laws in criminal matters; and retrospective laws, applicable to civil cases, hardly required any positive and express prohibition. In every system of jurisprudence, such laws are considered as contrary to the first principles of natural justice; and even in those countries where the courts do not feel themselves at liberty to disobey the will of the legislature, when clearly expressed, however unreasonable or unjust, they will not give effect to it unless it is thus expressed. Bracton, lib. 4, fol. 228; Dig. 50, 17, 75; Code Napoléon, art. 2; *Dash v. Van Kleeck*, 7 Johns. 477, 500; Kent's Com. vol. 1, part 3, lect. 20. Had retrospective laws, affecting vested rights acquired under contracts, been alone intended, more appropriate and restrictive terms would have been used. But thus limited in its operation, the prohibition would have been wholly ineffectual. The prohibition of paper-money, and tender laws, was certainly meant to apply to prospective, as well as retrospective acts. To prohibit debts from being compulsively satisfied with anything but gold and silver coin, and yet to permit the states to make laws for discharging debts, without payment of any kind, is an absurdity of which the convention cannot be suspected. It is universally admitted, that the prohibition covers instalment and suspension laws. These, confessedly, involve all the mischiefs meant to be corrected; and yet we are told, the states may

Ogden v. Saunders.

pass them *ad lictum*, provided they only make them prospective in their operation. The history of the times will show, that many of the laws which the convention must have had in their eye, were prospective, either in effect, or in express terms. State Papers, vol. 1, p. 23, Mr. Hammond's correspondence with Mr. Jefferson. *The prohibition is associated in the same clause with other prohibitions, all intended to promote the same object, that of securing the observance of good faith in matters of contract. "No state shall make anything but gold and silver coin a tender in the payment of debts," or "pass any law impairing the obligation of contracts." What debts? All debts, both those contracted before and after the passage of the tender law. What contracts? All contracts, both those made before, and those made after the impairing law.

What is this "obligation of contracts," which is prohibited from being impaired by any act of state legislation? We answer, it is the civil obligation, the binding efficacy, the coercive power, the legal duty of performing the contract. The constitution meant to preserve the inviolability of contracts, as secured by those eternal principles of equity and justice, which run throughout every civilized code, which form a part of the law of nature and nations, and by which human society, in all countries and all ages, has been regulated and upheld. It is said, that the obligation of contracts is derived from the municipal law alone: *Obligatio est juris vinculum, quo necessitate astringimur alicujus rei solvendæ secundum nostræ civitatis jure*. Just. Inst. lib. 3, tit. 14. This is what we deny. It springs from a higher source: from those great principles of universal law, which are binding on societies of men as well as on individuals. The writers on natural law are full of this subject.(a) And the court itself has given a practical

(a) Grotius, *de Jure Belli ac Pacis*. "On this subject, we are supplied with noble arguments from the divine oracles, which inform us that God himself, who can be limited by no established rules of law, would act contrary to his own nature, if he did not perform his promises. From whence it follows, that the obligation to perform promises, springs from the nature of that unchangeable justice, which is an attribute of God, and common to all who bears his image in the use of reason." (B. 2, ch. 11, § 1.) "It is a most sacred command of nature, and guides the whole order of human life, that every man fulfil his contracts." (B. 3, ch. 4, § 2.)

Burlamaqui. "It is as ridiculous to assert, that before the establishment of civil laws and society, there was no rule of justice to which mankind were subject, as to pretend that truth and rectitude depend on the will of men, and not on the nature of things." (Vol. 2, p. 158.)

Vattel, *Droit des Gens*. "It is shown by the law of nature, that he who has made a promise to any one, has conferred on him a true right to require the thing promised; and that, consequently, not to keep a perfect promise, is to violate the right of another, and is as manifest an injustice, as that of depriving a person of his property. There would be no more security, no longer any commerce between mankind, did they not believe themselves obliged to preserve their faith and to keep their word. This obligation is then as necessary, as natural, and indubitable, between the nations that live together in a state of nature, and acknowledge no superior on earth, to maintain order and peace in their society." (B. 2, ch. 12, § 163.)

Pothier, *des Obligations*. Natural law is the cause, mediately, at least, of all obligations; for if contracts, torts, and *quasi* torts, produce obligations, it is because the natural law ordains that every one should perform his promises, and repair the wrongs he has committed." (Pt. 1, ch. 1.)

Ogden v. Saunders.

*exposition to the clause, which cannot be reconciled to the supposition, that the obligation of contracts depends alone on the municipal laws of the states. In the case of *Green v. Biddle*, 8 Wheat. 1, it was determined, that certain acts of Kentucky were repugnant to the constitution of the United States, as impairing the obligation of the compact of 1789, between the states of Virginia and Kentucky, respecting the titles to land in the latter state. Here, the contract was a treaty between two sovereign states of the Union. Whence was its obligation derived, but from the law of nature and nations?

When it is contended, that the obligation of contracts depends upon universal law, it is not meant to assert, that the state legislatures may not change their present municipal codes. But it is denied, that they may change them so as to affect that "great principle which the convention intended to establish, that contracts should be inviolable." *Sturges v. Crowninshield*, 4 Wheat. 206. Many perplexing cases may be imagined, where it would be difficult to ascertain the precise extent of the constitutional limitation upon the power of the states. In a new system of government, so complicated as ours, it will not be easy, nor it is necessary, to adjust, by anticipation, the precise limits of its conflicting authorities. "Moral lines are strong and broad," and it is not possible to mark them *224] with mathematical *precision. What we insist upon is, that the prohibition was designed to guaranty to the people of the whole Union, of each state, and to foreigners, the inviolability of contracts, the impartial administration of civil justice, the observance of good faith, the ligament of the social union, so as to enforce the execution of agreements in some effectual mode. The prohibition is universal. All manner of contracts are included in it, and their obligation is forbidden from being impaired by any legislative act whatsoever. "No state shall pass any law impairing the obligation of contracts." It is not merely any law impairing a particular contract, but it is any law impairing the obligation, or binding efficacy, of contracts in general. It is any such a law, general or special, applicable to a specific contract, or to all contracts, or to a particular class of contracts; to contracts made between citizens of the same state, or with citizens of different states, or aliens; between the state and individuals or corporations, and between the states themselves; whether the contract was in existence, when the constitution was adopted, or subsequently made; and (as we contend) whether the law was made subsequent to the contract, or the contract to the law. It has, indeed, been attempted to carve out of the universality of the prohibition, an implied exception of such laws as were in existence when the constitution was formed, or which the states had been accustomed to pass in the ordinary course of of their domestic legislation. But nothing can be more arbitrary than this distinction. It is said, that insolvent laws were in existence, when the constitution was formed and adopted, and had existed from very early colonial times. So were paper-money and tender laws, instalment and suspension laws. Yet these are confessedly meant to be prohibited; and whenever such laws have been inadvertently or designedly passed by any state, since the adoption of the constitution, no care has been taken to make them prospective only in their operation. If it be said, that paper-money and tender laws are expressly prohibited, the answer is, that the extent of the prohibition does not depend upon the par-

Ogden v. Saunders.

ticular kind of law being specified ; but that, if it is once ascertained, that any law falls within the general prohibition, its being limited to future cases only, will not rescue *it from the grasp of that prohibition. The general legislation power of the states over the contracts is left [*225 untouched by the clause in question. The states may still provide what shall, and what shall not, be the lawful subject of contracts ; in what form they shall be made, and whether in writing, under seal, or by parol ; and by what solemnities they shall be attested ; who may contract, and who are disabled from contracting ; what contracts are forbidden by the policy of the state, either as respects its internal commerce, its police, its health, its finances, its morals. In short, the dominion of the states over the entire field of civil legislation is complete, except so far as it has been surrendered, expressly, or by fair implication, to the national government, or as its exercise is expressly prohibited to the states. But still the question recurs, how far has it been surrendered, and how far has its exercise been thus prohibited ? The states may enact laws forbidding certain kinds of contracts from being made ; or any contract being made by certain individuals ; or requiring them to be made in certain prescribed forms, and attested with certain solemnities, and proved by certain species of testimony. Contracts made contrary to these regulations may be void in their inception, and never have a legal obligation ; or those which are permitted to be made, may be discharged by performance, by payment, or by prescription, and the presumption arising from the lapse of time as a rule of evidence. The states may make any and all regulations respecting contracts, provided they do not include among these regulations a provision that lawful contracts shall have no obligation. The constitution makes the binding obligation an inseparable incident to the contract. Without doubt, the supreme power of the nation may make laws impairing the obligation of contracts. Congress, not being prohibited in the constitution, may make laws having that effect, wherever it is a necessary consequence of the exercise of any legislative power given by the constitution. Thus, the war-making power necessarily involves in its exercise the dissolution of contracts of affreightment and charter-party, of insurance and partnership, and other conventions connected with a commercial intercourse with the public enemy. But the radical vice of the opposite argument consists in assuming *that the states are supreme in respect to this matter. They have [*226 parted with the power of making all laws impairing the obligation of contracts, and they have given the power to congress, so far as it is involved in the enactment of bankrupt laws, or of any other law which congress has authority to make.

As to what may be said in respect to the consequences of the decision the court is called upon to pronounce, they have been very much exaggerated, in all the discussions which have taken place on this subject. Few of the states have ever had bankrupt laws. Most of them have confined their regulations to a discharge of the person only. Others have already modified their insolvent laws, and conformed them to the recent decisions of this court. There is a general disposition to acquiesce in those decisions. The person of the debtor is everywhere free. The statute of limitations is fast obliterating stale demands : and it is consolatory to believe, that although the perseverance of this high tribunal, in its former resolutions, might be

Ogden v. Saunders.

attended with some temporary and partial evils, they would soon find their appropriate remedy in the exertion of the constitutional power of congress. Whatever difficulties may attend the question, relating to a uniform code of bankrupt laws, they must ultimately be overcome by the legislative wisdom of the country. The establishment of such a code is imperiously demanded by our peculiar situation as a confederacy of numerous states, closely connected by an active commercial intercourse, with various partial and conflicting regulations concerning the relation of debtor and creditor; by the policy of reciprocating the laws of foreign countries upon the same subject; and by the general interests of commerce, interwoven as they are with our grandeur and power as a nation, and with all the sources of public and private prosperity.

The *Attorney-General, E. Livingston, Clay, D. B. Ogden, Jones, Sampson and Haines*, argued, *contra*: 1. That the power of establishing "uniform laws on the subject of bankruptcies throughout the United States," as given to congress in the constitution, was not exclusive of the states over *227] the same subject. 2. That the laws of the *state of New York, now in question, were not laws, "impairing the obligation of contracts," in the sense of the constitution.

[The editor regrets that, from the number of counsel who argued on this side of the question, and the great variety of topics insisted on by them, he has been obliged to condense the whole argument into the following summary, which he hopes will be found to contain the substance of their reasoning, although it does not distinctly assign to each his appropriate portion of the argument, and is far from doing justice to the learning, eloquence and ability, with which the subject was discussed.]

1. It was stated to be the settled doctrine of this court, that any state of the Union has a right to pass a bankrupt law, provided such law does not impair the obligation of contracts, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law. Although some of the powers of congress are exclusive, from their nature, without any express prohibition of the exercise of the same powers by the states, the power of establishing bankrupt laws is not of this description. *Sturges v. Crowninshield*, 4 Wheat. 192. The court had determined, that the right of the several states to pass bankrupt laws is not extinguished, by the enactment of a uniform bankrupt law throughout the Union, by congress, but only suspended so far as the two laws conflict. *Ibid*. One of the laws of New York, now in question, was originally passed on the 21st of March 1788, was re-enacted in 1801, among the revised laws of that year, and continued in force until long after the discharge of the plaintiff in error was obtained. And although a uniform bankrupt law of congress was in force during a part of this period, it was repealed before the discharge; and, consequently, supposing the state insolvent law did conflict in any respect with the bankrupt law of congress, it was only so far suspended in its operation; and upon the repeal of the law of congress, was revived in all its effects. The other act, that of 1813, was *passed after the repeal *228] of the bankrupt law of congress of 1800.

But supposing this to be an open question, in order to determine it, it

Ogden v. Saunders.

was said to be necessary to look, not merely at the great federal objects for which the constitution was ordained, but to the antecedent condition of the parties to the compact. They were sovereign states, with all the powers of municipal government, which they had long exercised ; and with regard to this particular power of passing insolvent and bankrupt laws, they had been in the actual exercise of it, for many years before the adoption of the constitution, and even from the earliest colonial times. The English bankrupt laws, and the temporary acts which were occasionally passed by the British parliament for the relief of insolvent debtors, were not extended to the colonies. The several states had insolvent laws in force, at the adoption of the constitution, and they continued, after the adoption, to alter, revise and reenact those laws, manifestly unconscious that they had parted with this power. This was, indeed, no proof that they had not parted with it, if there was any other party having at once a right and an interest to make the objection. But the people of the Union, represented in congress, so far from contesting the power of the states over this matter, had never exercised the power of making bankrupt laws, except in a single instance, and then with an express saving of the state insolvent laws. Bankrupt Law of 1800, § 61. (2 U. S. Stat. 36.) So, the people of the several states, represented in their respective local legislatures, had all exercised this power. Here, then, was a significant declaration of the people, that they had not parted with this power, in their state capacities ; and that the grant of a similar authority, in their new capacity of a federal union, did not, by the mere grant of it, exclude the exercise of it by them, in their state capacities, at least, until superseded by a general and permanent law of congress. Contemporaneous construction had always been considered as of great weight in matters of constitutional law ; and in the question relating to the power of congress *to establish such corporations as the Bank of the United States, was [*229 considered as decisive. There are only three cases in which the states are excluded from the exercise of any power antecedently possessed by them :

1. When a power is granted to congress in exclusive terms.
2. When the states are expressly prohibited from exercising it in a specific form.
3. When a power is granted to congress, the contemporaneous exercise of which by the states would be incompatible.

It was not asserted on the other side, that the power now in question falls under either of the first two heads ; nor could it, by any fair course of reasoning, be shown to fall under the third head, of being an incompatible power, except when the incompatibility arises from its actual exercise by congress. The grant of the power of establishing "a uniform rule of naturalization," and "uniform laws on the subject of bankruptcies," being contained in the same clause, and expressed in similar terms, had justly been considered as subject to the same interpretation. Before the adoption of the constitution, the states had various incongruous rules of naturalization, and laws on the subject of bankruptcies, some of which discharged the person only of the debtor, and others his future acquisitions of property. Then came this provision of the constitution, which manifestly looks to the antecedent condition of things existing in the several states. The word *uniform* was significantly used, as applicable to that condition of things. In any other view, the expression has no peculiar meaning, and does not qualify the general grant of power ; for all the laws of congress, on general subjects, are necessarily "uniform throughout the

Ogden v. Saunders.

United States." The censure of the state regulations, implied in the terms in which the power to correct them is given to congress, was pointed against their want of uniformity. The policy and necessity both of bankrupt and naturalization laws, was clearly recognised. The sole object of granting to congress any power over these subjects, was, to secure that uniformity which the conflicting regulations of the different states could not attain. But the terms in which the grant is conceived were not mandatory. Congress was left free to exercise it, or not, at its discretion; and the only *consequence of an actual exercise of the power by congress, was *230] to supersede, during such exercise, the state laws, so far as they conflict with the laws of congress. (a)

2. The clause relied upon as virtually abolishing this power, is found in a subsequent and remote section of the constitution, wherein, after an enumeration of certain specified laws which the states may not pass, it is added, "nor any law impairing the obligation of contracts." From this it was inferred, that the states cannot pass bankrupt laws, although the power is not exclusive in congress. The states may pass bankrupt laws, it had been said, provided they do not impair the obligation of contracts. But all bankrupt laws do impair the obligation of contracts; *i. e.*, they discharge the debtor from his debts, without payment; and therefore, the states cannot pass them, even when the power is not actually exercised by congress. It had, however, been conceded, that they may pass insolvent laws, which discharge the person only, because these do not impair the obligation, but only affect the remedy. It had been said, they affect the remedy only, because they still leave the obligation entire, to be enforced against the future property of the debtor. But suppose, the state law should deny the creditor any power of coercion whatever, whether against the body or the estate of the debtor, it would still act upon the remedy only, and yet would strip the contract of all its binding efficacy, except merely that moral obligation, that *scintilla juris*, which, though it might form a sufficient consideration for a new promise, was in itself no ground of action. As the obligation of the contract does not depend upon municipal law, the withdrawal of all *231] the means of coercion which that law *gives, cannot impair the obligation, since it only takes away the remedy. Thus, according to this distinction between the right and the remedy, creditors are left completely at the mercy of state legislation, notwithstanding the boasted efficacy of this constitutional prohibition.

But (it was asked) what is the true import of this clause, forbidding the states from passing "any law impairing the obligation of contracts?" A contract is not merely that which the parties expressly stipulate. It is that also which the existing laws of the country where the contract is made, annex as conditions to it, at the time when it is formed. It had been

(a) It may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of congress, uniform laws on the subject of bankruptcies ought not to be established, it does not follow, that partial laws may not exist, or that state legislation on the subject must cease. 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. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts." *Sturges v. Crowninshield*, 4 Wheat. 196.

Ogden v. Saunders.

admitted, that a state might prohibit contracts altogether. If so, it may permit them, *sub modo*, with such conditions as it thinks fit to annex; and the parties who make a contract in that state, make it subject to the conditions. These conditions enter into the contract, and form a part of it, as completely as if they had been expressly stipulated by the parties themselves. These conditions are sometimes beneficial to one party, sometimes to the other: sometimes they add to the contract, sometimes they diminish it. But in every instance, they receive the tacit assent of the parties, and are not considered as impairing the obligation of the contract. A. gives B. a bond for \$1000, payable on demand. There is no stipulation for interest. But the law annexes the tacit condition that the obligee shall receive interest, and that at a certain fixed rate. So, in the contract of exchange, the drawer of a bill does not stipulate to pay it, if the drawee refuses. In the same manner, the liability of the indorser to the holder is implied by the law, and cannot be collected from the bill itself. Still less, is his right to be discharged for want of due notice of the dishonor of the bill, to be found in the written contract. But the law implies it, and, therefore, it might be said to impair the obligation of the actual contract between the parties, which contained no such condition. How did it happen, that this was not considered a violation of the constitution? It could only be, because the law of the place has annexed that condition to the contract, and made it as much a part of the contract, as if the parties had expressed it. The same principle applies to the custom of adding days of grace to *the [*232 specified time of payment in bills and notes, which are various in different countries, and make the contract of the parties, whatever the law of the place where the payment is to be made, says shall be the contract. *Renner v. Bank of Columbia*, 9 Wheat. 556. So, where the law of the place gives a peculiar remedy to the creditor on a bill or note, more summary and strict than in ordinary cases, the party shall be intended to have renounced the benefit of the ordinary law, and to have submitted himself to the extraordinary process provided for the particular case. *Bank of Columbia v. Okely*, 4 Wheat. 235. And so of many other cases, in which whatever is considered as discharging the contract by the law of the place where it was made, or with a view to which it is made, is considered as discharging it everywhere else, in whatever jurisdiction the creditor may attempt to enforce it, although no such condition is expressed in the terms of the contract itself. 2 Str. 733; Cooke's Bankrupt Law 314; 5 East 124; 3 T. R. 609; 1 East 6; 1 Dall. 188, 229. This proceeds, not upon the idea that the foreign law can impair the obligation of the contract, or the foreign court refuse to execute it, but that they will give the same effect to it which is given by the law and the courts of the country where it is made; they will regard that as the contract of the parties which the *lex loci* declares to be the contract of the parties. 3 Ves. jr. 449; 1 W. Bl. 257; 2 Burr. 1077; 1 Bos. & Pul. 138; 16 Johns. 233, 250; Huberus, Prælect. tom. 2, lib. 1, tit. 3; *de Conflictu Legum*, cited in note to 3 Dall. 370. So, in the present case, the contract being made in a state, where the local law, existing at the time, annexed to the contract the condition that, in certain events, beyond the control of the contracting parties, the contract should be discharged, the parties contracting in the place of the law, and with a knowledge of the law, are presumed to assent to it.

Ogden v. Saunders.

But it had been said, that if the local law be a part of the contract, so also is the constitution ; this might be admitted, without in any manner affecting the question. The constitution does not define "the obligation of contracts." It does not say, that the express stipulations of the *parties
 *233] alone shall form the contract. The contract is formed of express and implied consent, of convention, and of law. The constitution contemplates it in its legal sense, and in all its parts. If, then, the local laws in force when the contract is made, form a part of the contract, this is the contract which the constitution says shall not be impaired. So that it was not the plaintiff in error who sought to impair the obligation of his contract. It was the creditor who would impair the obligation, by striking out of the contract one of the conditions annexed to it by the law of the place.

Admitting, then, that the states could not pass bankrupt laws which shall discharge antecedent contracts, it did not follow, that they might not pass bankrupt laws, under which debts subsequently contracted might be discharged. In the latter case, the law annexes conditions to the express contract of the parties, to which it implies their assent. All the different restraints on state legislation which are associated in the same prohibitory clause, were intended to prevent certain unjust, oppressive and impolitic laws, both in civil and criminal matters. It had not been denied on the other side, that the prohibition of bills of attainder, and *ex post facto* laws, was exclusively aimed at acts retrospective, partial and unjust in their operation ; and it would not be difficult to show, that none of the other prohibitions were intended to affect the sovereign power of the states over their civil and criminal codes, when exercised, as all legislative power ought to be exercised, by general, impartial and prospective regulations. The history of the times, and the contemporaneous expositions of the clause, at the formation and adoption of the constitution, together with the subsequent judicial interpretations of it in cases which had since arisen, all concurred to prove, that the evils complained of, and the remedies meant to be applied for their correction, exclusively referred to legislative acts affecting vested rights, or past transactions. 5 Marsh. Life of Washington, 75, 85, 89, 259 ; 3 Ramsay's Univ. Hist. 46, 77 ; 2 Ramsay's Hist. of South Carolina, 440, 483 ; Journ. Fed. Convention 79, 227, 359 ; Virginia Debates 339 ; 3 Dall. 390 ; 1 Tuck. Bl. 312, app'x, part 1 ; The Federalist, No. 44 ; 1 State Papers 252 ; Secret Debates 70 ; 3 W. C. C. 318 ; 5 Hall's L. J. 530, 552 ; 1 Paine 79 ; 5 Binn. 362, 364 ; 13 Mass. 16 ; 3 Johns. 74 ; 16 Ibid. 233 ; 7 Johns. Ch.
 376. The history of the legislation *of the state whose acts were now
 *284] under consideration, would afford a strong illustration of this topic of argument. A system of insolvent laws had existed in that state, with some short interruptions, for sixty years past ; and subsequent to the adoption of the constitution, such laws had repeatedly passed the scrutiny of the council of revision, always composed of able statesmen and learned jurists, and in some instances, of those who had taken an active part in the formation of the constitution, without even a suggestion that these acts were prohibited by the clause in question. 16 Johns. 234, note *a*. In every instance in which this court had hitherto applied the prohibition to a state law, it was to some act operating upon antecedent existing contracts. Such, too, was the plain and obvious meaning of the words of the prohibition. How could any law be said to impair the obligation on a contract not in existence

Ogden v. Saunders.

when the law was passed? The obligation must first be contracted, before it can be impaired. Some right must be vested under a contract, before any party can have a right to complain of a law impairing its obligation. The party, who supposes himself to be injured, cannot complain of a law in existence when his contract was made, because (as had been shown) the law formed a part of that contract, and therefore, could not impair its obligation.

It was asked, what is the contract, and what the obligation of the contract? And it was answered, that the contract was what the parties understood it to be, and they understood it as the law declares it to be. Whatever is expected on one side, and known to be expected on the other, is a part or condition of the contract. Paley's Moral Phil. 92, 106. The obligation of the contract is not the contract itself, but something arising out of it. The moral obligation is that which binds the conscience only. The legal obligation is that which the law imposes. *It binds the contracting party to do that which the law says he shall do, under [*235 certain contingencies which may arise. There is nothing of mere human institution (and it is with this that the constitution deals) which binds to the performance of any contract, except the laws under which that contract is made, and the remedies provided by them to enforce its execution. The insolvent acts form a part of those laws, and the remedies provided to enforce the contract. The obligation of a contract may be impaired, by interference in favor of the creditor, as well as in favor of the debtor. But here, the existing remedies secured to both by the law (which is the part of the contract) are preserved with integrity, and there is, consequently, no violation of the constitutional provision, which was intended equally to protect the rights of both debtor and creditor. Indeed, the proceedings under some of these laws are compulsory against the debtor, and force him to make a surrender and assignment of his property for the benefit of his creditors, on their application. Bankrupt and insolvent laws have existed, in various forms, in every age and every civilized and commercial country, as one of the means of securing a fair and impartial distribution of the effects of insolvents among all their creditors, or as a relief which society has found it necessary to extend to the honest debtor, who has become unable from misfortune to satisfy the demands of his creditors. The states have, therefore, the same right to pass these laws (supposing the power not to be exclusively vested in congress), which they have to pass laws of limitation, or usury, or divorce, or any other ordinary regulation respecting contracts. All these laws might be said to have the effect of impairing the obligations of contracts, since they alter, increase, lessen or diminish what would otherwise be the effect of the agreement of the parties, by annexing conditions other and different from those expressed by the parties. If it were possible to suppose a commercial contract made independent of any of those regulations which the municipal code of every civilized country prescribes, it would be stripped of all these conditions, and reduced to the mere naked agreement of the parties, without any means of enforcing its performance. But the municipal law gives effect to the actual contract of *the parties, by implying a multitude of clauses and conditions, not expressed [*236 by them, and by providing adequate means to enforce it. Every municipal code contains a provision determining at what age a person shall be deemed

Ogden v. Saunders.

capable of contracting, and the period of majority is different, under different systems of law. This is a positive rule of society. In a state of nature, there is no definite age at which an individual becomes capable of contracting. Is not the whole of this subject under the control of state legislation? and would a law, extending the period of minority, be said to be a law impairing the obligation of contracts? So also, the power of contracting, which is permitted to a married woman, is more or less limited, under different systems of jurisprudence, and there is nothing in which the positive institutions of society are more diversified. And the contract of marriage itself is subject to be dissolved by the laws of the different states of the Union, under various circumstances and conditions. The policy of some states had made absolute divorces extremely difficult to be obtained, others had granted them with more facility. But could it be said, that these laws, or any alteration of these laws, impaired the obligation of the contract of marriage? Was it not a constituent part of this contract, that it should be subject to be dissolved, under the circumstances and according to the conditions prescribed in the laws of the state in force at the time when the marriage took place?¹ In most of the states, the policy of the English statute of frauds and registry acts had been adopted, and certain contracts and conveyances were required to be in writing, and others to be registered. Might not the states require it as an essential condition to the validity of all contracts and all conveyances, that they should be in writing, and should be registered; and could this condition, annexed by the law to the contract of the parties, be said to impair its obligation? In short, it was insisted, that the argument on the other side, when pushed to its legitimate consequences, would go to restrain state legislation upon almost every subject of property and internal police, and to fasten upon the states, against their sovereign will, immutable codes of civil jurisprudence, the inconvenience and mischiefs of which could not be corrected by any means

*237] *within the constitutional power of congress. On most of the subjects of ordinary civil legislation, congress had no power at all; and on this particular subject of bankruptcy, there was little hope of its being exercised. So that, if the court should pronounce the state bankrupt codes invalid, and congress should refuse to supply their place by the establishment of uniform laws throughout the Union, the country would present the extraordinary spectacle of a great commercial nation, without laws on the subject of bankruptcy.

Webster, in reply.—The question arising in this case is not more important, nor so important even, in its bearing on individual cases of private right, as in its character of a public political question. The constitution was intended to accomplish a great political object. Its design was not so much to prevent injustice or injury in one case, or in successive single cases, as it was to make general salutary provisions, which, in their operation, should give security to all contracts, stability to credit, uniformity among all the states, in those things which materially concerned the foreign commerce of the country, and their own credit, trade and intercourse among

¹ If a marriage be contracted with such condition, what more is it than a contract of legal concubinage? It is, certainly, not a Christian marriage.

Ogden v. Saunders.

themselves. The real question, is, therefore, a much broader one than has been argued. It is this, whether the constitution has not, for general political purposes, ordained, that bankrupt laws should be established only by national authority? We contend, that such was the intention of the constitution; an intention, as we think, plainly manifested by a consideration of its several provisions.

The act of New York, under which this question arises, provides, that a debtor may be discharged from all his debts, upon assigning his property to trustees for the use of his creditors. When applied to the discharge of debts, contracted before the date of the law, this court has decided that the act is invalid. *Sturges v. Crowninshield*, 4 Wheat. 122. The act itself makes no distinction between past and future debts, but provides for the discharge of both in the same manner. In the case, then, of a debt *already existing, it is admitted, that the act does impair the obligation of contracts. We wish the full extent of this decision to be [*238 well considered. It is not, merely, that the legislature of the state cannot interfere, by law, in the particular case of A. or B., to injure or impair rights which have become vested under contracts; but it is, that they have no power, by general law, to regulate the manner in which all debtors may be discharged from subsisting contracts; in other words, they cannot pass general bankrupt laws, to be applied *in præsentia*. Now, it is not contended, that such laws are unjust, and ought not to be passed by any legislature. It is not said, they are unwise or impolitic. On the contrary, we know the general experience is, that when bankrupt laws are established, they make no distinction between present and future debts. While all agree, that special acts, made for individual cases, are unjust, all admit, that a general law, made for all cases, may be both just and politic. The question then, which meets us on the threshold, is this: if the constitution meant to leave the states the power of establishing systems of bankruptcy to act upon future debts, what great or important object, of a political nature, was answered, by denying the power of making such systems applicable to existing debts? The argument used in *Sturges v. Crowninshield*, was, at least, a plausible and consistent argument. It maintained, that the prohibition of the constitution was levelled only against interferences in individual cases, and did not apply to general laws, whether those laws were retrospective or prospective in their operation. But the court rejected that conclusion. It decided, that the constitution was intended to apply to general laws, or systems of bankruptcy; that an act, providing that all debtors might be discharged from all creditors, upon certain conditions, was of no more validity than an act, providing that a particular debtor, A., should be discharged on the same conditions from his particular creditor, B.

It being thus decided, that general laws are thus within the prohibition of the constitution, it is for the plaintiff in error now to show, on what ground, consistent with the general objects of the constitution, he can establish a distinction, which can give effect to those general laws, *in [*239 their application to future debts, while it denies them effect in their application to subsisting debts. The words are, that "no state shall pass any law impairing the obligation of contracts." The general operation of all such laws is, to impair that obligation; that is, to discharge the obligation, without fulfilling it. This is admitted; and the only ground taken

Ogden v. Saunders.

for the distinction to stand on is, that when the law was in existence, at the time of the making of the contract, the parties must be supposed to have reference to it, or, as it is usually expressed, the law is a part of the contract. Before considering what foundation there is for this argument, it may be well to inquire, what is that obligation of contracts, of which the constitution speaks, and whence is it derived ?

The definition given by the court in *Sturges v. Crowninshield*, is sufficient for our present purpose. "A contract," says the court, "is an agreement to do some particular thing ; the law binds the party to perform this agreement, and this is the obligation of the contract." It may, indeed, probably, be correct to suppose the constitution used the words in somewhat of a more popular sense. We speak, for example, familiarly of a usurious contract, and yet we say, speaking technically, that a usurious agreement is no contract. By the obligation of a contract, we should understand the constitution to mean, the duty of performing a legal agreement. If the contract be lawful, the party is bound to perform it. But bound by what ? What is it that binds him ? And this leads to what we regard as a principal fallacy in the argument on the other side. That argument supposes, and insists, that the whole obligation of a contract has its origin in the municipal law. This position we controvert. We do not say, that it is that obligation which springs from conscience merely ; but we deny that it is only such as springs from the particular law of the place where the contract is made. It must be a lawful contract, doubtless ; that is, permitted and allowed ; because society has a right to prohibit all such contracts, as well as all such actions, as it deems to be mischievous or injurious. But if the contract be such as the law of society tolerates, *in
*240] other words, if it be lawful, then we say, the duty of performing it springs from universal law. And this is the concurrent sense of all the writers of authority.

The duty of performing promises is thus shown to rest on universal law ; and if, departing from this well-established principle, we now follow the teachers who instruct us that the obligation of a contract has its origin in the law of a particular state, and is, in all cases, what that law makes it, and no more, and no less, we shall probably find ourselves involved in inexplicable difficulties. A man promises, for a valuable consideration, to pay money in New York ; is the obligation of that contract created by the laws of that state ? or does it subsist independent of those laws ? We contend, that the obligation of a contract, that is, the duty of performing it, is not created by the law of the particular place where it is made, and dependent on that law for its existence ; but that it may subsist, and does subsist, without that law, and independent of it. The obligation is in the contract itself, in the assent of the parties, and in the sanction of universal law. This is the doctrine of Grotius, Vattel, Burlamaqui, Pothier and Rutherford. The contract, doubtless, is necessarily enforced by the municipal law of the place where performance is demanded. The municipal law acts on the contract, after it is made, to compel its execution, or give damages for its violation. But this is a very different thing from the same law being the origin or fountain of the contract. Let us illustrate this matter by an example. Two persons contract together in New York, for the delivery, by one to the other, of a domestic animal or utensil of husbandry, or a weapon of war. This is

Ogden v. Saunders.

a lawful contract, and while the parties remain in New York, it is to be enforced by the laws of that state. But if they remove with the article to Pennsylvania or Maryland, there a new law comes to act upon the contract, and to apply other remedies, if it be broken. Thus far the remedies are furnished by the laws of society. But suppose, the same parties to go together to a savage wilderness, or a desert island, beyond the reach of the laws of any society ; the obligation of the contract still subsists, and is as perfect as ever, and is now to be enforced by another law, that is, the *law of [*241 nature, and the party to whom the promise was made, has a right to take by force the animal, the utensil, or the weapon, that was promised to him. The right is as perfect here, as it was in Pennsylvania, or even in New York ; but this could not be so, if the obligation was created by the law of New York, or were dependent on that law for its existence, because the laws of the state can have no operation beyond its territory. Let us reverse this example. Suppose, a contract to be made between two persons cast ashore on an uninhabited territory, or in a place over which no law of society extends. There are such places, and contracts have been made there, by individuals casually there, and these contracts have been enforced in courts of law, in civilized communities. Whence do such contracts derive their obligation, if not from universal law ?

If these considerations show us that the obligation of a lawful contract does not derive its force from the particular law of the place where made, but may exist where the law does not exist, and be enforced where that law has no validity, then it follows, we contend, that any statute which diminishes or lessens its obligation, does impair it, whether it precedes or succeeds the contract in date. The contract having an independent origin, whenever the law comes to exist together with it, and interferes with it, it lessens, we say, and impairs its own original and independent obligation. In the case before the court, the contract did not owe its existence to the particular law of New York ; it did not depend on that law, but could be enforced without the territory of the state, as well as within it. Nevertheless, though legal, though thus independently existing, though thus binding the party everywhere, and capable of being enforced everywhere, yet, the statute of New York says, that it shall be discharged without payment. This, we say, impairs the obligation of that contract. It is admitted to have been legal in its inception, legal in its full extent, and capable of being enforced by other tribunals, according to its terms. An act, then, purporting to discharge it, without payment, is, as we contend, an act impairing its obligation.

*But here we meet the opposite argument, stated, on different occasions, in different terms, but usually summed up in this, that the law itself is a part of the contract, and therefore, cannot impair it. What does this mean ? Let us seek for clear ideas. It does not mean, that the law gives any particular construction to the terms of the contract, or that it makes the promise, or the consideration, or the time of performance, other than they are expressed in the instrument itself. It can only mean, that it is to be taken as a part of the contract, or understanding of the parties, that the contract itself shall be enforced by such laws and regulations, respecting remedy, and for the enforcement of contracts, as are in being in the state where it is made, at the time of entering into it. This is meant, or nothing very clearly intelligible is meant, by saying the law is part of the contract.

Ogden v. Saunders.

There is no authority in adjudged cases, for the plaintiff in error, but the state decisions which have been cited, and, as has already been stated, they all rest on this reason, that the law is part of the contract. Against this we contend, 1st. That if the proposition were true, the consequence would not follow; 2d. That the proposition itself cannot be maintained.

1. If it were true, that the law is to be considered as part of the contract, the consequence contended for would not follow; because, if this statute be part of the contract, so is every other legal or constitutional provision existing at the time, which affects the contract, or which is capable of affecting it; and especially, this very article of the constitution of the United States is part of the contract. The plaintiff in error argues in a complete circle. He supposes the parties to have had reference to it, because it was a binding law, and yet he proves it to be a binding law, only upon the ground that such reference was made to it. We come before the court, alleging the law to be void, as unconstitutional; they stop the inquiry by opposing to us the law itself. Is this logical? Is it not precisely *objectio ejus, cujus dissolutio petitur*? If one bring a bill to set aside a judgment, is that judgment itself a good plea in bar to the bill? We propose *243] to inquire, if this law is of force to control our contract, or whether, by the constitution of the United States, such force be not denied to it. The plaintiff in error stops us by saying, that it does control the contract, and so arrives shortly at the end of the debate. Is it not obvious, that supposing the act of New York to be a part of the contract, the question still remains as undecided as ever? What is that act? Is it a law, or is it a nullity? A thing of force, or a thing of no force? Suppose, the parties to have contemplated this act, what did they contemplate? its words only, or its legal effect? its words, or the force which the constitution of the United States allowed to it? If the parties contemplated any law, they contemplated all the law that bore on their contract, the aggregate of all the statute and constitutional provisions. To suppose, that they had in view one statute, without regarding others, or that they contemplated a statute, without considering that paramount constitutional provisions might control or qualify that statute, or abrogate it altogether, is unreasonable and inadmissible. "This contract," says one of the authorities relied on, "is to be construed, as if the law were specially recited in it." Let it be so, for the sake of argument. But it is also to be construed, as if the prohibitory clause of the constitution were recited in it, and this brings us back again to the precise point from which we departed.

The constitution always accompanies the law, and the latter can have no force, which the former does not allow to it. If the reasoning were thrown into the form of special pleading, it would stand thus: the plaintiff declares on his debt; the defendant pleads his discharge under the law; the plaintiff alleges the law unconstitutional; but the defendant says, you knew of its existence; to which the answer is obvious and irresistible, I knew its existence on the statute book of New York, but I knew, at the same time, it was null and void under the constitution of the United States.

The language of another leading decision is, "a law in force at the time of making the contract does not violate that contract;" but the very question is, whether there be any such law "in force;" for if the states have *244] no authority to pass such laws, then no such law can be in force.

Ogden v. Saunders.

The constitution is a part of the contract, as much as the law, and was as much in the contemplation of the parties. So that the proposition, if it be admitted, that the law is part of the contract, leaves us just where it found us, that is to say, under the necessity of comparing the law with the constitution, and of deciding by such comparison, whether it be valid or invalid. If the law be unconstitutional, it is void, and no party can be supposed to have had reference to a void law. If it be constitutional, no reference to it need be supposed.

2. But the proposition itself cannot be maintained. The law is no part of the contract. What part is it? the promise? the consideration? the condition? Clearly, it is neither of these. It is no term of the contract. It acts upon the contract, only when it is broken, or to discharge the party from its obligation, after it is broken. The municipal law is the force of society, employed to compel the performance of contracts. In every judgment in a suit on contract, the damages are given, and the imprisonment of the person or sale of goods awarded, not in performance of the contract, or as part of the contract, but as an indemnity for the breach of the contract. Even interest, which is a strong case, where it is not expressed in the contract itself, can only be given as damages. It is nearly absurd, to say that a man's goods are sold on a *feri facias*, or that he himself goes to jail, in pursuance of his contract. These are the penalties which the law inflicts for the breach of his contract. Doubtless, parties, when they enter into contracts, may well consider both what their rights, and what their liabilities, will be, by the law, if such contracts be broken; but this contemplation of consequences, which can ensue only when the contract is broken, is no part of the contract itself. The law has nothing to do with the contract till it be broken; how then can it be said to form a part of the contract itself?

But there are other cogent and more specific reasons against considering the law as part of the contract. 1. If the law be part of the contract, it cannot be repealed or altered; because, in such case, the repealing or modifying law itself would impair the obligation of the contract. The insolvent law of New York, for example, authorizes the *discharge of a debtor, on the consent of two-thirds of his creditors. A subsequent act requires [*245 the consent of three-fourths; but if the existing law be part of the contract, this latter law would be void. In short, whatever is part of the contract cannot be varied but by consent of the parties; therefore, the argument runs *in absurdum*; for it proves that no laws for enforcing the contract, or giving remedies upon it, or any way affecting it, can be changed or modified, between its creation and its end. If the law in question binds one party, on the ground of assent to it, it binds both, and binds them until they agree to terminate its operation. 2. If the party be bound by an implied assent to the law, as thereby making the law a part of the contract, how would it be, if the parties had expressly dissented, and agreed that the law should make no part of the contract? Suppose, the promise to have been, that the promisor would pay at all events, and not take advantage of the statute; still, would not the statute operate on the whole, on this particular agreement, and all? and does not this show that the law is no part of the contract, but something above it? 3. If the law of the place be part of the contract, one of its terms and conditions, how could it be enforced, as we know it might be, in another jurisdiction, which should have no regard to

the law of the place? Suppose, the parties, after the contract, to remove to another state, do they carry the law with them as part of their contract? We all know, they do not. Or, take a common case; some states have laws abolishing imprisonment for debt; these laws, according to the argument, are all parts of the contract; how then can the party, when sued in another state, be imprisoned contrary to the terms of his contract? 4. The argument proves too much, inasmuch as it applies as strongly to prior as to subsequent contracts. It is founded on a supposed assent to the exercise of legislative authority, without considering whether that exercise be legal or illegal. But it is equally fair, to found the argument on an implied assent to the potential exercise of that authority. The implied reference to the control of legislative power, is as reasonable and as strong, when that power is dormant, as while it is in exercise. In one case, the argument is, "the law *246] existed, you knew it, and acquiesced." In the other, it is, "the power to pass the law existed, you knew it, and took your chance." There is as clear an assent in the one instance, as in the other. Indeed, it is more reasonable and more sensible, to imply a general assent to all the laws of society, present and to come, from the fact of living in it, than it is to imply a particular assent to a particular existing enactment. The true view of the matter is, that every man is presumed to submit to all power which may be lawfully exercised over him, or his right, and no one should be presumed to submit to illegal acts of power, whether actual or contingent. 5. But a main objection to this argument is, that it would render the whole constitutional provision idle and inoperative; and no explanatory words, if such words had been added in the constitution, could have prevented this consequence. The law, it is said, is part of the contract; it cannot, therefore, impair the contract, because a contract cannot impair itself. Now, if this argument be sound, the case would have been the same, whatever words the constitution had used. If, for example, it had declared that no state should pass any law impairing contracts prospectively or retrospectively; or law impairing contracts, whether existing or future; or whatever terms it had used to prohibit precisely such a law as is now before the court, the prohibition would be totally nugatory, if the law is to be taken as part of the contract; and the result would be, that, whatever may be the laws which the states by this clause of the constitution are prohibited from passing, yet, if they in fact do pass such laws, those laws are valid, and bind parties by a supposed assent.

But further, this idea, if well founded, would enable the states to defeat the whole constitutional provision by a general enactment. Suppose, a state should declare, by law, that all contracts entered into therein, should be subject to such laws as the legislature, at any time, or from time to time, might see fit to pass. This law, according to the argument, would enter into the contract, become a part of it, and authorize the interference of the legislative power with it, for any and all purposes, wholly uncontrolled by the constitution of the United States. So much for the argument that the law is a part of the *contract. We think it is shown to be not so; *247] and if it were, the expected consequence would not follow.

The inquiry, then, recurs, whether the law in question be such a law as the legislature of New York had authority to pass. The question is general. We differ from our learned adversaries, on general principles. We

Ogden v. Saunders.

differ as to the main scope and end of this constitutional provision. They think it entirely remedial: we regard it as preventive. They think it adopted to secure redress for violated private rights: to us it seems intended to guard against great public mischiefs. They argue it, as if it were designed as an indemnity or protection for injured private rights, in individual cases of *meum* and *tuum*: we look upon it as a great political provision, favorable to the commerce and credit of the whole country. Certainly, we do not deny its application to cases of violated private right. Such cases are clearly and unquestionably within its operation. Still, we think its main scope to be general and political. And this, we think, is proved by reference to the history of the country, and to the great objects which were sought to be obtained by the establishment of the present government. Commerce, credit and confidence, were the principal things which did not exist under the old confederation, and which it was a main object of the present constitution to create and establish. A vicious system of legislation, a system of paper-money and tender laws, had completely paralyzed industry, threatened to beggar every man of property, and ultimately to ruin the country. The relation between debtor and creditor, always delicate, and always dangerous, whenever it divides society, and draws out the respective parties into different ranks and classes, was in such a condition in the years 1787, '88 and '89, as to threaten the overthrow of all government; and a revolution was menaced, much more critical and alarming than that through which the country had recently passed. The object of the new constitution was to arrest these evils; to awaken industry, by giving security to property; to establish confidence, credit and commerce, by salutary laws, to be enforced by the power of the whole community. The revolutionary war was over, the country had peace, but little domestic tranquillity; *liberty, but few of its enjoyments, and none of its security. The states had struggled [*248 together, but their union was imperfect. They had freedom, but not an established course of justice. The constitution was, therefore, framed, as it professes, "to form a more perfect union, to establish justice, to secure the blessings of liberty, and to insure domestic tranquillity."

It is not pertinent to this occasion, to advert to all the means by which these desirable ends were to be obtained. Some of them, closely connected with the subject now under consideration, are obvious and prominent. The objects were, commerce, credit and mutual confidence in matters of property; and these required, among other things, a uniform standard of value, or medium of payments. One of the first powers given to congress, therefore, is that of coining money, and fixing the value of foreign coins; and one of the first restraints imposed on the states, is the total prohibition to coin money. These two provisions are industriously followed up and completed, by denying to the states all power of emitting bills of credit, or of making anything but gold and silver a tender in the payment of debts. The whole control, therefore, over the standard of value, and medium of payments, is vested in the general government. And here the question instantly suggests itself, why should such pains be taken to confide in congress alone this exclusive power of fixing on a standard value, and of prescribing the medium in which debts shall be paid, if it is, after all, to be left to every state to declare that debts may be discharged, and to prescribe how they may be discharged, without any payment at all? Why say that no man

Ogden v. Saunders.

shall be obligated to take in discharge of a debt, paper-money issued by the authority of a state, and yet say, that by the same authority, the debt may be discharged, without any payment whatever? We contend, that the constitution has not left its work thus unfinished. We contend, that, taking its provisions together, it is apparent it was intended to provide for two things, intimately connected with each other. 1. A uniform medium for *249] the payment of debts. *2. A uniform manner of discharging debts, when they are to be discharged, without payment.

The arrangement of the grants and prohibitions contained in the constitution, are fit to be regarded on this occasion. The grant to congress, and the prohibition on the states, though they are certainly to be construed together, are not contained in the same clauses. The powers granted to congress are enumerated, one after another, in the eighth section; the principal limitations on those powers, in the ninth section; and the prohibitions to the states, in the tenth section. Now, in order to understand whether any particular power be exclusively vested in congress, it is necessary to read the terms of the grant, together with the terms of the prohibition. Take an example from that power of which we have been speaking, the coinage power. Here, the grant to congress is, "to coin money, regulate the value thereof, and of foreign coins." Now, the correlative prohibition on the states, though found in another section, is, undoubtedly, to be taken in immediate connection with the foregoing, as much so as if it had been found in the same clause. The only just reading of these provisions, therefore, is this: "Congress shall have power to coin money, regulate the value thereof, and of foreign coin; but no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts."

These provisions respect the medium of payment, or standard of value, and, thus collated, their joint result is clear and decisive. We think the result clear also, of those provisions which respect the discharge of debts without payment. Collated in like manner, they stand thus: "Congress shall have power to establish uniform laws on the subject of bankruptcies throughout the United States; but no state shall pass any law impairing the obligation of contracts." This collocation cannot be objected to, if they refer to the same subject-matter; and that they do refer to the same subject-matter we have the authority of this court for saying, because this court solemnly determined, in *Sturges v. Crowninshield*, that this prohibition on the states *250] did apply to systems of bankruptcy. It must be now *taken, therefore, that state bankrupt laws were in the mind of the convention, when the prohibition was adopted, and therefore, the grant to congress on the subject of bankrupt laws, and the prohibition to the state on the same subject, are properly to be taken and read together; and being thus read together, is not the intention clear, to take away from the states the power of passing bankrupt laws, since, while enacted by them, such laws would not be uniform, and to confer the power exclusively on congress, by whom uniform laws could be established?

Suppose, the order of arrangement in the constitution had been otherwise than it is, and that the prohibitions to the states had preceded the grants of power to congress, the two powers, when collated, would then have read thus: "No state shall pass any law impairing the obligation of con-

Ogden v. Saunders.

tracts; but congress may establish uniform laws on the subject of bankruptcies." Could any man have doubted, in that case, that the meaning was, that the states should not pass laws discharging debts without payment, but that congress might establish uniform bankrupt acts? and yet this inversion of the order of the clauses does not alter their sense. We contend, that congress alone possesses the power of establishing bankrupt laws; and although we are aware, that in *Sturges v. Crowninshield*, the court decided, that such an exclusive power could not be inferred from the words of the grant in the seventh section, we yet would respectfully request the bench to reconsider this point. We think, it could not have been intended, that both the states and general government should exercise this power; and therefore, that a grant to one implies the prohibition on the other. But not to press a topic which the court has already had under its consideration, we contend, that even without reading the clauses of the constitution, in the connection which we have suggested, and which is believed to be the true one, the prohibition in the tenth section, taken by itself, does forbid the enactment of state bankrupt laws, as applied to future, as well as present debts. We argue this, from the words of the prohibition, from the association they are found in, and from the objects intended.

1. The words are general. The states can pass no law *impairing [251 contracts; that is, any contract. In the nature of things, a law may impair a future contract, and therefore, such contract is within the protection of the constitution. The words being general, it is for the other side to show a limitation; and this, it is submitted, they have wholly failed to do, unless they shall have established the doctrine that the law itself is part of the contract. It may be added, that the particular expression of the constitution is worth regarding. The thing prohibited is called a law, not an act; a law, in its general acceptation, is a rule prescribed for future conduct, not a legislative interference with existing rights. The framers of the constitution would hardly have given the appellation of law to violent invasions of individual right, or individual property, by acts of legislative power. Although, doubtless, such acts fall within this prohibition, yet they are prohibited also by general principles, and by the constitutions of the states, and therefore, further provision against such acts was not so necessary as against other mischiefs.

2. The most conclusive argument, perhaps, arises from the connection in which the clause stands. The words of the prohibition, so far as it applies to civil rights, or rights of property, are, "that no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in the payment of debts, or pass any law impairing the obligation of contracts." The prohibition of attainders, and *ex post facto* laws, refer entirely to criminal proceedings, and therefore, should be considered as standing by themselves; but the other parts of the prohibition are connected by the subject-matter, and ought, therefore, to be construed together. Taking the words thus together, according to their natural connection, how is it possible to give a more limited construction to the term "contracts," in the last branch of the sentence, than to the word "debts," in that immediately preceding? Can a state make anything but gold and silver a tender in payment of future debts? This nobody pretends. But what ground is there for a distinction? No state shall make anything but gold and silver a tender in

Ogden v. Saunders.

the payment of debts, nor pass any law impairing the obligation of contracts. *252] Now, by what reasoning is it made *out, that the debts here spoken of, are any debts, either existing or future; but that the contracts spoken of are subsisting contracts only? Such a distinction seems to us wholly arbitrary. We see no ground for it. Suppose, the article, where it uses the word debts, had used the word contracts. The sense would have been the same then, as it now is; but the identity of terms would have made the nature of the distinction now contended for, somewhat more obvious. Thus altered, the clause would read, that no state should make anything but gold and silver a tender in discharge of contracts, nor pass any law impairing the obligation of contracts; yet the first of these expressions would have been held to apply to all contracts, and the last to subsisting contracts only. This shows the consequence of what is now contended for, in a strong light. It is certain, that the substitution of the word contracts, for debts, would not alter the sense; and an argument that could not be sustained, if such substitution were made, cannot be sustained now. We maintain, therefore, that if tender laws may not be made for future debts, neither can bankrupt laws be made for future contracts. All the arguments used here, may be applied with equal force to tender laws for future debts. It may be said, for instance, that when it speaks of debts, the constitution means existing debts, and not mere possibilities of future debts; that the object was to preserve vested rights; and that if a man, after a tender law had passed, had contracted a debt, the manner in which that tender law authorized that debt to be discharged, became part of the contract, and that the whole debt, or whole obligation, was thus qualified by the pre-existing law, and was no more than a contract to deliver so much paper-money, or whatever other article which might be made a tender, as the original bargain expressed. Arguments of this sort will not be found wanting in favor of tender laws, if the court yield to similar arguments in favor of bankrupt laws.

These several prohibitions of the constitution stand in the same paragraph; they have the same purpose, and were introduced for the same object; they are expressed in words of similar import, in grammar, and in sense; they are subject to the same construction, and, we think, no reason *253] has *yet been given for imposing an important restriction on one part of them, which does not equally show, that the same restriction might be imposed also on the other part.

We have already endeavored to maintain, that one great political object, intended by the constitution, would be defeated, if this construction were allowed to prevail. As an object of political regulation, it was not important to prevent the states from passing bankrupt laws applicable to present debts, while the power was left to them in regard to future debts; nor was it at all important, in a political point of view, to prohibit tender laws as to future debts, while it was yet left to the states to pass laws for the discharge of such debts, which, after all, are little different, in principle, from tender laws. Look at the law before the court in this view. It provides, that if the debtor will surrender, offer or tender to trustees, for the benefit of his creditors, all his estate and effects, he shall be discharged from all his debts. If it had authorized a tender of anything but money to any one creditor, though it were of a value equal to the debt, and thereupon, provided for a

Ogden v. Saunders.

discharge, it would have been clearly invalid. Yet it is maintained to be good, merely because it is made for all creditors, and seeks a discharge from all debts; although the thing tendered may not be equivalent to a shilling in the pound of those debts. This shows, again, very clearly, how the constitution has failed of its purpose, if, having in terms prohibited all tender laws, and taken so much pains to establish a uniform medium of payment, it has yet left the states the power of discharging debts, as they may see fit, without any payment at all.

To recapitulate what has been said, we maintain; first, that the constitution, by its grants to congress, and its prohibitions on the states, has sought to establish one uniform standard of value, or medium of payment. Second, that, by like means, it has endeavored to provide for one uniform mode of discharging debts, when they are to be discharged without payment. Third, that these objects are connected, and that the first loses much of its importance, if the last also be not accomplished. Fourth, that reading the grant to congress and the prohibition on the states together, the inference is strong, that the constitution intended to confer *an exclusive power to pass [254 bankrupt laws on congress. Fifth, that the prohibition, in the tenth section, reaches to all contracts, existing or future, in the same way as the other prohibition in the same section extends to all debts existing or future. Sixthly, and that, upon any other construction, one great political object of the constitution will fail of its accomplishment.

February 19th, 1827. The learned judges delivered their opinions as follows: WASHINGTON, Justice.—The first and most important point to be decided in this cause turns essentially upon the question, whether the obligation of a contract is impaired by a state bankrupt or insolvent law, which discharges the person and the future acquisitions of the debtor from his liability under a contract, entered into in that state after the passage of the act?

This question has never before been distinctly presented to the consideration of this court, and decided, although it has been supposed by the judges of a highly respectable state court, that it was decided in the case of *McMillan v. McNeill*, 4 Wheat. 209. That was the case of a debt contracted by two citizens of South Carolina, in that state, the discharge of which had a view to no other state. The debtor afterwards removed to the territory of Louisiana, where he was regularly discharged, as an insolvent, from all his debts, under an act of the legislature of that state, passed prior to the time when the debt in question was contracted. To an action brought by the creditor in the district court of Louisiana, the defendant plead in bar his discharge, under the law of that territory, and it was contended by the counsel for the debtor, in this court, that the law under which the debtor was discharged, having passed before the contract was made, it could not be said to impair its obligation. The cause was argued on one side only, and it would seem from the report of the case, that no written opinion was prepared by the court. The chief justice stated, that the circumstance of the state law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle, which had been asserted by the *court in the case of [255 *Sturges v. Crowninshield*. The correctness of this position is believed

Ogden v. Saunders.

to be incontrovertible. The principle alluded to was, that a state bankrupt law, which impairs the obligation of a contract, is unconstitutional, in its application to such contract. In that case, it is true, the contract preceded, in order of time, the act of assembly, under which the debtor was discharged, although it was not thought necessary to notice that circumstance in the opinion which was pronounced. The principle, however, remained, in the opinion of the court, delivered in *McMillan v. McNeill*, unaffected by the circumstance that the law of Louisiana preceded a contract made in another state, since that law, having no extra-territorial force, never did at any time govern or affect the obligation of such contract. It could not, therefore, be correctly said to be prior to the contract, in reference to its obligation, since if, upon legal principles, it could affect the contract, that could not happen, until the debtor became a citizen of Louisiana, and that was subsequent to the contract. But I hold the principle to be well established, that a discharge under the bankrupt laws of one government, does not affect contracts made or to be executed under another, whether the law be prior or subsequent in the date to that of the contract; and this I take to be the only point really decided in the case alluded to. Whether the chief justice was correctly understood by the reporter, when he is supposed to have said, "that this case was not distinguishable in principle from the preceding case of *Sturges v. Crowninshield*," it is not material at this time to inquire, because I understand the meaning of these expressions to go no further than to intimate, that there was no distinction between the cases as to the constitutional objection, since it professed to discharge a debt contracted in another state, which, at the time it was contracted, was not within its operation, nor subject to be discharged by it. The case now to be decided, is that of a debt contracted in the state of New York, by a citizen of that state, from which he was discharged, so far as he constitutionally could be, under a bankrupt law of that state, in force at the time when the debt was contracted. It is a case, therefore, that bears no resemblance to the one just noticed.

*256] I come now to the consideration of the question, which, for the first time, has been directly brought before this court for judgment. I approach it with more than ordinary sensibility, not only on account of its importance, which must be acknowledged by all, but of its intrinsic difficulty, which, every step I have taken in arriving at a conclusion with which my judgment could in any way be satisfied, has convinced me, attends it. I have examined both sides of this great question, with the most sedulous care, and the most anxious desire to discover which of them, when adopted, would be most likely to fulfil the intentions of those who framed the constitution of the United States. I am far from asserting that my labors have resulted in entire success; they have led me to the only conclusion by which I can stand with any degree of confidence; and yet, I should be disingenuous, were I to declare, from this place, that I embrace it, without hesitation, and without a doubt of its correctness. The most that candor will permit me to say upon the subject is, that I see, or think I see, my way more clear on the side which my judgment leads me to adopt, than on the other, and it must remain for others to decide, whether the guide I have chosen has been a safe one or not.

It has constantly appeared to me, throughout the different investigations

Ogden v. Saunders.

of this question, to which it has been my duty to attend, that the error of those who controvert the constitutionality of the bankrupt law under consideration, in its application to this case, if they be in error at all, has arisen from not distinguishing accurately between a law which impairs a contract, and one which impairs its obligation. A contract is defined by all to be an agreement to do, or not to do, some particular act; and in the construction of this agreement, depending essentially upon the will of the parties between whom it is formed, we seek for their intention, with a view to fulfil it. Any law, then, which enlarges, abridges, or in any manner changes, this intention, when it is discovered, necessarily impairs the contract itself, which is but the evidence of that intention. The manner, or the degree, in which this change is effected, can in no respect influence this conclusion; for whether the law affect the validity, the construction, the duration, the mode of *discharge, or the evidence of the agreement, it impairs the contract, though it may not do so to the same extent, in all the supposed cases. Thus, a law which declares that no action shall be brought whereby to charge a person upon his agreement to pay the debt of another, or upon an agreement relating to lands, unless the same be reduced to writing, impairs a contract made by parol, whether the law precede or follow the making of such contract; and, if the argument, that this law also impairs, in the former case, the obligation of the contract, be sound, it must follow, that the statute of frauds, and all other statutes which in any manner meddle with contracts, impair their obligation, and are, consequently, within the operation of this section and article of the constitution. It will not do, to answer, that, in the particular case put, and in others of the same nature, there is no contract to impair, since the pre-existing law denies all remedy for its enforcement, or forbids the making of it, since it is impossible to deny, that the parties have expressed their will in the form of a contract, notwithstanding the law denies to it any valid obligation. [*257]

This leads us to a critical examination of the particular phraseology of that part of the above section which relates to contracts. It is a law which impairs the obligation of contracts, and not the contracts themselves, which is interdicted. It is not to be doubted, that this term, *obligation*, when applied to contracts, was well considered and weighed by those who framed the constitution, and was intended to convey a different meaning from what the prohibition would have imported without it. It is this meaning of which we are all in search. What is it, then, which constitutes the obligation of a contract? The answer is given by the chief justice, in the case of *Sturges v. Crowninshield*, to which I readily assent now, as I did then; it is the law which binds the parties to perform their agreement. The law, then, which has this binding obligation, must govern and control the contract, in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge.

But the question, which law is referred to in the above *definition still remains to be solved. It cannot, for a moment, be conceded, that the mere moral law is intended, since the obligation which that imposes is altogether of the imperfect kind, which the parties to it are free to obey, or not, as they please. It cannot be supposed, that it was with this law the grave authors of this instrument were dealing. The universal law of all civilized nations, which declares that men shall perform that to which

Ogden v. Saunders.

they have agreed, has been supposed by the counsel who have argued this cause for the defendant in error, to be the law which is alluded to ; and I have no objection to acknowledging its obligation, whilst I must deny that it is that which exclusively governs the contract. It is upon this law, that the obligation, which nations acknowledge to perform their compacts with each other, is founded, and I, therefore, feel no objection to answer the question asked by the same counsel—what law it is which constitutes the obligation of the compact between Virginia and Kentucky ? by admitting, that it is this common law of nations which requires them to perform it. I admit further, that it is this law which creates the obligation of a contract made upon a desert spot, where no municipal law exists, and (which was another case put by the same counsel) which contract, by the tacit assent of all nations, their tribunals are authorized to enforce.

But can it be seriously insisted, that this, any more than the moral law upon which it is founded, was exclusively in the contemplation of those who framed this constitution ? What is the language of this universal law ? It is, simply, that all men are bound to perform their contracts. The injunction is as absolute as the contracts to which it applies. It admits of no qualification, and no restraint, either as to its validity, construction or discharge, further than may be necessary to develop the intention of the parties to the contract. And if it be true, that this is exclusively the law to which the constitution refers us, it is very apparent, that the sphere of state legislation upon subjects connected with the contracts of individuals, would be abridged beyond what it can for a moment be believed the sovereign states of this Union would have consented to ; for it will be found, upon examination, that there are few laws which concern the general *police of a
*259] state, or the government of its citizens, in their intercourse with each other, or with strangers, which may not in some way or other affect the contracts which they have entered into, or may thereafter form. For what are laws of evidence, or which concern remedies, frauds and perjuries, laws of registration, and those which affect landlord and tenant, sales at auction, acts of limitation, and those which limit the fees of professional men, and the charges of tavern-keepers, and a multitude of others which crowd the codes of every state, but laws which may affect the validity, construction, or duration or discharges of contracts ? Whilst I admit, then, that this common law of nations, which has been mentioned, may form in part of the obligation of a contract, I must unhesitatingly insist, that this law is to be taken in strict subordination to the municipal laws of the land where the contract is made, or is to be executed. The former can be satisfied by nothing short of performance ; the latter may affect and control the validity, construction, evidence, remedy, performance and discharge of the contract. The former is the common law of all civilized nations, and of each of them ; the latter is the peculiar law of each, and is paramount to the former, whenever they come in collision with each other.

It is, then, the municipal law of the state, whether that be written or unwritten, which is emphatically the law of the contract made within the state, and must govern it throughout, wherever its performance is sought to be enforced. It forms, in my humble opinion, a part of the contract, and travels with it, wherever the parties to it may be found. It is so regarded by all the civilized nations of the world, and is enforced by the tribunals of

Ogden v. Saunders.

those nations, according to its own forms, unless the parties to it have otherwise agreed, as where the contract is to be executed in, or refers to the laws of, some other country than that in which it is formed, or where it is of an immoral character, or contravenes the policy of the nation to whose tribunals the appeal is made; in which latter cases, the remedy which the comity of nations afford for enforcing the obligation of contracts wherever formed, is denied. Free from these objections, this law, which accompanies the contract as forming a part of *it, is regarded and enforced every- [*260 where, whether it affect the validity, construction or discharge of the contract. It is upon this principle of universal law, that the discharge of the contract, or one of the parties to it, by the bankrupt laws of the country where it was made, operates as a discharge everywhere. If then, it be true, that the law of the country where the contract is made, or to be executed, forms a part of that contract, and of its obligation, it would seem to be somewhat of a solecism, to say, that it does, at the same time, impair that obligation.

But it is contended, that if the municipal law of the state where the contract is so made, form a part of it, so does that clause of the constitution which prohibits the states from passing laws to impair the obligation of contracts; and consequently, that the law is rendered inoperative by force of its controlling associate. All this I admit, provided it be first proved, that the law, so incorporated with, and forming a part of the contract, does, in effect, impair its obligation; and before this can be proved, it must be affirmed, and satisfactorily made out, that if, by the terms of the contract, it is agreed, that, on the happening of a certain event, as, upon the future insolvency of one of the parties, and his surrender of all his property for the benefit of his creditors, the contract shall be considered as performed and at an end, this stipulation would impair the obligation of the contract. If this proposition can be successfully affirmed, I can only say, that the soundness of it is beyond the reach of my mind to understand.

Again it is insisted, that if the law of the contract forms a part of it, the law itself cannot be repealed, without impairing the obligation of the contract. This proposition, I must be permitted to deny. It may be repealed at any time, at the will of the legislature, and then it ceases to form any part of those contracts which may afterwards be entered into. The repeal is no more void, than a new law would be, which operates upon contracts to affect their validity, construction or duration. Both are valid (if the view I take of this case be correct), as they may affect contracts afterwards formed; but neither are so, if they bear upon existing contracts; and in the former case, in which the repeal *contains no enactment, [*261 the constitution would forbid the application of the repealing law to past contracts, and to those only.

To illustrate this argument, let us take four laws, which either by new enactments, or by the repeal of former laws, may affect contracts as to their validity, construction, evidence or remedy. Laws against usury are of the first description. A law which converts a penalty, stipulated for by the parties, as the only atonement for a breach of the contract, into a mere agreement for a just compensation, to be measured by the legal rate of interest, is of the second. The statute of frauds, and the statute of limitations, may be cited as examples of the two last. The validity of these laws can

Ogden v. Saunders.

never be questioned by those who accompany me in the view which I take of the question under consideration, unless they operate, by their express provisions, upon contracts previously entered into ; and even then they are void only so far as they do so operate, because, in that case, and in that case only, do they impair the obligation of those contracts. But if they equally impair the obligation of contracts subsequently made, which they must do, if this be the operation of a bankrupt law upon such contracts, it would seem to follow, that all such laws, whether in the form of new enactments, or of repealing laws, producing the same legal consequences, are made void by the constitution ; and yet the counsel for the defendants in error have not ventured to maintain so alarming a proposition.

If it be conceded, that those laws are not repugnant to the constitution, so far as they apply to subsequent contracts, I am yet to be instructed how to distinguish between those laws, and the one now under consideration. How has this been attempted by the learned counsel who have argued this cause upon the ground of such a distinction ? They have insisted, that the effect of the law first supposed, is to annihilate the contract in its birth, or rather to prevent it from having a legal existence, and, consequently, that there is no obligation to be impaired. But this is clearly not so, since it *262] may legitimately avoid all contracts afterwards entered into, which reserve to the lender a higher rate of interest than this law permits. The validity of the second law is admitted, and yet this can only be in its application to subsequent contracts ; for it has not, and I think it cannot, for a moment, be maintained, that a law which, in express terms, varies the construction of an existing contract, or which, repealing a former law, is made to produce the same effect, does not impair the obligation of that contract. The statute of frauds, and the statute of limitations, which have been put as examples of the third and fourth classes of laws, are also admitted to be valid, because they merely concern the modes of proceeding in the trial of causes. The former, supplying a rule of evidence, and the latter, forming a part of the remedy given by the legislature to enforce the obligation, and likewise providing a rule of evidence.

All this I admit. But how does it happen, that these laws, like those which affect the validity and construction of contracts, are valid as to subsequent, and yet void as to prior and subsisting contracts ? For we are informed by the learned judge who delivered the opinion of this court in the case of *Sturges v. Crowninshield*, that, "if, in a state where six years may be pleaded in bar to an action of *assumpsit*, a law should pass, declaring that contracts already in existence, not barred by the statute, should be construed within it, there could be little doubt of its unconstitutionality." It is thus most apparent, that, whichever way we turn, whether to laws affecting the validity, construction or discharges of contracts, or the evidence or remedy to be employed in enforcing them, we are met by this overruling and admitted distinction, between those which operate retrospectively, and those which operate prospectively. In all of them, the law is pronounced to be void, in the first class of cases, and not so, in the second.

Let us stop, then, to make a more critical examination of the act of limitations, which, although it concerns the remedy, or, if it must be conceded, the evidence, is yet void or otherwise, as it is made to apply retroactively, or prospectively, and see, if it can, upon any intelligible principle, be distin-

Ogden v. Saunders.

guished *from a bankrupt law, when applied in the same manner? What is the effect of the former? The answer is, to discharge the debtor, and all his future acquisitions, from his contract; because he is permitted to plead in bar of any remedy which can be instituted against him, and consequently, in bar or destruction of the obligation which his contract imposed upon him. What is the effect of a discharge under a bankrupt law? I can answer this question in no other terms than those which are given to the former question. If there be a difference, it is one which, in the eye of justice at least, is more favorable to the validity of the latter than of the former; for in the one, the debtor surrenders everything which he possesses towards the discharge of his obligation, and in the other, he surrenders nothing, and sullenly shelters himself behind a legal objection with which the law has provided him, for the purpose of protecting his person, and his present, as well as his future acquisitions, against the performance of his contract. It is said, that the former does not discharge him absolutely from his contract, because it leaves a shadow sufficiently substantial to raise a consideration for a new promise to pay. And is not this equally the case with a certificated bankrupt, who afterwards promises to pay a debt from which his certificate had discharged him? In the former case, it is said, the defendant must plead the statute, in order to bar the remedy, and to exempt him from his obligation. And so, I answer, he must plead his discharge under the bankrupt law, and his conformity to it, in order to bar the remedy of his creditor, and to secure to himself a like exemption. I have, in short, sought in vain for some other grounds on which to distinguish the two laws from each other, than those which were suggested at the bar. I can imagine no other, and I confidently believe that none exist, which will bear the test of a critical examination.

To the decision of this court, made in the case of *Sturges v. Crowninshield*, and to the reasoning of the learned judge who delivered that opinion, I entirely submit; although I did not then, nor can I now, bring my mind to concur in that part of it, which admits the constitutional power of the state legislatures to pass bankrupt laws, by which I understand, those laws which discharge the person and the future *acquisitions of the bankrupt from his debts. I have always thought that the power to pass [*264 such a law was exclusively vested by the constitution in the legislature of the United States. But it becomes me to believe, that this opinion was, and is incorrect, since it stands condemned by the decision of a majority of this court, solemnly pronounced.

After making this acknowledgment, I refer again to the above decision with some degree of confidence, in support of the opinion to which I am now inclined to come, that a bankrupt law, which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States. It is there stated, "that, until the power to pass uniform laws on the subject of bankruptcies be exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the constitution of the United States." The question in that case was, whether the law of New York, passed on the 3d of April 1811, which liberates, not only the person of the debtor, but discharges him from all liability for any debt contracted previous, as well as subsequent to his discharge, on his surrender-

Ogden v. Saunders.

ing his property, for the use of his creditors, was a valid law, under the constitution, in its application to a debt contracted prior to its passage? The court decided that it was not, upon the single ground, that it impaired the obligation of that contract. And if it be true, that the states cannot pass a similar law, to operate upon contracts subsequently entered into, it follows inevitably, either that they cannot pass such laws at all, contrary to the express declaration of the court, as before quoted, or that such laws do not impair the obligation of contracts subsequently entered into; in fine, it is a self-evident proposition, that every contract that can be formed, must either precede, or follow, any law by which it may be affected,

I have, throughout the preceding part of this opinion, considered the municipal law of the country, where the contract is made, as incorporated with the contract, whether it affects its validity, construction or discharge. But I think it quite immaterial to stickle for this position, if it be conceded *265] to me, what can scarcely be denied, that this municipal *law constitutes the law of the contract so formed, and must govern it throughout. I hold the legal consequences to be the same, in whichever view the law, as it affects the contract, is considered.

I come now to a more particular examination and construction of the section under which this question arises; and I am free to acknowledge, that the collocation of the subjects for which it provides, has made an irresistible impression upon my mind, much stronger, I am persuaded, than I can find language to communicate to the minds of others. It declares, that "no state shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts." These prohibitions, associated with the powers granted to congress "to coin money, and to regulate the value thereof, and of foreign coin," most obviously constitute members of the same family, being upon the same subject, and governed by the same policy. This policy was, to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in congress the power to establish a uniform standard of value, by the means pointed out, if the states might use the same means, and thus defeat the uniformity of the standard, and, consequently, the standard itself? And why establish a standard at all, for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of state tender laws? It is, obvious, therefore, that these prohibitions, in the 10th section, are entirely homogeneous, and are essential to the establishment of a uniform standard of value, in the formation and discharge of contracts. It is for this reason, independent of the general phraseology which is employed, that the prohibition, in regard to state tender laws, will admit of no construction which would confine it to state laws which have a retrospective operation.

The next class of prohibitions contained in this section, consists of *266] bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. Here, too, we observe, as I think, members of the same family brought together in the most intimate connection with each other. The states are forbidden to pass any bill of attainder or *ex post facto* law,

Ogden v. Saunders.

by which a man shall be punished criminally or penally, by loss of life, of his liberty, property or reputation, for an act which, at the time of its commission, violated no existing law of the land. Why did the authors of the constitution turn their attention to this subject, which, at the first blush, would appear to be peculiarly fit to be left to the discretion of those who have the police and good government of the state under their management and control? The only answer to be given is, because laws of this character are oppressive, unjust and tyrannical; and, as such, are condemned by the universal sentence of civilized man. The injustice and tyranny which characterizes *ex post facto* laws, consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder. But if it was deemed wise and proper to prohibit state legislation as to retrospective laws, which concern, almost exclusively, the citizens and inhabitants of the particular state in which this legislation takes place, how much more did it concern the private and political interests of the citizens of all the states, in their commercial and ordinary intercourse with each other, that the same prohibition should be extended civilly to the contracts which they might enter into? If it were proper to prohibit a state legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar, as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other states, and foreigners, as well as citizens of the same state, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such state interference? How natural, then, was it, under the influence of these considerations, to interdict similar legislation in regard to contracts, by providing, that no state should pass laws [*267 impairing the obligation of past contracts? It is true, that the first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil character; but if I am correct in my view of the spirit and motives of these prohibitions, they agree in the principle which suggested them. They are founded upon the same reason, and the application of it is at least as strong to the last, as it is to the first two prohibitions.

But these reasons are altogether inapplicable to laws of a prospective character. There is nothing unjust or tyrannical in punishing offences prohibited by law, and committed in violation of that law. Nor can it be unjust or oppressive, to declare by law, that contracts subsequently entered into, may be discharged in a way different from that which the parties have provided, but which they know, or may know, are liable, under certain circumstances, to be discharged in a manner contrary to the provisions of their contract.

Thinking, as I have always done, that the power to pass bankrupt laws was intended by the authors of the constitution to be exclusive in congress, or, at least, that they expected the power vested in that body would be exercised, so as effectually to prevent its exercise by the states, it is the more probable, that, in reference to all other interferences of the state legislatures upon the subject of contracts, retrospective laws were alone in the contemplation of the convention.

In the construction of this clause of the tenth section of the constitution,

one of the counsel for the defendant supposed himself at liberty so to trans-
pose the provisions contained in it, as to place the prohibition to pass laws
impairing the obligation of contracts in juxtaposition with the other prohibi-
tion to pass laws making anything but gold and silver coin a tender in pay-
ment of debts, inasmuch as the two provisions relate to the subject of
contracts. That the derangement of the words, and even sentences of a law,
may sometimes be tolerated, in order to arrive at the apparent meaning of
*268] the legislature, to be gathered from *other parts, or from the entire
scope of the law, I shall not deny. But I should deem it a very haz-
ardous rule to adopt, in the construction of an instrument so maturely con-
sidered, as this constitution was, by the enlightened statesmen who framed
it, and so severely examined and criticised by its opponents in the numerous
state conventions which finally adopted it. And if, by the construction of
this sentence, arranged as it is, or as the learned counsel would have it to
be, it could have been made out, that the power to pass prospective laws,
affecting contracts, was denied to the states, it is most wonderful, that not
one voice was raised against the provision, in any of those conventions, by
the jealous advocates of state rights, nor even an amendment proposed, to
explain the cause, and to exclude a construction which trenches so exten-
sively upon the sphere of state legislation. But, although the transposition
which is contended for may be tolerated, in cases where the obvious inten-
tion of the legislature can in no other way be fulfilled, it can never be
admitted, in those where consistent meaning can be given to the whole clause,
as its authors thought proper to arrange it, and where the only doubt is,
whether the construction which the transposition countenances, or that which
results from the reading which the legislature has thought proper to adopt,
is most likely to fulfil the supposed intention of the legislature. Now,
although it is true, that the prohibition to pass tender laws of a particular
description, and laws impairing the obligation of contracts, relate, both of
them, to contracts, yet, the principle which governs each of them, clearly to
be inferred from the subjects with which they stand associated, is altogether
different; that of the first forming part of a system for fixing a uniform
standard of value, and, of the last, being founded on a denunciation of
retrospective laws. It is, therefore, the safest course, in my humble opinion,
to construe this clause of the section according to the arrangement which
the convention has thought proper to make of its different provisions. To
insist upon a transposition, with a view to warrant one construction rather
than the other, falls little short, in my opinion, of a begging of the whole
question in controversy.

*269] *But why, it has been asked, forbid the states to pass laws making
any thing but gold and silver coin a tender in payment of debts, con-
tracted subsequent, as well as prior, to the law which authorizes it; and
yet confine the prohibition to pass laws impairing the obligation of contracts
to past contracts, or in other words, to future bankrupt laws, when the con-
sequence resulting from each is the same, the latter being considered by the
counsel as being, in truth, nothing less than tender laws in disguise. An
answer to this question has, in part, been anticipated by some of the pre-
ceding observations. The power to pass bankrupt laws having been vested
in congress, either as an exclusive power, or under the belief that it would
certainly be exercised. it is highly probable that state legislation, upon that

Ogden v. Saunders.

subject, was not within the contemplation of the convention ; or, if it was, it is quite unlikely, that the exercise of the power by the state legislatures, would have been prohibited by the use of terms which, I have endeavored to show, are inapplicable to laws intended to operate prospectively. For had the prohibition been to pass laws impairing contracts, instead of the obligation of contracts, I admit, that it would have borne the construction which is contended for, since it is clear, that the agreement of the parties, in the first case, would be impaired as much by a prior, as it would be by a subsequent, bankrupt law. It has, besides, been attempted to be shown, that the limited restriction upon state legislation, imposed by the former prohibition, might be submitted to by the states, whilst the extensive operation of the latter would have hazarded, to say the least of it, the adoption of the constitution by the state conventions.

But an answer, still more satisfactory to my mind, is this : Tender laws, of the description stated in this section, are always unjust ; and, where there is an existing bankrupt law, at the time the contract is made, they can seldom be useful to the honest debtor. They violate the agreement of the parties to it, without the semblance of an apology for the measure, since they operate to discharge the debtor from his undertaking, upon terms variant from those by which he bound himself, to the injury of the creditor, and unsupported, *in many cases, by the plea of necessity. They extend relief to the opulent debtor, who does not stand in need of it ; as well [*270 as to the one who is, by misfortunes, often unavoidable, reduced to poverty, and disabled from complying with his engagements. In relation to subsequent contracts, they are unjust, when extended to the former class of debtors, and useless, to the second, since they may be relieved by conforming to the requisitions of the state bankrupt law, where there is one. Being discharged by this law from all his antecedent debts, and having his future acquisitions secured to him, an opportunity is afforded him to become once more a useful member of society. If this view of the subject be correct, it will be difficult to prove, that a prospective bankrupt law resembles, in any of its features, a law which should make anything but gold and silver coin a tender in payment of debts.

I shall now conclude this opinion, by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone, would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond all reasonable doubt. This has always been the language of this court, when that subject has called for its decision ; and I know that it expresses the honest sentiments of each and every member of this bench. I am perfectly satisfied, that it is entertained by those of them from whom it is the misfortune of the majority of the court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them.

Ogden v. Saunders.

My opinion is, that the judgment of the court below ought to be reversed and judgment given for the plaintiff in error.

*271] *JOHNSON, Justice.—This suit was instituted in Louisiana, in the circuit court of the United States, by Saunders, the defendant here, against Ogden, upon certain bills of exchange. Ogden, the defendant there, pleads in bar to the action, a discharge obtained in due form of law, from the courts of the state of New York, which discharge purports to release him from all debts and demands existing against him on a specified day. This demand is one of that description, and the acts under which the discharge was obtained, was the act of New York, of 1801, a date long prior to that of the cause of action on which this suit was instituted. The discharge is set forth in the plea, and represents Ogden as “an insolvent debtor, being, on the day and year thereafter mentioned, in prison, in the city and county of New York, on execution issued against him in some civil action,” &c. It does not appear, that any suit had ever been instituted against him by this party, or on this cause of action, prior to the present. The cause below was decided upon a special verdict, in which the jury find, 1st. That the acceptance of the bills on which the action was instituted, was made by Ogden, in the city of New York, on the days they severally bear date, the said defendant then residing in the city of New York, and continuing to reside there until a day not specified. 2d. That under the laws of the state of New York, in such case provided, and referred to in the discharge, which laws are specially found, &c. (meaning the state law of 1801), application was made for, and the defendant obtained, the discharge hereunto annexed. 3d. That by the laws of New York, actions on bills of exchange, and acceptances thereof, are limited to the terms of six years. 4th. That at the time the said bills were drawn and accepted, the drawee and the drawer of the same, were residents and citizens of the state of Kentucky. On this state of facts, the court below gave judgment against Ogden, the discharged debtor.

We are not in possession of the grounds of the decision below; and it has been argued here as having been given upon the general nullity of the discharge, on the grounds of its unconstitutionality. But it is obvious, that it might also have *proceeded upon the ground of its nullity as to
*272] citizens of other states, who have never, by any act of their own, submitted themselves to the *lex fori* of the state that give the discharge—considering the right given by the constitution to go into the courts of the United States upon any contracts, whatever be their *lex loci*, as modifying and limiting the general power which states are acknowledged to possess over contracts formed under control of their peculiar laws. This question, however, has not been argued, and must not now be considered as disposed of by this decision.

The abstract question of the general power of the states to pass laws for the relief of insolvent debtors, will be alone considered. And here, in order to ascertain with precision, what we are to decide, it is first proper to consider what this court has already decided on this subject. And this brings under review the two cases of *Sturges v. Crowninshield*, and *McMillan v. McNeill*, adjudged in the year 1819, and contained in the 4th vol. of the reports. If the marginal note to the report, or summary of the effect of the

Ogden v. Saunders.

case of *McMillan v. McNeill*, presented a correct view of the report of that decision, it is obvious, that there would remain very little, if anything for this court to decide. But by comparing the note of the reporter with the facts of the case, it will be found, that there is a generality of expression admitted into the former, which the case itself does not justify. The principle recognised and affirmed in *McMillan v. McNeill*, is one of universal law, and so obvious and incontestible, that it need be only understood to be assented to. It is nothing more than this, "that insolvent laws have no extra-territorial operation upon the contract of other states ; that the principle is applicable as well to the discharges given under the laws of the states, as of foreign countries ; and that the anterior or posterior character of the laws under which the discharge is given, with reference to the date of the contract, makes no discrimination in the application of that principle."

The report of the case of *Sturges v. Crowninshield* needs also some explanation. The court was, in that case, greatly divided in their views of the doctrine, and the judgment partakes as much of a compromise, as of a legal adjudication. *The minority thought it better to yield some- [*273 thing, than risk the whole. And although their course of reasoning led them to the general maintenance of the state power over the subject, controlled and limited alone by the oath administered to all their public functionaries, to maintain the constitution of the United States, yet, as denying the power to act upon anterior contracts, could do no harm, but, in fact, imposed a restriction conceived in the true spirit of the constitution, they were satisfied to acquiesce in it, provided the decision were so guarded as to secure the power over posterior contracts, as well from the positive terms of the adjudication, as from inferences deducible from the reasoning of the court. The case of *Sturges v. Crowninshield*, then, must, in its authority, be limited to the terms of the certificate, and that certificate affirms two propositions. 1. That a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law. 2. That a law of this description, acting upon prior contracts, is a law impairing the obligation of contracts, within the meaning of the constitution. Whatever inferences or whatever doctrines the opinion of the court in that case may seem to support, the concluding words of that opinion were intended to control and to confine the authority of the adjudication to the limits of the certificate.

I should, therefore, have supposed, that the question of exclusive power in congress to pass a bankrupt law was not now open ; but it has been often glanced at in argument, and I have no objection to express my individual opinion upon it. Not having recorded my views on this point in the case of *Sturges v. Crowninshield*, I avail myself of this occasion to do so. So far, then, am I from admitting that the constitution affords any ground for this doctrine, that I never had a doubt, that the leading object of the constitution was to bring in aid of the states a power over this subject, which their individual powers never could attain to ; so far from limiting, modifying, *and attenuating legislative power, in its known and ordinary [*274 exercise, in favor of unfortunate debtors, that its sole object was to extend and perfect it, so far as the combined powers of the states, represen-

Ogden v. Saunders.

ted by the general government, could extend it. Without that provision, no power would have existed that could extend a discharge beyond the limits of the state in which it was given, but with that provision, it might be made co-extensive with the United States. This was conducing to one of the great ends of the constitution, one which it never loses sight of in any of its provisions, that of making an American citizen as free in one state as he was in another. And when we are told, that this instrument is to be construed with a view to its federative objects, I reply, that this view alone of the subject is in accordance with its federative character. Another object, in perfect accordance with this, may have been that of exercising a salutary control over the power of the states, whenever that power should be exercised without due regard to the fair exercise of distributive justice. The general tendency of the legislation of the states, at that time, to favor the debtor, was a consideration which entered deeply into many of the provisions of the constitution. And as the power of the states over the law of their respective *forums* remained untouched by any other provision of the constitution; when vesting in congress the power to pass a bankrupt law, it was worthy of the wisdom of the convention, to add to it the power to make that system uniform and universal. Yet, on this subject, the use of the term uniform, instead of general, may well raise a doubt, whether it meant more than that such a law should not be partial, but have an equal and uniform application in every part of the Union. This is in perfect accordance with the spirit in which various other provisions of the constitution are conceived.

For these two objects, there appears to have been much reason for vesting this power in congress; but for extending to the grant the effect of exclusiveness over the power of the states, appears to me not only without reason, but to be repelled by weighty considerations. 1. There is nothing which, on the face of the constitution, bears the semblance of direct prohibition on the states to *exercise this power; and it would seem
 *275] strange, that, if such a prohibition had been in the contemplation of the convention, when appropriating an entire section to the enumeration of prohibitions on the states, they had forgotten this, if they had intended to enact it. The antithetical language adopted in that section, as to every other subject to which the power of congress had been previously extended, affords a strong reason to conclude, that some direct and express allusion to the power to pass a bankrupt law would have been here inserted also, if they had not intended that this power should be concurrently, or, at least, subordinately, exercised by the states. It cannot be correct reasoning, to rely upon this fact, as a ground to infer, that the prohibition must be found in some provision not having that antithetical character, since this supposes an intention to insert the prohibition, which intention can only be assumed. Its omission is a just reason for forming no other conclusion than that it was purposely omitted. But, 2. It is insisted, that, though not express, the prohibition is to be inferred from the grant to congress to establish uniform laws on the subject of bankruptcies throughout the United States; and that this grant, standing in connection with that to establish a uniform rule of naturalization, which is, in its nature, exclusive, must receive a similar construction. There are many answers to be given to this argument; and the first is, that a mere grant of a state power, does not, in itself, necessarily

Ogden v. Saunders.

imply an abandonment or relinquishment of the power granted, or we should be involved in the absurdity of denying to the states the power of taxation, and sundry other powers ceded to the general government. But much less can such a consequence follow, from vesting in the general government, a power which no state possessed, and which, all of them combined, could not exercise to meet the end proposed in the constitution. For, if every state in the Union were to pass a bankrupt law, in the same unvarying words, although this would, undoubtedly, be an uniform system of bankruptcy, in its literal sense, it would be very far from answering the grant to congress. There would still need some act of congress, or some treaty *under sanction of an act to congress, to give discharges in one state a full [*276 operation in the other. Thus, then, the inference which we are called upon to make, will be found not to rest upon any actual cession of state power, but upon the creation of a new power, which no state ever pretended to possess; a power which, so far from necessarily diminishing or impairing the state power over the subject, might find its full exercise in simply recognising as valid, in every state, all discharges which shall be honestly obtained under the existing laws of any state. Again, the inference proposed to be deduced from this grant to congress, will be found much broader than the principle in which the deduction is claimed. For, in this, as in many other instances in the constitution, the grant implies only the right to assume and exercise a power over the subject. Why, then, should the state powers cease, before congress shall have acted upon the subject? or why should that be converted into a present and absolute relinquishment of power, which is, in its nature, merely potential, and dependent on the discretion of congress whether, and when, to enter on the exercise of a power that may supersede it?

Let any one turn his eye back to the time when this grant was made, and say, if the situation of the people admitted of an abandonment of a power so familiar to the jurisprudence of every state; so universally sustained in its reasonable exercise, by the opinion and practice of mankind, and so vitally important to a people overwhelmed in debt, and urged to enterprise by the activity of mind that is generated by revolutions and free governments. I will, with confidence, affirm, that the constitution had never been adopted, had it then been imagined that this question would ever have been made, or that the exercise of this power in the states should ever have depended upon the views of the tribunals to which that constitution was about to give existence. The argument proposed to be drawn from a comparison of this power with that of congress over naturalization, is not a fair one, for the cases are not parallel; and if they were, it is by no means settled, that the states would have been precluded from this power, *if congress had not assumed it. But, admitting, *argumenti gratiâ*, that [*277 they would, still, there are considerations bearing upon the one power, which have no application to the other. Our foreign intercourse being exclusively committed to the general government, it is peculiarly their province, to determine who are entitled to the privileges of American citizens, and the protection of the American government. And the citizens of any one state being entitled by the constitution to enjoy the rights of citizenship in every other state, that fact creates an interest in this particular in each other's acts, which does not exist with regard to their bankrupt laws; since state

Ogden v. Saunders.

acts of naturalization would thus be extra-territorial in their operation, and have an influence on the most vital interests of other states. On these grounds, state laws of naturalization may be brought under one of the four heads or classes of powers precluded to the states, to wit, that of incompatibility ; and on this ground alone, if any, could the states be debarred from exercising this power, had congress not proceeded to assume it. There is, therefore, nothing in that argument.

The argument deduced from the commercial character of bankrupt laws, is still more unfortunate. It is but necessary to follow it out, and the inference, if any, deducible from it, will be found to be direct and conclusive in favor of the state rights over this subject. For if, in consideration of the power vested in congress over foreign commerce, and the commerce between the states, it was proper to vest a power over bankruptcies that should pervade the states ; it would seem, that by leaving the regulation of internal commerce in the power of the states, it became equally proper to leave the exercise of this power, within their own limits, unimpaired. With regard to the universal understanding of the American people on this subject, there cannot be two opinions. If ever contemporaneous exposition, and the clear understanding of the contracting parties, or of the legislating power (it is no matter in which light it be considered), could be resorted to, as the means of expounding an instrument, the continuing and unimpaired existence of this power in the states ought never to have been controverted. Nor was it *278] controverted, *until the repeal of the bankrupt act of 1800, nor until a state of things arose, in which the means of compelling a resort to the exercise of this power by the United States, became a subject of much interest. Previously to that period, the states remained in the peaceable exercise of this power, under circumstances entitled to great consideration. In every state in the Union, was the adoption of the constitution resisted by men of the keenest and most comprehensive minds ; and if an argument, such as this, so calculated to fasten on the minds of a people, jealous of state rights, and deeply involved in debt, could have been imagined, it never would have escaped them. Yet nowhere does it appear to have been thought of ; and, after adopting the constitution, in every part of the Union, we find the very framers of it, everywhere among the leading men in public life, and legislating or adjudicating under the most solemn oath to maintain the constitution of the United States, yet nowhere imagining that, in the exercise of this power, they violated their oaths, or transcended their rights. Everywhere, too, the principle was practically acquiesced in, that taking away the power to pass a law on a particular subject was equivalent to a repeal of existing laws on that subject. Yet, in no instance, was it contended, that the bankrupt laws of the states were repealed, while those on navigation, commerce, the admiralty jurisdiction, and various others, were at once abandoned, without the formality of a repeal. With regard to their bankrupt or insolvent laws, they went on, carrying them into effect, and abrogating, and re-enacting them, without a doubt of their full and unimpaired power over the subject. Finally, when the bankrupt law of 1800 was enacted, the only power that seemed interested in denying the right to the states, formally pronounced a full and absolute recognition of that right. It is impossible for language to be more full and explicit on the subject, than is the sixth section of this act of congress. It acknowledges both the

Ogden v. Saunders.

validity of existing laws, and the right of passing future laws. The practical construction given by that act to the constitution is precisely this, that it amounts only to a right to assume the power to legislate on the subject, and therefore, abrogates or suspends the existing laws, only so far as they may *clash with the provisions of the act of congress. This construction was universally acquiesced in, for it was that on which [*279 there had previously prevailed but one opinion from the date of the constitution.

Much alarm has been expressed respecting the inharmonious operation of so many systems, all operating at the same time. But I must say, that I cannot discover any real ground for these apprehensions. Nothing but a future operation is here contended for, and nothing is easier than to avoid those rocks and quicksands which are visible to all. Most of the dangers are imaginary, for the interests of each community, its respect for the opinion of mankind, and a remnant of moral feeling, which will not cease to operate in the worst of times, will always present important barriers against the gross violation of principle. How is the general government itself made up, but of the same materials which separately make up the governments of the states?

It is a very important fact, and calculated to dissipate the fears of those who seriously apprehend danger from this quarter, that the powers assumed and exercised by the states over this subject, did not compose any part of the grounds of complaint by Great Britain, when negotiating with our government on the subject of violations of the treaty of peace. Nor is it immaterial, as an historical fact, to show the evils against which the constitution really intended to provide a remedy. Indeed, it is a solecism, to suppose, that the permanent laws of any government, particularly those which relate to the administration of justice between individuals, can be radically unequal or even unwise. It is scarcely ever so, in despotic governments; much less in those in which the good of the whole is the predominating principle. The danger to be apprehended, is from temporary provisions and desultory legislation; and this seldom has a view to future contracts. At all events, whatever be the degree of evil to be produced by such laws, the limits of its action are necessarily confined to the territory of those who inflict it. The ultimate object in denying to the states this power, would seem to be, to give the evil a wider range, if it be one, by extending the benefit of discharges over the whole of the Union. *But it is [*280 impossible to suppose, that the framers of the constitution could have regarded the exercise of this power as an evil, in the abstract, else they would hardly have engrafted it upon that instrument which was to become the great safeguard of public justice and public moral. And had they been so jealous of the exercise of this power in the states, it is not credible, that they would have left unimpaired those unquestionable powers over the administration of justice which the states do exercise, and which, in their immoral exercise, might leave to the creditor the mere shadow of justice. The debtor's person, no one doubts, may be exempted from execution. But there is high precedent for exempting his lands; and public feeling would fully sustain an exemption of his slaves. What is to prevent the extension of exemption, until nothing is left but the mere mockery of a judgment, without the means of enforcing its satisfaction?

Ogden v. Saunders.

But it is not only in their execution laws, that the creditor has been left to the justice and honor of the states for his security. Every judiciary in the Union owes its existence to some legislative act; what is to prevent a repeal of that act? and then, what becomes of his remedy, if he has not access to the courts of the Union? Or what is to prevent the extension of the right to imparl? of the time to plead? of the interval between the sittings of the state courts? Where is the remedy against all this? and why were not these powers taken also from the states, if they could not be trusted with the subordinate and incidental power here denied them? The truth is, the convention saw all this, and saw the impossibility of providing an adequate remedy for such mischiefs, if it was not to be found ultimately in the wisdom and virtue of the state rulers, under the salutary control of that republican form of government which it guaranties to every state. For the foreigner and the citizens of other states, it provides the safeguard of a tribunal which cannot be controlled by state laws in the application of the remedy; and for the protection of all, was interposed that oath which it requires to be administered to all the public functionaries, as well of the states as the United States. It may be called the ruling principle of *281] the constitution, to interfere, as little as possible between the citizen and his own state government; and hence, with a few safeguards of a very general nature, the executive, legislative and judicial functions of the states are left as they were, as to their own citizens, and as to all internal concerns. It is not pretended, that this discharge could operate upon the rights of the citizen of any other state, unless his contract was entered into in the state that gave it, or unless he had voluntarily submitted himself to the *lex fori* of the state, before the discharge; in both which instances, he is subjected to its effects, by his own voluntary act.

For these considerations, I pronounce the exclusive power of congress over the relief of insolvents untenable, and the dangers apprehended from the contrary doctrine, unreal.

We will next inquire, whether the states are precluded from the exercise of this power, by that clause in the constitution, which declares that no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." This law of the state of New York is supposed to have violated the obligations of a contract, by releasing Ogden from a debt which he had not satisfied; and the decision turns upon the question, first, in what consists the obligation of a contract? and, secondly, whether the act of New York will amount to a violation of that obligation, in the sense the of constitution.

The first of these questions has been so often examined and considered in this and other courts of the United States, and so little progress has yet been made in fixing the precise meaning of the words "obligation of a contract," that I should turn in despair from the inquiry, were I not convinced, that the difficulties the question presents are mostly factitious, and the result of refinement and technicality; or of attempts at definition made in terms defective both in precision and comprehensiveness. Right or wrong, I come to my conclusion of their meaning, as applied to executory contracts, the subject now before us, by a simple and short-handed exposition. Right and *282] obligation are considered by all ethical writers *as correlative terms.

Whatever I, by my contract, give another a right to require of me,

Ogden v. Saunders.

I, by that act, lay myself under an obligation to yield or bestow. The obligation of every contract will then consist of that right or power over my will or actions, which I, by my contract, confer on another. And that right and power will be found to be measured neither by moral law alone, nor universal law alone, nor by the laws of society alone, but by a combination of the three—an operation in which the moral law is explained and applied by the law of nature, and both modified and adapted to the exigencies of society by positive law. The constitution was framed for society, and an advanced state of society, in which I will undertake to say, that all the contracts of men receive a relative, and not a positive interpretation : for the rights of war must be held and enjoyed in subserviency to the good of the whole. The state construes them, the state applies them, the state controls them, and the state decides how far the social exercise of the rights they give us over each other can be justly asserted. I say, the social exercise of these rights, because in a state of nature, they are asserted over a fellow-creature, but in a state of society, over a fellow-citizen. Yet, it is worthy of observation, how closely the analogy is preserved between the assertion of these rights in a state of nature and a state of society, in their application to the class of contracts under consideration. Two men, A. and B., having no previous connection with each other (we may suppose them even of hostile nations), are thrown upon a desert island. The first, having had the good fortune to procure food, bestows a part of it upon the other, and he contracts to return an equivalent in kind. It is obvious here, that B. subjects himself to something more than the moral obligation of his contract, and that the law of nature, and the sense of mankind, would justify A. in resorting to any means in his power to compel a compliance with this contract. But if it should appear, that B., by sickness, by accident or circumstances beyond human control, however superinduced, could not possibly comply with his contract, the decision would be otherwise, and the exercise of compulsory power over B. would be followed with the indignation of mankind. He has carried the power conferred *on him over the will or actions of another beyond [*283 their legitimate extent, and done injustice in his turn. “*Summum jus est summa injuria.*”

The progress of parties, from the initiation to the consummation of their rights, is exactly parallel to this, in a state of society. With this difference, that in the concoction of their contracts, they are controlled by the laws of the society of which they are members ; and for the construction and enforcement of their contracts, they rest upon the functionaries of its government. They can enter into no contract which the laws of that community forbid, and the validity and effect of their contracts is, what the existing laws give to them. The remedy is no longer retained in their own hands, but surrendered to the community, to a power competent to do justice, and bound to discharge towards them the acknowledged duties of government to society, according to received principles of equal justice. The public duty, in this respect, is the substitute for that right which they possessed in a state of nature, to enforce the fulfilment of contracts ; and if, even in a state of nature, limits were prescribed, by the reason and nature of things, to the exercise of individual power, in exacting the fulfilment of contracts, much more will they be in a state of society. For it is among the duties of society, to enforce the rights of humanity ; and both the debtor and the

Ogden v. Saunders.

society have their interest in the administration of justice, and in the general good ; interest which must not be swallowed up and lost sight of, while yielding attention to the claim of the creditor. The debtor may plead the visitations of Providence, and the society has an interest in preserving every member of the community from despondency—in relieving him from a hopeless state of prostration, in which he would be useless to himself, his family and the community. When that state of things has arrived, in which the community has fairly and fully discharged its duties to the creditor, and in which, pursuing the debtor any longer would destroy the one, without benefiting the other, must always be a question to be determined by the common guardian of the rights of both ; and in this originates the power *284] exercised by governments in favor of insolvents. *It grows out of the administration of justice, and is a necessary appendage to it.

There was a time when a different idea prevailed, and then it was supposed, that the rights of the creditor required the sale of the debtor and his family. A similar notion now prevails on the coast of Africa, and is often exercised there by brute force. It is worthy only of the country in which it now exists, and of that state of society in which it once originated and prevailed. "*Lex non cogit ad impossibilia*," is a maxim applied by law to the contracts of parties in a hundred ways. And where is the objection, in a moral or political view, to applying it to the exercise of the power to relieve insolvents ? It is in analogy with this maxim, that the power to relieve them is exercised ; and if it never was imagined, that, in other cases, this maxim violated the obligation of contracts, I see no reason why the fair, ordinary and reasonable exercise of it in this instance, should be subjected to that imputation. If it be objected to these views of the subject, that they are as applicable to contracts prior to the law, as to those posterior to it, and, therefore, inconsistent with the decision in the case of *Sturges v. Crowninshield*, my reply is, that I think this no objection to its correctness. I entertained this opinion then, and have seen no reason to doubt it since. But if applicable to the case of prior debts, *multo fortiori*, will it be so, to those contracted subsequent to such a law ; the posterior date of the contract removes all doubt of its being in the fair and unexceptionable administration of justice, the discharge is awarded.

I must not be understood here, as reasoning upon the assumption that the remedy is grafted into the contract. I hold the doctrine untenable, and infinitely more restrictive on state power than the doctrine contended for by the opposite party. Since, if the remedy enters into the contract, then the states lose all power to alter their laws for the administration of justice. Yet, I freely admit, that the remedy enters into the views of the parties when contracting ; that the constitution pledges the states to every creditor *285] for the full, and fair, and candid exercise of state power, to the *ends of justice, according to its ordinary administration, uninfluenced by views to lighten or lessen, or defer the obligation to which each contract fairly and legally subjects the individual who enters into it. Whenever an individual enters into a contract, I think his assent is to be inferred, to abide by those rules in the administration of justice which belong to the jurisprudence of the country of the contract. And when compelled to pursue his debtor in other states, he is equally bound to acquiesce in the law of the *forum* to which he subjects himself. The law of the contract remains

Ogden v. Saunders.

the same everywhere, and it will be the same in every tribunal; but the remedy necessarily varies, and with it, the effect of the constitutional pledge, which can only have relation to the laws of distributive justice known to the policy of each state severally. It is very true, that inconveniences may occasionally grow out of irregularities in the administration of justice by the states. But the citizen of the same state is referred to his influence over his own institutions for his security, and the citizens of the other states have the institutions and powers of the general government to refer to. And this is all the security the constitution ever intended to hold out against the undue exercise of the power of the states over their own contracts, and their own jurisprudence.

But since a knowledge of the laws, policy and jurisprudence of a state, is necessarily imputed to every one entering into contracts within its jurisdiction, of what surprise can he complain, or what violation of public faith, who still enters into contracts, under that knowledge? It is no reply, to urge that, at the same time, knowing of the constitution, he had a right to suppose the discharge void and inoperative, since this would be but speculating on a legal opinion, in which, if he proves mistaken, he has still nothing to complain of but his own temerity, and concerning which, all that come after this decision, at least, cannot complain of being misled by their ignorance or misapprehensions. Their knowledge of the existing laws of the state will henceforward be unqualified, and was so, in the view of the law, before this decision was made.

It is now about twelve or fourteen years since I was called *upon, on my circuit, in the case of *Gill, Canonge & Co. v. L. Jacobs*, to [*286 review all this doctrine. The cause was ably argued by gentlemen whose talents are well known in this capitol, and the opinions which I then formed, I have seen no reason since to distrust.

It appears to me, that a great part of the difficulties of the cause, arise from not giving sufficient weight to the general intent of this clause in the constitution, and subjecting it to a severe literal construction, which would be better adapted to special pleadings. By classing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is a general provision against arbitrary and tyrannical legislation over existing rights, whether of person or property. It is true, that some confusion has arisen from an opinion, which seems early, and without due examination, to have found its way into this court; that the phrase "*ex post facto*," was confined to laws affecting criminal acts alone. The fact, upon examination, will be found otherwise; for neither in its signification nor uses is it thus restricted. It applies to civil as well as to criminal acts (1 Shep. Touch. 68, 70, 73), and with this enlarged signification attached to that phrase, the purport of the clause would be, "that the states shall pass no law, attaching to the acts of individuals other effects or consequences than those attached to them by the laws existing at their date; and all contracts thus construed, shall be enforced according to their just and reasonable purport." But to assign to contracts, universally, a literal purport, and to exact from them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction and fulfilment of contracts, as

Ogden v. Saunders.

over the form and measure of the remedy to enforce them. As instances of the first, take the contract imputed to the drawer of a bill, or indorser of a note, with its modifications; the deviations of the law from the literal contract of the parties to a penal bond, a mortgage, a policy of insurance, bottomry-bond, and various others that might be *enumerated. And for instances of discretion exercised in applying the remedy, take the time for which executors are exempted from suit; the exemption of members of legislatures; of judges; of persons attending courts, or going to elections; the preferences given in the marshaling of assets; sales on credit for a present debt; shutting of courts altogether against gaming debts and usurious contracts; and above all, acts of limitation. I hold it impossible to maintain the constitutionality of an act of limitation, if the modification of the remedy against debtors, implied in the discharge of insolvents, is unconstitutional. I have seen no distinction between the cases that can bear examination.

It is in vain to say, that acts of limitation appertain to the remedy only; both descriptions of laws appertain to the remedy, and exactly in the same way; they put a period to the remedy, and upon the same terms, by what has been called, a tender of paper-money, in the form of a plea, and to the advantage of the insolvent laws, since if the debtor can pay, he has been made to pay. But the door of justice is shut in the face of the creditor, in the other instance, without an inquiry on the subject of the debtor's capacity to pay. And it is equally vain to say, that the act of limitation raises a presumption of payment, since it cannot be taken advantage of, on the general issue, without provision by statute; and the only legal form of a plea, implies an acknowledgment that the debt has not been paid. Yet so universal is the assent of mankind in favor of limitation acts, that it is the opinion of profound politicians, that no nation could subsist without one.

The right, then, of the creditor, to the aid of the public arm for the recovery of contracts, is not absolute and unlimited, but may be modified by the necessities or policy of societies. And this, together with the contract itself, must be taken by the individual, subject to such restrictions and conditions as are imposed by the laws of the country. The right to pass bankrupt laws is asserted by every civilized nation in the world. And in no writer, I will venture to say, has it ever been suggested, that the power of annulling such contracts, universally exercised under their bankrupt or insolvent systems, involves a violation of the obligation of contracts. *288] *In international law, the subject is perfectly understood, and the right generally acquiesced in; and yet the denial of justice is, by the same code, an acknowledged cause of war.

But it is contended, that if the obligation of a contract has relation at all to the laws which give or modify the remedy, then the obligation of a contract is ambulatory, and uncertain, and will mean a different thing in every state in which it may be necessary to enforce the contract. There is no question that this effect follows; and yet, after this concession, it will still remain to be shown, how any violation of the obligation of the contract can arise from that cause. It is a casualty well known to the creditor, when he enters into the contract; and if obliged to prosecute his rights in another state, what more can he claim of that state, than that its courts shall be open to him, on the same terms on which they are open to other individuals? It

Ogden v. Saunders.

is only by voluntarily subjecting himself to the *lex fori* of a state, that he can be brought within the provisions of its statutes in favor of debtors, since, in no other instance, does any state pretend to a right to discharge the contracts entered into in another state. He who enters into a pecuniary contract, knowing that he may have to pursue his debtor, if he flees from justice, casts himself, in fact, upon the justice of nations.

It has also been urged, with an earnestness that could only proceed from deep conviction, that insolvent laws were tender laws of the worst description, and that it is impossible to maintain the constitutionality of insolvent laws that have a future operation, without asserting the right of the states to pass tender laws, provided such laws are confined to a future operation. Yet to all this there appears to be a simple and conclusive answer. The prohibition in the constitution to make anything but gold or silver coin a tender in payment of debts, is express and universal. The framers of the constitution regarded it as an evil, to be repelled without modification ; they have, therefore, left nothing to be inferred or deduced from construction on this subject. But the contrary is the fact with regard to insolvent laws ; it contains no express *prohibition to pass such laws, and we are called upon here to deduce such a prohibition from a clause, which is any- [*289 thing but explicit, and which already has been judicially declared to embrace a great variety of other subjects. The inquiry, then, is open and indispensable, in relation to insolvent laws, prospective or retrospective, whether they do, in the sense of the constitution, violate the obligation of contracts ? There would be much in the argument, if there was no express prohibition against passing tender laws ; but with such express prohibition, the cases have no analogy. And, independently of the different provisions in the constitution, there is a distinction existing between tender laws and insolvent laws, in their object and policy, which sufficiently points out the principle upon which the constitution acts upon them, as several and distinct ; a tender law supposes a capacity in the debtor to pay and satisfy the debt in some way, but the discharge of an insolvent is founded in his incapacity ever to pay, which incapacity is judicially determined according to the laws of the state that passes it. The one imports a positive violation of the contract, since all contracts to pay, not expressed otherwise, have relation to payment in the current coin of the country ; the other imports an impossibility that the creditor ever can fulfil the contract. If it be urged, that to assume this impossibility is itself an arbitrary act, that parties have in view something more than present possessions, that they look to future acquisitions, that industry, talents and integrity are as confidently trusted as property itself ; and, to release them from this liability, impairs the obligation of contracts ; plausible as the argument may seem, I think the answer is obvious and incontrovertible. Why may not the community set bounds to the will of the contracting parties in this, as in every other instance ? That will is controlled in the instances of gaming debts, usurious contracts, marriage-brokerage bonds, and various others ; and why may not the community also declare, that, "look to what you will, no contract formed within the territory which we govern shall be valid as against future acquisitions ;" "we have an interest in the happiness, and services, and families of this community, which shall not be superseded by individual *views ?" Who can [*290 doubt the power of the state to prohibit her citizens from running in

Ogden v. Saunders.

delt altogether? A measure a thousand times wiser than that impulse to speculation and ruin, which has hitherto been communicated to individuals by our public policy. And if to be prohibited altogether, where is the limit which may not be set both to the acts and the views of the contracting parties?

When considering the first question in this cause, I took occasion to remark on the evidence of contemporaneous exposition, deducible from well-known facts. Every candid mind will admit, that this is a very different thing from contending that the frequent repetition of wrong will create a right. It proceeds upon the presumption, that the contemporaries of the constitution have claims to our deference, on the question of right, because they had the best opportunities of informing themselves of the understanding of the framers of the constitution, and of the sense put upon it by the people, when it was adopted by them; and in this point of view, it is obvious, that the consideration bears as strongly upon the second point in the cause as on the first. For, had there been any possible ground to think otherwise, who could suppose that such men, and so many of them, acting under the most solemn oath, and generally acting rather under a feeling of jealousy of the power of the general government than otherwise, would universally have acted upon the conviction, that the power to relieve insolvents, by a discharge from the debt, had not been taken from the states, by the article prohibiting the violation of contracts? The whole history of the times, up to a time subsequent to the repeal of the bankrupt law, indicates a settled knowledge of the contrary.

If it be objected to the views which I have taken of this subject, that they imply a departure from the direct and literal meaning of terms, in order to substitute an artificial or complicated exposition; my reply is, that the error is on the other side; *qui hæret in literâ, hæret in cortice*. All the notions of society, particularly in their jurisprudence, are more or less artificial; our constitution nowhere speaks the language of men in a state of nature; let any one attempt a literal exposition of the phrase which immediately precedes the one under *consideration, I mean "*ex post facto*," *291] and he will soon acknowledge a failure. Or let him reflect on the mysteries that hang around the little slip of paper which lawyers know by the title of a bail-piece. The truth is, that even compared with the principles of natural law, scarcely any contract imposes an obligation conformable to the literal meaning of terms. He who enters into a contract to follow the plough for the year, is not held to its literal performance, since many casualties may intervene, which would release him from the obligation, without actual performance. There is a very striking illustration of this principle to be found in many instances in the books; I mean, those cases in which parties are released from their contracts, by a declaration of war, or where laws are passed rendering that unlawful, even incidentally, which was lawful at the time of the contract. Now, in both these instances, it is the government that puts an end to the contract, and yet no one ever imagined, that it thereby violates the obligation of contracts. It is, therefore, far from being true, as a general proposition, "that a government necessarily violates the obligation of a contract, which it puts an end to, without performance." It is the motive, the policy, the object, that must

Ogden v. Saunders.

characterize the legislative act, to affect it with the imputation of violating the obligation of contracts.

In the effort to get rid of the universal vote of mankind in favor of limitation acts, and laws against gaming, usury, marriage-broking, buying and selling of offices, and many of the same description, we have heard it argued, that, as to limitation acts, the creditor has nothing to complain of, because time is allowed him, of which, if he does not avail himself, it is his own neglect; and as to all others, there is no contract violated, because there was none ever incurred. But it is obvious, that this mode of answering the argument involves a surrender to us of our whole ground. It admits the right of the government to limit and define the power of contracting, and the extent of the creditor's remedy against his debtor; to regard other rights besides his, and to modify his rights, so as not to let them override entirely the general interests of society, the interests of the community itself in the talents and services of the debtor, the regard due to his *happiness, and to the claims of his family upon him and upon the government. [*292 No one questions the duty of the government to protect and enforce the just rights of every individual over all within its control. What we contend for, is no more than this, that it is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semblance of right and justice. It is true, that in the exercise of this power, governments themselves may sometimes be the authors of oppression and injustice; but whenever the constitution could impose limits to such power, it has done so; and if it has not been able to impose effectual and universal restraints, it arises only from the extreme difficulty of regulating the movements of sovereign power; and the absolute necessity, after every effort that can be made to govern effectually, that will still exist, to leave some space for the exercise of discretion, and the influence of justice and wisdom.

THOMPSON, Justice.—This action is founded on several bills of exchange, bearing date in September 1806, drawn by J. Jordan, upon Ogden, the plaintiff in error, in favor of Saunders, the defendant in error. The drawer and payee, at the date of the bills, were citizens of, and resident in, Kentucky. Ogden was a citizen of, and resident in, New York, where the bills were presented and accepted by him, but were not paid when they came to maturity, and are still unpaid. Ogden sets up, in bar of this action, his discharge under the insolvent law of the state of New York, passed in April 1801, as one of the revised laws of that state. His discharge was duly obtained on the 19th of April 1808, he having assigned all his property for the benefit of his creditors, and having, in all respects, complied with the laws of New York for giving relief in cases of insolvency. These proceedings, according to those laws, discharged the insolvent from all debts due at the time of the assignment, or contracted for before that time, though payable afterwards, except in some specified cases, which do not affect the present question.

From this brief statement, it appears, that Ogden, being sued upon his acceptances of *the bills in question, the contract was made, and to be executed within the state of New York, and was made subsequent [*293 to the passage of the law under which he was discharged. Under these

Ogden v. Saunders.

circumstances, the general question presented for decision is, whether this discharge can be set up in bar of the present suit. It is not pretended, but that if the law under which the discharge was obtained, is valid, and the discharge is to have its effect, according to the provisions of that law, it is an effectual bar to any recovery against Ogden. But it is alleged, that this law is void, under the prohibition in the constitution of the United States (art. 1, § 10), which declares, that "no state shall pass any law impairing the obligation of contracts." So that the inquiry here is, whether the law of New York, under which the discharge was obtained, is repugnant to this clause in the constitution; and, upon the most mature consideration, I have arrived at the conclusion, that the law is not void, and that the discharge set up by the plaintiff in error is an effectual protection against any liability upon the bills in question.

In considering this question, I have assumed, that the point now presented is altogether undecided, and entirely open for discussion. Although several cases have been before this court which may have a bearing upon the question, yet, upon the argument, the particular point now raised has been treated by the counsel as still open for decision, and so considered by the court, by permitting its discussion. Although the law under which Ogden was discharged appears, by the record, to have been passed in the year 1801, yet, it is proper to notice, that this was a mere revision and re-enactment of a law which was in force as early, at least, as from the year 1788, and which has continued in force from that time to the present (except from the 3d of April 1811, until the 14th of February 1812), in all its material provisions, which have any bearing upon the present question. To declare a law null and void, after such a lapse of time, and thereby prostrate a system which has been in operation for nearly forty years, ought to be called for by some urgent necessity, and founded upon reasons and principles scarcely admitting of doubt. In our complex system of government, we must expect that *294] questions involving the jurisdictional limits between the general and state governments, will frequently arise; and they are always questions of great delicacy, and can never be met, without feeling deeply and sensibly impressed with the sentiment, that this is the point upon which the harmony of our system is most exposed to interruption. Whenever such a question is presented for decision, I cannot better express my views of the leading principles which ought to govern this court, than in the language of the court itself, in the case of *Fletcher v. Peck*, 6 Cranch 128: "The question (says the court) whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom or ever be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But, it is not on slight implication, and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." If such be the rule by which the examination of this case is to be governed and tried (and that it is, no one can doubt), I am certainly not prepared to say, that it is not, at least, a

Ogden v. Saunders.

doubtful case, or that I feel a clear conviction that the law in question is incompatible with the constitution of the United States.

In the discussion at the bar, this has rightly been considered a question relating to the division of power between the general and state governments. And in the consideration of all such questions, it cannot be too often repeated (although universally admitted), or too deeply impressed on the mind, that all the powers of the general government are derived solely from the constitution; and that whatever power is not conferred by that charter, is reserved to the states respectively, or to the people. The state of New York, when the law in question was passed (for I consider this a mere continuation of the insolvent act of 1788), was *in the due and rightful exercise of its powers as an independent government; and unless this power [*295 has been surrendered by the constitution of the United States, it still remains in the state. And in this view, whether the law in question be called a bankrupt or an insolvent law, is wholly immaterial; it was such a law as a sovereign state had a right to pass; and the simple inquiry is, whether that right has been surrendered. No difficulty arises here out of any inquiry about express or implied powers granted by the constitution. If the states have no authority to pass laws like this, it must be in consequence of the express provision, "that no state shall pass any law impairing the obligation of contracts."

It is admitted, and has been so decided by this court, that a state law, discharging insolvent debtors from their contracts, entered into antecedent to the passing of the law, falls within this clause in the constitution, and is void. In the case now before the court, the contract was made subsequent to the passage of the law; and this, it is believed, forms a solid ground of distinction, whether tested by the letter, or the spirit and policy of the prohibition. It was not denied on the argument, and I presume, cannot be, but that a law may be void in part and good in part; or, in other words, that it may be void, so far as it has a retrospective application to past contracts, and valid, as applied prospectively to future contracts. The distinction was taken by the court in the third circuit, in the case of *Golden v. Prince* (3 W. C. C. 313), and which, I believe, was the first case that brought into discussion the validity of a state law analogous to the one now under consideration. It was there held, that the law was unconstitutional, in relation to that particular case, because it impaired the obligation of the contract, by discharging the debtor from the payment of his debts, due or contracted for before the passage of the law. But it was admitted, that a law, prospective in its operation, under which a contract afterwards made might be avoided, in a way different from that provided by the parties, would be clearly constitutional. And how is this distinction to be sustained, except on the ground that contracts are deemed to be made in reference to the existing law, and to be governed, *regulated and controlled by its provisions? As the question before the court was the validity of an [*296 insolvent law, which discharged the debtor from all contracts, the distinction must have been made in reference to the operation of the discharge upon contracts made before, and such as were made after, the passage of the law, and is, therefore, a case bearing directly upon the question now before the court. That the power given by the constitution to congress, to establish uniform laws on the subject of bankruptcies throughout the United States,

Ogden v. Saunders.

does not withdraw the subject entirely from the states, is settled by the case of *Sturges v. Crowninshield*, 4 Wheat. 191. It is there expressly held, that "until the power to pass uniform laws on the subject of bankruptcies is exercised by congress, the states are not forbidden to pass a bankrupt law, provided it contain no principle which violates the 10th section of the first article of the constitution of the United States." And this case also decides, that the right of the states to pass bankrupt laws is not extinguished, but is only suspended by the enactment of a general bankrupt law by congress, and that a repeal of that law removes disability to the exercise of the power by the states; so that the question now before the court, is narrowed down to the single inquiry, whether a state bankrupt law, operating prospectively upon contracts made after its enactment, impairs the obligation of such contract, within the sense and meaning of the constitution of the United States.

This clause in the constitution has given rise to much discussion, and great diversity of opinion has been entertained as to its true interpretation. Its application to some cases may be plain and palpable, to others more doubtful. But so far as relates to the particular question now under consideration, the weight of judicial opinions in the state courts is altogether in favor of the constitutionality of the law, so far as my examination has extended. And, indeed, I am not aware of a single contrary opinion. (13 Mass. 1; 16 Johns. 233; 7 Johns. Ch. 299; 5 Binn. 264; 5 Hall's L. J. 530; 6 Ibid. 475; Niles' Reg. 15th of September 1821; *Townsend v. Townsend*, Peck 1.)

*297] In proceeding to a more particular examination of the *true import of the clause "no state shall pass any law impairing the obligation of contracts," the inquiries which seem naturally to arise are, what is a contract? what its obligation? and what may be said to impair it? As to what constitutes a contract, no diversity of opinion exists; all the elementary writers on the subject, sanctioned by judicial decisions, consider it briefly and simply an agreement in which a competent party undertakes to do, or not to do, a particular thing; but all know, that the agreement does not always, nay, seldom, if ever, upon its face, specify the full extent of the terms and conditions of the contract; many things are necessarily implied, and to be governed by some rule not contained in the agreement; and this rule can be no other than the existing law when the contract is made, or to be executed. Take, for example, the familiar case of an agreement to pay a certain sum of money, with interest. The amount, or rate of such interest, is to be ascertained by some standard, out of the agreement, and the law presumes the parties meant the common rate of interest established in the country where the contract was to be performed. This standard is not looked to for the purpose of removing any doubt or ambiguity arising on the contract itself, but to ascertain the extent of its obligation; or, to put a case more analogous, suppose, a statute should declare generally, that all contracts for the payment of money should bear interest, after the day of payment fixed in the contract, and a note, where such law was in force, should be made payable in a given number of days after date. Such note would surely draw interest from the day it became payable, although the note upon its face made no provision for interest; and the obligation of the contract to pay the interest would be as complete and binding as to pay

Ogden v. Saunders.

the principal ; but such would not be its operation, without looking out of the instrument itself, to the law which created the obligation to pay interest. The same rule applies to contracts of every description ; and parties must be understood as making their contracts with reference to existing laws, and impliedly assenting that such contracts are to be construed, governed and controlled, by such laws. Contracts, absolute and unconditional *upon their face, are often considered subject to an implied condition which [*298 the law establishes as applicable to such cases. Suppose, a state law should declare, that in all conveyances thereafter to be made, of real estate, the land should be held as security for the payment of the consideration-money, and liable to be sold, in case default should be made in payment : would such a law be unconstitutional? And yet it would vary the contract from that which was made by the parties, if judged of by the face of the deed alone, and would be making a contract conditional, which the parties had made absolute, and would certainly be impairing such contract, unless it was deemed to have been made subject to the provisions of such law, and with reference thereto, and that the law was impliedly adopted as forming the obligation and terms of the contract. The whole doctrine of the *lex loci* is founded on this principle.

The language of the court, in the third circuit, in the case of *Camfranke v. Burnell*, 1 W. C. C. 341, is very strong on this point. Those laws, say the court, which in any manner affect the contract, whether in its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself. The contract is a law which the parties impose upon themselves, subject, however, to the paramount law—the law of the country where the contract is made. And when to be enforced by foreign tribunals, such tribunals aim only to give effect to the contracts, according to the laws which gave them validity. So also, in this court, in the case of *Renner v. Bank of Columbia*, 9 Wheat. 586, the language of the court is to the same effect, and shows that we may look out of the contract, to any known law or custom, with reference, to which the parties may be presumed to have contracted, in order to ascertain their intention, and the legal and binding force, and obligation of their contract. The *Bank of Columbia v. Okely*, 4 Wheat. 235, is another case recognising the same principle. And in the case of *Dartmouth College v. Woodward*, Ibid. 695, it is well observed by one of the judges of this court, “that all contracts recognised as valid in any *country, obtain their obligation and construction *jure loci contractūs*.” And this doctrine is universally recognised, both in the [*299 English and American courts.

If contracts are not made with reference to existing laws, and to be governed and regulated by such laws, the agreement of parties, under the extended construction now claimed for this clause in the constitution, may control state laws on the subject of contracts altogether. A parol agreement for the sale of land is a contract, and if the agreement alone makes the contract, and it derives its obligation solely from such agreement, without reference to the existing law, it would seem to follow, that any law which had declared such contract void, or had denied a remedy for breach thereof, would impair its obligation. A construction involving such consequences is certainly inadmissible. Any contract, not sanctioned by existing laws,

Ogden v. Saunders.

creates no civil obligation ; and any contract discharged in the mode and manner provided by the existing law where it was made, cannot, upon any just principles of reasoning, be said to be impaired by such law. It will, I believe, be found, on examination, that the course of legislation in some of the states, between debtor and creditor, which formed the grounds of so much complaint, and which probably gave rise to this prohibition in the constitution, consisted principally, if not entirely, of laws having a retrospective operation upon antecedent debts.

If a contract does not derive its obligation from the positive law of the country where it is made, where is to be found the rule, that such obligation does not attach, until the contracting party has attained a certain age? In what code of natural law, or in what system of universal law, out of which it is said, at the bar, spring the eternal and unalterable principles of right and of justice, will be found a rule, that such obligation does not attach, so as to bind a party under the age of twenty-one years? No one will pretend, that a law exonerating a party from contracts entered into before arriving at such age, would be invalid. And yet, it would impair the obligation of the contract, if such obligation is, derived from any other source than the existing law of the place where made. Would it not be within the legitimate *powers of a state legislature, to declare prospectively that no
 *300] one should be made responsible, upon contracts entered into before arriving at the age of twenty-five years? This, I presume, cannot be doubted. But, to apply such a law to past contracts, entered into when twenty-one years was the limit, would clearly be a violation of the obligation of the contract. No such distinction, however, could exist, unless the obligation of the contract grows out of the existing law, and with reference to which the contract must be deemed to have been made.

The true import of the term "obligation," as used in the constitution, may admit of some doubt. That it refers to the civil or legal, and not moral obligation, is admitted by all. But whether the remedy upon the contract is entirely excluded from the operation of this provision, is a point on which some diversity of opinion has been entertained. That it is not intended to interfere with or limit state legislation, in relation to the remedy, in the ordinary prosecution of suits, no one can doubt. And, indeed, such a principle is indispensable to facilitate commercial intercourse between the citizens or subjects of different governments, and is sanctioned by all civilized nations ; and if, according to the language of these cases, this principle extends to the *obligation*, as well as the construction of contracts, it would seem to follow, as a necessary conclusion, that it must embrace all the consequences growing out of the laws of the country where the contract is made ; for it is the law which creates the obligation, and whenever, therefore, the *lex loci* provides for the dissolution of the contract, in any prescribed mode, the parties are presumed to have acted subject to such contingency. And hence, in the English courts, wherever the operation of a foreign discharge under a bankrupt law has been brought under consideration, they have given to it the same effect that it would have had in the country where the contract was made. And the same rule has been recognised and adopted in the courts of this country, almost universally, where the question has arisen. But whether a law might not so change the nature and extent of existing remedies, and thereby so materially impair the right, as

Ogden v. Saunders.

to fall within the scope *of this prohibition, if it extended to remedies upon antecedent contracts, is by no means clear.' If the law, whatever it may be, relating to the remedy, has a prospective operation only, no objection can arise to it, under this clause in the constitution. It is a question that must rest in the sound discretion of the state legislature. But men, when entering into contracts, can hardly be presumed entirely regardless of the remedy which the law provides in case of a breach of the contract; and the means of obtaining satisfaction for such breach enters essentially into consideration in making the contract. If, at the time of making the contract, it be known, that the person only of the debtor, and not his property, or his personal property only, and not his lands, or a certain part of either, is to be resorted to for satisfaction, no ground of complaint can exist, the contract having been made with full knowledge of all these things; but if, at the time the contract is made, not only the person, but all the property, both real and personal, of the debtor, might be resorted to for satisfaction, and a law should be passed, placing beyond the reach of the creditor the whole, or the principal part, of the debtor's property, it would be difficult to sustain the constitutionality of such a law. The statute of limitations is conceded to relate to the remedy. Suppose, when a contract was made, the limitation was six years, and it should be reduced to six months, or any shorter period, and applied to antecedent contracts, would it not be repugnant to the constitution? But if the legislature of a state should choose to adopt, prospectively, six months as the limitation, who could question the authority so to do? And suppose, further, that the unconstitutionality of the law in question is admitted, could the state of New York pass a law limiting the right of recovery against any insolvent who had been duly discharged according to the provisions of the insolvent act, to ten days from the passage of such law? And yet this would be a statute of limitation, and affect the remedy only. The law now in question is nothing more than taking away all remedy; and whether it be the whole, or some material part thereof, would seem to differ in degree only, and not in principle; and if to have a retrospective operation, *might well [*302 be considered as falling within the spirit and policy of the prohibition.

In the case of *Sturges v. Crowninshield*, the court, in explaining the meaning of the terms "obligation of a contract," say, "a contract is an agreement in which a party undertakes to do, or not to do, a particular thing; the law binds him to perform his undertaking, and this is, of course, the obligation of his contract." That is, as I understand it, the law of the contract forms its obligation; and if so, the contract is fulfilled, and its obligation discharged, by complying with whatever the existing law required in relation to such contract; and it would seem to me, to follow, that if the law, looking to the contingency of the debtor's becoming unable to pay the whole debt, should provide for his discharge, on payment of a part, this would enter into the law of the contract, and the obligation to pay would, of course, be subject to such contingency.

It is unnecessary, however, on the present occasion, to attempt to draw, with precision, the line between the right and the remedy, or to determine

¹ An act which takes from a creditor a substantial remedy for the enforcement of his contract, is unconstitutional. *Penrose v. Erie Canal Co.*, 56 Penn. St. 46.

Ogden v. Saunders.

whether the prohibition in the constitution extends to the former, and not to the latter, or whether, to a certain extent, it embraces both ; for the law in question strikes at the very root of the cause of action, and takes away both right and remedy, and the question still remains, does the prohibition extend to a state bankrupt or insolvent law, like the one in question, when applied to contracts entered into subsequent to its passage? Whether this is technically a bankrupt or an insolvent law, is of little importance. Its operation, if valid, is to discharge the debtor absolutely from all future liability, on surrendering up his property, and in that respect, is a bankrupt law, according to the universal understanding in England, where a bankrupt system is in operation. It is not, however, limited to traders, but extends to every class of citizens ; and, in this respect, is more analogous to the English insolvent laws, which only authorize the discharge of the debtor from imprisonment.

If this provision in the constitution was unambiguous, and its meaning entirely free from doubt, there would be no door left open for construction, *303] or any proper ground upon which the intention of the framers of the constitution could be inquired into : this court would be bound to give to it its full operation, whatever might be the views entertained of its expediency. But the diversity of opinion entertained of its construction, will fairly justify an inquiry into the intention, as well as the reason and policy of the provision ; all which, in my judgment, will warrant its being confined to laws affecting contracts made antecedent to the passage of such laws. Such would appear to be the plain and natural interpretation of the words, "no state shall pass any law impairing the obligation of contracts."

The law must have a present effect upon some contract in existence, to bring it within the plain meaning of the language employed. There would be no propriety in saying, that a law impaired, or in any manner whatever modified or altered, what did not exist. The most obvious and natural application of the words themselves, is to laws having a retrospective operation upon existing contracts ; and this construction is fortified by the associate prohibitions, "no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The first two are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals. And no good reason is perceived, why the last should be restricted to retrospective laws, relating to private rights growing out of the contracts of parties. The one provision is intended to protect the person of the citizen from punishment criminally, for any act not unlawful when committed ; and the other to protect the rights of property, as secured by contracts sanctioned by existing laws. No one supposes, that a state legislature is under any restriction in declaring, prospectively, any acts criminal, which its own wisdom and policy may deem expedient. And why not apply the same rule of construction and operation to the other provision, relating to the rights of property ? Neither provision can strictly be considered as introducing any new principle, but only, for greater security and safety, to incorporate into this charter, provisions admitted by all to be among the first principles of our government. No state court would, I presume, sanction and enforce an *ex post facto* law ; if no *304] such prohibition was contained in the constitution of the United States ; so, neither would retrospective laws, taking away vested

Ogden v. Saunders.

rights, be enforced. Such laws are repugnant to those fundamental principles, upon which every just system of laws is founded. It is an elementary principle, adopted and sanctioned by the courts of justice in this country, and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition. It is, therefore, no objection to the view I have taken of this clause in the constitution, that the provision was unnecessary. The great principle asserted, no doubt, is, as laid down by the court in *Sturges v. Crowninshield*, the inviolability of contracts; and this principle is fully maintained by confining the prohibition to laws affecting antecedent contracts. It is the same principle, we find, contemporaneously (13th July 1787, 1 U. S. Stat. 52 n.), asserted by the old congress, in an ordinance for the government of the territory of the United States north-west of the river Ohio. By one of the fundamental articles, it is provided, that "in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the territory, that shall in any manner whatever interfere with or affect private contracts or engagements, *bonâ fide*, and without fraud, previously made," thereby pointedly making a distinction between laws affecting contracts antecedently, and subsequently, made; and such a distinction seems to me to be founded upon the soundest principles of justice, if there is anything in the argument, that contracts are made with reference to, and derive their obligation from, the existing law.

That the prohibition upon the states to pass laws impairing the obligation of contracts is applicable to private rights merely, without reference to bankrupt laws, was evidently the understanding of those distinguished commentators on the constitution, who wrote the *Federalist*. In the 44th number of that work (p. 281), it is said, that "bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed *to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experi- [*305]ence has taught us, nevertheless, that additional defences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights." Had it been supposed, that this restriction had for its object the taking from the states the right of passing insolvent laws, even when they went to discharge the contract, it is a little surprising, that no intimation of its application to that subject should be found in these commentaries upon the constitution. And it is still more surprising, that if it had been thought susceptible of any such interpretation, no objection should have been made, in any of the states, to the constitution, on this ground, when the ingenuity of man was on the stretch, in many states, to defeat its adoption; and particularly in the state of New York, where the law now in question was in full force, at the very time the state convention was deliberating upon the adoption of the constitution. But if the prohibition is confined to retrospective laws, as it naturally imports, it is not surprising, that it should have passed without objection, as it is the assertion of a principle universally approved.

It was pressed upon the court, with great confidence, and, as it struck

Ogden v. Saunders.

me, at the time, with much force, that if this restriction could not reach laws existing at the time the contract was made, state legislatures might evade the prohibition (immediately preceding) to make any thing but gold and silver a tender in payment of debts, by making the law prospective in its operation, and applicable to contracts thereafter to be made. But on reflection, I think, no such consequences are involved. When we look at the whole clause in which these restrictions are contained, it will be seen, that the subjects embraced therein are evidently to be divided into two classes; the one, of a public and national character, the power over which is entirely taken away from the states; and the other, relating to private and personal rights, upon which the states may legislate, under the restrictions specified. The former are, "no state shall enter any into treaty, alliance or confederation, grant *letters of marque and reprisal, coin money, emit bills of credit." Thus far, there can be no question, that they relate to powers of a general and national character. The next in order is, or "make anything but gold and silver a tender in payment of debts;" this is founded upon the same principles of public and national policy, as the prohibition to coin money and emit bills of credit, and is so considered in the commentary on this clause, in the number of the Federalist I have referred to. It is there said, the power to make anything but gold and silver a tender in payment of debts, is withdrawn from the states, on the same principles with that of issuing a paper currency. All these prohibitions, therefore, relate to powers of a public nature, and are general and universal in their application, and inseparably connected with national policy. The subject-matter is entirely withdrawn from state authority and state legislation. But the succeeding prohibitions are of a different character; they relate to personal security and private rights, viz., or "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The subject-matter of such laws is not withdrawn from the states; but the legislation thereon must be under the restriction therein imposed. States may legislate on the subject of contracts, but the laws must not impair the obligation of such contracts. A tender of payment necessarily refers to the time when the tender is made, and has no relation to the time when the law authorizing it shall be passed, or when the debt was contracted. The prohibition is, therefore, general and unlimited in its application. It has been urged in argument, that this prohibition to the states to pass laws impairing the obligation of contracts, had in view an object of great national policy, connected with the power to regulate commerce; that the leading purpose was, to take from the states the right of passing bankrupt laws. And to illustrate and enforce this position, this clause has been collated with that which gives to congress the power of passing uniform laws on the subject of bankruptcies; and by transposition of the clause, the constitution is made to read, congress shall have power to establish uniform laws on the subject of

*306] bankruptcies throughout the United States; but no state *shall pass any law impairing the obligation of contracts; and this prohibition is made to mean, no state shall pass any bankrupt law.

No just objection can be made to this collocation, if the grant of the power to congress, and the prohibition in question to the states, relate to the same subject-matter, viz., bankrupt laws. But it appears to me very difficult to maintain this proposition. It is, in the first place, at variance

Ogden v. Saunders.

with the decision in *Sturges v. Crowninshield*, where it is held, that this power is not taken from the states absolutely, but only in a limited and modified sense. And in the next place, it is not reasonable to suppose, that a denial of this power to the states, would have been couched in such ambiguous terms, if, as has been contended, the giving to congress the exclusive power to pass bankrupt laws, was the great and leading object of this prohibition, and the preservation of private rights followed only as an incident of minor importance, it is difficult to assign any satisfactory reason, why the denial of the power to the states was not expressed in plain and unambiguous terms, viz., no state shall pass any bankrupt law. This would have been a more natural, and certainly, a less doubtful, form of expression ; and besides, if the object was to take from the states altogether the right of passing bankrupt laws, or insolvent laws having the like operation, why did not the denial of the power extend also to naturalization laws? The grant of the power to congress on this subject, is contained in the same clause, and substantially in the same words, "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." If the authority of congress on the subject of naturalization is exclusive, from the nature of the power, why it not also, with respect to bankruptcies? And if, in the one case, the denial of the power to the states was necessary, it was equally so in the other. I cannot think, therefore, that the prohibition to pass laws impairing the obligation of contracts, had any reference to a general system of bankrupt or insolvent laws. Such a system, established by the sovereign legislative power of the general, or state governments, cannot, in any just sense, be said to *impair the obligation of contracts. In every government of laws, [*308 there must be a power somewhere to regulate civil contracts ; and where, under our system, is that power vested? It must be either in the general or state governments. There is certainly no such power granted to the general government, and all power not granted is reserved to the states. The whole subject, therefore, of the regulation of contracts must remain with the states, and be governed by their laws respectively ; and to deny to them the right of prescribing the terms and conditions upon which persons shall be bound by their contracts thereafter made, is imposing upon the states a limitation, for which I find no authority in the constitution ; and no contract can impose a civil obligation beyond that prescribed by the existing law when the contract was made ; nor can such obligation be impaired, by controlling and discharging the contract according to the provisions of such law. Suppose, a contract for the payment of money should contain an express stipulation by the creditor, to accept a proportional part, in case the debtor should become insolvent, and to discharge the contract, can there be a doubt, that such contract would be enforced? And what is the law in question, but such contract, when applied to the undertaking of Ogden, by accepting these bills? It is no strained construction of the transaction, to consider the contract and the law inseparable, when judging of the obligation imposed upon the debtor ; and, if so, the undertaking was conditional, and the holder of the bills agreed to accept a part, in case of the inability of the acceptor, by reason of his insolvency, to pay the whole.

The unconstitutionality of this law is said to arise from its exempting the property of the insolvent, acquired after his discharge, from the payment of

Ogden v. Saunders.

his antecedent debts. A discharge of the person of the debtor is admitted to be no violation of the contract. If this objection is well founded, it must be on the ground, that the obligation of every contract attaches upon the property of the debtor, and any law exonerating it, violates this obligation. I do not mean, that the position implies a lien by way of mortgage or pledge on any specific property, but that all the property which a debtor *309] has, when called upon for payment, is liable to be *taken in execution to satisfy the debt, and that a law releasing any portion of it, impairs the obligation of the contract. The force and justice of this position, when applied to contracts existing at the time the law is passed, is not drawn in question. But its correctness, when applied to contracts thereafter made is denied. The mode and manner, and the extent to which property may be taken in satisfaction of debts, must be left to the sound discretion of the legislature, and regulated by its views of policy and expediency, in promoting the general welfare of the community, subject to such regulation. It was the policy of the common law, under the feudal system, to exempt lands altogether from being seized, and applied in satisfaction of debts; not even possession could be taken from the tenant. There can be no natural right growing out of the relation of debtor and creditor, that will give the latter an unlimited claim upon the property of the former. It is a matter entirely for the regulation of civil society; nor is there any fundamental principle of justice, growing out of such relation, that calls upon government to enforce the payment of debt to the uttermost farthing which the debtor may possess; and that the modification and extent of such liability, is a subject within the authority of state legislation, seems to be admitted by the uninterrupted exercise of it. I have not deemed it necessary to look into the statute books of all the states on this subject, but think it may be safely affirmed, that in most, if not all the states, some limitation of the right of the creditor over the property of the debtor has been established. In New York, various articles of personal property are exempted from execution. In Rhode Island, real estate cannot at all be taken on judicial process for satisfaction of a debt, so long as the body of the debtor is to be found within the state; and Virginia has adopted the English process of *elegit*, and a moiety only of the debtor's freehold is delivered to the creditor, until, out of the rents and profit thereof, the debt is paid. Do these statute regulations impair the obligation of contracts? I presume, this will not be contended for; and yet they would seem to me, to fall within the principle urged on the part of the defendant in error.

*It is no satisfactory answer to say, that such laws relate to the *310] remedy. The principle asserted is, that the creditor has a right to his debtor's property, by virtue of the obligation of the contract, to the full satisfaction of the debt; and if so, a law, which in any case exempts any portion of it, must impair the obligation of the contract. Such a limitation and restriction upon the powers of the state governments cannot, in my judgment, be supported, under the prohibition to pass laws impairing the obligation of contracts.

If the letter of the constitution does not imperiously demand a construction which denies to the states the power of passing insolvent laws like the one in question, policy and expediency require a contrary construction. Although there may be some diversity of opinion, as to the policy of establishing a general bankrupt system in the United States, yet it is generally

Ogden v. Saunders.

admitted, that such laws are useful, if not absolutely necessary, in a commercial community. That it was the opinion of the framers of the constitution, that the power to pass bankrupt laws ought somewhere to exist, is clearly inferrible from the grant of such power to congress. A contrary conclusion would involve the greatest absurdity. The specific power, however, granted to congress, never did, nor never could, exist in the state governments. That power is to establish *uniform* laws on the subject of bankruptcies throughout the United States, which could only be done by a government having co-extensive jurisdiction. Congress not having as yet deemed it expedient to exercise the power of re-establishing a uniform system of bankruptcy, affords no well-founded argument against the expediency or necessity of such a system in any particular state. A bankrupt law is most necessary in a commercial community ; and as different states in this respect do not stand on the same footing, a system which might be adapted to one, might not suit all, which would naturally present difficulties in forming any uniform system ; and congress may, as heretofore, deem it expedient to leave each state to establish such system, as shall best suit its own local circumstances and views of policy, knowing at the same time, that if any great public inconvenience shall grow out of the different state laws, the evils *may be corrected by establishing a uniform system, according to the provision of the constitution, which will suspend the state laws [*311 on the subject. If such should be the views entertained by congress, and induce them to abstain from the exercise of the power, the importance to the state of New York, as well as other states, of establishing the validity of laws like the one in question, is greatly increased. The long continuance of it there, clearly manifests the views of the state legislature with respect to the policy and expediency of the law. And I cannot but feel strongly impressed, that the length of time which this law has been in undisputed operation, and the repeated sanction has received it from every department of the government, ought to have great weight when judging of its constitutionality.

The provisions of the 61st section of the bankrupt law of 1800, appear to me to contain a clear expression of the opinion of congress in favor of the validity of this, and similar laws in other states. It cannot be presumed, they were ignorant of the existence of these laws, or their extent and operation. And, indeed, the section expressly assumes the existence of such laws, by declaring, that this act shall not repeal or annul the laws of any state, now in force, or which may be thereafter enacted, for the relief of insolvent debtors, except so far as the same may affect persons within the purview of the bankrupt act ; and even with respect to such persons, it provides, that, if the creditors shall not prosecute a commission of bankruptcy within a limited time, they shall be entitled to relief under the state laws for the relief of insolvent debtors. And what relief did such laws give ? Was it merely from imprisonment only ? Certainly not. The state laws here ratified and sanctioned, or, at least, some of them, were such as had the full effect and operation of a bankrupt law, to wit, to discharge the debtor absolutely from all future responsibility. It is true, if these laws were unconstitutional and void, this section of the bankrupt law could give them no validity. But it is not in this light the argument is used. The reference is only to show the sense of congress with respect to the validity of such laws ; and if it is fair

Ogden v. Saunders.

to presume congress was acquainted with the extent and operation of these laws, this clause is a direct affirmation of their validity. *For it *312] cannot be presumed, that body would have expressly ratified and sanctioned laws which they considered unconstitutional.

In the case of *Sturges v. Crowninshield*, as I have before remarked, it is said, that by this prohibition (Art. 1, § 10) in the constitution, the convention appears to have intended to establish a great principle, "that contracts should be inviolable." This was, certainly, though a great, yet not a new, principle. It is a principle inherent in every sound and just system of laws, independent of express constitutional restraints. And if the assertion of this principle was the object of the clause (as I think it was), is it reasonable to conclude, that the framers of the constitution supposed that a bankrupt or insolvent law, like the one in question, would violate this principle? Can it be supposed, that the constitution would have reserved the right, and impliedly enjoined the duty upon congress to pass a bankrupt law, if it had been thought, that such law would violate this great principle? If the discharge of a party from the performance of his contracts, when he has, by misfortunes, become incapable of fulfilling them, is a violation of the eternal and unalterable principles of justice, growing out of what has been called at the bar the universal law, can it be, that a power, drawing after it such consequences, has been recognised and reserved in our constitution? Certainly not. And is the discharge of a contract any greater violation of those sacred principles in a state legislature, than in that of the United States? No such distinction will be pretended. But a bankrupt or insolvent law involves no such violation of the great principles of justice, and this is not the light in which it always has been, and ought to be, considered. Such law, in its principle and object, has in view the benefit of both debtor and creditor, and is no more than the just exercise of the sovereign legislative power of the government, to relieve a debtor from his contracts, when necessity, and unforeseen misfortunes, have rendered him incapable of performing them; and whether this power is to be exercised by the states individually, or by the United States, can make no difference in principle, in a government like ours, where sovereignty, to a modified extent, *exists *313] both in the states, and in the United States. It was, in the formation of the constitution, a mere question of policy and expediency, where this power should be exercised; and there can be no question, but that, so far as respects a bankrupt law, properly speaking, the power ought to be exercised by the general government. It is naturally connected with commerce, and should be uniform throughout the United States. A bankrupt system deals with commercial men, but this affords no reason why a state should not exercise its sovereign power, in relieving the necessities of men who do not fall within the class of traders, and who, from like misfortune, have become incapable of performing their contracts.

Without questioning the constitutional power of congress to extend a bankrupt law to all classes of debtors, the expediency of such a measure may well be doubted. There is not the same necessity of uniformity of system, as to other classes than traders; their dealings are generally local, and different considerations of policy may influence different states on this subject; and should congress pass a bankrupt law confined to traders, it would

Ogden v. Saunders.

still leave the insolvent law of New York in force as to other classes of debtors, subject to such alteration as that state shall deem expedient.

Upon the whole, therefore, it having been settled by this court, that the states have a right to pass bankrupt laws, provided they do not violate the prohibition against impairing the obligation of contracts; and believing, as I do, for the reasons I have given, that the insolvent law in question, by which a debtor obtains a discharge from all future responsibility, upon contracts entered into after the passage of the law, and before his discharge does not impair the obligation of these contracts; I am of opinion, that the judgment of the court below ought to be reversed.

TRIMBLE, Justice.—The question raised upon the record in this case, and which has been discussed at the bar, may be stated thus: Has a state, since the adoption of the constitution of the United States, authority to pass a bankrupt *or insolvent law, discharging the bankrupt or insolvent [*314 from all contracts made within the state, after the passage of the law, upon the bankrupt or insolvent surrendering his effects, and obtaining a certificate of discharge from the constituted authorities of the state? The counsel for the defendant in error have endeavored to maintain the negative of the proposition, on two grounds: First. That the power conferred on congress by the constitution, “to establish uniform laws on the subject of bankruptcies throughout the United States,” is, in its nature, an exclusive power; that, consequently, no state has authority to pass a bankrupt law; and that the law under consideration is a bankrupt law. Secondly. That it is a law impairing the obligation of contracts, within the meaning of the constitution.

In the case of *Sturges v. Crowninshield*, 4 Wheat. 122, this court expressly decided, “that since the adoption of the constitution of the United States, a state has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the constitution, and provided there be no act of congress in force to establish a uniform system of bankruptcy, conflicting with such law.” This being a direct judgment of the court, overruling the first position assumed in argument, that judgment ought to prevail, unless it be very clearly shown to be erroneous. Not having been a member of the court when that judgment was given, I will content myself with saying, the argument has not convinced me it is erroneous; and that, on the contrary, I think the opinion is fully sustained by a sound construction of the constitution. There being no act of congress in force to establish a uniform system of bankruptcy, the first ground of argument must fail.

It is argued, that the law under consideration is a law impairing the obligation of contracts, within the meaning of the constitution. The 10th section of the 1st art. of the constitution is in these words: “No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything *but gold [*315 and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility.” In the case of *Sturges v. Crowninshield*, the defendant in the original suit had been discharged in New York, under an insolvent law of that state, which purported to apply to past as well as

Ogden v. Saunders.

future contracts ; and being sued on a contract made within the state, prior to the passage of the law, he pleaded his certificate of discharge in bar of the action. In answer to the 3d and 4th questions, certified from the circuit court to this court for its final decision, drawing in question the constitutionality of the law, and the sufficiency of the plea in bar founded upon it, this court certified its opinion, "that the act of New York, pleaded in this case, so far as it attempts to discharge the contract on which this suit was instituted, is a law impairing the obligation of contracts, within the meaning of the constitution of the United States ; and that the plea of the defendant is not a good and sufficient bar of the plaintiff's action." In the case of *McMillan v. McNeill*, 4 Wheat. 209, the defendant in the court below pleaded a discharge obtained by him in Louisiana, on the 23d of August 1815, under the insolvent law of that state, passed in 1808, in bar of a suit instituted against him upon a contract made in South Carolina, in the year 1813. This court decided, that the plea was no bar to the action ; and affirmed the judgment given below for the plaintiff. These cases do not decide the case at bar. In the first, the discharge was pleaded in bar to a contract made prior to the passage of the law ; and in the second, the discharge obtained in one state under its laws, was pleaded to a contract made in another state. They leave the question open, whether a discharge obtained in a state, under an insolvent law of the state, is a good bar to an action brought on a contract made within the state, after the passage of the law.

In presenting this inquiry, it is immaterial, whether the law purports to apply to past as well as future contracts, or is wholly prospective in its provisions. *It is not the terms of the law, but its effect, that is inhibited by the constitution. A law may be in part constitutional, and in part unconstitutional. It may, when applied to a given case, produce an effect which is prohibited by the constitution ; but it may not, when applied to a case differently circumstanced, produce such prohibited effect. Whether the law under consideration, in its effects and operation upon the contract sued on in this case, be a law impairing the obligation of this contract, is the only necessary inquiry. In order to come to a just conclusion, we must ascertain, if we can, the sense in which the term, "obligation of contracts," is used in the constitution. In attempting to do this, I will premise, that in construing an instrument of so much solemnity and importance, effect should be given, if possible, to every word. No expression should be regarded as a useless expletive ; nor should it be supposed, without the most urgent necessity, that the illustrious framers of that instrument had, from ignorance or inattention, used different words, which are, in effect, merely tautologous.

I understand it to be admitted in argument, and if not admitted, it could not be reasonably contested, that, in the nature of things, there is a difference between a contract, and the obligation of the contract. The terms contract, and obligation, although sometimes used loosely as convertible terms, do not properly import the same idea. The constitution plainly presupposes that a contract and its obligation are different things. Were they the same thing, and the terms, contract and obligation, convertible, the constitution, instead of being read as it now is, "that no state shall pass any law impairing the obligation of contracts," might, with the same meaning, be read,

Ogden v. Saunders.

"that no state shall pass any law impairing the obligation of obligations," or, "the contract of contracts;" and to give to the constitution the same meaning which either of these readings would import, would be ascribing to its framers a useless and palpable absurd tautology. The illustrious framers of the constitution could not be ignorant that there were, or might be, many contracts, without obligations, and many obligations, without contracts. "A contract is defined to be, an agreement in which a party *undertakes to do, or not to do, a particular thing." *Sturges v. Crowninshield*, 4 [*317 Wheat. 197. This definition is sufficient for all the purposes of the present investigation, and its general accuracy is not contested by either side.

From the very terms of the definition, it results, incontestibly, that the contract is the sole act of the parties, and depends wholly on their will. The same words, used by the same parties, with the same objects in view, would be the same contract, whether made upon a desert island, in London, Constantinople or New York. It would be the same contract, whether the law of the place where the contract was made, recognised its validity, and furnished remedies to enforce its performance, or prohibited the contract, and withheld all remedy for its violation. The language of the constitution plainly supposes that the obligation of a contract is something not wholly depending upon the will of the parties. It incontestibly supposes the obligation to be something which attaches to, and lays hold of the contract, and which, by some superior external power, regulates and controls the conduct of the parties in relation to the contract; it evidently supposes, that superior external power to rest in the will of the legislature. What, then, is the obligation of contracts, within the meaning of the constitution? From what source, does that obligation arise?

The learned chief justice, in delivering the opinion of the court in *Sturges v. Crowninshield*, after having defined a contract to be "an agreement wherein a party undertakes to do, or not to do, a particular thing," proceeds to define the obligation of the contract in these words: "the law binds him to perform his engagement, and this is, of course, the obligation of the contract." The Institutes, lib. 3, tit. 4 (Cooper's translation), say, "an obligation is the chain of the law, by which we are necessarily bound to make some payment, according to the law of the land." Pothier, in his treatise concerning obligations, in speaking of the obligation of contracts, calls it "*vinculum legis*," the chain of the law. Paley, p. 56, says, "to be obliged, is *to be urged by a violent motive, resulting from the command of [*318 another." From these authorities, and many more might be cited, it may be fairly concluded, that the obligation of the contract consists in the power and efficacy of the law, which applies to, and enforces performance of, the contracts, or the payment of an equivalent for non-performance. The obligation does not inhere, and subsist in the contract itself, *proprio vigore*, but in the law applicable to the contract. This is the sense, I think, in which the constitution uses the term "obligation."

From what law, and how, is this obligation derived, within the meaning of the constitution? Even if it be admitted, that the moral law necessarily attaches to the agreement, that would not bring it within the meaning of the constitution. Moral obligations are those arising from the admonitions of conscience and accountability to the Supreme Being. No human lawgiver can impair them. They are entirely foreign from the purposes of the con-

Ogden v. Saunders.

stitution. The constitution evidently contemplates an obligation which might be impaired by a law of the state, if not prohibited by the constitution.

It is argued, that the obligation of contracts is founded in, and derived from, general and universal law ; that by these laws, the obligation of contracts is co-extensive with the duty of performance, and, indeed, the same thing ; that the obligation is not derived from, nor depends upon, the civil or municipal laws of the state ; and that this general universal duty or obligation, is what the constitution intends to guard and protect against the unjust encroachments of state legislation. In support of this doctrine, it is said, that no state, perhaps, ever declared by statute or positive law that contracts shall be obligatory ; but that all states, assuming the pre-existence of the obligation of contracts, have only superadded, by municipal law, the means of carrying the pre-existing obligation into effect. This argument struck me, at first, with great force ; but upon reflection, I am convinced it is more specious than solid. If it were admitted, that, in an enlarged and very general sense, obligations have their foundation in natural, or what is *319] called, in the argument, universal law ; that this *natural obligation is, in the general, assumed by states as pre-existing, and upon this assumption, they have not thought it necessary to pass declaratory laws in affirmance of the principles of universal law : yet nothing favorable to the argument can result from these admissions, unless it be further admitted or proved, that a state has no authority to regulate, alter, or in any wise control, the operation of this universal law, within the state, by its own peculiar municipal enactments. This is not admitted, and, I think, cannot be proved.

I admit, that men have, by the laws of nature, the right of acquiring and possessing property, and the right of contracting engagements. I admit, that these natural rights have their correspondent natural obligations. I admit, that, in a state of nature, when men have not submitted themselves to the controlling authority of civil government, the natural obligation of contracts is co-extensive with the duty of performance. This natural obligation is founded solely in the principles of natural or universal law. What is this natural obligation ? All writers who treat on the subject of obligations, agree, that it consists in the right of the one party, to demand from the other party, what is due ; and if it be withheld, in his right, and supposed capacity, to enforce performance, or to take an equivalent for non-performance, by his own power. This natural obligation exists among sovereign and independent states and nations, and amongst men, in a state of nature, who have no common superior, and over whom none claim, or can exercise, a controlling legislative authority. But when men form a social compact, and organize a civil government, they necessarily surrender the regulation and control of these natural rights and obligations into the hands of the government. Admitting it, then, to be true, that, in general, men derive the right of private property, and of contracting engagements, from the principles of natural universal law ; admitting that these rights are, in the general, not derived from, nor created by society, but are brought into it ; and that no express, declaratory, municipal law be necessary for their creation or recognition ; yet, it is equally true, that these rights, and the obligations resulting *320] from them, are subject to be regulated, modified, and, sometimes, absolutely restrained, by the positive enactments of muni-

Ogden v. Saunders.

cial law. I think it incontestibly true, that the natural obligation of private contracts between individuals in society, ceases, and is converted into a civil obligation, by the very act of surrendering the right and power of enforcing performance into the hands of the government. The right and power of enforcing performance exists, as I think all must admit, only in the law of the land, and the obligation resulting from this condition is a civil obligation.

As, in a state of nature, the natural obligation of a contract consists in the right and potential capacity of the individual to take, or enforce the delivery of, the thing due to him by the contract, or its equivalent ; so, in the social state, the obligation of a contract consists in the efficacy of the civil law, which attaches to the contract, and enforces its performance, or gives an equivalent in lieu of performance. From these principles, it seems to result, as a necessary corollary, that the obligation of a contract, made within a sovereign state, must be precisely that allowed by the law of the state, and none other. I say *allowed*, because, if there be nothing in the municipal law to the contrary, the civil obligation being, by the very nature of government, substituted for, and put in the place of, natural obligation, would be co-extensive with it ; but if, by positive enactments, the civil obligation is regulated and modified, so as that it does not correspond with the natural obligation, it is plain, the extent of the obligation must depend wholly upon the municipal law. If the positive law of the state declares the contract shall have no obligation, it can have no obligation, whatever may be the principles of natural law in relation to such a contract. This doctrine has been held and maintained by all states and nations. The power of controlling, modifying, and even of taking away, all obligation from such contracts as, independent of positive enactments to the contrary, would have been obligatory, has been exercised by all independent sovereigns ; and it has been universally held, that the courts of one sovereign will, upon principles of comity and common justice, enforce contracts made within the dominions of another sovereign, so far as they were obligatory by the *law of the country, [*321 where made ; but no instance is recollected, and none is believed to exist, where the courts of one sovereign have held a contract, made within the dominions of another, obligatory against, or beyond the obligation assigned to it by, the municipal law of its proper country. As a general proposition of law, it cannot be maintained, that the obligation of contracts depends upon, and is derived from, universal law, independent of, and against, the civil law of the state in which they are made. In relation to the states of this Union, I am persuaded, that the position, that the obligation of contracts is derived from universal law, urged by the learned counsel in argument, with great force, has been stated by them much too broadly. If true, the states can have no control over contracts. If it be true, that the "obligation of contracts," within the meaning of the constitution, is derived solely from general and universal law, independent of the laws of the state, then it must follow, that all contracts made in the same or similar terms, must, whenever, or wherever made, have the same obligation. If this universal natural obligation is that intended by the constitution, as it is the same, not only everywhere, but at all times, it must follow, that every description of contract which could be enforced, at any time or place, upon the principles of universal law, must, necessarily, be enforced at all other

Ogden v. Saunders.

times, and in every state, upon the same principles, in despite of any positive law of the state to the contrary. The argument, based on the notion of the obligation of universal law, if adopted, would deprive the states of all power of legislation upon the subject of contracts, other than merely furnishing the remedies or means of carrying this obligation of universal law into effect. I cannot believe that such consequences were intended to be produced by the constitution.

I conclude, that, so far as relates to private contracts between individual and individual, it is the civil obligation of contracts—that obligation which is recognised by, and results from, the law of the state in which the contract *322] is made, which is within the meaning of the constitution. If *so, it follows, that the states have, since the adoption of the constitution, the authority to prescribe and declare, by their laws, respectively, what shall be the obligation of all contracts made within them. Such a power seems to be almost indispensable to the very existence of the states, and is necessary to the safety and welfare of the people. The whole frame and theory of the constitution seem to favor this construction. The states were in the full enjoyment and exercise of all the powers of legislation on the subject of contracts, before the adoption of the constitution. The people of the states, in that instrument, transfer to, and vest in, the congress, no portion of this power, except in the single instance of the authority given to pass uniform laws on the subject of bankruptcies throughout the United States; to which may be added, such as results by necessary implication in carrying the granted power into effect. The whole of this power is left with the states, as the constitution found it, with the single exception, that in the exercise of their general authority, they shall pass no law “impairing the obligation of contracts.”

The construction insisted upon by those who maintain that prospective laws of the sort now under consideration are unconstitutional, would, as I think, transform a special limitation upon the general powers of the states, into a general restriction. It would convert, by construction, the exception into a general rule, against the best-settled rules of construction. The people of the states, under every variety of change of circumstances, must remain unalterably, according to this construction, under the dominion of this supposed universal law, and the obligations resulting from it. Upon no acknowledged principle can a special exception out of a general authority, be extended by construction, so as to annihilate or embarrass the exercise of the general authority. But to obviate the force of this view of the subject, the learned counsel admit, that the legislature of a state has authority, to provide by law what contracts shall not be obligatory, and to declare that no remedy shall exist for the enforcement of such as the legislative wisdom deems injurious. They say, the obligation of a contract is coeval with its *323] existence; that the moment an agreement is made, *obligation attaches to it; and they endeavor to maintain a distinction between such laws as declare that certain contracts shall not be obligatory at all, and such as declare they shall not be obligatory, or (what is the same thing in effect) shall be discharged, upon the happening of a future event. The former, they say, were no contracts in contemplation of law, were wholly forbidden, and therefore, never obligatory; the latter were obligatory at

Ogden v. Saunders.

their creation, and that obligation is protected by the constitution from being impaired by any future operation of the law.

This course of reasoning is ingenious and perplexing ; but I am greatly mistaken, if it will not be found, upon examination, to be unsatisfactory and inconclusive. If it were admitted, that, generally, the civil obligation of a contract made in a state attaches to it, when it is made, and that this obligation, whatever it be, cannot be defeated by any effect or operation of law, which does not attach to it at its creation, the admission would avail nothing. It is as well a maxim of political law, as of reason, that the whole must necessarily contain all the parts; and, consequently, a power competent to declare a contract shall have no obligation, must necessarily be competent to declare it shall have only a conditional or qualified obligation. If, as the argument admits, a contract never had any obligation, because the pre-existing law of the state, declaring it should have none, attached to it at the moment of its creation, why will not a pre-existing law, declaring it shall have only a qualified obligation, attached to it in like manner, at the moment of its creation? A law, declaring that a contract shall not be enforced, upon the happening of a future event, is a law declaring the contract shall have only a qualified or conditional obligation. If such law be passed, before the contract is made, does not the same attach to it, the moment it is made ; and is not the obligation of the contract, whatever may be its terms, qualified, from the beginning, by force and operation of the existing law? If it is not, then it is absolute, in despite of the law, and the obligation does not result from the law of the land, but from some other law. The passing of a law, declaring that a contract shall have no obligation, or shall have obligation generally, but cease to *be obligatory in specified events, is but the exertion of the same power. The dif- [324
ference exists, not in the character of the power, but the degree of its exertion, and the manner of its operation.

In the case at bar, the contract was made in the state, and the law of the state, at the time it was made, in effect, provided that the obligation of the contract should not be absolute, but qualified by the condition that the party should be discharged, upon his becoming insolvent, and complying with the requisitions of the insolvent law. This qualification attached to the contract, by law, the moment the contract was made, became inseparable from it, and travelled with it through all its stages of existence, until the condition was consummated by the final certificate of discharge. It is argued, that this cannot be so, because the contract would be enforced, and must necessarily be enforced, in other states, where no such insolvent law exists. This argument is founded upon a misapprehension of the nature of the qualification itself. It is in the nature of a condition subsequent, annexed by operation of law to the contract, at the moment of its creation. The condition is, that upon the happening of all the events contemplated by the law, and upon their verification, in the manner prescribed by the law itself, by the constituted authorities of the state, the contract shall not thereafter be obligatory. Unless all these take place ; unless the discharge is actually obtained within the state, according to its laws, the contingency has not happened, and the contract remains obligatory, both in the state and elsewhere.

It has been often said, that the laws of a state in which a contract is

Ogden v. Saunders.

made, enter into, and make part of the contract ; and some who have advocated the constitutionality of prospective laws of the character now under consideration, have placed the question on that ground. The advocates of the other side, availing themselves of the infirmity of this argument, have answered triumphantly, "admitting this to be so, the constitution is the supreme law of every state, and must, therefore, upon the same principle, enter into every contract, and overrule the local laws." My answer to this *325] *view of both sides of the question is, that the argument, and the answer to it, are equally destitute of truth. I have already shown, that the contract is nothing but the agreement of the parties ; and that if the parties, in making their agreement, use the same words, with the same object in view, where there is no law, or where the law recognises the agreement, and furnishes remedies for its enforcement, or where the law forbids, or withholds, all remedy for the enforcement of the agreement, it is the very same contract, in all these predicaments. I have endeavored to show, and I think successfully, that the obligation of contracts, in the sense of the constitution, consists not in the contract itself, but in a superior external force, controlling the conduct of the parties in relation to the contract ; and that this superior external force is the law of the state, either tacitly or expressly recognising the contract, and furnishing means whereby it may be enforced. It is this superior external force, existing potentially, or actually applied, "which binds a man to perform his engagement ;" which, according to Justinian, is "the chain of the law, by which we are necessarily bound to make some payment—according to the law of the land ;" and which, according to Paley, being "a violent motive, resulting from the command of another," obliges the party to perform his contract. The law of the state, although it constitutes the obligation of the contract, is no part of the contract itself ; nor is the constitution either a part of the contract, or the supreme law of the state, in the sense in which the argument supposes. The constitution is the supreme law of the land upon all subjects upon which it speaks. It is the sovereign will of the whole people. Whatever this sovereign will enjoins or forbids, must necessarily be supreme, and must counteract the subordinate legislative will of the United States, and of the states. But on subjects, in relation to which the sovereign will is not declared, or fairly and necessarily implied, the constitution cannot, with any semblance of truth, be said to be the supreme law. It could not, with any semblance of truth, be said, that the constitution of the United States is the supreme law of any state, in relation to the solemnities requisite for conveying real *326] estate, or the responsibilities or obligations *consequent upon the use of certain words in such conveyance. The constitution contains no law, no declaration of the sovereign will, upon these subjects ; and cannot, in the nature of things, in relation to them, be the supreme law. Even if it were true, then, that the law of a state in which a contract is made, is part of the contract, it would not be true, that the constitution would be part of the contract. The constitution nowhere professes to give the law of contracts, or to declare what shall or shall not be the obligation of contracts. It evidently pre-supposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of law ; and the pre-existence of both the contracts and their obligation being thus supposed, the sovereign will is announced,

Ogden v. Saunders.

that "no state shall pass any law impairing the obligation of contracts." If it be once ascertained, that a contract existed, and that an obligation, general or qualified, of whatsoever kind, had once attached, or belonged to the contract, by law, then, and not till then, does the supreme law speak, by declaring that obligation shall not be impaired.

It is admitted in argument, that statutes of frauds and perjuries, statutes of usury, and of limitation, are not laws impairing the obligation of contracts. They are laws operating prospectively upon contracts thereafter made. It is said, however, they do not apply, in principle, to this case; because the statutes of frauds and perjuries apply only to the remedies, and because, in that case, and under the statutes of usury, the contracts were void from the beginning, were not recognised by law as contracts, and had no obligation; and that the statutes of limitation create rules of evidence only. Although these observations are true, they do not furnish the true reason, nor, indeed, any reason, why these laws do not impair the obligation of contracts. The true and only reason is, that they operate on contracts, made after the passage of the laws, and not upon existing contracts. And hence, the chief justice very properly remarks, of both usury laws, and laws of limitation, in delivering the opinion in *Sturges v. Crowninshield*, that if they should be made to *operate upon contracts already entered into, they would be unconstitutional and void. If a [*327 statute of frauds and perjuries should pass, in a state formerly having no such laws, purporting to operate upon existing contracts, as well as upon those made after its passage, could it be doubted, that so far as the law applied to, and operated upon, existing contracts, it would be a law "impairing the obligation of contracts?" Here, then, we have the true reason and principle of the constitution. The great principle intended to be established by the constitution, was the inviolability of the obligation of contracts, as the obligation existed and was recognised by the laws in force at the time the contracts were made. It furnished to the legislatures of the states a simple and obvious rule of justice, which, however theretofore violated, should, by no means, be thereafter violated; and whilst it leaves them at full liberty to legislate upon the subject of all future contracts, and assign to them either no obligation, or such qualified obligation as, in their opinion, may consist with sound policy, and the good of the people; it prohibits them from retrospectively upon existing obligations, upon any pretext whatever. Whether the law professes to apply to the contract itself, to fix a rule of evidence, a rule of interpretation, or to regulate the remedy, it is equally within the true meaning of the constitution, if it, in effect, impairs the obligation of existing contracts; and in my opinion, is out of its true meaning, if the law is made to operate on future contracts only. I do not mean to say, that every alteration of the existing remedies would impair the obligation of contracts; but I do say, with great confidence, that a law taking away all remedy from existing contracts, would be, manifestly, a law impairing the obligation of contracts. The moral obligation would remain, but the legal or civil obligation, would be gone; if such a law should be permitted to operate. The natural obligation would be gone, because the laws forbid the party to enforce performance by his own power. On the other hand, a great variety of instances may readily be imagined, in which the legislature of the state might alter, modify or repeal existing remedies,

Ogden v. Saunders.

and enact others in their stead, without the slightest ground for a sup-
 *328] position *that the new law impaired the obligation of contracts. If
 there be intermediate cases, of a more doubtful character, it will be
 time enough to decide them when they arise.

It is argued, that as the clause declaring that "no state shall pass any law impairing the obligation of contracts," is associated in the same section of the constitution with the prohibition to "coin maney, emit bills of credit," or "make anything but gold and silver coin a legal tender in payment of debts;" and as these all evidently apply to legislation in reference to future, as well as existing contracts, and operate prospectively, to prohibit the action of the law, without regard to the time of its passage, the same construction should be given to the clause under consideration. This argument admits of several answers. First, as regards the prohibition to coin money, and emit bills of credit. The constitution had already conferred on congress the whole power of coining money, and regulating the current coin. The grant of this power to congress, and the prohibitions upon the states, evidently take away from the states all power of legislation and action on the subject, and must, of course, apply to the future action of laws, either then made, or to be made. Indeed, the language plainly indicates, that it is the act of "coining money," and the act of emitting bills of credit, which is forbidden, without any reference to the time of passing the law, whether before or after the adoption of the constitution. The other prohibition, to "make anything but gold or silver coin a tender in payment of debts," is but a member of the same subject of currency, committed to the general government, and prohibited to the states. And the same remark applies to it, already made as to the other two. The prohibition is not, that no state shall pass any law; but that even if a law does exist, the "state shall not make anything but gold and silver coin a legal tender." The language plainly imports, that the prohibited tender shall not be made a *legal* tender, whether a law of the state exists or not. The whole subject of tender, except in gold and silver, is withdrawn from the states. These cases cannot, therefore, furnish a sound rule of interpretation for that clause which prohibits the states from *passing* laws "impairing the obligation of contracts." This *clause relates to a subject confessedly left wholly
 *329] with the states, with a single exception; they relate to subjects wholly withdrawn from the states, with the exception that they may pass laws on the subject of tender in gold and silver coin only.

The principle, that the association of one clause with another of like kind, may aid in its construction, is deemed sound; but I think it has been misapplied in the argument. The principle applied to the immediate associates of the words under consideration, is, I think, decisive of this question. The immediate associates are the prohibitions to pass bills of attainder, and *ex post facto* laws. The language and order of the whole clause is, no state shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." If the maxim *noscitur à sociis* be applied to this case, there would seem to be an end of the question. The two former members of the clause undeniably prohibit retroactive legislation upon the existing state of things, at the passage of the prohibited laws. The associated idea is, that the latter member of the same clause should have a similar effect upon the subject-matter to which it relates. I suppose this was the under-

Ogden v. Saunders.

standing of the American people, when they adopted the constitution. I am justified in this supposition, by the contemporary construction given to the whole of this clause by that justly celebrated work, styled the Federalist, written at the time, for the purpose of recommending the constitution to the favor and acceptance of the people. In No. 44 (p. 281), commenting upon this very clause, and all its members, the following observations are made: "Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters." Did the American people believe, could they believe, these heavy denunciations were levelled against laws which *fairly prescribed, and plainly pointed out, to the people, rules for [*330 their future conduct; and the rights, duties and obligations, growing out of their future words or actions? They must have understood, that these denunciations were just, as regarded bills of attainder, and *ex post facto* laws, because they were exercises of arbitrary power, perverting the justice and order of existing things by the reflex action of these laws. And would they not naturally and necessarily conclude, the denunciations were equally just, as regarded laws passed to impair the obligation of existing contracts, for the same reason?

The writer proceeds, "Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments, as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but a link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

I cannot understand this language otherwise than as putting bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, all upon the same footing, and deprecating them all, for the same cause. The language shows, clearly, that the whole clause was understood, at the time of the adoption of the constitution, to have been introduced into the instrument, in the very same spirit, and for the very same purpose, namely, for the protection of personal *security and of private rights. [*331 The language repels the idea, that the member of the clause immediately under consideration was introduced into the constitution upon any grand principle of national policy, independent of the protection of private rights, so far as such an idea can be repelled, by the total omission to sug-

Ogden v. Saunders.

gest any such independent grand principle of national policy, and by placing it upon totally different ground. It proves that the sages who formed and recommended the constitution to the favor and adoption of the American people, did not consider the protection of private rights, more than the protection of personal security, as too insignificant for their serious regard, as was urged with great earnestness in argument. In my judgment, the language of the authors of the Federalist proves that they, at least, understood, that the protection of personal security, and of private rights, from the despotic and iniquitous operation of retrospective legislation, was, itself, and alone, the grand principle intended to be established. It was a principle of the utmost importance to a free people, about to establish a national government, "to establish justice," and, "to secure to themselves and their posterity the blessings of liberty." This principle is, I think, fully and completely sustained by the construction of the constitution which I endeavored to maintain.

In my judgment, the most natural and obvious import of the words themselves, prohibiting the passing of laws "impairing the obligation of contracts;" the natural association of that member of the clause with the two immediately preceding members of the same clause, forbidding the passing of "bills of attainder," and "*ex post facto* laws;" the consecutive order of the several members of the clause; the manifest purposes and objects for which the whole clause was introduced into the constitution, and the contemporary exposition of the whole clause, all warrant the conclusion, that a state has authority, since the adoption of the constitution, to pass a law, whereby a contract made within the state, after the passage of the law, may be discharged, upon the party obtaining a certificate of discharge, as an insolvent, in the manner prescribed by the law of the state.

*332] *MARSHALL, Ch. J. (*Dissenting.*)—It is well known, that the court has been divided in opinion on this case. Three judges, Mr. Justice DUVALL, Mr. Justice STORY and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion, that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration, is, whether the act of the state of New York is consistent with, or repugnant to, the constitution of the United States?

This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character, as to make it unnecessary now to say more than that, if it be right that the power of preserving the constitution from legislative infraction, should reside anywhere, it cannot be wrong, it must be right, that those whom the delicate and important duty is conferred should perform it according to their best judgment. Much, too, has been said concerning the principles of construction which ought to be applied to the constitution of the United States. On this subject, also, the court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say, that the intention of the instru-

Ogden v. Saunders.

ment must prevail ; that this intention must be collected from its words ; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended ; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers—is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the constitution, on which the case now under consideration is supposed to depend, it may be proper to inquire, *how far it is affected by the former [*333 decisions of this court. In *Sturges v. Crowninshield*, it was determined, that an act which discharged the debtor from a contract entered into, previous to its passage, was repugnant to the constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it farther ; and with that reasoning (for myself alone this expression is used) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for *Ogden v. Saunders*, because the two cases differ from each other in a material fact ; and it is a general rule, expressly recognised by the court in *Sturges v. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made. In *Sturges v. Crowninshield*, the law acted on a contract which was made before its passage ; in this case, the contract was entered into after the passage of the law. In *McMillan v. McNeill*, the contract, though subsequent to the passage of the act, was made in a different state, by persons residing in that state, and, consequently, without any view to the law, the benefit of which was claimed by the debtor. The *Farmers' & Mechanics' Bank of Pennsylvania v. Smith* differed from *Sturges v. Crowninshield* only in this, that the plaintiff and defendant were both residents of the state in which the law was enacted, and in which it was applied. The court was of opinion, that this difference was unimportant. It has then been decided, that an act which discharges the debtor from pre-existing contracts is void ; and that an act which operates on future contracts is inapplicable to a contract made in a different state, at whatever time it may have been entered into. Neither of these decisions comprehends the question now presented to the court. It is, consequently, open for discussion.

The provision of the constitution is, that “no state shall pass any law” “impairing the obligation of contracts.” The plaintiff in error contends that this provision inhibits the passage of retrospective laws only—of such as act on contracts *in existence at their passage. The defendant in [*334 error maintains, that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from state legislation, the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past, and those which act on future contracts ; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class, may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union ; that it is intended to make us, in a great measure, one people, as to commercial objects ; that, so far as respects the intercommunication of individuals, the lines of separation

Ogden v. Saunders.

between states are, in many respects, obliterated ; it would not be matter of surprise, if, on the delicate subject of contracts once formed, the interference of state legislation should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words ; and in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the state legislature is entirely prohibited. The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty, without affecting the rights of individuals. These are, the powers "to enter into any treaty, alliance or confederation ; grant letters of marque or reprisal, coin money, emit bills of credit." The second class of prohibited laws comprehends those whose operation consists in their
 *335] action on individuals. *These are, laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility. In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A state is as entirely forbidden to pass laws impairing the obligation of contracts, as to make treaties or coin money. The question recurs, what is a law impairing the obligation of contracts ?

In solving this question, all the acumen which controversy can give to the human mind, has been employed, in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively ; and, on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the mind, would probably be, that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties ; and, if it be not illegal, to bind them to the extent of their stipulations. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion, that the words contract and obligation, as used in the constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the states to punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws, is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed ; and a law is not *ex post facto*, unless it looks back to an act done before its passage. Language
 *336] is incapable of expressing, in plainer terms, that the mind of the convention was directed to retroactive *legislation. The thing forbidden

Ogden v. Saunders.

is retroaction. But that part of the clause which relates to the civil transactions of individuals, is expressed in more general terms ; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a state to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the time the law may be passed, and debts afterwards created. The prohibition has been considered as total ; and yet the difference in principle between making property a tender in payment of debts, contracted after the passage of the act, and discharging those debts without payment, or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment, or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious, as to denote plainly a difference of intention in the framers of the instrument. "No state shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law, would go far in confining these words to debts existing at that time. Yet, this distinction has never, we believe, occurred to any person. How soon it may occur, is not for us to determine. We think it would, unquestionably, defeat the object of the clause.

The counsel for the plaintiff insist, that the word "impairing," in the present tense, limits the signification of the operation of the act at the time of its passage ; that no law can be accurately said to impair the obligation of contracts, unless the contracts exist at the time. *The law cannot [*337 impair what does not exist. It cannot act on nonentities. There might be weight in this argument, if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws are to operate on a future, contingent, unforeseen event. The time to which the word "impairing" applies, is not the time of the passage of the act, but of its action on the contract. That is, the time present, in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that state into Connecticut, and becomes insolvent, it is not pretended, that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract, at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation, until an insolvency should take place, and a certificate of discharge be granted. Until these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking,

Ogden v. Saunders.

as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is, what is the original obligation of a contract, made after the passage of such an act as the insolvent law of New York? Is it unconditional, to perform the very thing stipulated, or is the condition implied, that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved by the constitution. Any law which lessens, must impair it. All admit, that the constitution refers to, and preserves, the legal, not the moral obligation of a *338] contract. Obligations *purely moral, are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on states by the constitution, are intended for those objects which would, if not restrained, be the subject of state legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff insists, that the law enters into the contract so completely as to become a constituent part of it. That it is to be construed, as if it contained an express stipulation to be discharged, should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the legislature. This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously. Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time, by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property, enters into the contract, and forms a part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence; the effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend, that to deny the operation of the law on the contract under consideration, is to impair its obligation. Are gentlemen prepared to say, that an insolvent law, once enacted, must, to a considerable extent, be permanent? That the legislature is incapable of varying it so far as respects existing contracts?

So too, if one of the conditions of an obligation for the payment of money *339] be, that on the insolvency of the obligor, *or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all, or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined, that a law authorizing the same tender, on the same contingency, enters into, and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective, as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts, made after its passage, to its control. If it be said, that such a law would be obviously unconstitutional and void, and therefore,

Ogden v. Saunders.

could not be a constituent part of the contract, we answer, that if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect, which is far from being so to another. The law now under consideration is, in the opinion of one party, clearly consistent with the constitution, and in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning, which would settle this question, by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the legislature might prescribe, would become a component part of every contract, and be one of its conditions.¹ Thus, one of the most important features in the constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and by construed into an inanimate, inoperative, unmeaning clause. Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a *general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. [*340 But will reason sustain this distinction? They say, that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood. But the principle contended for does not make the insertion of this new term or condition into the contract, to depend upon its reasonableness. It is inserted, because the legislature has so enacted. If the enactment of the legislature becomes a condition of the contract, because it is an enactment, then it is a high prerogative, indeed, to decide, that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position, by several legal principles, and by some decisions of this court, which have been relied on as being applicable to it. The first case put is, interest on a bond payable on demand, which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract. Let the correctness of this averment be tried by the course of proceedings in such cases. The failure to pay, according to stipulation, is a breach of the contract, and the means used to enforce it constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated, that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case, the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from

¹ See Pennsylvania College Cases, 13 Wall. 190; s. c. 63 Penn. St. 428.

Ogden v. Saunders.

each other. The damages must be assessed by a jury ; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt ; and yet, if a suitor were to declare on such a bond, as containing this new term *for the payment
*341] of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject, would be a law regulating the remedy.

The liability of the drawer of a bill of exchange, stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise, that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing ; and in determining what evidence shall be sufficient to prove it, does not introduce new conditions, not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C., for value received ; the bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawer, and has a right to exact that his promise will be performed. He has also a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that *his* bill is disgraced, because this notice enables him to take measures for his own security. It is reasonable, that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions, depends upon implied contracts ; upon contracts which are not written, but which grow out of the acts of the parties. In such cases, the parties are suppose to have made those stipulations, which, as honest, fair and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain
*342] acts, unexplained by compact, impose *certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience and partly in the indulgence of the creditor. By the terms of the note, the debtor has to the last hour of the day on which it becomes payable, to comply with it ; and it would often be inconvenient, to take any steps after the close of day. It is often convenient, to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the legislature, but by the acts of the parties. The case cited from 9 Wheat. 581, is

Ogden v. Saunders.

a note discounted in bank. In all such cases, the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious, if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the acts of the parties, and this part of the contract is founded on their acts. Since, by contract, the maker is not liable for his note, until the days of grace are expired, he has not broken his contract, until they expire. The duty of giving notice to the indorser of his failure, does not arise, until the failure has taken place ; and consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of the *Bank of Columbia v. Okely*, 4 Wheat. 235, was one in which the legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turned on the question, whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled *in that case is, that a party may [*343 renounce a benefit, and that Okely had exercised this right.

The cases from *Strange* and *East* turn upon a principle, which is generally recognised, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon a contract, not that they enter into it, and become a stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them, not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other state as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate. It is not, we think, true, that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is, undoubtedly, a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it, by taking security against it. When it comes unlooked for, it would be entirely contrary to reason, to consider it as a part of the contract.

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them, and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states, by arresting their power to repeal or modify such laws with respect to existing contracts.

*But although the argument is not sustainable in this form, it [*344

Ogden v. Saunders.

assumes another, in which it is more plausible. Contract, it is said, being the creature of society, derives its obligation from the law ; and, although the law may not enter into the agreement, so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it ; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known when the contract was formed. This argument has been illustrated by references to the statutes of frauds, of usury and of limitations. The construction of the words in the constitution, respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from state legislation. The acknowledgment, that they remain within it, is urged as an admission, that contract is not withdrawn by the constitution, but remains under state control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage. The defendants maintain that an error lies at the very foundation of this argument. It assumes, that contract is the mere creature of society, and derives all its obligation from human legislation. That it is not the stipulation an individual makes which binds him, but some declaration of the supreme power of a state to which he belongs, that he shall perform what he has undertaken to perform. That though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it, that we find no trace of such enactment. So far back as human research carries us, we find the judicial power as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies, on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do ; that the breach of this obligation is an injury for which the injured party has a just claim *to compensation, and that society ought to afford him a remedy *345] for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to, and independent of society, we may reasonably conclude, that, those original and pre-existing principles are, like many other natural rights, brought with man into society ; and, although they may be controlled, are not given by human legislation.

In the rudest state of nature, a man governs himself, and labors for his own purposes. That which he acquires is his own, at least, while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold ; another more food than is necessary for his immediate use. They agree each to supply the wants of the other from his surplus. Is this contract without obligation ? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it ?

Ogden v. Saunders.

Or, two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping faith between these parties, and the right to enforce it, if violated, the answer admits the obligation of contracts, because, upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle, that the injured party may be the weakest. In society, the *wrongdoer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and if society acquire the power of coercion, that power will be applied, without previously enacting that his contract is obligatory. [*346]

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury, and to enforce that reparation, if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying, that the power, if possessed, is rightfully used.

In a state of nature, then, individuals may contract, their contracts are obligatory, and force may rightfully be employed to coerce the party who has broken his engagement. What is the effect of society upon these rights? When men unite together and form a government, do they surrender their right to contract, as well as their right to enforce the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be, that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be, that neither has ever been made; that individuals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains, to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily *surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints, the original power remains unimpaired. This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national

Ogden v. Saunders.

law, whose opinions have been viewed with profound respect by the wisest men of the present, and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire, how far law acts externally on it, and may control that obligation? That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor, under the circumstances, and on the condition prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract, on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved, by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a state." In our system, the legislature of a state is the supreme power, in all cases where its action is not restrained by the constitution of the United States. Where it is so restrained, the legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question, to say, that because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the legislature of New York; for the question returns *348] *upon us, is this act a law? Is it consistent with, or repugnant to, the constitution of the United States? This question is to be solved only by the constitution itself.

In examining it, we readily admit, that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the state legislatures, except in those special cases where restraint is imposed by the constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained, by showing that the legislature may prescribe the circumstances, on which the original validity of a contract shall be made to depend. If the legislative will be, that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form, before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the constitution, because they do not impair the obligation of the contract. The obligation must exist, before it can be impaired; and a prohibition to impair it, when made, does not imply an inability to prescribe those circumstances which shall create its obligation. The statutes of frauds, therefore, which have been enacted in the several states, and which are acknowledged to flow from the proper exercise of state sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning; they deny that the instrument ever

Ogden v. Saunders.

became a contract. They deny it all original obligation ; and cannot impair that which never came into existence.

Acts of limitation approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its *obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles. In the case of [*349 *Sturges v. Crowninshield*, it was observed by the court, that these statutes relate only to the remedies which are furnished in the courts ; and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption, that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone, that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief, not to be tolerated, if contracts might be set up, at any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet, twenty years of unexplained silence on the part of the creditor, is evidence of payment. On parol contracts, or on written contracts, not under seal, which are considered in a less solemn point of view than sealed instruments, the legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enactments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers, when it is regulating the remedy and mode of proceeding in its courts.

The counsel for the plaintiff in error insist, that the right to regulate the remedy and to modify the obligation of the contract are the same ; that obligation and remedy are identical, that they are synonymous—two words conveying the same idea. The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the *undertaking to perform ; it originates with the contract itself, and operates anterior [*350 to the time of performance. The remedy acts upon a broken contract, and enforces a pre-existing obligation. If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society, they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is

Ogden v. Saunders.

not surrendered, with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but where not regulated, it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived from different sources.

But although the identity of obligation and remedy be disproved, it may be, and has been urged, that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation—that they live, languish and die together. The use made of this argument is to show the absurdity and self-contradiction of the construction which maintains the inviolability of obligation, while it leaves the remedy to the state governments. We do not perceive this absurdity or self-contradiction. Our country exhibits the extraordinary spectacle of distinct, and, in many respects, independent, governments over the same territory and the same people. The local governments are restrained from impairing

*351] the obligation of contracts, *but they furnish the remedy to enforce them, and administer that remedy in tribunals constituted by themselves. It has been shown, that the obligation is distinct from the remedy, and it would seem to follow, that law might act on the remedy, without acting on the obligation. To afford a remedy is certainly the high duty of those who govern, to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the constitution has not undertaken to enforce its performance. That instrument treats the states with the respect which is due to intelligent beings, understanding their duties, and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the states from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a state be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know, it would not. If the debtor should come within the jurisdiction of any court of another state, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This cannot be ascribed to a renewal of the obligation; for passing the line of a state cannot recreate an obligation which was extinguished. It must be the original obligation, derived from the agreement of the parties, and which exists unimpaired, though the remedy was withdrawn.

But we are told, that the power of the state over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred, that the construction which maintains the inviolability of the obligation, must be extended to the power of regulating the remedy. The difficulty which this view of the subject presents, does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The constitution contemplates restraint as to the obligation of contracts, not as to the application of
 *352] remedy. If this restraint affects a power which the constitution did not mean to touch, it can *only be, when that power is used as an

Ogden v. Saunders.

instrument of hostility, to invade the inviolability of contract, which is placed beyond its reach. A state may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the constitution. Thus, the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations, or between the states. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a state shall not merely modify, or withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation, without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this. The law affords remedy, by giving execution against the person, or the property, or both. The same power which can withdraw the remedy against the person, can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from state legislation, to have left it thus obviously exposed to destruction. The answer is, that if the law goes further, and annuls the obligation, without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty *which men selected for the government of [*353 their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by every member, to support the constitution of the United States, furnishes no security against intentional attempts to violate its spirit, while evading its letter—the question how far the constitution interposes a shield for the protection of an injured individual, who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined, that such a law would be a successful evasion of the constitution, it does not follow, that an act which operates directly on the contract, after it is made, is not within the restriction imposed on the states by that instrument. The validity of a law acting directly on the obligation, is not proved, by showing that the constitution has provided no means for compelling the states to enforce it.

We perceive, then, no reason for the opinion, that the prohibition “to

Ogden v. Saunders.

pass any law impairing the obligation of contracts," is incompatible with the fair exercise of that discretion, which the state legislature possess in common with all governments, to regulate the remedies afforded by their own courts. We think, that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering, countenance, we think, this idea. No state shall "pass any law impairing the obligation of contracts." These words seems to us to import, that the obligation is intrinsic, that it is created by the contract itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose, that the framers of our constitution were intimately acquainted with the writings of those wise and learned men, whose treatises *354] on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration, that contracts possess an original intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose, that the framers of our constitution took the same view of the subject, and the language they have used confirm this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these: That the words of the clause in the constitution which we are considering, taken in their natural and obvious sense, admit of a prospective, as well as of a retrospective, operation. That an act of the legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law. That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the state, is entirely consistent with their inviolability, after they have been formed. That the obligation of a contract is not identified with the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it, does not imply a prohibition to vary the remedy; nor does a power to vary the remedy, imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited, of the assemblage of a whole people, by their representatives, in convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, *355] *and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the

Ogden v. Saunders.

morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil, was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government. To impose restraints on state legislation, as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened and comprehensive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument, which was intended to be perpetual, the presumption is strong, that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time, is intended so to operate. But if the construction for which the plaintiff's counsel contend be the true one, the constitution will have imposed a restriction, in language indicating perpetuity, which every state in the Union may elude at pleasure. The obligation of contracts in force at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts, into an inhibition to pass retrospective laws. Had this been the intention [356 of the convention, is it not reasonable to believe, that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of the instrument, and we should have probably found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the state legislatures would have been forbidden "to pass any retrospective law impairing the obligation of contracts," or "to pass any law impairing the obligation of contracts previously made." Words which directly and plainly express the cardinal intent, always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly, there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct preceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain, whether his words comprehend other things, not immediately in his mind; but it can seldom be uncertain, whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospec-

Ogden v. Saunders.

tive operation, it is scarcely conceivable, that some word would not have been used, indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say, a minute portion of that subject. The general language of the clause is such as might be suggested by a general intent to prohibit state legislation on the subject to which that language is applied—the obligation of *contracts; not such as would *357] be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration, that those laws which had effected all that mischief the constitution intended to prevent, were prospective as well as retrospective, in their operation. They embraced future contracts, as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion, that, on this point, the district court of Louisiana has decided rightly.

March 6th, 1827. Judgment having been entered in favor of the validity of a certificate of discharge under the state laws in those cases (argued in connection with *Ogden v. Saunders*) where the contract was made between citizens of the state under whose law the discharge was obtained, and in whose courts the certificate was pleaded, the cause was further argued by the same counsel, upon the points reserved, as to the effect of such a discharge, in respect to a contract made with a citizen of another state, and where the certificate was pleaded in the courts of another state, or of the United States.

To render the judgment which was finally pronounced in the cause intelligible, it is necessary to state, that in addition to the plea of the certificate of discharge under the insolvent law of the state of New York, of 1801, the defendant below, Ogden, pleaded the statute of limitations (of New York) *non assumpsit infra sex annos*. To this plea, the plaintiff below, Saunders, replied, that previous to the running of the statute, to wit, in April 1810, the defendant, Ogden, removed from the state of New York to New Orleans, in the state of Louisiana, where he continued to reside until the commencement of this suit.

The jury found the facts of the drawing and acceptance of the bills, of the discharge under the insolvent law of New York, and of the defendant's removing to Louisiana at the time stated in the plaintiff's replication, in the form *of what was probably intended to be a special verdict, sub- *358] mitting the law to the court: "If the law be for the plaintiff, then they find for the plaintiff, the amount of the several acceptances, with the interest and costs; but if the law on the said facts be for the defendant, then the jury find for the defendant, with costs." A judgment was rendered by the court below upon this verdict. And the cause being brought by writ of error before this court, among the errors assigned was the following: "That the judgment of the court is for a greater sum than is found by the jury; the whole amount of the bills set forth in the petition being \$2183, amounting, with interest from the time of the judicial demand, to \$2652.34; whereas, the judgment is for the sum of \$4017.64, damages," &c.

Ogden v. Saunders.

March 13th. JOHNSON, Justice.—I am instructed by the majority of the court finally to dispose of this cause. The present majority is not the same which determined the general question on the constitutionality of state insolvent laws, with reference to the violation of the obligation of contracts. I now stand united with the minority on the former question, and therefore, feel it due to myself and the community, to maintain my consistency. The question now to be considered is, whether a discharge of a debtor, under a state insolvent law, would be valid against a creditor or citizen of another state, who has never voluntarily subjected himself to the state laws, otherwise than by the origin of his contract.

As between its own citizens, whatever be the origin of the contract, there is now no question to be made on the effect of such a discharge ; nor is it to be questioned, that a discharge not valid under the constitution in the courts of the United States, is equally invalid in the state courts. The question to be considered goes to the invalidity of the discharge altogether, and therefore, steers clear of that provision in the constitution which purports to give validity, in every state, to the records, judicial proceedings, and so forth, of each state.

The question now to be considered, was anticipated in *the case [^{*359} of *Sturges v. Crowninshield*, when the court, in the close of the opinion delivered, declared that it means to confine its views to the case then under consideration, and not to commit itself as to those in which the interests and rights of a citizen of another state are implicated.

The question is one partly international, partly constitutional. My opinion on the subject is briefly this : that the provision in the constitution which gives the power to the general government to establish tribunals of its own in every state, in order that the citizens of other states or sovereignties might therein prosecute their rights under the jurisdiction of the United States, had for its object an harmonious distribution of justice throughout the Union ; to confine the states, in the exercise of their judicial sovereignty, to cases between their own citizens ; to prevent, in fact, the exercise of that very power over the rights of citizens of other states, which the origin of the contract might be supposed to give to each state ; and thus, to obviate that *conflictus legum*, which has employed the pens of Huberus and various others, and which any one who studies the subject will plainly perceive, it is infinitely more easy to prevent than to adjust. These conflicts of power and right necessarily arise only after contracts are entered into. Contracts then become the appropriate subjects of judicial cognisance ; and if the just claims which they give rise to, are violated by arbitrary laws, or if the course of distributive justice be turned aside, or obstructed by legislative interference, it becomes a subject of jealousy, irritation and national complaint or retaliation.

It is not unimportant to observe, that the constitution was adopted at the very period when the courts of Great Britain were engaged in adjusting the conflicts of right which arose upon their own bankrupt law, among the subjects of that crown in the several dominions of Scotland, Ireland and the West Indies. The first case we have on the effect of foreign discharges, that of *Ballantine v. Golding*, occurred in 1783, and the law could hardly be held settled before the case of *Hunter v. Potts*, which was decided in 1791.

Ogden v. Saunders.

*Any one who will take the trouble to investigate the subject, will, I think, be satisfied, that although the British courts profess to decide upon a principle of universal law, when adjudicating upon the effect of a foreign discharge, neither the passage in Vattel, to which they constantly refer, nor the practice and doctrines of other nations, will sustain them in the principle to the extent in which they assert it. It was all important to a great commercial nation, the creditors of all the rest of the world, to maintain the doctrine as one of universal obligation, that the assignment of the bankrupt's effects, under a law of the country of the contract, should carry the interest in his debts, wherever his debtor may reside; and that no foreign discharge of his debtor should operate against debts contracted with the bankrupt in his own country. But I think it perfectly clear, that in the United States, a different doctrine has been established; and since the power to discharge the bankrupt is asserted on the same principle with the power to assign his debts, that the departure from it in the one instance, carries with it a negation of the principle altogether.

It is vain to deny, that it is now the established doctrine in England, that the discharge of a bankrupt shall be effectual against contracts of the state that give the discharge, whatsoever be the allegiance or country of the creditor. But I think it equally clear, that this is a rule peculiar to her jurisprudence, and that reciprocity is the general rule of other countries; that the effect given to such discharge is so much a matter of comity, that the states of the European continent, in all cases, reserve the right of deciding whether reciprocity will not operate injuriously upon their own citizens. Huberus, in his third axiom on this subject, puts the effect of such laws upon the ground of courtesy, and recognises the reservation that I have mentioned; other writers do the same.

I will now examine the American decisions on this subject; and first, in direct hostility with the received doctrines of the British courts, it has been solemnly adjudged in this court, and, I believe, in every state court of the Union, that, notwithstanding the laws of bankruptcy *361] in *England, a creditor of the bankrupt may levy an attachment on a debt due the bankrupt in this country, and appropriate the proceeds to his own debt. In the case of *Harrison v. Sterry*, 5 Cranch 298, 302, a case decided in this court in 1809, upon full argument, and great deliberation, and in which all the English cases were quoted, it is expressly adjudged, "that in the case of a contract made with foreigners, in a foreign country, the bankrupt laws of the foreign country are incapable of operating a legal transfer of property in the United States," and judgment was given in favor of the attaching-creditors, against the claim of the foreign assignees. In that case, also, another important doctrine is established, in hostility with the British doctrine. For the United States had interposed a claim against the English assignees, in order to obtain satisfaction from the proceeds of the bankrupt's effects in this country, for a debt contracted in Great Britain. And this court decreed, accordingly, expressly restricting the power of the country of the contract to its concoction and exposition. The language of the court is, "The law of the place where a contract is made, is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority forms no part of the contract itself. It is extrinsic, and is rather a personal

Ogden v. Saunders.

privilege, dependent on the laws of the place where the property lies, and where the court sits which decides the cause." And, accordingly, the law of the United States was sustained, which gave the debts due the bankrupt here, to satisfy a debt contracted in England, to the prejudice of the law of England, which gave the same debt to the assignees of the bankrupt.

It cannot be necessary to go further than this case, to establish, that so far as relates to the foreign creditor, this country does not recognise the English doctrine, that the bankrupt law of the country of the contract is paramount, in disposing of the rights of the bankrupt. The United States pass a law which asserts the right to *appropriate a debt due a foreign bankrupt, to satisfying a debt due itself, and incurred by that bankrupt in his own country. The assignees of that bankrupt question this right, and claim the debt as legally vested in them by the law of the country of the contract, and maintain, that the debt due the United States, being contracted in Great Britain, was subject to the laws of Great Britain, and therefore, entitled only to share in common with other creditors in the proceeds of the bankrupt's effects; that the debt so appropriated by the law of the United States to its exclusive benefit was, as to all the bankrupt's contracts, or certainly as to all English contracts, vested in the assignees, on international principles, principles which gave effect to the English bankrupt laws, so vesting that debt, paramount to the laws of other countries. In giving effect to the law of the United States, this court overrules that doctrine; and in the act of passing that law, this government asserts both the power over the subject, and the right to exercise that power, without a violation of national comity; or has, at least, taken its stand against that comity, and asserted a right to protect its own interests, which, in principle, is equally applicable to the interests of its own citizens. It has had, in fact, regard to the *lex loci rei sitæ*, as existing in the person and funds of the debtor of the bankrupt, and the rights of self-preservation, and duty of protection to its own citizens, and the actual allegiance of the creditor and debtor, not the metaphysical allegiance of the contract, on which the foreign power is asserted. It would be in vain to assign the decision of this court in *Harrison v. Sterry*, on the passing of the law of the United States, to the general preference, which the government may assert in the payment of its own debt, since that preference can only exist to the prejudice of its own citizens, whereas, the precedence there claimed and conceded operated to the prejudice of British creditors.

The case of *Baker v. Wheaton*, adjudged in the courts of Massachusetts in the time of Chief Justice PARSONS (5 Mass. 509), is a very strong case upon this subject. That also was argued with great care, and all the British cases *reviewed; the court took time to deliberate, and the same doctrine was maintained, in the same year and the same month with *Harrison v. Sterry*, and certainly without any communication between the two courts. The case was this: one Wheaton gave a promissory note to one Chandler, both being at that time citizens and inhabitants of Rhode Island. Wheaton was discharged under the bankrupt laws of Rhode Island, both still continuing citizens and inhabitants of the same state, and the note remaining the property of Chandler. Subsequently to the discharge, Chandler indorses the note to Baker, and Wheaton is arrested in Massachusetts. He pleads the discharge in bar, and the court, in deciding, expresses

Ogden v. Saunders.

itself thus : " When, therefore, the defendant was discharged from that contract, *lege loci*, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of Rhode Island, he would not have been bound by the laws of it or any other state, and holding this note at the time of the discharge, he might afterwards maintain an action upon it, in the courts of this state." And again (page 311), " if the note had been transferred to the plaintiff, a citizen of this state, whilst it remained due and undischarged by the insolvent laws of Rhode Island, those laws could not affect his rights in the courts of law in this state, because he is not bound by them." This, it will be observed, regards a contract acknowledged to be of Rhode Island origin.

There is another case reported in the decisions of the same state (10 Mass. 337), which carries this doctrine still further, and, I apprehend, to a length which cannot be maintained. This was the case of *Watson v. Bourne*, in which Watson, a citizen of Massachusetts, had sued Bourne in a state court, and obtained judgment. Bourne was discharged under the insolvent laws of that state, and being afterwards found in Massachusetts, was arrested on an action of debt upon the judgment. He pleads the discharge ; plaintiff replies, that he, plaintiff, was a citizen of Massachusetts, and therefore, *364] not precluded by the discharge. The origin of the *debt does not appear from the report, and the argument turned wholly on the question, whether, by entering judgment in the court of the state, he had not subjected his rights to the state laws *pro tanto*. The court overruled the plea, and recognised the doctrine in *Baker v. Wheaton*, by declaring, " that a discharge of that nature can only operate where the law is made by an authority common to the creditor and debtor in all respects, where both are citizens or subjects." I have little doubt, that the court was wrong in denying the effect of the discharge, as against judgments rendered in the state courts, when the party goes voluntarily and unnecessarily into those courts ; but the decision shows, in other respects, how decidedly the British doctrine is repelled in the courts of that state.

The British doctrine is also unequivocally repelled, in a very learned opinion delivered by Mr. Justice NORR, in the court of the last resort in South Carolina, and in which the whole court, consisting of the common-law judges of the state, concurred. This was in the case of the assignees of *Popham v. Chapman et al.*, in which the rights of the attaching-creditor were maintained against those of the assignees of the bankrupt (1 Mill's Const. Rep. 253) ; and that the same rule was recognised at an early day in the courts of Pennsylvania, appears from the leading case of *Phillips v. Hunter*, 2 H. Bl. 402, in which a British creditor, who had recovered of a debtor of the bankrupt, in Pennsylvania, was compelled by the British courts to refund to the assignees in England, as for money had and received to their use.

I think it, then, fully established, that in the United States, a creditor of the foreign bankrupt, may attach the debt due the foreign bankrupt, and apply the money to the satisfaction of his peculiar debt, to the prejudice of the rights of the assignees or other creditors. I do not here speak of assignees, or rights created, under the bankrupt's own deed ; those stand on a different ground, and do not affect this question. I confine myself to assignments or transfers, resting on the operation of the laws of the country,

Ogden v. Saunders.

independent of the bankrupt's deed ; to the *rights and liabilities of debtor, creditor, bankrupt and assignees, as created by law.

What is the actual bearing of this right to attach, so generally recognised by our decisions ? It imports a general abandonment of the British principles ; for, according to their laws, the assignee alone has the power to release the debtor. But the right to attach necessarily implies the right to release the debtor, and that right is here asserted, under the laws of a state which is not the state of the contract. So also, the creditor of the bankrupt is, by the laws of his country, entitled to no more than a ratable participation in the bankrupt's effects. But the right to attach imports a right to exclusive satisfaction, if the effects so attached should prove adequate to make satisfaction. The right to attach also imports the right to sue the bankrupt ; and who would impute to the bankrupt law of another country, the power to restrain the citizens of these states in the exercise of their right to go into the tribunals of their own country for the recovery of debts, wherever they may have originated ? Yet, universally, after the law takes the bankrupt into its own hands, his creditors are prohibited from suing.

Thus much for the law of this case, in an international view. I will consider it with reference to the provisions of the constitution. I have said above, that I had no doubt, the erection of a distinct tribunal for the resort of citizens of other states, was introduced *ex industria*, into the constitution, to prevent, among other evils, the assertion of a power over the rights of the citizens of other states, upon the metaphysical ideas of the British courts on the subject of jurisdiction over contracts. And there was good reason for it ; for, upon that principle, it is, that a power is asserted over the rights of creditors which involves a mere mockery of justice. Thus, in the case of *Burrows v. Jemino* (reported in 2 Strange 733, and better reported in Moseley, and some other books), the creditor, residing in England, was cited, probably, by a placard on a door-post in Leghorn, to appear there to *answer to his debtor ; and his debt passed upon by the [*366 court, perhaps, without his having ever heard of the institution of legal process to destroy it. The Scotch, if I remember correctly, attach the summons on the flag-staff, or in the market-place, at the shore of Leith ; and the civil law process by proclamation, or *viis et modis*, is not much better, as the means of subjecting the rights of foreign creditors to their tribunals. All this mockery of justice, and the jealousies, recriminations, and, perhaps, retaliations, which might grow out of it, are avoided, if the power of the states over contracts, after they become the subject exclusively of judicial cognisance, is limited to their own citizens. And it does appear to me almost incontrovertible, that the states cannot proceed one step farther, without exercising a power incompatible with the acknowledged powers of other states, or of the United States, and with the rights of the citizens of other states.

Every bankrupt or insolvent system in the world, must partake of the character of a judicial investigation. Parties whose rights are to be affected, are entitled to a hearing. Hence, every system, in common with the particular system now before us, professes to summon the creditors before some tribunal, to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation ? The judgment to be passed is to prostrate

Ogden v. Saunders.

his rights ; and on the subject of these rights, the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate. In the only tribunal to which he owes allegiance, the state insolvent or bankrupt laws cannot be carried into effect; they have a law of their own on the subject ;(a) and a certificate of discharge under any other law would not be acknowledged as valid even in the courts of the state in which the court of the United States that grants it, is held. Where is the reciprocity? Where the reason upon which the
 *367] state courts *can thus exercise a power over the suitors of that court, when that court possesses no such power over the suitors of the state courts? In fact, the constitution takes away the only ground upon which this eminent dominion over particular contracts can be claimed, which is that of sovereignty. For the constitutional suitors in the courts of the United States are not only exempted from the necessity of resorting to the state tribunals, but actually cannot be forced into them. If, then, the law of the English courts had ever been practically adopted in this country in the state tribunals, the constitution has produced such a radical modification of state power over even their own contracts, in the hands of individuals not subject to their jurisdiction, as to furnish ground for excepting the rights of such individuals from the power which the states unquestionably possess over their own contracts and their own citizens.

Follow out the contrary doctrine in its consequences, and see the absurdity it will produce. The constitution has constituted courts professedly independent of state power in their judicial course ; and yet the judgments of those courts are to be vacated, and their prisoners set at large, under the power of the state courts, or of the state laws, without the possibility of protecting themselves from its exercise. I cannot acquiesce in an incompatibility so obvious. No one has ever imagined, that a prisoner, in confinement under process from the courts of the United States, could avail himself of the insolvent laws of the state in which the court sits. And the reason is, that those laws are municipal and peculiar, and appertaining exclusively to the exercise of state power in that sphere in which it is sovereign, that is, between its own citizens, between suitors, subjected to state power exclusively, in their controversies between themselves.

In the courts of the United States, no higher power is asserted than that of discharging the individual in confinement under its own process. This affects not to interfere with the rights of creditors in the state courts, against the same individual. Perfect reciprocity would seem to indicate,
 *368] *that no greater power should be exercised under state authority over the rights of suitors who belong to the United States jurisdiction. Even although the principle asserted in the British courts, of supreme and exclusive power over their own contracts, had obtained in the courts of the United States, I must think that power has undergone a radical modification by the judicial powers granted to the United States. I, therefore, consider the discharge under a state law, as incompetent to discharge a debt due a citizen of another state ; and, it follows, that the plea of a discharge here set up, is insufficient to bar the rights of the plaintiff.

It becomes necessary, therefore, to consider the other errors assigned in

(a) Act of congress of January 6th, 1800, ch. 4. (2 U. S. Stat. 4.)

Ogden v. Saunders.

behalf of the defendant; and first, as to the plea of the act of limitations. The statute pleaded here is not the act of Louisiana, but that of New York; and the question is not raised by the facts or averments, whether he could avail himself of that law, if the full time had run out, before his departure from New York, as was supposed in argument. The plea is obviously founded on the idea, that the statute of the state of the contract, was generally pleadable in any other state, a doctrine that will not bear argument.

The remaining error assigned has regard to the sum for which the judgment is entered, it being for a greater amount than the nominal amount of the bills on exchange on which the suit was brought, and which are found by the verdict. There has been a defect of explanation on this subject; but, from the best information afforded us, we consider the amount for which judgment is entered, as made up of principal, interest and damages, and the latter as being legally incident to the finding of the bills of exchange, and their non-payment, and assessed by the court under a local practice consonant with that by which the amount of written contracts is determined, by reference to the prothonotary, in many other of our courts. We, therefore, see no error in it. The judgment below will, therefore, be affirmed.

And the purport of this adjudication, as I understand it, is, that as between citizens of the same state, a discharge of a bankrupt by the laws of that state, is valid as it affects posterior *contracts; that as against creditors, citizens of other states, it is invalid as to all contracts. The [*369 propositions which I have endeavored to maintain in the opinion which I have delivered are these:

1st. That the power given to the United States to pass bankrupt laws is not exclusive.

2d. That the fair and ordinary exercise of that power by the states does not necessarily involve a violation of the obligation of contracts, *multo fortiori*, of posterior contracts.

3d. But when, in the exercise of that power, the states pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other states, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other states, and with the constitution of the United States.

WASHINGTON, THOMPSON and TRIMBLE, Justices, dissented. MARSHALL, Ch. J., and DUVAL and STORY, Justices, assented to the judgment, which was entered for the defendant in error.

Judgment affirmed. (a)

(a) In the case of *Shaw v. Robbins*, the judgment below was reversed. This was an action on several bills of exchange, drawn by the plaintiff on the defendant, payable to plaintiff's order, and by the defendant duly accepted. At the time of the transaction, the plaintiff was a citizen of Massachusetts, resident in that state, and the defendant, a citizen of New York, and there resident. The action was brought in a state court, in Ohio, and the defendant relied on a discharge, obtained in New York, under the provisions of the insolvent laws of that state. The highest court of law in Ohio gave judgment for the defendant; and the cause was brought before this court by a writ of error.

JOHNSON, Justice.—This is a contract between a citizen of New York and a citizen

Mason v. Haile.

of Massachusetts. It only differs from *Ogden v. Saunders* in this particular, that the action was brought in a state court; not the court of New York, but the court of another state. We think the decision in the case of *Ogden v. Saunders* applies to this, and must govern its decision. The judgment below, therefore, must be reversed, and the cause remand for such further proceedings as the law may require.

*370]

*MASON v. HAILE.

Obligation of contracts.—Remedies.

The states have a right to regulate or abolish imprisonment for debt, as a part of the remedy for enforcing the performance of contracts.

Where the condition of a bond for the jail-limits, in Rhode Island, required the party to remain a true prisoner, in the custody of the keeper of the prison, and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes during the time of restraint, then this obligation to be void, or else to remain in full force and virtue:" Held, that a discharge, under the insolvent laws of the state, obtained from the proper court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, &c., "and from all imprisonment, arrest and restraint of his person therefor"—was a lawful discharge, and that his going at large under it, was no breach of the condition of the bond.

CERTIFICATE of Division from the Circuit Court of Rhode Island.

This was an action of debt, brought in the circuit court of Rhode Island, upon two several bonds, given by the defendant, Haile, to the plaintiff, Mason, and one Bates, whom the plaintiff survived, one of which bonds was executed on the 14th, and the other on the 29th of March 1814. The condition in both bonds was the same, except as to dates and sums, and was as follows:

"The condition of the above obligation is such, that if the above-bounden Nathan Haile, now a prisoner in the state's jail, in Providence, within the county of Providence, at the suit of Mason and Bates, do and shall, from henceforth, continue to be a true prisoner, in the custody, guard and safe-keeping of Andrew Waterman, keeper of said prison, and in the custody, guard and safe-keeping of his deputy, officers and servants, or some one of them, within the limits of said prison, until he shall be lawfully discharged, without committing any manner of escape or escapes, during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

*371] *To the declaration upon these bonds, the defendant pleaded several pleas, the substance of which was, that in June 1814, after giving the bonds, the defendant presented a petition to the legislature of Rhode Island, praying for relief, and the benefit of an act passed in June 1756, entitled "an act for the relief of insolvent debtors," and that, in the meantime, all proceedings against him for debt might be stayed, and he be liberated from jail, on giving bonds to return to jail, in case his petition shall not be granted. Upon this petition, the legislature, in February 1815, passed the following resolution:

"On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act, entitled, 'an act for the relief of insolvent debtors,' passed in the year 1756, be extended to him, voted, that said petition be continued till the next session of this assembly; and that, in the meantime, all proceedings against him, the said Haile, on account of his debts, be

Mason v. Haile.

stayed ; and that the said Haile be liberated from his present confinement in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of said county, conditioned to return to jail in case said petition is not granted."

That, on the 28th of February 1815, he gave sufficient bond, with surety, to the sheriff, conditioned to return to jail, in case the petition should not be granted, and thereupon, the sheriff did liberate, and discharge him from his said confinement in said jail, and permit him to go at large, out of the said Waterman's custody, and the custody of the keeper of said prison, his deputy, officers and servants, and out of the limits of said jail and jail-yard; and he, said Haile, did, upon being so liberated, depart and go at large out of the same, accordingly, and so continued at large and liberated, until the prayer of said petition was granted by the legislature, at the February session 1816, and ever since, as lawfully he might. That in February 1816, the legislature, upon a due hearing, granted the prayer of the defendant's petition, and passed the following resolution :

"On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act passed in June 1756, for the relief of insolvent debtors, may be extended to him ; voted, that the prayer of the petition be, *and the same is hereby granted."

That the defendant, afterwards, in pursuance of the above resolution, [372 and of the laws of the state, received in due form, from the proper court, a judgment, "that he should be, and thereby was, fully discharged of and from all debts, duties, contracts and demands, of every name, nature and kind, outstanding against him, debts due to the state aforesaid, and to the United States, excepted, and from all imprisonment, arrest and restraint of his person therefor."

To the pleas so pleaded, the plaintiff demurred ; there was a joinder in demurrer ; and on the argument of the cause, the opinions of the judges of the court below were opposed, upon the question, whether the defendant was entitled to judgment, on the ground, that the matters set forth on his part in his pleas, was sufficient to bar the action, or whether the plaintiff was entitled to judgment upon the demurrers and joinders. The question was, thereupon, certified to this court for final decision.

February 9th. The cause was argued by *Webster* and *Bliss*, for the plaintiff; and by *Whipple* and *Wheaton*, for the defendant.

On the part of the *plaintiff*, it was argued, that the acts of the legislature of Rhode Island, of February 1815, and of February 1816, liberating the person of the defendant from imprisonment, and reviving in his favor an obsolete insolvent act of the colonial legislature, passed in the year 1756, were (in the strictest sense) laws impairing the obligation of contracts. They interfered with an actually vested right of the creditor, acquired under existing laws, and entitling him to a particular remedy against the person of his debtor. Upon the narrowest construction which had ever been given to the prohibition in the constitution of the United States, they impaired the obligation of the bonds now in question ; which, though a part of the judicial proceedings to enforce the execution of the primary contract, were still "contracts," within the letter and spirit of the constitution. The obligation of these contracts was entirely destroyed by these legislative acts,

Mason v. Haile.

which were not general laws, but private acts, professedly intended for the relief of the party in the particular case. They might even be considered *void, on general principles, independent of the positive prohibition in *373] the constitution, as being retrospective laws interfering with vested rights. The law of 1756 was no longer in force in Rhode Island, and the reference to it in the acts of 1815 and 1816, could only have the effect of reviving it in the particular case, and was tantamount to the enactment of a new law with similar provisions. But the acts now in question were clearly retrospective acts of legislation, impairing the obligation of contracts in existence when the acts were passed; and, consequently, the case fell within the principles determined by the majority of the court in *Ogden v. Saunders* (*ante*, p. 213).

For the *defendant*, it was insisted, that although the act of 1756 was not in force (as a general and permanent law) when the bonds were given, yet the statutes of 1798 and 1812, provide for relief in cases of insolvency; which is always granted, by referring to the act of 1756, and reviving its provisions in favor of the individual. These statutes, together with the established usage under them, making part of the unwritten law of the state, form a system or code of insolvent laws, authorizing the debtor to petition in the manner prescribed by the act of 1756, constituting the legislature a court to hear and determine it as a case between debtor and creditor (*Olney v. Andrews*, 3 Dall. 308; *Calder v. Bull*, *Ibid.* 386), and requiring an assignment of the debtor's property for the benefit of all his creditors. The local legislature possesses sovereign power over the remedy, in its own courts, for the enforcement of contracts made within its own territory (*Sturges v. Crowninshield*, 4 Wheat. 200-1); and the acts under which the prison bonds were given, as well as those under which the discharge was obtained, are a part of the process laws of the state, which it has a right to make, alter and repeal, at its pleasure. The bonds in question could hardly be considered as contracts, within the meaning of the constitutional prohibition, since there is but one voluntary party to them. They are rather a part of the judicial process for enforcing the performance of contracts, and the collection of debts. *The legislative resolution of February 1815, is *374] not void on account of its dependence on the act of insolvency of 1816, because the latter, though it professes to discharge both person and property (and therefore, may be void in part), is not entirely void, it being a present discharge executed, and therefore, void only for the excess. But admitting the act of 1816 to be entirely void, that of 1815 has no necessary connection with, or dependence upon it. If the resolution of 1815 would have been a valid discharge from imprisonment in close jail, it must be a valid discharge from the limits, as it does not impair the contract for the liberty of the yard. It does not impair it, because that contract is part of a general system, or code of laws, regulating the remedy in regard to imprisonment for debt; and taken in connection with that system, it is plain, that the legislature, when they provided the bond, as a security for the creditor, did not mean to deprive themselves of the power of entirely liberating the debtor. The words "lawful discharge," are general, and necessarily include all discharges which were lawful, previous to the execution of the bond. And even if the resolution of 1816 is to be considered

Mason v. Haile.

not as the sentence of a court of justice, but as a special law, future in its operation, it does not impair the obligation of the contract, because the bond, by necessary construction, must be taken to refer to future laws, and is to be governed by the laws of the state, general or special, in force at the time of the discharge. Whatever these laws provide shall be a "lawful discharge," is a "lawful discharge," within the meaning of the laws under which the bonds were taken, since all these laws are made by the same legislative authority, having sovereign control over the subject-matter.

THOMPSON, Justice, delivered the opinion of the court.—The question in this case arises upon the following certificate of a division of opinion of the judges of the circuit court of the United States for the district of Rhode Island. "This cause came on to be heard, and was argued by counsel on both sides, and thereupon, the following question occurred, viz., whether, upon the amended pleas in this case, severally pleaded to the first and second counts of the *plaintiff's declaration, and to which there are [*375 demurrers, and joinders in demurrer, the defendant is entitled to judgment, on the ground, that the matters set forth therein, on the part of the defendant, are sufficient to bar the action; or whether the plaintiff is entitled, upon said demurrers and joinders, to judgment? Upon which question, the court was divided in opinion."

It is not understood by this court, that any question, as to the sufficiency of the pleas, in point of form, is drawn under examination, but simply, whether, upon the merits, the matter thereby set up is sufficient to bar the action. The action is founded upon two several bonds, given by the defendant to the plaintiff, and one Bates, whom the plaintiff survives, one dated the 14th, and the other the 29th of March 1814. The condition in both bonds in the same, except as to dates and sums, and is as follows: "The condition of the above obligation is such, that if the above-bounden Nathan Haile, now a prisoner in the state's jail, in Providence, within the county of Providence, at the suit of said Mason and Bates, do and shall from henceforth continue to be a true prisoner, in the custody, guard and safe-keeping of Andrew Waterman, keeper of said prison, and in the custody, guard and safe-keeping of his deputy, officers and servants, or some one of them, within the limits of said prison, until he shall be lawful discharged, without committing any matter of escape or escapes, during the time of restraint, then this obligation to be void, or else to remain in full force and virtue."

The defence set up by the pleas, to show there has been no breach of the condition of the bond, is, substantially, that in June 1814, after giving the bond in question, the defendant presented a petition to the legislature of Rhode Island, praying relief, and the benefit of the insolvent act of 1756; and that, in the meantime, all proceeds against his person and estate, for the collection of debts, might be stayed, and he be liberated from jail, on giving bonds to return, in case his petition should not be granted. Upon this petition, the legislature, in February 1816, passed the following resolution: "On the petition of Nathan Haile, praying, for the reasons therein stated, that the benefit of an act, entitled an act for the relief of insolvent debtors, passed in the year *1756, be extended to him, voted, that [*376 said petition be continued until the next session of this assembly; and that, in the meantime, all proceedings against the said Haile, on account

Mason v. Haile.

of his debts, be stayed ; and that the said Haile be liberated from his present imprisonment in the jail, in the county of Providence, on his giving sufficient bond to the sheriff of the county, conditioned to return to jail, in case said petition is not granted." The defendant, after the passing of this resolution, gave the bond required by it, and on the 28th of the same month, was discharged from imprisonment, and has ever since been at large, out of the custody of the sheriff. In February 1816, the legislature, upon a due hearing, granted the prayer of the defendant, and passed the following resolution : "On the petition of Nathan Haile, of Foster, praying, for the reasons therein stated, that the benefit of an act, passed in June 1756, for the relief of insolvent debtors, may be extended to him, voted, that the prayer of the said petition be and the same is hereby granted." By the granting of the prayer of the petition, the condition of the second bond given to the sheriff was complied with, and the bond became extinguished.

The defendant afterwards proceeded to take the benefit of the insolvent act revived in his favor, according to the statute provisions, and received in due form from the proper court, a judgment, "that he should be, and thereby was, fully discharged of and from all debts, contracts and demands, of every name, nature and kind, outstanding against him, debts due to the state aforesaid, or to the United States, excepted, and from all imprisonment, arrest and restraint of his person therefor." The insolvent act of 1756 is not considered in force as a general and permanent law, but the legislature of Rhode Island has been in the constant habit of entertaining petitions, like the present, and has by the general law of 1798 (now in force), prescribed the mode by which such petitions are to be regulated ; and in case of granting the prayer of the petition, the course is to pass an act or resolution, giving the benefit of the act of 1756 to the petitioner, and thus, in effect, reviving it for his particular benefit. So, that the mode pursued to obtain the discharge of the defendant, as set out in the pleas, was according to the *377] established course *of proceeding in cases of insolvency, and in conformity to the laws of Rhode Island, by which the defendant was discharged from all his contracts, and from imprisonment.

The effect of this discharge upon the original judgment against Haile is not now drawn in question. The only inquiry is, whether he has violated the condition of his bonds of March 1814, by going at large, under the authority and sanction of the resolutions of the legislature, as before stated. His bond required him to remain a true prisoner, until he should be lawfully discharged, without committing any manner of escape, during the time of restraint. The bond is not that he shall remain a true prisoner, until the debt shall be paid. Nor is there anything upon the face of the bond, or if we look out of it, to the known and established laws and usages in that state, calling for such a construction. A lawful discharge, in its general signification, will extend to, and be satisfied by, any discharge obtained under the legislative authority of the state. And it is not unreasonable, to consider such prison-bonds as given subject to the ordinary and well-known practice in Rhode Island, for the legislature to entertain petitions in the manner pursued by the defendant, to obtain the benefit of the insolvent act of 1756, in the manner in which these petitions are received and proceeded upon, as prescribed by the act of 1798. And, indeed, this cannot strictly be considered a private contract between the parties, but rather as a statute

Mason v. Haile.

engagement, imposed by an act of the legislature, and as a part of the process under which the defendant was held as a prisoner. And with the full knowledge of this regulation and practice, it is hardly to be presumed, that such discharges were not understood to be lawful discharges. And the same remarks will apply to the term "escape" in the bond, which can mean no more than a departure from the limits, without lawful authority. Suppose, the legislature, after the execution of this bond, had enlarged the jail limits? It surely would not have been an escape, for the defendant to have availed himself of the enlarged limits, and gone beyond his former bounds. And yet, if the limits prescribed at the time the bond was executed, are to govern the effect and operation of the bond, it would be an escape. Such bonds may well be considered *as an enlargement of the prison limits, and a mere modification of the imprisonment, according to the provisions [*378 of the laws of Rhode Island.

Can it be doubted, but the legislatures of the states, so far as relates to their own process, have a right to abolish imprisonment for debt altogether, and that such law might extend to present, as well as future imprisonment? We are not aware, that such a power in the states has ever been questioned. And if such a general law would be valid, under the constitution of the United States, where is the prohibition to be found, that denies to the state of Rhode Island the right of applying the same remedy to individual cases? This is a measure which must be regulated by the views of policy and expediency entertained by the state legislatures. Such laws act merely upon the remedy, and that in part only. They do not take away the entire remedy, but only so far as imprisonment forms a part of such remedy. The doctrine of this court in the case of *Sturges v. Crowninshield*, 4 Wheat. 200, applies with full force to the present case. "Imprisonment of the debtor," say the court, "may be a punishment for not performing his contract, or may be allowed as a means for inducing him to perform it. But a state may refuse to inflict this punishment, or may withhold it altogether, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner, does not impair its obligation."

In whatever light, therefore, the question is viewed, no breach of the condition of the bond, according to its true sense and interpretation, has been committed. The liberation of the defendant from confinement, on his giving bond to the sheriff, to return to jail, in case his petition for a discharge should not be granted, was sanctioned by the due exercise of legislative power, and was analogous to extending to him more enlarged jail limits, and would not be considered an escape. And both this and the final discharge, so far, at all events, as it related to the imprisonment of the defendant, affected the remedy in part only, and was in the due and ordinary exercise of the powers vested in the legislature of Rhode Island, and was a lawful discharge, and no *escape, and of course, no breach of [*379 the condition of the bond in question.

It must, accordingly, be certified to the circuit court, that the matters set forth in the defendant's amended pleas, are sufficient to bar the plaintiff's action.

WASHINGTON, Justice. (*Dissenting.*)—It has never been my habit to deliver dissenting opinions, in cases where it has been my misfortune to

Mason v. Haile.

differ from those which have been pronounced by a majority of this court. Nor should I do so upon the present occasion, did I not believe, that the opinion just delivered is at variance with the fundamental principles upon which the cases of *Sturges v. Crowninshield*, and *Ogden v. Saunders*, have been decided. A regard for my own consistency, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded.

The great, the intelligent principle, upon which those cases were decided, is, that a retrospective state law, so far as it operates to discharge, or to vary the terms of, an existing contract, impairs its obligations, and is, for that reason, a violation of the tenth section of the first article of the constitution of the United States; but that a law, which is prospective in its operation, has not this effect, and, consequently, is not forbidden by that instrument. But, if I rightly understand the opinion pronounced in this case, and the facts upon which it is founded, this principle is subverted, and the distinction between retrospective and prospective laws, in their application to contracts, is altogether disregarded. The facts are, that the bond upon which this action is brought, bears date the 14th of March 1814, and the condition is, that the defendant, then a prisoner in the state's jail, in Providence, at the suit of the plaintiff, shall continue to be a true prisoner, in the custody and safe-keeping of the keeper of the said jail, within the limits of the said prison, until he shall be lawfully discharged. Upon the petition of the defendant to the legislature of Rhode Island, to extend to him the benefit of a certain act passed in the year 1756, an act was passed in February 1815, which liberated him from his confinement in the jail *380] aforesaid, on his giving a bond to return *to the said jail, in case his petition should not be granted; and, by a subsequent act, passed in the following year, he was discharged from his debts, upon a surrender previously made of all his estate, for the benefit of his creditors. The plea admits, that the defendant did depart from the limits of the jail, and justifies the alleged escape, under the above acts of the legislature. The opinion considers those acts as constitutional, and decides, that the defendant was lawfully discharged within the terms of his bond.

The case of *Sturges v. Crowninshield* arose upon a contract for the payment of money, from which the debtor was discharged under a subsequent state insolvent law, and this discharge was pleaded in bar of the action upon the contract. This court decided the plea to be insufficient, upon the ground, that the law upon which it was founded impaired the obligation of the contract, which was entered into previous to his discharge. The obligation of the contract upon which the present suit was brought, is not to pay money, but to continue a true prisoner within the limits of the jail in which he was then confined. A subsequent act of the legislature discharges him from his confinement, and authorizes him to go at large, of which law he availed himself, and under which he justifies the alleged breach of the condition of his bond.

A contract, we are informed by the above case, is an agreement by one or more persons to do, or not to do, a particular thing; and the law which compels a performance of such contract, constitutes its obligation. The thing to be done in that case was, to pay money; and in this it is to continue a true prisoner; and at the time it was concluded, the existing law of

Mason v. Haile.

Rhode Island required him to perform this engagement. A discharge from his debts, in the former case, by a subsequent law of the state, impaired that obligation; but this obligation, it is said, is not impaired by a subsequent law, which discharges him from confinement, as well as from all his debts. If the principle which governs the two cases can be reconciled with each other, the course of reasoning by which it is to be effected is quite too subtle for my mind to comprehend it.

It was stated in the case alluded to, that imprisonment of *the debtor forms no part of the contract, and, consequently, that a law [*381 which discharges his person from confinement, does not impair its obligation. This I admit, and the principle was strictly applicable to a contract for the payment of money. But can it possibly apply to a case where the restraint of the person is the sole object of the contract, and continuing within the limits of the prison, the thing contracted to be done. I admit the right of a state to put an end to imprisonment for debt altogether, and even to discharge insolvent debtors from their debts, by the enactment of a bankrupt law for that purpose. I am compelled, by the case of *Sturges v. Crowninshield*, to make this latter admission, and I voluntarily make the former. But what I insist upon is, that if a law, in either case, is made to operate retroactively upon contracts, to do what the law discharges the party from doing, it impairs the obligation of the contract, and is so far invalid.

I will not briefly consider the reasons which are assigned for distinguishing this case from that of *Sturges v. Crowninshield*. It is said, that the bond in this case is not, in point of law, a contract, since there is but one voluntary party to it, and a contract cannot exist, unless there be at least two parties to it. My answer is, that the law of Rhode Island which authorized the giving of the bond, made the creditor the other party, as much so as creditors and legatees are made parties to a bond, which the law requires an executor to give. If this answer be not considered as satisfactory, I will add another, which is, that the creditor has adopted it as his contract by putting it in suit.

Again, it is said, that the acts which discharged this defendant from his imprisonment, and even from the debt altogether, are not retrospective in their operation, and are not so considered in the state where they were passed. How they are considered in that state, is more than this court can judicially know, and, consequently, that circumstance cannot here form the basis of a judicial determination. All that we do judicially know is, that the act of 1756 *was a temporary law, and expired nearly half a [*382 century ago. It was, then, in the year 1815, as if it had never existed. An act in this year to revive it, either as a general law, or for the purpose of benefiting a particular individual, is the enactment of a new law, which derives all its force from the will of the legislature which enacts it, and not from that of the legislature to which the expired law owed its temporary existence. Is it possible, that argument, or authorities, can be required to prove this proposition? Would the argument upon which the contrary proposition is founded have been adopted in the case of *Sturges v. Crowninshield*, if the discharge had been under an act passed subsequent to the contract, which revived an old expired insolvent or bankrupt law? And

Mason v. Haile.

am I to understand, that contracts for the payment of money, as well as for the restraint of the person of the debtor, may now be discharged in the state of Rhode Island, at any time, by an act to revive the act of 1756 in favor of debtors for whose benefit it may be revived? If this be the effect of the present decision (and I confess I cannot perceive how it can be otherwise), the decision in the case of *Sturges v. Crowninshield* will avail nothing in that state, nor in any other of the states in whose code an old deceased insolvent law can be found, which, in the days of its existence, authorized a legislative discharge of a debtor from his debts, or from his prison bounds bond.

Lastly, it is said, that this law does no more than enlarge the limits of the prison-rules, within which the defendant bound himself to continue. And can it be contended, that a law which has this effect, does not vary (and if it does so, it impairs) the terms of the contract entered into by the defendant? For what object, was he restricted to certain limits, if not to coerce him to pay the debt for which the plaintiff had a judgment and execution against him? And is not this object defeated, and the whole value of his prison-bounds contract destroyed, by enlarging the limits to those of the state, of the United States, or of the four quarters of the globe? I shall add nothing further. I have prepared no written opinion; my object in declaring my dissent from that which has been delivered, being not so much *383] to prove *that opinion to be wrong, as to vindicate my own consistency.

CERTIFICATE, that the matters set forth in the defendant's pleas are sufficient to bar the plaintiff's action.

COLUMBIAN INSURANCE COMPANY, Plaintiffs in error, *v.* CATLETT, Defendant in error.

Marine insurance.—Total loss.—Deviation.—Salvage.—Lien of freight.

A policy for \$10,000 upon a voyage at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge, in the United States, upon all lawful goods and merchandise, laden or to be laden on board the ship, &c., beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States, aforesaid—is an insurance upon every successive cargo taken on board, in the course of the voyage out and home, so as to cover the risk of a return-cargo, the proceeds of the sales of the outward cargo.

Such a policy covers an insurance of \$10,000 during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact of a portion of the original cargo having been safely landed at an intermediate port, before the loss.

Where the cargo, in the course of the outward voyage, and before its termination, was permanently separated from the ship, by the total wreck of the latter, and the cargo being perishable in its nature, though not injured to one-half its value, it became necessary to sell it, the further prosecution of the voyage with the same ship or cargo became impracticable: *Held*, that this was a technical total loss, on account of the breaking up of the voyage.¹

Whether a delay at a particular port constitutes a deviation, depends upon the usage of trade, with reference to the object of selling the cargo: where different ports are to be visited for this purpose, the owner has a right to limit the price at which the master may sell, to a reasonable extent; and a delay at a particular port, if *bonâ fide* made for that purpose, does not [*384 constitute a deviation, though occasioned by this restriction.

Freight is not a charge upon the salvage of cargo, in the hands of the underwriters, whether the assured is owner of the ship or not.

ERROR to the Circuit Court for the District of Columbia.

March 3d, 1827. This cause was argued by *Webster* and *Taylor*, for the plaintiffs in error; and by the *Attorney-General* and *Swann*, for the defendant in error.

March 9th. *STORY*, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the district of Columbia, sitting at Alexandria. The original action was upon a policy of insurance, dated the 16th of February 1822, whereby the Columbian Insurance Company insured the plaintiff \$10,000, lost or not lost, at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all kinds of lawful goods and merchandise, laden or to be laden on board the ship called the *Commerce*, &c.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same, until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States. The goods and merchandise to be valued, as interest may appear. The policy contained the usual risks; and the premium agreed on was three and three-quarters per cent., to return half per cent., for each port not used or attempted, and no loss happens. There are other provisions in the policy, which will be hereafter commented on. The breach alleged in the declaration is a total loss by perils of the seas, with the usual averments of notice and non-payment.

The trial was had upon the general issue, and a verdict found, by consent,

¹ *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 220. And see *Hogg v. Augusta Insurance & Banking Co.*, 7 How. 595.

for the plaintiff, for \$10,000, subject to the opinion of the court upon the demurrer to evidence filed in the case. It was farther agreed, that if it should be the opinion of the court, that the plaintiff was not entitled to recover the full amount of the insurance, but is entitled to an average loss, then a reference to ascertain that average, or to modify the amount of the *385] verdict in any other respect as to the sum, should be made to an auditor, and judgment should be given for the sum finally reported and confirmed by the court, subject, however, to the exceptions of either party to any opinion of the court on that subject. The reference was accordingly made, and, upon the coming in of the auditor's report, the court pronounced its opinion, and gave judgment for the plaintiff for \$7656.57, with interest from the 14th of October 1822.

From the demurrer to evidence, it appeared, that the ship sailed from Alexandria on her voyage, about the 14th of February 1822, having on board a cargo of 2297½ barrels of flour, of the invoice price of \$16,887.32, both ship and cargo being owned by the plaintiff. On the 21st of March, she arrived in safety, with her cargo, at St. Thomas, having met with no accident; and she continued at that port, until the 30th of May following, for the purpose of selling her cargo, and for no other cause. During this period, the master, who was also consignee, sold by retail 509½ barrels; being limited, by his instructions, to \$8 per barrel, and not being able to procure that price for the residue of the cargo, he sailed, on the 31st of May, for Cape Haytien, with it, and had also on board some doubloons, amounting to \$480, part of the proceeds of the former sales. He might have sold his whole cargo at from \$7.50 to \$7.75, at St. Thomas. The 509½ barrels of flour sold at St. Thomas, according to the invoice price, amounted to \$3512.99, leaving the value of the cargo on board, exclusive of the doubloons, at the time of sailing from that port, according to the invoice, at \$12,328.25.

On the 6th of June, the ship, with her cargo, arrived off Cape Haytien, and the master having gone on shore, the ship stretching too far in, took the ground and was wrecked. In consequence of this disaster, 155 barrels of flour were totally lost, 1633 were got on shore, part without injury, but the greater part damaged, and the whole was sold. The gross amount of the sales at Cape Haytien was \$9391.34, the expenses of salvage, including commissions on sales, \$4124.72; the proportion of the master's expenses *386] attaching on the cargo, \$285.78. Of the proceeds of the sales at Cape Haytien, the sum of \$4953.89 was invested in coffee, which was shipped to Baltimore, where it produced only \$3517.40. The plaintiff makes a claim for freight of the outward cargo of \$2104.25, as a proper deduction from the proceeds.

As soon as the plaintiff heard of the loss, he sent the following letter to the insurance company, under date of the 5th July 1822: "Gentlemen: Having received a letter from Captain McKnight (the master), informing me that the ship Commerce was lost, I abandon the proportion of the cargo that your office was interested in. Respectfully, &c." The master's protest, and the survey of the ship were also exhibited to the company on the 14th of August. The abandonment was never finally accepted by the directors, but sundry negotiations took place between them and the plaintiff, which however, led to no effectual arrangement.

Columbian Insurance Co. v. Catlett.

The first question arising in this case, is upon the true construction of the policy itself, as to the voyage insured. Is it an insurance upon the original cargo only, from the time of its loading until its final discharge, or is it an insurance upon every successive cargo, which is taken on board, in the course of the voyage out and home, so as to cover the risk of a return-cargo, the proceeds of the sale of the outward cargo? The argument in behalf of the defendant is, that the risk applies, upon the terms of the policy, only to the original cargo, laden at Alexandria. The terms of the policy are, on a voyage, "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise, laden or to be laden on board the ship, &c.; beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States aforesaid." It is supposed, that those words tie up the adventure to the original cargo shipped at Alexandria, because the risk is to attach on the same, at that port, and to continue on the same, until safely landed at St. Thomas, &c., and the United States. Perhaps, a very strict grammatical construction might lead to such a conclusion. But policies have never been construed *in such a strict and rigid manner. The instrument itself is somewhat loose in its form, [*387 and has always received a liberal construction with reference to the nature of the voyage and the manifest intent of the parties. What is the nature of the present voyage? It is, upon the face of the policy, plainly an insurance upon all lawful goods, not only for the outward voyage to the West Indies, but for the homeward voyage to the United States. The underwriters must be presumed, equally with the assured, to know the nature and course of such a voyage. It is for the purpose of trade, and the exchange of the outward cargo, by sale or barter, for a return-cargo of West India productions. It we could shut our eyes to the knowledge of this fact, belonging, as it does, intimately to the history and commercial policy of the nation itself, as disclosed in its laws, the whole evidence in the case furnishes abundant proofs of its notoriety. The true meaning of the policy is to be sought in an exposition of the words, with reference to this known course and usage of the West India trade. The parties must be supposed to contract with a tacit adoption of it as the basis of their engagements. The object of the clause under consideration may be thus rationally expounded, as intended only to point out the time of the commencement and termination of the risk on the goods, successively, and at different periods of the voyage, constituting the cargo. It would be pushing the argument to a most unreasonable extent, to suppose, that the parties deliberately contracted for risks on a homeward voyage, on goods which, according to the known course of the trade, and the very nature of the commodities, were not, and could not be, intended to be brought back to the United States. We are of opinion, that the policy was for the whole voyage round, and covered any return-cargo taken on board at any of the designated ports in the West Indies. This is not like the cases cited at the bar, where a policy on goods, at and from a particular port, beginning the adventure from the lading thereof, has been held not to cover goods taken on board at an antecedent port.

Columbian Insurance Co. v. Catlett.

Those are all cases of insurance upon a single passage, unaffected by any known course or usage of trade to explain the intentions of the parties.

*388] The next question is, whether the delay at St. Thomas for seventy days, was not so unreasonable as to constitute a deviation. Without question, any unreasonable delay in the ordinary progress of the voyage avoids the policy on this account. But what delay will constitute such a deviation, depends upon the nature of the voyage, and the usage of the trade. It may be a very justifiable delay, to wait in port, and sell by retail, if that be the course of business, when such delay would be inexcusable, in a voyage requiring or authorizing no such delay. The parties, in entering into the contract of insurance, are always supposed to be governed in the premium, by the ordinary length of the voyage, and the course of the trade. That delay, therefore, which is necessary to accomplish the objects of the voyage, according to the course of the trade, if *bonâ fide* made, cannot be admitted to avoid the insurance. In the present case, it is proved, that the stay at St. Thomas was solely for the purpose of selling the cargo, and for no other cause. But it is said, that a sale might have taken place at St. Thomas of the whole cargo, if the orders of the owner had not contained a direction to the master, limiting the sale at St. Thomas to the price of eight dollars, and that this limitation was the sole cause of the delay, and was unreasonable; that the master ought, under the circumstances, to have sold at a lower price, or have immediately elected to go to another port. We are of a different opinion. In almost every voyage undertaken, of this nature, where different ports are to be visited for the purposes of trade, and to seek markets, it is almost universal for the owner to prescribe limits of price to the sales. Such limitations have never hitherto been supposed to vary the insurance, or the rights of the party under it. It cannot be, that the master, if entitled to go to a single port only, is bound to sell at whatever sacrifice, as soon as he arrives at that port, and within the period at which he may unload, and sell, and reload a return-cargo. He must, from the very nature of the case, have a discretion on this subject. If he arrives at a bad market, he must have a right to wait a reasonable time for a rise of the market, to make suitable inquiries, and to try the effect of partial and limited sales.

*389] He is not bound to sell the whole *cargo at once, whatever be the sacrifice, and thus frustrate the projected adventure. In short, he must exercise in this, as in all other cases, a sound discretion for the interest of all concerned; and if it be fairly and reasonably exercised, it ought not to be deemed injurious to rights secured by the policy. It is as much the true interest of the owner to sell in a reasonable time, and with all proper dispatch, as it is for the underwriters. To be sure, if the owner should limit the price to an extravagant sum, or the master should delay, after all reasonable expectations of a change of market were extinguished, such circumstances might properly left to a jury, to infer a delay amounting to a deviation. And here, again, as on the former point, it may be remarked, that every underwriter is presumed to know the ordinary course of the trade, and to regulate his proceedings accordingly.¹

But it is said, that there is no sufficient evidence of the usage of trade in the present case. It is to be remembered, that this is a case which comes

¹ Norris v. Ins. Co. of N. America, 3 Yeates 84.

Columbian Insurance Co. v. Catlett.

before this court upon a demurrer to evidence. The plaintiff was not bound to have joined in the demurrer, without the defendant's having distinctly admitted, upon the record, every fact which the evidence introduced on his behalf conduced to prove; and that when the joinder was made, without insisting on this preliminary, the court is at liberty to draw the same inferences in favor of the plaintiff, which the jury might have drawn from the facts stated. The evidence is taken most strongly against the party demurring to the evidence. This is the settled doctrine in this court, as recognised in *Pawling v. United States*, 4 Cranch 219, and *Fowle v. Common Council of Alexandria*, 11 Wheat. 320. The testimony in the present case, does not, in direct terms (as has been justly stated at the bar), establish the general usage of the West India trade. The witnesses do not, generally speak to a usage, *eo nomine*. But it cannot be denied, that its scope and object are to establish the usage, by an enumeration of facts and voyages, by persons experienced in the trade, and referring to their own knowledge and general information. It thus conduces, indirectly, to prove the usage; and as it is altogether one way, it is *certainly such that a jury might infer a usage from it. And if so, this court may infer it. We con- [*390 sider it, then, as a fair deduction from this testimony, that considerable delays in port in the West India trade are not uncommon, for the purpose of taking the advantages of the market, and that sales by retail are within the usage. There are no facts from which this court can infer, that the delay in the present case was unreasonable or unusual; and, consequently, we cannot admit, that the delay amounted to a deviation. The case of *Oliver v. Maryland Insurance Company*, 7 Cranch 487, is in no respect inconsistent with this doctrine. One question in that case was, whether the delay at Barcelona, for the purpose of taking in a return-cargo, was a deviation. The court below instructed the jury, that it was not, if the vessel did not remain longer in that port than the usage and custom of trade at that place rendered necessary to complete her cargo. This court was of opinion, that the instruction was, in substance, correct. The only difficulty which arose was, from the terms of the instruction, which seemed to limit the right, not to the time necessary to take in the cargo, but to a particular period, regulated by the usage of trade. The chief justice there said, "There is some doubt spread over the opinion in this case, in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed, this was regulated by usage and custom. The usages and customs of a port, or of a trade, are peculiar to a port or trade. But the necessity of waiting, where a cargo is to be taken on board, until it can be obtained, is common to all ports and all trades. The length of time frequently employed in selling one cargo and procuring another, may assist in proving, that a particular vessel has, or has not, practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems so to have been understood, that the plaintiff could not recover, unless the jury should be of opinion, that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time *usually [*391 employed for that purpose might be evidence." This case, therefore, recognises the right to wait in port for the purpose of selling one cargo and

Columbian Insurance Co. v. Catlett.

procuring another; and the reasoning is employed solely to avoid a criticism founded upon some ambiguity of phrase peculiar to that case. On the other hand, the cases cited at the bar abundantly prove, that the usage and course of trade are very material to determine whether the delay be unreasonable or not. *Salvador v. Hopkins*, 3 Burr. 1707; *Vallance v. Dewar*, 1 Camp. 503; *Ongier v. Jennings*, Ibid. 505 n.; Phillips' Ins. 182-83.

The next question is, whether there has been a total loss? And this divides itself into two distinct considerations; first, whether the facts of the case created a right of abandonment as for a technical total loss? and secondly, if so, whether there has been a legal abandonment by the assured?

Upon the first point, there is not much room for difficulty. The insurance was not for a single passage, but for the round voyage, out and home. The cargo, in the course of the outward voyage, and before it was terminated (for the master had still an election to go to another port, after his arrival at Cape Haytien), was permanently separated from the ship, by the total wreck of the latter. It was a perishable cargo, and much injured by the accident, though it does not appear to be to the amount of one-half its value; and it was liable to still farther deterioration. There was a necessity, then, for an immediate sale at Cape Haytien, and the further prosecution of the voyage, with that ship, or that cargo, became impracticable. It was completely frustrated. Under such circumstances, we are of opinion, that, according to the established doctrine of the commercial law, it was a clear case of a technical total loss, on account of the breaking up of the voyage. It is a much stronger case than that of *Dorr v. New England Insurance Company*, 4 Mass. 232, or *Hudson v. Harrison*, 3 Brod. & Bing. 97, where the court held the losses total.¹

Was there, then, a due and legal abandonment? The letter of abandonment is admitted to have been sent in due *season, and, in its terms, *392] it amounts to a cession of the property. Under ordinary circumstances, it would furnish nothing upon which to suspend a doubt. The difficulty arises from two clauses in the particular form of policy used by this company. One is in the following terms: "In case of loss, the same shall be paid in sixty days after proof and adjustment thereof, without any deduction, except the amount of the premium, if then unpaid." The other is, "it is hereby agreed, that the insured shall not abandon to the insurers, until sixty days have elapsed after having given notice to them of his intention so to do, and of the loss or event which may entitle the insured thereto." The suit was not brought until after more than 120 days had elapsed from the abandonment made by the letter of the 5th of July. No question, therefore, arises on this head. But the argument is, that the notice of abandonment must, by the terms of the policy, precede the actual abandonment sixty days; and that, in the present case, either no notice at all of such intention has been given, or there has been no actual abandonment at the end of that period. The letter of the 5th of July must either operate as a notice of abandonment, or as actual abandonment; if the former, then there has been no act of abandonment following up the notice; if the latter, then it was made too soon, and contrary to the terms of the stipulation. Such is the stress of the argument.

¹ And see *Saunders v. Baring*, 34 L. T. 419, Q. B.

In construing these clauses, it is material to consider the intention of the parties, as expounded by the general principles of law applicable to the contract. By these principles, the assured, upon an abandonment in due season, for a technical total loss, acquires an immediate right of recovery against the underwriters. He is not bound to wait until they have signified their acceptance or refusal of the abandonment, if it be valid, nor, if accepted, is he bound to wait for payment, but he may immediately commence an action against them. The object of the first clause is, in the case of an undisputed loss, to obtain a delay of payment for sixty days after the adjustment. But from its very terms, it can only apply to the case where there has been proof of loss, and also an adjustment. If proof of the loss *has been offered, and no adjustment made, as in case of a disputed loss, the clause has been supposed, in the cases cited at [*393 the bar, not to apply. *Vos v. Robinson*, 9 Johns. 192 ; *Alleyne v. Maryland Insurance Company*, 6 Har. & Johns. 408. The underwriter is, then, understood to waive the privilege. The true object of the second clause is, to postpone the absolute right of abandonment, until sixty days after notice of the loss, so as to enable the underwriters to have time for deliberation upon the acceptance or rejection of it, when made, and to avail themselves of all intermediate events for their benefit. It is wholly unnecessary to consider, whether the assured, after a notice of abandonment, can retract, if the underwriters choose to insist upon accepting it ; or whether, if, instead of a mere notice, he tenders an unequivocal abandonment, which is accepted the underwriters, within the sixty days, he has, nevertheless, a right to withdraw it, if, within the same period, events turn up in his favor. The present case does not present any facts leading to such a question. The clause is manifestly introduced into the policy for the advantage of the underwriters, and not of the assured. But there is no necessity for giving any very strict interpretation to it, to accomplish the fair objects of its provisions. If Mr. Catlett had written a letter to the company, stating to them, that he thereby gave notice to them of the loss, and his intention to abandon, and had then added therein, that at the termination of the sixty days, they were to deem that letter an absolute abandonment, there could scarcely be a doubt, that such a letter would have been sufficient to satisfy the requirements of the clause. It would give to the underwriters the full benefit of it. If he had written, at the same time, two letters, one containing a notice of his intention to abandon, and the other that he made an abandonment, to take effect at the end of the sixty days after the notice, the same legal result would seem to be justified. The clause does not insist upon an abandonment being made *in presenti*, by an instrument dated at the expiration of the sixty days ; but only that it shall not, in point of law, be obligatory *as an abandonment, until that period. This seems to us a fair and rational exposition of the intention of the clause. In [*394 what respect does the letter of the 5th of July differ from the legal results above stated ? It is written with reference to the known language and stipulations of the policy, and it must now be interpreted, as it must have been understood, and, indeed, looking to the subsequent proceedings of the company, we may say, as it was understood by both parties. Neither of them seems to have acted upon the supposition, that any other, or more formal act of abandonment, was necessary. The letter gives notice of an

Columbian Insurance Co. v. Catlett.

intention to abandon, because, in its terms, it includes an actual abandonment. It has a tacit reference to the clause in the policy, and must be deemed as a notice to abandon, and at the same time, a declaration that it shall operate as an abandonment in the case, as soon as by law it may. In our judgment, it was a continuing act of abandonment, and became absolute, at the end of the sixty days. It was an abandonment *in presenti*, to take effect *in futuro*. Neither the form of the notice, nor the abandonment, is prescribed in the clause. They may be in one or two instruments; they may be in direct terms, or by fair and natural inference. It matters not how they are given or executed; it is sufficient, in point of fact, that they have been given or executed. Our opinion accordingly is, that upon the true interpretation of this last clause in the policy, the letter of the 5th of July was a sufficient notice of an intention to abandon, and that, at the expiration of the sixty days, it operated as an actual abandonment.

The abandonment, then, having been duly made, the next question that arises is, how the loss is to be apportioned. The argument on behalf of the company is, that as part of the cargo was landed at St. Thomas, the amount risked by them is to be diminished by their proportion of the cargo so landed. In short, that the loss is now to be made up by them, with reference to the value of the whole cargo on board, when the risk first attached, and not with reference to the value on board, at the time of the loss, notwithstanding it exceeded the amount insured. We are of a different opinion. We think the true intent and object of the policy was, to cover

*an insurance of \$10,000, during the whole voyage, out and home, so
*395] long as the assured had that amount of property on board. This is not a policy for a voyage to St. Thomas only, in which case, the argument might justly apply. But it is a policy to two other ports, on the outward voyage, and also for the homeward voyage. The language of the policy is, that the underwriters insure \$10,000, at and from Alexandria, and two other ports in the West Indies, and back to the United States. The premium is apportioned accordingly, for a half per cent. is to be returned "for each port not used or attempted;" and the contemplation of the parties manifestly is, that the premium should be paid during the round voyage, upon the full sum insured, and that the assured should have the full benefit of the insurance, so long as he had \$10,000 on board. The intermediate landing of a portion of the cargo, in the course of the voyage, was wholly immaterial, in the understanding of the parties, so long as the value on board was sufficient to cover the insurance. If the clause, usual in policies in the eastern states, as to priority of insurance, had been here incorporated, and there had been a subsequent insurance, this, as the prior policy, must have first attached, to the extent of the sum insured during the whole voyage. If there had been a subsequent insurance, without any such clause, it might form a case for contribution among the various underwriters; but would in no shape affect the rights of the assured. The loss, therefore, must be apportioned between the parties, in the proportion which the sum insured bears to the amount of value on board at the time of the loss, that is, as \$10,000 bears to \$12,328 $\frac{2}{3}$.

The next question is, whether the freight for the outward voyage is to be deducted from the salvage, and allowed the assured, who was owner of the ship as well as the cargo. The amount reported by the auditor is not

Columbian Insurance Co. v. Catlett.

disputed, and the controversy is, whether it is a charge upon the salvage, in the hands of the underwriters. In point of fact, no freight was or could be payable in this case, for the plain reason, that the assured was owner of the ship, and there could, therefore, be no lien upon the cargo or its proceeds for the same. But in point of law, the case is not supposed to be varied by *this circumstance; for if the freight would be a proper charge on [396 the salvage, if a third person were owner of the ship, in the hands of the assured, there is no reason why it should not be allowed, when the assured is owner. We consider the law on this point as conclusively settled. As between the owner of the ship and the owner of the cargo, the former has a lien upon the cargo, for all the freight which becomes due and payable to him, whether it be a full or *pro rata* freight. But freight is a charge upon the cargo, against which the underwriters do not, in any event, whether of abandonment with salvage, or of partial loss, undertake to indemnify the owner of the cargo. In order to obtain the salvage, when in the hands of the ship-owner, it may become necessary for the underwriters to pay the amount of the freight, for which they have a lien, as it may to pay any other charge created by the act of the owner of the cargo. But this does not change the nature or extent of the responsibility of the underwriters. As between themselves and the assured, they have a right to deduct the amount so paid from the loss, or to recover it in any other manner, as money paid for the use of the latter. This doctrine was expressly held by the court of king's bench, in *Baillie v. Modigliani*, Marsh. Ins. 628, and was confirmed in the fullest manner in this court, in *Caze & Richard v. Baltimore Insurance Company*, 7 Cranch 358.

It only remains to notice an objection made to the form of the declaration. It is said, that there is no averment in the declaration, that any preliminary proofs of loss were offered to the company, nor of any promise to pay in sixty days after such proofs, according to the terms of the policy, nor that any abandonment, or notice, was given to the underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. The abandonment and notice thereof are but matters of evidence, to establish the fact of a total loss, which is expressly averred in the declaration. As to the other part of the objection, it proceeds upon a mistake of the terms of the declaration. There is an express averment, after the allegation of the loss, that the company, on, &c., at, &c., had notice thereof, and by means thereof became liable, &c., and in consideration thereof promised, *that they would pay the plaintiff the sum due, "according to the [397 tenor and effect of the said policy of insurance." This is a sufficient averment of a promise to pay according to the stipulations of the policy, and conforms to the general course of precedents in pleading.

Upon the whole, it is the opinion of this court, that the judgment of the court below, so far as it allowed the freight of \$2041²⁵/₁₀₀ to the assured is erroneous, and ought to be reversed; and that, in all other respects, it ought to be affirmed.

JOHNSON, Justice. (*Dissenting*).—I concur with the court in all the points decided in this cause, except that which relates to freight. On that, it is my impression, that they have misapprehended the case, the question, and the doctrine on which it turns. If so, it is not to be wondered at, if it

should appear, that they have decided upon the authority of adjudications which have no bearing upon the case.

The great disadvantage of Catlett's cause, arises from the form in which this question is presented. It is raised in the adjustment of this loss, and comes up so confounded and blended with other matters, that it may well bewilder those who are more conversant with special pleadings, than with mercantile statements. To give this question a fair chance with a lawyer, it should have come up on an action instituted by the underwriters, to recover of the ship-owner money which arose from the proceeds of an abandoned cargo, and had been remitted to the owner. The questions on the subject of freight would then have been distinctly presented, to wit, whether the freight had been earned? and whether the owner had not a right to set it off against the proceeds of the abandoned cargo. And who would then entertain a doubt upon the subject? Would the ship-owner have been permitted to pay over the proceeds of the abandoned cargo to the underwriters, and take his remedy against the shipper of the goods? No one can imagine such a doctrine.

It is said, that the owner of the cargo shall, in no case, throw the freight upon the underwriter. But there are other interests always involved in such *398] cases, besides those of owner and underwriter of the cargo. The ship-owner has his rights, and is not bound to forego his lien on the cargo for the freight, and to look to an absent, or insolvent owner, or insurer, for indemnity. The master is his agent to receive the freight, as well as agent of the underwriter to remit the salvage, and has a right, nay, is bound, to take care of the interests of his employer. It is not, therefore, the owner of the cargo who throws the freight upon the underwriter, but the owner of the ship, in the fair exercise of his unquestionable rights. It is clear then, that the freight may be legally thrown upon the underwriters, by the act of another, even in opposition to the will of the insured. It must, then, be ascertained, whether the underwriter, who has thus had the freight thrown upon him, by having it deducted from the proceeds of the salvage, can recover it back from the insured. And in order to examine the question distinctly, we will suppose the case of a payment of a loss, before the freight has been thus thrown upon the underwriter; that is, before the proceeds of the salvage have been realized and remitted to the ship-owner, and by him applied to his own freight. And on what principle could a right in the insurer to recover back, in such an action against the assured, be maintained?

It must be recollected, that I am here speaking of the case of an abandonment, on a voyage in which freight has been earned. In cases of absolute total loss, no freight can be earned; but in that of a technical total loss, it is well known, that freight may be earned. It was not disputed in the argument, that freight, in this case, was earned; and the sufficiency of the abandonment to cast the loss upon the underwriters, is now decided. It is true, the underwriters did not accept the abandonment, and have not, by any express act, accepted the salvage, but they are doing it now, when they lay claim to the proceeds of the salvage remitted to Catlett. If they do not mean to be incumbered with the freight, let them withdraw their claim to the remittance, and Catlett then remains in possession of the cargo, subject to his lien for freight. The case must, then, be considered as one in which

Columbian Insurance Co. v. Catlett.

the *freight is earned and both the abandonment and salvage accepted; but the proceeds of the latter remitted to the ship-owner, and by him retained for freight. The question will be, whether, in such a case, the underwriter, who has thus been compelled, in effect, to pay the freight, can recover it, in any form of action, from the assured?

What is the effect of a valid abandonment? The right here contended for is, "the right to pay the freight out of the salvage." It is not true, in a sense applicable to this case, that the assured has no right to throw the freight upon the insurer. The right to abandon positively implies the right to throw the freight upon the underwriter indirectly. It is a right to charge him with a total loss, and if he gets nothing from the wreck, the assured has only asserted his rights against him to their acknowledged extent. It is a right to convert a partial actual loss, into a technical total loss. There is one technical total loss familiarly known to lawyers and merchants, which occurs without abandonment. I mean, where the goods saved are less in value than the freight. There is a complete analogy between the two cases; and in the latter case, it is expressly adjudged, and so laid down by the best elementary writers, "that the insured has a right to apply the salvage to pay the freight (2 Marsh. Ins. 588), giving credit for the balance only to the underwriter." (Ibid. 619.) And this is precisely the right which Catlett contends for in the present case. The right so to apply the salvage results unavoidably from the received and acknowledged consequences of the right of abandonment.

Take the familiar case that occurs every day, in time of war. A vessel is captured by an enemy; the insurer on the cargo hears of it, tenders his abandonment, and it is accepted and paid. Who, at that period, would think of making a discount of the freight from the policy? It has not been earned; the assured never was liable for it. But the ship is rescued by her crew, proceeds on her voyage, arrives in safety, and delivers her cargo. Here freight is earned, and must be paid; but by whom? Certainly, not by the shipper, for he is divorced from the adventure, and the goods as much *the property of the underwriters as if they had purchased and shipped them. I have mentioned the case of an accepted [*400 abandonment; but the effect of a valid abandonment is the same as if it had been accepted.

In the case at bar, at what point of time did the transfer of interest take place? Certainly, at the instant when the accident happened. The abandonment has the same effect as if the owner and insurer had been on board, and the abandonment made at the moment the misfortune occurred. But freight had not then been earned; the liability for it had not attached on the assured; and in the eye of the law, as between him and the underwriter, it could no more attach on him, than if the cargo had then gone to the bottom. By the abandonment, it is, as to him, as if it had gone to the bottom. The law places it in that situation, by declaring it a total loss; and the language of the books on this subject is, "that he ought not to be placed in a worse situation than if the cargo had gone to the bottom." (*Boyfield v. Brown*, 2 Str. 1065.) The assured never incurred the liability for the freight, but the underwriter did; for when the freight was earned, he stood in the place of the assured.

In arguing to show that a liability for the freight never did attach upon

the assured, as between him and the underwriter, I have considered the transfer by abandonment as taking place at the moment of the accident. But as to the effect of the abandonment, the law goes further, and considers the underwriter in the light of the owner from the commencement of the voyage. (Marsh. Ins. 601-2.) Upon this principle it is, that in the case of a ship insured and abandoned, the underwriter is entitled to whatever freight she may afterwards earn. In the language of Mr. Marshall, "the insurer becomes the legal assignee and owner, and from that time he is liable for all her future outgoings, and, consequently, entitled to all her future earnings." But if entitled to freight to be earned by the ship, why should not the cargo in his hands remain liable for freight to be afterwards incurred? Liability in the one instance is the correlative of right in the other. It is altogether a mistake, to call this charging the underwriter with the freight.

*401] The *proposition affirmed is, that the abandonment does not discharge the cargo from the lien for the freight, to which it was subject in the hands of the assured. Even in the hands of the owner, this liability was not unlimited and unconditional; for if damage is incurred (by perils of the sea, not from internal decay), and the salvage goods will not pay the freight in value, the owner is not bound to receive them. Of his interest in this behalf, he may judge for himself; it is only when he does receive them, that he must pay. And this is precisely the alternative which Catlett holds out to the underwriter.

There is a very strong, and I think, conclusive adjudication on this subject, to be found in the third volume of the Massachusetts reports; it is the case of *Fotheringham v. Prince*, p. 563. Wages are to the ship what freight is to the cargo; a contingent liability attaching only on the fulfilment of the contract. In the case referred to, a vessel had been insured from St. Ubes to a port of discharge in the United States. She was cast away on Cape Cod, and abandoned, but the salvage was sufficient to pay the wages, and the proceeds were remitted to the underwriters. The wages were thus earned, and the owners were compelled to pay them, and now brought suit against the underwriters, counting as well for money had and received, as on the policy. The court decided, that the underwriters were bound to refund the money paid for wages, by the owner; and the adjudication is in principle precisely what is here contended for in behalf of the plaintiff below. Had the salvage in this case been remitted to the underwriters, and Catlett brought his action for money had and received to recover his freight, it would have been a case on all-fours with the present.

It has been supposed, that to decide that point against the underwriters, would be to make them liable for two insurances, upon receiving one premium; that it would be making them liable for both freight and cargo, upon a premium received only on the cargo. But it may be truly said, that the inconsistency is on the other side; the argument is directly in point, in favor of this claim for freight. This decision is not only making

*402] *Catlett liable on the cargo, where he was his own insurer for the freight only, but is making him lose his freight, after he had earned it, and pay it into the pockets of underwriters, who had never insured it, and therefore, could not acquire it by abandonment. Suppose, another company had insured the freight, in this instance, and Catlett had abandoned to them,

Columbian Insurance Co. v. Catlett.

can it be doubted, that if the proceeds of the salvage had been remitted to the insurers on the cargo, the insurers on the freight would have been entitled to recover it of them? If so, Catlett is entitled to it, for he was his own insurer on the freight. Whether we consider him as having insured, or having earned it, his right is incontestible.

But it is supposed, that the cases of *Baillie v. Modigliani*, and of *Caze & Richaud v. Baltimore Insurance Company*, have established a contrary doctrine. It appears to me, that it is by placing too much confidence in the general language of indexes, and marginal notes, and misapprehending the doctrine on which this case turns, that the mistake arises. We have nothing but a manuscript report of that case of *Baillie v. Modigliani*, and obviously one for which the learned judge, by whom the decision was made is very little indebted to his reporter. We find in it a mass of correct principles, thrown together, without order, and without object, and which I make no doubt, is the skeleton of a very learned and correct opinion; and one which, had we the whole of it, would have furnished a full exposition of the doctrine of this case, as well as of that. But, as a decision, the case of *Baillie v. Modigliani* does not touch the present case. For, in that case, there was no abandonment; the cargo was sold in France, with the benefit of the *pro rata* freight, and the owners wished to charge the underwriters with the freight so paid, as a loss incident to the capture. The question in the present case did not arise there, and could not arise in any case that does not comprise in it both the ingredients of technical total loss, and freight earned. That was a case of partial loss, and what the judge chose to say about the doctrine of the case of a total loss, was mere *gratis dicta*. It would be but charity, or an act of *justice to his learning, to suppose, that if he ever did utter the words attributed to him, to wit, "In [403 case of a loss, total as between the insurer and assured, with salvage, the owner may either take the part saved, or abandon, but in neither case can he throw the freight upon the underwriters; because they have not engaged to indemnify him against it, and have nothing to do with it"—that he had in mind the only sense of those words in which it was possible that he could be correct; which was, "that they could in no case raise a personal charge for freight, against the underwriters, where sufficient salvage to pay the freight had never come to their hands." In any other sense, every merchant on the exchange of London could have told his lordship that he was incorrect. To have obtained from the learned judge a decision applicable to the present cause, the question should have been propounded to him, as applicable to a case of technical total loss, with salvage sufficient to cover the freight. The answer would then have been rendered in the language of the books, a language on this subject equally that of lawyers, merchants and insurers, "Where freight is earned, the assured, in the case propounded, has a right to apply the salvage to the payment of freight;" which is, in so many words, what Catlett contends for in the present cause.

I have reasoned all along on the assumption that it makes no difference in principle, whether the vessel and cargo be owned by the same individual, or by different persons. I consider it unquestionable, and even conceded; and, indeed, where the cargo is insured, and the vessel not, after abandonment, the underwriter is, in the eye of the law, an owner *ab origine*, of the cargo, and so distinct from the ship-owner. In the case of *Caze & Richaud*

Columbian Insurance Co. v. Catlett.

v. *Baltimore Insurance Company*, 7 Cranch 358, the counsel attempted to draw a distinction ; but the court did not listen to it, and in their decision obviously consider it as immaterial to the question before them.

The case of *Caze & Richaud* is that which is relied on as most fatal to the claim of freight in the present cause ; but to me it appears as plain as an axiom, that the court have themselves made it a different case, and *404] adjudged *it to be no authority against the present claim. No one pretends, that Catlett could have retained for freight, if no freight had been earned. But this is the express decision of the court in the case of *Caze & Richaud* ; and if there was no freight due, of what consequence to the decision was it, to say, "that it was no lien upon the cargo," or that "the underwriters could not be made to pay the freight?" The proposition was equally true, of the most indifferent person. It is of no consequence, as to the bearing of that decision upon this case, to inquire whether the court were right or wrong in deciding that no freight was earned. In so deciding, they have made it a different case from this in an indispensable circumstance, the earning of freight ; and plainly shown, that they could not have had in contemplation, to decide a case in which freight had been earned, which is the present case. I believe, myself, that we were wrong in every line of that decision ; that it will not stand the test of commercial law in any one of the three propositions that it lays down.

The case was this : a vessel and cargo, belonging to the same owner, sailed from Bordeaux for this country ; the cargo was insured, the vessel and freight not ; on her voyage, there being war between Great Britain and France, she was captured and carried into Halifax, having then crossed the Atlantic, and gone three-fourths of the way on her course to her port of destination. The cargo was abandoned, and vessel and cargo both condemned ; but on an appeal, the condemnation was reversed as to both. It is mentioned in the report, that there was no appeal "as to the freight ;" but the case is defective, in showing whether separate claims were filed for ship and cargo, or the two included in a joint claim by the owner. If joint, the question of freight could not have arisen. But if, as seems probable from the proceeds of the cargo passing into the hands of the underwriters, the claims were several, then a question may be raised, whether the plaintiff was not concluded, by his acquiescence in a judicial decision of a competent tribunal, against the claim to freight. This would have sustained the judgment against him in this court, had there been no other obstacle to his *405] recovering. *As the abandonment was accepted, and the sum insured paid, the proceeds of the cargo got into the hands of the underwriters, and that suit was instituted for money had and received to the use of the ship-owner. Had he preferred this claim against the proceeds of the cargo, while lying in the registry of the British admiralty, there cannot be a doubt, that it would have been adjudged to him, in the distribution of the money among the several claimants.

The three propositions which the opinion affirms in the case of *Caze & Richaud*, are, 1. That under no circumstances can be assured throw the freight upon the underwriters, even by abandonment. 2. That no freight, even *pro rata*, was earned in that cause. 3. That the lien of the owner on the cargo for his freight could not affect the question.

On the first point, no one will pretend to maintain the affirmative as a

Columbian Insurance Co. v. Catlett.

general proposition. Losses are either total, partial, or technically total. Upon an actual total loss, no question of freight can ever arise, for there is no freight earned. In the case of partial loss, it is never admitted in adjustments: and this is the full import of the decision in *Baillie v. Modigliani*, and in the case of *Gibson v. Philadelphia Insurance Company*, and some others. It is a charge payable after the arrival of goods at their port of destination, and therefore, never admitted into an adjustment of a partial loss. The cases of technical total loss are of two kinds, as has been before noticed; the one with, the other, without, abandonment. It is not contended, that, even in these, the assured can throw the freight upon the underwriters, otherwise than incidentally by abandonment. It has been shown, that this is not the principle at all, upon which the doctrine insisted on by Catlett rests, and may, therefore, be safely conceded to the case of *Modigliani*, and all others in which these *dicta* are to be found. The principle is, "that the owner cannot, by his abandonment, divest the lien which the ship-owner has in the goods abandoned." That the underwriter takes the cargo *cum onere*—a rule which is held sacred even against hostile capture (*Der Mohr*, in 3 and 4 Robinson). The law is, that the master is not bound to part *with his cargo, and fails in his duty, if he does, until his freight is paid. Why should he be so bound, any more in the case of the [406 transfer by abandonment, than in any other transfer? In that class of technical total losses, which arises where the freight incurred exceeds the value of the thing saved, it is expressly decided, that the right to apply the salvage to the freight exists; and it is impossible to draw a distinction between that class of cases, and the cases of technical total loss produced by abandonment. The full latitude of the assertion, therefore, that the assured cannot throw the freight upon the insurer, may be conceded, without affecting the right of the party to freight in the present case. The rule is rightly laid down, but its application is mistaken.

The same observations dispose of the third position assumed by the court in *Caze & Richaud*, since it must be obvious, that the lien of the ship-owner on the cargo is all important to the question. The right to apply the salvage to the freight, grows out of the right of the master to hold the cargo for the freight, whatever change of interest may be produced in it by the act of the owners of the cargo. The consideration of the second proposition of the court in *Caze & Richaud's Case*, is not material to this cause, any further than it shows that they considered themselves as deciding a case the very reverse of the present. Yet so convinced am I, that the decision there made against a *pro rata* freight was a hasty decision, that I will conclude with expressing a hope that, if ever the subject should again come before this court, it will pause and examine the doctrine, without prejudice from that decision, since it is one which involves principles of great interest to the mercantile world, and on which, I will undertake to say, if ever that case should be reviewed, there will be found a vast deal of learning and authority against the decision, and very little to sustain it. In the very case which the court profess to decide, the case of *Baillie v. Modigliani*, the same *pro rata* charge was paid and acquiesced in by the court and the bar, without a question.

*Upon the whole, I never was clearer in any opinion in my life, [*407

Columbian Insurance Co. v. Catlett.

than that the decision now rendered against the allowance of freight in this adjustment, is not to be sustained by either principle or authority.

After the opinion of the court was delivered in this case, the parties ascertained, that the auditor's report was incorrect (by the disallowance of the freight), in some other respects, and required a different adjustment; and application was accordingly made for a hearing upon these points. The following additional opinion was subsequently delivered by the court.

March 15th. STORY, Justice.—In consequence of the former opinion delivered in this cause, the parties have found it necessary to readjust the auditor's report in several particulars, not suggested at the former argument. Indeed, upon that argument, the parties assumed that the report was perfectly correct, except as to the item of freight. We have examined the report, and are satisfied, that the original plaintiff is entitled to recover the sum of \$6626.18, with interest from the 14th of October 1822, which is the residue of the sum of \$10,000 insured by the company, deducting the premium note and the proportion of salvage belonging to the underwriters, which has been received by the original plaintiff; and the judgment of the circuit court is to be reformed accordingly.

JUDGMENT.—This cause came on, &c.: On consideration whereof, it is ordered and adjudged by the court, that there is error in so much of the judgment as allowed to the said Catlett, as freight to be deducted from the salvage, the sum of \$2041.25: And it is further ordered and adjudged, that upon the reformation of the auditor's report, required by the disallowance of the freight aforesaid and otherwise, there is now due and payable to the said Catlett the sum of \$6626.18, together with interest thereon, from the 14th of October 1822, the said sum being the balance of the sum of *408] \$10,000 insured, after *deducting the amount of the premium due on the policy, viz., \$376, and also the proportion of the salvage belonging to the said Columbian Insurance Company, viz., \$2997.82, received by the said Catlett; and that the judgment of the circuit court, to the amount of the said sum of \$6626.18, and interest thereon from the 14th of October 1822, be and hereby is affirmed; and as to the residue of the said judgment, be and hereby is reversed: And the cause is to be remanded to the said circuit court, with directions to enter judgment for the said Catlett accordingly: the parties in the court below to be at liberty to open the auditor's report, so far as respects the item for \$480, the proceeds of the doubloons, and the item for \$719.37 paid over to Captain McKnight; and the judgment to be varied by the circuit court as these items may be found for either party; execution, however, to be granted immediately for the balance of the judgment, deducting the said sum of \$719.37.

The GENERAL INTEREST INSURANCE COMPANY, Plaintiffs in error, v.
RUGGLES, Defendant in error.

Marine insurance.—Fraud of master.

Where an insurance was effected, after a loss had happened, though unknown to the assured, the master having omitted to communicate information to the owner, and having expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which, information of the loss had not reached the parties, at the time the policy was underwritten: *Held*, that the owner having acted with good faith, was not precluded from a recovery upon the policy, on account of the fraudulent misconduct of the master.¹

Ruggles v. General Interest Insurance Co., 4 Mason 74, affirmed.

*ERROR to the Circuit Court of Massachusetts.

[*409

February 27th, 1827. This cause was argued by *D. B. Ogden* and *Wheaton*, for the plaintiffs in error, citing *Park. Ins.* 209, 320 ; 1 *T. R.* 12; 1 *Maule & Selw.* 35 ; 9 *Johns.* 32 ; *Phil. Ins.* 82, 97 : and by *Webster* and *Bliss*, for the defendant in error.

March 12th. THOMPSON, Justice, delivered the opinion of the court.—This is an action on a policy of insurance, bearing date the 9th of February 1824, for \$3000, on the sloop *Harriet*, lost or not lost, at and from Newport, Rhode Island, to, at and from, all ports and places to which she may proceed in the United States, during the term of six months, beginning on the 12th of January 1824. And also, \$600 property on board said sloop, at and from Newport to Charleston or Savannah, or both. The sloop, whilst proceeding on her voyage, and within the term of six months, to wit, on the 19th of January, was wrecked on Cape Hatteras, and both vessel and cargo wholly lost. An abandonment was, in due time, made, and a total loss claimed. The case comes before this court upon a bill of exceptions taken to the directions given by the circuit court for the district of Massachusetts, to the jury, upon the law of the case.

The loss, it will be seen, happened on the 19th of January, and the policy was not effected until the 9th of February. And the question upon the trial turned upon the legal effect and operation of the misconduct of the master, after the loss occurred. It was proved, that the master, immediately after the loss, for the purpose, and with the design, that the owner, not hearing of the close of the vessel, might effect insurance thereon, did express his intention not to write to the owner, and took measures to prevent the fact of the loss being known ; and that by the conduct of the master in this particular, and in consequence of the measures adopted by him to suppress intelligence of the loss, knowledge thereof had not reached the parties, at the time the policy was underwritten.

*Upon these facts, the court instructed the jury, that although it was the duty of the master to give information of the loss to his owner, as soon as he reasonably could, yet that, in the present case, when there had been an abandonment in due time, for a loss really total, if the owner, at the time of procuring the insurance, had no knowledge of the

[*410

¹ *S. P. Kohne v. Insurance Co. of N. America*,
1 *W. C. C.* 93 ; *Patton v. Janney*, 2 *Cr. C. C.*
71 ; *Clement v. Phoenix Ins. Co.*, 6 *Bl. C.*

C. 481 ; *Folsom v. Mercantile Mutual Ins. Co.*,
8 *Id.* 170.

General Interest Insurance Co. v. Ruggles.

loss, but acted with entire good faith, he was not precluded from a recovery. Nor was the policy void, by the omission of the master to communicate the information ; or by his acts, in suppressing intelligence of the loss, although such omission and acts were wilful, and resulted from the fraudulent design to enable the owner to make insurance, after the loss ; the owner himself not being conusant of such acts and design, at the time of procuring the insurance. And under this direction, a verdict was found for the plaintiff for a total loss.

The statement of the case admits fraudulent misconduct on the part of the master, by reason whereof, the policy was effected, before any knowledge of the loss reached the assured, or the underwriters ; but that the assured was entirely ignorant of this misconduct in the master ; and that, on his part, there was the most perfect good faith in procuring the policy. Here, then, is a loss thrown upon one of two innocent parties ; and the question is, by which is it to be borne? The determination of this question must depend, in a great measure, if not entirely, upon the relation in which the master stood to the respective parties, when this misconduct occurred. If the loss of the vessel had been occasioned by any misconduct of the master, short of barratry, whilst in the prosecution of the voyage, and before the loss happened, or if, at the time this misconduct is alleged against him, he was the exclusive agent of the owner, for any purposes connected with procuring the insurance, the owner must bear the loss. But if, after the loss, the agency of the master ceased, and was at an end, or if he, in judgment of law, became the agent of the underwriters, his misconduct cannot be chargeable to the assured.

The researches of counsel have not furnished the court with any adjudged cases, either in the English or American courts, which seem to have decided this question. Some *have been referred to, which *411] have been urged as having a strong bearing upon the point, but which, on examination, will be found distinguishable in some material facts and circumstances. The precise point, therefore, now before the court, may be considered new, but we apprehend it is to be governed by the application of principles understood to be well settled in the law of insurance.

It is important to understand, with precision and accuracy, the relation in which the master stood to the owner of the vessel, at the time when he was guilty of the fraud and misconduct imputed to him. It was, after the loss occurred, and at a time when there had been a total destruction of the subject insured, over which the master's agency had extended.

The case has been argued on the part of the underwriters, as if the agency growing out of the relation of master and owner of the vessel, existed at this time ; and that the assured was responsible for all consequences arising from the misconduct of the master ; and that the law would presume, that whatever was known to the master, must be considered as impliedly known to the owner. These propositions may be true, when applied to a state of facts properly admitting of such application ; but cannot be true, to the extent to which they have been urged in the present case. If the owner is presumed to know whatever is known to the master, there could be no valid policy effected upon a vessel, after she was, in point of fact, lost. Such lost must be known to the master ; and if it follows, as a legal conclusion, that it is known to the owner, the policy would be void.

General Interest Insurance Co. v. Ruggles.

Nor, upon this doctrine, could there ever be any insurance against barratry, or any other misconduct of the master; for his own acts must necessarily be known to himself. And, indeed, the principle, pressed thus far, would render it impracticable ever to have any guarantee whatever against the fraud or misconduct of an agent, any more than against that of the principal himself. The knowledge of the agent, therefore, with respect to the fact of loss, cannot affect the insurance; nor could the knowledge of the owner himself, with respect to such loss, affect the insurance in all *cases. Suppose, the owner should himself be the master, or be on board, having left orders with an agent to procure insurance, in a [*412 given time, unless he should hear from him, or have information of the arrival of the vessel at her port of destination; and the vessel should be lost, the day before the policy was underwritten, and at a distance that rendered it impossible that information thereof could reach the agent, would such a policy be void? No one could certainly maintain such a proposition. And it is by no means an unfrequent practice, to obtain insurance in this way. It is not, therefore, true, as a universal rule, that either the fact of loss, or the knowledge of such fact, by the agent, or the principal, at the time the policy is procured, will vacate it. But such knowledge must be brought home to some of the parties or agents connected with the business of procuring the insurance; and then the rule properly applies, which puts the principal in place of the agent, and makes him responsible for his acts; there is then the relation of principal and agent in the subject-matter of the contract. But the master, in his character as master, has no authority to procure insurance, nor is he, in any sense, an agent for such purpose, or in any way connected with it. There may, undoubtedly, be superadded to his powers and duties as master, an agency in other matters, to effect insurance or any other lawful business; but in his appropriate character of master, the law considers him an agent, only for the navigation of the vessel, and in such matters as are connected with, and incident to, such employment. And when the books speak of the master's being agent of the owner, they are to be understood in this sense. He is not to be considered as the general agent of the owner, for all purposes whatsoever that may have connection with the voyage. He is a special agent for navigating the vessel, and can neither bind nor prejudice his principal, by any act not coming properly within the scope and object of such employment. Unless the powers of agents are thus limited, no man could be safe in the transaction of any business through the agency of another. The master, in his character as such, had certainly no authority to procure insurance. He could not bind the owner by such a contract; and if he could not, why should his *acts, totally unconnected with the business of procuring the insurance, render void a contract entered into, in good faith, in all parties [*413 having any concern in the transaction? It is a general rule, applicable to agencies of every description, that the agent cannot bind his principal, except in matters coming within the scope of his authority; and this rule applies particularly to a master and owner of a vessel, and is construed with considerable strictness. Thus, in the case of *Boucher v. Lawson*, Cas. temp. Hardw. 85, and Abbott 119, the action was against the owner of a ship, for goods lost by the carelessness of the master; and judgment was given for the defendant, because it did not appear that the ship was usually

General Interest Insurance Co. v. Ruggles.

employed in carrying goods for hire. For Lord HARDWICKE said, no man could say, that the master, by taking in goods of his own head, could make the owners liable.

It is a little difficult to perceive, how, in any legal sense, the relation of principal and agent could exist, at the time when the misconduct of the master is alleged to have taken place. So far as he was agent for navigating the vessel, it had terminated, by the absolute destruction of the subject. The agency would seem to have ceased from necessity; there was nothing upon which it could act. Had there not been a total loss of the vessel, there would have remained a duty and legal obligation, on the part of the master, to use his best exertions to save what he could from the wreck. But when the subject-matter of the agency becomes extinct, it is not easy to understand, how, in any just sense, the agency can be said to survive. There might be a moral duty resting on the master, to communicate information of the loss to his owner. But how could there have been any legal obligation binding upon him to do it? The information could neither benefit nor prejudice the owner. It is a general rule of law, that if an injury arises to a principal, in consequence of the misconduct of his agent, an action may be sustained against him for the damage. Could an action in this case be sustained by the owner against the master, for not giving him information of the loss? and if not, it would seem to follow, as a necessary consequence, that the owner could not be prejudiced by his acts.

*414] But suppose, the agency of the master not to have terminated, but that, in judgment of law, he was the agent of some one. The question recurs, whose agent was he? The answer cannot admit of a doubt. If agent at all, he was, by operation of law, the agent of the underwriters. The policy, taking the risk on the vessel and cargo, lost or not lost, although effected after the loss happened, related back; and by the abandonment, the underwriters were substituted in the place of the assured; and the master, although the agent of the owner, until the loss occurred, became, upon the abandonment, the agent of the underwriters. The law upon this subject is well settled, where there is only a technical total loss, and any part of the subject insured remains; the interest in the salvage, whatever it may be, becomes transferred to the underwriters, and the agency is, of course, transferred with the subject; and the agent, thereafter, becomes responsible to the underwriters for the faithful discharge of his trust. No action could be sustained against him by the assured, for the proceeds, or any misconduct in the management thereof. This is not only the settled rule of law, but a contrary doctrine would involve the greatest absurdity. It would be placing the absolute interest in the property in one party, and making the agent accountable for its management to another. No action could be sustained by the assured, for the plain reason, that he would have no interest in the subject of the agency. And if such would be the effect of an abandonment, in case of a technical total loss, there can be no good reason assigned, why the rule should not be applied to a loss really total, so far as to transfer whatever agency could remain. So that, whether the agency terminated by the total destruction of the subject, or was transferred, by the abandonment, to the underwriters, the misconduct of the master could not prejudice the rights of the owner. The connection of principal and agent was dissolved, and they stood towards each other as mere strangers,

so far as any legal responsibility could be involved in the conduct of the master. Such we apprehend to be the result of the application of well-settled principles of law to the facts and circumstances presented by the bill *of exceptions, in the absence of any authority to govern [415 the case.

We will proceed, then, briefly to notice the cases that have been supposed to have a bearing upon this question favorable to the underwriters. In *Fitzherbert v. Mather*, 1 T. R. 12, the fraud or concealment relied upon to avoid the policy was, that one Thomas, who, on the 16th of September, and before the loss happened, had written a letter to the agent of the assured and put it in the post-office, but the mail did not leave the place, until the afternoon of the next day, before which time, and on the morning of the 17th, he knew of the loss, but did not withdraw his letter from the post-office, nor write another giving information of the loss. Here was, then, a palpable case of gross negligence, if Thomas was to be considered the agent of the assured; and that he was, appears not only to have been assumed by the whole court, but the conclusion is fully warranted by the facts in the case. The assured, in his letter to Fisher, who procured the insurance, directed him to procure it, on receiving the bills of lading; which bills, it appears from the case, were to be sent to him by Thomas. The letter and information from Thomas was, therefore, made the foundation of the insurance, and the assured adopted Thomas as his agent, by directing Fuller to procure insurance, on receiving the bills of lading from him. It was, therefore, a case of concealment or misrepresentation, by one who stood in the relation of agent of the assured, in the subject-matter of the contract, and whose information lay at the foundation of it.

The case of *Stuart v. Dunlop*, 4 Bro. P. C. 320, and *Park Ins.* 209, decided in the House of Lords, is very imperfectly reported, the reasons of the judgment, and the ground on which the decision rested, not appearing in any report of the case. Enough, however, is shown, from the statement of facts, to put the decision upon the plain ground, that the policy was procured by an agent of the assured, expressly instructed by him to obtain the insurance; he, the agent, having grounds to suspect a loss of the ship, which grounds were not communicated to the underwriter; and besides this, there was enough to afford strong suspicion, that *the [416 assured himself knew of the loss. The men who arrived at Greenock, knowing of the loss, communicated the information to the friend and intimate acquaintance of the assured, who desired it might be concealed. The same day, this friend held a conversation with the clerk of the assured, and asked him, if he knew whether there was any insurance upon the vessel, and if there was any account of her; and, after this, the assured directed this clerk to write to get insurance. The case was open to strong suspicion, that the friend of the assured had communicated to him the information he had received of the loss, which would have been a plain ground for declaring the policy void. But if such a conclusion is not fairly warranted, there was enough communicated to the clerk, to lead him to suspect a loss had happened; and he being the agent employed to procure the insurance, his principal was properly chargeable with all the information he had in relation to the loss.

The case of *Andrews & Boerum v. Marine Insurance Company*, 9

Johns. 32, does not seem so have much bearing upon this point. The decision turned upon a question of fact, whether there was such gross negligence, or constructive fraud, as to vacate the policy. There was no question of agency involved in the decision. The master of the vessel was part-owner, and one of the insured, and there was no point raised as to his legal obligation to use ordinary diligence in giving information of the loss to his co-owners; but the court considered, that, under the circumstances of the case, he was not chargeable with such negligence as to vacate the policy. But what would have been the result, if the doctrine now contended for had been applied to that case? If what is known to the agent is considered as impliedly known to the principal, with much more propriety should the knowledge of one part-owner be imputable to all. And the policy must have been held void, because procured with implied knowledge of the loss.

The case of *Gladstone v. King*, 1 Maule & Selw. 35, did not turn upon the question now before the court. The claim was for an average loss upon the ship, in consequence of an injury received, before the policy was effected. The defence set up was a concealment of this fact, or negligence in the *master in not mentioning it, in a letter written to his owners, *417] after the injury had been received, and before the policy was underwritten. The policy, however, took up the vessel from commencement of the voyage, and would, of course, cover the injury. The court considered the concealment material, and that the underwriter ought not to be charged with the loss. They did not, however, decide the policy to be void, which would seem to have been the necessary consequence of a material concealment, according to the principles of insurance law. But they exonerated the underwriter, by the application of what was avowed to be a new principle; that this antecedent damage should be considered an implied exception out of the policy; and this principle, say the court, although new, is adopted as being consistent with justice and convenience.

It is unnecessary to say, whether, to such a case, arising here, we should think proper to adopt and apply this new principle. It is enough, for the present, to say, the principle does not apply to the case now before us. It may, however, be observed, that the decision in that case, so far, at least, as it went to exonerate the insurer from the payment of the average loss, may be supported upon well-settled rules. Information of the injury was withheld by the master, whilst he was acting in his appropriate character of master, and, as such, was the exclusive agent of the owner, and for whose negligence he alone was responsible. And from what fell from Lord ELLENBOROUGH, upon the trial, it may be presumed, this letter was shown to the underwriter, and, if so, it amounted to a representation that the vessel had sustained no injury at the date of the letter. But unless the case is imperfectly reported, it would be difficult to sustain it, upon principles heretofore understood to govern analogous cases.

These are all cases cited on the argument, on the part of the underwriters, which are supposed to have a bearing upon the present question. We think, however, they are distinguishable, in many material circumstances, and particularly in this, that the fraud or concealment, which was held to *418] vitiate the policies, was traced to some agent, having connection, in some way, with procuring the insurance: and the *agency was, there-

fore, concerning the subject-matter of the contract. It is, no doubt, true, with respect to policies of insurance, as well as to all other contracts, that the principal is responsible for the acts of his agent; and that any misrepresentation, or material concealment, by the agent, is equally fatal to the contract, as if it had been the act of the principal himself. But such responsibility must, of necessity, be limited to cases where the agent acts within the scope of his authority. In the present case, the master was clothed with no authority or agency, in any manner connected with procuring insurance. The misconduct charged against him occurred, not whilst he was acting as master, but at a time when the relation of master and owner may well be considered as dissolved, from necessity, by reason of a total destruction of the whole subject-matter of the agency; and if not, the master, by the legal operation of the abandonment, became the agent of the underwriters, and was their agent, at the time of his alleged misconduct.

It is said, that, if this is a new question, the court should adopt such rule as is best calculated to preserve good faith in effecting policies of insurance. But it is by no means clear, that this end would be best promoted, by adopting the rule contended for on the part of the underwriters. Cases may very easily be supposed, where negligence or misconduct in agents of underwriters, as to matters not immediately connected with effecting a policy, will still have a remote influence, which may have a tendency to prejudice the interest of the assured. Such cases, however, as well as those of the description now under consideration, will most likely be of rare occurrence, and nice and minute distinctions practically operate unfavorably on the business of insurance.

If underwriters feel themselves exposed to fraudulent practices in such cases, the protection is in their own hands, by not assuming any losses that may have happened prior to the date of the policy. It is considered a hazardous undertaking to insure, lost or not lost, and a proportionate premium is demanded, according to the circumstances stated, to show the probability or improbability of the safety of the subject insured.

*Although no adjudged cases, directly applicable to the one before us, have been found, we do not consider this decision as establishing [*419 any new principle in the law of insurance, but as grounded on the application of principles already settled, to a new combination of circumstances.

Judgment affirmed.

BROWN and others, Plaintiffs in error, v. STATE OF MARYLAND, Defendant in error.

Constitutional law.—State licenses.

An act of a state legislature, requiring all importers of foreign goods by the bale or package, &c., and other persons selling the same by wholesale, bale or package, &c., to take out a license, for which they shall pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the constitution of the United States, which declares that "no state shall, without the consent of congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares, that congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes."¹

ERROR to the Court of Appeals of Maryland. This was an indictment in the city court of Baltimore, against the plaintiffs in error, upon the second section of an act of the legislature of the state of Maryland, passed in 1821, entitled, "an act supplementary to the act laying duties on licenses to retailers of dry goods, and for other purposes."

The second section of the act provides, "that all importers of foreign articles or commodities, of dry goods, wares or merchandises, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, *bale *420] or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act, to which this is a supplement." The penalties and forfeitures prescribed by the original act, which was passed in 1819, were, a forfeiture of the amount of the license tax, and a fine of \$100, to be recovered by indictment.

The defendants having demurred to the indictment, a judgment was rendered upon the demurrer against them, in the city court, which was affirmed in the court of appeals, and the case was brought, by writ of error, to this court.

February 28th. *Meredith*, for the plaintiffs in error, contended, that the law in question was an unconstitutional exercise of the taxing power of Maryland. He did not deny the existence of such a power. As a necessary incident to sovereignty, it belonged to the several states, before the adoption of the constitution, and it still belongs to them, subject, however, to the

¹ A state has no power to impose a tax on the amount of sales, made by an auctioneer, of imported goods, in the original packages. *Cook v. Pennsylvania*, 99 U. S. 566. Nor to tax sales by brokers, of foreign merchandise, in the original packages, as imported; imported goods are not liable to state taxation, until they enter into the mass of general property, either by a sale, or by breaking up the original packages, by the importer. *People v. Moring*, 3 Keyes 374. So, a state law imposing a discriminating license tax upon non-resident traders, is unconstitutional.

Ward *v. Maryland*, 12 Wall. 418. A license tax for the sale of goods is, in effect, a tax upon the goods themselves; and therefore, a law requiring the payment of a license tax by persons who go from place to place, for the purpose of selling goods, not the produce of the state, is void. *Wilton v. Missouri*, 91 U. S. 275. A state cannot discriminate against the vendees of goods brought from other states and countries. *Guy v. Baltimore*, 100 Id. 434. s. p. *Tiernan v. Rinker*, 102 Id. 123. See *Machine Co. v. Gage*, 100 Id. 676.

Brown v. Maryland.

restrictions imposed upon its exercise, by the paramount authority of that instrument. With regard to these restrictions, he did not mean to contend, that the general grant contained in the eighth section of the first article of the constitution, vested in the national government anything more than a concurrent power of taxation. He admitted the rule of construction, that a grant of power to congress does not, of itself, imply a prohibition of its exercise by the states. The powers granted to the general government are never to be considered as exclusive, unless they are made so in express terms, or unless, from the nature of the power itself, its concurrent exercise must necessarily produce direct repugnancy or incompatibility. But he argued, that this was by no means the inevitable result, from a concurrent exercise of the taxing power, because its peculiar nature rendered it often capable of being exercised by different authorities at the same time, and even upon the same subject, without actual collision or interference.

The restrictions which he had alluded to, were to be found *in other provisions of the constitution; and they were both express and [*421 implied. The former were all comprised in the tenth section of the first article, by which the states are prohibited, unless with the consent of congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws; and are, also, without such consent, forbidden to impose any duty upon tonnage. The effect of this prohibition, coupled with the general grant of the taxing power before referred to, is to vest in the national government an exclusive right to the commercial imposts of the country. With the exception of these, however, the power to lay and collect taxes is a concurrent power.

But, like all the other concurrent powers of the states, this power of taxation is subject, in its exercise, to that general implied restriction which necessarily results from the supreme and paramount authority of the Union. This is a vital principle of the political system, and its direct operation is to restrain the states from the exercise of any power repugnant to, or incompatible with, the constitution, or the constitutional laws of the national government. By which is to be understood, not merely a repugnancy growing out of a concurrent exercise of the same power by congress and a state legislature, but that which may arise from the exercise of one power by a state, with reference to a different power, whether exclusive or concurrent, express or implied, residing in the general government.

Having stated and illustrated these as the constitutional limits of the taxing power of the states, he insisted, that they had been transgressed by the legislative act under consideration. The second section comprises all the provisions of the law which are material to the question. The true construction of this section is somewhat doubtful; upon any interpretation, however, it prohibits the importer from selling the imported merchandise, without having first taken out a license to do so, for which he is required to pay a stipulated tax.

The question then is, whether this is such a law as the legislature of Maryland have a right to pass. Under color of a license law, he contended, that this statute was a palpable *evasion of the express restriction upon the states to "lay duties on imports;" an indirect attempt to do [*422 that which the constitution has explicitly inhibited. And he said this, because he thought it might be clearly shown, that a law, laying a tax on

Brown v. Maryland.

the importer, for the privilege of selling the merchandise he has himself imported, which is this law, and this case, is equivalent, in all substantial respects, to a duty on imports, since, with a few slight and unimportant differences, it answers all the purposes, and produces all the effects, of a concurrent power in the states to impose such a duty.

What are the apparent differences between this and a tax directly on imports? It may be said, in the first place, that the one is a tax for the privilege of bringing the foreign article into the country, and the other, a tax for the privilege of selling it, after it is so brought in. But these privileges are indissolubly connected; the right to sell is a necessary incident to the right of importing. The grant of a privilege to import, would be of no value, unless it implies a right to sell. Prohibit sale, and importation necessarily ceases. He maintained, that, on a fair and just construction of the whole revenue system, the implication was irresistible. That the duties exacted by the general government were paid, not for the privilege to import simply, but for the privilege of importing foreign commodities, and using them in the way of merchandise, might be incontestably proved, by showing that no goods were dutiable, unless imported with the intention, and for the purpose of traffic. With this view, he referred to various provisions of the act of March 1799, ch. 128, §§ 30, 32, 45, 46, 60, 107, and to the case of *The Concord*, 9 Cranch 388.(a) This is the principle, also, of the English law of customs, from which our system is mainly borrowed. Hale on the Customs, pt. 3, ch. 20, in Harg. L. Tracts 211. It was likewise worthy of remark, that the legislation of Maryland, upon this subject, before the adoption of the constitution, was in strict accordance with the same principle, and carried it so far as to permit the merchant to try the market *423] by an actual sale, and paying the duties only on the *portion sold, to export the residue free of duty. Hanson's Laws of Maryland, Act of 1783, ch. 36, § 34; Act of 1784, ch. 84, § 5. There is, then, no difference in this respect between these two modes of taxation.

It may be said, that these taxes are payable at different times; in the one case, at the time of importation, in the other, at the time of sale. But if they are both paid substantially for the same privilege, surely, this is not a material difference. It is a matter that simply concerns the safety, certainty and convenience of collection; but it gives no distinctive character to the law. In point of fact, however, the duty imposed by the revenue system is not payable, except it is less than \$50, until after the importation.

A third apparent difference may be said to consist in this: that the import duty is a charge, upon the goods, the license, upon the *person*; but the one is as much a charge upon the goods as the other, if by that is meant an increase of their actual cost. The import duty is, however, a personal charge upon the importer; it is not the bond that alone makes him personally liable; without having given a bond, he is still answerable for the duties. 1 Mason 482.

These are the only differences in the operation of the two taxes, and they are apparent, but not substantial; they are the disguise thrown about the law, to elude detection. The true test, however, is, to consider the effect of

(a) See also 4 Cranch 347.

Brown v. Maryland.

this law upon the exclusive grant to the general government, to raise revenue from imposts. The reasons for such a grant are obvious. The objects committed by the constitution to the general government are of immense magnitude, and require corresponding means. Of all species of taxation, that upon imposts is most fruitful, and least oppressive. It is sound policy, therefore, to cherish and extend this branch of the public revenue; because, whenever it fails, other modes of taxation must necessarily be resorted to, of a more odious and oppressive nature. Now, the consequence of the right claimed by this law, on the part of Maryland, is, to place this branch of the public revenue completely in her power; as entirely so, as if she had, constitutionally, a concurrent right ^{*}to tax imports. It is to enable her, [^{*424} at her pleasure, by means of license laws, to annihilate, as it regards her own territory, the commercial revenues of the country. What is to prevent her from prohibiting altogether the importation of foreign merchandise into any of her ports? It is only to increase the price of the license, until the commodity will no longer bear the burden, and the end is accomplished; importation must, in that case, necessarily cease, and with it, revenue. It is not pretended, that these consequences are produced by this particular law; it is not necessary, that this should be the case. We are not to look at the particular exercise of power, so much as at the principle upon which the power is asserted. We are not to judge of the constitutionality of this law, by the amount of tax which it imposes; it is not the degree of taxation, in the particular instance, that determines the right to tax. That the public revenue is, to a certain degree, affected by the operation of this law, is incontestable. But if, on principle, Maryland has a right to demand \$50, as the price of a license to sell imported merchandise, she has a right to demand any sum for the same privilege. If, in other words, she is within the proper sphere of her taxing power, that power is, in its nature, unlimited, and she may carry it to what extent she pleases. A power to tax, this court has emphatically said, is a power to destroy. In this case, it is a power to prohibit; a power to deprive the government of the means to accomplish its great objects, and conduct all its important operations—a power to defeat the intention of the exclusive grant of commercial revenue.

If Maryland has a right to enact laws of this description, she has a right to regulate her own foreign commerce, although, by the constitution, it is exclusively vested in congress. The imposition of import duties is often resorted to, not for the purpose of revenue, but to regulate commercial intercourse with foreign countries. Discriminating duties, protective duties, prohibitory duties, are so many commercial regulations. These may all be resorted to, under the disguise of license laws. If Maryland has a right to pass general license laws, she may pass partial ones; she may select particular commodities, and burden their sale with a license duty; she may establish a tariff of discriminating ^{*}duties for herself, and affect, if not defeat, [^{*425} the commercial policy of the country. In one word, she may exercise the same right to regulate commerce, by means of license laws, which a concurrent power to tax imports would give her, and thus evade, in this respect also, the constitutional prohibition. It may be said, that this law looks to no such object; that it is simply a tax for revenue, and that there is no ground to apprehend, that it will be used for any other purpose. But the motives for legislative acts are not fit subjects of judicial inquiry. If

Brown v. Maryland.

the power can be exercised for one purpose, it may be for another; the intention may always be effectually concealed. It is the principle of the law, and its capacity to be exerted for the attainment of other objects than that which it professes to aim at in the particular case, that it is proper and necessary to look to. If the states are authorized to pass laws of this description, the purposes which induced the prohibition are defeated, and it is rendered altogether nugatory.

Taney and *Johnson*, contra, insisted, that the law of Maryland did not lay a duty on imports, and was not repugnant to the constitution of the United States. The act of assembly (they said) does not impose a tax on the importation of foreign goods, nor upon the trade and occupation of an importer. But the tax is imposed upon the trade and occupation of selling foreign goods by wholesale, after they have been imported. It is a tax upon the profession or trade of the party, when that trade is carried on within the state. It is laid upon the same principle with the usual taxes on retailers, or innkeepers, or hawkers and peddlers, or upon any other trade exercised within the state. It is true, the importers of foreign goods are, by express words, made subject to the provisions of this law, provided they sell by wholesale; but it is the selling by wholesale which subjects the party to the tax; it is upon that trade, that the tax is imposed.

Does the constitution of the United States forbid Maryland to impose *426] such a tax? This is the only question presented by the record. *The plaintiffs in error insist, that the tax in question is virtually a duty on imports, and violates that clause in the constitution which declares that a state shall not lay duties on imports. We answer, it is not, either directly or indirectly, a duty on imports. A duty on imports is a tribute paid to the sovereignty of the country, for permission to introduce foreign goods. To import, and to bring in, mean the same thing. Act of March 2d, 1799, ch. 128; 1 Mason 499; 4 Wheat. 246. A duty on imports is, therefore, a duty on the bringing in of foreign goods—on the act of importation. The duty is paid for the permission to introduce them; it is the consideration given for that privilege. The party buys the right to introduce the goods into the United States, and to place them under the protection of the laws of the country. He becomes liable to the whole duty, by the every act of importation; and the amount is the same, whether he proposes to sell the goods, or to keep them for his own use, or to give them as a present to another.

After the goods have been brought into a state, the importer has no peculiar relation to them, by reason of his being the importer. He is known to the state laws in the character of owner, or as the party entitled to the custody of the goods, and he receives the same degree of protection, whether he be the importer or not the importer. The property, when it has passed through the custom-houses, is no longer under the exclusive protection of the United States. It is guarded by the laws of the state—must be transferred and otherwise dealt with, according to the laws of the state. It is, therefore, imported or brought in, and the act of importation is completed. If, therefore, a duty on imports means a duty on the act of importation, or the permission to introduce, it is very clear, that the law in question is not, directly or indirectly, a duty on imports.

But it is said, that the word "imports," as used in the constitution of

Brown v. Maryland.

the United States, does not mean importation, but means the goods imported. If this interpretation be right, then the constitution of the *United States must be expounded, as if it had said, "no state shall, without [*427 the consent of congress, lay any imposts or duties on goods imported." And if such be the true reading of the constitution, then no state can lay a tax upon any article of property which was imported from a foreign country. According to this construction, imported plate, imported furniture, imported property of every kind, would be privileged property, and exempt from taxation by the states. For, if the word "imports," as used in the constitution, means "goods imported," or "imported goods," then the states, without the permission of congress, cannot tax property, within their dominion, and owned by their citizens, provided that property has been introduced from abroad. Such would be the inevitable consequence of expounding the word "imports," as if the words "imported goods" had been used. The uniform practice of the states, the principles of justice, the interests of the community, are all directly opposed to this construction.

But it is said, that if "imports" means importation, and not the goods imported, yet the privilege of selling is inseparably incident to the importation, and is always implied in the privilege to import. This argument, like the one last replied to, will be found to prove too much, and to lead to results that can hardly be acquiesced in. The right to import foreign goods is derived from the United States. The duties are imposed by the federal government, and are paid to that sovereignty. The permission to import is conferred by that government, and if the right to sell is implied in the permission to import, then the right to sell is derived from the United States, and becomes an absolute and vested right in the importer, as soon as he acquires the privilege of introducing the goods; that is, as soon as he pays the duties, or secures them, according to the acts of congress. And if the right to sell is a vested right, derived from the general government, then this right cannot be limited, restrained, regulated, or in any manner affected, by state legislation. The importer, then, having an absolute and unconditional right to sell, may sell in any place, and in any manner he thinks proper. He may offer for sale large quantities of gunpowder, in the heart of a city, *and thus endanger the lives of the citizens; he may offer hides, fish, and articles of that description, in places offensive [*428 and inconvenient to the public, and dangerous to the health of the citizens; he may hold an auction at his own warehouse, and refuse to pay any tax to the state; he may sell at retail; he may sell as a hawker and peddler; and the laws of the states which impose taxes on these trades, are unconstitutional and void, so far as the importer is concerned. These taxes have been always imposed by some of the states, and their right to derive a revenue from these sources has never before been questioned.

It may be said, that the right of the importer to sell, is a right to sell by wholesale only, and not by auction, or by retail. If, however, the right exists at all, it cannot be limited to sales by wholesale. It is said to be incident to the permission to import; and if it be annexed to that permission, then it must be an absolute and unconditional right; for where can we find the qualification? If the states are disabled from imposing a tax on the sales of foreign merchandise, when made by the bale or package, why are they not equally unable to impose a tax on the sales of such goods, when

Brown v. Maryland.

made by auction, or retail, or in any other manner? The constitution gives no peculiar privilege to any particular mode of sale; and this court, in expounding the instrument, will not introduce into it new limitations, and new divisions of power, not implied by its words.

In fine, the importer, by the payment of the duties, either acquires the right to sell, as well as the right to introduce the goods, or he acquires the right to bring in merely. In the first case, his right to sell would be beyond the reach of state control, and state regulation. In the second case, the goods would be subject to the laws and authority of the state. It can hardly be held, that an importer may sell in any place, and in any manner he pleases; and if he may not, it is because the disposition of the goods is subject to the regulations of the state authorities; and if they are so subject, they are, consequently, liable to such burdens as the state may impose on any particular mode of sale or transfer; and therefore, liable to the tax in question.

The cases cited of goods wrecked on our shores, can *hardly be *429] supposed to bear on this argument. To import, implies an act of the will, a voluntary introduction of the goods. Besides, in those cases, the question is, are the goods liable to pay duty? not what rights will the payment of the duty procure? And when the questions are so different, it is not perceived, how a decision of the one can in any degree affect the other.

But it is insisted, on the other side, that if the law in question be not repugnant to that clause in the constitution which forbids a state to lay a duty on imports, yet it is in violation of that clause which gives congress the power to regulate commerce with foreign nations. It must be observed, that this argument admits, *argumenti gratiâ*, that the tax in question is not, either directly or indirectly, a duty on imports. But the plaintiffs in error contend, that although it be not a duty on imports, still the tax in question is forbidden by the constitution of the United States. In other words, they maintain, that the tenth section in the constitution of the United States is not the only one which limits the taxing power of the states; and that this power is still further curtailed by the clause which gives congress the power to regulate commerce. It has been settled by the decisions of this court, that the grant of a power to congress, does not extinguish the right of the states to legislate on the same subject, unless congress exercises the power granted. And when the power is exercised, the states may yet legislate, if the whole ground of legislation has not been covered by the laws of the United States; provided the state law be not repugnant to that of the federal government. Assuming these principles as settled, it would be a sufficient answer to this argument to say, that no law of congress gives, or professes to give to the importer, the right to sell. The revenue laws referred to, charge duties in certain cases, where sales may be made. The laws are framed on the assumption that certain foreign goods will be permitted to be sold; but these laws do not give that permission generally, nor point out in what mode they may be sold. If, therefore, under this power to regulate commerce, congress may give the importer a right to sell, yet the right is not given; and until it is given by congress, *the states may regulate and tax *430] the sales, without violating the constitution of the United States.

But this clause in the constitution does not give to congress the power contended for. By the constitution of the United States, the power of taxa-

Brown v. Maryland.

tion by the states is restrained, by express words, in certain cases. It has always been supposed, that these limitations of state sovereignty, in matters of revenue, so carefully and particularly set down, excluded all inference and implication, and left with the states all the powers of taxation not expressly denied to them in the restraining section. It is very clear, that the men who framed the constitution, and the people who adopted the constitution, so understood it. The *Federalist* must be considered as expressing the opinions of the friends of the federal constitution, both in and out of the convention; and in No. 33, and near the conclusion of that number, the commentary on the subject of the taxing power is thus concluded: "The inference from the whole is, that the individual states would, under the proposed constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports." And throughout No. 32 and No. 33 of the *Federalist*, the same principle is repeatedly asserted, as a clear and indisputable one.

But, if congress, under the power to regulate commerce, may authorize the importer to sell, then certain important powers of taxation, besides duties on imports and exports, have been surrendered by the states. For, if congress may give by law, to the importer, the right to sell, congress may direct how the sale may be made, or may allow the importer to elect any mode he pleases; and whenever this shall be done by the general government, the power of the states to regulate such sales is at an end, and, consequently, their power of taxation also. If this argument, then, be sustained by the court, the authority of the states to regulate and to tax auctioneers and retailers is not "an independent and uncontrollable authority," as was supposed by the distinguished writers in the *Federalist*, but is a mere dependent authority, and liable to the control of congress, so far as foreign *goods are concerned. Congress, it is said, may give the importer the right to sell. If congress may do so, then the states cannot tax [^{*431} any mode of sale which congress may please to permit. Such powers were surely too important and valuable to have been surrendered in this loose and slovenly manner. If they were to have been given up by the states, they would have been given up in express terms, like the duties on imports, and not by vague and uncertain inferences. Besides, if congress may give the right to sell in any manner, they may also give the right to sell in any place; and the police laws of the different states, made for their safety or health, exist only by the permission of congress. And again, if congress may not only prescribe the terms upon which foreign goods may be introduced into the country, but may direct how they shall be sold, and thus exempt the sales from state taxation, why may not congress, upon the same principle, exempt all foreign goods from taxation by the states? If congress may exercise exclusive dominion over foreign goods, for one purpose, after they have been brought into a state, why may not the same exclusive power be exercised for any other purpose? Reasons of policy might, indeed, make a difference; but we are not now discussing the policy of introducing new provisions into the constitution, but endeavoring to ascertain the meaning of the words used in the instrument.

The last argument urged in behalf of the plaintiff in error, is founded on the supposed policy and objects of the constitution, rather than on the

Brown v. Maryland.

interpretation of any words used in the instrument itself. It is said, that if a state may impose the tax in question, it may increase it to any amount, and by that means, the states may prevent importations altogether. And hence, it is inferred, that a power capable of being so much abused, was not intended to have been left with the states. Nothing can be more fallacious than to urge the possible abuse of power by the states, for the purpose of proving that the power has been taken away. Such an argument goes to the destruction of all state power. Such a principle of construction would put an end to all state authority; for all power may possibly be abused.

*432] The states cannot and *ought not to be deemed more liable than the federal government to abuse the powers confined to them by the people; nor can any supposed and merely possible inconvenience, which might arise from an improper use of state power, furnish a ground for deciding against the existence of the power. We must be continually liable to this inconvenience, from the complex character of our government. In the *Federalist*, No. 32, the rule of construction is thus stated: "It is not a mere possibility of inconvenience in the exercise of powers, but an immediate and constitutional repugnancy, that can, by implication, alienate and extinguish a pre-existing right of sovereignty." The possibility of inconvenience from the improper use of this power by the states, is not, therefore, any argument against the existence of this power. It cannot, by implication, alienate and extinguish the power for which we are contending.

But, indeed, it is impossible, that the power to lay the tax in question can lead to any inconvenience, or can be used to embarrass the regulations, or lessen the revenue of the federal government. If the tax on wholesale dealers should be so heavy as to prevent importations, the people of the state will be the principal sufferers. If it enhances the price of imported goods, the burden is, at least, as heavy on the people of the state, as it is on the citizens of other states, and this furnishes abundant security that no such tax will ever be vexatiously laid. The people of a state cannot be justly suspected of imposing heavy burdens upon themselves, for the purpose of thwarting or embarrassing the general government. If, indeed, the people of a state could be guilty of such folly, they might, by bounties and other facilities to manufacturers in their own state, effectually prevent the importation of foreign goods. Nobody would deny that the states possess this power; but nobody suspects them of being disposed to abuse it. There is, indeed, no real danger of serious inconvenience from these conflicting powers. The good sense and good feelings of the people will always apply the remedy; and we may safely confide, that the state governments, and the general government, will never embark in the unprofitable

*433] contest of trying which shall do each other the most harm. But *if such a state of things should ever take place, it would matter very little how the boundaries of power had been marked out by judicial decision. The Union cannot be preserved, by the mere strength and power of the federal government. It is dissolved, as soon as it shall forfeit the affection and confidence of the states.

The *Attorney-General*, for the plaintiffs in error, in reply, stated the question to be, whether a state law, which rendered it criminal to import and sell foreign goods, without the permission of the state, which permission

Brown v. Maryland.

was only to be obtained by paying a tax to the state, was repugnant to the constitution, laws and treaties of the Union. If the state of Maryland had the power to lay such a restraint on the importation and sale of foreign goods, every other state must have the same power; and the consequence would be, that this power of taxation would directly interfere, both with the power of regulating commerce, and with the taxing power of congress. The *quantum* of tax imposed by the state could make no difference. The same principle would apply, as in the attempt of the same state to tax the Bank of the United States, where the court held, that a power to tax, was a power to tax limited only by the pleasure of the state; and that it was, therefore, a power to destroy. *McCulloch v. Maryland*, 4 Wheat. 316.

In the present case, the power was denied, upon two grounds; first, because the power exerted by the law in question is that of regulating commerce with foreign nations, and among the several states, which the court has determined to be exclusively vested in congress. *Gibbons v. Ogden*, 9 Wheat. 1. Secondly, because it was that of laying an impost, or duty, on imports, without the consent of congress.

In order to determine whether the present law interfered with the exercise of the power of regulating commerce, it was only necessary to see, whether it undertook to prescribe the terms on which commerce may be carried on with foreign *nations, and among the states. If it were a power to prescribe those terms, it was a power to prescribe the [*434 whole terms. After congress, in the exercise of its exclusive power, has prescribed certain terms, it is incompetent for the states to add other terms. Could there be any doubt, that the exclusive power of regulating foreign commerce included that of prescribing to all the citizens of the Union the conditions, and the whole conditions, on which they shall be permitted to bring into the United States, for sale and consumption, the productions of foreign countries? This power does not stop with the permission to bring them in; for if the states may prohibit their sale, or restrain or burden it, in any mode, they may, in effect, prohibit their importation. If they may prevent their sale, they may prohibit their barter or exchange, or use and consumption in the country, in any and every mode; and thus effectually defeat the beneficial exercise of the permission to import. The states might even confiscate the goods, or order them to be burnt and destroyed, after they were landed; and this would no more interfere with the right of importation, according to the opposite argument, than the law now in question. And it was asked, whether the sagacious statesmen who framed the constitution meant to confer upon congress a power so idle and illusory? They looked to the exercise of this power of regulating commerce as a great source of national wealth and aggrandizement. *Federalist*, No. 11. They looked to it as a great means of developing the agricultural and manufacturing resources of the country, and its general industry; as an instrument by which the nation should be enriched at home, and rendered capable of countervailing the commerciale regulations of foreign and rival nations. But if the power of regulating commerce ceases, on the landing of the goods, and the whole subject is then delivered over to the discretion of the respective states, with their various partial and discordant views of policy, its exclusive exercise by congress will be utterly vain and useless. So that the very existence of that commerce, a power of regulating and preserving

Brown v. Maryland.

which is so studiously conferred on congress, *is, at last, made to depend upon the caprice and pleasure of the states. What signifies the power of regulation, if the states may destroy the very substance of the thing to be regulated? Uniformity, or permanency of regulation, with a view to any purpose of policy, in regard to the agricultural, manufacturing or commercial interests of the nation, is, of course, as much out of the question, as if there were no Union, or as if it were still infected with all the debility of the former confederation. The same state power, exercised upon short-sighted and narrow views, might be exerted so as to defeat the other branch of the power, that of regulating commerce among the states. The free intercommunication which now prevails between the states, may be effectually checked, by requiring a similar license to import into a particular state, the productions of other states. So also, what the state may do as to imports, it may do as to exports. It may require a license from the exporting merchant, and thus, in effect, lay a duty on exports, although both the states and congress are expressly forbidden in the constitution from laying such a duty; and the whole power of regulating the commerce, both of exports and imports, is exclusively vested in congress. By the joint exercise of these two usurped powers, the state may establish a total non-intercourse with other states, and with foreign nations, in direct violation of the laws, and treaties and constitution of the Union. Or it may make a discrimination among foreign nations, or among the different states, with a view of discouraging their commerce, or of encouraging some branch of its own internal industry, in direct repugnancy to the policy of the Union, as exhibited in its laws and treaties. One of the avowed objects for conferring the power of regulating commerce upon congress, was that of raising a revenue for the support of the national government. It was foreseen, that the prosperity of commerce would best be promoted by uniform regulations contained in the laws and treaties of the Union; and it was also foreseen, that an impost was that species of taxation best suited to the genius and habits of the American people. Federalist, No. 12. *But if the power now in
 *436] question may be exercised by one state, it may be exercised by all; and the principal source from which the revenues of the Union were to be derived, will be dried up, or diverted to local purposes. In short, it was insisted, that all the evils for which the constitution was intended to provide an effectual remedy, would be entailed upon the country, by confirming the validity of such state laws as the act now in question.

March 12th, 1827. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the court of appeals of Maryland, affirming a judgment of the city court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted, that all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or c^t wine, rum, brandy, whiskey and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and in case of neglect or refusal to take

Brown v. Maryland.

out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods, without having license to do so. A judgment was rendered against them on demurrer, for the penalty which the act prescribes for the offense ; and that judgment is now before this court.

The cause depends entirely on the question, whether the legislature of a state can constitutionally require the importer of foreign articles to take out a license from the state, before he shall be permitted to sell a bale or package so imported.

It has been truly said, that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies it constitutionality. The plaintiffs *in error take the burden upon themselves, and insist, that the act under consideration is repugnant to [*437 two provisions in the constitution of the United States. 1. To that which declares that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." 2. To that which declares that congress shall have power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

1. The first inquiry is into the extent of the prohibition upon states "to lay any imposts or duties on imports or exports." The counsel for the state of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give them a much wider scope. In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective states, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power. What, then, is the meaning of the words, "imposts or duties on imports or exports?"

An impost or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured, before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them, after they were landed. The policy and consequent practice of levying or securing the duty before, or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely *a duty [*438 on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition, show the extent in which it was understood. The limitation is, "except

Brown v. Maryland.

what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel ; so far as they act upon importations, they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the states to lay duties on imports or exports. The exception was made, because the tax would otherwise have been within the prohibition. If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause, had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution as to other instruments. If it be applicable, then, this exception in favor of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purposes of inspection, with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation. From the vast inequality between the different states of the confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several states exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by *the statesmen of that

*439] day, the general power of taxation, indispensably necessary as it was, and jealous as the states were of any encroachment on it, was so far abridged, as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted, by placing that whole subject under the control of congress. Whether the prohibition to "lay imposts or duties on imports or exports," proceeded from an apprehension that the power might be so exercised as to disturb that equality among the states which was generally advantageous, or that harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain, that the object would be as completely defeated, by a power to tax the article in the hands of the importer, the instant it was landed, as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country ; the one would be a necessary consequence of the other. No goods would be imported, if none could be sold. No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty, by laying a duty on the thing imported, in the hands of the importer. It is obvious, that the same power which imposes a light duty, can impose a very heavy one—one

Brown v. Maryland.

which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a state, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular state. We are told, that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view, when discussing its existence. All power may be abused ; and if the fear of its abuse is to constitute an argument against its *existence, it might be urged against the existence of that which is universally acknowledged, and [*440 which is indispensable to the general safety. The states will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any state would act so unwisely. But we do not place the question on that ground. These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason be said, that no state would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our constitution have thought this a power which no state ought to exercise. Conceding, to the full extent which is required, that every state would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded, that each would respect the interests of others. A duty on imports is a tax on the article which is paid by the consumer. The great importing states would thus levy a tax on the non-importing states, which would not be less a tax, because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those states whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the states. When we are inquiring, whether a particular act is within this prohibition, the question is not, whether the state may so legislate as to so hurt itself, but whether the act is within the words and mischief of the prohibitory clause. It has already been shown, that a tax on the article, in the hands of the importer, is within its words ; and we think it too clear for controversy, that the same tax is within its mischief. We think it unquestionable, that such a tax has precisely the same tendency to enhance the price of the article, as if imposed upon it while entering the port.

The counsel for the state of Maryland insist, with great reason, that if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, *which all admit to be essential to the states, to an extent which has never yet been suspected, and will [*441 deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation ; and, if this be admitted, they insist, that entering the country is the point of time when the prohibition ceases, and the power of the state to tax commences. It may be conceded, that the words of the prohibition ought not to be pressed to their utmost extent ; that in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which

Brown v. Maryland.

remain in the states, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the constitution is intended to secure ; that there must be a point of time when the prohibition ceases, and the power of the state to tax commences ; we cannot admit, that this point of time is the instant that the articles enter the country. It is, we think, obvious, that this construction would defeat the prohibition.

The constitutional prohibition on the states to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable, when they do not approach each other, may yet, when the intervening colors between white and black, approach so nearly, as to perplex the understanding, as colors perplex the vision, in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Until they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has, *perhaps, lost its distinctive character *442] as an import, and has become subject to the taxing power of the state ; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports, to escape the prohibition in the constitution.

The counsel for the plaintiffs in error contend, that the importer purchases, by payment of the duty of the United States, a right to dispose of his merchandise, as well as to bring it into the country ; and certainly, the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale ; it constitutes the motive for paying the duties ; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair-dealing requires, that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only, which are intended for sale or consumption in the country. Thus, sea-stores, goods imported and re-exported in the same vessel, goods landed and carried over land, for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows, that, in the opinion of the legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases, the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell, by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the state cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population ; he may

Brown v. Maryland.

introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may *bring in goods, as plate, [*443 for his own use, and thus retain much valuable property exempt from taxation. These objections to the principle, if well founded, would certainly be entitled to serious consideration. But, we think, they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove, that it may not be restored to with safety, as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry goods, in the form in which it was imported, without a license. This state of things is changed, if he sells them, or otherwise mixes them with the general property of the state, by breaking up his packages, and travelling with them as an itinerant peddler. In the first case, the tax intercepts the import, as an import, in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated, until it shall have contributed to the revenue of the state. It denies to the importer the right of using the privilege which he has purchased from the United States, until he shall have also purchased it from the state. In the last cases, the tax finds the article already incorporated with the mass of property, by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer. So, if he sells by auction. Auctioneers are persons licensed by the state, and if the importer chooses to employ them, he can as little object to paying for this service, as for any other for which he may apply to an officer of the state. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the officers licensed by the state to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the states. If the possessor stores it himself, out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores *it there, in his [*444 own opinion, more advantageously than elsewhere. We are not sure, that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a state. The principle, then, for which the plaintiffs in error contend, that the importer acquires a right, not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the states, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the constitution no further than to prevent the states from doing that which it was the great object of the constitution to prevent.

But should it be proved, that a duty on the article itself would be repugnant to the constitution, it is still argued, that this is not a tax upon the article, but on the person. The state, is said, may tax occupations, and

Brown v. Maryland.

this is nothing more. It is impossible to conceal from ourselves, that this is varying the form, without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the state may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the state has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the state has not a right to do, because it is prohibited by the constitution.

*445] In support of the argument, that the prohibition ceases, the instant the goods are brought into the country, a comparison has been drawn between the opposite words export and import. As, to export, it is said, means only to carry goods out of the country; so, to import, means only to bring them into it. But suppose, we extend this comparison to the two prohibitions. The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupations which is possessed by the states. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations? Or, suppose, revenue-cutters were to be stationed off the coast, for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased, the instant they were brought into the country, so the prohibition to tax articles exported ceased, when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted, is repugnant to that article of the constitution which declares, that "no state shall lay any impost or duties on imports or exports."

2. Is it also repugnant to that clause in the constitution which empowers "congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes?" The oppressed and degraded state of commerce, previous to the adoption of the constitution, can scarcely be forgotten. It was regulated by foreign nations, with a single view to *446] their own interests; and our disunited efforts to counteract their restrictions, were rendered impotent, by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of

the federal government to enforce them had become so apparent, as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted, whether any of the evils proceeding from the feebleness of the federal government, contributed more to that great revolution which introduced the present system, than the deep and general conviction, that commerce ought to be regulated by congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations, and among the several states? This question was considered in the case of *Gibbons v. Ogden*, 9 Wheat. 1, in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the constitution. The power is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior. We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts continually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse—one of its most ordinary ingredients is traffic. It is inconceivable, that the power to authorize this traffic, *when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell. If this be admitted, and we think it cannot be denied, what can be the meaning of an act of congress, which authorizes importation, and offers the privilege for sale, at a fixed price, to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly—an intent as wise as it is moral—is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell? What would be the language of a foreign government, which should be informed, that its merchants, after importing according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up com-

Brown v. Maryland.

merce. It will not meet this argument, to say, that this state of things will never be produced ; that the good sense of the states is a sufficient security against it. The constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not, how far will it be probably abused? The power claimed by the state is, in its nature, in conflict with that given to congress ; and the greater or less extent in which it may be exercised, does not enter into the inquiry *448] concerning its existence. *We think, then, that if the power to authorize a sale, exists in congress, the conclusion that the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer, for selling the article, in his character of importer, must be in opposition to the act of congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country, must be hostile to the power given to congress to regulate commerce, since an essential part of the regulation, and principal object of it, is, to prescribe the regular means for accomplishing that introduction and incorporation. The distinction between a tax on the thing imported, and on the person of the importer, can have no influence on this part of the subject. It is too obvious for controversy, that they interfere equally with the power to regulate commerce.

It has been contended, that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a state to tax its own citizens, or their property within its territory. We admit this power to be sacred ; but cannot admit, that it may be used so as to obstruct the free course of a power given to congress. We cannot admit, that it may be so used as to obstruct or defeat the power to regulate commerce. It has been observed, that the powers remaining with the states may be so exercised as to come in conflict with those vested in congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the constitution has applied it to the often interfering powers of the general and state governments, as a vital principle of perpetual operation. It results, necessarily, from this principle, that the taxing power of the states must have some limits. It cannot reach and restrain the action of the national government, within its proper sphere. It cannot reach the *449] administration of *justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the states may tax all persons and property found on their territory, what shall restrain them from taxing goods in their transit through the state from one port to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a state from taxing any article passing through it, from one state to another, for the purpose of traffic? or from taxing the transportation of articles passing from the state itself to another, for commercial purposes? These cases are all within

Brown v. Maryland.

the sovereign power of the taxation, but would obviously derange the measures of congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument further, or to give additional illustrations of it, because the subject was taken up, and considered with great attention in *McCulloch v. State of Maryland*, 4 Wheat. 316, the decision in which case is, we think, entirely applicable to this.

It may be proper to add, that we suppose the principles laid down in this case, to apply equally to importations from a sister state. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the court of appeals of the state of Maryland, in affirming the judgment of the Baltimore city court, because the act of the legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

THOMPSON, Justice. (*Dissenting.*)—It is with some reluctance, and very considerable diffidence, that I have brought myself publicly to dissent from the opinion of the court in this case; and did it not involve an important constitutional *question, relating to the relative powers of the general and state governments, I should silently acquiesce in the [*450 judgment of the court, although my own opinion might not accord with theirs.

The case comes before this court on a writ of error to the court of appeals of the state of Maryland, upon a judgment rendered in that court against the defendants. The proceedings in the court below were upon an indictment against the defendants, merchants in the city of Baltimore, trading under the firm of Alexander Brown & Sons, and to recover against them the penalty alleged to have been incurred, for a violation of an act of the legislature of that state, by selling a package of foreign dry goods, without having a license for that purpose, as required by said act; and the only question which has been made and argued is, whether the act referred to is in violation of the constitution of the United States.

The act in question was passed on the 23d of February 1822, and is entitled “a supplement to the act laying duties on licenses to retailers of dry goods, and for other purposes.” By the second section, under which the penalty has been recovered, it is enacted, “that all importers of foreign articles or commodities, of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, &c., and other persons selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement.”

By the original act, passed in 1819, retail dealers in foreign merchandise are required to take out a license; and the supplemental act requires, that

Brown v. Maryland.

wholesale dealers should likewise take out a license to sell. These acts being *in pari materia*, are to be taken together, and their effect and operation manifestly is nothing more than to require retail and wholesale dealers in foreign merchandise, to take out a license, before they should be authorized *451] to sell such merchandise. *The act does not require a license to import, or demand anything more of the importer, than is required of any other dealer in the article imported. The license is for selling, and is general, applying to all persons; that all importers, and other persons selling by wholesale, bale or package, &c., shall, before they are authorized to sell, take out a license, &c. I understand it to be admitted, that these laws, so far as they relate to retail dealers, are not in violation of the constitution of the United States; and if so, the question resolves itself into the inquiry, whether a distinction in this respect between a retail and wholesale dealer in foreign merchandise, can exist, under any sound construction of the constitution.

The parts of the constitution which have been drawn in question, on the discussion at the bar, and with which the law in question is supposed to be in conflict, are, that which gives to congress the power to regulate commerce with foreign nations, and among the several states, and that which declares that no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws. It is very obvious, that this law can, in no manner whatever, affect the commercial intercourse between the states; it applies purely to the internal trade of the state of Maryland. The defendants were merchants, trading in the city of Baltimore. The indictment describes them as such, and alleges the sale to have been in that place; and nothing appears to warrant an inference, that the package of goods sold was not intended for consumption at that place; and the law has no relation whatever to goods intended for transportation to another state. It is proper here to notice, that although the indictment alleges, that the defendants did import and sell, yet the district-attorney, in framing the indictment, very properly considered the offence to consist in the selling, and not in the importation, without a license. No one will pretend, that if the indictment had only alleged, that the defendants did import a package of foreign dry *452] goods, without a license, it could have been sustained. The *act applies to the importer, and other persons selling by wholesale; and the allegation that the defendants did import, is merely descriptive of the double character in which they were dealing, both as importers and sellers. The indictment would, undoubtedly have been good, had it merely alleged, that the defendants sold the package, without a license. So that neither the act, nor the form in which the complaint is presented, makes any discrimination between the importer, and any other wholesale dealer in foreign merchandise, but requires both to take out a license to sell; nor does it appear to me, that this law, in any manner, infringes or conflicts with the power of congress to regulate commerce with foreign nations. It is to be borne in mind, that this was a power possessed by the states, respectively, before the adoption of the constitution, and is not a power growing out of the establishment of the general government. It is to be viewed, therefore, as the surrender of a power antecedently possessed by the states, and the extent of the surrender must receive a fair and reasonable interpretation, with

Brown v. Maryland.

reference to the object for which the surrender was made. This was principally with a view to the revenue, and extended only to the external commerce of the United States, and did not embrace any portion of the internal trade or commerce of the several states. This is not only the plain and obvious interpretation of the terms used in the constitution, commerce with foreign nations ; but such has been the construction adopted by this court. In the case of *Gibbons v. Ogden*, 9 Wheat. 194, the court, in speaking of the grant of the power of congress to regulate commerce, say, "It is not intended to 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. The enumeration of the particular classes of commerce to which the power was to be extended, would not have been made had the intention 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. [453 The genius and character of the whole government seems 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." And again (p. 208), "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 (commerce) to a considerable extent."

If such be the division of power between the general and state governments in relation to commerce, where is the line to be drawn between internal and external commerce? It appears to me, that no other sound and practical rule can be adopted, than to consider the external commerce as ending with the importation of the foreign article ; and the importation is complete, as soon as the goods are introduced into the country, according to the provisions of the revenue laws, with the intention of being sold here for consumption, or for the purpose of internal and domestic trade, and the duties paid or secured. And this is the light in which this question has been considered by this and other courts of the United States. 5 Cranch 368 ; 9 Ibid. 104 ; 1 Mason 499. This, it will be perceived, does not embrace foreign merchandise intended for exportation, and not for consumption ; nor articles intended for commerce between the states ; but such as are intended for domestic trade within the state : and it is to such articles only that the law of Maryland extends. I cannot, therefore, think, that this law at all interferes with the power of congress to regulate commerce ; nor does it, according to my understanding of the constitution, violate that provision, which declares that no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.

*The compensation required by this law to be paid for a license to sell, cannot be considered an impost or duty, within the sense [454 and meaning of these terms, as used in the constitution. They refer to

Brown v. Maryland.

the foreign duty, and not to any charge that may grow out of the internal police of the states. It may directly fall on the imported articles, and enhance the price in the sale ; but even this is not an expense imposed on the importer or other seller, but is borne ultimately by the consumer.

But the broad principle has been assumed, on the argument, that the payment of the foreign duty is a purchase of the right and privilege, not only of introducing the goods into the country, but of selling them, free from any increased burden imposed by the states ; and, unless this principle can be sustained, the law in question is not in violation of the constitution. The counsel, however, aware that the principle thus broadly laid down, if practically carried out to its full extent, would lead to consequences so obviously untenable, that it would at once show the unsoundness of the principle itself, have limited its application to the first wholesale disposition of the merchandise. Can such a distinction, however, be sustained ? There is nothing, certainly, in the letter of the constitution, to support it ; nor does it fall within any reasonable intendment, growing out of the nature of the subject-matter of the provision. The prohibition to the states is against laying any impost or duty on imports. It is the merchandise that is exempted from the imposition. The constitution nowhere gives any extraordinary protection to the importer. So that, if the law was confined to the importer only, he could find no exemption from the operation of state laws. Nor is there, according to my judgment, any rational ground, upon which the constitution may be considered as extending such exemption to wholesale, and not to retail dealers. If the payment of the foreign duty is the purchase of the privilege to sell, as well as to introduce the article into the country, where can be the difference whether this privilege is exercised in the one way or the other ? The retail merchant often imports his own goods ; and why should he be compelled to take out a license to sell, *when his neighbor, who imports and sells by wholesale, is exempted.

*455] But the distinction is altogether fruitless, and does not effect the object supposed to have been intended, viz., to take from the states the power of imposing burdens upon foreign merchandise, that might tend to lessen or entirely prevent the importation, and thereby diminish the revenue of the United States. It is very evident, that no such purpose can be accomplished, by limiting the protection to the first sale. It was admitted, that after the first sale, and the article becomes mixed and incorporated in the general mass of the property of the country, and to be applied to domestic use, it loses this pretended privilege. But every one knows, that whatever charge or burden is imposed upon the retail sale, affects the wholesale indirectly, as much as if laid directly upon the wholesale. The retail dealer takes this charge into calculation, in the purchase from the wholesale merchant, and which, of course, equally affects the importation. Suppose, the fifty dollars required to be paid by the wholesale dealer, was imposed on the retail merchant, would it not equally affect the importation ? It would equally increase the burden, and enhance the expense of the article, when it comes into the hands of the consumer, and on whom all the charges ultimately fall. And if these charges are so increased by the state governments, in any stages of the internal trade, as to check their sale for consumption, it will necessarily affect the importation. So that nothing short of a total exemption from state charges or taxes, under all circumstances,

Brown v. Maryland.

will answer the supposed object of the constitution. And to push the principle to such lengths, would be a restriction upon state authority, not warranted by the constitution.

It certainly cannot be maintained, that the states have no authority to tax imported merchandise. But the same principle of discrimination between the wholesale and retail dealer, as to a license to sell, would seem to me, if well founded, to extend to taxes of every description. And it would present a singular incongruity, to exempt a wholesale merchant from all taxes on his stock of goods, and subject to taxation the like stock of his neighbor who was selling by retail. *It is laid down in No. 32 of the Federalist (and I believe universally admitted), "that the states, [*456 with the sole exception of duties on imports and exports, retain authority to tax, in the most absolute and unqualified sense ; and any attempt on the part of the national government to abridge them in the exercise of it, would be a violent assumption of power, unwarranted by any article or clause in the constitution." Although an impost or duty may be considered a tax in its most enlarged sense, yet every tax cannot be understood to mean an impost or duty, in the sense of the constitution. As here used, it evidently refers to the foreign duty imposed by revenue laws. It would be a singular use of the term "impost," to apply it to a tax on real estate ; and no one, I presume, would contend, that all imported articles upon which the duties have been paid, are exempt from all state taxation in the hands of the consumer. And yet this would follow, if *duty* and *tax* are, in all respects, synonymous ; for the constitution declares, that no state shall lay any duty on imports, viz., the article imported. To avoid these consequences, which are entirely inadmissible, the inhibition to the states must be understood as extending only to foreign duties, and not to taxes imposed by the states, after the imports become articles of internal trade, and for domestic use and consumption ; they then become subject to state jurisdiction.

This law seems to have been treated as if it imposed a tax or duty upon the importer, or the importation. It certainly admits of no such construction. It is a charge upon the wholesale dealer, whoever he may be, and to operate upon the sale, and not upon the importation. It requires the purchase of a privilege to sell, and must stand on the same footing as a purchase of a privilege to sell in any other manner, as by retail, at auction, or as hawkers and peddlers, or in whatever way state policy may require. Whether such regulations are wise and politic, is not a question for this court. If the broad principle contended for on the part of the plaintiffs in error, that the payment of the foreign duty is a purchase of the privilege of selling, be well founded, no limit can be set by the states to the exercise of this privilege. The first sale may be made in defiance of all state *regulation ; and [*457 all state laws regulating sales of foreign goods at auction, and imposing a duty thereupon, are unconstitutional, so far, at all events, as the sale may be by bale, package, hogshead, barrel or tierce, &c. And, indeed, if the right to sell follows, as an incident to the importation, it will take away all state control over infectious and noxious goods, whilst unsold, in the hands of the importer. The principle, when carried out to its full extent, would inevitably lead to such consequences.

It has been urged with great earnestness upon the court, that if the states are permitted to lay such charges and taxes upon imports, they may be so

Brown v. Maryland.

multiplied and increased, as entirely to stop all importations. If this argument presents any serious objection to the law in question, the answer to it, in my judgment, has already been given : that the limitation, as contended for, of state power, will not effect the objects proposed. Whether this additional burden is imposed upon the wholesale or retail dealer, it will equally affect the importation ; and nothing short of a total exemption from all taxation and charges of every description, will take from the states the power of legislating, so as in some way may indirectly affect the importation.

But arguments drawn against the existence of a power from its supposed abuse are illogical, and generally lead to unsound conclusions. And this is emphatically so, when applied to our system of government. It supposes the interest of the people, under the general and state governments, to be in hostility with each other, instead of considering the two governments as parts only of the same system, and forming but one government for the same people, having for its objects the same common interest and welfare of all. If the supposed abuse of a power is a satisfactory objection to its existence, it will equally apply to many of the powers of the general government ; and it is as reasonable to suppose, that the people would wish to injure or destroy themselves, through the instrumentality of the one government as the other.

The doctrine of the court in the case of *McCulloch v. State of Maryland*, 4 Wheat. 316, has been urged *as having a bearing upon this
*458] question, unfavorable to the validity of the law. But it appears to me, that that case warrants no such conclusion. It is there admitted, that the power of taxation is an incident of sovereignty, and is co-extensive with that to which it is an incident. And that all subjects, over which the sovereign power of a state extends, are objects of taxation. The bank of the United States could not be taxed by the states, because it was an instrument employed by the government in the execution of its powers. It was called into existence, under the authority of the United States, and of course, could not have previously existed as an object of taxation by the states. Not so, however, with respect to imports ; they were in existence, and under the absolute jurisdiction and control of the states, before the adoption of the constitution. And it is, therefore, as to them, a question of surrender of power by the states, and to what extent this has been given up to the United States. And it is expressly admitted in that case, that the opinion did not deprive the states of any resources they originally possessed ; nor to any tax paid by the real property of the bank, in common with the other real property within the state ; nor to a tax imposed on the interest which the citizens of Maryland may hold in the institution, in common with other property of the same description throughout the state. But the tax was held unconstitutional, because laid on the operation of the bank, and consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution—and this instrument, created by the government of the Union. But these objections do not apply to the law in question. The government of the Union found the states in the full exercise of sovereign power over imports. It was one of the sources of revenue originally possessed by the states. The law does not purport to act directly upon anything which has been surrendered to the general govern-

Brown v. Maryland.

ment, viz., the external commerce of the state. It may operate indirectly upon it, to some extent ; but cannot be made essentially to impede or retard the operations of the government ; not more so than might be effected by a tax on the stock held by individuals in the bank of the United States. And, indeed, the power *of crippling the operations of the government, in the former case, would not be so practicable as in the latter ; for it [*459 has the whole range of the property of its citizens for taxation, and to provide the means for carrying on its measures. So that it would be beyond the reach of the states, materially to affect the operations of the general government, by taxing foreign merchandise, should they be disposed so to do.

I am, accordingly, of opinion, that the judgment of the court of appeals of the state of Maryland ought to be affirmed.

JUDGMENT.—This cause came on, &c. : On consideration whereof, this court is of opinion, that there is error in the judgment rendered by the said court of appeals in this, that the judgment of the city court of Baltimore, condemning the said Alexander Brown, George Brown, John A. Brown and James Brown, to pay the penalty therein mentioned, ought not to have been so rendered against them, because the act of the legislature of the state of Maryland, entitled, “an act supplementary to the act laying duties on licenses to the retailers of dry goods, and for other purposes,” on which the indictment on which the said judgment was rendered is founded, so far as it enacts, “that all importers of foreign articles, of dry goods, wares or merchandise, by bale or package, or of wine, rum, brandy, whiskey, or other distilled spirituous liquors, &c., selling the same by wholesale, bale or package, hogshead, barrel or tierce, shall, before they are authorized to sell, take out a license as by the original act is directed, for which they shall pay fifty dollars ; and in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement,” is repugnant to the constitution of the United States, and void ; wherefore, the said court of appeals, before whom the said judgment of the said city court of Baltimore was brought by appeal, ought not to have affirmed, but should have reversed, the same : Wherefore, it is considered by this court, that the said judgment of the said court of appeals, affirming the said judgment of the city court of Baltimore, *be reversed and annulled, and that the cause be remanded to the said [*460 court of appeals, with directions to reverse the same.

UNITED STATES v. GOODING.

Slave-trade.—Indictment.—Burden of proof.

Upon an indictment under the slave-trade act of the 20th of April 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master, being a part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, is admissible in evidence against the owner.¹

Upon such an indictment against the owner, charging him with fitting out the ship, with intent to employ her in the illegal voyage, evidence is admissible, that he commanded, authorized and superintended the fitment, through the instrumentality of his agents, without being personally present.

It is not essential, to constitute a fitting out, under the acts of congress, that every equipment, necessary for a slave-voyage, or any equipment peculiarly adapted to such a voyage, should be taken on board; it is sufficient, if the vessel is actually fitted out, with intent to be employed in the illegal voyage.

In such an indictment, it is not necessary to specify the particulars of the fitting out; it is sufficient, to allege the offence in the words of the statute.

Nor is it necessary, that there should be any principal offender to whom the defendant might be aiding and abetting; these terms in the statute do not refer to the relation of principal and accessory in cases of felony; both the actor, and he who aids and abets the act, are considered as principals.

It is necessary, that the indictment should aver, that the vessel was built, fitted out, &c., or caused to sail, or be sent away, within the jurisdiction of the United States.

An averment that the ship was fitted out, &c., "with intent that the said vessel should be employed" in the slave-trade, is fatally defective, the words of the statute being, "with intent to employ" the vessel in the slave-trade, and exclusively referring to the intent of the party causing the act.

*461] ¹Objections to the form and sufficiency of the indictment may, in the discretion of the court, be discussed and decided, during the trial before the jury; but, generally speaking, they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer.

In criminal proceedings, the *onus probandi* rests upon the prosecutor, unless a different provision is expressly made by statute.²

CERTIFICATE of Division from the Circuit Court of Maryland. This was a prosecution in the circuit court of Maryland, against the defendant, Gooding, under the slave-trade act of the 20th of April 1818, ch. 373. The indictment alleged:

1. That the said Gooding, being a citizen of the United States, after the passing of the act of the congress of the United States, entitled, "an act in addition to an act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord 1808, and to repeal certain parts of the same," that is to say, after the 20th of April 1818, to wit, on the 30th day of September, in the year 1824, at the district of Maryland, did fit out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, and within the jurisdiction of this court, a certain vessel called the General Winder, with intent to employ the said vessel, the General Winder, in procuring negroes from a foreign country, to wit, from the

¹ See *The Kate*, 2 Wall. 350; *The Sarah*, Id. 366; *The Weathergage*, Id. 375; *The Reindeer*, Id. 383.

² *Pauli v. Commonwealth*, 89 Penn. St. 432. In criminal cases, the burden of proof never shifts; so that, if from any part of the testi-

mony, as, circumstantial evidence of an *alibi*, there arose a reasonable doubt of the defendant's guilt, he should be acquitted. *Tanner v. Commonwealth*, 86 Id. 54; *Watson v. Commonwealth*, 95 Id. 418.

United States v. Gooding.

continent of Africa, to be transported to another place, to wit, to the Island of Cuba, in the West Indies, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided ; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

2. That the said Gooding, a citizen of the said United States, and residing therein, to wit, at the district aforesaid, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, within the jurisdiction of this court, at the district aforesaid, did, for himself, as owner, send away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called the General Winder, with intent to employ the said vessel, the General Winder, in procuring negroes from a foreign country, *to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, to be sold [*462 as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided ; to the evil example of all others in like case offending, and against the peace, government and dignity of the United States.

3. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did aid in fitting out, for himself, as owner, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, a certain other vessel, called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided ; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

4. That the said Gooding, a citizen of the said United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did abet the taking on board, from one of the coasts of Africa, divers negroes, to wit, 290, not being inhabitants, nor held to service by the laws of either of the states or territories of the United States, of a certain other vessel, called the General Winder, for the purpose of selling such negroes as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided ; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

5. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, *did, for himself, as owner, cause to sail from the port of Baltimore, within the jurisdiction of the United States, a certain [*463 other vessel, called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to another

United States v. Gooding.

place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress in such case made and provided; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

6. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself, as owner, cause to be sent away from the port of Baltimore, within the jurisdiction of the United States, a certain other vessel, called the General Winder, with intent that the said vessel, the General Winder, should be employed in procuring negroes from a foreign country, to wit, from the continent of Africa, to be transported to a certain other place, to wit, to the Island of Cuba, to be sold as slaves, contrary to the true intent and meaning of the act of congress, in such case made and provided; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

7. That the said Gooding, a citizen of the United States, and residing therein, after the passing of the act of congress aforesaid, to wit, on the day and year last aforesaid, at the district aforesaid, and within the jurisdiction of this court, did, for himself, as owner, or for other persons, as factor, fit out, equip, load or otherwise prepare, a certain other ship or vessel, called the General Winder, in the port of Baltimore, within the jurisdiction of the United States, to wit, at the district aforesaid, or did cause the same ship or vessel, the General Winder, to be so fitted out, equipped, loaded or otherwise prepared, with intent that the said ship or vessel, the General Winder, should be employed in procuring negroes, mulattoes or persons of color, from a foreign kingdom, place or country, to wit, from the continent of Africa, to be transported to another port or place, to wit, to *the Island of
*464] Cuba, in the West Indies, to be there sold, or otherwise disposed of as slaves, or held to labor or service, contrary to the true intend and meaning of the act of congress in such case made and provided; to the evil example of all others in like case offending, and against the peace, government and dignity of the said United States.

At the trial in the circuit court, the United States offered evidence that the defendant purchased of one McElderry, the vessel called the General Winder, in the indictment mentioned, and that said vessel was built in the port of Baltimore, also in the said indictment mentioned. They further offered in evidence, that at the time said purchase was made, the said vessel was not completely finished, and that the same was finished, under the superintendence of a certain Captain John Hill, who was appointed by the defendant, master of said vessel, on her then intended voyage. They also offered in evidence, that the defendant was, at the time when the offence laid in the indictment was charged to have been committed, and at the time of his purchase of the said vessel, and ever since had been, a citizen of the United States, and had constantly, from the time of the purchase of the said vessel, till the present period, been an actual resident of the said port of Baltimore.

They further offered evidence, that after the said purchase, and after the appointment of the said Captain Hill as master, as aforesaid, the said Hill ordered various fitments for the said vessel, at the said port of Balti-

United States v. Gooding.

more, which said fitments were furnished for said vessel, and afterwards, on the order of said Hill, were paid for by the defendant. They also offered in evidence, that some of these fitments were peculiarly adapted for the slave-trade, and are never put on board any other vessels than those intended for such trade; a part of such fitments, so ordered by Captain Hill and paid for by the defendant, to wit, three dozen of brooms, eighteen scrapers, and two trumpets, were actually put on board the General Winder, in the port of Baltimore, the residue of the equipments on board the General Winder, at the time of her departure, being such as are usual on board vessels carrying on trade between said port and the West Indies; and the rest of such fitments, peculiar to the slave-trade as *aforesaid*, were shipped at [465 the said port of Baltimore, on board another vessel called the Pocahontas, chartered by the defendant. That the said vessel called the General Winder, sailed from the port of Baltimore, fitted as *aforesaid*, and with the said Hill as master, on or about the 21st day of August 1824, having cleared for the island of St. Thomas, in the West Indies. That the other vessel, called the Pocahontas, also sailed for St. Thomas, from the port of Baltimore, with the part of the said fitments put on board her as before mentioned, some time in the month of September following. They also gave evidence that both the said vessels, the General Winder and the Pocahontas, afterwards arrived at St. Thomas, and that, at that island, the said peculiar fitments, shipped as *aforesaid* in the Pocahontas, were there transshipped from said vessel to the General Winder, the said Hill still being the master of the last-mentioned vessel. They also further offered in evidence, that the defendant, about six or seven months after the sailing of the General Winder from the said port of Baltimore, declared in the presence of a competent witness, that the General Winder had made him a good voyage, having arrived with a cargo of slaves, the witness thought he said 290, and that he also declared in the presence of the same witness, at another time, that he, the defendant, was the sole owner of the said vessel, called the General Winder. They also offered in evidence, by another witness, that the defendant, had, at another time, declared in the presence of this other witness, that the said witness, who was a creditor of the defendant, should be paid one-half his debt, on the arrival of the General Winder at Trinidad de Cuba. The United States, further to support the said indictment, offered to give in evidence to the jury, by a certain Captain Peter L. Coit, that he, Captain Coit, was at St. Thomas, while the General Winder was at that island, as before stated, in September 1824, and that he was frequently on board the said vessel, at that time, at St. Thomas; that the said Captain Hill, the said master of the General Winder, then and there proposed to the said witness, Captain Coit, to engage on board the General Winder, as mate, for the voyage **then* in progress, and described the same to be [466 a voyage to the coast of Africa for slaves, and thence back to Trinidad de Cuba. That he offered to the said witness \$70 per month, and five dollars per head for every prime slave which should be brought to Cuba. That on the witness inquiring who would see the crew paid, in the event of a disaster attending the voyage, Captain Hill replied, "uncle John," meaning (as witness understood) John Gooding, the defendant.

The defendant's counsel objected to the admissibility of this evidence,

United States v. Gooding.

and the judges divided in opinion upon its admissibility. They also moved the court for its opinion upon the following points :

1. That on the charges contained in the 1st, 2d, 3d, 5th and 6th counts in the indictment, it is incumbent on the United States to prove, that the vessel, named or mentioned in the indictment, was fitted out, sent away, caused to sail, or caused to be sent away, with intent to transport negroes from the coast of Africa to the Island of Cuba.

2. That evidence, that the defendant caused the vessel in question to be fitted out by Captain John Hill, or any one else, will not support the first count in the indictment, in which he is charged with fitting her out himself.

3. That the first count charges a fitting out in the port of Baltimore, which, according to the true legal interpretation of the words in an indictment, means a complete equipment ; and that evidence of a partial preparation here, and a further equipment at St. Thomas, will not support the charge contained in this count.

4. That the defendant cannot be convicted on the first count, because no offence is legally charged in the said count, it being necessary to specify the particular equipments in the indictment, in order that the defendant may have notice of the particular charge against him.

5. That the defendant cannot be convicted upon the third and fourth counts, because these counts do not charge any offence to have been committed by any principal, to whom the defendant was or could be aiding or abetting ; also, that he cannot be convicted upon the fourth count, unless he was actually or constructively present when the negroes were *467] taken on board on the coast of Africa ; and if the defendant was in Baltimore, at the time the said negroes were taken on board, on the coast of Africa, he could not aid or abet, within the meaning of the fourth section of the act of congress of 20th of April 1818, upon which he was indicted.

6. That the defendant cannot be convicted on the 2d, 5th and 6th counts in the indictment, because no legal offence is charged in either of these counts, the said counts not charging that the General Winder was built, fitted, equipped, loaded, or otherwise prepared, within the jurisdiction of the United States ; and that the said 5th and 6th counts are also defective, in charging the defendant with intent that the vessel should be employed in the slave-trade, instead of charging him with intent to employ her.

7. That the defendant cannot be convicted on the 3d, 4th, 5th and 6th counts, unless there be a previous conviction of the principal in the offence, in the said counts mentioned.

The opinions of the judges being divided upon these points, and also upon the question of allowing objections to the form and sufficiency of the indictment to be discussed at the trial before the jury, the questions were certified to this court for final determination.

March 12th and 13th, 1827. The cause was argued by the *Attorney-General* and *Coxe*, for the United States ; and by *Taney* and *Mitchell*, for the defendant.

March 16th. *STORY*, Justice, delivered the opinion of the court.—This is the case of an indictment against Gooding for being engaged in the slave-trade, contrary to the prohibitions of the act of congress of the 20th of

United States v. Gooding.

April 1818. It comes before us upon a certificate of division of opinions in the circuit court of the district of Maryland, upon certain points raised at the trial. We take this opportunity of expressing our anxiety, lest by too great indulgence to the wishes of counsel, questions of this sort should be frequently brought before this court, and thus, in effect, an appeal in *criminal cases become an ordinary proceeding, to the manifest [*468 obstruction of public justice, and against the plain intendment of the acts of congress. Cases of real doubt and difficulty, or of extensive consequence as to principle and application, and furnishing matter for very grave deliberation, are those alone which can be reasonably presumed to have been within the purview of the legislature, in allowing an appeal to this court upon certificates of division. In this very case, some of the questions certified may have been argued and decided in the court below, upon the motion to quash the indictment ; and there are others, upon which it is understood, that the circuit court had no opportunity of passing a deliberate judgment.

The first question that arises is upon the division of opinions whether, under the circumstances of the case, the testimony of Captain Coit to the facts stated in the record, was admissible. That testimony was to the following effect : that he, Captain Coit, was at St. Thomas, while the General Winder was at that island, in September 1824, and was frequently on board the vessel, at that time ; that Captain Hill, the master of the vessel, then and there proposed to the witness to engage on board the General Winder as mate, for the voyage then in progress, and described the same to be a voyage to the coast of Africa, for slaves, and thence back to Trinidad de Cuba ; that he offered to the witness \$70 per month, and five dollars per head for every prime slave which should be brought to Cuba ; that on the witness inquiring who would see the crew paid in the event of a disaster attending the voyage, Captain Hill replied, " Uncle John," meaning (as the witness understood) John Gooding, the defendant.

It is to be observed, that, as preliminary to the admission of this testimony, evidence had been offered to prove that Gooding was owner of the vessel, that he lived at Baltimore, where she was fitted out, and that he appointed Hill master, and gave him authority to make the fitments for the voyage, and paid the bills therefor ; that certain equipments were put on board peculiarly adapted for the slave-trade ; and that Gooding had made declarations that the vessel had been engaged in the slave-trade, and had made him a good *voyage. The foundation of the authority of the [*469 master, the nature of the fitments, and the object and accomplishment of the voyage, being thus laid, the testimony of Captain Coit was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection, before us. The argument is, that the testimony is not admissible, because, in criminal cases, the declarations of the master of the vessel, are not evidence to charge the owner with an offence ; and that the doctrine of the binding effect of such declarations by known agents, is, and ought to be, confined to civil cases. We cannot yield to the force of the argument. In general, the rules of evidence in criminal and civil cases are the same. Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must, indeed, be shown, that the agent has the authority, and that the act is within its scope ; but these being conceded or proved, either by the course of

business, or by express authorization, the same conclusion arises, in point of law, in both cases. Nor is there any authority for confining the rule to civil cases. On the contrary, it is the known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act. This is so true, that even the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots, employed to administer poison. The proof of the command or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency. So, in cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all. Each is deemed to consent to, or command, what is done by any other, in furtherance of the common object. Upon the facts of the present case, the master was just as much a guilty principal as the owner, and just as much within the purview of the act, by the illegal fitment.

The evidence here offered was not the mere declarations *of the
*470] master, upon other occasions, totally disconnected with the objects of the voyage. These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprise. He had an implied authority to hire a crew, and do other acts necessary for the voyage. The testimony went to establish, that he endeavored to engage Captain Coit to go as mate, for the voyage then in progress, and his declarations were all made with reference to that object, and as persuasives to the undertaking. They were, therefore, in the strictest sense, a part of the *res gestæ*, the necessary explanations attending the attempt to hire. If he had hired a mate, the terms of the hiring, though verbal, would have been part of the act, and the nature of the voyage, as explained at the time, a necessary ingredient. The act would have been so combined with the declarations, as to be inseparable, without injustice. The same authority from the owner which allows the master to hire the crew, justifies him in making such declarations and explanations as are proper to attain the object. Those declarations and explanations are as much within the scope of the authority, as the act of hiring itself. Our opinion of the admissibility of this evidence proceeds upon the ground, that these were not the naked declarations of the master, unaccompanied with his acts in that capacity, but declarations coupled with proceedings for the objects of the voyage, and while it was in progress. We give no opinion upon the point, whether mere declarations, under other circumstances, would have been admissible. The principle which we maintain is stated with great clearness by Mr. Starkie, in his Treatise on Evidence (2 Stark. Evid. part 4, p. 60): "Where," says he, "the fact of agency has been proved, either expressly or presumptively, the act of the agent, co-extensive with the authority, is the act of the principal, whose mere instrument he is, and then, whatever the agent says, within the scope of his authority, the principal says, and evidence may be given of such acts and declarations, as if they had been actually done and made by the principal himself."(a)

(a) See also 2 Stark. Evid. part 4, p. 403, 404.

United States v. Gooding.

*The other questions arise from the instructions or opinions prayed for by the defendant, at the trial, upon matters of law, upon which also the judges were divided in opinion.

The first instruction prayed puts the point, whether the burden of proof of the offences charged in the indictment did not rest upon the United States. Without question, it does, in all cases where a party stands charged with an offence, unless a different provision is made by some statute; for the general rule of our jurisprudence is, that the party accused need not establish his innocence; but it is for the government itself to prove his guilt, before it is entitled to a verdict or conviction. This question has been abandoned at the argument here, and is too plain for controversy, since there is no statutable provision altering the general principle in this particular.

The second instruction is conceived in very general terms, so general, indeed, that it cannot be supported, if it is to be understood in its obvious sense. It asks the court to instruct the jury that evidence that the defendant caused the vessel to be fitted out by Captain Hill, or any one else, will not support the first count in the indictment, in which the defendant is charged with fitting her out himself. This obviously covers the case, where the fitting out is by the instrumentality of any other persons, however innocent of his design, even though the defendant himself should be personally present, either really or constructively, and superintending the whole operations. To this extent, it is clearly unmaintainable. But, in a more restrictive sense, it involves the question, whether evidence, that the owner commanded, authorized and superintended the fitment, through his agents, without his personal presence, would support this count. We are of opinion, in the affirmative. The act of congress does not require that the fitting out should be by the owner personally, without the assistance or agency of others. The act itself is of a nature which forbids such a supposition. The fitment of a vessel is, ordinarily, and, indeed, must be done, through the instrumentality of others. It is not a single act, but a series of subordinate operations, requiring the co-operation of persons in various trades and arts, all conducting to the same end. It would be against the plain sense of the *legislature, to interpret its language to mean, that the act which it [472] punishes, and which must or may be done by many, in the ordinary course of business, shall only be punishable, when the extraordinary fact occurs of its being done by one person. If done by others, under the command and direction of the owner, with his approbation and for his benefit, it is just as much, in contemplation of law, his own act, as if done by himself. To this extent, at least, the maxim may be safely applied, *qui facit per alium, facit per se*. And it cannot be material, whether it be done in his absence from, or his presence in, the scene. Especially, there can be no doubt, that the principle ought to be applied with increased force, where the owner resides at the same port or neighborhood, and superintends the course of the operations, even if he does not see them. Even in the highest crimes, those who are present, aiding and commanding, or abetting, are deemed principals; and, if absent, in treason and in misdemeanors, they are still deemed principals; though it may be necessary, in treason, to lay the *overt* acts precisely according to the fact, from considerations peculiar to that offence. This instruction ought, therefore, to have been refused.

United States v. Gooding.

The third instruction turns upon the point, whether the fitting out, in the sense of the act of congress, means a complete equipment, so that a partial equipment only will extract the case from the prohibitions of the statute. This objection appears to us to proceed from a mistaken view of the facts applicable to the case. If the vessel actually sailed on her voyage from Baltimore, for the purpose of employment in the slave-trade, her fitting was complete, for all the purposes of the act. It is by no means necessary, that every equipment for a slave-voyage should have been taken on board at Baltimore; nor, indeed, that any equipments exclusively applicable to such a voyage, should have been on board. The presence of such equipments may furnish strong presumptive proof of the object of the voyage, but they do not constitute the offence. The statute punishes the fitting out of a vessel, with intent to employ her in the slave-trade, however innocent the equipment may be, when designed for a lawful voyage. It is the act, combined with the intent, and not either, separately, which is punishable. *473] Whether the fitting out be fully adequate for the purposes of a slave-voyage may, as matter of presumption, be more or less conclusive; but if the intent of the fitment be to carry on a slave-voyage, and the vessel depart on the voyage, her fitting out is complete, so far as the parties deem it necessary for their object, and the statute reaches the case.

But we are also of opinion, that any preparations for a slave-voyage, which clearly manifest or accompany the illegal intent, even though incomplete and imperfect, and before the departure of the vessel from port, do yet constitute a fitting out, within the purview of the statute. This was held by this court, upon full consideration, in the cases of *The Emily* and *The Caroline*, 9 Wheat. 381, and *The Plattsburg*, 10 Ibid. 133. Those cases, indeed, arose upon the construction of the slave-trade acts of 1794, 1800 and 1807; but the language of those acts is almost literally transcribed into the statute of 1818, and the construction adopted therein must govern the present case. In either view, therefore, our answer to the third prayer is, that a complete equipment is not necessary to be proved, but any partial preparation, which demonstrates or accompanies the illegal intent, will bring the case within the statute, and support the charge in the first count of the indictment.

The fourth instruction respects the sufficiency of the averments of the first count; and it is contented, that there ought to have been a specification of the particulars of the fitting out, and that it is not sufficient, to allege the act itself, without them. The indictment, in this respect, follows the language of the statute, and is as certain as that is. We cannot perceive any good reason for holding the government to any greater certainty in the averments of the indictment. The fitting out of a vessel may, and must, consist of a variety of minute acts and preparations, almost infinite in their detail, and the enumeration would answer no valuable purpose to the defendant, to assist him in his defence, and subserve no public policy. The fitting out of a vessel is a sort of business, which is as clear and definite as any other; and we might just as well, in an indictment upon the act for building a ship with the illegal intent, require that the government *474] should particularize the acts of building, through their whole details, as those of equipment. The building of a ship is not an act more certain in its nature, than the fitting out of a ship. The particular prepara-

United States v. Gooding.

tions are matters of evidence, and not of averment. Every man may well be presumed to know, what are the fitments of a vessel for a voyage, without more particularity. The objection proceeds upon the supposition, that ordinary equipments only, though combined with the illegal intent, are not within the act; and that extraordinary equipments only, for such a voyage, are provided for. This has been already shown to be an incorrect exposition of the statute. It imputes no guilt to any particulars of the equipment, but to the act, combined with the illegal intent.

In general, it may be said, that it is sufficient certainty in an indictment, to allege the offence in the very terms of the statute. We say, in general, for there are doubtless cases where more particularity is required, either from the obvious intention of the legislature, or from the application of known principles of law. At the common law, in certain descriptions of offences, and especially of capital offences, great nicety and particularity are often necessary. The rules which regulate this branch of pleading were sometimes founded in considerations which no longer exist, either in our own or in English jurisprudence; but a rule being once established, it still prevails, although if the case were new, it might not now be incorporated into the law. So, again, in certain classes of statutes, the rule of very strict certainty has sometimes been applied, where the common law furnished a close and appropriate analogy. Such are the cases of indictments for false pretences, and sending threatening letters, where the pretences and the letters are required to be set forth, from the close analogy to indictments for perjury and forgery. Courts of law have thought such certainty not unreasonable or inconvenient, and calculated to put the plea of *autrefois acquit*, or *convict*, as well as of general defence at the trial, fairly within the power of the prisoner. But these instances are by no means considered as leading to the establishment of any general rule. On the contrary, the course has been to leave every class of cases to be decided *very much upon its own peculiar circumstances. Thus, in cases of conspiracy, it has never been held necessary to set forth the *overt* [*475 acts or means, though these might materially assist the prisoner's defence. So, in cases of solicitation to commit crimes, it has been held sufficient, to state the act of solicitation, without any averment of the special means. And in endeavors to commit a revolt, which is, by statute, in England, made a capital offence, it has always been deemed sufficient, to allege the offence in the words of the statute, without setting forth any particulars of the manner or the means. These cases approach very near to the present; and if any, by way of precedent, ought to govern it, they well may govern it. The case of treason stands upon a peculiar ground; there, the *overt* acts must, by statute, be specially laid in the indictment, and must be proved as laid. The very act, and mode of the act, must, therefore, be laid as it is intended to be proved. If the party be only constructively a principal, as an absent and distant coadjutor or leader, it may be necessary to aver the fact accordingly. There is great good sense in the rule which has been laid down, that where the offence is made up of a number of minute acts, which cannot be enumerated upon the record, without great prolixity and inconvenience, and the danger of variance, they ought to be dispensed with. The present case is a fit illustration of the rule; the fitting out is a compound of various minute acts, almost incapable of exact specification.

United States v. Gooding.

The fifth instruction turns upon a doctrine applicable to principal and accessory in cases of felony, either at the common law or by statute. The present is the case of a misdemeanor, and the doctrine, therefore, cannot be applied to it; for in cases of misdemeanors, all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals. Under such circumstances, there is no room for the question of actual or constructive presence or absence; for whether present or absent, all are principals. They may be indicted and punished accordingly. Nor is the trial or conviction of an actor indispensable to furnish a right to try the person who aids or abets the act; each, in the eye of the law, is deemed guilty as a principal. In the *present indictment, the offence is in the third and *476] fourth counts laid, by aiding and abetting, in the very terms of the act of congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, and not merely according to the intendment of law. We do not consider, that the terms "aid" and "abet," used in this statute, are used as technical phrases belonging to the common law, because the offence is not made a felony, and therefore, the words require no such interpretation. The statute punishes them as substantive offences, and not as accessorial, and the words are, therefore, to be understood as in the common parlance, and import assistance, co-operation and encouragement. These remarks furnish an answer to the seventh instruction, which must share the fate of the fifth.

The sixth instruction is that which has presented the most difficulty. It embraces two propositions; the first is, that the second, fifth and sixth counts in the indictment, ought to have contained an averment that the vessel was built, fitted out, &c., within the jurisdiction of the United States; the second is, that the fifth and sixth counts do not allege the offence in the words of the statute, those words being, "with intent to employ the vessel" in the slave-trade, &c., whereas, each of these counts avers, "with intent that the said vessel should be employed" in the slave-trade, which imports a very different state of facts. In order to understand these exceptions, it is necessary to attend carefully to the very words of the act of congress. The second section enacts, "that no citizen or citizens, &c., shall, after the passing of this act as aforesaid, for himself, themselves, or any other person or persons whatsoever, either as master, factor or owner, build, fit, equip, load, or otherwise prepare, any ship or vessel, in any port or place within the jurisdiction of the United States, nor cause any *such* ship or vessel to sail from any port or place whatsoever, within the jurisdiction of the same, for the purpose of procuring any negroes, &c., to be transported, &c., as slaves." The third section enacts, "that every person or persons so building, fitting out, equipping, loading, or otherwise preparing, or sending away, or causing any of the acts aforesaid to be done, with intent to employ *such ship or vessel in such trade or business, after the passing of this *477] act, contrary to the true intent and meaning thereof, or who shall in anywise be aiding or abetting therein, shall severally, on conviction thereof by due course of law, forfeit, &c. The first point turns upon the interpretation of the words "such ship or vessel," in each of these sections. To what do they refer? The only ship or vessel spoken of in either section, is such as have been built, fitted out, &c., in some port or place of the United States. "Such ship or vessel" must, therefore, refer to a ship or vessel so built,

United States v. Gooding.

fitted out, &c., as its antecedent, or the relative "such" can have no meaning at all. The word is sensible in the place where it occurs, and it is the duty of the court, when it can, to give effect to every word in every enactment, if it can be done, without violating the obvious intention of the legislature. This is a penal act, and is to be construed strictly, that is, with no intendment or extension beyond the import of the words used. There is no certainty that the legislature meant to prohibit the sailing of any vessel on a slave-voyage, which had not been built, fitted out, &c., within the jurisdiction of the United States. If a foreign vessel, designed for the slave-trade, and fully fitted out for that purpose, were, by accident or design, to anchor in our ports, it would not be reasonable to suppose, that the legislature could have intended the sailing of such a vessel from our ports to be an offence, within the purview of our laws. Yet, if the construction contended for on behalf of the United States be adopted, that would be the result.

But it is sufficient to say, that the word "such" has an appropriate sense, and can be reasonably referred only to the ship or vessel previously spoken of; and such ship or vessel is not merely one built, fitted out, &c., but one built, fitted out, &c., in a port or place within the United States. The whole description must be taken together. If we were to adopt any other construction, we should read the words as if "such" were struck out, and the clause stood, "any ship or vessel." Such a course would not be defensible in construing a penal statute. It is remarkable, that in the slave-trade acts of 1794 (1 U. S. Stat. 347), and of 1807 *(2 Ibid. 426), the word "such" is omitted, and seems to have been introduced into the act of [478 1818, *ex industriâ*. We must take the law as we find it, and, upon examination of its language, we are of opinion, that this exception is well taken. The cases of the *United States v. Lacoste*, 2 Mason 129, and *United States v. Smith*, Ibid. 143, have been cited at the bar as containing a different opinion expressed in the circuit court in Massachusetts. I owe it, in candor, to acknowledge, that the fact is so; but I have no recollection that the point was made at the argument, and I am confident, that it never was insisted upon in the view which has been presented by the argument in this court. My own error, however, can furnish no ground for its being adopted by this court, in whose name I speak on the present occasion.

The other point is equally fatal. There is a clear distinction between causing a vessel to sail, or to be sent away, with intent to employ her in the slave-trade, and with intent that she should be employed in that trade. The former applies to an intent of the party causing the act, the latter to the employment of the vessel, whether by himself or a stranger. The evidence may fully support these counts, and yet may not constitute an offence within the act of congress; for the employment by a mere stranger would not justify the conviction of the party charged with causing her to sail, or to be sent away, with intent to employ her in the slave-trade, as owner. There is no reason, in criminal cases, why the court should help any such defective allegations. The words of the statute should be pursued.

It remains only to consider the point, whether these objections to the sufficiency of the indictment could be properly taken at this stage of the proceedings. Undoubtedly, according to the regular course of practice, objections to the form and sufficiency of an indictment ought to be discussed,

United States v. Gooding.

upon a motion to quash the indictment, which may be granted or refused in the discretion of the court, or upon demurrer to the indictment, or upon a motion in arrest of judgment, which are matters of right. The defendant has no right to insist that such objections should be discussed or decided, *479] during the trial of the facts by the jury. It would *be very inconvenient and embarrassing, to allow a discussion of such topics, during the progress of the cause before the jury, and introduce much confusion into the administration of public justice. But, we think, it is not wholly incompetent for the court to entertain such questions, during the trial, in the exercise of a sound discretion. It should, however, be rarely done, and only under circumstances of an extraordinary nature. The circuit court, in the present case, did allow the introduction and discussion of these questions, during the trial, and were divided upon the propriety of the practice. We can only certify, that the court possessed the authority, but that it ought not to be exercised except on very urgent occasions. A certificate will be sent to the circuit court of the district of Maryland, according to this opinion.

CERTIFICATE.—This cause came on, &c. : On consideration whereof, it is ordered and adjudged, that the following opinions be certified as the opinions of this court on points of division to the circuit court aforesaid. 1. That the testimony of Peter L. Coit, set forth in the record, was, under the circumstances of the case, admissible as competent evidence against the defendant, Gooding. 2. That the opinions prayed for by the counsel for the defendant, Gooding, in the first and sixth prayers, set forth in the record, were correct in law, and ought to have been given by the court. 3. That the opinions prayed for in all the other prayers of the defendant, were incorrect in law, and ought to have been refused. 4. That the objections taken to the form and sufficiency of the indictment by the defendant's counsel, were not matters of right, which the defendant might insist upon, and discuss, and require to be decided, during the trial of the issue by the jury ; and that the same should, according to the regular course of practice, have been discussed on a motion to quash the indictment, or on demurrer, or on motion in arrest of judgment ; but that the court had, nevertheless, *480] *competent authority, in the exercise of a sound discretion, to permit such objections to be discussed and decided, during the trial.

UNITED STATES *v.* MARCHANT and COLSON.*Criminal law.—Separate trials.*

Where two or more persons are jointly charged, in the same indictment, with a capital offence, they have not a right by law, to be tried separately, without the consent of the prosecutor, but such separate trial is a matter to be allowed in the discretion of the court.

CERTIFICATE of Division from the Circuit Court of Massachusetts.¹

March 12th, 1827. The opinion of the court in this case was delivered by STORY, Justice.—The question, which comes before us upon a certificate of a division of opinion of the judges of the circuit court of Massachusetts, is this, whether two or more persons, jointly charged, in the same indictment, with a capital offence, have a right, by the laws of the country, to be tried severally, separately and apart, the counsel for the United States objecting thereto, or whether it is a matter to be allowed in the discretion of the court. We have considered the question, and are of opinion, that it is a matter of discretion in the court, and not of right in the parties. And it has become my duty briefly to expound some of the reasons which urge us to that conclusion.

The subject is not provided for by any act of congress ; and therefore, if the right can be maintained at all, it must be as a right derived from the common law, which the courts of the United States are bound to recognise and enforce. The crimes act of 1790, ch. 9, provides, in the 29th section, for the right of peremptory challenge in capital cases ; and this right, to the extent of the statute, must, *in all cases, be allowed the prisoners, [*481 whether they are tried jointly or separately. Upon a joint trial, each prisoner may challenge his full number, and every juror challenged as to one, is withdrawn from the panel as to all the prisoners on the trial, and thus, in effect, the prisoners in such a case possess the power of peremptory challenge to the aggregate of the numbers, to which they are respectively entitled. This is the rule clearly laid by Lord Coke, Lord Hale and Sergeant Hawkins, and, indeed, by all the elementary writers. Hawk. P. C. b. 2, ch. 41, § 9 ; 2 Hale H. P. C. 268 ; Co. Litt. 156 ; *Beauchamp's Case*, 9 Edw. IV. folio 27, pl. 40 ; Plowd. 100 ; Kelyng 9.

One consequence of this, in ancient times, was, that embarrassments often arose at trials at the assizes, on account of a defect of sufficient jurors. The statute of Westminster II., c. 38, ordained, "that in one assize, no more shall be returned than twenty-four." The common practice under this statute used to be, for the sheriff to return forty-eight jurors, although the precept named but twenty-four. It was, indeed, held, at an early period, that the statute of Westminster did not apply to criminal cases ; but, notwithstanding this, the usual practice prevailed, unless the court directed a larger number to be returned. And it was not until the reign of George II., that a larger number was required by law to be returned at the assizes. The

¹ For the opinion of Judge STORY, in the circuit court, see 4 Mason 158. And see *United States v. Gibert*, 2 Sumn. 20 ; *United States v. Kelly*, 4 W. C. C. 528 ; *United States v. Wilson*, Bald. 78 ; *United States v. Collyer*, Wharton

Hom. 489 ; *Commonwealth v. Manson*, 2 Ash. 31 ; *Commonwealth v. Skupinski*, 9 Leg. Int. 34. In New York, it is provided by statute, that in such cases, a separate trial shall be a matter of right. *Babcock v. People*, 15 Hun 353.

United States v. Marchant.

history of this branch of the subject is very clearly stated in 3 Bac. Abr. tit. Juries, B., 6, and in Kelyng 16. (a) It is obvious, that on joint panels, returned for joint trials, at the assizes, a defect of jurors might, from this limitation, often take place. And it became a question, in very early times, whether, under such circumstances, the court had power, against the will of the prisoners, to sever the panel, and to try them severally, if they insisted upon their right of several challenge. It was decided, upon full consideration, that the court had this power. To this effect are the cases in Plowd. 100, in Dyer 152 b, and in Kelyng 9 ; and the doctrine has received the sanction *482] of Lord HALE, and other writers of the highest authority. *Whether, then, prisoners, who are jointly indicted, can, against their wishes, be tried separately, does not admit of a doubt.¹ It remains to consider, whether they can insist upon a several trial.

The sole ground upon which this claim can rest must be, if maintainable at all, that they have a right to select their jury out of the whole panel, and that as, upon a joint trial, one may desire to retain a juror who is challenged by another, and, if challenged by one, he must be withdrawn as to all, this right of selection is virtually impaired. But it does not appear to us, that this reasoning can, upon the principles of the common law, be supported. x The right of peremptory challenge is not, of itself, a right to select, but a right to reject jurors. It excludes from the panel those whom the prisoner objects to, until he has exhausted his challenges, and leaves the residue to be drawn for his trial, according to the established order or usage of the court. The elementary writers nowhere assert a right of this nature in the prisoner, but uniformly put the allowance of peremptory challenges upon distinct grounds. Mr. Justice Blackstone, in his Commentaries (4 Bl. Com. 353), puts it upon the ground, that the party may not be tried by persons against whom he has conceived a prejudice, or who, if he has unsuccessfully challenged them for cause, may, on that account, conceive a prejudice against the prisoner. The right, therefore, of challenge, does not necessarily draw after it the right of selection, but merely of exclusion. It enables the prisoner to say who shall not try him; but not to say who shall be the particular jurors to try him. The law presumes, that every juror sworn in the case is indifferent and above legal exception ; for otherwise he may be challenged for cause. What jurors, in particular, shall try the cause, depends upon the order in which they are called ; and the result is a mere incident following the challenges, and not the absolute selection of the prisoner, resulting from his power of challenge.

This view of the general principle of the common law is very much confirmed by other considerations. It is laid down by Hawkins (Pl. C. b. 2, ch. 41, § 8), that where several persons are arraigned on the same indictment, and severally plead not guilty, it is in the election of the prosecutor *483] either to take out joint *venires* against them all, or several *against each of them. This plainly supposes that it is in the election of the prosecutor, whether there should be a joint or separate trial. If there had

(a) See also, 2 Hale H. P. C. 263.

¹ Commonwealth v. Hughes, 11 Phila. 430 ; People v. Howell, 4 Johns. 296 ; People v. Vermilyea, 9 Cow. 369.

United States v. Marchant.

been any known right in the prisoner to control this election, it seems incredible, that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

But a still more direct conclusion against the right may be drawn from the admitted right of the crown to challenge in criminal cases, and the practice under that right. We do not say, that the same right belongs to any of the states in the Union ; for there may be a diversity in this respect as to the local jurisprudence or practice;¹ the inquiry here is, not as to what is the state prerogative, but, simply, what is the common-law doctrine as to the point under consideration. Until the statute of 33 Edw. I., the crown might challenge peremptorily any juror, without assigning any cause ; but that statute took away that right, and narrowed the challenges of the crown to those for cause shown. But the practice, since this statute, has uniformly been, and it is clearly settled, not to compel the crown to show cause, at the time of objection taken, but to put aside the juror, until the whole panel is gone through. Hawkins, on this point, says (Pl. C. b. 2, ch. 43, §§ 2, 3), "if the king challenge a juror, before the panel is perused, it is agreed, that he need not show any cause of his challenge, till the whole panel be gone through, and it appears that there will not be a full jury, without the person so challenged. And if the defendant, in order to oblige the king to show cause, presently challenge, *touts paravaile* ; yet it had been adjudged, that the defendant shall be first put to show all his causes of challenge, before the king need to show any." And the learned author is fully borne out by the authorities which he cites, and the same rule has been recognised down to the present times. Hale H. P. C. ch. 36, p. 271 ; 3 Bac. Abr. Jury, E, 10 ; *Rex v. Conigsmarke*, 9 How. St. Tr. 1 ; *Rex v. Stapleton*, 3 Ibid. 502 ; *Rex v. Borosky*, 9 Ibid. 1 ; *Rex v. Gray*, Ibid. 127, s. c. T. Raym. 473 ; *Rex v. Grahme*, 12 How. St. Tr. 646 ; *Rex v. Cook*, 13 Ibid. 311 ; *Rex v. Horne Tooke*, 25 Ibid. 1, 24 ; 1 Chit. Cr. Law 533 ; *Rex v. Campion*, 1 How. St. Tr. 1050.

*This acknowledged right of peremptory challenge existing in the crown, before the statute of 33 Edw. I., and the uniform practice [^{*484} which has prevailed, since that statute, to allow a qualified and conditional exercise of the same right, if other sufficient jurors remained for the trial, demonstrate, as we think, that no such power of selecting his jury belongs, or was ever supposed to belong, by the common law, to the prisoner ; and that, therefore, he could not demand, as matter of right, a separate trial to enable him to exercise it. In a separate or joint trial, he could, at any time, be defeated by the crown of such choice, by its own admitted prerogative.

The circumstances already alluded to, of the right of each prisoner, on a joint trial, to exercise his full right of peremptory challenge, and the small number of jurors usually returned on the panel at the assizes, accounts in a very satisfactory manner for the language used in some of the cases, as to the necessity of directing separate trials, where the prisoners refused to

¹ *United States v. Douglass*, 2 Bl. C. C. 207 ; *NELSON, J.* In Pennsylvania, the prosecution is not required to assign cause of challenge, until

the panel is exhausted ; *Zell v. Commonwealth*, 94 Penn. St. 258 ; even in cases of misdemeanor. *Haines v. Commonwealth*, 12 W. N. C. 193.

United States v. Marchant.

join in their challenges. The plain reason was, that otherwise there could be no trial at all, for defect of jurors, at the same assizes; and therefore, the court, in furtherance of public justice, were accustomed, without the consent of the prisoners, to direct a separate trial. In this way the reason of the practice is understood by Lord Hale (2 Hale P. C. ch. 34, p. 263), and by Hawkins (Hawk. P. C. b. 2, ch. 41, § 9), and by other more recent writers on common law. (a) In this manner, the language of Lord HOLT in *Charnock's Case* (12 Howell's State Trials 1454; s. c. 3 Salk. 81), is to be interpreted; for it is manifest, that he could not intend, that there could not be a joint trial, where the prisoners challenged separately, for no rule was better settled in his time than that they could. Indeed, in *Rex v. Grahme* (12 Howell's State Trials, 646, 673), the same learned judge uses similar language in a sense which admits of no other interpretation; and this was the answer given to it, when cited in a later case for the like purpose.

*That case is *Rex v. Noble and others*, in 1713, before Lord Chief
*485] Justice PARKER, and reported in the State Trials (9 Harg. St. Tr. 1; s. c. 15 Howell's St. Tr. 731). In that case, which was an indictment for murder, Noble moved the court for a separate trial, and the motion was denied. He was convicted, and when brought up for judgment, he moved in arrest of judgment this very matter, that there was a mis-trial, because (to use his own words) "we were severed in our challenges, and yet were tried together by the same jury;" and he relied upon the language of Lord HOLT in *Charnock's Case*, as in point. The court overruled the objection, and stated, that Lord HOLT's language referred solely to the public inconvenience, on account of a probable defect of jurors, and not to any matter of right in the prisoners. Sentence was accordingly passed upon the prisoner, and he was executed. There is a curious and learned commentary appended in a note to this trial, which was printed before the execution of Noble, in which an attempt was made to question the correctness of the decision. But it is therein admitted, that Noble's counsel declined to argue the point, though requested; from which we cannot but infer, that they thought the objection unfounded. The decision itself has never since been questioned or denied. We have, therefore, in the present case, not merely the absence of any authority in favor of the matter of right, but the course of practice, and the general reasoning deducible from the prerogative of the crown against it; and lastly, a direct authority, in times when the administration of criminal justice was unsuspected, on the very point.

Such is the substance of the reasons which induce us to decide against the claim as a matter of right. In our opinion, it is a matter of sound discretion, to be exercised by the court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence. A certificate is, accordingly, to be sent to the circuit court.

CERTIFICATE.—This cause came on, &c. : On consideration whereof, it
*486] is ordered and adjudged by this court, *that it be certified to the said circuit court, that where two or more persons are jointly charged, in the same indictment, with a capital offence, such persons have not a right, by the laws of the country, to be tried severally, separately and apart, the

(a) 1 Chitty's Crim. Law 535 See Starkie's Crim. Pl. 35.

United States v. 350 Chests of Tea.

counsel for the United States objecting thereto ; but that such separate trial is a matter to be allowed in the discretion of the court before whom the indictment is tried. All which is ordered to be certified, &c.

UNITED STATES v. 350 CHESTS OF TEA : LIPPINCOTT and others, Claimants.

Smuggling.—Bonds for duties.—Seizures.—Lien, how enforced.

The term "concealed," as used in the 68th section of the duty act of the 2d of March 1799, ch. 128, applies only to articles intended to be secreted and withdrawn from public view on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive. The forfeiture inflicted by that section, does not extend to a case, where, the duties not having been paid or secured, in any other manner than by giving the general bond, and storing the goods according to the 62d section of the act, the goods were fraudulently removed from the storehouse agreed upon by the collector and the importer, by some person other than the claimants, who were *bond fide* purchasers of the goods, and without their knowledge and consent, to another port, where the goods were found stowed on board the vessel in which they were transported, in the usual manner of stowing such goods, when shipped for transportation.

Under the 62d section of the act, in the case of teas, the duties are "secured to be paid," in the sense of the law, by the single bond of the importer, accompanied by a deposit of the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties are actually paid, or otherwise secured ; and no forfeiture is incurred, under the 58th section, by the removal and concealment of the goods on which the duties have been thus "secured to be paid."

To authorize the seizure and bringing to adjudication of teas, under *43d section of the act, it is necessary, not only that the chests should be unaccompanied by the proper [*487 certificates, but also by the marks required to be placed upon them by the 39th section.

The lien of the government for duties, attaches upon the articles, from the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the custom-house officers.

Quære ? Whether such lien can be enforced against a *bond fide* purchaser, without notice that the duties were not paid or secured ?

The lien for duties cannot in any case, be enforced by a libel of information in the admiralty ; the revenue jurisdiction of the district courts, proceeding *in rem*, only extending to cases of seizures for forfeitures under laws of impost, navigation or trade of the United States.

But a suit at common law may be instituted in the district or circuit courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same.

APPEAL from the Circuit Court for the Southern District of New York.¹

March 8th, 1827. This cause was argued by the *Attorney-General*, for the United States ; and by *Webster* and *Coze*, for the claimants.

March 15th. WASHINGTON, Justice, delivered the opinion of the court.—This was a libel filed in the district court of the United States for the southern district of New York, in the name of the United States, against 350 chests of hyson-skin tea, imported from Canton, in the ship Benjamin Rush, as forfeited to the use of the United States. The libel charges, that the chests of teas were seized by the collector of the customs for the district of Philadelphia, on the 6th of December, in the year 1825, at the city of New York, on waters navigable from the sea by vessels of ten or more tons burden, and alleges three distinct grounds of forfeiture. First, that the

¹ Reported below, 1 Paine 409.

United States v. 350 Chests of Tea.

teas, being subject to pay duties, were imported into the United States, at Philadelphia, and were there unladen, without having been entered at any custom-house, and without a permit from any collector and naval officer, or from any collector of the customs of the United States, the duties imposed *488] thereon not having been paid, or secured to *be paid, according to law. Secondly, that the said chests of tea, so imported, and subject to pay duties, were afterwards found concealed on board a certain vessel, in the southern district of New York, the said duties not having been paid, or secured to be paid, as the law requires. Third, that the said teas, being so imported, and subject to duties, were landed at Philadelphia, without the permit of the inspectors of the customs of that district, and were deposited in a storehouse in the said district, agreed on by the collector of the said district and Edward Thomson, the importer of the said teas, who, previous to the landing thereof, elected to give, and did actually execute and give, to the collector of the said district, his bond, without a surety, in double the amount of duties chargeable on the whole amount of teas so imported, in conformity with the provisions of the 62d section of the act to regulate the collection of duties on imports and tonnage. That the said teas were afterwards clandestinely and fraudulently removed by the said Thomson, or his agents, from the storehouse in which they had been deposited, without any permit from the collector and naval officer of the said district, and without the duties thereon having been first paid, or secured to be paid, and were afterwards found concealed as before mentioned.

To this libel, a claim and answer were filed on behalf of Joshua Lippincott, William Lippincott and Benjamin W. Richards, of Philadelphia, setting forth, that the said teas were imported into Philadelphia, by Edward Thomson, who had the same regularly entered, and unladen under a permit duly granted by the collector, in the presence of the proper custom-house officers of that port; and that the said chests of tea were duly inspected, weighed, marked and numbered, as the law required. That bond was given by Thomson, and the teas were stored, as stated in the libel, in conformity with the 62d section of the law therein referred to; that a certificate, signed and sealed in due form of law, was issued, to accompany each of the chests of tea, which certificates were delivered to Thomson, and afterwards came to the possession of the claimants, to whom a bill of sale of the said teas had been made by the said Thomson, as a security for certain large advances *489] made *by them to Thomson, and that the said certificates were then held by them as their property. This bill of sale being set out in the claim, purports to convey to the claimants all Thomson's right in these, and other chests of teas, with power to enter the same, from the custom-house stores, and to secure the duties thereon, should it be deemed necessary, as a collateral security for certain notes granted, and to be granted, to Thomson, by the claimants. The claim then proceeds to state, that Thomson, at the same time, indorsed to the claimants the invoice and bills of lading of the said teas, and delivered the same, together with the bill of sale, and his key of the store, in which the teas were deposited, to the claimants; that the chests of tea mentioned in the libel were taken from the storehouse in which they had been deposited, without the knowledge or consent of the claimants, nor can they say by what means they were so taken; but they have heard and believe, that they were taken out by Thomson, to whom the claimants

had delivered the key for another purpose, and were delivered to Francis H. Nicoll, who caused them to be shipped to New York, with full notice at the time that they were the property of the claimants.

The district court decreed the teas to be forfeited to the United States, from which sentence an appeal was prayed to the circuit court, where the same was reversed, and restitution decreed to the claimants, from which last decree, the cause comes before this court by appeal; and the only question to be decided is, whether, upon this libel, and the facts agreed upon in the district court, the teas in question are liable to forfeiture, for any of the causes stated in the libel?

The first ground of forfeiture alleged in the libel, is so satisfactorily disposed of, by the facts agreed in the case, that it was not relied upon, nor even noticed, in the argument of the cause in this court. The charge is, that the teas in question, being subject to the payment of duties upon their importation, were unladen at the port of Philadelphia, without having been entered at any custom-house, and without a regular permit to land the same having been first obtained. *The facts agreed, admit that they were entered, inspected, bonded and stored, according to law, and particularly to [*490 the 62d section of the duty act, as alleged in the claim.

The next alleged cause of forfeiture is, that the teas were found concealed on board a certain vessel, the duties thereon not having been paid, or secured to be paid. This charge is also negatived by the statement of facts, which admits, that the teas were not secreted, nor were they found secreted at the time of seizure, on board the vessel where they were seized, but were then and there stowed in the usual and customary manner of stowing such property, when put on board for transportation. It is, nevertheless, insisted, on the part of the United States, that although the conclusion that the teas were not found secreted, must now be admitted as a fact, not to be controverted in argument, nevertheless, the court is bound to say that, upon a view of the facts agreed in the statement, which forms part of this record, they were concealed, in point of law, and according to the true intent and meaning of the act of congress, under which the seizure was made. These facts are, that, after the teas were placed in the storehouse agreed upon by the collector and the importer, they were fraudulent removed from thence, by some persons other than the claimants, and without their knowledge or consent; and after a regular entry and clearance at the custom-house in Philadelphia, were shipped on board the vessel in which they were seized, and transported to the port of New York, the duties thereon not having been paid or secured, in any other manner than by giving the general bond, and storing the teas according to the provisions of the 62d section of the duty act.

This question arises out of the 68th section of the duty act, and depends upon the true construction of that section. It declares, so far as concerns this particular case, "that every collector, &c., shall have full power and authority to enter any ship or vessel in which they shall have reason to suspect any goods, &c., subject to duties, are concealed, and therein to search for, seize and secure, any such goods," &c., and "all such goods, &c., on which the duties shall not have been paid, or secured to be paid, shall be forfeited."

*The argument upon this section is, that, after the goods are stored, according to the provisions of the 62d section, the fraudulent removal [*491

of them from the place in which they are so deposited, without a permit, and without paying or securing the duties, in the mode prescribed by the act, amounts to a concealment of them, in whatever place, and under whatever circumstances, they may be found; that the real ground of forfeiture of goods so removed, is the non-payment of the duties, or the not securing of the same, according to the provisions of this section; and the concealment of them is merely a circumstance to warrant the custom-house officer in searching for, seizing and bringing them to adjudication. The court cannot yield its assent to either of these propositions. The act provides for, and defines, by express enactments, the various acts which should draw after them the penalty of forfeiture of the goods imported. Thus, if they be unladen, at any other time than in open day, unless by a special license, or at any other time, without a permit by the proper officer, they are subject to forfeiture, under the 50th section; and the like consequence follows, as to distilled spirits, wines or teas, which are landed without the special permit provided for by the 37th section, or otherwise than under the inspection of the surveyor, or other officer acting as inspector of the revenue, contrary to the direction of the 38th section. These are all acts of illegal importation, and on that ground, the goods are made liable to forfeiture. But after they are regularly entered, landed, bonded and stored, there is no part of this act which exposes them to this penalty, for being illegally withdrawn from the place of their deposit, without a permit from the proper officer, or without the duties thereon being first paid, or secured to be paid. Nor would it seem, but for the extraordinary circumstances which have attended these and the other teas mentioned in these proceedings, to have been necessary to devise other guards than those which the 62d section of the act has provided for securing to the United States the payment of the duties. The key of one of the locks to be placed on the store in which the teas are deposited, is directed to be retained by the inspector, who is forbidden *to *492] deliver out any part of them, without a written permit from the collector and naval officer, to the obtaining of which, it is necessary, that the duties should be first paid on the parcel which the owner desires to remove, or should be secured to be paid, by a bond, with surety or sureties, to the satisfaction of the collector, in the penalty and on the terms prescribed in this section. The security thus provided by the deposit might be lost by the destruction of the articles themselves by fire, or might be jeopardized by the fraudulent, the felonious, or the violent removal of them from the place of their supposed safe-custody. But that they should be so removed, with the fraudulent connivance, or in consequence of the culpable carelessness of the inspector, or of any other officer of the customs, was a risk which probably did not enter in the contemplation of the legislature. Be this as it may, it is perfectly clear, that no provision is anywhere made to meet the case of goods so illegally removed, whether by subjecting them to forfeiture, or by pointing out any other remedy to guard the government against the loss to which those acts might expose it. A remedy, although it may, under certain circumstances, be an inadequate one, is, nevertheless, provided by the general principles of law. The lien of the government for the duties, which attached upon the articles, from the moment of their importation, was not, and could not be, discharged, by the unauthorized and illegal removal of the articles from the custody of the inspector, or other custom-house officer,

United States v. 350 Chests of Tea.

having charge of them, and might have been enforced by the ordinary remedies provided by law in similar cases. Whether it could be enforced against a fair *bond fide* purchaser of goods, removed from the store, by a permit from the proper officers, without notice that the duties were not paid or secured, is a question which does not arise in this case, and upon which no opinion, therefore, is intended to be given.

In order, then, to subject teas illegally removed from the storehouse in which they were deposited, to forfeiture, under this count in the libel, it is essential for the United States to prove, upon the trial, not only that the duties for which they were liable were unpaid, or not secured to be paid, but that they were found concealed at the time they were seized. A *suspicion of this fact, if honestly entertained by the person search- [*493 ing for, and making the seizure, would be sufficient to protect him against any claim for damages in consequence of those acts, although it should afterwards appear, on the trial, that, in point of fact, the articles were not concealed. But the owner of the goods is not put, upon his trial, to prove that the duties were paid or secured, until that fact is established. The expressions in the latter part of this section, leave no room for doubt upon this point. They are, that "all such goods, &c., on which the duties shall not have been paid, or secured to be paid, shall be forfeited," that is to say, the goods so concealed and seized.

The argument, that goods subject to duties are, in the view of the law, and by a fair construction of this section, concealed, wherever and under whatever circumstances they may be found, is equally inadmissible. If that were the intention of the legislature, the offence would consist, not in the concealing of such goods, but in having the possession of them; and the authority to seize, applying to such a case, would, no doubt, have extended to all goods, wherever found, out of their place of deposit, on which the duties had not been paid, or secured to be paid. The term "concealed," used in this section, is one of plain interpretation, and obviously applies to articles intended to be secreted and withdrawn from public view, on account of their being so subject to duties, or from some fraudulent motive.

But if the argument upon this part of the case were well founded, the count in the libel which we are now examining could not be maintained, since we are all of opinion, that the duties upon these teas were secured to be paid, within the fair construction of the 62d section of the duty law. By this section, the duties upon all goods imported, and subject thereto, are to be paid, or secured to be paid, before a permit to land them can be granted. If the importer elect not to pay them, he is at liberty to secure them, by bond, with one or more sureties, to the satisfaction of the collector, or the collector may accept his own bond, without sureties; but in the latter case, the goods themselves must be deposited with the proper custom-house officer pointed out in the section. These provisions apply, thus far, to all kinds of *goods. The difference as to the mode of securing the duties between [*494 teas imported from China or Europe, and other goods, consists in the following particulars. As to the former, the teas, where bond without sureties is given, are to be deposited, at the expense and risk of the importer, in a store to be agreed on by him and the inspector, on which the inspector is to affix two locks, the key of one to be retained by himself, and the other to be kept by the importer; and it is made the duty of the inspector to attend,

at all reasonable times, for the purpose of delivering out the teas, as the same may be required ; but he is forbidden to deliver any part of them, without a permit in writing, signed by the collector and naval officer, to the obtaining of which, it is required, that the duties on the teas to be delivered shall be first paid, or secured to be paid, by a bond to be given, with a surety or sureties, to the satisfaction of the collector, for payment of the duties, at particular periods mentioned in the section. And in case the duties should not be paid at the period so stipulated in the first bond, or secured to be paid in the manner last specified, the collector is required to sell, at public auction, so much of the teas as may be necessary, and after retaining the sum which shall not have been so paid, or secured, together with the expenses of sale and safe-keeping of the teas, to return the overplus, if any, to the owner thereof. As to goods other than teas, if the importer elect, instead of paying the duties, or securing the same, by giving bond with satisfactory sureties, to give his own bond, without sureties, the collector is required to accept such bond, together with a deposit of so much of the goods on which the duties are payable, as in his judgment shall be sufficient security for the amount of the duties for which such bond shall have been given, together with the charge of safe-keeping, and seizing the same, which goods, so deposited, are to be kept by the collector at the expense and risk of the party on whose account they were deposited, until the sum specified in the bond shall become due ; and if the same be not then paid, so much of the goods deposited as may be necessary to discharge the duties and expenses are to be sold, and the proceeds to be disposed of, as in the former case.

*495] *From this recital of the most material parts of the above section it is most apparent, that the legislature contemplated the bond of the importer, accompanied by a deposit of all the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties were paid, or otherwise secured, as an equivalent security, with a bond, and approved sureties, if the importer had elected to give such a bond in the first instance. By no other construction can the express terms of the section be satisfied. The importer has an option allowed him, at the time of making his entry, to secure the duties, instead of paying them. How may he secure them ? The section proceeds immediately to point out the two following modes : "On the same terms and stipulations as on other goods imported ;" that is to say, by bond, with sureties satisfactory to the collector, or "by his own bond in double the amount of the duties," which latter bond, accompanied by the deposit of the teas, as before mentioned, the collector is required the accept. It is perfectly obvious, that this latter security is to be accepted in lieu of, and as equivalent to, the former. And we may confidently ask, is it not so ? The condition of the China trade must be in a deplorable state, and must necessarily be discontinued, whenever the value of the teas imported from that country shall fall below the amount of the duties imposed upon them ; and unless such a state of things could have been contemplated, what better security for payment of the duties could have been devised, consistent with the existence of the trade itself, than the uncontrolled possession of the articles subject to the duties, with the power to sell the same for their discharge, in case they should not be paid when they should become due, or should not be otherwise secured to be paid ? As an additional evidence that congress

United States v. 350 Chests of Tea.

considered this security as at least equivalent to bond with approved securities, this section goes on to provide, that the amount of each bond taken for the duties on any teas delivered under a permit from the store, after a deposit, shall be indorsed immediately on the original bond given by the importer, specifying the amount of duty secured on the teas delivered out, by whom, and the term of payment. If, *then, the whole quantity of teas deposited should be withdrawn in the mode prescribed by this [*496 section, either at one, or at different periods, before the expiration of the term of credit allowed, the United States would have precisely the same security that they would have had, if the importer had, in the first instance, elected to give bond, with approved sureties, instead of his own bond, accompanied by a deposit of the articles themselves subject to the duties.

In consequence of an intimation of the attorney-general, that, in case the decision of the court should be against the United States, upon what we have called the second count in the libel, he should move to amend the libel by inserting a count under the 43d section of this law, the cause was argued at the bar as if such a count now formed a part of the libel. But if the above opinion be correct, it is manifest, that such a count would not help the case, since, if the duties were secured to be paid, according to the provisions of the 62nd section, no forfeiture could be decreed under the 43d section. The facts agreed, present, besides, an additional reason why such a decree could not properly be made under that section, since they admit, that each chest of the teas in question, at the time of seizure, was duly numbered, and had on it all the marks which the law requires, and that the certificates required by the act to accompany each of the chests, remained in the hands of the claimants, at Philadelphia. Now, we are all of opinion, that, to authorize a seizure of teas, and bringing them to adjudication, it is necessary, under the 43d section, not only that the chests should be unaccompanied by the proper certificates, but also that they should be unaccompanied by the marks required to be placed upon them by the 39th section. Both must concur, in order to justify a seizure, and to raise such a presumption that the teas are liable to forfeiture, as to throw upon the claimant the burden of proving that they were imported according to law, and that the duties thereon were paid, or secured to be paid, in order to avoid a sentence of condemnation.

Enough has already been said, to dispose of the third count in the libel, even if it had been pressed in the argument of the cause, since it is not pretended, that there *is any section of the above act which subjects teas [*497 to forfeiture, on the ground of their having been clandestinely and fraudulently removed from the store in which they were deposited, by the importer or by any other person, without a permit, and without the duties thereon having been first paid or secured to be paid. It is quite unlikely, that a case so extraordinary and disgraceful as that which has given rise to this controversy, was, or could have been, anticipated by the legislature, which enacted the law under consideration. One would have supposed, but for the instance before us, that the act had provided every guard for the safety of the public interest, which any imaginable contingency could have rendered necessary.

The only remaining objection taken to the decree of the circuit court is,

United States v. 350 Chests of Tea.

that the payment of the duties to which these teas were subject, ought to have been made a condition of their restitution to the claimants, or that they should have been decreed to be sold towards the payment of the duties for which the original bond of Thomson was given, and which remained unpaid. Admitting that those duties were even now due, which is not the case, we could not yield our assent to the correctness of this objection, even if the prayer of the libel had corresponded with such a decree, and even if the teas in question were liable for duties beyond those properly chargeable against the quantity seized, which is by no means conceded.

By the 9th section of the judiciary act, the district courts have exclusive original cognisance, amongst other subjects, 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 navigable from the sea by vessels of a specified burden, within their respective districts, as well as upon the high seas; and also, of all seizures made on land, or other waters than as aforesaid, and of all suits for penalties and forfeitures incurred under the laws of the United States. They have also cognisance, concurrent with the state courts, of all suits at common law, where the United States sue, where the matter in dispute, exclusive *498] of costs, amounts to the sum or value of \$100. Now, it is not pretended, that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown, that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or subject them to forfeiture. But, even if there were such a law, the only proceeding which could have been instituted under it, must have been, to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the district court could entertain a suit, by way of libel, to enforce the payment of duties. No jurisdiction is conferred upon that court, in such a case, either by the above section of the judiciary act, or by any other act of congress. There is no doubt, but that a suit at common law might be instituted in that court, as well as in the circuit court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected, is not one which can obtain the sanction of this court.

The decree of the circuit court, reversing that of the district court, and awarding restitution to the claimants, must be affirmed.

Decree affirmed.

POTTER, Appellant, v. GARDNER and others, Respondents.

Charge of debts on lands devised.

A devise, "I give and devise to my beloved son, E. W. G., two third parts of that my Ferry farm, so called," &c., "to him, the said E. W. G. and to his heirs and assigns for ever, he, my said son, E. W. G., paying all my just debts out of said estate; and I do hereby order, and it is my will, that my son, E. W. G. shall *pay all my just debts, out of the estate therein given to him as aforesaid," creates a charge upon the estate, in the hands of the devisee. [*499]

A *bond fide* purchaser, who pays the purchase-money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts.¹

But if the money be misapplied by the devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied.²

On a bill filed by an executor, against a devisee of lands charged with the payments of debts, for an account of the trust fund, &c., the creditors are not indispensable parties to the suit; the fund may be brought into court, and distributed, under its direction, according to the rights of those who may apply for it.

Gardner v. Gardner, 3 Mason 178, reversed.

APPEAL from the Circuit Court of Rhode Island.

February 2d, 1827. This cause was argued by the *Attorney-General* and *Potter*, for the appellant; and by *Webster* and *D. B. Ogden*, for the respondents.

February 9th. MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the court of the United States for the first circuit, in the district of Rhode Island. The case was this:

On the 7th of July 1817, Peleg Gardner made his last will, in which, among other things, he devised as follows: "I give and devise to my beloved son, Ezekiel W. Gardner, two third parts of all that my Ferry farm, so called," &c., "to him, the said Ezekiel W. Gardner, and to his heirs and assigns for ever, he, my said son, Ezekiel W. Gardner, paying all my just debts out of said estate: and I do hereby order, and it is my will, that my son, Ezekiel W. Gardner, shall pay all my just debts out of the estate herein given to him as aforesaid." The testator gives to his wife, the plaintiff, Hannah, a part of his real and personal estate for life, in lieu of dower, and to his daughter, the other plaintiff, other parts of his real and personal estate. Peleg Gardner died soon after the making of his will, and his several devisees entered into the estates devised to them respectively.

On the 13th of July 1818, the court of probates for the *county, *[500 in pursuance of a statute made for that purpose, appointed commissioners to receive and examine the claims of the creditors, who made a report, on the 10th day of July 1820, from which it appears that the debts proved against the estate and allowed, amount to \$7593.14, exclusive of a claim of \$1000, exhibited by one Mann, which was disallowed, and for which a suit has been commenced against the executrix.

The testator had devised the remaining third part of his Ferry estate to his daughter Isabel, who had sold and conveyed the same to her brother

¹ Greenway v. Roberts, 2 Cr. C. C. 246; Pennsylvania Life Ins. Co. v. Austin, 42 Penn. St. 257; Fued v. Schieffelin, 7 Johns. Ch. 150.

² And see Champlin v. Haight, 10 Paige 274; s. c. 7 Hill 245.

Potter v. Gardner.

Ezekiel. After which, Ezekiel agreed to sell the whole estate to the appellant, Elisha R. Potter, for the amount of \$15,000.

This bill is filed by the executrix and devisees of Peleg Gardner, to subject the purchase-money of the Ferry estate to the payment of the testator's debts. The decree of the circuit court was in favor of the plaintiffs below; and from that decree, Elisha R. Potter has appealed to this court. The bill contains many charges of fraudulent combination between Ezekiel W. Gardner and Elisha R. Potter, which it would be waste of time to review in detail, because they are not sustained, and because the case rests on principles of equity, which are believed to be well settled.

The first objection made to the decree is, that the plaintiffs have no right to ask the aid of a court of equity, because they cannot assert the claims of the creditors who could have proceeded at law against the estate in the hands of Ezekiel, and may now proceed at law against the remaining estate of Peleg. That the plaintiffs can give no discharge which will extinguish the rights of the creditors, and that the creditors ought, for that reason, to have been made parties to the suit. The bill states, and so is the fact, that the whole estate of Peleg Gardner, both real and personal, was disposed of by his will; and, as the Ferry estate devised to Ezekiel was the fund provided for the payment of his debts, his devisees and legatees took immediate possession of the property bequeathed to them, respectively, and nothing remains in the hands of the executrix wherewith to satisfy the creditors.

*501] The bill also states, that Ezekiel W. Gardner is insolvent, or in very doubtful circumstances; that a considerable part of the purchase-money has been applied to the payment of his own debts, and that the plaintiffs have cause to fear that the residue will be misapplied in the like manner, so that the whole trust fund will be wasted, and the property bequeathed to them be taken by the creditors. These allegations are not controverted, and make, we think, a very clear case for an application to a court of equity. It is true, that the creditors might have been made parties defendants, but we do not think them parties who may not be dispensed with. So much of the fund as yet remains may be brought into court, and may be distributed according to the rights of those who may apply for it. We have, then, no doubt of the jurisdiction of the court.

We have as little doubt of the liability of the Ferry estate, while in the hands of Ezekiel, to the creditors of the testator. The words of the will create an express charge. "I give and devise to my beloved son, Ezekiel W. Gardner, and his heirs, for ever, two thirds of my Ferry farm, he paying all my just debts out of said estate." More explicit words could not have been used. It is admitted by the counsel for the appellant, that these words would charge the estate, in a country where the law did not previously charge it; but since, in Rhode Island, lands are liable, by law, to the debts of the testator, the will superadds nothing to this legal charge. It may be admitted, that, as between the devisee and the creditor, no charge is super-added by the will; but the relation of the devisees to each other is materially affected by it. A testator cannot, by his will, withdraw from his creditors any property which the law subjects to their claims, but he may provide a particular fund for his debts, and if the creditors resort to a different fund, those to whom the property so taken by them was given, are entitled to compensation out of the fund provided for debts. Examples of this principle

Potter v. Gardner.

abound in the books. Personal property is universally liable for debts. If the particular fund provided by the testator for that object, be of that description, and a specific thing, bequeathed to another, be taken in execution *by a creditor, it has never been doubted, that the legatee whose property has been taken, may resort to the trust-fund for compensation. [*502 The principle is too well settled to be now a subject for discussion. The law of Rhode Island, then, subjecting lands to the payment of debts, can have no influence on the case before the court. The Ferry estate, had it remained in the possession of the devisees, would not only have been liable to the creditors, but would have been liable to the other devisees and legatees, for such portions of their property as had been applied in payment of the debts of the testator.

What change has been made by the sale to Elisha R. Potter? Although this question has been argued with great earnestness, and at considerable length, scarcely any real difference exists between the parties. The appellees seem to yield to the authority of those modern decisions which deny the distinction between lands charged in the hands of an heir, or devisee, with the payment of debts, and lands devised to a trustee for the payment of debts. They admit, that, in either case, the purchaser who pays the purchase-money to the person authorized to sell, is not bound to look to its application. But they contend, that if the purchase-money be misapplied, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied. The counsel for the appellants assent to this proposition. It is scarcely necessary to say, that so much of the purchase-money as remained unpaid, when this suit was instituted, is liable to the creditors, and is applicable by the court to the purposes of the trust. What, then, is really in dispute between the parties? Nothing but the questions how much of the purchase-money remains unpaid, and how much of it has been applied to the debts of Ezekiel, with the co-operation of Mr. Potter.

The whole purchase made by Mr. Potter amounted to \$15,800, of which \$15,000 were given for the Ferry estate, and \$800 for a lot in Jamestown, purchased by Ezekiel from his sister Isabel. One-third of the Ferry estate had also been purchased by Ezekiel from Isabel, so that \$5800 of the whole purchase-money was given *for property not charged by the will of Peleg Gardner with his debts, and the remaining \$10,000 for property [*503 which was so charged. That sum constituted the trust fund. In the arrangement between the parties, Mr. Potter retained \$3500 for a debt due to himself, and paid debts due from Ezekiel, to the amount, as stated in the answers, of \$1830, making, in the whole, \$5330. On a subsequent agreement between the parties, Potter paid a debt of Ezekiel, amounting to \$800; so that Potter has himself paid the debts of Ezekiel to the amount \$6330, being \$330 out of the trust-fund. His cash payments, at that time, are stated at \$318.66. In June 1820, the parties came to a settlement, when a balance of \$7729.62 was found to be in the hands of Potter, for which, he says, he gave his note, payable to order, in good mortgages in South Kingston, or in the state of New York, and a negotiable cash note, payable to the defendant's order, for \$4000, on the 25th of March 1822. The cash payments stated by the defendants, amount to \$4318.64. The residue of the purchase-money has either been applied by Potter himself to the payment of Ezekiel's debts, or is comprehended in the note payable in mortgages, or remains in his hands

Potter v. Gardner.

unaccounted for. In either case, it is liable, so far as it exceeds the sum of \$5800, which is not charged by the will, to the creditors of Peleg Gardner. This court does not enter into minute calculations to ascertain the precise sum due. An account, if it be found necessary, comprehending the necessary calculations of interest, may be taken in the circuit court. The note payable in mortgages is not alleged to be paid, and, not being negotiable, would pass to an assignee, subject to the equity which was attached to it when in the hands of Ezekiel W. Gardner.

The defendant, Elisha R. Potter, has been stated to be liable for the debts of Peleg Gardner, for so much of the purchase-money of the trust-estate as remains in his hands. So far he is liable, directly and immediately, and is properly *decreed to pay the money into court. But, so far as *504] he has applied the money to the debts of Ezekiel, his responsibility is not, we think, immediate, but depends on the failure of Ezekiel to pay; the decree ought, in the first instance, to be against Ezekiel, and, if the money cannot be obtained from him, then against Elisha R. Potter.

No doubt exists of the right of any of the parties to contest the claim of any creditor. The report of the commissioners may be *prima facie*, but is not conclusive evidence of the claim. The creditor may ascertain his debt by a suit in the state court, or the executrix may contest it in the court of the United States. If Elisha R. Potter, or Ezekiel W. Gardner, suppose the executrix to be unfaithful to her duty in this respect, the court will permit either of them to use her name in opposition to the claim.

We are of opinion, that so much of the decree as may subject Elisha R. Potter to the debts of Peleg Gardner, beyond the purchase-money remaining in his hands, and beyond the money paid by him in discharge of the debts of Ezekiel W. Gardner, after deducting therefrom the amount of the estates purchased by the said Ezekiel from his sister Isabel, ought to be reversed, and that in all other things, it ought to be affirmed.

DECREE.—This cause came on, &c.: On consideration whereof, this court is of opinion, that there is error in so much of the decree of the said circuit court as subjects Elisha R. Potter to the payment of a larger sum of money that now remains in his hands, of the original purchase-money, added to the sum he has applied to the payment of the debts of Ezekiel W. Gardner, after deducting therefrom the amount given for the estates purchased from Isabel Gardner; and in so much of the said decree as directs the said Elisha R. Potter to pay the sums he has misapplied to the debts of Ezekiel W. Gardner, and for which he, the said Ezekiel, is liable in the first instance, before he, the said Ezekiel, shall have failed to pay the same: It is, therefore, the opinion of this court, that so much of the said decree as is contrary to this opinion, be reversed and annulled, and that the same be, in all other *505] *respects, affirmed; and the cause is remanded to the said circuit court, with directions to reform the said decree according to this opinion, and to do all other things therein as equity and justice may require. In taking any account between any of the parties which may be necessary for giving effect to this order, interest is to be computed according to law and usage.

UNITED STATES *v.* NICHOLL.*Sureties of public officers.*

The act of May 15th, 1820, ch. 625, § 2, which requires new sureties to be given by certain public officers, on or before the 30th of September 1820, does not expressly, or by implication, discharge the former sureties from their liability.

The sureties are not responsible for moneys placed by the government in the hands of the principal, after the legal termination of his office; but they are responsible for moneys which came into his hands, while in office, and which he subsequently failed to account for and pay over.

In general, *laches* is not imputable to the government:¹ But *quære?* whether, in case there is an express agreement between the government and the principal, giving time to the latter, and suspending the right of the former to sue, the sureties are not discharged, as in a similar case between private individuals?

A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with, or to have happened, will not discharge the sureties.

The cases of the United States *v.* Kirkpatrick (9 Wheat. 720), and the United States *v.* Vanzandt (11 Ibid. 184), applied to the determination of the present case.

ERROR to the Circuit Court for the Southern District of New York.

February 26th, 1827. This cause was argued by the *Attorney-General* and *Sampson*, for the plaintiffs; and by *D. B. Ogden*, for the defendant.

March 5th. TRIMBLE, Justice, delivered the opinion of the court.—

*The questions to be decided in this case arise out of a bill of exceptions, taken by the plaintiffs, to the charge and instructions of the [*506 circuit court to the jury, upon the trial of the cause. (a)

The suit was founded on the official bond of Robert Swartwout, as navy agent, and with whom the defendant had become bound as one of his sureties. The bond bears date the 22d day of February 1819; and is in the penalty of \$20,000, with the usual condition, to be void if Swartwout should faithfully perform the duties of his office, and account for, and pay over, when required, the public property and money placed in his hands. The declaration alleges, as a breach of the condition of the bond, that Swartwout's accounts had been settled by the proper accounting officers on the — day of —; and that upon that settlement, a large balance had been found against him, which he had failed and refused to pay over to the United States, when required. The pleadings having been made up according to the practice of New York, so as to put in issue the matters in controversy between the parties, the plaintiffs gave in evidence to the jury, the bond, with its condition, and Swartwout's settled account, duly certified from the treasury department; and the defendant gave in evidence a letter from the secretary of the navy to Robert Swartwout, dated the 25th day of February 1819; two commissions to Swartwout as navy agent, the one dated the 16th day of October 1818, and the other, the 30th day of November 1818, and the following letter, dated the 8th day of December 1823,

(a) This cause was tried in the court below by the late District Judge VAN NESS.

¹ The sureties of a postmaster are not discharged, by permitting him to remain in office, after notice to the auditor of the post-office

department that he was a defaulter. *Jones v. United States*, 18 Wall. 662.

United States v. Nicholl.

from Mr. Pleasanton, agent of the treasury, to Mr. Tillotson, the district-attorney, which will be more particularly noticed hereafter :

“Treasury Department, Fifth Auditor's Office,
December 8, 1823.

“SIR :—From the best information I can obtain, it seems pretty certain, that if we foreclose the mortgage given to the United States by General *507] Robert Swartwout, and expose *the property to sale, subject to a previous mortgage given to Mr. Coster, we shall lose the whole, or nearly all of our debt, this property being our only reliance, if the sureties should be discharged by due course of law from their responsibility for the payment of it. Under these circumstances, the only alternative which presents itself for securing any considerable portion of the debt is, to allow General Swartwout time within which to make an advantageous disposition of the property. He expresses a confident belief, that in seven years, he would be enabled, by connecting it with a banking institution for which a charter has already been granted by the state of New Jersey, not only to pay off the first mortgage, but our mortgage also. It has been recommended by the navy department to allow this time, and I have, accordingly instead of three years, as intimated to you some time ago, determined to allow him seven years, provided the first mortgagee will pledge himself in writing, not to molest him for the same space of time ; and provided also, that the bank with which the property is to be connected, shall go into operation on or before the first of October next. Should the banking capital not be made up by the time mentioned, and the bank fail to go into operation, this agreement is to be considered wholly null and void. You will be pleased to take such steps as will give this arrangement effect.

“As the sureties on General Swartwout's bond dispute our right to recover the penalty from them, it will be your duty forthwith to institute suits against them, in the circuit court, and judgment going against us there, you will remove the cause to the supreme court, it being very desirable that the law should be settled in relation to bonds so situated. I have the honor, &c.

(Signed)

S. PLEASANTON,

Agent of the Treasury.”

The circuit court decided, and, accordingly, instructed the jury :
1. “That the defendant, Francis H. Nicoll, was not responsible for any defalcation that took place on the part of Robert Swartwout, as navy agent, *508] subsequent to the *30th day of September 1820, when, in and by the act of congress, passed the 18th of May 1820, new sureties were required by law to be given by the said Robert Swartwout.

2. “That the defendant was not responsible for any deficiency of public money reported on by the accounting-officers of the United States, subsequent to the 30th of November 1822, when it appeared in evidence, that the appointment of Robert Swartwout, as navy agent, expired by its legal termination.

3. “That he left it to them to decide, whether the letter from S. Pleasanton, Esq., addressed to Robert Tillotson, Esq., which had been read in evidence before the jury, did give further time to Robert Swartwout for the payment of the debt due the United States ; and that if, in the opinion of the jury, the letter in question did give time to the said Robert Swart-

United States v. Nicholl.

wout, until October 1824, or any subsequent period, that then the defendant was discharged from his liability, and their verdict should be rendered for the defendant. And lastly, that the said several matters so produced and read in evidence, on the part of the said Francis H. Nicoll, were sufficient, in law, to maintain the issue on his part, and that the United States ought not, upon all the matters produced in evidence, to maintain the said action," &c. These several opinions and instructions are brought before this court for re-examination by the present writ of error.

Upon looking into the act of congress, passed May 15th, 1820, entitled "an act providing for the better organization of the treasury department," which is the one referred to in the first instruction, we are satisfied, it was misconstrued by the judge. The second section of the act provides a new and summary process against public defaulters and their sureties, after the 30th of September 1820. The scope and design of the act, in requiring new sureties to be given by that day, was, in order that, if such new sureties should be given, the summary process might operate upon them, as well as upon the principal, if the treasury department should elect to pursue such summary process. This is manifest from the provision in the act, that the summary process shall not affect the existing sureties. *The act nowhere directs the principals to be discharged from office, upon [*509 failure to give new sureties; and if the act had so directed, they would have remained in office, until actually removed. The law does not, in terms, declare the existing sureties shall be discharged, from and after the 30th of September 1820. It would require a very strained construction of the statute, to discharge them, by implication, while their principals were permitted to remain in office. Such construction would be, we think, against the manifest intention of the legislature. The 10th section enacts, "that nothing in this act contained shall be construed to take away or impair any right or remedy which the United States now have, by law, for the recovery of taxes, debts or demands."

The cases of the *United States v. Kirkpatrick*, 9 Wheat. 720, and the *United States v. Vanzandt*, 11 Ibid. 184, are, in principle, undistinguishable from this case. They decide, 1st. That *laches* is not imputable to the government; 2d. That the provisions of the law requiring settlements by its officers to be made at short periods, are designed for the security and protection of the government, and to regulate the conduct of those officers; that they are merely directory to those officers, and form no part of the contract with the sureties. And the last case decides, 3d. That where the act expressly directs a defaulting officer to be recalled at the expiration of six months from the time of his fault, his sureties are not discharged, but remain liable for his defaults thereafter, until he is actually recalled.

If the second instruction given to the jury was intended to inform them, that the defendant, as surety of Swartwout, was not legally responsible for money placed by the government in his hands, after the legal termination of his office, it was unquestionably correct; and this is the sense in which we suppose the court meant to be understood. But if it was intended to convey the idea, that he was not responsible for money which came to Swartwout's hands, while in office, but which he afterwards failed to account for and pay over, it was clearly incorrect.

*In deciding upon the third instruction given, as to the effect and [*510

United States v. Nicholl.

operation of Mr. Pleasanton's letter to the district-attorney, it is not intended to give any intimation of what would be the opinion of this court if it had appeared from the letter, that the government had made any arrangement with Swartwout, without the assent of his sureties, whereby the right of the government to sue upon the bond had been suspended to the first day of October 1824, or to any subsequent time. Nothing of the kind appears from the letter. It speaks of a mortgage which had been given by Swartwout, upon property subject to a former mortgage to Mr. Coster ; but it does not appear that, by the terms of the mortgage, the right to sue on the official bond was suspended ; and the taking of a collateral security, without suspending the right to sue on the bond, could not bar the action on the bond. The letter speaks of an intention formed, of giving time upon the mortgage, upon specified conditions and contingencies ; but none of those conditions or contingencies are shown to have been complied with, or to have happened. The letter contains no contract, and gives no time *per se*, upon any consideration binding on the government ; and that the letter did not intend to suspend the right of the United States to sue on this bond is palpable, because it directs suit to be brought thereon immediately. As no fact, connected with the letter, was proved by evidence *aliunde*, the construction of the letter, upon its face, was matter of law, and the circuit court ought to have decided and instructed the jury accordingly, that nothing on the face of the letter constituted any defence to the action. There was nothing but the construction of the letter to be left to the jury, and the court ought to have informed the jury that, according to its true construction, it did not give time so as to bar the action against the surety.

After the observations already made, it cannot be necessary to go into any further reasoning to show that the circuit court erred in its concluding instruction, that, upon the whole matter, the law was for the defendant. It was a conclusion drawn by that court from the premises it had assumed in *511] the former instruction given, and the error of these premises having been shown, the error of the conclusion necessarily follows.

Some observations were made by the defendant's counsel, in argument, as to the manner in which the debits and credits in Swartwout's account had been adjusted by the accounting officers ; and he seemed to suppose that credits which ought to have been applied towards the extinguishment or lessening of the debits for money placed in his hands before the 20th of November, 1822, had been improperly applied to the transactions of Swartwout with the government after that day. The case of *United States v. January & Patterson*, 7 Cranch 572, is in point to show, that, as to any disbursements of money, after the 30th of November 1822, for which Swartwout was entitled to credit, it was at the election of the government to apply them to either account. But there is no necessity for the application of the principle to this case ; for, upon looking into the account, we find that, after crediting Swartwout with all his disbursements, up until the 30th of November 1822, there remained, on that day, a balance in his hands unaccounted for, much beyond the penalty of the bond ; so that no injustice is done to the surety in the manner of settling the account.

Judgment reversed, and a *venire facias de novo* awarded

McGILL and others, Plaintiffs in error, v. The PRESIDENT, DIRECTORS & COMPANY OF THE BANK OF THE UNITED STATES, Defendants in error.

Liability of sureties.

A. W. McG. gave a bond to the Bank of the United States, with sureties, conditioned for the faithful performance of the duties of the office of cashier of one of the offices of discount and deposit, during the term he should hold that office; the president and directors of the bank having discovered that he had been guilty of *a gross breach of trust, passed a resolution, at Philadelphia, on the 27th of October 1820, "that A. W. McG., cashier, &c., be [*512 and he is hereby suspended from office, till the further pleasure of the board be known:" and another resolution, "that the president of the office at Middletown, be authorized and requested to receive into his care, from A. W. McG., the cashier, the cash, bills discounted, books, papers and other property in said office, and to take such measures for having the duties of cashier discharged, as he may deem expedient;" these resolutions were immediately transmitted by mail, to the president of the office at Middletown, who received them on the morning of Sunday, the 29th of the same month, but did not communicate them to the cashier, nor carry them into effect, until the afternoon of the 30th, between four and five o'clock: Held, that the sureties continued liable for his defaults until that time.

On such a bond, the recovery against the sureties is limited to the penalty.¹

Partial payment having been made by the sureties (subject to all questions), the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus resulting, from the commencement of the suit, there having been no previous demand of the penalty, or acknowledgment that the whole was due. But interest was refused to the sureties on the payments.

United States Bank v. McGill, 1 Paine 661, affirmed.

ERROR to the Circuit Court of Connecticut.

February 12th, 1827. This cause was argued by *D. B. Ogden*, for the plaintiff in error, and by *Webster*, for the defendants in error.

February 19th. JOHNSON, Justice, delivered the opinion of the court.—This cause comes up by writ of error from the circuit court of the United States, held for the district of Connecticut, in which the defendants here obtained a judgment against the plaintiffs, upon a penal bond, in which McGill was principal, the other defendants sureties. McGill was cashier of one of the branches of the Bank of the United States, and this bond was given in the penal sum of \$50,000, conditioned for the due performance of that office.

The replication sets out a great variety of breaches, and the cause was decided below upon a special verdict, by which was found for the plaintiffs the sum of \$66,548, consisting of a variety of items, upon which interest is *charged, severally, from the date of the embezzlement or other [*513 breach, to the time of finding the verdict. The verdict then finds two payments, one of \$20,000, made by one of the sureties, on the 16th of December 1820; the other of \$500, made by another of the sureties, on the 22d of December 1820, on which they also calculate interest to the date of the verdict, and deducting the amount of principal and interest, strike a balance of \$43,182.50.

¹ Farrar v. United States, 5 Pet. 373; Leggett v. Humphreys, 21 How. 67; United States v. Brown, 1 Paine 425; Brown v. Burrows, 2 Bl. C. C. 340. Nevertheless, in United States v. Meeker, 30 Leg. Int. 344, it was held by

Nixon, J., in the district court of New Jersey, in an action on a paymaster's bond, that the sureties were liable to the extent of the penalty, with interest thereon from the commencement of the suit.

McGill v. United States Bank.

It also finds the following facts : "That the President and Directors of the Bank of the United States, on the 27th of October 1820, at Philadelphia, passed the following resolution, to wit : "Whereas, it appears, by the report of a committee of the office of discount and deposit, at Middletown, that Arthur W. McGill, cashier of that office, has been guilty of a gross breach of trust, in knowingly suffering over-drafts to be made by individuals ; also by making over-drafts himself ; therefore, resolved, that A. W. McGill, cashier of the office at Middletown, be and he is hereby suspended from office, till the further pleasure of the board be known. On motion, resolved, that the president of the office at Middletown, be authorized and requested to receive into his care, from A. W. McGill, the cashier, the cash, bills discounted, books, papers and other property in said office, and to take such measures for having the duties of cashier discharged, as he may deem expedient." Which resolutions were immediately transmitted by mail to the president of the Middletown office, who received them, on the morning of Sunday, the 29th of the month, but did not communicate them to McGill, until the afternoon of the 30th, between the hours of four and five in the afternoon. It then finds, that all the breaches were incurred before the 30th, and goes on to find, alternatively, so as to enable the court to give judgment, according to its views of the law, as between the parties. There appear to have been various questions argued in the court below, some of which were decided for *514] the plaintiff, some for the defendant ; but *as the plaintiff below seeks an affirmance of the judgment, and has not sued out a writ of error, it follows, that we confine ourselves to those points only which were decided against the plaintiff here. These were two, one of them going to the whole right to recover, the other to the application of the payments towards the discharge of the sum to be recovered.

The first of these was, whether the sureties were not discharged *ipso facto* from further liability, by the resolution of the parent bank, on the 27th ; or, if not on that day, then on the 29th, the day on which it was received at Middletown by mail. If discharged on either of those days, it would follow, that the plaintiffs below could not have judgment, since the finding was up to the day following. We are unanimously and decidedly of opinion, that the ground assumed by the defendants below cannot be maintained. What was there in the resolutions of the parent bank to discharge the obligors at all from their liability ? The resolution was only to suspend, and this implies the right to restore. The cashier's salary went on, and had the board rescinded their resolution, what necessity would there have existed for a re-delivery of his bond ? But there is no necessity for placing the decision on this ground, since, notwithstanding the resolution of the board is expressed in the present tense, a future operation must necessarily be given it, from a cause that could not be overcome, the distance of the parties from each other. Time became indispensable to giving notice, and the day on which the communication reached the president of the Middletown bank, was a day not to be profaned by the business of a bank. There was, then, no obligation to deliver the notice, and dispossess the cashier, until the 30th, and the law makes no fractions of a day.

The court below, in applying the payments, directed them to be deducted from the penalty of the bond, and then gave interest upon the balance thus resulting. This, with the exception of the interest, was the most favorable

Drummond v. Preston.

application possible for the defendants below ; and the interest on the balance having been only allowed from the date of the suit, and the sum thus ascertained, falling short of the penalty of the bond, *we think, the defendant below has nothing to complain of. It will be discovered, by [*515 reference to dates, that the payments here made preceded the institution of the suit, and although made by the sureties, they were made, severally, for anything that appears to the contrary from the verdict. Technically, then, the judgment to be entered would have been a judgment for the penalty of the bond, and in applying the partial payment, the court would have been governed by those principles which have been transferred in practice from the courts of equity to the courts of law, in deciding on what terms a party shall be released from the penalty of his bond. These always are, on payment of principal, interest and costs. And it can constitute no objection to the application of this principle to the case of these obligors, that no interest was allowed them, during the short interval between the payment and the suing out of the writ, since the breaches were incurred long before, and interest for the same period is refused to the bank.

Judgment affirmed, with six per cent. interest.

RICHARD DRUMMOND, surviving partner of CHARLES DRUMMOND, v. The Executors of GEORGE PRESTMAN.

Guarantee.

The following letter of guaranty, "Baltimore, 17th Nov. 1803, Capt. Charles Drummond, Dear Sir—My son William having mentioned to me, that in consequence of your esteem and friendship for him, you had caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together on my part, I think proper to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable for the faithful discharge of all his engagements to you, both now and in future. (Signed) Geo. Prestman," will extend to a partnership debt incurred by William P. to *Charles Drummond, and Richard his brother, it being proved, that [*516 the transactions to which the letter related were with them as partners, and that no other brother of the said Charles was interested therein.

In such a case, the record of a judgment confessed by the principal, William P., to Richard D., as surviving partner of Charles and Richard D., for the amount of the debt due by William P., to the partnership firm, was held to be admissible in evidence, *inter alia*, to charge the guarantor, George P., under his letter of guaranty.¹

ERROR to the Circuit Court of Maryland.

This cause was argued by the *Attorney-General* and *Meredith*, for the plaintiff, citing 11 Wheat. 74 ; 2 Evans' Pothier 212 ; 3 Stark. Evid. 1021, 1602 ; 7 Taunt. 265 ; 10 East 271 ; Fell Guar. 105 ; 3 T. R. 454 ; 3 Cranch 492 ; 3 Wheat. 148 note : and by *Taney* and *Donaldson*, for the defendant, citing 2 Saund. 411, 415 ; 2 M. & Selw. 363 ; 5 Bos. & Pul. 175 ; 4 Cranch 224 ; 7 Ibid. 69 ; 1 Mason 361, 371 ; 5 Esp. 26 ; 3 Stark. Evid. 1386 ; 1 Ibid. 192 ; 3 Har. & McHen. 342 ; 4 Johns. 511 ; 10 Ves. 123.

¹ s. P. McLaughlin v. Bank of Potomac, 7 Carman v. Noble, 9 Penn. St. 306 ; Hazzard v. Bow. 220 ; Berger v. Williams, 4 McLean 577 ; Nagle, 40 Id. 178.

Drummond v. Prestman.

March 9th. JOHNSON, Justice, delivered the opinion of the court.—This case arises on the following state of facts : Richard and Charles Drummond being engaged in some joint mercantile adventures, which appear to have been carried on chiefly by Charles, made consignments, in the year 1803, to William Prestman, then doing business as a commission merchant in Baltimore. George Prestman, the father of William, thereupon addressed to Charles Drummond a letter of guarantee in these terms :

“Baltimore, 17th Nov. 1803.

“Capt. Charles Drummond :

“Dear Sir—My son William having mentioned to me, that, in consequence of your esteem and friendship for him, you have caused and placed property of yours and your brother's in his hands for sale, and that it is probable, from time to time you may have considerable transactions together ; on my part, I think, proper, by this, to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now, and in future.”

*The connection in business was kept up between the Drummonds
*517] and William Prestman, until Charles's death, after which, Richard, who resided in Norfolk, came up to Baltimore, to adjust the accounts of the concern with William, and then received from him an account stated as between him and Charles Drummond, on which, after some corrections, which appear on the face of the account, the balance is struck, for which this suit is instituted. This account commences with an acknowledgment of a balance due the Drummonds in November 1804, and brings down their transactions to December 20th, 1805. Upon this account, a suit was instituted against William Prestman in 1806, in the name of Richard, survivor of Richard and Charles Drummond, and a judgment confessed. William Prestman was dead, at the time of the trial of this cause.

This suit is now instituted upon the letter of guaranty ; and the declaration, after setting out the letter and the subsequent transactions with William, demands the sum acknowledged due upon the account stated. Upon the trial, the plaintiff gave in evidence the letter of guaranty, the account stated by William, parol evidence of subsequent acknowledgments of its correctness, and the record of recovery upon that account, in which he confesses judgment to Richard, as survivor of Richard and Charles Drummond ; also parol evidence conducing to prove the joint dealings of the Drummonds. In the progress of the trial, the defendant took exception to the admission in evidence of the record of recovery against William : the court overruled the exception, and it went to the jury, but the court refused to grant a prayer of the plaintiff, that they would instruct the jury that, upon the whole evidence, he was entitled to a verdict. And to this refusal, the bill of exceptions is taken, upon which the principal question in this cause arises.

As evidence was permitted to go to the jury, conducing to prove, as well the copartnership between Richard and Charles Drummond, as the balance due by William Prestman, and the interest of Richard in that balance, it follows, that the refusal of the court to give that instruction, could

*only have been upon the ground, that the guarantee did not cover
*518] this demand ; and this, accordingly, has been the principal question

Drummond v. Prestman.

made in argument. It is contended, that the correct construction of this guarantee will exclude a copartnership debt; that, in its language and import, it is confined to liabilities to be incurred by William to Charles or Richard severally, or to Charles individually, and cannot be extended to a copartnership interest under a trade ostensibly carried on as between Charles solely and William. We have considered this question attentively, and are unanimous in the opinion, that the guarantee may well be construed to cover the joint trade of Charles and Richard. An interest of Richard is expressly contemplated by the guarantee, and the language of the letter seems more naturally adapted to a joint, than a several interest. For, a concern being represented in the person of any one of its members, the use of the pronoun of the second person is naturally suggested, and familiarly resorted to, when we address ourselves to an individual of the concern. This court is not called upon to decide whether the words might not also be correctly applied to an individual interest as well as a joint concern; it is enough, for the purposes of this action, if they will cover the latter.

It is a rule, in expounding instruments of this character, "that the words of the guarantee are to be taken as strongly against him as the sense will admit." But it is not necessary to test this letter by any canon of the law of guaranty more rigid than the first and most general, to wit, "that no party shall be bound beyond the extent of the engagement which shall appear from the expression of the guarantee, and the nature of the transaction." There is nothing on the face of the letter which holds out the idea of a connection between William and the Drummonds, exclusively in their individual capacity. The object is, to throw business into the hands of the guarantor's son, and it could not have been inconsistent with this idea, to guaranty a joint trade, as well as an individual trade. The grammatical construction of the language will sanction this idea, and the nature and object of the guarantee favors it. If it be *conceded, that there is a latent ambiguity on the face of the instrument, that ambiguity might [*519 well be explained by the objects of the instrument, and the circumstances attending its origin. We are, therefore, of opinion, that the court erred in refusing the instruction as prayed, and for that reason, the judgment must be reversed, and a *venire facias de novo* awarded.

But, as is the practice of this court, where questions present themselves on the record, and are argued, upon which the same cause may possibly be brought back here, the court has also considered the question whether the record of the judgment between this plaintiff and William, was properly admitted in evidence. On this subject, it is necessary to observe, that it was not set up as a plea in bar, nor as a decision conclusive of the right of the party to recover in this action. There was evidence in the cause to establish the defendant's guarantee, and the balance acknowledged by William; also, evidence conducing to prove the joint trade carried on by Charles and Richard Drummond, through the hands of Charles with William. This record was certainly competent to prove a fact which every judgment is competent to prove between any parties, to wit, that such a judgment was obtained between certain parties, on a certain cause of action. It was also evidence to prove, that the cause of action was identically the same with the one on which this action was instituted; and that, in that suit, William Prestman solemnly acknowledges that the statement made by

Drummond v. Prestman.

him in favor of Charles Drummond, was a debt really due on a joint trade between Charles and Richard Drummond. And why should not this be evidence against George, the guarantor, who had tendered himself as security to these individuals, in these very transactions?

We are perfectly aware of the rule, that he who cannot profit by a judgment between other parties, should not be damnified by it. But here, the application of the rule is in favor of the admission of this record. Suppose, the suit against William Prestman had gone to a jury, and a verdict *520] obtained against this plaintiff, can there be a doubt, *that the record would have been admissible in evidence in favor of this defendant? The material fact on this subject is, that the liability of the guarantor is dependent upon the liability of the principal; the case, therefore, is not widely different from that of accessory and principal, in which the record of the conviction of the principal is *prima facie* evidence against the accessory.

Nor is it unlike the case of *Green v. New River Company*, 4 T. R. 590, in which it was held, that a judgment against a master, for damages, from the negligence of his servant, was good evidence against the servant, in an action against him, by the master, for the same negligence; the recovery in the one case being dependent upon that in the other. (See also, Stark. Ev. 188-89.) There, the case is presented, of a master suing the servant for damage sustained by the negligence of the servant; the questions are, whether the master has been damnified by the negligence of the servant, and to what amount; and the record of a judgment against the master, is admitted in evidence against the servant. The present case, however, is a much stronger one; it seems unique in its principle; since the object of introducing the record seems not so much to prove that a judgment was obtained, as that a judgment was confessed. Now, the proof of William Prestman's liability to Drummond, was indispensable to Drummond's recovery against the guarantor. But this liability might have been proved by a confession in writing, or even by parol, after his death, if not before; then why not by the more solemn act of confessing it of record? It is worthy of remark in this case, that the guarantee purports, by its terms, to be something more than a mere suretyship for a debt. The words are, I guaranty to you "the conduct of my son." It partakes, therefore, of the nature of a bond given by a surety for the faithful discharge of a duty; and it cannot be doubted, that, in proving the fact of a breach of the condition of such a bond, the confessions of the principal, after his death, would be evidence. It would *521] be difficult to assign a reason why his confessions *should lose that character, by increasing in their solemnity.

We are aware, that there are cases which have been thought to maintain principles inconsistent with these doctrines. They are chiefly collected together in the 2nd vol. of Mr. Metcalf's edition of Starkie's Treatise on Evidence, tit. Surety. We have examined those cases, and find some of them of very little authority, others inapplicable to the circumstances of the present case, and, generally, in support of our opinion.

The case of *Dawes et al. v. Shed et al., Executors*, 15 Mass. 6, has no application. It was a suit against the surety of an executor, by a creditor of the deceased, who had obtained judgment against the executor, and received payments of interest upon the debt. The question was, whether

Drummond v. Prestman.

this precluded the surety from his plea of the act of limitations of that state, made in favor of executors. The court decided, that it did not preclude him. In that case, the record was pleaded in bar, and the decision given, that it was not conclusive. In the case of *Respublica v. Davis*, 3 Yeates 128, an attempt appears to have been made, to introduce a record, for the purpose of proving an admission of counsel in evidence; we cannot understand on what principle it was rejected; but the suit being on a recognisance that one Cobbett should keep the peace, and the breach proposed to be established being the publication of a libel, parol evidence of the confession of Cobbett was admitted, to prove, against the surety, that he had published a libel. So that this authority would seem in favor of our doctrine. So, in the *Sheriffs of London v. Tindall*, 1 Esp. 394, which was a suit against the surety of a bailiff, a receipt indorsed on a warrant, in the handwriting of the principal, was admitted in evidence, which amounted to nothing less than a confession that the bailiff had received a sum of money, and ordered the prisoner discharged. It was objected, that the bailiff himself should be sworn, but the judge refused, and admitted the evidence, declaring that the bailiff *was, in fact, the defendant in the action. This would go far to prove, that even in William Prestman's life, the stated account would [*522 have been evidence against George; and the fact of a judgment being entered upon it by confession, could not have been immaterial to corroborate it.

The case of *Evans et al. v. Beatie, Executors*, 5 Esp. 26, seems *contra*; for there, in a suit against the guarantor of one Copper, for "any woollens that should be furnished him by plaintiff," evidence was offered to prove Copper's parol acknowledgment of certain goods delivered, but refused, on the ground that he might be sworn, and it was not the best evidence the nature of the case would admit of. Here, it will be observed, that the principal was living; but we must not be thought to concur, without further consideration, in the doctrine that he could have been equally sworn for the one party, or compelled to give evidence for the other. With the surety he had a direct interest, and against the plaintiff, it was equally direct. In the present case, the principal was dead. This case is loosely reported, and attributes some observations to Lord ELLENBOROUGH, which we doubt much the authenticity of.

In the case of *Higham v. Ridgway*, 10 East 122, the doctrine on these subjects is laid down with so much good sense as to speak its own correctness. It is to this effect, that the principle to be drawn from all the cases is, that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is clearly evidence, after his death, if he could have been examined to it in his lifetime. On this principle it is, that entries in receivers' accounts are admitted; so also, an acknowledgment by a witness, of a debt to another, or of an acquittance of a debt to himself; because, the individual who makes the acknowledgment has no interest of his own to subserve, but does it to his own prejudice. In all such cases, however, the evidence is received with due caution, and its weight must rest with the jury.

The most stubborn case on this subject that we have considered, is that of *Beall v. Beck*, reported in 3 Har. & McHen. 242. *This was debt upon a sheriff's bond, brought against a surety, in Maryland. The [*523

Harcourt v. Gaillard.

same plaintiff had brought suit, and recovered judgment against the sheriff, for the same cause of action, and the court refused to receive the record of that judgment in evidence, as against the surety. In the inferior court, it was rejected, on a division of opinion, but in the court of the last resort, we are told, the judgment was affirmed. On this decision we can only remark, that the report of it is very brief and unsatisfactory; there is no argument of counsel, or other means of determining on what the decision turned. If the attempt was made to introduce the record as final and conclusive against the surety, it was properly rejected, and in the absence of anything to prove the contrary, we cannot but suspect, that such was the true import of that decision. In any other view, we should not feel satisfied to recognise its authority.

Judgment reversed, and a *venire facias de novo* awarded.

HARCOURT and others v. GAILLARD and others.

British grants.

A grant made by the British governor of Florida, after the declaration of independence, within the territory lying between the Mississippi and the Chatahouchee rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo river, due east, to the Chatahouchee, is invalid, as the foundation of title, in the courts of the United States.

ERROR to the District Court of Mississippi.

February 13th, 1827. This cause was argued by *White* and *Isaacks*, for the plaintiffs; and by *Coxe* and *Worthington*, for the defendants, citing 5 Hall's L. J. 412, 422, 430; 4 Johns. 163.

*March 3d. JOHNSON, Justice, delivered the opinion of the court.
 *524] —The question upon which this cause turns arose out of a British grant to the ancestor of the plaintiff, dated the 24th of January 1777. The land in controversy is situated in that tract of country which lies between the Mississippi and Chatahouchee rivers, and between the 31st degree of north latitude, to the south, and a line drawn from the mouth of the Yazoo river, due east, to the Chatahouchee. From the earliest times of the settlement of North America, the region of territory in which that tract of country is described, was the subject of wars and negotiations with France, Spain and Great Britain, until 1763, when Great Britain became the undisputed proprietor of the whole, from the lakes Maurepas to Ponchartrain, and the gulfs of Mexico and Florida, by the Mississippi, northerly. Before that time, her claim extended southwardly to the 29th degree of north latitude, as is evidenced by her charter to the lords proprietors, of 1677; and from the same instrument, it appears, that she interfered with the province of Louisiana, by extending her southern line to the Pacific ocean. The country of Florida, therefore, south of the 29th degree, was a conquest; that north of the 29th degree, and up the Mississippi, was held as a part of her own territory, concerning which her treaties with France and Spain only established a disputed boundary.

On the 7th of October 1763, the king, exercising a right which was never questioned over what were then called royal provinces, issued his proclamation, by which he established the northern boundary of the Floridas, at the

Harcourt v. Gaillard.

31st degree of north latitude, from the Mississippi to the Apalachicola, down that stream, to its confluence with Flint river, and from that point by a line to the head of the St. Mary's, and by that river to the sea. And this was the line which, by treaty of peace, was established as the southern boundary of the United States. After the peace, the United States, Spain, South Carolina and Georgia, succeeded to the disputes of Great Britain, France and Spain, relative to the same tract of country,

*The original title of South Carolina, under the grant to the lords proprietors, was unquestionable; and she contended, that she [*525 had never been legally divested of soil or sovereignty. Georgia founded her claim on the commissions to her governor, Wright, which comprised, within its jurisdiction, the territory in question; and the United States claimed it as a conquest from the British province of West Florida. While Spain insisted, that it was a part of Louisiana or Florida, and as such, ceded to her by the treaty of 1783. Finally, South Carolina, by the treaty of Beaufort, relinquished her claim to Georgia, and the United States settled her claim, by taking a cession from Georgia of the land in controversy; so that, at present, the claims of the United States, of the state of South Carolina, and of Georgia, have become united in the general government.

The grant to Harcourt, it will be perceived, from its date, was subsequent to the declaration of independence, and within the acknowledged limits of the United States; it, therefore, involves the question whether such a grant can be valid; a question which would have been involved in less difficulty, if the United States had never set up the claim of conquest. That ground would admit the original right of the governor of West Florida to grant, and if so, his right to grant might have continued in force, until the treaty of peace; and the grant in that case to Harcourt might have had extended to it the benefit of those principles of public law which are applicable to territories acquired by conquest; whereas, the right set up by South Carolina and Georgia deny all power in the grantor over the soil; the question which they present, is one of disputed boundaries, within which, the power that succeeds in war is not obliged to recognise as valid any acts of ownership exercised by his adversary.

There are several reasons for putting the claim of the United States out of the question. She has abandoned it, and it is very clear, could never have sustained it. The very ground on which she denied the capacity of Spain to conquer, or take by cession, the territory on the Mississippi, was fatal to the pretensions set up by her against Georgia and South *Carolina, to wit, that Spain could not acquire, by conquest, a territory within the limits claimed by an ally in the war. But there was [*526 another reason. There was no territory within the United States that was claimed in any other right than that of some one of the confederated states; therefore, there could be no acquisition of territory made by the United States, distinct from, or independent of, some one of the states.

We are then referred to the belligerent rights of South Carolina and Georgia; and it is immaterial to the question here, to which of those states the territory appertained. Each declared itself sovereign and independent, according to the limits of its territory, and both extended their claims of territory to the 31st parallel of north latitude. There is no evidence that

either, at that time, had acquiesced in the extension of the territory of Florida beyond that line.

The facts upon which the right of the governor of Florida to issue grants beyond the 31st degree of north latitude rested are these : After the proclamation of 1763, the board of trade of Great Britain, which, at that time, had the affairs of the colonies committed to them, passed a resolution, of the date of March 1764, in which they advise the king to extend the limits of West Florida up to a line drawn from the mouth of the Yazoo, east to the Chatahouchee. It does not appear, that the king ever made an order adopting this recommendation. No proclamation was issued in pursuance of it ; but it appears that, from that time, the commissions to the governors of West Florida designated that line as the northern limit of that province ; notwithstanding which, Governor Wright continued to preside over Georgia, under his commission of 1763, which embraced in its limits the whole of that country, bounded south by the 31st degree of north latitude. Thus stood the rights of the parties, at the commencement of the revolution, and when, by the treaty of peace, the southern boundary of the United States was fixed at the ancient boundary of South Carolina or Georgia (it matters not which), Georgia insisted on that line, as the limit which she was entitled to, and which she had laid claim to, when she declared herself independent ; or which the United States had asserted in her behalf, in the declaration of *527] independence. But as there had been nothing very unequivocal *done, at the time of the declaration of independence, as to designating the limits of the United States, it is still contended, that the tract of country in which the grant lies, had been legally separated from Georgia, before the revolution, and attached to West Florida ; and that, therefore, a grant by the governor of the latter province was valid, if made at any time previous to the treaty of peace.

Two questions here occur, first, whether this separation had taken effect by any valid act ? and secondly, if it had, whether it made any difference in the case, upon international principles ? On both these points, we are of opinion, that the law is against the validity of this grant. It is true, that the power of the crown was, at that time, admitted to be very absolute over the limits of the royal provinces ; but there is no reason to believe, that it had ever been exercised by any means less solemn and notorious than a public proclamation. And although the instrument by which Georgia claimed an extension of her limits to the northern boundary of that territory, was of no more authority or solemnity than that by which it was supposed to have been taken from her, it was otherwise with South Carolina. Her territory had been extended to that limit, by a solemn grant from the crown to the lords proprietors, from whom, in fact, she had wrested it by a revolution, even before the rights of the proprietors had been bought out by the crown.

But this is not the material fact in the case ; it is this, that this limit was claimed and asserted by both of those states, in the declaration of independence, and the right to it was established by the most solemn of all international acts, the treaty of peace. It has never been admitted by the United States, that they acquired anything by way of cession from Great Britain, by that treaty. It has been viewed only as a recognition of pre-existing rights, and on that principle, the soil and sovereignty within their

Harcourt v. Gaillard.

acknowledged limits, were as much theirs, at the declaration of independence, as at this hour. By reference to the treaty, it will be found, that it amounts to a simple recognition of the independence and the limits of the United States, without any language purporting a cession, or relinquishment of *right, on the part of Great Britain. In the last article of the treaty of Ghent, will be found a provision respecting grants of land made [*528 in the islands then in dispute between the two states, which affords an illustration of this doctrine. By that article, a stipulation is made in favor of grants before the war, but none for those which were made during the war. And such is unquestionably the law of nations. War is a suit prosecuted by the sword; and where the question to be decided is one of original claim to territory, grants of soil made *flagrante bello* by the party that fails, can only derive validity from treaty stipulations. It is not necessary here to consider the rights of the conqueror, in case of actual conquest; since the views previously presented put the acquisition of such rights out of this case.

The remaining question is, whether the parties plaintiffs have been established in their rights, by any act or treaty of the United States? The treaty of peace contains no stipulation in their favor. Nor does the treaty with Georgia, since all the reservations there made in favor of British or Spanish grants, and inchoate titles, are expressly confined to the case of actual settlers. But the spontaneous bounty of the United States has gone further, and confirmed a great variety of questionable titles, emanating from British and Spanish authority. Is this one of the titles embraced within the provisions of the statutes passed upon this subject? It is obvious, that it is not.

It is true, that the act of the 3d of March 1803, although making no express provision in favor of British or Spanish grants, unaccompanied with possession, does seem to proceed upon the implication that they are valid; recognising the principle, that a change of sovereignty produces no change in individual property, yet it imputes to them only a modified validity, since, by the 5th section, it imposes a positive necessity upon the proprietors, to record such grants, and makes expressly void, all the rights claimed under the first three sections of that act, or the Georgia treaty, if the duty so imposed be not complied with. And with regard to all *other [*529 evidences of title, not recorded in the time limited, declares, that they shall never be admitted in evidence against any grant derived from the United States. The first section of the supplementary act of 27th of March 1804, extends the time for recording British grants, and vests in the board of commissioners a power of examining and confirming the claims to be filed under its provisions, as extensive as that given by the previous act over the rights claimed under the cession from Georgia, or the first three sections of that act.

But the grant to Harcourt appears neither to have been recorded, nor passed upon by the commissioners; it has, therefore, nothing to claim from the bounty of the United States; and that provision in the 5th section of the act of 1803, which forbids its being received in evidence as against American grants, would certainly have operated against it, in any case clearly within the provisions of that act. Here, it is contended, that the court anticipated the question, and rejected the grant, before it was possible that the question could arise, whether the same land had passed under an American grant. On

Henderson v. Poindexter.

this subject, it must be observed, that neither of the acts of 1803 or 1804, contains an express recognition of the validity of any British grants beside those which were accompanied with possession ; and for that reason, coming within the Georgia treaty, and those which should be confirmed by the commissioners under the first section of the act of 1804, with regard to which, there seems to be a very general power given to that board. All others must rest upon their validity, according to the principles of the modern law of nations. Upon these principles, it has been shown, that the grant to Harcourt was invalid, and, if so, it was not admissible as evidence to sustain the plaintiff's action, under any circumstances. The rule, therefore, applies to this case, that a plaintiff must recover by the strength of his own title, not the weakness of his adversary's ; for which reason, we think the grant was properly rejected, and that the judgment below must be affirmed, with costs.

Judgment affirmed.

*530] *HENDERSON, Plaintiff in error, v. POINDEXTER's Lessee, Defendant in error.

Spanish grants.

Spanish grants, made after the treaty of peace of 1782, between the United States and Great Britain, between the territory east of the river Mississippi, and north of a line drawn from that river at the 31st degree of north latitude, east to the middle of the river Apalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States.¹

No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and the State of Georgia, of the 24th of April 1802, or has been laid before the board of commissioners constituted by the act of congress of the 8d of March 1803, ch. 340, and of March 27th, 1804, ch. 414.²

ERROR to the District Court of Mississippi.

February 17th, 1827. This cause was argued by *Webster* and *Coxe*, for the plaintiff in error, citing *Las Partidas*, 381, l. 16, 384 ; l. 21, 382 ; l. 18 ; Civ. Code of Louisiana, 478, art. 23, 24 ; 484, art. 43 ; 486, art. 57 ; 5 Hall's L. J. 390 ; 3 Dyer 355 a ; 10 Johns. 23 : and *D. B. Ogden*, for the defendant in error, citing *Vattel*, *Droit des Gens*, lib. 1, c. 20, §§ 244, 263.

March 7th. MARSHALL, Ch. J., delivered the opinion of the court.—This is a writ of error to a judgment rendered in the court of the United States for the district of Mississippi, in an ejectment brought by the defendant in error.

George Poindexter, the lessor of the plaintiff, claimed title to the premises in controversy, by virtue of several patents regularly issued to him under the laws of the United States. If the lands were, at the time, grantable, his title is unquestionable. Consequently, the case depended, in the district court, on the title of the defendant in that court. Under several
*531] opinions given by the judge to the jury, to which bills of exceptions were taken, a verdict was found *for the plaintiff in ejectment,

¹ United States v. *Reynes*, 9 How. 127 ; *La Roche v. Jones*, Id. 155 ; *Robinson v. Minor*, 10 Id. 627 ; *United States v. Philadelphia*, 11 Id. 609.

² S. P. *De la Croix v. Chamberlain*, *post*, p. 599 ; *Pollard v. Files*, 2 How. 591 ; *Pollard v. Hagan*, 3 Id. 212.

the judgment on which has been brought before this court. The case must depend on the correctness of the opinions given by the district judge; but as those opinions bring the title of the defendant in ejectment before this court, the case will be best understood, by taking a general view of the principles on which that title stands.

The defendant gave in evidence a grant from the government of Spain, for 1000 acres of land, bearing date on the 20th of June 1795, with a plat and certificate of survey annexed; under which grant, he claimed so much of the land in controversy as it covered. He also offered in evidence a duly certified copy of a certificate of survey and patent, issued thereon to David Pannell, for 500 acres, the residue of the premises in controversy; the certificate by the Spanish surveyor-general Carlos Trudeau, dated the 25th of March 1795, and the patent issued December 7th, 1797, by Manuel Gayoso, the Spanish governor of West Florida, with a deed of release and confirmation from David Pannell to him, dated January 19th, 1820. It was admitted, that the originals of the plat and certificate of survey, and of the patent thereon, of which copies were offered, were not in his possession, nor under his control. These papers were rejected, and a bill of exceptions was taken to the opinion rejecting them.

The defendant also read the deposition of Tessias, to prove the fairness of the grants under which he claimed, and that they were regularly issued by the proper officers of the Spanish government, at the time they bear date respectively. To rebut this testimony, the plaintiff in ejectment produced a letter of instructions, found among the papers of William Atcheson, deceased, the deputy-surveyor, by whom the lands in controversy were surveyed. This letter was directed to William Atcheson, and was proved to be in the handwriting of William Dunbar, who is also dead, and who was proved to be the principal surveyor of the district of Natchez, under whom Atcheson acted. The signature appears to have been torn off. This paper tended to show, that the surveys and grant were not made at the time they bear date, but afterwards. The defendant objected *to its admission, [*532 but his objection was overruled, and to this opinion also, he took an exception.

The defendant prayed the court to instruct the jury,

1st. If they should find that, at the time of the sale by the United States of the premises in question, the defendant was in full possession thereof, under an adverse title, or color of title, such sale was void, and passed no title on which the plaintiff could recover.

2d. If they should find, that the defendant, and those under whom he claimed, had the uninterrupted and quiet adverse possession of the premises, claiming under a Spanish title, legally and fully executed, prior to October 27th, 1795, under which the possession was originally taken, that the plaintiff cannot recover.

3d. If the jury should find, that on the 20th of June 1795, a patent emanated from the Spanish government to Joseph Pannell, under whom the defendant claimed, then such patent constituted a good title in the grantee, and those claiming under him, although the grantee was not, on the 27th of October 1795, an actual resident of the territory ceded by Georgia to the United States.

4th. If the jury should believe that Joseph Pannell, under whom the

Henderson v. Poindexter.

defendant claimed, on or before the 27th of October 1795, was a resident of the said territory, and that he claimed the premises in controversy, by virtue of a Spanish patent, legally and fully executed, prior to that day, the defendant is entitled to a verdict.

5th. That the paper purporting to be a copy of the articles of agreement between Joseph Pannell and Francis Poussett, dated September 20th, 1796, was competent testimony to prove any fact in controversy between the parties in this suit.

6th. If the jury should be of opinion, that the date attached to the paper, purporting to be the instructions from William Dunbar to William Atcheson, is an interpolation or forgery, in such case, they shall disregard it altogether.

7th. In this action of ejectment, after a long and continued possession of thirty years on the part of the defendant, and those under whom he claims, under title, or color of title, the jury are authorized to presume, that it had *533] a legal *origin, and was legally continued in the defendant, and those under whom he claims, in the absence of satisfactory proof to the contrary.

8th. If the jury should believe, that the survey made by William Atcheson, in September 1795, was made at the time it purports to bear date, that then and in such case, it will constitute an instrument of a higher and superior nature to the instrument purporting to be private instructions from said Dunbar to said Atcheson, for the purpose of proving the residence of the said Pannell at that time.

9th. That if, on the whole matter, the jury should have a reasonable doubt, then their verdict should be for the defendant. The court granted the 4th, 6th, 7th and 9th prayers, but refused the 1st, 2d, 3d, 5th and 8th, to which refusal, the counsel for the defendant excepted.

In argument, two general questions have been made. 1st. Is the title set up by the plaintiff in error under the Spanish government, sufficient in itself to protect his possession? 2d. Has it been recognised and confirmed by the United States?

1. The first point has been argued very elaborately, and with deep research. The court will not enter into the reasoning of the parties, but will state the result of an attentive consideration of that reasoning. It is undoubtedly true, that the exact boundary line between the southern British colonies and Florida, was never adjusted, while that province remained in possession of Spain. Each crown claimed territory which had been granted by the other, and was settled by its subjects. Florida was at length ceded to Great Britain; after which, the 31st degree of north latitude was, by the proclamation of 1763, established as the dividing line between that province and Georgia. The crown, however, was in the habit of changing the limits of the colonies; and, though we complained of the manner in which this branch of the prerogative was exercised, we did not resist it. In consequence of a recommendation of the board of trade, the limits of Florida *534] were supposed to be extended, as appears by the commissions to *its governor, so as to comprehend the land in controversy. This was the state of things, when the war of our revolution commenced. In its progress, Spain took part in it, and reconquered Florida. At the treaty by which that war was terminated, Great Britain acknowledged the United States to be free, sovereign and independent, and treated with them as such. Their

Henderson v. Poindexter.

boundaries were particularly described, so as to comprehend the land in controversy. The preliminary articles of peace between the United States and Great Britain were signed at Paris, on the 30th of November 1782. But these articles were provisional, and were not to take effect until terms of peace should be agreed upon between Great Britain and France. On the 20th of January 1783, preliminary articles of peace were signed between Great Britain and France, and between Great Britain and Spain. In the treaty with Spain, the Floridas were ceded to that power, without any description of boundary.

The United States continued to assert a claim to the 31st degree of north latitude, while Spain maintained perseveringly her pretensions to extend farther north. This was the subject of long and fruitless discussion between the two governments, which was terminated by the treaty signed at San Lorenzo el Real, on the 27th day of October 1795. By this treaty, "the high contracting parties declare and agree, that the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the river Mississippi, at the northernmost part of the 31st degree of latitude north of the equator, which from thence shall be drawn, due east, to the middle of the river Apalachicola or Chatahouchee; thence," &c. This treaty declares and agrees that the line which was described in the treaty of peace between Great Britain and the United States as their southern boundary, shall be the line which divides their territory from East and West Florida. The article does not import to be a cession of territory, but the adjustment of a controversy between the two nations. It is understood as an admission that the right was originally in the United States. Nor is there anything extraordinary in this admission. The negotiations were all *depending at [535 the same time and the same place. That between the United States and Great Britain was first completed and signed; it must have been communicated to France, and, of course, was known to Spain; in it, the southern boundary of the United States was accurately defined. The subsequent cession of the Floridas to Spain contained no description of boundaries. Great Britain could not, without a breach of faith, cede to Spain what she had acknowledged to be the territory of the United States; no general words ought to be so construed. We think, that Spain ought to have understood the cession, and must have understood it, as being made only to the extent that Britain might rightfully make. This opinion is confirmed by a subsequent part of the same article, which respects the troops, &c., of either party, in the territory of the other. It is in these words: "And it is agreed, that, if there should be any troops, garrisons or settlements of either party, in the territory of the other, according to the above-mentioned boundaries, they shall be withdrawn from the said territory, within the term of six months after the ratification of this treaty, or sooner, if it be possible; and that they shall be permitted to take with them all the goods and effects which they possess."

It has been very truly urged by the counsel for the defendant in error, that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy, as well as of justice and humanity, is always required, and is never refused. Had Spain

Henderson v. Poindexter.

considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and of national honor would have demanded, and which the United States could not have refused. But instead of requiring an article to this effect, she has expressly stipulated for the withdrawal of the settlements made within what the treaty admits to be the territory of the United States, and for permission to the settlers to bring their property with them. We think this an unequivocal acknowledgment, that the occupation of that territory by Spain was wrongful ; and we think *536] the opinion thus clearly indicated, was supported *by the state of facts. It follows, that Spanish grants, made after the treaty of peace, can have no intrinsic validity, and the holders must depend for their titles on the laws of the United States. We proceed, then, to inquire into the rights of the plaintiff in error, under those laws.

The first act to which our attention has been directed, is that by which Georgia ceded her western territory to the United States. That act provides, "that all persons who, on the 27th day of October 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed, prior to that day, by the former British government of West Florida, or by the government of Spain." On the 3d of March 1803 (2 U. S. Stat. 229), congress passed "an act regulating the grants of land, and provided for the disposal of the lands of the United States south of the state of Tennessee." The first section enacts, that any person or persons "who were resident in the Mississippi territory, on the 27th day of October 1795, and who had, prior to that day, obtained, either from the British government of West Florida, or from the Spanish government, any warrant or order of survey for lands lying within the said territory, to which the Indian title had been extinguished, and which were, on that day, actually inhabited and cultivated, by such person or persons, or for his or their use, shall be confirmed in their claims to such lands, in the same manner as if their titles had been completed." This section places those persons, who had obtained a warrant or order of survey on the 27th of October 1795, on equal ground with those whose titles were completed, provided the Indian title was extinguished, and provided also, the land claimed was actually inhabited and cultivated, either by the person claiming title, or by some other for his use.

The second section provides for those who did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land, in that country ; and *537] the third section *gives a pre-emption to those who did actually inhabit and cultivate a tract of land, at the time of passing the act. The 4th section enacts, that two land-offices shall be established, for the disposal of the lands of the United States in the Mississippi territory, one in the county of Adams, and the other in the county of Washington ; and the fifth directs, "that every person claiming lands by virtue of any British grant, or of the first three sections of the act, or of the articles of agreement and cession between the United States and the state of Georgia, shall, before the last day of March, in the year 1804, deliver to the register of the land-office within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed ; and shall also, on or before that day, deliver to the said register, for the purpose of being recorded, every grant, order of survey, and conveyance or

Hendersen v. Poindexter.

other written evidence of his claim, and the same shall be recorded," &c.; "and if such person shall neglect," &c., "all his right, so far as the same is derived from the above-mentioned articles of agreement, or from the first three sections of this act shall become void, and for ever thereafter be barred."

The sixth section directs the appointment of two boards of commissioners, for the purpose of ascertaining the right of persons claiming the benefit of the articles of agreement and cession between the United States and the state of Georgia, or of the first three sections of the act. One of these boards was to take cognisance of claims to lands lying west of Pearl river, and the other, of claims to lands lying east of that river. Each board was empowered to hear, and determine and decide, in a summary manner, all matters respecting such claims, within their respective districts; and their determination, so far as relates to any rights derived from the articles of agreement with Georgia, and from the first three sections of the act, was declared to be final. The act proceeds to direct, that each board may appoint a clerk, "whose duty it shall be, to enter in a book, to be kept for that purpose, perfect and correct minutes of the proceedings, decisions, meetings and adjournments of the boards, together with the *evidence on which such decisions are made; which books and papers, [*538 on the dissolution of, the boards, shall be transmitted to, and lodged in the office of, the secretary of state." The commissioners are directed to grant certificates to all persons in whose favor decisions shall be made, which certificates are to be recorded by the register of the land-office, and amount, in all cases where grants have been made, to a complete relinquishment on the part of the United States; and where grants have not been made, entitle the party to receive one from the United States.

A supplemental act was passed, in March 1804, which prolonged the time, until the last day of November in that year, for giving the notice prescribed by the 5th section of the original act, to the register of the land-office, of claims to lands lying west of Pearl river, for the purpose of being recorded. This act provides, that in cases of a complete British or Spanish grant, it shall not be necessary for the claimant to have any other evidence of his claim recorded, except the original grant or patent, together with the warrant or order of survey, and the plat. The 3d section enacts, "that when any Spanish grant, warrant or order of survey, shall be produced to either of the said boards, for lands which were not, at the date of the instrument, or within one year thereafter, inhabited, cultivated or occupied, by or for the use of the grantee, or whenever either of the said boards shall not be satisfied that such grant, warrant or order of survey, did issue at the time when the same bears date, the said commissioners shall not be bound to consider such grant, warrant or order of survey, as conclusive evidence of the title, but may require such other proof of its validity as they may deem proper; and the said boards shall make a full report to the secretary of the treasury, to be by him laid before congress for their final decision, of all claims grounded on such grants, &c., as may have been disallowed by the said boards, on suspicion of their being ante-dated or otherwise fraudulent."

It is contended by the plaintiff in error, that these several acts confirm the titles of all those who held lands under the Spanish government, by

Henderson v. Poindexter.

virtue of grants or orders of survey which were made, with good faith, prior to the 27th day of *October, in the year 1795. The defendant in error *539] maintains, that they confirm the titles of those only who were actual settlers of the Mississippi territory, anterior to that day. It is admitted, that the state of Georgia, in its act of cession, has stipulated for those only who were actual settlers on the 27th of October 1795, and who held grants legally and fully executed at that time.

The first section of the act of 1803 comprises incomplete titles only, and does not extend to those which were comprehended in the act of cession. It is, in terms, limited to actual settlers; and no person who was not an actual settler can claim under that act. The silence observed by congress respecting grants fully executed, countenances the opinion, that the articles of agreement between the United States and Georgia were supposed to be, in themselves, a confirmation of the titles of those who were within the words of the instrument. But as the legislature was making provision for the sale of the vacant lands within the ceded territory, it was deemed necessary to ascertain the particular lands which were appropriated. The 5th section of the act, therefore, requires, that every person having such claims shall, before the last day of March, in the year 1804, deliver a notice in writing, specifying the extent of his claims, to the register of the land-office, together with his title papers, that they may be recorded. On failure, his title, so far as it is derived from the first three sections of the act, or from the articles of agreement with Georgia, shall become void; nor shall such title paper "be considered or admitted as evidence, in any court of the United States, against any grant derived from the United States."

So far as titles were derived from the act itself, no person could complain of this restriction. It was, however, a very rigorous law as respected those who were protected by the articles of agreement of Georgia. This act certainly contains no confirmation of Spanish titles, except of those which were held by persons who were actual settlers at the time prescribed in the law itself. It provides for the sale of all the unappropriated lands, and establishes a tribunal with power to decide on all titles.

The language of the act of the 27th of March 1804, is *less explicit. It declares, "that persons claiming lands in the Mississippi territory, by virtue of any British or Spanish grant, or by virtue of the first three sections of the act to which this is a supplement, or of the articles of agreement and cession with the state of Georgia, may, after the last day of March, in the year 1804, and until the last day of November then next following, give notice in writing of their claims, to the register of the land-office, for the lands lying west of Pearl river, and have the same recorded, in the manner prescribed by the 5th section of the act to which this is a supplement." The defendant in error contends, that, although the descriptive words of the act apply generally to persons claiming lands under British or Spanish grants, they ought to be confined to the actual settlers of the country. This construction rests chiefly on the argument, that the act of 1804 is a mere supplement to the act of 1803; that the two laws ought to be construed together; that their great object is to quiet possession, and that the main purpose is to give a longer time for recording claims to lands lying west of Pearl river.

There is, we think, great difficulty in maintaining this construction. It

Henderson v. Poindexter.

has been observed, and the observation has great weight, that all British and Spanish grants held by persons who were actual inhabitants of the country, on the 27th of October 1795, were protected by the articles of agreement with the state of Georgia. Yet these persons are enumerated in the act, as constituting a distinct class of claimants, not provided for in that compact. The inference is very strong, that congress must have supposed there was such a class. The concluding words of the section indicate the same idea. They are, "and the powers vested by law in the commissioners appointed for the purpose of ascertaining the claims to lands lying west of Pearl river, shall, in every respect, extend and apply to claims which may be made by virtue of this section ; and the same proceedings shall thereupon be had, as are prescribed by the act aforesaid, in relation to claims which shall have been exhibited on or before the last day of March, in the year 1804." *This language we think adapted to new claims, as well as to a prolongation of the time in which claims may be recorded, as the [*541 preparatory step to laying them before the commissioners. It is observable, too, that the 5th section of the act of 1803 mentions British but not Spanish grants. They are comprehended in that class of claims which were confirmed by the articles of agreement with Georgia. The act of 1803 contemplates no Spanish grant that was not protected by those articles. The act of 1804, however, introduces Spanish with British grants, and places them together, as forming a class of cases not provided for in the compact with Georgia. We cannot suppose, that the legislature would have changed its language, and have introduced the words Spanish grants, with directions that they should be recorded, and laid before the commissioners, if nothing existed to which the words would be applicable.

The language of the third section also indicates an opinion, that persons, not inhabitants of the country on the 27th of March 1795, might be entitled to land under a Spanish grant, warrant or order of survey. It provides for the case of a claim to land which was not, at the date of such grant, &c., or within one year thereafter, inhabited, cultivated or occupied by, or for the use of, the grantee. Now, land might be inhabited, cultivated or occupied, for the use of a grantee, who was not himself an inhabitant of the country, or might be occupied by himself, within one year after the date of the grant, though not so occupied on the 27th of October 1795. The act goes on to provide, that, in such case, or whenever the commissioners shall not be satisfied that the grant, &c., issued at the time it bears date, such grant, &c., shall not be conclusive evidence of the title. This language might certainly justify the implication that congress supposed the commissioners might establish titles in favor of non-residents. The decision of commissioners against them is not to be final. They are to be reported to the secretary of the treasury, to be by him laid before congress for the final decision of that body.

On the 28th of February 1809, congress appears to have acted on this report. An act was then passed, directing the *lands, the claims to which had been disallowed by the commissioners, to be sold in the [*542 same manner as other public lands. The same act reserves the right of the Spanish claimant to institute his suit in the highest court of law or equity in the said territory, for the recovery of the land, within one year after it shall have been sold by the United States. If he shall fail to sue within the time

Henderson v. Poindexter.

limited, his right to sue shall be for ever barred. The second section makes the decision of such cause to depend entirely on the claimant's proving that the survey was made before the 27th of October 1795, and on the fairness of the transaction; and the third section declares parol evidence to be admissible. This act relates solely to those claims which were laid before the commissioners, and disallowed.

The patent under which the plaintiff in error claims the tract of 1000 acres, appears to have the following indorsements on it :

"Entered on record, at Natchez, in the county of Adams, Mississippi territory, in lib. B, fol. 149 a 150, this second day of April, A. D. 1801.

"JOHN HENDERSON, Recorder."

"Land Office, west of Pearl river.

"This plat, certificate and letters-patent, are recorded in the Register's book B, of written evidences of claims, fol. 621, &c. Examined and corrected by
J. GIRAULT, Translator."

The plat and certificate of survey, and patent for 500 acres, appear to have been registered in the land-office west of Pearl river, on the 26th of March 1804. The patent for the last survey gives no additional title, because it was granted after the authority of Spain over the country had ceased. It does not appear, that either of these title papers was laid before the board of commissioners.

There is certainly some difficulty in construing these acts of congress. It is not easy to resist the conviction, that the government has legislated on the idea, that Spanish titles might be valid, though held by persons who *543] were not *residents of the country on the 27th of October 1795; yet no law has, in express terms, imparted this validity to them. The act of 1804 allows them to be recorded, and to be laid before the commissioners, to be decided on by them. It goes further, and seems to point the attention of the commissioners to the fairness of the claim, rather than to the residence of the claimant. The certificate of the board in favor of the claimant is conclusive against the United States. Their determination against him is to be reported to the secretary of the treasury, in order to be laid before congress; and this determination is to be founded on the opinion, that the document of title is ante-dated, or otherwise fraudulent. When congress acts on its report, no absolute decision is made against the rejected claims, but the claimant is allowed time to assert his title in a court of law or equity. These provisions are scarcely to be reconciled with the idea, that no Spanish grant could be valid, if made to a non-resident of the territory. It would seem as if the commissioners might have taken cognisance of such a claim, might have decided in its favor, and that such a decision would have been conclusive.

But we repeat, that there is no act of congress expressly confirming such titles, and that they derive no validity from any other source. The whole legislation on this subject requires, that every title to lands in the country which had been occupied by Spain, should be laid before the board of commissioners. The motives for this regulation are obvious; and as the titles had no intrinsic validity, it was opposed by no principle. Claimants could not complain, if the law which gave validity to their claims, should also

Henderson v. Poindexter.

provide a board to examine their fairness, and should make their validity depend on their being laid before that board. The plaintiff in error has failed to bring his case before the tribunal which the legislature has provided for its examination, and has, therefore, not brought himself within the law. No act of congress applies to a grant held by a non-resident of the territory, in October 1795, which has not been laid before the board of commissioners. It is true, that no act has declared such grants void; but the legislature has ordered the lands to be *sold which were not appropriated in a manner recognised by law, and the land in controversy is of that [*544 description.

If this view of the subject be correct, no Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the contract with Georgia, or has been laid before the board of commissioners. This opinion is decisive of every point on which the court gave opinion, so far as respects title.

The first bill of exceptions, taken by the plaintiff in error, is to the rejection of a certified copy of a certificate of survey, and a patent issued thereon, by the Spanish governor of West Florida, in December 1797. The patent was properly rejected, because Spain no longer occupied the territory, and the authority which had been exercised, in fact, by the Spanish government, had ceased. The order and certificate of survey were properly rejected, because they were not confirmed by the first three sections of the act of 1803, and had never been laid before the board of commissioners.

The paper dated the 19th of October 1796, purporting to be private instructions from William Dunbar, the principal surveyor of the district of Natchez, to William Atchison, the deputy, who made the surveys for the land in controversy, was admitted to rebut the testimony of a witness whose deposition had been taken to prove that the Spanish title papers were fair, and were correctly dated. This paper was admitted, because it related to the official duties of the deputy, was found among his papers after his death, and was proved to be in the handwriting of his principal, who was also dead. Doubts are entertained by some of the judges respecting the propriety of its admission. But this is a question which we think it unnecessary to decide, because the grant not having been laid before the board of commissioners, could not have availed the defendant in the court below, who did not bring himself within the reservation of the cession from Georgia.

The plaintiff in error, after the testimony had been laid before the jury, prayed the court to instruct them on several points of law which grew out of it. The first of these, *which was refused, questioned the validity of [*545 a grant made by the United States for land occupied at the time, under color of an adverse title. There can be no doubt of the correctness of rejecting this proposition. The 2d, 3d and 5th points, which the court was prayed to state as law to the jury, depend on the position that residence in the country on the 27th of October 1795, was not necessary to the validity of the title set up by the defendant in that court. As the title had not been laid before the board of commissioners and as residence was indispensable to the validity of a claim, supported by the act of cession, from Georgia, we think these instructions were properly refused. The 8th was unimportant to the case, in the view which this court has taken of it. If the question, whether the survey, purporting to bear date in September 1795, was

The Antelope.

really made on that day, or was ante-dated, had been the question to be decided by the jury, as it would have been had this paper been laid before the board of commissioners, the court did right in refusing to grant this prayer. It seems to request the court to say, that, in deciding on the verity of a paper alleged to be fraudulent, the paper itself is entitled to more credit than the parol testimony which impeaches it, though the law declares parol testimony to be admissible. On the other points, the court gave the instruction asked by the plaintiff in error.

We think, the plaintiff in error has neither brought himself within the articles of agreement between the United States and the state of Georgia, nor within the acts of congress; and that the judgment of the district court must be affirmed, with costs.

Judgment affirmed.

*546] *The ANTELOPE: The Spanish and Portuguese Consuls, Claimants.

Costs in the admiralty.

Further explanation of the decree of this court, in 10 Wheat. 66, and 11 Ibid. 413.

The Africans captured, except those restored to the Spanish claimants, to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

No judgment or decree can be rendered directly against the United States, for costs and expenses.

The fees and compensation to the marshal, where the government is a party to the suit, and his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges.

Decree of the circuit court, in respect to the apportionment among the several parties to the suit of the costs and expenses, affirmed.

Identity of the Africans restored to the Spanish claimant, established by sufficient evidence.

APPEAL from the Circuit Court of Georgia. This is the same cause which is reported in 10 Wheat. 66, and 11 Ibid. 413, and was again brought before the court, upon a further appeal, and certificate of a division of opinions as to the proceedings of the court below, in execution of the former decrees of this court.

March 6th, 1827. It was argued by the *Attorney-General* and *Key*, for the appellants; and by *Berrien*, *C. J. Ingersoll* and *Wilde*, for the respondents.

March 15th. TRIMBLE, Justice, delivered the opinion of the court.—This case having been before this court, and a decree rendered therein at February term 1825, and again brought up, and an explanatory decree made therein at February term 1826, the reports of the case in 10 Wheat. 66, and 11 Ibid. 413, are referred to for the general history of its facts and circumstances, and for the principles settled in it by the former decrees of this court. The case was remanded to the circuit court, with directions to make

*547] *a final disposition of the controversy between the parties, pursuant to the principles of the decrees of 1825 and 1826 of this court. The circuit court, in order to enable it to decree finally in the case, directed the register to take and report an account of the costs, and also of the expenses of keeping, maintaining, &c., of the Africans, by the marshal, and which account was accordingly reported. Exceptions were filed to the report by

The Antelope.

both the Portuguese and Spanish claimants. The circuit court also caused proofs to be taken for the purpose of identifying individually the Africans to be delivered to the Spanish claimants, as directed by the decree of 1826. Thus circumstanced, the case came on for final hearing before the circuit court. The court decreed that the Portuguese claimant should not be made liable for costs, or any proportion of the expenses and charges of the marshal for maintaining, &c., the Africans; and being of opinion, that thirty-nine of the Africans were sufficiently identified by proof, as being the property of the Spanish claimants, directed the thirty-nine Africans, so identified, to be delivered to the Spanish claimants, upon their paying a proportion of the costs and expenses reported by the registrar, in the ratio of the number of Africans delivered, to the whole number; and the circuit court was further of opinion, that the residue of the Africans, not directed to be delivered to the Spanish claimants, should be delivered to the United States, to be disposed of according to law; but on the question whether they shall be delivered absolutely, or on condition of payment of the balance of the expenses which will remain unsatisfied, after charging the Africans adjudged to the Spanish claimants in their due ratio, the judges of the circuit court being divided in opinion, ordered this difference of opinion to be certified to this court. The case comes up on this certificate of division, and also upon an appeal prayed by the district-attorney, on behalf of the United States, and allowed, "from so much of the said final order, of the circuit court, as relates to the apportionment among the several parties, of the costs and expenses, in the preservation, maintenance*and custody [*548 of the said Africans, and of the costs and expenses of th various proceedings which have been had in relation to the said Africans, and also from so much of said order as decrees thirty-nine of the said Africans to the Spanish claimants."

We will first consider the question arising upon the certificate of division of opinion between the judges of the circuit court. It appears, from the opinion delivered by the circuit court, and from the registrar's report, that in making up that report as to the amount of expenses, sixteen cents *per diem* was allowed the marshal for the custody, maintenance, &c., of the Africans; and the Spanish claimants were charged, as a condition precedent, with the proportion of expenses of the marshal, after this rate, in the ratio of the number of Africans to be delivered to them. The residue of the marshal's expenses, at the same rate *per diem*, is supposed to be meant by the term "expenses," in the question on which the judges were opposed in opinion; and it is supposed, the question upon which the judges were opposed in opinion was, whether the Africans, not directed to be delivered to the Spanish claimants, should be delivered by the marshal to the United States, absolutely and unconditionally, to be disposed of according to law, or whether it should be imposed on the United States, as a condition precedent to their delivery, that the United States should pay to the marshal his claim for expenses, at the rate aforesaid, in the ratio of the number of Africans to be delivered to the United States.

The Spanish claimants have not appealed from the decree of the circuit court. As the court had decided that they ought to bear some proportion of the expenses, it was necessary, for the purpose of ascertaining the amount which they were to pay, to fix upon some *data* for making up the account

The Antelope.

of expenses so far as related to them. But as they do not complain, this court is not called upon to decide, whether they were overcharged or not, nor to determine whether the rate of sixteen cents *per diem* was warranted by law, as the circuit court supposed, so far as the Spanish claimants are concerned.

*As relates to the United States, the question propounded by the *549] judges of the circuit court, and upon which they were divided in opinion, does not necessarily draw in question the *data* or rate of the marshal's allowance for expenses; but whether the payment of his expenses, at any rate, or to any amount, ought to be made a precedent condition to the delivery of the Africans to the United States. It may well be doubted, however, whether the state law does, as supposed by the court, authorize the marshal to charge, as matter of right, sixteen cents *per diem*, for keeping, maintaining, &c., the Africans; although it might furnish some guide, in an appeal to the sound direction and justice of the government, in making him a reasonable compensation. It is true, the first section of the "act for providing compensation, for the marshal" (1 U. S. Stat. 625), after declaring the fees and compensation to be allowed the marshal for certain enumerated services, &c., adds, "for all other services not herein enumerated, such fees or compensation as are allowed in the supreme court of the state where the services are rendered." This has generally been construed, and, we think, rightly, to mean, that where the services performed are not enumerated in the act of congress, but such services are enumerated, and a fixed allowance made therefor in the state laws, they shall fix the rule of compensation. The case under consideration is wholly unprovided for by the laws and usages of the state. The Africans to be delivered to the United States, are neither slaves, in contemplation of law, nor prisoners of war, nor persons charged with crimes. The compensations allowed by the laws of the state to sheriffs and jailers, in these cases, do not, therefore, furnish any positive rule of law or right, as to the compensation which ought to be allowed the marshal in the peculiar circumstances attending these Africans. He is, no doubt, entitled to a reasonable compensation; but that must depend upon the circumstances of the case, and not any positive rule. But be that as it may, it could not legally enter into the judgment and decree of the court, so far as that judgment or decree was to affect the rights of the United States, or the rights of the marshal as *against the United States. It is a *550] general rule, that no court can make a direct judgment or decree against the United States, for costs and expenses, in a suit to which the United States is party, either on behalf of any suitor, or any officer of the government. As to the officers of the government, the law expressly provides a different mode.

The third section of the "act for regulating process," &c. (1 U. S. Stat. 276), makes provision for the fees and compensation to be allowed the marshal, similar to the "act for providing for compensation to marshals," &c., above cited. The fourth section makes some further regulations concerning the fees and compensation to be allowed clerks and marshals, and then provides, "that the same having been examined and certified by the court, or one of the judges of it, in which the services shall have been rendered, shall be passed in the usual manner at, and the amount thereof paid out of, the treasury of the United States," &c. These provisions show,

The Antelope.

we think, incontestably, that, whether the marshal's fees and compensation for services rendered the United States be fixed by some positive statutory rule, as in enumerated services, or depend upon what is reasonable and just under the circumstances of the case, as in non-enumerated services, they must be certified to, and paid out of, the treasury, and cannot lawfully constitute any part of the judgment or decree in the cause. It would, indeed, be extraordinary, if the marshal, who is the servant of the government, and holds possession of the Africans merely by its authority, could obstruct the operations of the government, by a claim for compensation for his services. The laws give the marshal no lien on the Africans, and we can discover no principle which will justify the court in creating a lien, in effect, by its decree. There is no necessity for such a proceeding.

The seventh section of "an act in addition to the acts prohibiting the slave-trade," appropriates \$100,000 to carry the law into effect. The second section of the act authorizes the president of the United States to make such regulations and arrangements as he may deem *expedient for the safe-keeping, support and removal beyond the limits of the United States, [*551 all such negroes," &c. (3 U. S. Stat. 532.) It is not to be doubted, that, if a reasonable account for expenses were certified according to law, arrangements would be made to pay it out of the fund appropriated for carrying into effect the laws prohibiting the slave-trade.

We are of opinion, it ought to be certified to the circuit court, that all the Africans captured in the Antelope, except those directed to be delivered to the Spanish claimants, should be decreed to be delivered to the United States, absolutely and unconditionally, without the precedent payment of expenses.

In that part of the case brought up by appeal, it is insisted on behalf of the United States, that so much of the decree of the circuit court "as relates to the apportionment among the several parties of the costs and expenses in the preservation, maintenance and custody of the Africans, and the costs and expenses of the various proceedings which have been had in relation to said Africans," is erroneous. It is contended, that these costs and expenses were occasioned by the prosecution of a groundless claim by the Portuguese and Spanish claimants, and that they should have been decreed to pay them.

It may well be doubted, whether these questions are now open to discussion. By a former order and decree of the circuit court, made before the former appeals, the ordinary costs and charges were regulated, and they were paid accordingly; that order is not now before this court on this appeal. By the former decree of the circuit court, rendered before the former appeals, a principle was established as to the ratio in which the Spanish and Portuguese claimants should be chargeable with the expenses of maintenance, &c. The principle was, that they should be charged in the ratio of the number of Africans to be delivered to them respectively. There was no appeal from that part of the former decree of the circuit court; or if there was, it was virtually affirmed by the former decree of this court.

In the application of the principle to the case as it now *stands, [*552 it seems to follow, necessarily, that as none of the Africans are to be delivered to the Portuguese claimant, he should pay none of the expenses of keeping them; and that the Spaniard should pay in the ratio of thirty-nine, the number to be delivered to him. The condition of the Portuguese

The Antelope.

consul, too, is very peculiar. Under the circumstances in which these Africans were captured, and brought into the United States, it was his duty to interpose a claim for part of them, on behalf of the subjects of his majesty the king of Portugal. That claim was sustained in the district and circuit courts, and the general propriety of the claim was also recognised by the former decree of this court, but as no individual Portuguese claimant of the property appeared, before the hearing of the appeal, the claim of the vice-consul of Portugal was dismissed, on that ground. It would be too much to visit him with the extraordinary expenses, under such circumstances, and he has heretofore paid his proportion of the ordinary expenses of the suit.

We think there is no just ground of complaint on the part of the United States, that the Spanish claimants have not been burdened with more than a ratable proportion of the expense of keeping the Africans.

It only remains to be inquired, whether the circuit court erred in directing thirty-nine of the Africans to be delivered to the Spanish claimants. It has been argued, that there is no credible and competent evidence to identify them, or any of them. We are not of that opinion. We think, that under the peculiar and special circumstances of the case, the evidence of identity is competent, credible and reasonably satisfactory, to identify the whole thirty-nine. It ought not to be forgotten, that in the original cause it had been established to the satisfaction of this court, that ninety-three of the Africans brought in with the Antelope, were the property of the Spanish claimants; but as many of the Africans had died, it was the opinion of this court, that number should be reduced according to the whole number living. The circuit court, proceeding upon this principle, fixed the whole number to which the Spanish claimants *were entitled at fifty, and *553] then proceeded to inquire as to their identity.

Grondona, who had been examined as a witness in the original cause, was second officer on board the Antelope, when the Spanish Africans were purchased and put on board the Antelope, on the coast of Africa. It appears, that the Africans captured, and brought in with the Antelope, were put into the possession of Mr. William Richardson; and that he had about fifty of them employed at work upon the fortifications of Savannah; that while there, Grondona came out with the marshal, for the purpose of identifying the Spanish Africans; that the fifty Africans were drawn up in a line; that Grondona made signs, and spoke to the negroes, and they to him, and they generally appeared to recognise him as an acquaintance. On cross-examination, he says, he cannot say, that every one of the negroes recognised the sign made by the person accompanying the marshal to the fortifications, but that they generally did. The Africans of the Antelope being paraded in front of the court-house, Mr. Richardson was directed by the court to point out, and designate, individually, the Africans who had worked on the fortifications, and he designated thirty-four. It is proved by Mr. Morel, the marshal, that Grondona recognised five others, who were with other persons, and that they appeared to recognise Grondona as an acquaintance. These five are described by name, and pointed out by other witnesses. Before these proofs were taken in open court, for the purpose of identifying the Africans claimed by the Spaniards, Grondona had disappeared, and it is suggested, was dead. He had, however, in his examination as a witness in chief in the cause, shown, that he was an officer on board, and knew the Africans

McLemore v. Powell.

belonging to the Spanish claimants. Grondona, and the Africans, both spoke languages not understood by the witnesses; yet it could well be seen by them, that Grondona and the Africans knew and understood each other; and Mr. Richardson swears, that many of them appeared to know him very well, and that he claimed them as *part of the Africans originally [*554 put on board the Antelope by the Spanish owners. We think this evidence was sufficient, under the very peculiar circumstances of this case, reasonably to satisfy the mind of the identity of thirty-nine of the Africans as belonging to the Spanish claimants.

DECREE AND CERTIFICATE.—This cause came on, &c.: On consideration whereof, this court is of opinion, that there is no error in the decree of the circuit court so far as the same proceeds, and that it be affirmed; and upon the question on which the judges of the circuit court were divided in opinion, it is the opinion of this court, that all the Africans, not to be delivered to the Spanish claimants, ought to be decreed to be delivered to the United States, unconditionally, and without the precedent payment of expenses, to be by them disposed of according to law.

McLEMORE, Plaintiff in error, v. POWELL and others, Defendants in error.

Discharge of indorser.

An agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties.

A mere agreement by the holder of a bill, with the drawer, for delay, without any consideration for it, and without any communication with or assent of the indorser, will not discharge the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself.¹

ERROR to the Circuit Court of West Tennessee.

February 15th, 1827. This cause was argued by *White* and *Eaton*, for the plaintiff in error; and by *Webster* and *Bliss*, for the defendants in error.

*February 20th. STORY, Justice, delivered the opinion of the court.—This is a writ of error to the circuit court of the United [*555 States for the district of West Tennessee. The original action was *assumpsit*, brought by Powell, Fosters & Co., as holders of a bill of exchange, drawn by one Thomas Fletcher, in May 1819, at Nashville, upon Messrs. McNeil, Fisk & Rutherford, at New Orleans, payable to Thomas Read, or order, for \$2000, in sixty days after date, and by him indorsed to the defendant, John C. McLemore, and by him to the plaintiffs. The bill, upon presentment for acceptance, was dishonored, and due notice of the dishonor was given to the defendant.

At the trial, upon the general issue, Thomas Fletcher, the drawer, was, under a release from the defendant, McLemore, examined as a witness, and, among other things, testified, that, in the month of October following the dishonor of the bill, "one of the plaintiffs applied to him, at Nashville, for

¹ S. P. ROSS v. JONES, 22 Wall. 588.

McLemore v. Powell.

the money on the bill, and threatened to sue immediately, if an arrangement was not made to pay the bill. The witness then proposed to the plaintiff, if he would indulge him four or five weeks, he would himself, to a certainty, pay the bill. To this the plaintiff agreed, and told the witness he was going to Louisville, Kentucky, and would return by Nashville, about the expiration of that time, and would receive said payment. Since said time, the witness has never seen said plaintiff." The witness further testified, that the defendant was an accommodation indorser for him on the bill; that the plaintiff told him, that the bill would be left with a Mr. Washington, at Nashville; that he expected he would himself be at that place, at the time agreed on, but that, if he did not come, he would give the instructions to Mr. Washington, by letter, what to do, if the witness did not pay at the expiration of the time agreed on. It did not appear, that any consideration was paid or stipulated for this delay; and no suit was commenced, until after this period had elapsed. The district judge instructed the jury, that if they believed the conversation above stated amounted to no more than an agreement that a suit should not be brought for four or five weeks, and that no premium or consideration was given or paid, or to be paid, by *556] Fletcher, the indorsers were not discharged, *that an agreement for giving day must be an obligatory contract for a consideration, which ties up the hands of the creditor, and disables him from suing, thereby affecting the interests and rights of the indorser; that the indorser has a right to require and demand of the creditor to bring a suit against the drawer, and if he has disabled himself from bringing a suit, by a contract for a consideration, he has thereby released the indorser; and that, if the jury were satisfied from the testimony, that time was given, for a valuable consideration paid, or to be paid, or that a new security was taken by the holder, the indorser was discharged and absolved from all the obligations of the indorsement. Under this instruction, the jury found a verdict for the plaintiffs, upon which there was judgment given in their favor. A bill of exceptions was taken to the charge of the court; and the present writ of error is brought for the purpose of ascertaining its illegal correctness.

It is unnecessary to give any opinion upon that part of the charge which respects the right of an indorser to require the holder to commence a suit against the drawer. In general, the indorser, by paying the bill, has a complete power to re-instate himself in the possession and ownership of the bill, and thus to entitle himself to a personal remedy on the instrument against all antecedent parties. The same reason, therefore, does not exist, as may in common cases of suretyship, to compel the creditor to active diligence, by suit against the principal. Without expressing any opinion on this point, it is sufficient to say, that the error, if any, was favorable to the defendant, and therefore, it can form no subject of complaint on his part.

The case, then, resolves itself into this question, whether a mere agreement with the drawers for delay, without any consideration for it, and without any communication with, or assent of, the indorser, is a discharge of the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself. And we are all of opinion, that it does

McLemore v. Powell.

not. We admit the doctrine, that although the indorser has received due notice of the dishonor of the bill, yet, if the holder afterwards enters into any new agreement with the drawer for delay, in any manner changing *the nature of the original contract, or affecting the rights of the indorser, or to the prejudice of the latter, it will discharge him. But [557 in order to produce such a result, the agreement must be one binding in law upon the parties, and have a sufficient consideration to support it. An agreement without consideration is utterly void, and does not suspend for a moment the rights of any of the parties. In the present case, the jury have found, that there was no consideration for the promise to delay a suit, and, consequently, the plaintiffs were at liberty immediately to have enforced their remedies against all the parties. It was correctly said by Lord ELTON, in *English v. Darley*, 2 Bos. & Pul. 61, that "as long as the holder is passive, all his remedies remain;" and we add, that he is not bound to active diligence. But if the holder enters into a valid contract for delay, he thereby suspends his own remedy on the bill, for the stipulated period; and if the indorser were to pay the bill, he could only be subrogated to the rights of the holder, and the drawer could or might have the same equities against him as against the holder himself. If, therefore, such a contract be entered into without his assent, it is to his prejudice, and discharges him.

The cases proceed upon the distinction here pointed out, and conclusively settle the present question. In *Walwyn v. St. Quintin*, 1 Bos. & Pul. 652, where the action was by indorsees against the drawer of a bill, it appeared, that after the bill had become due, and been protested for non-payment, though no notice had been given to the drawer, he having no effects in the hands of the acceptor, the plaintiffs received part of the money on account, from the indorser; and to an application from the acceptor, stating, that it was probable he should be able to pay at a future period, they returned for answer, that they would not press him. The court held it no discharge; and Lord Chief Justice EYRE, in delivering the opinion of the court, said, that if this forbearance to sue the acceptor had taken place before noticing and protesting for non-payment, so that the bill had not been demanded when due, it was clear, the drawer would have been discharged, for it would be giving a new credit to the acceptor. But that, after protest for non-payment, *and notice to the drawer, or an equivalent to notice, a right to sue the drawer had attached, and the holder was not bound to sue [558 the acceptor. He might forbear to sue him. The same doctrine was held in *Arundel Bank v. Goble*, reported in a note to Chitty on Bills. (Chitty 379, note c, ed. 1821.) There, the acceptor applied for time, and the holders assented to it, but said they should expect interest. It was contended, that this was a discharge of the drawer; but the court held otherwise, because the agreement of the plaintiffs to wait was without consideration, and the acceptor might, notwithstanding the agreement, have been sued the next instant; and that the understanding that interest should be paid by the acceptor, made no difference. So, in *Badnall v. Samuel*, 3 Price (Exch.) 521, in a suit by the holder against a prior indorser of a bill of exchange, it was held, that a treaty for delay between the holder and acceptor, upon terms which were not finally accepted, did not discharge the defendant, although an actual delay had taken place, during the negotiation, because there was no

United States v. Barker.

binding contract which precluded the plaintiffs from suing the acceptor at any time.¹

Upon authority, therefore, we are of opinion, that this writ of error cannot be sustained, and that the judgment below was right. Upon principle, we should entertain the same opinion, as we think the whole reasoning upon which the delay of the holder to enforce his rights against the drawer is held to discharge the indorser after notice, is founded upon the notion, that the stipulation for delay suspends the present rights and remedies of the holder. The judgment of the court below is, therefore, affirmed, with costs.

Judgment affirmed.

*559] *UNITED STATES v. PRISCILLA BARKER, Administratrix of ABRAHAM BARKER, deceased.

Discharge of indorser of bill.

Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals.²

Where the United States were the holders of certain bills of exchange, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and indorsers, residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left the 8th, having arrived at New York, at 35 minutes past 10 o'clock, A. M., on the 10th : *Held*, that the indorser was discharged, by the negligence of the holders.

So also, where the United States were the holders of other bills, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and indorsers, residing in New York, and notice was given to the indorser on the 12th of the same month, the mail which left Washington on the 8th, having reached New York early on the morning of the 11th : *Held*, that the indorser was discharged, by the negligence of the holders.

United States v. Barker, 4 W. C. C. 464, affirmed.

ERROR to the Circuit Court for the Eastern District of Pennsylvania. This was an action of *assumpsit*, brought in the court below, by the United States, against the personal representative of A. Barker, deceased, the indorser of several bills of exchange, drawn in the year 1814, by J. Barker, in New York, on different houses of trade in England. Among the bills, two were protested for non-acceptance, and two for non-acceptance and non-payment.

It appeared in evidence, at the trial, that the agent of the United States treasury, in New York, where the bills were drawn, and where the drawer and indorsers resided, received a letter from the secretary of the treasury, dated Washington, December 7th, 1814, requesting him to notify the *560] drawer and indorsers of the non-acceptance of the first set of bills, and that notice was accordingly given to them on the 12th of December. It was further proved that the mail which left Washington on the 8th of the same month, arrived at New York, at 35 minutes past 10 o'clock, A. M., on the 10th. It was also proved, that the said agent received a letter from the secretary of the treasury, dated at Washington, May 8th, 1815, direct-

¹ And see *Sterling v. Marietta and Susquehanna Trading Co.*, 11 S. & R. 179.

² *United States v. Bank of the Metropolis*, 15 Pet. 377.

United States v. Barker.

ing him to give notice of the non-payment of the second set of bills of exchange to the drawer and indorsers, and that they were notified on the 12th of the same month. It was further proved, that the mail which left Washington, containing letters of the 8th of May, reached New York early in the morning of the 11th. But no notice of the non-acceptance of this second set of bills was proved.

The learned judges in the court below instructed the jury, that the holders of the bill had not used due diligence. The letter of the 7th of December 1814, must be considered as having been written on that day, and ought to have been put into the post-office, to come by the mail of the 8th, and, if so, it would have reached New-York on the morning of the 10th. That the letter of the 8th of May 1815, should have been put into the post-office, to come by the mail of the 9th, and would have reached New York the morning of the 11th. The earliest notice alleged was on the 12th of May and December, respectively; and it seemed clear, either that the letters were not put into the post-office at Washington, in due time, or that the agent in New York was guilty of negligence in giving notice to the parties, in either of which cases they were discharged.

A verdict and judgment was rendered upon this instruction in the court below, on which the cause was brought, by writ of error, to this court.

February 16th, 1827. The cause was submitted, without argument, by the *Attorney-General*, for the United States; and by *Webster*, for the defendant.

MARSHALL, Ch. J., delivered the opinion of the court.—*That [*561 whatever doubts might be entertained as to the charge of the court below, relating to the transactions in England (which it has not been thought necessary to state), in respect to the protest and transmission of the bills, we think there is none, as to what took place after their arrival at the treasury of the United States. The question was, whether notice of the dishonor of the bills was transmitted to the party, within the time prescribed by the general law in respect to bills of exchange? The court were of opinion, that there was negligence, either at Washington or New York, as to giving such notice; and that the notice actually given was too late to fix him with the responsibility. The letter from the treasury department, giving the notice, was either not sent in due course of mail to New York, or there was negligence at New York in not giving notice there, as early as it should have been given, after the letter arrived at that city. Whether, therefore, the judge erred or not, as to the first part of his charge, in respect to the transmission of the bills from England in a reasonable time, there was no doubt that the United States had no right to recover, on account of the neglect in giving due notice, after the return of the bills. Upon this ground, the judgment of the circuit court was affirmed.

Judgment affirmed.

PARKER and another v. JUDGES of the CIRCUIT COURT OF MARYLAND.

Injunction.

An injunction out of the circuit court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court.

An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it.

*562] *February 9th, 1827. *Raymond*, for the plaintiffs, having, on a former day, obtained a rule to show cause why a *mandamus* should not issue to the Judges of the Circuit Court of Maryland, cause was this day shown, and the question argued by *Raymond*, for the rule, and by the *Attorney-General*, against it.

February 19th. MARSHALL, Ch. J., delivered the opinion of the court. —A rule was made upon the judges of the court of the United States for the fourth circuit and district of Maryland, to show cause why an execution should not issue on a judgment rendered in that court in favor of Parkin, Parker & Clough, against John E. Rigden. A writ of error had been sued out to this judgment, which had been affirmed in this court, and the usual mandate had been awarded. On affidavit that the clerk of the circuit court had refused to issue an execution, and that the judges of that court had refused to direct one, this rule was made.

The cause shown is, that, after suing forth the writ of error to the original judgment, Rigden had determined to abandon it. That the counsel who had obtained the judgment took the record from the clerk's office, filed it in this court, and obtained an affirmance of the judgment. Before this affirmance, John E. Rigden obtained an injunction to stay all proceedings at law on the said judgment, which the counsel for Parkin, Parker & Clough, have made two ineffectual attempts to dissolve; and that the said judges were, and are, of opinion, that to issue execution during the continuance of the injunction, would be a violation thereof.

The record of the proceedings in chancery is annexed to this return, which shows that an injunction was awarded by Elias Glenn, the district judge, on the 19th of February 1825, at which time the writ of error was depending in this court. The *subpoena* was returnable to the May term of the circuit court, but the record does not state, that any order was made in the cause at that term. In December, a rule was made on the defendants *563] in equity to answer the bill. In *May 1826, an answer was filed for Parkin, Parker & Clough, by William Gwynn and Daniel Raymond, their agents and attorneys, who moved to dissolve the injunction, which motion was rejected. Afterwards, in December 1826, on the suggestion that there is no bond for the performance of any decree which might be pronounced in the cause, it was ordered by the court, that the injunction be dissolved, unless cause be shown to the contrary, on or before the 23d day of December instant. On the 22d, this rule was extended. The bond, given on obtaining the injunction, which had been mislaid, was found, and on the 26th, the court, on argument, again refused to dissolve the injunction.

The cause shown on the return, consists of two parts: 1st. The supposed incorrect conduct of the counsel for the plaintiff at law, in bringing

Parker v. Judges of the Circuit Court.

up the record, after the defendant had abandoned his intention to prosecute the writ of error. 2d. The pendency of the injunction.

The first cause shown is entirely insufficient. The plaintiff in error having given bond to prosecute his writ, was at liberty at any time to bring up the record; and although the writ constituted no *supersedeas*, yet the party who had obtained the judgment would remain exposed to the hazard of its being reversed at a distant day. To obviate such an inconvenience, one of the rules of this court authorizes the defendant in error, where the plaintiff has failed to file the record within the time prescribed, to docket the cause, and file a copy of the record with the clerk. The defendant in error has only conformed to this rule, and can be liable to no censure for doing so.

The second cause assigned for refusing to issue the execution, has been contested on two grounds:

1. It is contended, that an injunction could not be awarded, while the record was before this court on a writ of error. We do not think this a valid objection. The suit in chancery does not draw into question the judgment and proceedings at law, or claim a right to revise them. It sets up an equity independent of the judgment, which admits the validity of that judgment, but suggests reasons why the *party who has obtained it [564 ought not to avail himself of it. It proposes to try a question entirely new, which has not been, and could not be, litigated at law. It may be brought before the commencement of a suit at law, pending such suit, or after its decision by the highest law tribunal. The bill is an original bill, and may be filed, although an injunction should not be awarded. The injunction arrests proceedings at law, and may be dissolved or continued, without making any final decree in the case. The condition of the suit at law may be a reason for imposing terms on the party who applies for an injunction, but can be no reason for refusing it. The *subpoena* and injunction act on the person to whom they are directed, not on the record, and it can be of no consequence where the record is.

2. The second objection to the pendency of the injunction has more weight. It was awarded in December 1825, by the district judge, and no order appears to have been made for its continuance at the succeeding term. The act which authorizes the district judges to grant writs of injunction, provides, "that the same shall not, unless so ordered by the circuit court, continue longer than to the circuit court next ensuing." An order for its continuance, therefore, ought to have been made; and, after the close of the term, without such order, an execution might have been sued out on the judgment without any contempt of the court. But if, in point of law, the injunction ceased to exist, the court could re-instate it at will. The judges acted obviously on the opinion, that the injunction still continued, and ought to continue. Two successive motions to dissolve it were overruled. The same view of the case which induced the court thus to continue the injunction, must have induced a re-instatement of it, had it been supposed to be discontinued, by the omission to make an order in it, at the term to which the *subpoena* was returnable. If, upon the ground of this omission, the *mandamus* should be awarded, it might be rendered useless by granting a new injunction. It ought to be granted, as the case, as it now appears, shows that the plaintiff in equity is entitled to relief. We must suppose

Thompson v. Peter.

that, in the opinion of the court, he is so entitled, *or the injunction would have been dissolved on motion. The continuance of the injunction is, in substance, equivalent to a renewal of it.

Under these circumstances, some difference of opinion exists on the motion for a *mandamus*. Some of the judges think, that it ought to be awarded; others are of opinion, that as the injunction is still continued by the court, and as the judges who have a right to give it force have returned that it is in force, it ought not to be awarded. The motion is overruled.

Rule discharged.

THOMPSON v. PETER and JOHNS, Administrators *de bonis non* of PETER, deceased.

Statute of limitations.

An acknowledgment of the debt, by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations.¹

ERROR to the Circuit Court for the District of Columbia. This was an action of *assumpsit*, brought in September 1822, by the plaintiff against the defendants, for goods sold, &c., to their intestate.

At the trial in the court below, the plaintiff gave in evidence, that in the lifetime of the intestate, James Peter, who died in the year 1808, he admitted the payment at his request and for his use, by the plaintiff, of the \$800 charged in the account produced; that after the death of said Peter, and after his brother D. Peter had obtained letters of administration on his estate, an account, of which the one now in suit is a copy, was drawn off, passed the orphans' court, and presented to said D. Peter, as said administrator, for payment; to which he answered, there were no funds in hand to pay the debts of the intestate. The said account, with the certificate of *566] allowance by the orphans' court thereon, and so presented as aforesaid, was left in the hands of said D. Peter, after his death, which was in the year 1812; and after the defendants had qualified as administrators *de bonis non*, some time in the spring or summer of the year 1820, an application was made on behalf of the plaintiff to the defendant, G. Peter, for a settlement of the said account; to which he answered, that he knew very little of the business of the estate, which was principally attended to by the other defendant, Johns, but there were no funds in hand to pay the debts of the estate; and in a subsequent conversation, the said G. Peter, in answer to another application for payment of the said account, said, that until a recovery could be had from one Magruder, to whom lands of the intestate had been sold, for the purchase-money of which a suit was pending, the administrators would have no funds to pay James Peter's debts; application for a settlement was then made in behalf of the plaintiff, to said Johns, to whom the other defendant had referred as the acting administrator, and the said Johns was requested to see if the said account, before delivered to said David Peter as aforesaid, was not among the files of his papers, and to return it, for the purpose of bringing suit on it; to which the said Johns

¹ Fritz v. Thomas, 1 Whart. 66; Reynolds v. Penn. St. 225; Steel v. Steel, 12 Id. 64; Clark Hamilton, 7 Watts 420; Forney v. Benedict, 5 v. Maguire, 35 Id. 259.

Williamson v. Daniel.

replied, that he had seen, or believed the account was on file ; would look for and return it ; and further said, there were no funds in hand to pay the debts of the estate ; and on a second application to the said Johns for the said account, he said, he had looked for it and could not find it.

A verdict was taken, subject to the opinion of the court, whether the above was sufficient evidence, to be left to the jury, of a subsequent acknowledgment of the debt, to take the case out of the statute of limitations. A judgment having been rendered for the defendants, the cause was brought by writ of error before this court.

February 23d, 1827. The cause was argued by *Jones*, for the plaintiff ; and by *Key*, for the defendants.

March 1st. MARSHALL, Ch. J., delivered the opinion of the court.—
*This was a suit brought in September 1822, on a promise alleged to have been made by the intestate of the defendant, who died in the year 1808. The defendant pleaded *non assumpsit*, and the statute of limitations, on which pleas issue was joined. By consent of parties, a verdict was found for the plaintiff, subject to the opinion of the court, whether the evidence, which is stated in a case made by the parties, be sufficient to be left to the jury as evidence of a subsequent acknowledgment, competent to take the case out of the statute of limitations. The court gave judgment for the defendants, which judgment is now before this court on a writ of error.

The court is of opinion, that the circuit court decided rightly. The original administrator, David Peter, did not acknowledge the debt, but said there were no funds in hand to pay the debts of the testator. This language might be used by a person not intending to give any validity to the claim, and ignorant of its real merits. The conversation with one of the present defendants, George Peter, was still further from being an acknowledgment. Had this even been a suit against the original debtor, these declarations would not have been sufficient to take the case out of the statute. The cases cited from 8 Cranch 72, and 11 Wheat. 209, are expressly in point. But this is not a suit against the original debtor. It is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed, the contrary has been held.

Judgment affirmed, with costs.

*WILLIAMSON and others, Appellants, v. DANIEL and others, Respondents. [*568

Limitation over after estate-tail.—Slaves.

An absolute bequest of certain slaves to P. H. is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H., or J. D. A., should die without a lawful heir of their bodies, that the other should heir its estate, which converted the previous estate into an estate-tail ; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be on a contingency too remote.

The rule of *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her.

Williamson v. Daniel.

APPEAL from the Circuit Court of Georgia. The controversy in this cause arose out of the following clauses in the will of James Daniel :

"I lend my wife twenty-one negroes," naming them, and also certain lands, during her natural life. And subsequently, "I give and bequeath unto my granddaughter, Patsy Hendrick, three negroes, viz., Joe, Parker and Willis—I also give her one-half of the negroes I have lent my wife, to her and her heirs for ever. I give and bequeath unto my grandson, Jesse Daniel Austin, son of Betty Austin, one-half of the negroes I have lent my wife, after the death of my wife, Nancy Daniel. Now my will is, that if either of my grandchildren, Patsy Hendrick, or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate."

Jesse Daniel Austin (now called by special act Jesse Austin Daniel) survived Patsy Hendrick ; and after the death of Nancy Daniel, the widow of the testator, took into possession all the negroes bequeathed to her during her life. Patsy Hendrick died about the year 1805, intestate, and without heirs of her body, being at the time of her death, an infant about nine years old, leaving Robert Hendrick, her father, and Louisa Hendrick, her half-*569] sister, by the father's *side, now Louisa Gibbes, one of the complainants, her next of kin. Robert Hendrick died in 1814, having first made his will, bequeathing his estate to the said Louisa, his daughter, and his wife Mary, now Mary Williamson, also a complainant. Some of the slaves, to wit, Sally and her children, were born in the lifetime of Nancy Daniel.

The court below determined, that the limitation over was too remote, and decreed one-half the slaves to the representatives of Patsy Hendrick, the complainants. It is also decreed, that the slaves, Sally and her children, did not belong to the estate of the tenant for life. The defendants appealed to this court.

March 12th, 1827. The cause was argued by *Berrien*, for the appellants, citing *Fearne*, 445, 471, 478, 482, 485 ; *Prec. in Ch.* 15 ; 1 *P. Wms.* 534 ; *Prec. in Ch.* 108 ; 3 *P. Wms.* 253 ; 3 *Johns.* 289 ; 2 *Mass.* 56 ; 1 *P. Wms.* 663 ; 3 *Atk.* 396 ; 2 *T. R.* 720 ; 7 *Ibid.* 585 ; 8 *Ves.* 11 ; 17 *Ibid.* 479 : and by *Wilde*, for the respondents.

March 16th. MARSHALL, Ch. J., delivered the opinion of the court.—The first bequest to Patsy Hendrick would pass the slaves therein mentioned to her absolutely, were not this absolute estate qualified by the subsequent limitation over, if either of the testator's grand-children Patsy Hendrick, or Jesse Daniel Austin, should die without a lawful heir of their bodies, that the other should heir its estate. We think these words convert the absolute estate previously given, into an estate-tail ; and, if so, since slaves are personal property, the limitation over is too remote. There are no words in the will which restrain the dying without issue to the time of the death of the legatee. The remainder over is to take effect, whenever either of the immediate legatees should die without a lawful heir of his or her body. The gift in remainder is a gift to the stock, and is limited over on a contingency too remote to be allowed by the policy of the law.

Newman v. Jackson.

*The second point is, we believe, well settled. The issue is, we believe, universally considered as following the mother, unless they be separated from each other by the terms of the instrument which disposes of the mother.

Decree affirmed, with costs.

NEWMAN, Plaintiff in error, v. JACKSON, Defendant in error.

Notice of sale.

Question as to the sufficiency of a notice of sale of real property, under a deed of trust. No particular form of such a notice is prescribed by law; it is sufficient, if the description of the land be reasonably certain, so as to inform the public of the property to be sold.

ERROR to the Circuit for the District of Columbia.

March 2d, 1827. This cause was argued by *Key*, for the plaintiff in error; and by *Swann*, for the defendant in error.

March 12th. TRIMBLE, Justice, delivered the opinion of the court.—This was an action of ejectment, brought to recover lot No. 99, in Threlkeld's addition to Georgetown, with the improvements thereon, fronting sixty feet on Fayette street, and one hundred and twenty feet on Second street. The plaintiff in error was tenant in possession of the premises, appeared to the action, and, upon entering into the common consent rule, was admitted to defend, and pleaded not guilty, upon which issue was joined.

Upon the trial in the court below, the plaintiff gave in evidence a deed from John W. Bronaugh to Thomas G. Moncure, conveying to him, in trust, for the payment of certain enumerated creditors, "a lot on Fayette street, and Second street, in Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with the buildings, *improvements and [*571 privileges," in trust, to secure the payment of the enumerated debts, within thirty days; and if not then paid, the property conveyed in trust to be sold, "after a week's notice in the Messenger," &c. The plaintiff gave in evidence the notice published in the Messenger, under, and in pursuance of which, the property was sold at public auction, in these words, to wit:

"By virtue of a deed of trust to the subscriber, for the securing certain moneys therein mentioned, will be exposed to public sale, on Thursday, the 4th of March next, for ready money, the following described property, viz., lot No. 99, in Peter, Beatty, Threlkeld and Deakins' addition to Georgetown, fronting 60 feet on Fayette street, and 120 feet on Second street, with a two-story brick dwelling-house, in excellent repair, thereon. The sale to take place on the premises.

THOMAS G. MONCURE, Trustee.

"The above sale postponed until the 4th day of May next, when it will certainly take place. March 24th, 1819."

The plaintiff proved, that the lot conveyed by the deed of trust had been sold on the premises, at public auction, by Moncure, the trustee, on the day mentioned in the notice, and that Jackson became the highest bidder and purchaser; and the plaintiff gave in evidence the deed of conveyance made by the trustee to Jackson, for lot No. 99, &c., in pursuance of the public

Newman v. Jackson.

sale. It was proved, that the plaintiff in error had entered upon the premises, as tenant to John W. Bronaugh, and that he was in possession at the commencement of the suit ; and the town plats were also given in evidence. A verdict was taken for the plaintiff, subject to the opinion of the court, as to the law arising upon the case, and the court below, thereupon, gave judgment for the plaintiff in that court.

It is contended for the plaintiff in error, that the judgment of the court below is erroneous, and should be reversed : *1st. Because no valid *572] sale could be made of the premises in question, without the aid of a court of equity. 2d. Because the trustee's "proceedings were irregular, and no title passed to the appellee by Moncure's deed of the 14th of June 1819."

We do not think there is anything in the first ground assumed by the counsel for the plaintiff in error. Whether the conveyance from Bronaugh to Moncure be regarded as a mortgage, as contended for by the counsel, or as a deed of trust, in the usual and technical sense of the term, there can be no doubt, it vested in Moncure the legal title to the premises ; and his conveyance of the premises by deed, to the appellee, if regularly made, must necessarily be regarded in a court of law, as investing the appellee with the legal title. How the matter might be regarded by a court of equity, is not for this court here to say. But it is perfectly clear, that the conveyance of the trustee was a sufficient title at law, to enable his alienee to recover in the action of ejectment, unless the second objection is maintainable.

The second ground of argument proceeds upon an objection to the notice of sale. It turns out, upon an inspection of the town plats, that the premises in question do not lie in "Peter, Beatty, Threlkeld and Deakins' addition to Georgetown," as described in the notice, but in "Threlkeld's" addition to Georgetown. And this mistake in the description of the premises, it is insisted, wholly vitiates the notice, and must render the sale made under it void. We think the objection ought not to be sustained. The law has prescribed no particular form for a notice of this description. It is sufficient, if, upon the whole matter, it appears calculated reasonably to apprise the public of the property intended to be sold. We think the notice sufficient, for that purpose, notwithstanding the inaccuracy of describing the property as being in "Peter, Beatty, Threlkeld and Deakins' addition," instead of "Threlkeld's addition." It could not mislead those who did not know the precise limits of these respective additions, and they were, to those who might wish to purchase, of so little consequence, as scarcely to form a subject of inquiry. That part of the description, all must have known, did not, *573] and could *not, point out the particular lot intended to be sold. That could not only be arrived at by the more certain and specific description of its locality ; namely, "lot No. 99, fronting 60 feet on Fayette street, and 120 on Second street." To those who knew the precise limits of the several additions, the notice furnished, upon its face, not only sufficient evidence of the mistake, but a sufficient corrective of that mistake. They could not be ignorant, that Fayette street and Second street were not in the addition described, but in the adjoining addition, in the name of Threlkeld. As the lot is described as fronting 60 feet on one of those streets, and 120 on the other, it must have been obvious, at once, that as these streets crossed each other at right angles, and the lots were laid off in a right-angled parallelogram, the lot intended lay in the angle formed by these two streets. The

Dunlap v. Dunlap.

streets of a town are its public highways, and must be presumed to be well known to, or easily found by, all those who have an interest in knowing them, or inquiring for them. They are, indeed, the most prominent and notorious land-marks and guides by which the lots are to be sought for, found and known.

It cannot be believed, that any one wishing to find, or know, lot No. 99, fronting 60 feet, on Fayette street, and 120 feet on Second street, or to purchase, could be, for one moment, misguided by the inaccurate, and palpably mistaken description, of its being in "Peter, Beatty, Threlkeld and Deakins' addition." Common sense would dictate, to every one who read the notice, that the less important, obscure and indefinite part of the description, which whether true or false, did not mix and give locality to the lot intended to be described, ought to yield to that palpable and notorious description, in reference to the public streets and highways of the town, which gave it positive locality.

It has been said, that the No. 99, did not appear on the recorded plat of the town, upon which the square only is laid down, without divisional lines and numbers designating the lots of each square; but it is admitted, it was numbered on the plat made out by order of the corporation, and lodged with the register, but not recorded. *It is believed, no purchaser would have ventured to buy, without first inspecting the title-deeds, [574 and both the plats. But be this as it may, and even if any should have been so careless as not to examine the latter plat, still it would clearly appear from the recorded plat, that the lot described did not lie in the addition supposed by the notice, but in Threlkeld's addition, which was all that was necessary to correct the mistake; and it would also appear, it must necessarily lie in the angle made by Fayette street and Second street. A purchaser, or any one inclined to become a purchaser, of property upon those streets, could not have failed to have ascertained the particular lot intended by the notice.

We all think the notice was, notwithstanding the mistake in part of the description, certain to a common and reasonable extent, and that is sufficient.

Judgment affirmed, with costs.

DUNLAP and another, Appellants, v. DUNLAP and others, Respondents.

Deficiency in quantity of land.

A question of fact, in a suit in equity, respecting the proprietary interest in an entry of lands within the military district of Ohio.

Rule of equity, that where land is sold as for a certain quantity, a court of equity relieves, if the quantity be defective, only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor.

APPEAL from the Circuit Court of Ohio.

February 9th, 1827. This cause was argued by *Scott*, for the appellants; and by *Doddridge*, for the respondents.

February 17th. MARSHALL, Ch. J., delivered the opinion of the court.—*This suit was brought originally by John Dunlap, the ap- [575

Dunlap v. Dunlap.

pellee, in the circuit court of the United States, sitting in the district of Ohio, to obtain a conveyance of one moiety of a tract of land in the state of Ohio, which was purchased, as is alleged in the bill, on the joint account of the plaintiff, and of his uncle Alexander, one of the defendants in the circuit court. Alexander, who made the contract, obtained the conveyance to himself, and afterwards conveyed the land to his son James. Both Alexander and James were made defendants.

Some time about the year 1792 or 1793, Alexander Dunlap purchased from John Fowler, an entry of 1000 acres of land on the Scioto river, in the Virginia military district, at the price of 100%, Virginia currency. An agreement was entered into, at the time, between the plaintiff and the defendant, Alexander, that this purchase should be made in partnership, the plaintiff says, with himself, the defendant says, with John Dunlap, senior, his father. The testimony, however, proves incontestibly that, though the moiety of the purchase-money was paid by the father, it was paid for the plaintiff, whom he always considered as the rightful proprietor of the land. The purchase will, therefore, be treated as being made on the joint account of the plaintiff and Alexander Dunlap. James Dunlap claims as a volunteer under Alexander, and his title is dependent on that of his father.

The original entry was made the 7th of August 1787. It was withdrawn and re-entered on the 22d of April 1796, and this entry was again withdrawn and re-entered on the 25th of July 1796. The warrant was re-entered on nearly the same land. The changes were such as might probably be caused by a more perfect knowledge of the country; and the last entry, as surveyed on the 20th of October 1796, contains about 300 acres of surplus land. The plat of the surveyor, however, on which the patent issued, specifies only 1000 acres. The right to this surplus constitutes the chief subject of controversy between the parties. The plaintiffs contend, that the whole entry was purchased, and that in such contracts, the whole entry passes to the purchaser. The defendants insist, that the original contract was *576] *for only 1000 acres, and that the surplus land belonged to Fowler. That he afterwards purchased this surplus, not on joint account, but for himself. In 1802, he obtained a grant for the whole tract in his own name, and now claims the whole surplus as his separate property.

The entry is for 1000 acres of land. The survey made on the entry purports to be for 1000 acres of land. The plat and certificate of survey were transferred by John Fowler to Alexander Dunlap, by an indorsement in the following words: "I do hereby assign all my right, title and interest to the within land to Alexander Dunlap, and request a grant may issue accordingly." This is the only written evidence of the contract, and purports to be a transfer of the whole entry and survey.

The defendant, Alexander, alleges, in his answer, that the original contract was "only for 1000 acres of land," that after the survey, he discovered the surplus and mentioned it to Fowler, who said that he had contracted to sell but 1000 acres, and should require additional compensation for the excess. The respondent agreed to give him \$300 for the surplus, and Fowler's receipt for that sum, dated the 17th of October 1800, is annexed to the answer. Though the defendant introduces into his answer the allegation that he purchased only 1000 acres of land, yet it is remarkable, that in the first part of the same answer, he states himself to have pur-

Dunlap v. Dunlap.

chased the entry, and also says, that the surplus was not discovered, until many years afterwards, when the survey was made. The reservation of a surplus, when no surplus existed, in a contract which purported to be made for the entire tract, at a time when the purchase of entries was a common transaction, and the probability that an entry might be so surveyed as to comprehend more land than it called for, or so as to interfere with other entries and lose a part of the land it covered, was a matter of general notoriety, is so extraordinary a circumstance, as to justify a critical examination of the testimony by which it is supported.

Alexander Dunlap, in the first instance, states the contract to have been, in fact, what it purports to be, a purchase of the entry, that is, of the entire entry. To reconcile this *with the subsequent declaration, that "the purchase was only of 1000 acres of land," we must suppose, that, as [*577 the entry called for that quantity, and he purchased the entry, he might allow himself to say that he purchased only 1000 acres. He drew an inference, however, which the law does not draw, and on which he ought not to have acted, until he consulted his partner.

The defendants also sustain their pretensions, by the testimony of John Fowler, whose deposition was first taken on the 24th of October 1817. He identifies the receipt, and swears that it was a fair transaction. His deposition is taken a second time, on the 3d of August 1819. He swears, "that he sold to Alexander Dunlap 1000 acres of land, within the bounds of a military survey, made in his name, as assignee of Arthur Lind, on the Scioto river, and afterwards, about the 17th day of October 1800, he sold to said Alexander Dunlap, for the consideration of \$300, all the surplus contained within the bounds of the said military survey." This deposition states the original contract, as if a survey, not an entry, had been the subject of it; and as if the transfer had been of a specified portion of that survey, not of the whole.

On the 18th of November 1820, a copy of the plat and certificate of survey was obtained from the general land-office, by which it appeared, that the survey was made on the 20th of October 1796, three or four years after the entry had been sold.

The deposition of John Fowler was again taken, on the 28th of November 1822. He swears, that in 1792 or 1793, he sold to Alexander Dunlap 1000 acres, part of a military survey made in the deponent's name, as assignee of Arthur Lind, on the Scioto river, at the rate of 10¢ Virginia currency, per 100 acres, reserving the surplus should the said survey contain any within the bounds." Some years afterwards, he was informed by the late General Nathaniel Massie, that "the survey contained about 300 acres of surplus." Sometime after which, he proposed to sell the said surplus to Alexander Dunlap, who agreed to give him therefor \$300. *In this deposition, the witness states a sale by the acre, although, in his preceding depositions, he had spoken of a sale [*578 in gross. In his second deposition, he had mentioned the sale of 1000 acres of land, "within the bounds of a military survey made in his name on the Scioto;" plainly alluding to a survey already made. In his third deposition, he still speaks of a military survey, but plainly speaks of it as of one to be made in future. He reserved the surplus, he said, "should the said survey contain any, within the bounds." It is also observable, that he says,

Dunlap v. Dunlap.

he received the information from Massie ; whereas, Alexander Dunlap says, in his answer, that he himself gave the information to Fowler. This, however, taken in itself, would not be a very material contradiction ; it might be accounted for. But the various shapes in which Fowler places the contract, certainly show that his recollection of it was very imperfect, and is not entitled to much credit.

The assignment which he made to Alexander Dunlap is of the entire survey. It must be considered as an execution of the contract he had previously made ; and is written evidence of the extent of that contract. If, instead of selling the whole survey, as the assignment imports, he had sold only a part of it, his natural course would have been, either to take out the patent in his own name, and give his obligation to convey a part, when the patent should issue, or to take it out in their joint names, entering into an agreement, specifying their respective interests, or to take some obligation from Alexander Dunlap, binding him to reconvey the surplus. A written contract cannot be varied by such suspicious testimony as that of Fowler ; especially, in a case which contains within itself the strongest circumstances of probability against the attempt.

This probability is supported by other testimony than is furnished by the contract itself. James Dunlap, the brother of John, deposes, that Alexander Dunlap told him, he and the plaintiff had purchased the tract of land in partnership ; language, which certainly alludes to the whole tract. The partition, too, which was afterwards made, after an actual survey for the purpose, if it divided the tract into moieties, *is almost
*579] conclusive evidence, that the idea of Fowler's title to the surplus had not then occurred to the appellant.

The counsel for the appellant endeavors to support Fowler's title to the surplus, independent of the special contract, and cites some cases to show that where land has been sold for a certain quantity, and has, in fact, amounted to much less than the quantity mentioned, a court of equity has interposed and given relief. But the difference is very material between contracts made for land in a settled country, where the titles are complete, the boundaries ascertained, and the real quantity either known, or within the reach of the vendor, and those made for land situated as was the whole military district at the date of this contract. It was, notoriously, the general practice, to sell an entry or a survey, taking the chance of surplus, and the hazard of losing a part of the land by other entries. A special contract, departing from this general custom, ought to be in writing, or to be very clearly proved, especially, when the written evidence of the contract conforms to this general custom.

It is also worthy of remark, that the entry, as it stood when sold, could not have contained any surplus land. It calls "to begin on the Scioto, at the lower corner of Benjamin Lawson's entry, No. 439, running down the river 1000 poles, when reduced to a straight line, thence, from the beginning, with Lawson's line, so far that a line parallel to the general course of the river shall include the quantity." No excess ought to be anticipated from the survey of such an entry, and the anticipation of such excess is against all probability. The subsequent changes of the location must be supposed to have been made by the owner of the land, and the survey also must have been made by his direction, perhaps, through his agent, the locator, or

Dunlap v. Dunlap.

according to the judgment of the surveyor. Nothing could accrue to Fowler from a survey so made. We are, then, entirely satisfied, that the whole tract was purchased, and ought to be divided between the purchasers in equal moieties, unless some partition has been made or agreed upon between them.

It is certain, that an effort towards a partition has been *made, and the questions which grow out of this effort constitute the sole [580] difficulty in the case. The bill charges, that before the grant was issued, the parties divided the land in equal quantities, and the plaintiff paid Alexander \$60, for choice of moieties, and elected to take the northern or upper part. A dividing line was then run, and each party took possession of his land, in severalty. The defendant admits, that there was a conversation concerning a division, that the line was partially run, and that the plaintiff paid him \$60 for choice; but insists, that the line was only partially run, that the division was incomplete, and that the intention was to divide 1000 acres only.

It is, then, admitted, that some division was made, that some line was run, that John paid Alexander \$60 for choice, and chose the northern part. If that line can be found, it ought to be established, and if it has been run only a part of the way, it ought to be continued to the outward boundary of the tract. If it cannot be found, the land is now to be divided into moieties, in the manner then agreed on.

James and John Stephenson depose, that they were the chain-carriers, when the survey for the purpose of a division was made. That a dividing line was run, from the back line, towards the river. They both think, that a marked line, to which they were conducted, in the presence of the parties, and of James Hough, the surveyor, was the line which was then run. Their opinion is founded on the contiguity of the corner which was shown to them as the beginning, to a branch which is near it, and which they think they recollect. The line was run about twenty years before they gave their depositions, which was in 1818, and they do not know whether the line now shown them is the true line or not. Other testimony shows, that it cannot be the true line. The surveyor proves, that the marked tree shown as the beginning, had not, in 1821, been marked more than seven or eight years; and all the testimony in the cause proves, that *the line ran through [581] James Dunlap's orchard, and that he himself frequently said so. The line now claimed by him, and supposed by the Stephensons to be the true line, would not come near his orchard. It is apparent, then, that this line has been made long since the division, and there is some reason to suppose it was made by James Dunlap, who occupied Alexander's moiety of the tract.

The place established by the court as the beginning, is a white oak and blue oak, standing in the western line of the tract, and marked as a corner. Being in the line, there could be no reason for marking them as a corner, unless such had been the fact; and the trees could be a corner only between the Dunlaps. The surveyor cut a block out of the ash, including one of the chops, and found, from marks which are considered as unerring, that the chop had been made twenty-one years; that is, there were twenty-one years growth over it. This was in December 1718. The chop might have been made in the autumn of 1797, or the spring of 1798. The dividing line is

McConnell v. Lexington.

supposed to have been run in 1798. A line from this point to the river, so as to divide the tract equally, passes through James Dunlap's orchard, and leaves rather more of it on the side of John, than would be left by the line which James Dunlap had admitted. This line is established by the decree of the court. The testimony is, we think, in its favor, and that there is no error in the decree. It is affirmed, with costs.

Decree affirmed.

*582] *McCONNELL v. Trustees of the TOWN OF LEXINGTON.

Reservation.

A question in equity as to the title to a lot of land in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed, under the circumstances of the case.

APPEAL from the Circuit Court of Kentucky.

February 12th, 1827. This cause was argued by *Rowan*, for the plaintiff; and by *Talbot* for the defendant.

February 22d. MARSHALL, Ch. J., delivered the opinion of the court.—This suit was brought in the court of the United States for the seventh circuit and district of Kentucky, against the trustees of the town of Lexington, and others, to obtain a conveyance of in and out lots, No. 43, in that town, or of such other lots in lieu of them, as might still remain to be conveyed, by the trustees. The whole of out-lot No. 43, and a part of the in-lot, had been conveyed to other persons, who had been in possession for such a length of time as to bar the plaintiff's action. The bill was, therefore, dismissed by the plaintiff, as against those defendants, and continued against the trustees.

The commonwealth of Virginia had, in 1773, by an act commonly called "the land law," reserved 640 acres of land, for the benefit of those who had settled in a village or station, that it might be afterwards laid out into lots for a town, and divided among such settlers. The inhabitants of Lexington purchased 70 acres adjoining the reserve of 640 acres, and after laying the whole off in lots and streets, petitioned the assembly to establish a town. The legislature, in May 1782, passed an act, vesting the whole 710 acres in trustees, who were empowered to make conveyances to those persons who had already settled on the said lots, as also to the purchasers of lots thereto-
*583] fore sold; and to lay off such other parts of the said land as was not then laid off and settled, into lots and streets, and to sell, or otherwise dispose of the same, for the benefit of the inhabitants.

James McConnell was one of the settlers in Lexington, and was killed by the Indians in 1782. His brother and heir-at-law, Alexander McConnell, filed this bill in 1815, and founds his claim on proof that he had, in his lifetime, erected a tannery on in-lot No. 43, on which was a large spring; and on the following order of the board of trustees: "At a meeting of the board of trustees for the town of Lexington, September 30th, 1782, No. 43, in and out lot, granted to James McConnell, to be appraised, and the valuation thereof redound to the heirs of said McConnell, deceased."

The trustees, in their answer, insist, that in-lot No. 43 never was granted

McConnell v. Lexington.

to James McConnell, but a part of it has always been considered as reserved, on account of a spring upon it, for the use of the inhabitants. They are informed by the old settlers, that the privilege of establishing a tannery on that lot was, in the year 1781, granted to James McConnell, who did establish one, and that the order of appraisement was intended to cause a valuation of the improvements, and of the leather in the tannery, not of the lot itself; and that so much of the entry as applies to the lot itself, is a mistake of the clerk. They say, that other lots, not these, were granted to McConnell. They also insist on the length of time which has elapsed, and on the statute of limitations.

Several certificates from the clerk, and extracts from the record-books of the trustees, are filed as exhibits in the cause. From one of these certificates, it appears, that, on the 20th of December 1781, at the first arrangement of in and out lots of the town of Lexington, among the settlers, in-lot No. 18, and out-lot No. 37, were granted to James McConnell as his donation lots. The out-lot appears to have been transferred by John Clarke, whose connection with McConnell is not stated, to Robert Parker, to whose assignee a conveyance was made by the trustees, in August 1785. An assignment by Alexander McConnell, as heir-at-law of James, of his title to an out-lot in the town of Lexington, made in May 1795, is produced; but this assignment neither *mentions the number of the lot, nor the name of the [584 assignee.

Another certificate from the clerk states, that in-lot No. 18 was granted, on the 26th of March 1781, to William Stule, and afterwards, on the 20th of December 1781, to Benjamin Hayden. It was afterwards, on the 1st of July 1783, awarded to James McConnell, and afterwards, on the 8th of March 1785, was forfeited. The cause of forfeiture is not mentioned. The presumption is, that it must have been on account of the non-performance of some condition on which the allotment was made.

The entries of the orders made by the trustees seem to be in great confusion. This may be well accounted for by the then situation of that country. Some time in the year 1784 or 1785, Robert Parker, then clerk of the board of trustees, was ordered to transcribe their old books. Many of their entries were made on small scraps of paper, and on backs of old letters. The book then made out is said to be lost. There is, however, a book of records. The imperfect and confused state of the books has made it necessary to resort to the testimony of witnesses, to supply facts which the books do not disclose.

It is very well ascertained, that the large spring, below which McConnell's tan-vats were sunk, was inclosed within the stockade, and was used by the inhabitants of the fort generally. It is also in proof, that the settlers were each entitled to an in and out lot, and that the trustees frequently allowed those who were dissatisfied with the lots which they drew, to exchange them for others, not previously granted. William Stule, who was one of the original trustees, deposes, that the lot on which the tan-vats were sunk, in spring 1782, was called McConnell's lot, but he does not recollect any contract between McConnell and the trustees, or any disposition made by them of the lot, until a part of it was given to Bradford, on which to erect a printing-office. Robert Patterson was also one of the original trustees, and was friend and relation of McConnell. He deposes, that McConnell was a

McConnell v. Lexington.

tanner; the trustees being desirous to attract tradesmen to the station, permitted McConnell to erect a tan-yard on the lot in contest, about the fall of 1781. That the deponent was authorized by the trustees, about the year *1783 or 1784, to clear out and wall up the public spring, for which *585] he was paid by them. That it was called and used as the public spring, from the first settlement of the town. He believes, McConnell was permitted to use part of the lot, as a tannery for the people of the town, because it was more convenient, and under cover of the fort. While thus used, it was called McConnell's tan-yard. He does not know, that the trustees intended to make any other grant of the lot, than to suffer its use by McConnell. They fixed a market-house on the lot, in 1790 or 1791, and then claimed it as their own property. They granted part of it, in the year 1787, to John Bradford, on condition of his establishing a printing-office on it, reserving the public spring and a considerable front on Main and Water streets, on which they erected buildings which were rented to Bradford. They reserved a number of lots for public use.

John Torrence, William Martin, Samuel Martin, Benjamin Hayden, Joseph Mitchell, Josiah Collins and Hugh Thompson, were among the early settlers of Lexington, and were examined, some of them by the appellant, and some by the trustees. They all concur in the declarations, that the spring was public, for the use of the people of the fort generally; that it was called the public spring; some, that it was called the public spring lot; that McConnell sunk vats, and constructed a tan-yard on it, after which it was called McConnell's tan-yard, and one witness is inclined to think, McConnell's lot. They all concur, however, in denying having ever heard that the lot was given to McConnell, or to any other person. Some say, though they never heard him claim the lot, they have heard him claim the tan-yard. Joseph Mitchell swears, that McConnell claimed a lot in a different square. Hugh Thompson says, that the records of the trustees, which are produced to him at the time his disposition is taken, plainly show that in-lot No. 18, and out-lot No. 38, were granted to James McConnell. John Parker and Alexander Parker came to Lexington, the one, in 1783, and the other, in 1784. They were each of them members of the board of trustees, and depose to the universal understanding, that the spring lot was reserved for public use, and had never been granted to any person, until a part of it was *586] granted to *Bradford for a printing-office. Alexander Parker says, that on looking into the record-books, while a trustee, he saw, with surprise, the entry under which Alexander McConnell claims; and on making inquiries from Col. Rob. Patterson, also a trustee, was informed, that the trustees had prevailed on James McConnell to establish a tannery, under cover of the fort, to tan buffalo hides, and had, after his death, appointed appraisers to value his property. That the entry appears in its present form, is the mistake of the clerk who made it. He adds, that the records show, that in-lot No. 18, and out-lot No. 38, were granted to James McConnell.

The entry under which the appellant claims lot No. 43, does not purport to grant him that lot, but directs a valuation, in terms which import a former grant. No trace of that former grant is, however, found, and the testimony is very strong, to prove it was never made. The reasonableness of reserving a public spring for public use; the concurrent opinion of all the settlers, that it was so reserved; the universal admission of all, that it was never under-

Chotard v. Pope.

stood, that the spring lot was drawn by any person ; the early appropriation of it to public purposes ; the fact that James McConnell actually claimed a different lot, added to the length of time which has been permitted to elapse, without any assertion of title to this lot, are, we think, decisive against the appellant. There was no error in dismissing the plaintiff's bill, and the decree is affirmed, with costs.

Decree affirmed.

CHOTARD and others v. POPE and another.

Private statute.

The act of May 8th, 1820, ch. 595, "for the relief of the legal representatives of Henry Willis," did not authorize them to enter lands within the tract surveyed and laid off for the town of Claiborne, in the state of Alabama.

APPEAL from the District Court of Alabama.

*February 7th, 1827. This case was argued by *E. Livingston* and *Webster*, for the plaintiffs ; and by the *Attorney-General* and [**587* *Sampson*, for the defendants, citing 2 Cranch 386 ; 1 Burr. 474 ; 1 Doug. 30 ; Loft 371, 401 ; 1 Bl. Com. 87, 91 ; 1 T. R. 728 ; 12 Co. 8 ; 11 Ibid. 61 ; 2 Inst. 200 ; Plowd. 86, 73.

February 10th. JOHNSON, Justice, delivered the opinion of the court.—The rights of the complainants in the land in litigation in this cause, depend upon the construction of the congress of May 8th, 1820, passed for the relief of the legal representatives of Henry Willis. The words of that act under which the complainants suppose themselves entitled to relief, are these : "That the legal representatives of Henry Willis be and they are hereby authorized to enter, without payment, in lieu, &c., in any land-office, &c., in the states of Mississippi or Alabama, &c., a quantity of land not exceeding thirteen hundred acres, &c." Under the operation of these words, assuming the right to appropriate any unpatented land in the two states, the complainants have asserted the privilege of entering a tract of land which covers the site surveyed and laid off for the town of Claiborne, in the state of Alabama. The proper officers have refused the issue the ordinary evidences of title, and have gone on to sell out the town-lots, according to law. This bill is filed against the register of the land-office, and the purchaser of one of the town-lots, to compel them to make titles to complainants.

On behalf of the United States, it is contended, that the literal meaning of the terms of the act is limited and restrained by the context, and by consideration arising out of the general system of land laws of the United States, into which this act is ingrafted ; and that, so construed, the right granted is limited to that description of lands which are liable to be taken up at private sale. And such is the opinion of this court. That the legislature had distinctly in view its general provisions for disposing of the unappropriated lands of the United States, is distinctly shown in every line of the act under consideration. First, the party is referred to the land-office to make his entry ; he is then confined *to the location designated by the surveys made by the United States. After which, it goes on to [**588* enact, that "the register or registers of land-offices aforesaid, shall issue the necessary certificate or certificates, on return of which to the general land-

Chotard v. Pope.

office, a patent or patents shall issue." Here, the whole organization of the land-office is brought into review; and if, then, the term *enter* can be shown to be restricted and confined in its application to a particular class of description of lands, it will follow, that when used in laws relating to the appropriation of lands, it must lose its general and original signification, and be confined to what may be called its technical or legislative meaning.

The term *entry*, as applied to appropriations of land, was probably borrowed from the state of Virginia, in which we find it used in that sense, at a very remote period. Many cases will be found in the reports of the decisions of this court, in which the title to western lands were drawn in question, which will show how familiarly and generally the term is used by court and bar. Its sense, in the legal nomenclature of this country, is now as fixed and definite as that of many terms borrowed from the common law. It means, that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country, by filing his claim in the office of an officer known, in the legislation of several states, by the epithet of an entry-taker, and corresponding very much in his functions with the registers of land-offices, under the acts of the United States. In the natural progress of language, the term has been introduced into the laws of the United States; and by reference to those laws, we think the meaning of the term will be found to be distinctly confined to the appropriation of lands under the laws of the United States, at private sale.

It is familiarly known, that the public lands are uniformly brought into market, in pursuance of a system which commenced in the year 1796, and was perfected about the year 1800. The lands are first surveyed, then advertised at public auction, and then, whatever remains unsold at public auction, is offered at private sale to the first applicant, at stipulated prices. The act of 1800 presents a full view of the course pursued on this subject, *589] and the 7th section *(2 U. S. Stat. 76) of that act distinctly shows, that the right to enter lands is confined to those lands which are offered at private sale. The words *enter*, *entry*, and *book of entries*, will be found in that section, all used, and exclusively used, with reference to the appropriation of lands of that description. Now, no one ever imagined, that, under the general system, the right of appropriation, by *entry* in the register's office, extended to any appropriated lands, however those appropriations were legally made. The ideas on this subject were so fixed in familiar use, that congress felt no necessity for further precaution in legislating on this subject in this instance, than what is implied in the use of language belonging to their general system.

By looking through the laws making provisions for grants of land from the year 1800 downwards, congress will be found repeatedly using the term *entry*, in a sense which leaves no doubt of the description of lands to which it is applied. In the act of the 3d March 1817 (3 U. S. Stat. 390), entitled "an act allowing further time for *entering* donation rights to lands in the district of Detroit," it will be found, by comparing the title with the enacting clause, that the sense in which the term *entry* is used, is that of filing a claim with the register of the land-office. But all the previous laws on the subject show, that the only lands that could be appropriated, by filing a claim in the register's office, were those which were offered at private sale. In the act of March 1818 (6 U. S. Stat. 200), for "authorizing certain pur-

Mason v. Matilda.

chasers of public lands to withdraw their entries, and transfer the moneys paid thereon," we find congress familiarly using the term with reference to the same subject ; and still more explicitly in the act of March 1819, entitled "an act providing for the correction of errors in making entries of lands at the land offices" (3 U. S. Stat. 526), until, finally, in the year 1820, the very legislature which passed this act in favor of the heirs of Willis, has furnished such explicit evidence of the meaning which they attach to the grant of a right to *enter*, as banishes every doubt. In the 2d and 3d sections of the act of April 24th, 1820 (3 U. S. Stat. 566), entitled, "an act making further provisions for the sale of public lands," will be found conclusive evidence, *that the right to enter is identified with the right to purchase at private sale, and confined to the appropriating of such lands [*590 as may be legally appropriated by *entry* at the register's office ; from which are excluded all lands previously appropriated, whether by public sale, or by being withdrawn from the mass of lands offered for sale.

From the earliest date of the legislation of congress on this subject, there have been appropriations to the public use, made by withdrawing from this mass certain portions of territory for public seminaries, towns, salt-springs, mines, and other objects ; and the particular land in controversy was appropriated under a previous law, to wit, the act of April 1820, for the site of a town. We, therefore, think, that it was not included in the right to appropriate vested in the complainants under the act on which they rely.

Before dismissing this subject, it may be proper to remark, that the question considered is the only question that was made in argument. The court have also under consideration some points arising on the form of the remedy, and the state of the complainant's right ; on which subjects the courts are to be considered as uncommitted by any inference that may be drawn from their having disposed of the cause upon the principal question.

Decree affirmed, with costs.

MASON and another, Plaintiffs in error, v. MATILDA and others, Defendants in error.

Slavery.—Presumption.

On the construction of the statute of Virginia, emancipating slaves brought into that state in 1792, unless the owner removing with them should take a certain oath, within sixty days after such removal, the fact of the oath having been taken may be presumed, by the lapse of twenty years, accompanied with possession.

Matilda v. Mason, 2 Cr. C. C. 643, reversed.

* ERROR to the Circuit Court for the District of Columbia. [* 591

March 15th, 1827. This cause was argued by *Sampson* and *Lear*, for the plaintiffs in error ; and by *Jones* and *Key*, for the defendants in error.

March 16th. JOHNSON, Justice, delivered the opinion of the court.—This cause comes up on a bill of exceptions from the court held for Washington county, district of Columbia, in which Matilda, a negress, brought suit in behalf of herself and her three children, to recover their freedom. The material facts in the cause are these :

One James Craik, through whom the plaintiffs in this court make title,

Mason v. Matilda.

some time in the year 1792, brought Matilda from the state of Maryland, into Fairfax county, in Virginia, and there settled and resided until his death, in all about two and twenty years. During this time, the three children of Matilda were born, and the whole continued to be held by him in slavery, during his life, and at his death, were bequeathed to his wife, who bequeathed them to the wives of Moer and Mason. The whole time which elapsed from the bringing of Matilda into Virginia to the commencement of this suit, was thirty years.

By the laws of Virginia, a slave brought into that state in 1792, became free, after the lapse of one year; but to the act on this subject is subjoined a proviso, that it shall not extend to "those who may be inclined to remove from any of the United States, and become citizens of this state, if, within sixty days after such removal, he or she shall take the follownig oath before some justice of the peace of the commonwealth," and then the oath is set out *in extenso*.

On the trial, the defendants below could not produce positive testimony that the oath had been taken according to law; but after proving that the magistrates of the county, at the time of Matilda's removal, were all dead, and the continued possession of the family, from that time to the institution of the suit, they contended, that the cause should go to the jury, under a charge that, from the circumstances so given in evidence, the jury might *592] presume, that the oath had been taken in the prescribed time. *This the court refused, and charged the jury in terms purporting the contrary doctrine, upon which the jury found a verdict for the plaintiffs below.

In the argument, two questions have been examined: 1st. Whether such a presumption might legally be raised from length of time and circumstances? 2. Whether it could be raised, as against the children of Matilda, who, during the greatest part of the time, had been in a state of infancy? It is a relief to us, to find that there has been an express adjudication on both these points. The case arises under a Virginia statute, and in the court of appeals in that state, it appears that both questions arose in the case of *Abraham v. Mattheus*, 6 Munf. 159, and were decided in favor of the master of the slave. The court, in that case, decides, that the fact of having taken the oath required, and in the time required, may be presumed, after a lapse of twenty years, accompanied with possession. The language of the court is, "that it may be presumed, so as to throw the *onus probandi* on the opposite party;" and this has been considered in argument as an absurdity. In its literal sense, it is an absurdity, but in the sense of the court, it is far otherwise; it can only mean, that the presumption must be repelled by conflicting evidence, or the jury may legally found their verdict upon it. The infancy of Abraham was also insisted upon, in that case, as a circumstance to repel the presumption, but overruled. And that case was a stronger one on the effect of infancy than the present; for here the rule "*partus sequitur ventrem*" must take effect. The three children of Matilda claim their freedom on the supposed emancipation of their mother; but their mother did not, and could not, set up the circumstance of infancy in herself.

It has been supposed, that the case of *Garnett v. Sam and Phillis*, 5 Munf. 542, decided in the same court, the year before that of *Abraham*, conflicts with the latter, and leaves the law unsettled. If there was such

Mason v. Matilda.

conflict, it is obvious, that the later decision is the superior authority ; yet we admit that such incongruity, if it existed, would sanction this court in hesitating on the question whether the law was settled. *But there is no inconsistency between the two cases ; the same principle is [*593 admitted in the first, and asserted in the last. The instruction moved for in the case of Sam and Phillis was, "that the master, in order to entitle himself to the benefit of the proviso, must show that he had taken the oath prescribed and required by law." Now, although, upon its face, this would seem to import positive proof, yet the court take a different view of its meaning ; for they observe, "that the right of freedom *primâ facie* acquired, could only be obviated by evidence adduced to show, or by circumstances authorizing a presumption, that such an oath had been taken, and that the terms of the instruction asked, in that case, were broad enough to include the latter description of evidence as well as the former." This contains a distinct admission, that the master is not restricted to positive proof, and that a presumption of the material fact, that of the oath, resulting from circumstances, may be equivalent to positive proof.

It has been argued, that this presumption should be repelled by the ignorance, impotence, and continued state of duress in which the plaintiffs below must necessarily have continued from their state of bondage. But this also must have been duly considered by the learned judges of the Virginia bench, since the fact equally existed in the cases which were before them. Practically, we know, that they seldom want counsellors or aid of any kind, and that the leaning of courts and juries is very much in their favor. Where any reasonable grounds can be laid hold of, to sustain a verdict in their behalf, there is reason to believe, that, on questions of right, considerations of every kind, in favor of freedom, will always have, at least, their full weight. On the other hand, the natural repugnance of man at remaining in that state, is a consideration of great weight, in sustaining the presumption from lapse of time.

We think, therefore, that both the points made in argument have been decided. We are also satisfied, that the decisions *of the court are in perfect analogy with general principles, in the application of pre- [*594 scription and presumptions from length of time, and continued acquiescence of the party whose rights are implicated.

We do not deem it necessary to corroborate the Virginia decisions, by comparing them with the authorities on this subject, as we are in the habit of regarding with the highest respect the decisions of the state courts upon causes arising under their own statutes. But any one desirous of pursuing the inquiry, will find the law on this subject very well collected and digested in Mr. Starkie's 3d vol. of his Treatise on Evidence, and page 1225 of Mr. Metcalf's edition.

Judgment reversed, and *venire facias de novo* awarded.

LIDDERDALE'S Executors v. Executor of ROBINSON.

Priority of debts.

Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment-debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser, with the priority of a judgment-creditor.

CERTIFICATE of Division from the Circuit Court of Virginia.

February 9th, 1827. This cause was argued by *Powell*, for the plaintiffs, citing 8 Ves. 382 ; 12 Ibid. 413 ; 2 Vern. 608 ; 11 Ves. 22 ; 2 Call 125 ; 3 Ibid. 329 ; 1 Rand. 466 ; 3 Wheat. 520 :—no counsel appearing for the defendants.

February 17th. JOHNSON, Justice, delivered the opinion of the court.—The question to be decided in this cause is certified to this court on a division of opinion from the judges of the Virginia district.

*The bill is filed to recover a sum of money of Robinson's estate ;
*595] and the debts being numerous, and the assets probably insufficient to satisfy the whole, the right of priority becomes a material object among the creditors. The particular demand upon which this question is certified, is that of one Smith, who was joint indorser with Robinson, on a bill of exchange drawn by one Roots, and returned under protest. The bill, of course, must have been drawn payable to Robinson and Smith, and being taken up by them, and the latter having paid more than a moiety in satisfaction of the debt, his administrator now claims of the estate of Robinson the amount by which Smith's payments exceeded the moiety. There is no question on his right to come in for that sum, as a simple-contract creditor ; but he claims precedence, and the rank of a judgment-creditor, under a particular provision of the laws of Virginia, in force at Robinson's death, and under an equitable principle, according to which, he who pays a debt of a superior dignity is suffered to rank in the application of assets according to the dignity of the debt satisfied ; or, in other words, is substituted for the creditor who held the prior debt.

The terms of the Virginia act are these, "All bills of exchange which are, or shall be, protested, shall, after the death of the drawer or indorser thereof, be accounted of equal dignity with a judgment ; and the executors or administrators of every such drawer or indorser shall suffer judgment to pass against them for all debts due upon protested bills of exchange, before any bond, bill, or other debt, of equal or inferior dignity, under the penalty of being obliged to pay the same out of their own proper goods."

The priority, therefore, of the holder of the bill of exchange, as well against the estates of the indorsers, as the drawer, is unquestionable ; but the other creditors insist, that as between the co-indorsers, the rights of Smith against the estate of Robinson, must be determined by the nature of the action to which he would have been put at law to recover back what he paid above his moiety, that is, *assumpsit* on simple contract. But both on principle and authority, we are induced to think otherwise.

*What have the creditors of Robinson to complain of ? They are
*596] only referred back to the situation in which they were, before they were relieved by the application of Smith's funds to the payment of the bill of exchange. If the bill of exchange still remained in the hands of the

Lidderdale v. Robinson.

holder, unsatisfied, his right to a priority from Robinson's estate as to the moiety of the bill, would be unquestionable, and if relieved from that state by the money of Smith, it is but right, that Smith should have refunded to him that sum which they, without that payment, would certainly have been obliged to relinquish. This is in perfect analogy with that class of cases in which real assets have been decreed to make good to simple-contract creditors sums that have been taken from personal assets, and applied to relieve the real estate (8 Ves. 382), or to satisfy specialty creditors. *Gibbs v. Ongier*, 12 Ibid. 413.

That a surety, who discharges the debt of the principal, shall, in general, succeed to the rights of the creditor, as well direct as incidental, is strongly exemplified in those cases in which the surety is permitted to succeed to those rights, even against bail, who are themselves in many respects regarded as sureties. 2 Vern. 608 ; 11 Ves. 22. That such would be the effect of an actual assignment made by the creditor to the surety, or to some third person for his benefit, no one can doubt. But, in the cases last cited, we find the court of equity lending its aid to compel the creditor to assign the cause of action, and thus to make an actual substitution of the sureties, so as to perfect their claim at law. This fully affirms the right to succeed to the legal standing of their principal ; and, after establishing that principle, it is going but one step farther, to consider that as done, which the surety has a right to have done in his favor, and thus to sustain the substitution, without an actual assignment. And accordingly, we find the *dictum* expressed in *Robinson v. Wilson*, 2 Madd. 434, in pretty general terms, "that a surety who pays off a specialty debt shall be considered as a creditor by specialty of his principal."

If the parties in this cause be considered as claiming under assignment from the holder of the bill, and each as assignee*of the claim against his co-indorser, according to the actual state of their respective [*597 interests, there can be no doubt of the priority here claimed. This subject has undergone a very serious examination in the courts of the United States, and in cases in which, as in this, satisfaction had been made by the surety, without taking an actual assignment of the debt. The first in order of time was that of *Burrows & Brown v. Mc Whann & Campbell, administrators of Carnes*, 1 Desauss. 409. This was a case exactly the parallel of the present in all its circumstances. The parties were co-sureties of one Banks, in a bond to Warrington, and had all contributed, but unequally, to the satisfaction of the judgment obtained against them jointly, on the bond. They had taken no assignment of the judgment, and Brown & Burrows who had paid most, prayed to be let in as judgment-creditors of Carnes, their co-obligor, in right of the judgment obtained by the creditor, Warrington. There was, in this case, satisfaction also entered formally on the judgment, but as this was obtained by the management of Carnes's administrators, it was treated as a nullity, and the complainants had a priority decreed to them, in the right of the judgment against themselves, conjointly with Carnes, their co-obligor.

The next case was that of *Eppes et al., executors of Wayles, v. Randolph*, 2 Call 125, in which the surety to a bond, having paid it off, but having taken no assignment from the creditor, filed his bill to charge the real estate of the principal, upon the ground, that he had succeeded to the rights of the creditor, by the mere act of satisfying the bond. It was not questioned,

De la Croix v. Chamberlain.

that such would have been the effect of an assignment, nor that the aid of the court would have been granted to compel the creditor to assign ; but the claim to relief was resisted, upon the ground, that without such assignment, the surety could only be considered in the rank of a simple-contract creditor, and, as such, neither having a preference to other simple-contract creditors, nor the rights of a creditor by specialty, to charge the assets descended. This is precisely the defence set up in the present case ; but in the case of *Wayles v. Randolph*, the court decided, that the surety succeeded to the rights of the creditor, and *decree'd satisfaction accordingly *598] out of the remaining assets, both real and personal (p. 159), modifying their decree, however, so as not to affect the executor with a *devastavit*, for any payment made before the filing of the bill.

In the year 1802, the same point was decided in the courts of Virginia, in the case of *Tinsley v. Anderson*, 3 Call 329. In this case, a creditor filed his bill to compel mortgagees and judgment-creditors to subject the estate of one Anderson to a sale, that prior incumbrances might be cleared away, so as to let him in for satisfaction ; and in applying the proceeds of the mortgaged property, the court was called upon to decide this question, in all its latitude. In delivering their decree, the language of the court is, "that for all sums paid by sureties, they ought to be placed in the situation of the creditors whose debts they have paid, or are bound to pay."

That this, then, is the settled law of the state in which this contract and this cause originated, cannot be doubted. But we feel no inclination to place our decision upon that restricted ground, since we are well satisfied with its correctness, on a general principle, and on authorities of great respectability in other states.

We will, therefore, order it to be certified to the circuit court of Virginia district, that John Smith, executor of John Smith, deceased, is entitled to satisfaction from the assets of the estate of John Robinson, with the priority of a judgment-creditor of the deceased.

Certificate accordingly.

*599]

*DE LA CROIX v. CHAMBERLAIN.

Spanish title.

A *concession* of lands made by the Spanish authorities at Mobile, in the year 1806, cannot be given in evidence, to support an ejectment, in the courts of the United States, the same not having been recorded, nor passed upon by the board of commissioners, or register of the land-office, established by the acts of congress, relating to land titles in that country.

ERROR to the District Court of Alabama.

March 1st, 1827. This cause was argued by *E. Livingston*, for the plaintiff ; and by *Owen*, for the defendant.

March 14th. TRIMBLE, Justice, delivered the opinion of the court.— This was an action of ejectment, brought by the plaintiff in error against the defendant, in the district court of the United States for the district of Alabama. The plaintiff excepted to certain opinions of the court given in the progress of the trial, and his exceptions having been signed and sealed by the judge, a verdict and judgment was rendered against him ; which judgment and exceptions are brought before the court by writ of error.

De la Croix v. Chamberlain.

The questions in the case arise entirely out of the bill of exceptions. It states, that "the plaintiff claimed the land in the declaration mentioned, as devisee of the late Francis Collell, and offered in evidence, as the first link in the chain of his title, a concession from the Spanish government to the said Francis Collell, a copy of which is annexed to the bill of exceptions. The court decided, that the concession offered in evidence by the plaintiff, being no higher evidence of title than a warrant or order of survey, would not support an ejectment. The plaintiff offered no other title than that above mentioned in evidence. The court decided also, that the signature of the granting officer of the Spanish government (the intendant, as well as the assisting officers) must be proved." These are the opinions excepted to by the plaintiff. A history of the case, somewhat different, is given by the clerk, in the transcript of the record sent up. But it was no part of his duty, nor had he authority, as clerk, *to state upon the record what was offered in evidence on the trial, or what opinions were expressed [*600 by the court in relation to the evidence, otherwise than as stated in the bill of exceptions itself. The evidence given on the trial of an issue at common law, is no part of the record, unless made a part of it by bill of exceptions, demurrer to evidence, or case agreed by parties, and entered of record. Nor are the opinions of the court, given incidentally, in the progress of the trial, except so made by bill of exceptions, any part of the record. The statements of the clerk, so far as they are contrary to the statements verified by the seal of the judge, must be wholly disregarded.

The concession referred to in the bill of exceptions is, upon its face, not a grant, nor a survey, but it is, as is expressed in the bill of exceptions, only a warrant or order, authorizing the deputy-surveyor to make a survey, and to report the survey, when made, to the intendant, in order to found a grant upon it. The order of survey bears date the ——— day of ——— 1806. At that date, the Spanish authorities were in the actual possession of Mobile, where the land lies; and they claimed it as part of the Floridas, then belonging to the Spanish crown; the United States claimed it as part of Louisiana. But it is not necessary to investigate these conflicting claims. The United States have since obtained the Floridas, by purchase and cession from Spain, without having previously settled the controverted boundary between the Floridas, as claimed by Spain, and Louisiana, as claimed by the United States.

A question of disputed boundary between two sovereign independent nations, is, indeed, much more properly a subject for diplomatic discussion, and of treaty, than of judicial investigation. If the United States and Spain had settled this dispute by treaty, before the United States extinguished the claim of Spain to the Floridas, the boundary fixed by such treaty would have concluded all parties. But as that was not done, the United States have never, so far as we can discover, distinguished between the concessions of land made by the Spanish authorities, within the disputed territory, while Spain was in the actual possession of it, from concessions of a similar character, made by Spain, within the acknowledged *limits. We will not, therefore, raise any question, upon the ground of the want of [*601 authority in the intendant to make the concession. No question of that sort seems to have been made in the court below. Assuming, then, the authority of the Spanish intendant to make the concession and warrant of survey, the

question made and decided in the district court fairly arises, was it a sufficient title to recover upon, in the action of ejectment? If the concession had been made, in a country where, at the time, the principles and practices known to the common law prevailed, it would not bear a contest. It would be regarded, at most, as an incipient, inchoate right, but not a perfect legal estate. It would not be such title as would maintain an action of ejectment.

Was it a perfect legal estate, was it title, according to the Spanish law, which prevailed at Mobile at the time it was made? We apprehend not. It shows, upon its face, that other acts of sovereignty remained to be done, to perfect the title, and which the sovereign power might withhold. A survey was to be made, and, according to the laws and usages of Spain, a formal grant was to be made, in such cases, to complete the title.

It may be admitted, that the United States were bound, in good faith, by the terms of the treaty of cession, by which they acquired the Floridas, to confirm such concessions as had been made by warrants of survey; yet, it would not follow, that the legal title would be perfected, until confirmation. The government of the United States has, throughout, acted upon a different principle, in relation to these inchoate rights, in all its acquisitions of territory, whether from Spain or France. Whilst the government has admitted its obligation to confirm such inchoate rights or concessions as had been fairly made, it has maintained that the legal title remained in the United States, until by some act of confirmation, it was passed or relinquished to the claimants. It has maintained its right to prescribe the forms and manner of proceeding in order to obtain a confirmation, and its rights to establish tribunals to investigate and pronounce upon their fairness and validity. 'This is demonstrated by *the laws which congress have repeatedly passed, estab-
*602] lishing boards of commissioners, to investigate these claims, and to reject or confirm them, or report them to congress in cases of doubt; and by the acts of congress requiring all such claims to be recorded, within prescribed periods. It does not appear, that this order of survey has ever been recorded, or passed upon by the board of commissioners, or register of the land-office, established by congress, in the district in which the land lies. It can, therefore, derive no aid from the laws of the United States.

A law of Alabama was mentioned in the argument, as having some bearing on the case. That law provides, "that all certificates issued in pursuance of any act of congress, by any of the boards of commissioners, register of the land-office, &c., upon any warrant or order of survey, &c., for any lands, &c., shall be taken and received as vesting a full, complete and legal title, &c., so far as to enable the holder of such certificate to maintain any action," &c. This case is not brought within the provisions of this law; for it does not appear that any such certificate had been issued thereon.

It was insisted by the plaintiff's counsel, that, admitting the order of survey was not in itself title, still the judgment ought to be reversed, because, as the bill of exceptions states, "that the plaintiff offered the order of survey in evidence, as the first link in his chain of title;" the opinion of the court precluded him from offering other evidence of title—as, for example, a survey or grant founded on the order of survey. This argument proceeds upon a mistake. The expressions in the bill of exceptions, that he offered the order of survey, "as the first link in the chain of his title," do not import, as

Davidson v. Taylor.

the argument supposes, that he had, or might have, a survey or grant to offer, in addition to the warrant of survey. The words refer to the statement, that the plaintiff claimed as devisee of Mr. Collell, and mean, that after offering Collell's title, or the warrant of survey granted to Collell, as the first link in the chain of his the (plaintiff's) title, he intended to go on and complete the chain from that first link, by proof to establish the second link, namely his title as devisee. This is evident, *from what is afterwards stated, that he offered "no other title than the order of survey." Again, [*603 the court does not reject the order of survey, and exclude it altogether as evidence; but assuming that the paper offered is evidence of the party being proprietor of the order of survey, the court decided, that such order of survey was not title to recover on, in the action of ejectment. It was a decision, not upon the admissibility of the order of survey as evidence, but upon its legal effect, when admitted.

It is not easy to comprehend the object of the latter statement in the bill of exceptions, "that the court decided the signatures, &c., ought to be proved." It does not say, they were not proved. It does not state that the paper was rejected, because the signatures were not proved. But if the bill of exceptions had so stated, we think, the exception, on that ground, could not be maintained. The warrant of survey does not appear to have been recorded; it purported to be the act of foreign officers, and was not verified by the great seal of the nation to which they belonged, or any other authoritative official seal, which was either known, or could be proved. The court and jury could not be presumed cognisant of their signatures. How, then, could the genuineness and authenticity of the document be proved, otherwise than by proof of the signatures of the officers by whom it purported to be made? It was not of that class of public instruments which prove themselves, and, consequently, it ought to be proved in the mode ordinary instruments are required to be verified by the rules of evidence.

Judgment affirmed, with costs.

*DAVIDSON and another, Plaintiffs in error, v. TAYLOR, Defendant [*604
in error.

Bail.

The bail is fixed by the death of the principal, after the return of the *ca. sa.* and before the return of the *scire facias*, and the bail is not entitled to an *exoneretur* in such a case.

January 31st, 1827. THIS case was argued by *Jones*, for the plaintiffs in error; and by *Coxe*, for the defendant in error.

MARSHALL, Ch. J., delivered the opinion of the court.—This is a case of bail, and is to be decided by the principles of English law, which the case finds constitute also the law and practice of Maryland on the subject. According to these principles, the allowance of the bail to surrender the principal, after the return of a *ca. sa.* is considered as a matter of favor and indulgence, and not of right, and is regulated by the acknowledged practice of the court. To many purposes, the bail is considered as fixed, by the return of the *ca. sa.* But the courts allowed the bail to surrender the principal, within a limited period after the return of the *scire facias* against them, as matter

Scott v. Shreeve.

of favor, and not as matter pleadable in bar. In certain cases, even a formal surrender has not been required, where the principal was still living, and capable of being surrendered, and an *exoneretur* would be entered, and the principal discharged, immediately upon the surrender. But the rule has never been applied to cases where the principal dies before the return of the *scire facias*. In such a case, the bail is considered as fixed by the return of the *ca. sa.*, and his death afterwards, and before the return of the *scire facias*, does not entitle the bail to an *exoneretur*. The plea is, therefore, bad ; and the judgment is affirmed, and six per centum damages and costs.

Judgment affirmed.

*605] *SCOTT and others, Appellants, v. SHREEVE and others, Respondents.

Relief against judgment at law.

Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorsee of notes drawn by the obligor, the consideration having failed.

The assignee of such bonds takes them subject to all equities existing between the original parties.

APPEAL from the Circuit Court for the District of Columbia.

January 13th, 1827. This cause was argued by *Swann*, for the appellants ; and by *Taylor*, for the respondents.

January 20th. THOMPSON, Justice, delivered the opinion of the court.— This case comes up by appeal from the circuit court of the district of Columbia, for the county of Alexandria. The object of the bill filed in the court below, was to obtain relief against a judgment at law, recovered against Shreeve, the appellee, upon certain bonds given by him to Elisha Janney, and which bonds had been assigned to the appellant, Scott, as his trustee, for the benefit of his creditors. In the progress of the cause, it was deemed necessary by the court, that the Bank of Potomac should be made a party defendant. A supplemental bill for that purpose was accordingly filed, and the bank made a party.

The first inquiry that seems naturally to arise is, how the case stood as between Shreeve and Janney, the original parties to the bonds. The material facts upon which the complainant in the court below relied for relief, are not denied by the answer of Scott. From the bill and answer, and exhibits in the cause, accompanied by a written agreement between the solicitors of the parties, before the cause was set down for argument, the leading facts in the case appear to be—that some time in the year 1808, Shreeve failed in business, being indebted to the Bank of Potomac in the sum of \$6300, upon *606] a note discounted at the bank, *and upon which Janney was the indorser ; for whose security Shreeve transferred to him and John Roberts, who was also his indorser upon other notes, certain property, at a valuation, but which, upon settlement of accounts between them, fell short of Janney's responsibility to the bank upon his indorsement, \$1980.88 ; for which, by agreement between the parties, Shreeve gave to Janney five bonds, payable in five annual instalments, and Janney was to pay the note to the bank, upon which he was the indorser. The note, however, was con-

Scott v. Shreeve.

tinued running in the bank in its original form, Janney appearing responsible as indorser only. This note was renewed, from time to time, until the 19th of May 1809, when, by the payment which had been made by Janney out of the property assigned by Shreeve, it was reduced to the sum of \$3306; and Janney himself having failed about this time, no further payments were made upon this note, until the month of June 1818, when Shreeve, after a long absence, returned to Alexandria, and was called upon by the bank for payment of his note, upon which he paid the sum of \$3355.29, being the amount of principal and interest due upon the five bonds which he had given to Janney.

Upon this brief statement of the facts as between Shreeve and Janney, it will be seen, that Shreeve was exposed to a double responsibility for the same debt. He was liable on his note held by the bank (unless the bank may be considered as having assented to the arrangement, and accepted Janney as solely responsible on the note, which will be hereafter considered), and he was also liable to Janney on the bonds which he had given him. For the purpose of indemnifying Shreeve against his responsibility to the bank, Janney gave him the instrument bearing date the 1st of March 1809, acknowledging that Shreeve had satisfied him by his bonds of the 28th of February 1809, for all demands against him as security at bank, and for all other accounts; and that the note above referred to, although originally discounted for the use of Shreeve, was continued in his name, but for the convenience of him, Janney, and engaging to save Shreeve harmless from said note, and and in due time to take it up.

*An objection is here made to sustaining this bill in equity, because there was a complete and adequate remedy at law. But this [*607 objection cannot be sustained. The bonds given by Shreeve to Janney were simply for the payment of money, and although the consideration for which they were given had failed, by Janney's neglect to pay up the note in the Bank of Potomac, according to his engagement, this could not have been set up at law, as a defence in the suit upon the bonds; nor could he, in that suit, have set off the amount paid to the bank upon his note. The engagement of Janney, on assuming the payment of the note to the bank, was a contract of indemnity only, and rested in damages, and could never form the subject of a set-off at law; and although an action of law might be maintained against Janney, upon this indemnity, it would be going too far, even if Janney was solvent, to say, that a court of equity could not interpose and stay a recovery upon the bonds, but that the party must be turned round to his remedy at law upon his indemnity. But in the present case, it would be gross injustice, and a certain denial of all remedy, to refuse relief on this ground, Janney having become insolvent. There was, then, no defence at law, which Shreeve could have set up against these bonds, nor had he any other remedy at law to which he was bound to resort.

Was there, then, any defence which he could have set up against a suit upon his note, if he had permitted the bank to prosecute him? None is perceived by the court. He stood upon the note as maker, and was liable to the bank as such; and although, by the agreement between him and Janney, the note was continued in that form, for the convenience of Janney, yet the bank was no party to that arrangement, and could not be bound by it. Even admitting the knowledge of that agreement by the bank, it certainly could

Scott v. Shreeve.

not have been set up as a defence to the note, unless it could be shown, that there was an express or implied agreement to accept Janney as the debtor, and to discharge Shreeve.

It has been urged, however, on the part of the appellants, that the statute of limitations had run against the note, and that Shreeve might and ought *608] to have availed himself of it. *If the statute of limitations had run against this note, and might have been pleaded, we should be very unwilling to say, that Shreeve was bound to plead it. It is a defence which a party may often avail himself of with great justice and propriety. But whether he will or not, must be left to his own election. It is, however, unnecessary to inquire into the duty or obligation of Shreeve to have pleaded the statute, under the circumstances of the case, because we do not think it could have been set up as a defence to the action. The letter of license given by the bank to Shreeve bears date on the 12th January 1809, and was for the term of seven years, which, of course, expired in January 1816. It certainly cannot be pretended, that the statute ran during the continuance of this letter of license. Payment of the note was demanded by the bank, and made by Shreeve, in June 1818, about two years and five months after the expiration of the letter of license, a period much within the time necessary to bar the action.

The next inquiry is, whether Scott, the assignee of Janney, has acquired any greater right or interest in these bonds, than Janney himself had. So far as relates to the question, whether the consideration had failed, the assignee stands precisely in the situation of the original party. He took the bonds subject to all existing equities. This is the settled rule in chancery, and that which is recognised by the laws of Virginia, which are in force in Alexandria. Nor has anything occurred, since the assignment, to give to Scott, or the creditors of Janney, any additional rights. These bonds were assigned by Janney, as his own property, and for the benefit of his own creditors, which was a violation of the trust and confidence reposed in him by Shreeve. They were given expressly, according to the agreement of the parties, to provide for the payment of the note to the Bank of Potomac; and it is admitted, that no part of this note has been paid out of the funds of Janney. The note had been reduced from \$6300 to \$3306, at the time Janney failed, in the spring of 1809; but these payments were made out of Shreeve's funds, assigned by Janney to Roberts, by the deed of the 11th of *609] August 1808. And it is also admitted, that Scott, the assignee, *has made no payments upon this note, since the assignment to him. The creditors of Janney have, therefore, been deprived of none of his funds, nor can they have any right to claim the benefit of those bonds, which must be deemed to have been held by Janney, in trust for the bank, and not as his own property.

The only remaining inquiry is, whether the bank, by any express or implied agreement, accepted Janney as their debtor, and discharged Shreeve from his responsibility? The answer of the appellant, Scott, alleges, that Janney considered himself as having assumed the payment of the note in question, and that he was considered debtor to the bank for the same, and was solely relied upon by the bank for the payment of the note. That he believed the bank had full knowledge of the deed of the 11th of August 1808, by which provision was made for the payment of the note, and were satisfied with it.

Scott v. Shreeve.

And he further alleges, that the bank was so well satisfied with this provision, that it considered neither Janney nor Shreeve liable for it. If these allegations were supported by proof, they would go far, if not conclusively, to show, that the bank had adopted Janney as solely responsible for the note, and had discharged Shreeve. If so, the payment by Shreeve would be considered voluntary, and without any legal obligation, and would form no objection to the recovery on the bonds. The bank, however, denies, it was a party to the arrangement made by the deed of the 11th of August 1808, or that it made any stipulation or agreement with Shreeve or Janney, in any manner connected with that deed, unless the order of the 12th of January 1809 (the letter of license), be considered as connected with it. The answer further denies, that the bank ever did release, or agree to release, Shreeve, or that it ever did look solely to Janney, or the trust-estate created by the deed of the 11th of August 1808. It admits, that when this deed was executed, Janney and Roberts were both directors of the bank, but avers, that no proposition in relation to it ever came before the board, previous to the 12th of January 1809, when the letter of license was granted to Shreeve, with the concurrence of Janney and Roberts, sitting and acting as directors of the bank.

*The answer of Scott is not evidence against the bank, and his allegations with respect to the bank's having accepted Janney as the sole debtor for this note, are entirely unsupported by proofs, and must be laid out of view, as they are positively denied by the answer of the bank, and which answer is strongly supported by the order for the letter of license, which was granted subsequent to the arrangement between Shreeve and Janney. For, if the bank had considered Shreeve exonerated from the payment of the note, there could have been no necessity for, or propriety in, giving him a letter of license. Indeed, it would have been absurd, to give a letter of license to a man who was not a debtor to the bank. The order for this purpose is cautiously drawn, so as to retain the responsibility of both maker and indorser. The indulgence is granted expressly upon the condition that it is sanctioned by Janney, and without lessening the right of the bank against him. [*610]

Nor is the bank chargeable with negligence that can in any manner prejudice its rights, or of which the appellant has any right to complain. The indulgence was granted, with the concurrence of Janney, and under an impression, no doubt, by all parties, that the trust fund created by the deed of the 11th of August 1808, would be sufficient to satisfy this note. And it was upon this supposition, no doubt, that the letter of license for seven years was granted to Shreeve. No steps would be taken against him, until the expiration of that time, and demand of payment was made as soon thereafter as he returned to Alexandria. The utmost, then, that can be alleged against the bank is, that it had full knowledge of the provision made by the deed of the 11th of August 1808, for the payment of this note. And admitting that provision to have been amply sufficient, it would not bind the bank, without its assent, to resort to that fund alone, and discharge the parties to the note. The bank could have no objection to the provision made by that deed for the payment of the note, as it would add to its security, if the maker and indorser were also held responsible. And the proceedings in relation to the letter of license are conclusive to show, that it was the understanding of

Ramsay v. Allegre.

all parties, that the bank had not, at that *time, relinquished its claims upon Janney and Shreeve for the payment of the note.

We are, accordingly, of opinion, that the decree of the court below, granting a perpetual injunction against the appellant, and a dismissal of the bill as to the bank, be affirmed, with costs.

Decree affirmed.

RAMSAY v. ALLEGRE.

Jurisdiction of the admiralty.

Quære ? Whether a suit *in personam* in the admiralty may be maintained against the owner of a ship, by material-men furnishing supplies for the ship, in her home port, where the local law gives no specific lien upon the ship which can be enforced by a proceeding *in rem* ?

However this may be, in general, such suit cannot be maintained, where the owner has given a negotiable promissory note for the debt, which is not tendered to be given up, or actually surrendered, at the hearing.

APPEAL from the Circuit Court of Maryland. This was a libel filed in the district court, by the appellant, Ramsey, against the respondent, Allegre, alleging that the appellant, at the special instance and request of the respondent, owner, ship's husband, or consignee of the schooner Dorothea, had performed various work and labor, and found and provided various materials for the use of the said schooner, to equip and prepare her for a voyage on the high seas, amounting to the sum of \$2428.84 ; that the appellant had often applied to the respondent for payment, and been refused ; and praying process according to the course of the admiralty, &c.

A plea was filed by the respondent, alleging, among other things, that he had given the libellant his negotiable promissory note for the debt. It appeared, at the hearing, that the appellant had furnished the materials in *612] question, at the respondent's request, and *that the latter had given his negotiable promissory note for the same, which the appellant accepted, giving the following receipt therefor : "Received a note, at four months, which, when paid, will be in full for the above amount." The note not having been paid, this suit was brought. The district court dismissed the libel, upon the ground, that the jurisdiction of that court, as an instance court of admiralty, in the cause, was waived, by the acceptance of the promissory note ; and the decree having been affirmed in the circuit court, upon the same ground, the cause was brought by appeal to this court.

February 19th. The *Attorney-General* and *Meredith*, for the appellant, argued, that the district courts, proceeding as courts of admiralty and maritime jurisdiction, might take cognisance of material suits by material-men, either in *personam* or *in rem*. *The General Smith*, 4 Wheat. 438. The only question here was, whether the jurisdiction was waived, by the appellant's taking the note as conditional payment. The note did not extinguish the debt, and, consequently, could not affect the jurisdiction which originally attached on account of the nature of the debt. Without some special agreement to consider the note as payment, it could not be so regarded. It only operated as a suspension of the remedy, during the time allowed for its payment. If unpaid the party might resort to his original right of action, as if no note had been given. *Chit. on Bills* (5th ed.) 123, 130 ; 6 Cranch 253 ; 2 H. Bl. 317 ; 5 T. R. 141 ; 1 Evans' Pothier 380 a.

Ramsay v. Allegre.

Such is the doctrine of the common law ; and the civil law, which gave the rule to the admiralty, would be found in accordance. A *novation* is the substitution of a new for an old debt, by which the latter is extinguished. It may be made of a debt payable at a future day, or of a debt presently due, by a new engagement, allowing a term of credit. But the consent of the creditor must be positively declared, as the law will not presume that he means to abandon his rights under the first contract. Evans' Pothier 380, 385. No authority or principle could be found, to warrant *the assertion, that, although the original contract in this case was not [*613 extinguished, the suspension of the right of action took away the jurisdiction of the admiralty, so that it could not again be resorted to.

Hoffman and *Meyer*, contra, insisted, that the promissory note given in this case was a personal security, taken on land, and in all respects assimilated the case to that of the claim for the master's wages. Although, in general, locality might not be the test of admiralty jurisdiction, it might reasonably be contended, that where the credit is personal, and the security of a kind exclusively cognisable at common law, the locality should fix the jurisdiction. In the case of contracts, the admiralty jurisdiction, *in personam*, ought to be merely co-extensive with the proceeding *in rem*: and as the domestic character of the vessel freed the thing from jurisdiction, the person of the owner ought also to be exonerated. 4 Wheat. 438. As a security had been accepted, which had the effect of extinguishing a common-law lien, during the term of the note, no process could have been instituted in the admiralty, on the original contract ; and the idea of reviving a jurisdiction, which had been thus suspended, was a novelty not countenanced by any legal analogy. Supposing the jurisdiction of the admiralty to be dependent upon the existence of a lien, as defined by positive law, the authorities would show, that such a lien was extinguished at common law, by a new agreement. *Yelv.* 66 ; *Selw. N. P.* 1163 ; 3 Burr. 1498. It had been expressly determined, that in cases of dealings or obligations, naturally within the appropriate jurisdiction of the admiralty, if a special contract be entered into, or a special security be taken, the common-law jurisdiction will attach, as in ordinary cases, even though the new agreement does not operate technically by way of extinguishment. 4 Burr. 1950 ; 1 Peters' Adm. 238 ; 6 T. R. 320 ; 2 Bro. Civ. & Adm. Law 88, 97 ; 1 Salk. 31.

March 2d 1827. MARSHALL, Ch. J., delivered the opinion of the court : that, as it did not appear by the record, that the note had been tendered to be given up, or actually surrendered, *at the hearing in the court below, the decree would be affirmed, it not being necessary to consider the [*614 general question of jurisdiction.

JOHNSON, Justice.—I concur with my brethren in sustaining the decree below, but cannot consent to place my decision upon the ground on which they have placed theirs. I think it high time to check this silent and stealing progress of the admiralty, in acquiring jurisdiction to which it has no pretensions. Unfounded doctrines ought at once to be met and put down ; and *dicta*, as well as decisions, that cannot bear examination, ought not to be evaded and permitted to remain on the books, to be commented upon, and acquiesced in, by courts of justice, or to be read and respected by those

Ramsay v. Allegre.

whose opinions are to be formed upon books. It affords facilities for giving an undue bias to public opinion, and, I will add, of interpolating doctrines which belong not to the law. There need be no stronger illustration given than this case affords. Here is a libel *in personam*, on a contract, in the admiralty, filed expressly upon the authority of the case of *The General Smith*. I had never read the report of that case, that I recollect, until the argument in this cause; or, if I had, I attached so little importance to anything in it, besides the point that it decides, as to have forgotten that such doctrines were to be found in the reports of our decisions. But, upon being examined, what does it amount to? A gentleman of the bar, whose knowledge, particularly in the admiralty, commanded the highest respect in this court, is reported to have laid down a doctrine, in very explicit terms, which, I will venture to say, has no authority in law; and the court, carried away probably by the influence of his concessions, echoes them in terms which are not only not called for by the case, but actually, as I conceive, contradicted by the decision which is rendered.

The correctness of the decision in the case of *The General Smith*, cannot be questioned; it dismisses the libel, upon the ground, "that material-men and mechanics, furnishing repairs to a domestic ship, have no particular lien *615] upon the ship itself for the recovery of their demands." *But why have they no lien upon the ship? or, to speak more correctly, why are they precluded from a remedy in the admiralty, for subjecting the ship to arrest and sale in order to satisfy their demands? It is because jurisdiction over the contract has been taken from the courts of admiralty, and the exercise of jurisdiction, in such a case, prohibited to them by the common-law courts of Great Britain, for hundreds of years. And it is a fact of the most positive certainty and notoriety, that so far from retaining jurisdiction over this contract *in personam*, after being driven from jurisdiction *in rem*, that the former was first surrendered, and that in the most unequivocal terms.

I refer to the resolutions of February 1632, adopted by the king in council, and subscribed by all the judges in England, and to be found in the collection of the sea laws, and in various other books; by the second section of the second article of which it is declared, that "if suit be in the court of admiralty for building, or mending, saving, or necessary victualing of a ship, against the ship itself, and not against any party by name, but such as for his interest makes himself party (*i. e.* a claimant), no prohibition is to be granted, though this be done within the realm." This resolution implies an express recognition, that if such suit be instituted against the person, a prohibition shall issue. And this I hold to be the test of admiralty jurisdiction; for wherever a prohibition will issue, the jurisdiction has been taken away from the admiralty, or it never possessed it. And, accordingly, for two hundred years has this jurisdiction been abandoned by the British courts, with the single exception of seamen's wages; an exception, of which it may emphatically be said, "*probat regulam*." For, if any one will take the trouble to refer to the language of Ch. J. Holt, in the case of *Clay v. Snelgrave*, he will there find it said, "that it is an indulgence that the courts at Westminster permit mariners to sue for their wages in the admiralty court, because they may all join in suit, and is grounded upon the principle, that '*communis error facit jus*.'" (1 Ld. Raym. 576.) This privilege is denied to the master, and even to a mate succeeding to the master, when he

Ramsay v. Allegre.

sues for his wages as *master ; so rigid are the courts of Westminster in confining the admiralty to the few contracts over which it is permitted to retain jurisdiction. And when it is argued, that this discrimination to the prejudice of the master, is confined to his suit *in rem*, and that no case can be found, in which his remedy *in personam*, in the admiralty, has been denied him, it becomes necessary to remind counsel, that this may have proceeded from no one's ever having had the temerity to prefer such a suit—a consequence which would necessarily follow from what I hold to be undeniable, that, except on the contract for seamen's wages, the proceeding *in personam* upon contracts, is now unknown to the British admiralty tribunals.

I will sketch a brief history of the admiralty jurisdiction over contracts, and a view of its present state. The study of the history of the admiralty jurisdiction in England, in common with that of all the courts of that kingdom, except the common-law courts, presents an instructive lesson on the necessity of watching the advancement of judicial power, in common with all power ; inasmuch as it shows in what small beginnings, and by what indirect and covert means, aided by perseverance and ingenuity, originated the mighty structures against which, ultimately, the legislative and judicial power of the country had to exert the full force of their united efforts. The vast variety and importance of the subjects which the admiralty had appropriated to itself, will appear in a variety of authors ; but I would refer the reader to Godolphin's "View of the Admiral Jurisdiction," as well for its antiquity, as the great learning and respectability of the author. There, it will be seen, that the admiralty, before the time of Richard II., had arrogated to itself a scope of judicial, legislative and ministerial power, which withdrew from the trial by jury, and placed under the surveillance of the crown, of which the admiralty was only the representative, more than half the jurisprudence, and particularly, the commercial jurisprudence of the kingdom.

The statutes of the 13th and 15th Richard II. were passed, to set limits to this power, but such was the stability it had already acquired, that it was not until the act of 2 Henry IV., c. 11, *which gave to the subject [*617 exactly the right which the constitution of the United States gives to its citizens, against unconstitutional laws, was passed, that this overgrown power could be effectually restrained. For it could then no longer prescribe its own limits, in prejudice of the individual, and to the exclusion of his common-law rights. Neither the king nor his proctor could any longer justify or secure the individual who resorted to the admiralty, in a case in which the common law could give redress. (3 Levinz 353.) The act of 13th Richard says, upon complaint of encroachments made by the admirals and their deputies, it is enacted, "that the admirals and their deputies shall meddle with nothing done within the realm, but only with things done upon the sea ;" and the 15th Richard, c. 3, "that in all contracts, pleas and quarrels, and other things done within the bodies of counties, by land or water, the admiral shall have no cognisance, but they shall be tried by the law of the land." And the 2d Henry IV., c. 11, provides, "that he that finds himself aggrieved against the form of the statutes of Richard, shall have his action by writ grounded upon the case, against him that so pursues in the admiralty, and recover double damages."

Ramsay v. Allegre.

The check given by legislative provision was followed up by prohibitions from the common-law courts, and suits under the statute of Henry, until, upon the murmurs of the lord high admiral at the checks imposed upon his power, the subject was taken up by the king in council, in 1632, and a kind of compromise entered into, to which all the different tribunals appear to have at first conformed; but in which, after a time, the common-law judges appear to have discovered, that the crown and the admiralty had gained too decided an advantage over them, to admit of its being adhered to as a correct exposition of the statutes of Richard. Hence, in the 3d edition of Croke's reports, at the end of the 2d volume, we find these resolutions declared to be of no authority, as undoubtedly they were not, since it was not a regular judicial act. But in this, it must be noticed, that the authority denied to *618] those resolutions was not on the subject *of those powers which the admiralty renounced, but of those which they retained. Upon this ground, it is well known, that these resolutions, although printed in the 1st and 2d editions of Croke's reports, were omitted from the 3d. The *mantissa* at the end of the edition of 1767, declares their rejection as authority. But even before the adoption of those resolutions, a decision had taken place, which was conclusive, as well against their jurisdiction over the particular contract here under consideration, as against their right of proceeding upon it by process *in personam*.

I allude to *Cradock's Case*, 2 Brownl. 37, which was decided in the 7th of James, or in the year 1608, twenty-four years before the date of these resolutions. This was distinctly the case of a material-man; his purchases were of cordage, powder and shot, for a ship, and the party of whom they were bought sued Cradock in the court of admiralty. A prohibition was granted, and the reason assigned by the court is, that the statute 13 Richard II., "that the admiral shall not meddle with things made within the realm, but only of things made upon the sea, and here the contract was at St. Katharine's stairs, in the body of a county." And thus we see that, in the resolutions alluded to, the claim to jurisdiction *in personam*, denied the admiralty by the effect of that adjudication, is abandoned by them; at the same time, that they assert the right to exercise jurisdiction *in rem* upon the same class of contracts. It was not long after, however, that the exercise of jurisdiction *in rem* was also taken from them. And yet there is a semblance of authority for their having exercised it, during the interval of time between the adoption of the resolutions of 1632, and when they were declared to be of no authority. I allude to that quotation from 1 Roll. Abr. 533, which is copied into Bac. Abr. p. 196 of the 1st vol. and there, together with the note which refers to Cro. Car. 296, has remained the permanent source of many an error to those who have not taken the trouble to examine into the authority for the law laid down.

This subject will be found learnedly examined in the cases of *Clinton v. The brig Hannah and ship General Know*, decided *in the admiralty, *619] by Judge HOPKINSON, of Pennsylvania, in the year 1781; and by Judge BEE, in the admiralty of South Carolina, in the case of *Shrewsbury v. The sloop Two Friends*, in 1786; in both which cases, the authority of those quotations is rejected, and the lien of the shipwright to sue *in rem* in the admiralty denied. (Bee 419, 433.) Both those cases go to show the law of this subject, at the adoption of our constitution, and they merit high

respect, both for the known abilities of the judges who pronounced them, and the intrinsic learning they display. They show plainly, that the quotations mentioned rest altogether on the authority of the resolutions of 1632, to which certainly no lawyer will attribute authority any further than they go to show, that the admiralty did not even then pretend to the jurisdiction *in personam* upon contracts at all, and upon very few even *in rem*.

It may seem surprising, that from the time of Richard the Second down to the beginning of the 17th century, the jurisdiction of the admiralty court should have attracted so little of the attention of the common-law courts. One principal cause will be found in the civil wars, and the low state of commerce; and when the nation returned to a state of tranquillity, the power and vigor of her monarchs left little scope for legislative or judicial action. Yet there are cases to show, that the subject was not forgotten; and when the increase of commerce, and the weak reign of the Stuarts, presented a motive and an opportunity, that the attention of the nation was attracted to the usurpations and unconstitutional power exercised by that court. It is obvious also, from the cases and discussions of that day, that the common-law courts were embarrassed by a technical difficulty, arising out of the necessity of laying a venue to every action. As soon as this was removed (and the advocates of the admiralty murmur very much at the supposed absurdity of removing this absurdity), the progress of the common-law courts was rapid in wresting from the admiralty every species of contract, leaving them none to act upon, on which they could themselves render complete justice according to the established rights of the parties.

*They are charged with absurdity and inconsistency, but I pronounce the charge utterly groundless; for the one principle runs through all [*620 their decisions, that of subjecting to the trial by jury every cause in which that form of trial could be applied, without injury to the parties' rights. It is true, that where they found them in the exercise of a power analogous to that of a court of equity, they did not take from the admiralty a power which they should only have handed over to another civil-law court; they had no motive, if they had the power, to make the transfer. And hence, the admiralty is left in the exercise of jurisdiction in cases of hypothecation, bottomry, and a kind of specific execution between part-owners of ships. Their jurisdiction of prize and salvage are royalties, and that over seamen's wages is a peculiarity, but perfectly reasonable and consistent, in whatever light it be viewed. In the Sea Laws, it is called "a custom of the realm." Ch. J. Holt, we have seen, puts it on the ground of a positive concession and *communis error*. And the judges often say, "we permit them to exercise this jurisdiction, because they may sue together there, and must sue severally in the common-law courts, and there they can have remedy upon the body of the vessel, which they cannot have here;" thus placing the exception in their favor upon the conceded ground of incapacity in the common-law courts to do complete justice, and the equitable ground of preventing a multiplicity of suits.

My own opinion is, that it stands on a much higher ground, and has its basis in the same policy which makes their wages to depend on the safety of the ship they navigate, by giving them, in that event, every possible chance of getting compensated. To which we may add, that their thoughtless character and ignorance renders them emphatically the wards of the ad-

Ramsay v. Allegre.

miralty, while the law on which they earn or lose they wages is a system of the admiralty. The assertion of the general principle against the master's contract, finds its solution in his right to receive the freight, in preference even to his owner, and thus to pay himself; and in the perfect competence of the common-law courts to do justice in his contract with the owner. In the case of ransom, he still may resort to the admiralty, and proceed *in rem*.

*621] But right or wrong, it is not to be questioned at this day, that the admiralty have lost their jurisdiction over contracts, with the exceptions stated. The most animated advocates of the admiralty do not deny this. They mourn bitterly over its fall, but uniformly acknowledge that they are eulogizing the dead. In Godolphin, Sir Leoline Jenkins' Works, and the collection of the Sea Laws, will be found all in substance, that ever was said on this subject. Yet they all unequivocally acknowledge that its jurisdiction has long since been at an end over contracts, and *in personam*, with the exceptions I have stated; while they dwell eloquently, on the folly of plucking this "diamond from the crown;" and enlarge greatly on the inconvenience of leaving to a jury the decision of causes which could be so much more advantageously disposed of by a single judge and by a system of laws peculiar to the admiralty courts; and arraign with severity the inconsistencies, absurdities and unkindly feelings, in which the common-law courts have stripped the admiralty of its ancient and eminent power. Even Browne, the modern champion in Europe of the admiralty jurisdiction, but who obviously has only caught the feelings, and borrowed the arguments of those who have gone before him, is forced reluctantly to acknowledge, that the admiralty has, for ages, been stripped of these powers, though he would spare no effort to restore them if he could. (See Appendix to his 2d vol. and note at the end, said to be omitted at p. 100.)

It has sometimes been contended, that the decisions of the common-law courts, as exemplified by their granting prohibitions, is not conclusive against the admiralty jurisdiction—that it is a disputed jurisdiction, and therefore that the admiralty judges themselves should be heard in this "*litis contestatio*." But this is obviously incorrect; for the court of king's bench, by its acknowledged jurisdiction, as exemplified in the very exercise of its power to prohibit, is the very source to which we are to look for lights to determine the respective powers of the inferior courts. And the decisions that have taken place on this subject, are nothing less than judicial expositions of the statutes which limit the powers of the admiralty.

*622] They amount to the construction and application of the law of the realm, of the statute law, and are therefore conclusive. So every lawyer knows they are held to be in the British courts; and together they make up that system of law which, by universal consent, was adopted in the admiralty courts in this country, before the revolution, at least, on the subject of jurisdiction over contracts, and *in personam*. I will now take a brief view of some of the leading decisions, in England and in this country, on the subject of contracts.

The quotations I shall first make have two objects in view; first, to show that the particular contracts under consideration, to wit, of material-men, have been denied to their jurisdiction; and secondly, that in every instance in which they have been prohibited from the exercise of jurisdiction over

Ramsay v. Allegre.

contracts, it has been upon a ground that is fatal to the exercise of jurisdiction in this and similar causes. On this latter subject, it would be unnecessary to search further than that article in the 4th Inst. (138, 141), in which Sir Edward Coke gave a detailed account of his own answers to the complaints of the lord high admiral to the king, against the restraints then recently imposed by the common-law courts upon his jurisdiction. This was early in the reign of James the First, and notwithstanding the revival of the clamors against that learned judge, on the same subject, I cannot but express the opinion, that it is a calm, dignified, learned and triumphant answer. The authorities which he cites are valuable for their antiquity, as they show that the courts, in his time, were only treading in the steps of those who had preceded them. Thus to prove that charter-parties, were without their jurisdiction, he cites *Hore v. Unton* (31 Hen. VI.), and observes that there were an infinity of cases to the same point. To prove that policies of insurance were not of admiralty jurisdiction, he cites *Crane v. Pell* (38 Hen. VIII.). To prove that maritime contracts, notwithstanding a foreign origin, are not to be taken from the common-law courts, he cites 28th, 39th and 40th Eliz. And finally, it is important to advert to the manner in which he explains the rule by which it is to be determined whether any given contract is, or is not, of admiralty jurisdiction; *which is no other than by showing from adjudged cases, that the common-law [623 courts have exercised, and can exercise jurisdiction over the same contract. (p. 141.)

Sir MATTHEW HALE, in his history of the Common Law, when sketching the jurisdiction of the Admiralty, says, "the jurisdiction of the admiralty court, as to the matter of it, is confined, by the laws of this realm, to things done upon the high sea only; as depredations and piracies upon the high sea; offences of masters and mariners upon the high sea; maritime contracts made and to be executed upon the high sea; matters of prize and reprisal upon the high sea. But touching contracts or things made within the bodies of English counties, or upon the land, beyond the sea, though the execution thereof be in some measure upon the high sea, as charter-parties, or contracts made even upon the high sea, touching things that are not in their connection maritime, as a bond or contract for payment of money, &c., these things belong not to the admiral's jurisdiction. And thus the common law and the statutes of 13 Rich. II., c. 15, 15 Rich. II., c. 3, confine and limit their jurisdiction to matters maritime, and such only as are done upon the high sea." (Chap. 2, p. 35.)

I have before cited the case of *Cradock*, from Brownlow, to show how early the admiralty was prohibited from exercising jurisdiction, and that *in personam*, on the contracts of material-men. In a note to Abbott on Shipping (page 136), it is asserted, that the same case is reported in Owen, under the title *Leigh v. Burleigh*. But I think it clearly a distinct case, as not only the parties but the facts are different (Owen 122); but the principle of the decision is the same.

In Sheppard's Abridgment (vol. 1, p. 125), is to be found an excellent summary of the ancient admiralty law; and one article merits notice, as it serves very distinctly to show the true origin of the articles in Rolle and Bacon's Abridgment, which have been so often relied upon as authority for a contrary doctrine. He quotes Cro. Car. 296, 297, for the following doc-

Ramsay v. Allegre.

trine, "that a suit may be in the admiralty court for building, saving, amending and victualling of a ship against the ship itself, not against the party, but such as make themselves for their interest parties." This is the very language *of the resolutions of 1632, and those are the *624] pages in which they were inserted in the two first editions of Croke, before they were exploded. Sir Leoline Jenkins, whose authority certainly no advocate of the admiralty will deny, acknowledges, in so many words, that the admiralty could not exercise jurisdiction over the contracts of material-men. (1 vol. 83.)

That the remedy against the ship itself has long since been taken away, is established by many authorities. In the American edition of Abbott on Shipping a work entitled to great respect, is laid down, in very general terms, "that a shipwright, who has once parted with the possession of a ship, or has worked upon it, without taking possession, and a tradesman who has provided ropes, sails, provisions or other necessities for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands." (p. 135.) That the author is here speaking of a "claim or lien" in the admiralty, is fully established by reference to the cases which he cites and comments upon. The authorities he cites fully bear him out in his doctrine. They are chiefly *Hoare v. Clement*, 2 Show. 338; *Justin v. Ballam*, 2 Ld. Raym. 805; *Watkinson v. Barnardiston*, 2 P. Wms. 367. And numerous other cases might be cited, both ancient and modern, to the same effect, upon which the doctrine seems fully established in England, that neither shipwrights nor material-men can sue in the admiralty, either in *personam* or *in rem*, without express hypothecation, and all assigning the universal reason, that they have the common-law courts open to them. (See also *Bushnel v. Suel*, 1 Ves. 155.)

Some of those loose *obiter dicta* in which the most eminent and prudent judges sometimes indulge, have been attributed to an eminent English jurist, which have been thought to cast some doubt upon these doctrines in modern times. The fact stands thus: in the 17th Geo. III., Lord MANSFIELD is reported to have said, in the case of *Rich v. Coe*, Cowp. 636, "that a person who supplies a ship with necessities, has not only the personal security of the master and owner, but also the security of the specific ship." And again, *625] *nine years after, he is reported to have repeated the same *dictum* in the case of *Farmer v. Davies*, 1 T. R. 108, in both instances, however, mere *gratis dicta* with regard to the points decided. But in opposition to this, we have the expression of Lord KENYON, in the case of *Westerdell v. Dale*, which occurred eleven years after, in which he is reported to have said, that he doubted whether the doctrine had not been too generally laid down by Lord MANSFIELD, and referred to the authority of some of the old decisions, which established the contrary doctrine. Indeed, when we refer to the language of Lord MANSFIELD himself, in the case of *Wilkins v. Carmichael*, which occurred only two years after *Rich v. Coe*, it is difficult to imagine how the same judge could have held such inconsistent doctrines. For there (1 Doug. 101), he is reported to have decided, "that a carpenter, in parting with his possession, had lost his lien, if he ever had one;" "that creditors for stores and provisions had no lien," "and that work done for a ship in England is supposed to be on the personal credit of the employer,

Ramsay v. Allegre.

although, in foreign ports, the master might hypothecate." This is all consistent with the established doctrines of the English courts; and the truth is, that if this learned judge had had the subject fully before him, on a motion for a prohibition, he would never have confounded the law of other states, or other times, with the common law of England in his time. To do him justice, what he decides in the last case, should be received as what he meant in the two former.

In the third American edition of Abbott on Shipping, p. 160, I find a note in these words: "It does not appear, that it has ever been held in the courts of the United States, that shipwrights and furnishers of supplies in the ports of the United States have not a lien on the ships, or a right to admiralty process, to recover the amounts due them. The question has not, to my knowledge, arisen in the supreme court of the United States. But in the district court of Maryland, after a very learned discussion, WINCHESTER, Justice, decided, that a shipwright, by the maritime laws, has a lien on the ship for repairs done, and materials found by *him while the ship is in a port of the United States. (*Stevens v. The ship Sandwich*, Peters' [626 C. C. 233 note.) The same opinion was given by PETERS, Justice, in Pennsylvania, in *Gardner v. The ship New Jersey*, Ibid. 223. (See also, 1 Roll. Abr. 533, L. 15; Cro. Car. 296.)" From this note, it appears, that the learned editor, to whom, I presume, it is to be attributed, was not aware of the two decisions rendered by Judges HOPKINSON and BEE, to which I have above alluded. Both of them will be found directly in point against the shipwright's lien, and the research and learning which they display will be found worthy of the high reputation of the judges who rendered them. These cases will also be found interesting, from the circumstance of their containing criticisms upon the authority of the law upon which both Judges PETERS and WINCHESTER appear to have been misled; I mean, the standing quotation from 1 Bacon, with its usual accompaniments from Roll. and Cro. Car., *i. e.* Roll. Abr. 533, and Cro. Car. 296.

I cannot, however, admit, that the decision of Mr. PETERS, in the case of *The New Jersey*, is a case in point on the proposed subject. For the question of the lien of material-men or shipwrights did not there arise. It is only mentioned *arguendo*, as an apology for making an allowance to the master, out of funds in the registry, for wages paid, and supplies furnished the vessel from his own funds. An allowance, which he, at last, excuses in a note, by saying, "that it was not opposed," and for which he might also have pleaded the high authority of the case of *Watkinson v. Barnardiston*, 2 P. Wms. 367, in which the same thing was done, and that of *The John*, 3 Rob. 288. But the doctrine laid down as to material-men and shipwrights by the learned judge, is *gratis dictum*, and, as is fully shown in the case of *The General Knox*, cannot be sustained by the authority quoted.

With regard to Judge WINCHESTER's decision in the case of *The Sandwich*, it cannot be denied, that it is directly in point. But it is equally true, that it appeals to no authority that can sustain it. It is not by an exhibition of learning that decisions are to be tested, but by sound conclusions from unquestionable premises. To obstruct our inquiries by *a battery of cases, or learned and remote quotations, often obtain from faith, concessions that ought to be yielded only to investigation. I admit, that Judge WINCHESTER's decision is characterized by learning, but cer-

Ramsay v. Allegre.

tainly his premises cannot be conceded to him ; they are founded in error. His course of reasoning is this : "The constitution of the United States vests in the United States admiralty and maritime jurisdiction, and that jurisdiction is vested in the district court." "In England (I now quote his words), where the jealousy of the civil law was most conspicuous, while its authority was openly denied, the principles of equity derived from that code influenced the decisions of their courts in as great a degree as in countries where it was adopted. In all of which, from the books within my power, I can obtain any legal information, every contest or dispute between the owners and mariners, and the owners and builders, or equippers of a ship for navigation on the sea, is of a maritime nature, and cognisable in the admiralty." He then goes on to observe, "that the statutes of 13th and 15th Richard II. have received a construction which must, at all times, prohibit their extension to this country ;" and finally, when he comes to state the proposition, "has a shipwright a lien on the vessel by him repaired for the value of his materials, labor," &c., he says, "to decide this question, it is necessary to examine the nature of liens and privileged debts at the civil law ;" and, accordingly, he proceeds to examine what is the law of various countries of the continent, which are subject to the civil law, and concludes with adopting two propositions, thus : "I am, therefore, of opinion, that a ship-carpenter, by the maritime law, has a lien on the ship for repairs in port ; and that the cause being a maritime cause, the court has a jurisdiction over the person as well as over the ship." The authorities which he quotes are, Zouch, Beawes, Valin, Roll. Abr. 533, and 1 Bacon 178. Now, learned as this decision may be, it is obvious, that it is but a tissue of errors, since it adopts the civil law as its guide, and the admiralty law, in the time of its most extravagant pretensions, positively denying the *628] authority of *the statutes of Richard, and the modifications which they introduced into the law-maritime.

The laws of the continent of Europe furnish no authority on this question. Every state has its own laws on these contracts, as have most of the states of this Union. The ordinance of Louis XIV., on which Valin comments, is the statute law of France, and expressly vests in its courts maritime jurisdiction over a variety of contracts, which the common-law court has taken from the jurisdiction of the admiralty. The question is not what the civil law would give, but what remains to the admiralty of that jurisdiction, which no one denies that it had assumed, under the authority of civil law principles. The laws of Oleron, which may be called the statute law of Great Britain in maritime affairs, and which I am pleased to find published in Mr. Peters' first volume, together with Postlethwaite's Commentaries, give none of these powers over contracts to the admiralty.

I think it has been sufficiently shown, and, indeed, in denying authority to the British decisions under the statutes of Richard, Judge WINCHESTER must be held to admit, that the British decisions are contrary to his decision on the lien of the shipwright. Mr. Browne (in his 2d vol. p. 80, 81) distinctly acknowledges it to be settled, "that no person can sue in the admiralty for work and labor done in the port, before the voyage begins, or necessaries sold for the ship's use, before she sails, nor even where supplied to a foreign ship lying in a British port." Where money is lying in the registry, as in the case decided by Judge PETERS, there has been a disposi-

Ramsay v. Allegre.

tion manifested recently, to get over the rigid rule, if there could be found an excuse for it ; but none yet, I believe, has been found, except for money actually expended by the master, and for which he might have hypothecated. There, perhaps, it may be considered as a *quasi* hypothecation. (3 T. R. 323 ; 2 P. Wms. 367 ; 2 Rob.)

I will now show that Judge WINCHESTER is equally unsustained in his other principle, to wit, that "on a maritime contract, as a general proposition, the court of admiralty has jurisdiction over the person as well as over the ship." *I will not refer to the instance of bottomry by the master, because I do not believe that he had in mind that case, but [*629 will confine myself to the distinct proposition, "that in no case of contracts, except that of seamen's wages, can the admiralty proceed *in personam*," which is the point now before this court. I have referred to the celebrated resolutions of 1633, in which, when the admiralty were solemnly gathering up and consecrating, as they thought, the remains of their jurisdiction, this right is, in express terms, relinquished ; to Sheppard's Abridgment, in which, at a period long subsequent, such is given as the purport and exposition of that document ; and I have quoted *Cradock's Case* and *Leigh v. Burleigh*, in which the court of admiralty was expressly prohibited from proceeding *in personam* in behalf of material-men. I should think here I have a right to demand, if from the whole library of law-books, and God knows we have enough of them already, "camel loads," a single attempt to proceed *in personam*, upon a contract in the admiralty, except for seamen's wages, since the date of the resolutions of 1632, can be extracted. Adjudged cases cannot be found, because, since the antique cases to which I have referred, the right has been abandoned ; *dicta* enough can be produced, and some of those very modern.

Godbolt speaks of the process *in rem*, as the only process issuable in the first instance from the admiralty (260). In the edition of Abbott, which I have quoted, in a note upon the case of *Hoare v. Clement* (p. 136), a case arising on a contract for necessaries, it is admitted, "that the court of admiralty had no jurisdiction over the person, in that case." In *Johnson v. Shippin* (1 Salk. 35), in which a libel was filed against ship and owners, on an hypothecation for money borrowed abroad, on her voyage, it was argued, that, if suit lay against the owners at all, it lay at common law, and a prohibition was granted as to the suit against the owners, but refused as to the vessel. In *Ball v. Trelawny* (16 Car. I.), Trelawny had sued in the admiralty on a foreign contract, *in personam* ; obtained judgment, and Ball was in jail. The latter brought his action *under the stat. 2 Hen. VI., c. 11, recovered double damages, and was discharged on *habeas corpus*, [*630 on the ground of being in confinement in a cause "*coram non iudice*." (Cro. Car. 603, and 2 Ld. Raym. 982.)

Browne (2 vol. 100) lays down the rule in these terms : "The general rule, however, at present, is, that the admiralty acts only *in rem*, and that no person can be subject to that jurisdiction but by his consent, expressed by his entering into a stipulation." And even this mode of subjecting the person, through the medium of a stipulation, it is well known, was itself resisted at first, and acquiesced in only on the ground of its being an indispensable incident to the exercise of the jurisdiction *in rem*. In 1 Keble's Reports (p. 500), quoted by Browne, it is expressly said, "that without a

Ramsay v. Allegre.

stipulation, the admiralty has no jurisdiction at all over the person." In the case of *Ouston v. Hebden* (1 Wils. 101), where one libelled in the admiralty, to compel his part-owner in a ship to join in a sale, a prohibition was granted, upon the ground, that this was in fact an attempt to exercise a jurisdiction *in personam*.

There is a class of cases which may appear, at first view, to maintain a contrary doctrine, but which, upon examination, will be found consistent with the general principle. The case of *Manro v. Almeida*, decided in this court, was one of that description. They are cases in which the admiralty proceeds *quasi in rem*, when the subject of the suit is withdrawn from its jurisdiction. These cases proceed upon the supposed contempt in withdrawing the *res subjecta* from the process *in rem*. This was the case of *Smart v. Wolf* (3 T. R. 323), in which the prize court had improvidently ordered the cargo of the captured vessel to be delivered to the captors, reserving the question of freight, but without taking a stipulation bond, in a sum equal to what afterwards appeared due for freight. A monition from the admiralty was sued out to the captor's agent, to respond to the master's demand for freight, to the full amount decreed to him; and against this proceeding, the *631] court of king's bench refused a prohibition. *Here, the prize court acted upon a *quasi* hypothecation of the goods for the freight, resulting from their reserving the question of freight; and considered the captors in the light, either of their own bailee of the goods, or in the original relation of captor, against whom, if the goods are not returned on monition, the court proceeds as on contempt.

In *Manro v. Almeida* (10 Wheat. 472), the libellant claimed redress against a foreign captor, in a cause peculiarly of admiralty jurisdiction. The captain of a foreign privateer had, on the ocean, seized a sum of money in dollars, the property of the libellant, which the libellant alleged had been piratically taken; and finding property of the captor here, sued out process against the captor, for the purpose of examining before the admiralty the correctness of the seizure, and obtaining indemnity for it. The principal question considered in that case, arose on the form of proceeding; but the object was the prosecution of a suit *in rem*, to wit, to obtain restitution of the \$5000 seized by Almeida on the ocean, as prize. A case very similar to this is be found in a note to the case of *Smart v. Wolf*, in which the admiralty proceeded against the agents of a captor, to subject to its jurisdiction a sum of money that had been taken out of a prize, and passed into account between the agent and his principal.

On the cases of this class, two remarks will always hold good. 1st, They are instances in which the court of admiralty had jurisdiction of the principal question, not contracts, but maritime torts and prize causes, or their incidents; and 2d, that the process *in personam* is only the means to get possession of the *res subjecta*; that is, of exercising an unquestionable jurisdiction *in rem*.

We sometimes hear of a concurrent jurisdiction between the admiralty and common-law courts. But on the subject of contracts, which is the subject now under consideration, I deny, that, with the exception of seamen's wages, any such concurrent jurisdiction can exist. It is an absurdity in terms; for the rule which goes through all the cases, is in direct hostility with it. If the common law can try the cause, and give full redress, that

Ramsay v. Allegie.

alone takes away the admiralty jurisdiction. This is the principle on which the decisions rest, *from the remotest periods. The contract of bottomry is sometimes cited as an instance of concurrent jurisdiction. [*632 But it is a mistake, and an instance cannot be cited, better to illustrate the true doctrine on this subject, than this species of contract. If executed by the master, jurisdiction of it is exclusive in the admiralty, because it gives remedy only *in rem*. But if executed by the owner, it becomes also a personal contract. Yet who ever heard of a remedy upon it as such, anywhere but in a common-law court, or a court of equity? The contract of *respondentia*, which is as much a maritime contract as bottomry, gives no jurisdiction to the admiralty, either *in rem* or *personam*. (2 Browne 196, 197, and 4 East, p. 319.)

The case of *Menetone v. Gibbons* (3 T. R. 267) has nothing new in it; it is a recognition of doctrines as old as the hills. The question was, whether an hypothecation was taken out of the admiralty jurisdiction, because it was, in that instance, a sealed instrument. The general jurisdiction of the admiralty to proceed *in rem* on a bottomry bond, was not denied. The court explicitly acknowledge the doctrine, "that if the common law can try the cause, the admiralty shall not; and affirm the jurisdiction of the admiralty, merely on the ground, that there was no action against the party, at common law, and the common-law courts could not proceed *in rem* under the hypothecation." As to the rule there laid down, "that the jurisdiction of the admiralty shall be adjudged *secundum subjectam materiam*, it is as ancient as *Bridgeman's Case*, in the time of Hobart. But this decision is of importance here, in two points of view; since the court reason upon the principle throughout, that the admiralty jurisdiction is to be tested by the common-law remedy, and the grant of prohibitions.

There was a case decided in this court in the year 1824, which merits some attention. I mean the case of *The St. Jago de Cuba*; in which the court, at first view, would seem to have given a decision in favor of the claims of material-men upon a foreign ship, in a case where no actual hypothecation had been executed. But there are several considerations from which it will appear, that the court did not commit itself on that subject. The most material is, *that the question arose upon the application of money in the registry of the court, arising from the sale of the vessel for another [*633 cause. And in such instances, it will be seen from several cases, some of which have been noticed in the course of his discussion, that the court may act towards creditors as if that had been done which might lawfully have been done in their favor. And there is a peculiar propriety in doing this, when the court, by selling the vessel, has put it out of the power of the master to give that security to creditors which it is reasonable to suppose would have been given, where the master had no other means of getting advances made of money or materials. Several cases have been noticed of the master himself having the benefits of an actual hypothecation extended to him, when he expends his own money, where he might have raised it on bottomry, and the proceeds of the vessel are in the registry of the court. Yet this has been severely questioned in the British courts. (9 East 426.) Attention to the language of the court also will show, that they have been guarded on this subject. The question which the court is examining is, not whether the lien of a material-man attaches, independently of an actual

Ramsay v. Allegre.

hypothecation, but whether, if the master has exercised this "power of pledging or subjecting the vessel to material-men," the forfeiture to the government, without notice, would supersede their rights. And, although speaking of implied liens, whether the material-man here retained his supposed lien on the money in the registry, was distinctly the question, and the language of the court ought not to have any other effect given to it.

Yet, I am free to confess, individually, that in a case in which a hypothecation would be so clearly valid and legal, if actually made, I should want nothing but authority to induce me to sustain such a claim against the vessel; with regard to money in the registry, I think this case is authority for sustaining it, and that it is sanctioned by other authorities. (*Vide*, case of *The New Jersey* and *The John*, 3 Rob. 288.)

*634] Mr. Browne (2d vol. p. 100) has thought proper to charge *the common-law courts with having "involved the subject we are now upon in endless confusion." To me it appears, that the charge may more correctly be made upon those who have engaged, like himself, with so much zeal, in an effort to shake the authority of a course of decisions, that are uniform and consistent, and with one single exception (which exception is acknowledged as arbitrary, or positive law), reducible to a single principle—a principle altogether fatal to this action in its origin, since there can be no question that the party here had his common-law remedy. And I consider the effort particularly ungracious in an author who is driven to acknowledge its futility so often; one who confesses, in so many words, "that if the parties have bound themselves to answer personally, the admiralty cannot take cognisance of the question." (Vol. 2. p. 101.) "That the admiralty has, in a great measure (he should have said, altogether), dropped its claim to taking cognisance of charter-party, freight, and suits by material-men, and almost all other proceedings upon contract, except those for recovery of seamen's wages, or enforcing bottomry bonds." (p. 103.) "That the admiralty is excluded from jurisdiction of contracts, if personal, or sealed, or made on land." (p. 107.) "That the jurisdiction of the instance court of admiralty, which is, at present, seemingly (he should have said actually) allowed by the law court, is, that it is confined, in matters of contract, to suits for seamen's wages, or those on hypothecations; in matters of tort, to actions for assault, collision and spoil; and in *quasi* contracts, to actions by part owners for security, and actions of salvage." (p. 122.) "That the contract of insurance is, in practice, uniformly and decidedly out of the cognisance of the admiralty." (p. 188.) And finally, to acknowledge in the last page of his book, among his *errata et omissa*, "that personal contracts are held not to be cognisable in the admiralty."

It has sometimes been said, that this is a disputed jurisdiction; *but by whom is it disputed? Not by the courts of Great Britain; *635] for, in all their courts, as well of common as of civil law, when called distinctly to act upon the jurisdiction of the admiralty, there is no dispute, no contrariety of opinion; they all are governed by the same rules of decision. From time to time, some extravagant admirer of admiralty jurisdiction, or royal prerogative, has risen up in England, who has revived the ancient murmurs uttered by the friends of that court, when reluctantly putting off its usurped powers; but, with that exception, I know of no part of the English law that seems more clearly fixed than that of the admiralty

Ramsay v. Allegre.

jurisdiction. The misfortune is, that people will not be content to leave it as they find it, but employ themselves in efforts to revive what they cannot but acknowledge has been long since extinct. If the learning upon this subject should appear remote and antiquated, let it be remembered, that the law has been fixed in England for two centuries. And since the futile attempt of Sir L. Jenkins to revive it, no one, I believe, until Mr. Browne appeared before the public, had made any attempt to change the law of the admiralty in that kingdom.

I have felt it my duty to pay some attention to the subject, for several reasons. In the first place, I stand before the public as bearing my share of the responsibility incurred for certain opinions expressed in the case of *The General Smith*. For the just extent of my responsibility in that case, I must rely on the repeated decisions which I have made in my circuit in hostility with that doctrine. But I am willing to treat it as my own error, and shall, on that ground, claim the privilege of treating it with the greater freedom; at least, I shall endeavor to administer the antidote, if I have diffused the poison, and claim credit for an unequivocal proof of my repentance, by a public acknowledgment that it was inexcusable.

It will now examine that case, upon its authorities, and its consistency with itself. The case of *The General Smith* was one of the most extravagant attempts ever made to enforce this supposed lien of material-men. It serves to show to what embarrassments *the commercial world might be exposed, by pushing these maritime liens to excess. Since, upon the [636 same principle on which the libel was there filed, however long the time that had elapsed, whatever number of voyages the vessel had made, and whatever changes of property she might have passed through, she would still have remained liable to material-men. For, in that instance, the General Smith had made a voyage, and the property of her been changed, before the libel was filed. She was admitted, too, to be an American ship, in her home port. The court below very properly dismissed the libel, and this court did not hesitate to affirm the dismissal; and confined to its just import, as an adjudication, it is, most unquestionably, correct.

No man will subscribe more implicitly than myself, to the authority of decisions in this court; and I am ready at all times to adhere to the principles necessarily deducible from, or conducing to such decisions. But further than this, no judge is bound to subscribe to authority, for no other subjects are considered and adjudicated. But the report informs us, that Mr. Pinkney, who argued against the material-men, "admitted the general jurisdiction of the district court, as an instance court of admiralty, over suits by material-men, *in personam* and *in rem*, but denied that a suit could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged. That in the case of materials furnished or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced by a suit in the admiralty. But in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law (which was the law of Maryland), that mechanics have no lien upon the ship itself, for their demands, but must look to the personal security of the owner." (4 Wheat. 441, 442.)

Now, I have too high an opinion of Mr. Pinkney's law-reading, and of his talents as an advocate, not to be well convinced, that in this, as well as the

Ramsay v. Allegre.

residue of the argument attributed to him, he must have been misunderstood. And I find my sanction for this belief upon the face of the report itself; for, with the exception of the nullity of the *lien claimed *637] against a domestic ship, the authority which he quotes to sustain his doctrine, contradicts it in so many words. His quotations are Abbott on Ship. pt. 2, ch. 3, §§ 9-13, and the case of *The Levi Dearborne* (4 Hall's L. J. 97). The last quotation was a case of material-men suing *in rem*, in a home port, and was in point. But the quotation from Abbott was no other than the very passage on which I have before commented, and which, although commencing with stating the doctrines ascribed to Mr. Pinkney as prevailing on the continent of Europe, shows most distinctly that the law is otherwise in England. Mr. Pinkney never would have quoted, to support such doctrines, an author who has been shown to assert "that a shipwright, who has once parted with a ship, or has worked upon it, without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessities for the ship (*i. e.* material-men), are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself, for the recovery of their demands." Mr. Pinkney's quotation from Abbott comprises, and is limited to the sections that are occupied in maintaining the doctrine thus laid down by the author, and in showing, expressly, that it extends to a foreign as well as a domestic ship. In § 10, the author cites *Justin v. Ballam* (2 Ld. Raym. 805), which he considers as conclusive against the foreign ship. The distinction taken, is not between a domestic and foreign ship, but between a ship "on her voyage and absent from her owner, and one in her home port." And even in that case, the law, as laid down by the learned annotator to Abbott, in a note to the 8th section, upon 9 East 426, in the language of Lord ELLENBOROUGH, is, "that the master may hypothecate, not that the hypothecation attaches *per se* on the contract for the necessities." It is true, he cites Judge PETERS's decision in the case of *The New Jersey*, for a contrary doctrine; but he seems not to have adverted to the distinction recently admitted between distributing money in the registry, which is Judge PETERS's case, and that of arresting the vessel and subjecting her to sale. Nor has he adverted to the fact, that Judge PETERS places his decision on the authority *of *638] the English cases, which the text of Abbott alone will show are directly hostile to it. To which may be added, that even Judge PETERS does not countenance the doctrine of a right of proceeding *in personam*, attributed to Mr. Pinkney. But this also, when we find the rest of his reported argument so clearly a mistake, we have good reason for hesitating to ascribe to him. And the rather, for that, so well read a lawyer would not have advanced so bold a doctrine, without attempting to find some shadow of authority for it. Even Mr. Winder, who argued against Mr. Pinkney, does not venture to put his case upon the law of England, but relies upon the law of the continent, and insists on a right arbitrarily to adopt it here. Mr. Winder quotes Judge WINCHESTER's decision, and the case of *De Lovio v. Boit*, from 2 Gallis. 400. But Judge WINCHESTER affords no authority, since he decides on grounds which I have shown to be altogether heterodox or exploded.

With whom the idea originated, that the admiralty and maritime jurisdiction vested by the constitution in the United States, was that which the

Ramsay v. Allegre.

admiralty possessed or pretended to, before the time of Richard II., I am at a loss to conceive. Judges HOPKINSON, BEE, and PETERS, all distinguished revolutionary men, educated before the revolution, and deeply engaged in public life, until long after the constitution, concurred in fixing the period of the revolution for the law of the jurisdiction of the admiralty. And who can doubt, that the doctrine of that day was, that the jurisdiction anciently claimed by that court, was founded in usurpation. The acts of Richard expressly declare it; that of Henry, treated it as vain and void; and such all history proves it. Yet it is only by going back to those early times, that shadow of authority can be found for the pretensions which it seems disposed to put forth in our day.

Of the case in 2 Gallison, I will only remark, that it was a decision in the first circuit, in which the right to proceed *in personam* in the admiralty was asserted, in a suit upon a policy of insurance; and if the *nisi prius* decisions of the judges of this court are of any authority here, it is only necessary to observe, that a contrary decision has been rendered in the sixth circuit. Let them, therefore, fall together; and *let the question be tested upon principle and authority, independent of those decisions. [*639

I now come to the consistency of the opinion of the court in *The General Smith* with itself. That decision is, that the common law is the law of Maryland with regard to the rights of material-men, and that it has long since been settled, that they have no remedy *in rem*. But the opinion is introduced with a *dictum*, purporting, that had they sued in the admiralty *in personam*, there would have been no doubt of their right to proceed. And here the question is, whether there can be found anywhere in the books, a case in which an action *in personam* could be maintained in the admiralty, wherein the action *in rem* was denied to that court. No such case can be found; and the reason is obvious; that right alone would take away the admiralty jurisdiction altogether, since it would follow, that the right might be pursued at the common law: the case of seamen's wages always excepted, which I regard as positive law, and which, indeed, has been supposed by some to be retained by the admiralty, under the authority given that court, by a statute of one of the Henrys, to control mariners in regard to the amount of their wages.

Let the cases be searched from the remotest period, down to the time of *Menetone v. Gibbons*, and the ground of prohibition, and of recovery, under the 2d of Henry IV., will uniformly be found to be the competency of the common law to enforce the contract. This is the principle by which even their jurisdiction *in rem* is controlled, and hence it follows, that in no case in which they are prohibited from proceeding *in rem*, can they have the action *in personam*. I consider the decision, therefore, in the case of *The General Smith*, as conclusive against the doctrine which asserts the right of material-men to proceed *in personam*, and upon the authority of which the present suit is avowedly instituted. At least, as there is no authority given for it by the court, we may conclude, that it has no better authority than that on which we are given to understand Mr. Pinkney relied for the same doctrine.

I have now said a great deal on this subject, and I could not have said less, and discharged the duty which I feel that *I owe to the community. I am fortifying a weak point in the wall of the constitution. [*640

Ramsay v. Allegre.

Every advance of the admiralty is a victory over the common law ; a conquest gained upon the trial by jury. The principles upon which alone this suit could have been maintained, are equally applicable to one half the commercial contracts between citizen and citizen. Once establish the rights here claimed, and it may bring back with it all the admiralty usurpations of the fifteenth century. In England, there exists a controlling power, but here there is none. Congress has, indeed, given a power to issue prohibitions to a district court, when transcending the limits of the admiralty jurisdiction. But who is to issue a prohibition to us, if we should ever be affected with a partiality for that jurisdiction?

I, therefore, hold, that we are under a peculiar obligation to restrain the admiralty jurisdiction within its proper limits. That in case of contracts, it has no jurisdiction at all *in personam*, except as incident to the exercise of its jurisdiction *in rem*. That with regard to the contracts of shipwrights and material-men in her home port, the vessel cannot be subjected, unless by express hypothecation by the owner. That on her voyage, and where the master is destitute of other means of raising the necessary funds, she may be so subjected by the master, but it must be by actual hypothecation. But that when the ship has been sold for other claims, and the money in the registry, so that the master no longer has it in his power to raise money on her bottom, to satisfy demands which have been legally incurred, cases may arise, in which the claims of material-men and shipwrights, and of the master himself, may be sustained, without actual hypothecation.

Decree affirmed. (a)

(a) The editor of these reports feels it to be a duty which he owes to self-respect, and to the independence of the bar, to take some notice of the comments made *641] in the above opinion, upon the account *given in the third volume of this work, of Mr. Pinkney's argument in the case of *The General Smith*. Whether the editor was so unfortunate as to misunderstand the argument of that truly learned person, he is willing should be determined by the test proposed in the above opinion. No other reason is there given for questioning the accuracy of the report, than that Mr. Pinkney was too well read a lawyer, and too able an advocate, to have urged an argument which is contradicted by the authorities he cites in its support. This argument includes the following positions :

1. An admission of "the general jurisdiction of the admiralty over suits by material-men *in personam* and *in rem*." All that is necessary to remark upon this passage is, that it was superfluous for Mr. Pinkney to cite any authority for a concession voluntarily made by him, *argumenti gratia*, and it does not appear that the authorities subsequently referred to in the margin were intended for that purpose. On this occasion, as on many other occasions, he probably spoke from the fulness of his learning, and with a confidence inspired by his well-grounded reliance upon its accuracy.

2. That no "suit could be maintained in the present case, because the parties had no specific lien upon the ship for supplies furnished in the port to which she belonged." This is admitted to be an exception to the sweeping denunciation against the applicability to the argument of the authorities cited in its support. The authorities cited are, "*Abbott on Ship*, pt. 2, ch. 3, 9-13, and the cases there cited ; *Woodruff et al. v. The Levi Dearborne*, 4 Hall's Law Journ. 97."

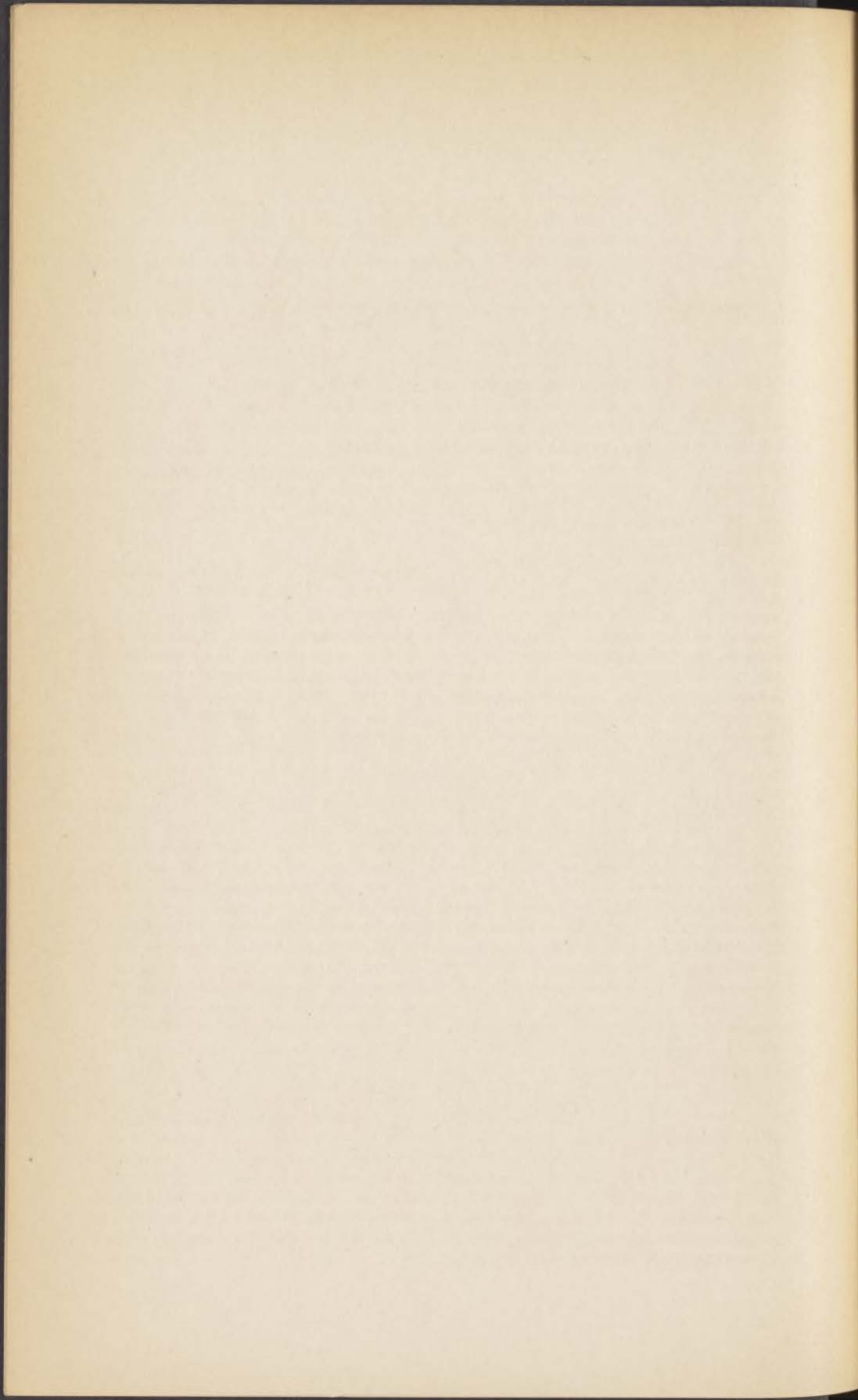
3. "That in the case of materials furnished, or repairs done to a foreign ship, the maritime law has given such a lien, which may be enforced in the admiralty." The passage cited from the text of *Abbott* (§9) shows, that by "the maritime law" of all Europe, England only excepted, material-men have such a lien, which may be enforced in the admiralty. Such was the law of Rome, and such is the law of all the maritime

Ramsay v. Allegre.

countries of the European continent. Such, too, was the law of Scotland, until it was recently altered by a decision "founded principally, as it seems, upon a desire to render the law of Scotland conformable to the law of England upon this subject." (Abbott, pt. 2, ch. 3, 14, p. 142.) How far the limits prescribed to the jurisdiction of the admiralty in England over maritime contracts, by the decisions of the common-law courts, after ages of controversy, had been adopted in this country, before the revolution, and how far the grant of admiralty and maritime jurisdiction in the constitution of the United States is to be construed with reference to those decisions, are questions foreign to the purpose of this note. The only question here is, whether Mr. Pinkney was warranted in quoting this passage *and the cases [*642 there cited," as an authority for the position, that "the maritime law has given such a lien, which may be enforced in the admiralty." The question is not, whether the authority is conclusive to support the position; but whether it is sufficiently pertinent to render it probable that it was actually referred to for that purpose. It may be, that there is, as is contended in the above opinion, some discrepancy among the decisions of the admiralty judges in this country on the subject; but still the cases collected in a note to the American edition of Abbott (p. 160), are believed to be sufficient to rescue the argument attributed to Mr. Pinkney from the imputation of being directly contradicted by the authorities quoted to sustain it. The case of *The Levi Dearborne*, determined by Mr. Justice Johnson in the circuit court of Georgia, is also quoted by Mr. Pinkney for the same purpose. That "this quotation was in point," will appear by the following extract from the opinion of the learned judge, as we find it reported by Mr. Hall. "The lien on vessels for material-men and shipwrights, exists only in a foreign port. Where the owner is present and resident, the common-law principle must govern; in such case, no lien on the vessel is created. In the case of the owner, who, though present when the work and materials are furnished, is transient and non-resident, I am disposed to think otherwise, and that in such case the lien attaches. It is proper also to state, what shall be deemed a foreign, and what a domestic port, as to this question: the seaports of the different states ought, in this respect, to be considered as foreign ports in relation to each other. Charleston, for instance, is a foreign port, as to a claim of this nature made in Savannah." 4 Hall's Law Journ. 101.

4. That "in the case of a domestic ship, it was long since settled by the most solemn adjudications of the common law (which was the law of Maryland), that mechanics have no lien upon the ship itself for their demands, but must look to the personal security of the owner." This position is not denied to be supported by the authorities said to have been quoted by Mr. Pinkney; but the error imputed to the report consists in the asserted liability of a foreign ship to such a lien, which (as it has been seen) is recognised and enforced by the general maritime law, and which appears also to have been maintained by several admiralty judges in this country, and especially, by Mr. Justice Johnson, although it may not have been adopted by the peculiar law of England.

In making these remarks, the editor has certainly not been influenced by any feelings of disrespect towards the learned judge by whom the above opinion was delivered, nor even by a desire to controvert the peculiar doctrines maintained in that opinion. It is his own character for accuracy and integrity as the reporter of the decisions of this court which the editor feels to be assailed, and therefore *seeks [*643 to vindicate. It is a duty which he owes to the court, to the profession, and to his own reputation, to maintain the fidelity of the reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless. In closing his labors, the editor has the consolation of reflecting, that it has been his humble aim to do justice to the learning and talents of the bar, and to uphold the honor and dignity of the bench. How far he has succeeded in this attempt, it does not become him to speak; but he is willing to submit to the impartial judgment of his professional brethren, whether the above accusation is supported by evidence.



INDEX

TO THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

The References in this Index are to the STAR *pages.

ADMIRALTY.

1. A question of probable cause of seizure, under the piracy acts of the 3d of March 1819, ch. 75, and the 15th of May 1820, ch. 212. *The Palmyra*..... *1
2. In such a case, although the crew may be protected by a commission *bond fide* received, and acted under, from the consequences attaching to the offence of piracy, by the general law of nations, although such commission was irregularly issued; yet, if the defects in the commission be such as, connected with the insubordination, and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient, under the act of congress, to justify the captors for bringing in the vessel for adjudication, and to exempt them from costs and damages. *Id.*
3. Although probable cause of seizure will not exempt from costs and damages, in seizures under mere municipal statutes, unless expressly made a ground of justification by the law itself, this principle does not extend to captures *jure belli*, nor to marine torts generally, nor to acts of congress authorizing the exercise of belligerent rights to a limited extent, such as the piracy acts of the 3d of March 1819, ch. 75, and the 15th of May 1820, ch. 112..... *Id.*
4. Explanation of the decree of this court in the case of the *The Antelope*, 10 Wheat. 66, and 11 *Id.* 413. *The Antelope*..... *546
5. *Quære?* Whether a suit *in personam* in the admiralty may be maintained against the owner of a ship, by material-men furnishing supplies for the ship in her home port, where the local law gives no specific lien upon the ship, which can be enforced by a proceeding *in rem*? *Ramsay v. Allegre*..... *611
6. However this may be, in general, such suit cannot be maintained, where the owner has given a negotiable promissory note for the

debt, which is not tendered to be given up, or actually surrendered, at the hearing... *Id.*

See CONSTRUCTION OF STATUTES: JURISDICTION, 5, 6.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. An unconditional promise, by the indorser of a bill or note, to pay it, or the acknowledgment of his liability, after knowledge of his discharge from his responsibility, by the *laches* of the holder, is an implied waiver of due notice of a demand from the drawee, acceptor or maker. *Thornton v. Wynn*..... *183
2. A mere agreement by the holder of a bill with the drawer, for delay, without any consideration for it, and without any communication with, or assent of the indorser, will not discharge the latter, after he has been fixed in his responsibility, by the refusal of the drawee, and due notice to himself. *McLe-more v. Powell*..... *554
3. Wherever the government of the United States, through its lawfully authorized agents, becomes the holder of a bill of exchange, it is bound to use the same diligence, in order to charge the indorser, as in a transaction between private individuals. *United States v. Barker*..... *559
4. Where the United States were the holders of certain bills of exchange, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, December 7th, 1814, to give notice of non-acceptance to the drawer and indorsers, residing in New York, and notice was given to the indorser, on the 12th of the same month, the mail which left the 8th having arrived at New York at 35 minutes past 10 o'clock, A. M. on the 10th: *Held*, that the indorser

was discharged by the negligence of the holders.....*Id.*

5. So also, where the United States were the holders of other bills, and their agent in New York was directed, by a letter from the secretary of the treasury, dated Washington, May 8th, 1815, to give notice of non-payment to the drawer and indorsers residing in New York, and notice was given to the indorser, on the 12th of the same month, the mail which left Washington on the 8th, having reached New York early on the morning of the 11th: *Held*, that the indorser was discharged by the negligence of the holders.*Id.*

CASES COMMENTED ON, AND CONFIRMED OR OVERRULED.

1. *English v. Darley*, 2 Bos. & Pul. 61; *Natwyn v. St. Quintin*, 1 Id. 652. Discharge of indorser of bill by *laches* of holder. *McLe-more v. Powell*.....*555, 557
2. *Fitzherbert v. Mather*, 1 T. R. 12. Fraud or concealment, to avoid the policy. *General Interest Ins. Co. v. Ruggles*.....*415
3. *Fowle v. Common Council of Alexandria*, 11 Wheat. 320. Demurrer to evidence. *Columbian Ins. Co. v. Callett*.....*389
4. *Head v. Providence Ins. Co.*, 2 Cranch 127. Powers of corporations created by statute. *Bank of United States v. Dandridge*...*68, 98
5. *King v. Inhabitants of Netherseal*, 4 T. R. 258. Conclusiveness of probate of wills. *Armstrong v. Lear*.....*175
6. *McCulloch v. State of Maryland*, 4 Wheat. 316. State power of taxation. *Brown v. State of Maryland*.....*449
7. *Miller v. Nicholls*, 4 Wheat. 311. Appellate jurisdiction of this court from the judgments of the highest state court, in cases arising under the constitution, laws and treaties of the Union. *Williams v. Norris*.....*124
8. *Oliver v. Maryland Ins. Co.*, 7 Cranch 487. Deviation.....*Id.* *390
9. *Osborn v. Bank of the United States*, 9 Wheat. 855. Jurisdiction of the courts of the Union in suits brought by the postmaster-general. *Postmaster-General v. Early*...*149
10. *The Apollon*, 9 Wheat. 362. The Marianna Flora, 11 *Ibid.* 2. Probable cause of seizure. *The Palmyra*.....*17
11. *The Emily and Caroline*, 9 Wheat. 381; *The Plattsburg*, 10 *Id.* 133. Acts constituting a "fitting out," under the slave-trade laws. *United States v. Gooding*.....*473
12. *United States v. Kirkpatrick*, 9 Wheat. 720, and *United States v. Vanzandt*, 11 *Id.* 184. Discharge of surety by *laches*, or varying the terms of the contract. *United States v. Nicholl*.....*509

CHANCERY.

1. Where an equity cause may be finally decided as between the parties litigant, without bringing others before the court, who would, generally speaking, be necessary parties, such parties may be dispensed with, in the circuit court, if its process cannot reach them, or if they are citizens of another state. *Mallow v. Hinde*.....*193
2. But if the rights of those not before the court are inseparably connected with the claim of the parties litigant, so that a final decision cannot be made between them, without affecting the rights of the absent parties, the peculiar constitution of the circuit court forms no ground for dispensing with such parties.....*Id.*
3. But the court may, in its discretion, where the purposes of justice require it, retain jurisdiction of the cause, on an injunction bill, as between the parties regularly before it, until the plaintiffs have had an opportunity of litigating their controversy with the other parties, in a competent tribunal; and if it finally appear by the judgment of such tribunal, that the plaintiffs are equitably entitled to the interest claimed by the other parties, may proceed to a final decree upon the merits.*Id.*
4. A question of fact, upon a bill filed to set aside the sale and assignment of a land-warrant, upon the ground that it was obtained by fraudulent misrepresentation, and taking undue advantage of the party's imbecility of body and mind. *Conner v. Featherstone*...*199
5. Evidence deemed insufficient, and bill dismissed.....*Id.*
6. Rule of equity, that where land is sold as for a certain quantity, a court of equity relieves, if the quantity be defective, only applicable to contracts for the sale of land in a settled country, where the titles are complete, the boundaries determined, and the real quantity known, or capable of being ascertained by the vendor. *Dunlap v. Dunlap*.....*575
7. Relief in equity against a judgment at law, upon certain bonds given for the indemnity of the obligee, as indorser of notes drawn by the obligor, the consideration having failed. *Scott v. Shreeve*.....*605
8. The assignee of such bonds takes them subject to all equities existing between the original parties.....*Id.*

See LEX LOCI, 1.

CONSTITUTIONAL LAW.

1. The authority to decide whether the exigencies contemplated in the constitution of the United States, and the act of congress of 1795, ch. 101, in which the president has

- authority to call forth the militia, "to execute the laws of the Union, suppress insurrections, and repel invasions," have arisen, is exclusively invested in the president, and his decision is conclusive upon all other persons. *Martin v. Mott*. *19
2. Although a militia-man, who refused to obey the orders of the president, calling him into the public service, under the act of 1795, is not, in the sense of the act, "employed in the service of the United States," so as to be subject to the rules and articles of war; yet he is liable to be tried for the offence, under the 5th section of the same act, by a court-martial called under the authority of the United States. *Id*.
3. Where, in an action of replevin, the defendant, being a deputy-marshal of the United States, avowed and justified the taking the plaintiff's goods, by virtue of a warrant issued to the marshal of the district, to collect a fine imposed on him by the judgment of a court-martial, described as a general court-martial composed of officers of the militia of the state of New York, in the service of the United States (*six* in number, and naming them), duly organized and convened, by general orders, issued pursuant to the act of congress of February 28th, 1795, ch. 101, for the trial of those of the militia of the state of New York, ordered into the service of the United States in the third military district, who had refused to rendezvous and enter into the service of the United States, in obedience to the orders of the commander in chief of the state of New York, of the 4th and 29th of August, 1814, issued in compliance with the requisition of the president, made in pursuance of the same act of congress, and alleging that the plaintiff, being a private in the militia, neglected and refused to rendezvous, &c., and was regularly tried by the said general court-martial, and duly convicted of the said delinquency: *Held*, that the avowry was good. *Id*.
4. It is not necessary, in such a case, that it should appear, in point of fact, that the particular exigency actually existed; it is sufficient, that the president has determined it, and all other persons are bound by his decision. *Id*. *32
5. It is unnecessary to set out the orders of the president; it is sufficient to show, that the governor of the state called out the militia upon the requisition of the president. . . . *Id*. *33
6. It is not necessary, that the court-martial for the trial of delinquent, under the act of 1795, should be composed of the precise number of officers required by the rules and articles of war for the composition of general courts-martial in the army. *Id*. *35
7. A court-martial, regularly organized under the act of 1795, ch. 101, does not expire with the termination of a war then existing. *Id*. *37
8. Under the 25th section of the judiciary act of 1789, ch. 20, where the construction of any clause in the constitution, or any statute of the United States, is drawn in question, in any suit in a state court, the decision must be against the title or right set up by the party, under such clause of the constitution or statute, or this court has no appellate jurisdiction in the case; it is not sufficient, that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute. *Williams v. Norris*. *117
9. Where, in such a case, the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision has been in favor of its validity, it is necessary to the exercise of the appellate jurisdiction of this court, that it should distinctly appear, that the title or right of the party depended upon the statute. *Id*.
10. Under the 25th section of the judiciary act of 1789, ch. 20, this court has no appellate jurisdiction from the final judgment of the highest court of a state, in a suit where is drawn in question the construction of a statute of, or a commission held under, the United States, unless some title, right, privilege, or exemption, under such statute, &c., be specially set up by the party, and the decision be against the claim so made by him. *Montgomery v. Hernandez*. *129
11. Where a suit was brought in a state court, upon a marshal's bond, under the act of April 10th, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defence to the action, that the suit ought to have been brought in the name of the United States, and the court decided, that it was well brought by the party injured in his own name: *Held*, that the exemption here set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants, under the act of congress, this court has no authority to re-examine the judgment, so far as respected the construction of that part of the act, which provides, that suits on marshals' bonds "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards." *Id*.
12. The circuit courts of the Union have jurisdiction, under the constitution, and the acts of April 30th, 1810, ch. 262, § 29, and of

- March 3d, 1815, ch. 783, § 4, of suits brought in the name of "the postmaster-general of the United States" on bonds given to the postmaster-general, by a deputy-postmaster, conditioned "to pay all moneys that shall come to his hands for the postage of whatever is by law chargeable with postage, to the postmaster-general of the United States for the time being, deducting only the commission and allowances made by the law for his care, trouble and charges in managing the said office," &c. *Postmaster-General v. Early*. *136
13. The postmaster-general has authority to take such a bond, under the different acts establishing and regulating the post-office department, and particularly under the act of April 30th, 1810, ch. 262, § 29, 42. . . . *Id.*
14. The power of congress "to establish uniform laws on the subject of bankruptcies throughout the United States," does not exclude the right of the states to legislate on the same subject, except when the power is actually exercised by congress, and the state laws conflict with those of congress. *Ogden v. Saunders*. . . . *213
15. A bankrupt or insolvent law of any state, which discharges both the person of the debtor, and his future acquisitions of property, is not a law "impairing the obligation of contracts," so far as respects debts contracted subsequent to the passage of such law. . . . *Id.*
16. But a certificate of discharge, under such a law, cannot be pleaded in bar of an action brought by a citizen of another state, in the courts of the United States, or of any other state than that where the discharge was obtained. . . . *Id.*
17. The states have a right to regulate, or abolish, imprisonment for debt, as a part of the remedy for enforcing the performance of contracts. *Mason v. Haile*. . . . *370
18. Where the condition of a bond for the jail-limits, in Rhode Island, required the party to remain a true prisoner, in the custody of the keeper of the prison, and within the limits of the prison, "until he shall be lawfully discharged, without committing any manner of escape or escapes, during the time of restraint, then this obligation to be void, or else to remain in full force and virtue;" *Held*, that a discharge under the insolvent laws of the state, obtained from the proper court, in pursuance of a resolution of the legislature, and discharging the party from all his debts, &c., "and from all imprisonment, arrest and restraint of his person therefor," was a lawful discharge, and his going at large under it, was no breach of the condition of the bond. . . . *Id.*
19. An act of a state legislature, requiring all importers of foreign goods by the bale or package, &c., and other persons selling the same by wholesale, bale, or package, &c., to take out a license, for which they shall pay \$50, and in case of neglect or refusal to take out such license, subjecting them to certain forfeitures and penalties, is repugnant to that provision of the constitution of the United States, which declares that "no state shall, without the consent of congress, lay any impost, or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and to that which declares that congress shall have power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." *Brown v. State of Maryland*. . . . *419

CONSTRUCTION OF STATUTES.

1. Upon an indictment, under the slave-trade act of the 20th of April 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master, being a part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner. *United States v. Gooding*. . . . *460
2. Upon such an indictment against the owner, charging him with fitting out the ship, with intent to employ her in the illegal voyage, evidence is admissible, that he commanded, authorized, and superintended the fitment, through the instrumentality of his agents, without being personally present. . . . *Id.*
3. It is not essential to constitute a fitting out under the acts of congress, that every equipment necessary for a slave-voyage, or any equipment peculiarly adapted to such a voyage, should be taken on board; it is sufficient, if the vessel is actually fitted out, with intent to be employed in the illegal voyage. *Id.*
4. In such an indictment, it is not necessary to specify the particulars of the fitting out; it is sufficient, to allege the offence in the words of the statute. . . . *Id.*
5. Nor is it necessary that there should be any principal offender to whom the defendant might be aiding and abetting. These terms in the statute do not refer to the relation of principal and accessory in cases of felony; both the actor, and he who aids and abets the act are considered as principals. . . . *Id.*
6. It is necessary, that the indictment should aver, that the vessel was built, fitted out, &c., or caused to sail, or be sent away, within the jurisdiction of the United States. . . . *Id.*
7. An averment that the ship was fitted out,

&c., "with intent that the said vessel should be employed" in the slave-trade, is fatally defective, the words of the statute being, "with intent to employ" the vessel in the slave-trade, and exclusively referring to the intent of the party causing the act.....*Id.*

8. The term "concealed," as used in the 68th section of the duty act of the 2d of March 1799, ch. 128, applies only to articles intended to be secreted and withdrawn from public view, on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive. The forfeiture inflicted by that section, does not extend to a case where, the duties not having been paid or secured, in any other manner than by giving the general bond, and storing the goods, according to the 62d section of the act, the goods were fraudulently removed from the storehouse agreed upon by the collector and the importer, by some person other than the claimants, who were *bond fide* purchasers of the goods, and without their knowledge and consent, to another port, where the goods were found stowed on board the vessel in which they were transported, in the usual manner of stowing such goods, when shipped for transportation. *United States v. 350 Chests of Tea*.....*486
9. Under the 62d section of the act, in the case of teas, the duties are "secured to be paid," in the sense of the law, by the single bond of the importer, accompanied by a deposit of the teas imported, to be kept under the lock and key of the inspector, and subject to the control of the collector and naval officer, until the duties are actually paid, or otherwise secured; and no forfeiture is incurred, under the 68th section, by the removal and concealment of goods on which the duties have been thus "secured to be paid.".....*Id.*
10. To authorize the seizure and bringing to adjudication of teas, under the 43d section of the act, it is necessary, not only that the chests should be unaccompanied by the proper certificates, but also by the marks required to be placed upon them by the 39th section.....*Id.*
11. The lien of the government, for duties, attaches upon the articles, from the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the custom-house officers.....*Id.*
12. *Quære?* Whether such lien can be enforced against a *bond fide* purchaser, without notice that the duties were not paid or secured.....*Id.*

See ADMIRALTY, 3: CONSTITUTIONAL LAW, 1-13:
CORPORATIONS, 1-5; LIMITATION.

CORPORATIONS.

1. Municipal corporations, acting within the limits of the powers conferred upon them by the legislature, in the exercise of a special franchise granted to them, and the performance of a special duty imposed upon them, are responsible for the acts and contracts of their agents, duly appointed and authorized, within the scope of the authority of such agents, in the same manner as other corporations and private individuals are responsible on their promises, express and implied. *Clark v. Corporation of Washington*.....*40
2. Where, by the charter granted by congress to the city of Washington, the corporation was empowered "authorize the drawing of lotteries," for effecting certain improvements in the city, and upon certain terms and conditions: *Held*, that the corporation was liable to the holder of a ticket in such a lottery, for a prize drawn against its number, although the managers appointed by the corporation to superintend such lottery were empowered to sell, and had sold, the entire lottery, to a lottery-dealer, for a gross sum, who was, by his agreement with them, to execute the details of the scheme as to the sale of the tickets, the drawings, and the payment of the prizes.....*Id.*
3. It seems, that the power granted in the charter "to authorize the drawing of lotteries," cannot be exercised so as to discharge the corporation from its liability, either by granting the lottery, or selling the privilege to others, or in any other manner; but the lotteries to be authorized by the corporation must be drawn under its superintendence, for its own account, and on its own responsibility.....*Id.*
4. In a suit brought by the president, directors and company of the Bank of the United States, upon a bond given to the bank to secure the faithful performance of the official duties of one of its cashiers, evidence of the execution of the bond, and of its approval by the board of directors (according to the rules and regulations contained in the charter of the bank), is admissible, notwithstanding there was no record of such approval; and the plaintiff may prove the fact of such approval by the board, by presumptive evidence, in the same manner as such fact might be proved in the case of private persons, not acting as a corporation, or as the agents of a corporation. *Bank of the United States v. Dandridge*.....*64
5. Where, in such a case, the cashier is duly appointed, and permitted to act in his office, for a long time, under the sanction of the directors, it is not necessary that his official

bond should be accepted by the board of directors as satisfactory, according to the terms of the charter, in order to enable him to enter legally on the duties of his office, or make his sureties responsible for the non-performance of those duties. The charter and the by-laws are to be considered, in this respect, as directory to the board, and not as conditions precedent.....*Id*

CONTRACT.

See CONSTITUTIONAL LAW, 14-18: GUARANTEE:
INSURANCE: SALE: SURETY.

DEVISE.

1. E. being seised of lands in the state of New York, devised the same, by his last will and testament, to his son Joseph, in fee, and other lands to his son Medcef, in fee, and added: "It is my will and I do order and appoint, that if either of my said sons should depart this life, without lawful issue, his share or part shall go to the survivor; and in case of both their deaths without lawful issue, then I give all the property to my brother, John E., and my sister, Hannah J., and their heirs." Joseph, one of the sons, died without lawful issue, in 1812, leaving his brother Medcef surviving, who afterwards died without issue: *Held*, that Joseph took an estate in fee, defeasible in the event of his dying without issue in the lifetime of his brother; that the limitation over was good as an executory devise; and on the death of Joseph, vested in his surviving brother Medcef. *Jackson v. Chew*.....*153
2. This court adopts the local law of real property, as ascertained by the decisions of the state courts, whether those decisions are grounded on the construction of the statutes of the state, or form a part of the unwritten law of the state.....*Id*.
3. The court, therefore, considered it unnecessary to examine the question arising upon the above devise, as a question of general law; or to review, and attempt to reconcile, the cases in the English courts, upon similar clauses in wills, the construction of this clause having been long settled by a uniform series of adjudications in New York, and having become a fixed rule of property in that state.....*Id*.
4. A devise in the following words: "I give and devise to my beloved son, E. W. G., two third parts of that my Ferry farm, so called," &c., "to him, the said E. W. G., and to his heirs and assigns for ever, he, my said son E. W. G., paying all my just debts out of said estate; and I do hereby order, and it is my will, that my son E. W. G. shall pay all my just debts, out of the estate herein given to him as aforesaid," creates a charge upon the estate in the hands of the devisee. *Potter v. Gardner**498
5. A *bond fide* purchaser, who pays the purchase-money to a person authorized to sell, is not bound to look to its application, whether in the case of lands charged in the hands of an heir or devisee with the payment of debts, or lands devised to a trustee for the payment of debts.....*Id*.
6. But if the money be misapplied by the devisee or trustee, with the co-operation of the purchaser, he remains liable to the creditors for the sum so misapplied.....*Id*.
7. On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an account of the trust fund, &c., the creditors are not indispensable parties to the suit. The fund may be brought into court, and distributed under its direction, according to the rights of those who may apply for it.....*Id*.
8. An absolute bequest of certain slaves to P. H., is qualified by a subsequent limitation over, that if either of the testator's grandchildren, P. H., or J. D. A., should die without a lawful heir of their bodies, that the other should heir his estate, which converted the previous estate into an estate-tail; and there being no words in the will which restrained the dying without issue to the time of the death of the legatee, the limitation over was held to be a contingency too remote. *Williamson v. Daniel*.....*568
9. The rule of *partus sequitur ventrem* is universally followed, unless there be something in the terms of the instrument which disposes of the mother, separating the issue from her.....*Id*.

DUTIES.

See CONSTRUCTION OF STATUTES, 8-12.

EVIDENCE.

1. Where the testimony of the seizing officer, in a proceeding *in rem* in the admiralty, is admitted in the court below, without objection, it cannot be objected to in this court, on appeal. *The Palmyra*.....*1
2. The rules of evidence as to presumptions in the case of private individuals, are applicable to the acts of corporate bodies. *Bank of United States v. Dandridge*.....*64
3. Cases where corporate acts have been the subject of presumptions.....*Id*.*71
4. Distinction, as to evidence between an act prescribed by law to be done, as a condition

- precedent, as a record, or only directory to the officers who are to make the record. *Id.* *81
5. The exclusive jurisdiction over wills of personality belongs to the appropriate court having the peculiar cognisance of testamentary matters; and before any testamentary paper, foreign or domestic, can be admitted in evidence, it must receive probate in such court. *Armstrong v. Lear*. *169
6. Upon an indictment under the slave-trade act, of the 20th of April 1818, ch. 373, against the owner of the ship, testimony of the declarations of the master, being a part of the *res gestæ*, connected with acts in furtherance of the voyage, and within the scope of his authority, as agent of the owner, in the conduct of the guilty enterprise, is admissible against the owner. *United States v. Gooding*. *460
7. Upon such an indictment against the owner, charging him with fitting out the ship, with intent to employ her in the illegal voyage, evidence is admissible, that he commanded, authorized and superintended the fitment, through the instrumentality of his agents, without being personally present. *Id.*
8. The *onus probandi*, in criminal cases, lies upon the prosecution, unless there be some positive provision by statute to the contrary. *Id.*

See GUARANTEE, 2.

GUARANTEE.

1. The following letter of guaranty, "Baltimore, 17th Nov. 1803. Capt. Charles Drummond, Dear Sir—My son William having mentioned to me, that, in consequence of your esteem and friendship for him, you had caused and placed property of yours, and your brother's, in his hands for sale, and that it is probable, from time to time, you may have considerable transactions together; on my part, I think proper to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable for the faithful discharge of all his engagements to you, both now and in future. (Signed) Geo. Prestman," will extend to a partnership debt incurred by William P. to Charles Drummond and Richard his brother, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of the said Charles was interested therein. *Drummond v. Prestman*. *515
2. In such a case, the record of a judgment confessed by the principal, William P., to Richard D., as surviving partner of Charles and Richard D., for the amount of the debt

due by William P. to the partnership firm, was held to be admissible in evidence, *inter alia*, to charge the guarantor, George P., under his letter of guaranty. *Id.*

See SURETY.

INSURANCE.

1. A policy for \$10,000, upon a voyage "at and from Alexandria to St. Thomas, and two other ports in the West Indies, and back to her port of discharge in the United States, upon all lawful goods and merchandise, laden or to be laden on board the ship, &c., beginning the adventure upon the said goods and merchandise, from the lading at Alexandria, and continuing the same until the said goods and merchandise shall be safely landed at St. Thomas, &c., and the United States aforesaid," is an insurance upon every successive cargo taken on board, in the course of the voyage out and home, so as to cover the risk of a return-cargo, the proceeds of the sales of the outward cargo. *Columbian Ins. Co. v. Catlett*. *882
2. Such a policy covers an insurance of \$10,000, during the whole voyage out and home, so long as the assured has that amount of property on board, without regard to the fact of a portion of the original cargo having been safely landed at an intermediate port, before the loss. *Id.*
3. Where the cargo, in the course of the outward voyage, and before its termination, was permanently separated from the ship, by the total wreck of the latter; and the cargo being perishable in its nature, though not injured to one-half its value, it became necessary to sell it, the further prosecution of the voyage with the same ship or cargo became impracticable; *Held*, that this was a technical total loss, on account of the breaking up of the voyage. *Id.*
4. Whether a delay at a particular port constitutes a deviation, depends upon the usage of trade with reference to the object of selling the cargo. Where different ports are to be visited for this purpose, the owner has a right to limit the price at which the master may sell, to a reasonable extent; and a delay at a particular port, if *bond fide* made for that purpose, does not constitute a deviation, though occasioned by this restriction. . . . *Id.*
5. Freight is not a charge upon the salvage of the cargo, in the hands of the underwriters, whether the assured is owner of the ship or not. *Id.*
6. Where an insurance was effected, after a loss had happened, though unknown to the assured, the master having omitted to com-

municate information to the owner, and having expressed his intention not to write to the owner, and taken measures to prevent the fact of the loss being known, for the avowed purpose of enabling the owner to effect insurance, in consequence of which, information of the loss had not reached the parties, at the time the policy was underwritten: *Held*, that the owner having acted with good faith, was not precluded from a recovery upon the policy, on account of the fraudulent misconduct of the master. *General Interest Ins. Co. v. Ruggles*.....*408

INDICTMENT.

See CONSTRUCTION OF STATUTES, 1-7: PRACTICE, 11-13.

JURISDICTION.

1. Cases in which the appellate jurisdiction of this court may be exercised upon the final judgments or decrees of the highest court of law or equity of a state, under the 25th section of the judiciary act of 1789, ch. 20. *Williams v. Norris*, *117; *Montgomery v. Hernandez*.....*129
2. Jurisdiction of the circuit courts of suits brought in the name of the postmaster-general of the United States, on bonds given to that officer by his deputies. *Postmaster-General v. Early*.....*136
3. Manner in which the jurisdiction of the circuit courts, in equity cases, is to be exercised, where, from the constitution of the court, persons who ought regularly to be made parties, cannot sue or be sued in those courts. *Mallow v. Hinde*.....*193
4. Jurisdiction of a court of equity over legacies cannot be exercised, until the will has received probate in the proper court having the peculiar jurisdiction over testamentary matters. *Armstrong v. Lear*.....*169
6. The lien for duties, under the impost laws, cannot, in any case, be enforced by a libel of information in the admiralty; the revenue jurisdiction of the district courts, proceeding *in rem*, only extending to cases of seizures for forfeitures under laws of impost, navigation or trade of the United States. *United States v. 350 Chests of Tea*.....*486
6. But a suit at common law may be instituted in the district or circuit courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same.....*Id.*
7. Jurisdiction of the admiralty, in suits *in personam*. *Ramsay v. Allegre*.....*Id.*

See LEX LOCI.

LEX LOCI.

1. A testamentary paper, executed in a foreign country, even if executed so as to give it the effect of a last will and testament by the foreign law, cannot be made the foundation of a suit for a legacy, in the courts of this country, until it has received probate here, in the court having the peculiar jurisdiction of the probate of wills and other testamentary matters. *Armstrong v. Lear*.....*169

LIEN.

1. The lien of a judgment on the lands of the debtor, created by statute, and limited to a certain period of time, is unaffected by the circumstance of the plaintiff not proceeding upon it (during that period), until a subsequent lien has been obtained and carried into execution. *Rankin v. Scott*.....*177
2. Universal principle, that a prior lien is entitled to prior satisfaction out of the thing it binds, unless the lien be intrinsically defective, or is displaced by some act of the party holding it, which shall postpone him at law or in equity.....*Id.*
3. Mere delay in proceeding to execution is not such an act.....*Id.*
4. Distinction created by statute, as to executions against personal chattels, and reasons on which it is founded.....*Id.*

See CONSTRUCTION OF STATUTES, 11, 12.

LIMITATION.

1. Under the fourth section of the act of April 10th, 1806, ch. 21, although the condition of a marshal's bond is broken, by his neglecting to bring money into court, directed to be so brought in or to pay it over to the party, yet, if the proceedings be suspended by appeal, so that the party injured has no right to demand the money, or to sue for the recovery of it, his right of action has not accrued, so as to bar it, if not commenced within six years. *Montgomery v. Hernandez*.....*129
2. An acknowledgment of the debt, by the personal representatives of the original debtor, deceased, will not take the case out of the statute of limitations. *Thompson v. Peter*.....*565

LOCAL LAW.

1. Under the act of North Carolina of 1782, for the relief of the officers and soldiers in the

continental line, &c., the commissioners having determined, that the French lick was within the reservations of the statute, as public property, and having surveyed the said reservation in 1784, the same was protected from individual survey and location, although it exceeded the quantity of 640 acres. *Edwards's Lessee v. Darby*. . . . *206

2. The French lick reservation has not been since subjected to appropriation, by entry and survey, as vacant land, by any subsequent statute of North Carolina or Tennessee. . . *Id.*
3. This court adopts the local law of real property, as ascertained by the decisions of the state courts; whether those decisions are grounded on the interpretation of statutes, or on unwritten law which has become a fixed rule of property in the state. *Jackson v. Chew*. *153
4. Cases reviewed, in which this court has recognised the state decisions as conclusive of questions of local law. *Id.* *168
5. A question in equity as to the title to a lot of land, in the town of Lexington, Kentucky, reserved as public property, and claimed as having been appropriated by the plaintiff's ancestor. Bill dismissed, under the circumstances of the case. *McConnell v. Town of Lexington*. *582
6. The act of May 8th, 1820, ch. 595, "for the relief of the legal representatives of Henry Willis," did not authorize them to enter lands within the tract surveyed and laid off for the town of Claiborne, in the state of Alabama. *Chotard v. Pope*. *587
7. On the construction of the statute of Virginia, emancipating slaves brought into that state in 1792, unless the owner removing with them should take a certain oath, within sixty days after such removal, the fact of the oath having been taken, may be presumed, by the lapse of twenty years, accompanied with possession. *Mason v. Matilda*. *590
8. Under the statute of Virginia, giving to debts due on protested bills of exchange, the rank of judgment-debts, a joint indorser, who has paid more than his proportion of the debt, has a right to satisfaction out of the assets of his co-indorser, with the priority of a judgment-creditor. *Lidderdale v. Robinson*. *595
9. A concession of lands, made by the Spanish authorities at Mobile, in the year 1806, cannot be given in evidence, to support an ejectment, in the courts of the United States, the same not having been recorded, or passed upon by the board of commissioners, or register of the land-office, established by the acts of congress, relating to land titles in that country. *De la Croix v. Chamberlain*. *599

See LIEN : TREATY, 1-3

PAYMENT.

1. Application of payments. *McGill v. Bank of the United States*. *611

POWER.

See DEVISE, 4-6

PRACTICE.

1. A stipulation taken in an admiralty suit, is a substitute for the thing itself, and the stipulators are amenable to the exercise of all those powers which the court could enforce, if the thing itself were still in its custody. *The Palmyra*. *1, 10
2. In every case of a proceeding for condemnation, upon captures made by the public ships of war of the United States, whether as of prize strictly *jure belli*, or under statutes of congress in the nature of prize ordinances, the proceedings are in the name of the United States, who prosecute for themselves as well as the captors, and the latter cannot control the proceedings. *Id.* *11
3. The strictness of technical common law forms is not indispensable in proceedings *in rem* in the admiralty. In general, in a libel for a forfeiture, it is sufficient to allege the offence in the words of the statute. *Id.* *13
4. A previous prosecution *in personam* against the offenders, is not necessary, under the piracy act, to found the proceeding *in rem* against the captured property. *Id.* *14
5. Where an objection to the testimony of the seizing officer is waived, in the court below, an objection to it, on the ground of interest, cannot be made on appeal. *Id.* *18
6. Where the burden of proof of certain specific defences set up by the defendant is on him, and the evidence presents contested facts, an absolute direction from the court, that the matters produced and read in evidence on the part of the defendant, were sufficient in law to maintain the issue on his part, and that the jury ought to render their verdict in favor of the defendant, is erroneous; and a judgment rendered upon a verdict purporting to have been given under such a charge, will be reversed, although the record was made up, as upon a bill of exceptions, taken at a trial before the jury, upon the matters in issue, no such trial ever having taken place, and the case having assumed that shape, by the agreement of the parties, in order to take the opinion of the court upon certain questions of law. *United States v. Tillotson*. *170
7. This court cannot take jurisdiction of a question, on which the opinions of the judges

- of the circuit court are opposed, where the division of opinion arises upon some proceeding subsequent to the decision of the cause in that court. *Devereaux v. Marr*. *212
8. The opinion of the court, or the reasons given for its judgment (unless in the case of instructions to the jury, spread upon the record by a bill of exceptions), form no part of the record, within the meaning of the above 25th section. Nor are they made a part of the record, by the local law of a state, requiring the judges to file their opinions in writing, among the papers in the cause. *Williams v. Norris*. *117
9. No orders in the state court, after the removal of the record into this court (not made by way of amendment, but introducing new matter), can be brought into the record here. The cause must be heard and determined upon the record, as it stood when removed. *Id.*
10. The judgment of the highest court of law of a state, deciding in favor of the validity of a statute of a state, drawn in question on the ground of its being repugnant to the constitution of the United States, is not a final judgment, within the 25th section of the judiciary act of 1789, ch. 20, if the suit has been remanded to the inferior state court where it originated, for further proceedings according to law. *Winn v. Jackson*. . . *135
11. Objections to the form and sufficiency of an indictment may, in the discretion of the court, be discussed and decided, during the trial before the jury; but, generally speaking, they ought regularly to be considered only upon a motion to quash the indictment, or in arrest of judgment, or on demurrer. *United States v. Gooding*. *460
12. In criminal proceedings, the *onus probandi* rests upon the prosecutor, unless a different provision is expressly made by statute. . . . *Id.*
13. Where two or more persons are jointly charged, in the same indictment, with a capital offence, they have not a right, by law, to be tried separately, without the consent of the prosecutor; but such separate trial is a matter to be allowed in the discretion of the court. *United States v. Marchant*. . *480
14. No judgment or decree can be rendered directly against the United States, for costs and expenses. *The Antelope*. *546
15. The fees and compensation of the marshal, where the government is a party to the suit, and his fees or compensation are chargeable to the United States, are to be paid out of the treasury, upon a certificate of the amount, to be made by the court, or one of the judges. *Id.*
- 16 An injunction out of the circuit court, to stay proceedings on a judgment at law in that court, may issue, notwithstanding the pendency of a writ of error on the judgment in this court. *Parker v. Judges of the Circuit Court of Maryland*. *561
17. An injunction issued by order of the district judge, expires at the next term of the court, unless continued by the court; but the denial of several successive motions to dissolve the injunction, may, under circumstances, be considered as equivalent to an order for renewing it. *Id.*
18. The bail is fixed by the death of the principal after the return of the *ca. sa.*, and before the return of the *scire facias*; and the bail is not entitled to an *exoneretur* in such a case. *Davidson v. Taylor*. *604

See ADMIRALTY: DEVISE, 7.

SALE.

1. Upon a sale, with a warranty of soundness, or where, by the special terms of the contract, the vendee is at liberty to return the article sold, an offer to return it, is equivalent to an offer accepted by the vendor, and the contract being thereby rescinded, it is a defence to an action for the purchase-money, brought by the vendor, and will entitle the vendee to recover it back, if it has been paid. *Thornton v. Wynn*. *183
2. So, if the sale be absolute, and the vendor afterwards consent, unconditionally, to take back the article, the consequences are the same. *Id.*
3. But if the sale be absolute, and there be no subsequent consent to take back the article, the contract remains open, and the vendee must resort to his action upon the warranty, unless it be proved, that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it, within a reasonable time. *Id.*
4. Question as to the sufficiency of a notice of sale of real property, under a deed of trust. *Newman v. Jackson*. *571
5. No particular form of such a notice is prescribed by law; it is sufficient, if the description of the land is reasonably certain, so as to inform the public of the property to be sold. *Id.*

STATUTES OF MISSOURI.

See LIEN.

STATUTES OF NEW YORK.

See LOCAL LAW, 3, 4: DEVISE, 1-8.

STATUTES OF NORTH CAROLINA.

See LOCAL LAW, 1, 2.

STATUTES OF VIRGINIA.

See LOCAL LAW, 8, 9.

SURETY.

1. The act of May 15th, 1820, ch. 625, § 2, which requires new sureties to be given by certain public officers, on or before the 30th of September 1820, does not expressly, or by implication, discharge the former sureties from their liability. *United States v. Nicholl* *505
2. The sureties are not responsible for moneys placed by the government in the hands of the principal, after the legal termination of his office; but they are responsible for moneys which came into his hands, while in office, and which he subsequently failed to account for, and pay over. *Id.*
3. In general, *laches* is not imputable to the government: But *quære?* whether, in case there is an express agreement between the government and the principal, giving time to the latter, and suspending the right of the former to sue, the sureties are not discharged, as in a similar case between private individuals? *Id.*
4. A mere proposition to give time, and suspend the right to sue, upon certain conditions and contingencies, which are not proved to have been complied with, or to have happened, will not discharge the sureties. *Id.*
5. The cases of *United States v. Kirkpatrick*, 9 Wheat. 920, and *United States v. Vanzandt*, 11 *Id.* 184, applied to the determination of the above case. *Id.*
6. A. W. McG. gave a bond to the Bank of the United States, with sureties, conditioned for the faithful performance the duties of the office of cashier of one of the offices of discount and deposit, during the term he should hold that office; the president and directors of the bank having discovered that he had been guilty of a gross breach of trust, passed a resolution, at Philadelphia, on the 27th of October 1820, "that A. W. McG., cashier, &c., be and he is hereby supended from office, till the further pleasure of the board be known;" and another resolution, "that the president of the office at Middletown, be authorized and requested to receive into his care, from A. W. McG., the cashier, the cash, bills discounted, books, papers and other property in said office, and to take such measures for having the duties of cashier discharged, as he

may deem expedient;" these resolutions were immediately transmitted by mail to the president of the office, at Middletown, who received them on the morning of Sunday, the 29th of the same month, but did not communicate them to the cashier, nor carry them into effect, until the afternoon of the 30th, between four and five o'clock: *Held*, that the sureties continued liable for his defaults, until that time. *McGill v. Bank of United States*. *511

7. On such a bond, the recovery against the sureties is limited to the penalty. *Id.*
8. Partial payments having been made by the sureties (subject to all questions), the application of these payments was made by deducting them from the penalty of the bond, and allowing interest on the balance thus resulting, from the commencement of the suit, there having been no previous demand of the penalty, nor acknowledgment that the whole was due. *Id.*
9. But interest was refused to the sureties on the payments. *Id.*
10. An agreement between the creditor and principal debtor for delay, or otherwise changing the nature of the contract, to the prejudice of the surety, in order to discharge the latter, must be an agreement having a sufficient consideration, and binding in law upon the parties. *McLemore v. Powell* *555

See GUARANTEE.

TREATY.

1. A grant made by the British governor of Florida, after the declaration of independence, within the territory lying between the Mississippi and the Chatahouchee rivers, and between the 31st degree of north latitude, and a line drawn from the mouth of the Yazoo river, due east, to the Chatahouchee, is invalid, as the foundation of title, in the courts of the United States. *Harcourt v. Gaillard*. *523
2. Spanish grants, made after the treaty of peace of 1782 between the United States and Great Britain, within the territory east of the river Mississippi, and north of a line drawn from that river at the 31st degree of north latitude, east, to the middle of the river Apalachicola, have no intrinsic validity, and the holders must depend for their titles exclusively on the laws of the United States. *Henderson v. Poindexter's Lessee*. *531
3. No Spanish grant, made while the country was wrongfully occupied by Spain, can be valid, unless it was confirmed by the compact between the United States and the state of Georgia, of the 24th of April 1802, or has been laid before the board of commissioners

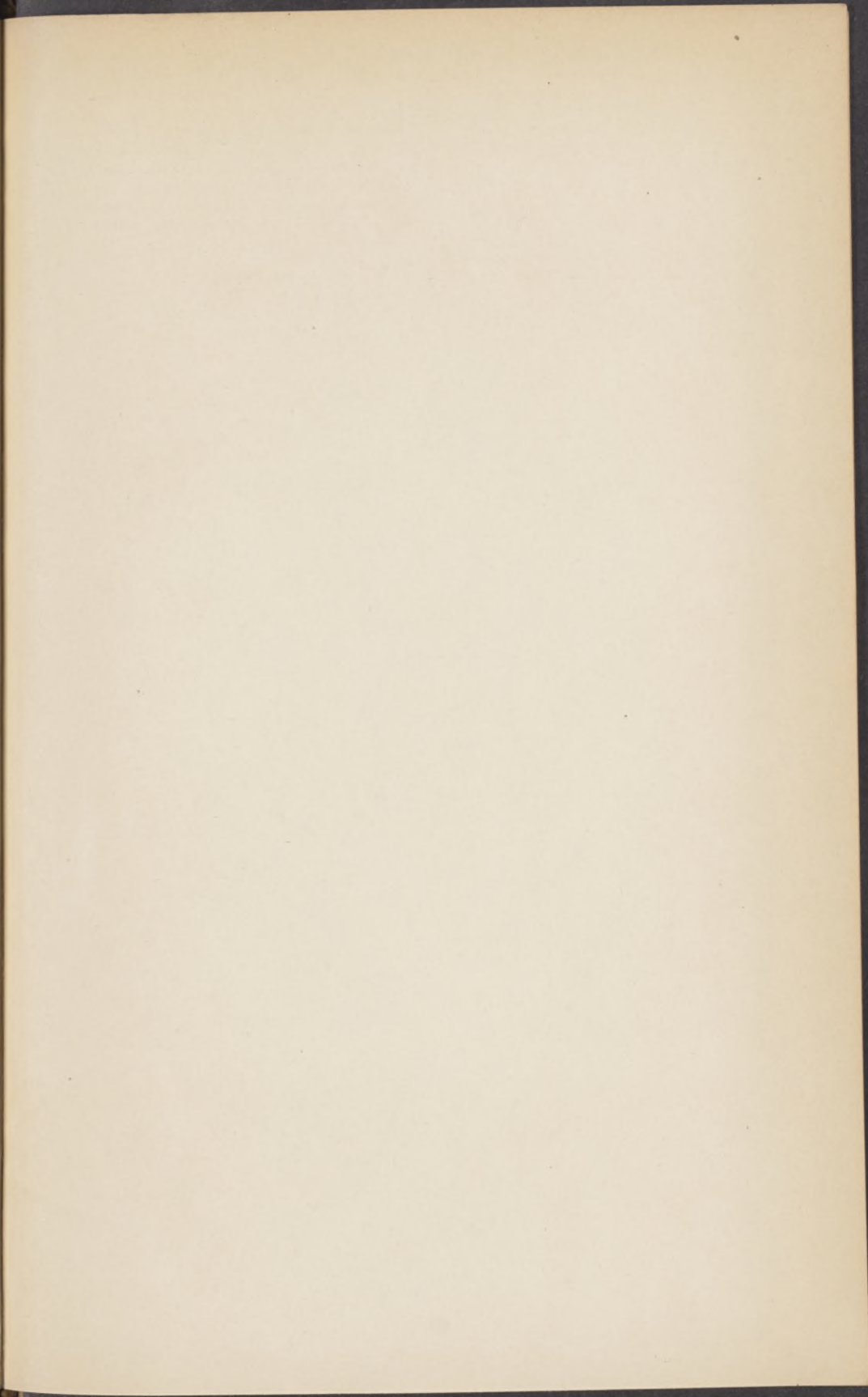
constituted by the act of congress of the 3d of March, 1803, ch. 340, and of March, 27th, 1804, ch. 414.....*Id.*

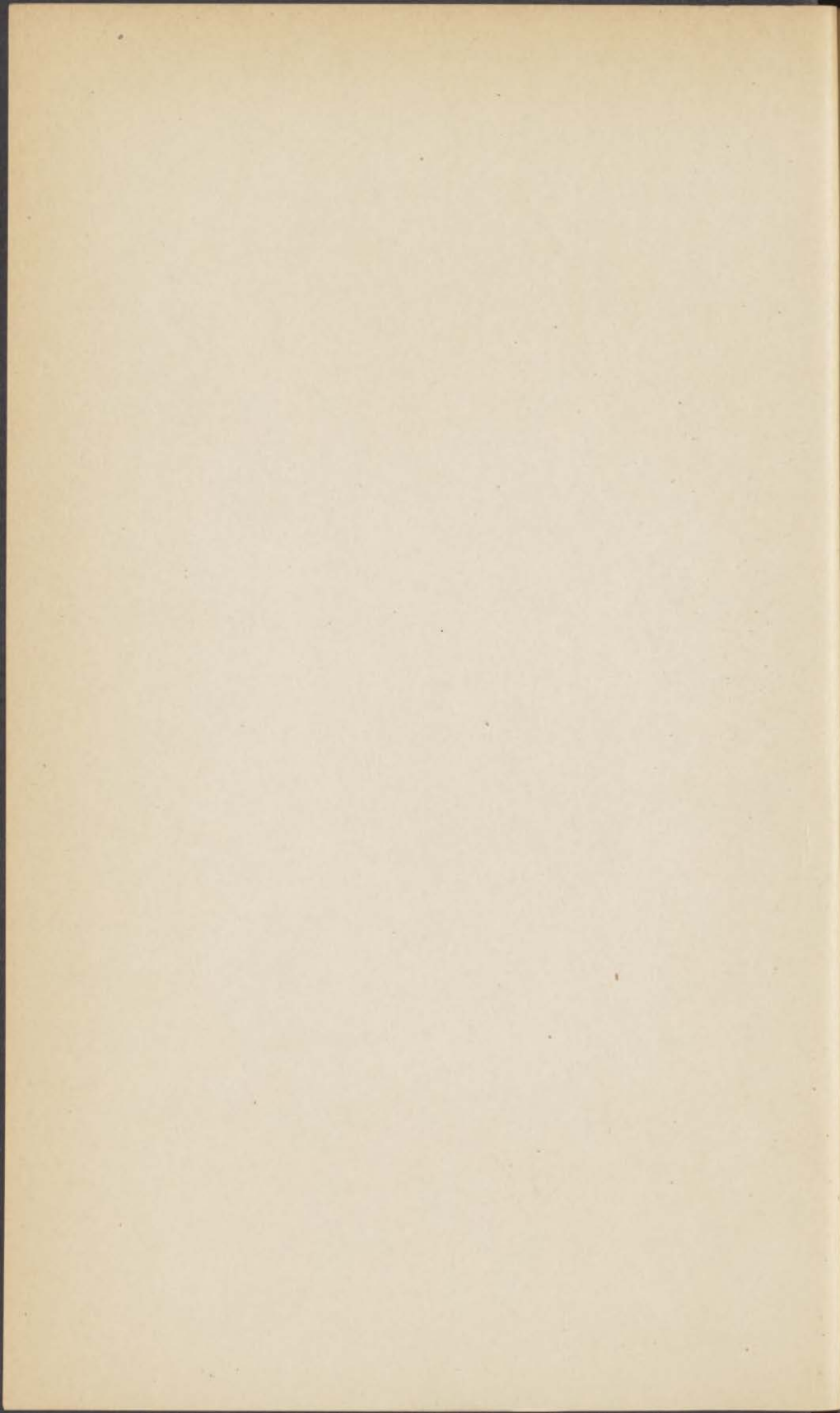
WILL

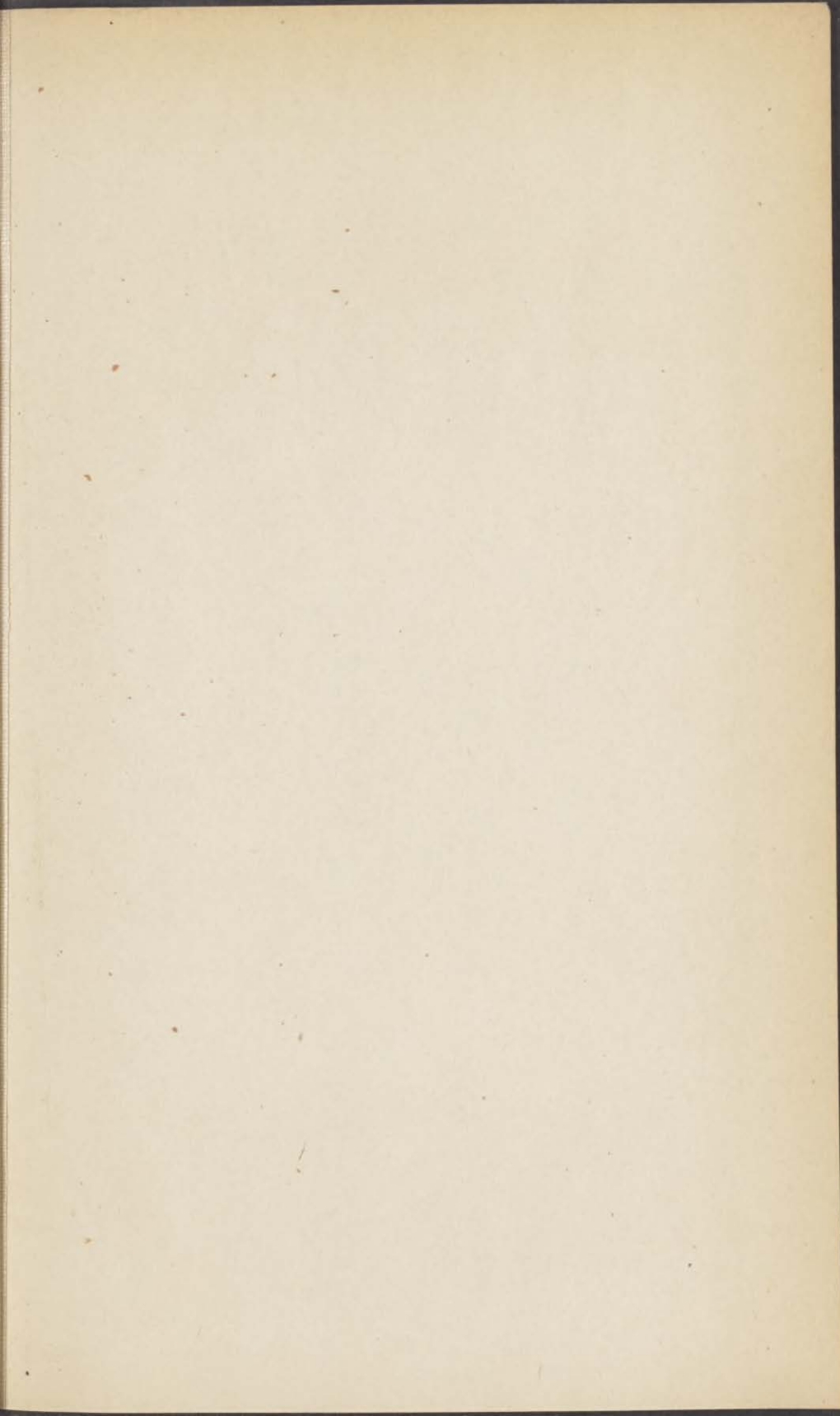
1. A testamentary paper, executed in a foreign country, so as to give it the effect of a last
418

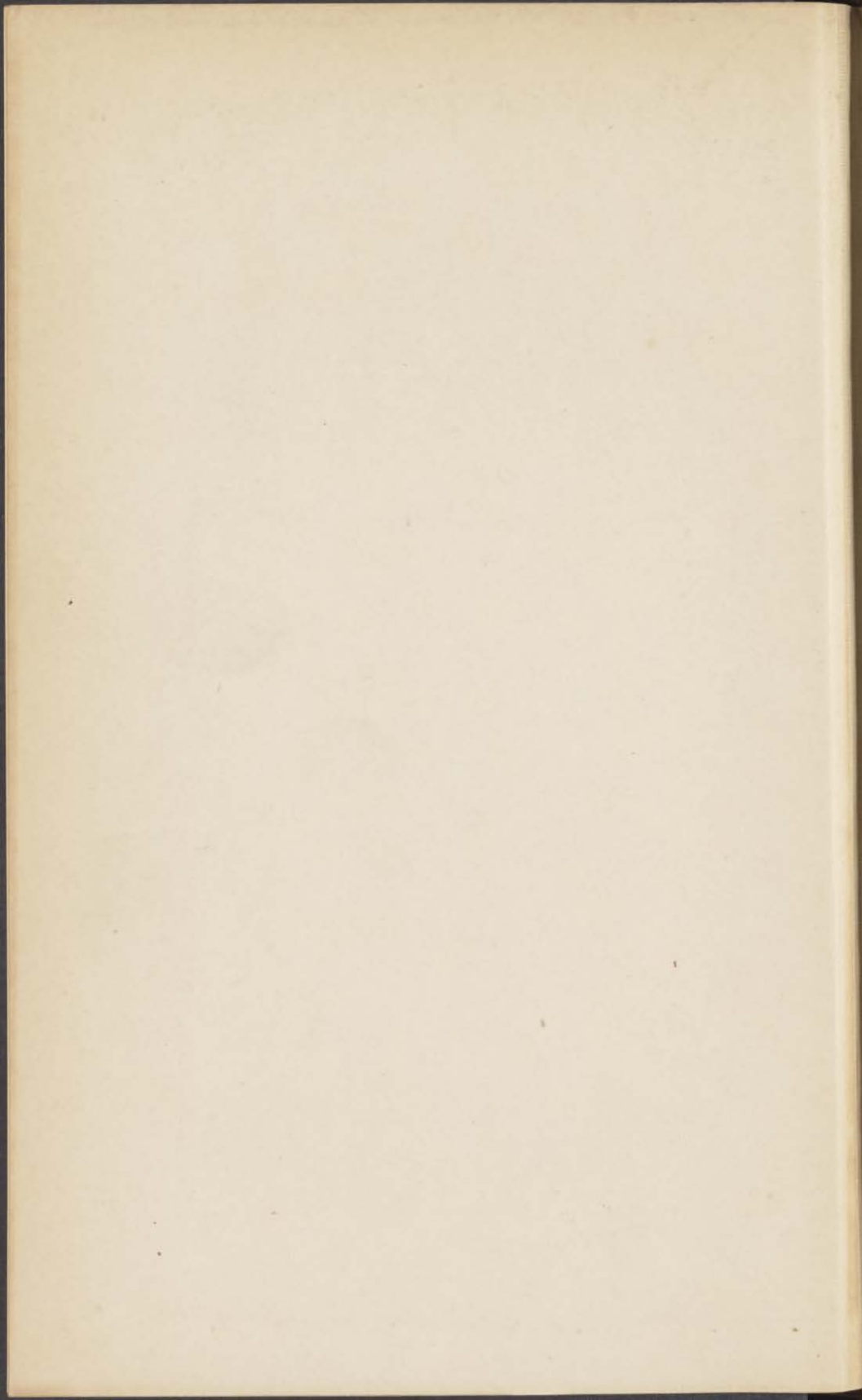
will and testament, by the foreign law, cannot be made the foundation of a suit for a legacy, in a court of equity in this country, until it has received probate here, in the proper court having the peculiar jurisdiction of the probate of wills, and other testamentary matters.
Armstrong v. Lear.....*169

See DEVISE.









25 U. S.

Set 1

