of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict, as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the court to reach the desired conclusion. There is not sufficient matter upon which we could positively say, that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the circuit court must be reversed, and the cause remanded, with directions to award a *venire facias de novo*.

This case came on, &c.: On consideration whereof, it is considered by this court, that there is error in the opinion of the circuit court, given to the *192] jury upon the prayer of the *defendants' counsel—that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant; that opinion having withdrawn from the proper consideration of the jury, matters of fact in controversy between the parties. It is, therefore, further considered and adjudged, that the judgment of the said circuit court, in this case, be and the same is hereby reversed; and that the cause be remanded to the said circuit court, with directions to award a *venire facias de novo*.

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*193] *Cornelius Comegys and Andrew Pettit, Plaintiffs in error, *v.* Ambrose Vasse, Defendant in error.

Spanish treaty.—Assignable claims.—Effect of abandonment to underwriters.

The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine and decide upon the amount and validity of asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final; and is not re-examinable; the parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction; a rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow, that this authority extends to adjust all conflicting rights, of different citizens, to the the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he be an American citizen. p. 212.

After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands, and those of others, are left to the ordinary course of judicial proceedings, in the established courts of justice. p. 212.

In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*—possibilities, coupled with an interest and claim, growing out of, and adhering to property—may pass by assignment.[1] p. 213.

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish; the underwriter then stands in the place of the assured, and becomes legally entitled to all that can be recovered from destruction. p. 214.

It is clear, that the right to compensation for damages and injuries, to which citizens of the

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[1] Erwin *v.* United States, 97 U. S. 396. A right of action for a tort is not assignable, by operation of law, or otherwise. Ware *v.* Brown, 2 Bond 267.

United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation, passed, by abandonment, to the underwriters upon property, which had been seized or captured. p. 215.

The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes, by cession, to the use of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded.[1] p. 215.

It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice; claims and debts due by a sovereign, are not commonly capable of being so enforced; but it does not follow, that because an unjust sentence cannot be reversed, the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration. p. 216.

The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity; it was demanded by our government as matter of right, and as such was granted by Spain. p. 217.

The right to compensation from Spain, held under abandonment made to *underwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States, passed to the assignees of a bankrupt, who held such rights, by the provisions of the bankrupt law of the United States, of the 4th April 1800.[2] p. 219. [*194

Vasse *v.* Comegys, 4 W. C. C. 570, reversed.

ERROR to the Circuit Court of Pennsylvania. The defendant in error instituted his suit against the plaintiffs here, who were the surviving assignees, under a commission of bankruptcy, issued against him, under the act of congress of the United States, for establishing a uniform system of bankruptcy throughout the United States, passed April 4th, 1800.

In the circuit court, a judgment was entered in favor of the defendant in error, the parties having agreed upon a case, which, if required by either, might be turned into a special verdict, subject to the opinion of the circuit court.

The case was: that Ambrose Vasse, previously to the year 1802, was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into ports of Spain and her dependencies; and abandonments were made thereof to the said Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. The said Ambrose Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of congress of the United States, for establishing an uniform system of bankruptcy throughout the United States. An assignment was made accordingly, to Jacob Shoemaker, since deceased, and the defendants, Cornelius Comegys and Andrew Pettit, who proceeded to take upon themselves the duties of assignees, and had continued to discharge the same. The certificate of discharge of the said Ambrose Vasse, bore date the 28th day of May 1802.

In the year 1824, the sum of $8846.14, was received by the defendants, from the treasury of the United States; being the sum awarded by the commissioners sitting at Washington, under the treaty of amity, settlement and limits, between the United States of America, and his Catholic Majesty,

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[1] S. P. Hunter *v.* United States, 5 Pet. 173. And see, The Potomac, 105 U. S. 624, and cases there cited.

[2] S. P. Phelps *v.* McDonald, 99 U. S. 298, in which the court declare the opinion of Judge STORY in Comegys *v.* Vasse, to be exhaustive and conclusive.

the King of Spain, dated the 22d day of February 1819, on account of the captures and losses aforesaid. On the 9th day of December 1823, the said Ambrose Vasse filed a bill in equity in the circuit court of the district of Columbia, claiming the sum awarded by the commissioners, and a settlement of the accounts of the assignees. This bill was intended to operate upon the funds which were expected to come into the hands of the agent of the assignees, prosecuting for them the claim before the commissioners; *195] but it was not *proceeded on; the said funds having been received by another person. The said Ambrose Vasse made a return of his effects to the commissioners of bankruptcy. The claim upon Spain for spoliations was not in the schedule; but claims upon France and Great Britain were.

The plaintiffs in error made the following points: 1. That the decree of the commissioners, under the Florida treaty, awarding the fund to the assignees of Ambrose Vasse, is conclusive in their favor, and against him. 2. That if the claim on the Spanish government was not legally the subject of assignment, and therefore, did not pass under the bankrupt proceedings, to the assignees, it could not pass under the abandonments made to Ambrose Vasse; who claims the fund, not as the original proprietor, but through cessions or assignments of the property made to him as an underwriter. 3. That this claim, as an incident to the property captured and carried into Spanish ports, did pass under the assignment of the bankrupt, and became vested in his assignees.

The case was argued by *J. R. Ingersoll* and *D. B. Ogden*, for the plaintiffs in error; and by *Lee* and *C. J. Ingersoll*, for the defendant.

For the *plaintiffs* in error, it was contended: I. That the commissioners under the Florida treaty had fixed the relative rights of the parties, by awarding the fund to the assignees, in the face of a claim presented by the bankrupt himself. In deciding thus, they decided, in effect, on the validity and operation of the assignment. The proceeding was not merely *ex parte*, but afforded to the bankrupt an opportunity to exhibit his pretensions; of which he had not failed to avail himself. His act of interposition was manifested by a bill in equity, filed in the circuit court of the district of Columbia, for the county of Washington, in December 1823; in which Ambrose Vasse, the complainant, states the facts now before this court, and attempts to reach the fund, not (as at present) from the assignees, but against the assignees; and to wrest it, not from the commissioners, but from the treasurer of the United States, who acted under their authority and decrees; and was, accordingly, made a party to the bill. If the commissioners have really decided the point, and, in so doing, they have not exceeded their jurisdiction, no appeal lies to this court. They acted under a treaty, which is the supreme law of the land; and no other tribunal, however exalted, can reverse or interfere with their decrees. The bill in equity admits, that Ambrose Vasse never filed the original claim. Hence, it appears, that all *196] the documents in support of it, *were in the possession of his assignees; and they enjoyed this evidence of ownership, at least. It is not, however, necessary, that the award of the commissioners should be conclusive; as the case of the plaintiffs in error is sufficiently strong upon the other points, which have been decided in the court below.

II. The argument of the defendant in error, is absolute and unqualified—that the claim which has yielded the fund in controversy, was of a description which could not be assigned. That the right to receive, did not exist in himself; and therefore, he could not transfer it to others; that he had nothing to assign; that his hopes rested on the will of an unaccountable, because sovereign power, who might, or might not, realize them; that no legal remedy could be pursued; and without some species of remedy, there can exist no right; that a claim, to be assignable, or even to have existence, means something not ideal, or merely precarious, but substantial, and susceptible of enforcement—not merely to be thought of, but pursued; and, by possibility, to be gained. Admitting, for a moment, both the position and the inference, the shadowy character of the claim, and the impossibility of transferring its ownership, and where does the defendant in error stand? His right to sue and recover, either from the commissioners, or his assignees, is derived through exactly the same sort of channel, as that of his antagonists. The only difference is, that he claims through a limited and partial assignment; and they through a general and all-comprehensive one. He was not the original owner. He was an underwriter, merely, on the property lost; and when he paid the losses, he received the assignments, without an idea, that at a distant day, this would be the shape in which they would develop themselves. He made his assignment, when everything was entirely unchanged. If all the representative interests are to be disregarded, and the political bounty is to inure to the first proprietor, then we are accountable, not to Ambrose Vasse, the underwriter, but to the original proprietors themselves. If the opposite argument be sound, neither of these parties is entitled to the money; and then, *potior est conditio defendentis.*

Nor does the defendant in error injudiciously concede anything, in the position which he assumes. He has no standing without it. Whatever he had, in the shape of property, passed by the bankruptcy. His only refuge is in the suggestion, that there was nothing, in the shape of property, to pass; and then, he is unhappily landed here—that being himself a claimant of it, as property, because under an assignment, the same argument applies with equal force to himself: and he is exactly as badly situated, as his opponents.

*The bankrupt thought the claim passed by the assignment, and intended that it should; for claims of a similar character, upon the [*197
French and British governments are stated among his effects, in the schedule laid before the commissioners. This, upon the government of Spain, was omitted; probably, because it was regarded as desperate, not being then included in any treaty.

III. There was a clear property to be assigned; and it was assigned by the original owners to the underwriter, and by the underwriter to his assignees.

1. Independently of all questions growing out of mere bankruptcy, this was, in its nature, peculiarly the subject of assignment. In matters of insurance, there was a time, when nearly every transfer consisted of a claim on a foreign government. No neutral vessel could, with safety, navigate the ocean. The attempt led, in instances innumerable, to capture and condemnation. Insurances were resorted to, at any rate of premium, however extravagant; and the little chance of hope of redress or indemnity, to which

the underwriters succeeded, was to be gathered from the sense of justice of these ruthless belligerents. Hence, transfers of these claims were of perpetual occurrence. Not only were the transfers made, and deemed worthy of acceptance; but our American courts of justice would permit no recovery from the insurers, until a cession had been actually made. *Brown* v. *Phœnix Ins. Co.*, 4 Binn. 45; *Rhinelander* v. *Penn. Ins. Co.*, 4 Cranch 42. Not only this; the time when abandonment cannot be made, is after restitution; when the opposite argument supposes the right only begins. *Adams* v. *Delaware Ins. Co.*, 3 Binn. 287; *Marshall* v. *Delaware Ins. Co.*, 4 Cranch 202. The claims on Denmark, France, England, Naples and Holland, comprise, agreeably to a sober estimate, $17,000,00 of American capital, locked up in the coffers of foreign potentates; and, long since, for the most part, reimbursed to the original proprietors, and resting on the insurance offices, to an immense extent. Why is it, that a policy always stipulates, that the insured shall sue, labor, &c., after capture, and even after condemnation; if the one party be requiring, and the other undertaking a wild, preposterous and despairing pursuit? It is the *spes recuperandi*—the incident to the property, or substitute for it, which is transferred, in whatever shape it may, at a distant day, present itself; although the transfer may be in form of the property itself. A thing need not be in possession, to be transferred. It may be on the other side of the globe. It need not even have actual existence, to be the subject of a legal contract of transfer or sale. A ship out of time—the hope or *chance of redemption, is sold in good faith. It appears, afterwards, that she was, at the time, consumed by fire, or at the bottom of the sea; yet the contract was good.

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2. As a matter of bankruptcy concern, and to be regulated by the principles of bankrupt laws. The treaty itself says not a word, as to person by whom the restored property, or its substitute, is to be received. It merely provides and awards the fund; but whether for the original owner, or underwriter, or assignee, is submitted to the general principles of established law. If it had provided, *eo nomine*, for the bankrupt, then it might, indeed, have been considered a solace for his general misfortunes, derived from a kind but ill-judged policy; and the political bounty (as it would then really be) would, perhaps, flow exactly where it was directed. But the argument, founded upon the idea of political bounty, is defective, when it attempts, on that ground, to give the fund to the bankrupt; since the treaty leaves that point, viz., the individual object of its kindness, entirely undefined. In the concatenation of inferences, one essential link is wanting; namely, that the particular individual is to be reimbursed. But why should the underwriter be preferred? He is not the original sufferer, whose feelings are to be assuaged; nor the final loser, whose pecuniary injuries are to be redressed. Had the violation of neutrality, which is remedied by the treaty never occurred, the property would have remained with the assured. As it is, the underwriter has paid the loss, but he has done it with the money of his creditors; and hence the *deficit* manifested in his bankruptcy. The real losers, then, on principle, have the fairest claim to redress.

As to the propriety of adopting bankrupt laws, there may be differences of opinion; but with respect to their object, policy and true application, when established, there can be none. They are not technical, but substantial. If they give relief from present difficulties, and hope and energy to

future exertions, it is in consequence of entire renunciation of all benefit from the past. If ingenuity could discover means by which debtors, notwithstanding their seeming surrender of all, could still retain a lurking interest, which deprives the creditor of his expected consolation ; it would not be surprising that bankrupt laws should be for ever discountenanced by legislative opposition, and that one general mercantile community should continue under the influence of a multitude of heterogeneous insolvent systems, feeble in their protection of the debtor, and worse than useless to the creditor.

It were extraordinary, indeed, if the effect of bankruptcy were to protect previously acquired property. But for his certificate, execution might be levied, attachment might reach the *fund, the wit of man could not elude the scrutiny of the law. Yet, the bankruptcy, which [*199 is designed to facilitate the assertion of these rights, if the present effort succeeds, would take them all away. The moment one becomes a bankrupt, a clear line is drawn between what is his, and what is his creditors'. The faculties which God and nature have given him, the disposition to labor, and the capacity for exertion of mind and body, are his own, inalienably, and nothing can deprive him of them. Even the personal claims to redress for bodily wrongs, which grow out of his person, and not out of his creditors' property, remain. But results arising from the investments of property, whether voluntarily or involuntarily made, however, or whenever, to arise, tracing their origin to previous possessions, are to return to those with whom they originated, and who did but advance them. Hence, all the limitations to the transfer by bankruptcy, are reducible to three classes : 1. Such as may never happen, being not merely future in their actual existence, but dependent for any, even a prospective, existence, upon events which, perhaps, never may occur. Of this description, are an heir apparent's pretensions. *Moth* v. *Frome*, Ambler 394. A pension to a soldier, who may die the moment after bankruptcy ; pay to an officer ; legacy to a bankrupt's wife, on the contingency of her surviving another person. *Krumbaar* v. *Burt*, 2 W. C. C. 406. 2. The lien of a tradesman, who has done work to a vessel. *Shoemaker* v. *Norris*, 3 Yeates 392. 3. Torts, which require an action in a personal form. *Shoemaker* v. *Keeley*, 1 Yeates 245 ; *Benson* v. *Flower*, W. Jones 215. This is confined to mere personal wrongs, not growing out of property, for there the assignees take, even though the injury be accompanied with violence. Eden's B. L. 235. Whatever does not come within one of these three exceptions, passes. Hence, almost every possible variety is to be found in the English cases, which are frequent, because of a continuance of bankrupt laws for a long series of years. 1 Cooke's B. L. 290, 365 ; 3 T. R. 88 ; 2 Vern. 432 ; 19 Ves. 432.

It was decided in England, nearly a century ago, that the insurer had the plainest equity in the world, to claim the proceeds of prizes taken under letters of reprisal, after they had paid the original owners. *Randal* v. *Cockran*, 1 Ves. sen. 98. The bankrupt law of the United States makes express provision for the transfer of equitable, as well as legal interests. Chief Justice KENT recognises our principle, in its largest extent, as to the substitute for the property, while he asserts that *there was no existing hope of recovery, as to the property itself. *Gracie* v. *New* [*200 *York Ins. Co.*, 8 Johns. 245.

The bankrupt law of the United States, in principle and policy, is the

same with the British statutes on the subject. In terms, so far as it applies to the present object, there is no difference. The deficiency is supposed to exist: 1. In the absence of the phrase of the statute (13 Eliz., c. 7), giving to the commissioners power "over all such interest in lands, as the bankrupt may lawfully depart withall." But this leaves the question exactly where it found it; as we are upon the very inquiry, whether this be such a thing as he may lawfully depart withall. And it is more than doubtful, whether the phrase would apply to the kind of interests now in contemplation. 2. In the supposed non-application of the 18th section, which contains the words, possibilities of profits. It is supposed, that this clause is introduced, not for the purpose of conveying the thing contemplated, but merely to discover anything which may fall in, prior to the certificate. It is apprehended, that there could be no object in a discovery, except to transfer; and it matters not, whether the transfer is made, while the object is remote, or is deferred, until beneficial possession can accompany the conveyance. And anything falling in, would become property; and under that name, must then and at all times be disclosed. 3. In the absence of the general expression in the statute, 6 Geo. IV., c. 16: "That this act shall be construed beneficially for creditors." That provision is not necessary for the present object, which is attained by a construction founded on the mere ordinary and inherent policy of a bankrupt system. The result is reached by Lord Chief Justice DALLAS, in an opinion delivered at Hilary term, 59 Geo. III., several years before the statute referred to, had any existence. *Clark* v. *Calvert*, 8 Taunt. 742.

Bankrupt laws are supposed to place the assignees in the room of the bankrupt, in the "same situation," without reserve. *Cassell* v. *Carroll*, 11 Wheat. 152. The interest in question, however, is plainly to be distinguished from a mere possibility; which is "an uncertain thing that may or may not happen." 2 Lill. Abr. 336. An heir presumptive or apparent, may have an expectation, but no right; for the ancestor may outlive him, or otherwise dispose of the inheritance. Hence, an heir apparent may be a witness, to prove the title to land, but a remainder-man cannot. *Smith* v. *Blackman*, 1 Salk. 283. A reversion absolute is thus a very different thing. Hence, we speak of the possibility of a *reverter*, which cannot be assigned, just as we do
*201] of *the possibility of a possession, which can. (Lord MANSFIELD, in the argument reported 11 Wheat. 168, on the Maryland charter.) A debt barred by the act of limitations, bankruptcy, or, perhaps, alienage; a debt of a foreign minister, infant or married woman, are not mere possibilities; although the remedies are, at least, as defective, and apparently inaccessible, as the one in question. The justice of a claim, and its assignable properties, are totally distinct, both from the question of its present or future character, and from the nature and even existence of a remedy. The assignable character of a thing depends on nothing technical, or *choses in action* would not pass. But upon the existence of right, abstracted from the consideration of present or future enforcement, or the susceptibility of enforcement at all, from the possible want of a precise remedy. Can there be a plainer proposition than this?—that he who unjustly takes my property from me, ought to restore it; in other words, that I ought to have it. And the union of my title to have, with his duty to restore, constitutes a rightful claim. The immediate wrongdoers are the individuals who committed the depredations on American commerce. The sovereign assumed the dis-

charge of these obligations ; and it is in pursuance of that assumption, that the money is paid.

The right might possibly be deficient, as regarded a specific remedy, and yet be a right still ; one, susceptible of being owned and transferred, though not advantageously used. But this right is perfect in itself, and is attended with a corresponding remedy. The error which lies at the root of the opposite suggestion, consists, in attaching a meaning too narrow and technical to the term "remedy." In a judicial court of justice, as our courts are organized, perhaps, there is none. The division, however, into executive, judiciary and legislative departments of government, is not universal. If, as it may be, the sovereign is the interpreter, as well as framer of the law ; that is, if instead of three branches, there be but one, or rather, instead of their being separate, they are united ; why is not an appeal as likely to succeed, when made to the supreme authority, as if made to what is usually a subordinate department ? At no very distant period of British history, the king himself actually attended in person in the courts of justice. He is still, in contemplation of law, present, *in aula regis*. But if the separation be entire, and judicial remedy be inaccessible, all being referred to the supreme power alone ; this merely reduces the difference between us, not to a question of remedy or no remedy, but the kind or quality of the remedy, whether judicial or executive. If this be the narrow line of separation, and so it is, at the worst, surely, you cannot pronounce the one everything, the other nothing—less than nothing ; that, a perfect, absolute, and *recoverable right ; this, a shadowy nonentity—a phantom—something "less even than a hope." [*202

On the contrary, it is a fundamental rule of presumption, that sovereigns will do justice voluntarily. It is the basis of international law. Hence, the broad line between barbarous and civilized states. What sovereign of a civilized community ever ventured to say, " he acknowledged no law but his own will, and set at defiance all remedy but that of force ?" There are laws among nations, just as well defined, and about as little liable to be broken, as those of particular municipalities. An American officer is understood to have applied for, and obtained, compensation, from the British government. An American citizen very recently made similar application, with similar success, to the sovereign of France. But it is more than presumption, that governments will do justice. It may be, and often is, enforced. They are compellable, by a code which is as effectual in its sanctions, as it is clear in its dictates. Municipal law is sometimes interfered with, by limitations, tenders and reliefs ; but contracts and rights are not, therefore, extinguished. There are places where there is no law. In China, strangers are altogether without the means of redress. Every one, with regard to them, is, whether native or sojourner, really irresponsible, and acknowledges not even the law of force. Yet bargains are made, and transfers are executed there, every day, which are respected and even enforced here. If one steal my property, and take refuge in the suburbs of Canton, does it cease to be my property ?—may I not retain or assign the ownership, notwithstanding the inaccessibility of the thing itself ? Principles are established by authority and precedent, which go the whole length of the case. The decision below assumes the broad ground, that there was no right, either in Ambrose Vasse or his assignees, or the original owners ; that "it is a mere expectancy, but without

hope, because without right, even a contingent one." Elementary writers on the law of nations, maintain very different principles. Grotius, lib. 3, c. 2, § 5; 2 Ruth. 568–70. Conformable to these principles, a decision was pronounced by the commissioners, under the 7th article of the British treaty, in the case of *The Betsey*, Furlong, master, Wheaton's Life of Pinkney, 193, &c. The newly-established Republic of Columbia, has set a noble example of deference for these doctrines, by reimbursing to the sufferers from depredation by their cruisers, the whole loss and interest, and fifty per cent. damages besides.

The best securities by which the hold on property is maintained, are claims on sovereign powers. Government stock, treasury-notes, exchequer bills, are all of this description. Yet, *where is the citizen that does not gladly exchange all the steadfast earth-bound property he has, and invest it in this more beneficial and productive possession? Trover and trespass may be maintained for it, contracts may be made with regard to it, transfers may take place of it; in short, there is no criterion of property or ownership, that may not be applied to what is regarded as having no substantial existence. A bond given by the King of Prussia, declaring himself and his successors bound to the holder, was held to pass as property by delivery. *Georgier* v. *Mieville*, 3 Barn. & Cr. 45. Yet where was the judicial remedy, if the crowned obligor had refused payment? Even criminal jurisprudence gives its sanction and assent to these principles. The forgery of a Prussian treasury-note, is within the statute, 43 Geo. III., c. 139, § 1; *Rex* v. *Manasseh Goldstein*, 3 Brod. & Bing. 201.

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The decrees of a foreign government are firm and irreversible, only with regard to the thing. A host of decisions, from *Hughes* v. *Cornelius*, 2 Show. 242, down to *Williams* v. *Armroyd*, 7 Cranch 423, and even *The Apollon*, Eden, claimant, 9 Wheat. 362, confirm this principle, but go no further. It required a constitutional provision to render adjudications and decrees conclusive throughout, even among sister states. Redress (if the thing itself be passed away) is substituted in some other shape, where wrong has been done by the decree; and it is the more necessary, in proportion to the efficacy and conclusiveness of the sentence by which the specific property has been irrevocably withdrawn. The cases provided for by treaty, were not necessarily, nor in point of fact, generally, of judicial condemnation and decree. They were of mere forcible abduction, and placing the ships and cargoes, tortiously, *infra præsidia*, for which indemnity is provided, not by restoring the thing, but substituting pecuniary compensation.

If the claim were originally nothing, yet when it became substantial, as it did at last, by the interposition of the government of the United States, it has relation back to the former time, and makes the whole available *ab initio*.

For the *defendant*.—The case states that the money was paid from the treasury, for losses provided for by the Florida treaty; but it does not state, to whom, or for whom, it was paid. The commissioners awarded nothing to Vasse's assignees, but, as is believed, to certain insurers, who claimed the funds. No doubt, their award is conclusive on its subject-matter, which is the amount and validity of the claims. By the 11th section, they were to receive, examine and decide upon such amount and validity.

By the second clause, they were to adjust claims; but they had no judicial function, process or power. They were a *board of inquest, to ascertain the sum of claims, and certify it to the treasury for payment. [*204 But parties could not litigate claims before the commission, which had no faculties of a judicial character. Neither of the parties to this suit were before that commission, which did not pretend to settle to whom, but only how much should be allowed to any ostensible claimant; leaving it to the ordinary tribunals to determine between disputants. It would be contrary to all principles, to extend, by construction, the powers of such an extraordinary court. In *Campbell* v. *Mullett*, 2 Swanst. 579, the three parties before the board did not each and all claim the same fund, but each his several share of it. There was no conflict of parties before the commissioners; but as the French partner was an alien enemy, his claim to part was rejected on that ground. In *Randal* v. *Cockran*, 1 Ves. sen. 98, Lord HARDWICKE rectified a judgment of commissioners appointed to distribute prize money; and the vice-chancellor, in the case in 2 Swanston, does not ascribe to the commissioners exclusive jurisdiction, except in their unquestionable province. Any person receiving money, by award of the commissioners, under the Florida treaty, holds it as money had and received to the use of all and any other persons capable of proving a right to it, or any part of it, by means of suit at law, or in equity.

The main question may be considered, first, by the light of the common law; secondly, by that of the English bankrupt acts and adjudications; thirdly, by our own. The commissioners' assignment to the assignees, is of estate and effects, claims and demands. The money in dispute was paid as indemnity for unlawful seizures; art. 9 of the treaty (8 U. S. Stat. 259). Vasse's certificate was signed in 1802. Of consequence, there was no indemnity, until twenty years afterwards. Whatever it may be, it is certain, that it was not specifically assigned, nor is it alluded to in the inventory of his property. If it passed, therefore, it must have been by mere operation of law, without intention of parties; for neither bankrupts, commissioners nor assignees appear to have adverted to it at all. Vasse's claims for English and French spoliations are mentioned, because they operated on his own property as a merchant. But whatever claims, if any he had, as an insurer, by virtue of losses made good by him to other merchants, are nowhere specified in the bankruptcy proceedings. From Vasse or from the commissioners, the assignees acquired no apparent title. Whatever their right is, to hold the fund they have got, must be shown independently of their title papers, which are altogether silent on the subject.

1. All the analogies from the common law are against it. By that, even a *chose in action* cannot be assigned, nor *any possibility or contingency, unless coupled with an interest, or in equity. 2 Bl. Com. 293; [*205 1 Com. Dig. 696–7, Assignment, C. 1, 2, 3; Shep. Touch. 239–40, 322; *Archer* v. *Bokenham*, 11 Mod. 152; *Wind* v. *Jekyl*, 1 P. Wms. 574; *Marks* v. *Marks*, 1 Str. 132. This, however, was not even a *chose in action*. It is questionable, whether Vasse could assign it himself. Yet the argument is, that the law assigned it, by constructive operation. But it is contended, that as it was assigned to him, it might be assigned by or from him. That argument confounds specific cession, with the constructive assignment, infer-

red from operation of law. The merchants whom Vasse indemnified for losses by captures, abandoned, and ceded to him specifically the *corpus* and the *spes recuperandi*. Indeed, neither abandonment nor cession is necessary; payment after total loss, acquires the title transferred, without either. *Gracie* v. *New York Insurance Company*, 8 Johns. 237. But the postulate here is, that by construction of the act of bankruptcy, this sovereign boon was transferred by Vasse to the commissioners, and by them to the assignees, without any specific or intended assignment of it, twenty years before it had existence; that such was the intention of the legislature in framing the bankrupt act. If so, certainly all the familiar doctrines of the common law were overlooked by them.

2d. It may be granted, that by the English statutes of Elizabeth, James and George, concerning bankruptcy, and their various adjudications, all property and interest passed by bankrupt assignment. I agree to the language of Ch. J. DALLAS, as quoted from 8 Taunt. 742—every beneficial interest. But then it must be what the law recognises as such, not every popular or vulgar notion of right or claim. In 2 Com. Dig. 112, title Bankruptcy, note *m*, the cases are collected, and the principles of exception will be found as well adjudged as those of general rule. After the extensive provisions of the statutes of Elizabeth and James, in 1732, came the Stat. 5 Geo. II., c. 32, enlarging and consolidating the system; and superadding the phrase, possibility of profits. The late consolidating act of 1825, 5 Geo. IV., c. 16, omits that phrase, but retains the legislative injunction, which pervades and characterizes the English system, to construe all the statutes largely and liberally for creditors. Thus enjoined, the courts have gone great lengths in administering the policy of the bankrupt laws. In exchange for personal liberation, they have required the surrender of all convertible property. But they have never taken anything which the bankrupt himself realizes after certificate, nor any mere damage demand, though suable before certificate. Now, the fund in question was
*206] a demand, if anything, for damages for *torts, and realized long after certificate. The English system goes no further than estate and effects, whether goods in possession, debts, contracts or *choses in action*, says Blackstone, 2 vol. 484. The act of Geo. IV., consolidating all its predecessors, is also limited to estate, goods, chattels, debts, and the like. Eden, app'x 25. Not a word of it applies to anything but tangible property, for which there is right of action, and right of action is nothing less than right of possession. *Dommett* v. *Bedford*, 6 T. R. 684. According to the latest and most eminent English authorities, mere possibilities are not devisable, nor do they pass to assignees under a commission of bankruptcy. Preston on Estates 75–6; Preston on Abstracts of Title 93–5, 254. The whole tenor of the argument of the master of the rolls, in the case of *Campbell* v. *Mullet*, 2 Swanst. 551, is to the same effect, in a case remarkably similar. The question there turned on partnership, it is true; but the reasons submitted in behalf of Vasse, are precisely those of the master of the rolls, whose decision is quoted as authority, in Gow on Part. 315–16. What possible construction of the English bankrupt law, can be drawn to a different result? The hope in question is not a thing at all, much less a *chose in action*. No right of action followed it; possession of it was impracticable; no remedy would reach it. The standard of remedy is the

true judicial test of right. To say, that this is but a question of the kind of remedy, is a mere argument of terms; for who can sue a sovereign? If the claim cannot be made in and through a court of justice, it is no claim. Even the political right, if it exist, to petition or complain to executive government, is not a right that can be classed with legal rights or claims. A mere possibility is an uncertain thing. 2 Lill. Abr. 343. But the hope of indemnity from a foreign sovereign, is the merest possibility imaginable. The English exceptions are: 1. Damages for torts or slander; *Benson* v. *Flower*, Sir W. Jones 215: 2. All unliquidated damages; *Goodtitle* v. *North*, 2 Doug. 562; *Banister* v. *Scott*, 6 T. R. 489; *Hammond* v. *Toulmin*, 7 Ibid. 612: 3. Any mere cause of action; *Ex parte Mare*, 8 Ves. 335; *Goddard* v. *Vanderheyden*, 3 Wils. 270. See also, *Overseers of St. Martins* v. *Warren*, 1 B. & Ald. 491; *Davies* v. *Arnott*, 3 Bing. 154. In *Watson* v. *Ins. Co. of N. A.*, 1 Binn. 47, it was left to a jury, to estimate a *spes recuperandi*; but in *Gracie* v. *New York Ins. Co.*, 8 Johns. 237, this proceeding is treated as preposterous. A fourth class of cases in England, concerns the pay of public officers, which never passes by bankrupt assignment, on principles of public policy. The doctrine of possibility of interest, it settled to mean a legal or practicable possibility; *Higden* v. *Williamson*, 3 P. Wms. 132; not any or every possibility; *Jacobson* v. *Williamson*, 1 Ibid. 385; **Moth* v. *Frome*, Ambl. 394; *Carleton* v. *Leighton*, 3 Meriv. 671; *Chandler* v. *Gardner*, cited in 17 Ves. 338; *Crutwell* v. *Lye*, Ibid. 343. It is not by the force of the phrase, that possibility of interest becomes so comprehensive a provision in the English bankrupt acts, but by their injunction on the courts to construe them largely. If Vasse, after assignment, and before certificate, had sued for slander or personal trespass, the assignees would have no right, according to the English law, to whatever he recovered after certificate. Now, the indemnity in question, which could not be sued for, was not awarded until after certificate, and then for torts *ex delicto*. Not a case from the English codes can be cited, nor a principle, which sanctions the assertion, that any mere possibility would pass, under such circumstances. All the cases referred to in the opposite argument, are of possibilities coupled with interest, and in some of them, the exception now contended for, is strongly put. *Jones* v. *Roe*, 3 T. R. 88. No English authority can be vouched by the assignees, while the case in 2 Swanston, the authority of Mr. Preston, and the analogies of all their established exceptions to the general rule, concur in the conclusion, that such a possibility as that in question, would not be taken by a commissioner's assignment, under the acts of bankruptcy in England. [*207

3d. But the American law differs materially from the English, on this subject. Bankruptcy, in England, is a long-established system, matured and formed by the legislature, and sustained by the judiciary. In this country, it had but a short-lived existence; has never been a public favorite, and the courts have no impulse from statutes to extend it by construction. The whole question is, what is the true interpretation of the act of congress of 1800. (2 U. S. Stat. 19.) The 5th, 6th, 13th and 14th sections are all that regulate assignments, and they each and all uniformly contemplate property that may be realized. By the 5th, the commissioners are to take possession of the property, and deliver the effects to the assignees. By the 6th, estate and effects are to be assigned; and the 13th provides for the

bankrupt's debts to be recovered. The 14th directs the assignees to recover his property, goods, chattels and debts. The 13th does, indeed, mention claims, but it characterizes them as such as are suable, attachable and recoverable by legal process. The only debatable section is the 18th. All the rest exclude every idea of possibility, contingency, damages or the like. They uniformly treat of tangible property, and nothing else. The 15th section, copied from the first section of the statute 5 Geo. II., provides for disclosure of every possibility of profit. But that provision is confined to the discovery of the bankrupt's interests. The same *section, when it comes to provide for their assignment, returns to the word estate. The intent was to eviscerate *ex seipso* an account of everything that may be realized; but not comprehending personal demands for torts and damages. This is clear from the 50th section, which provides for contingencies falling due before certificate; a superfluous provision, if the 18th section had already provided for them. These sections would be in conflict otherwise. But the meaning of this voluminous act is not to be taken from any detailed section. What may be called its code, is to be found in the whole taken together. The 26th section, allowing a premium for the discovery of estate; the 29th section, compelling assignees to exhibit accounts of estate and effects; the 32d section, directing them to keep books of receipts from estate; the 34th section, authorizing them to sell the estate at auction; the 53d section, making an allowance for support out of the estate; and the 54th section, directing a deposit of the money proceeding from the estate; all these sections are to be taken with the 5th, 6th, 13th and 14th sections, already analyzed, and altogether demonstrate, without doubt, that property, such as may be possessed, sued for and recovered, taken into possession and turned to account, was intended to pass by commissioners' assignment, but never any mere contingencies, with which no interest is coupled.

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By capture and *deductio infra præsidia*, the property insured and paid for by Vasse, was lost entirely. No lawful reclamation for it remained. The sufferer was the original owner, by whose session both *res* and *spes* were transferred to Vasse, when he paid for the losses. But this transfer conveyed to him no *chose in action*, because there can be none, without a right of action, for there is no such thing as right, without legal remedy. 3 Bl. Com. 123. No interest existed in Vasse, because he had no right; no claim, because a claim is a demand for a thing out of possession. Here was no *jus prosequendi*, or *standi in judicio;* no demand against the Spanish government, or our own; nothing of which any judicature could take cognisance. A right to damages begins, when an injury is inflicted. 3 Bl. Com. 116. But that is a suable right, of municipal cognisance. So, a captor has a defeasible and imperfect right, after capture, but only because the prize courts are open to him; whereas, Vasse could have sued or complained nowhere. The wrong he sustained was by a tort; the only redress was sovereign and international; the wrong was belligerent; the claim was by this nation against that; there was no arbiter, and war was the only remedy. The bounty which resulted, after twenty years' negotiation, was a sovereign boon, altogether contingent, gratuitous, unliquidated and fortuitous. Spain had declined in power; *this country had improved; her colonies, our neighbors, revolted, after our example; Florida, her province, happened to be convenient for our requital, and the very seizure

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of that province, which preceded its transfer, was not only accidental, but unauthorized. Grotius is quoted for the position, that an individual right exists to make reprisal for wrong suffered; but both Grotius and Rutherforth speak of national, not individual redress. Grotius does indeed refer to Homer, for the authority of Nestor, who is reported by that authority to have reprised on the cattle of the Eleans, for their stealing his horses; but this is not modern law, if it be even Grecian, in the times of the Iliad. Individual reprisals are unknown to the modern law of nations, especially, to the law of this country, which, by written constitution, requires a law enacted in form, to make war lawful. Vasse had no right to claim from Spain, or to act at all; he could do nothing but submit. Mr. Pinkney's argument, as referred to in the case of *The Betsey*, Furlong, does not contradict this position; and if it does, it was overruled by the majority of the commissioners, to whom it was addressed. *Brown* v. *Phœnix Ins. Co.*, 4 Binn. 445, and *Rhinelander* v. *Penn. Ins.* Co., 4 Cranch 45, do not affect the question of an assignment, by construction of the act of bankruptcy—and that is the only question. The sovereign grant was appropriated, by treaty between the two nations; it was distributable by the United States. Similar claims have been settled with the Republic of Colombia, and are pending against France, Naples and Denmark. The opposite argument has already transferred them in all cases of bankruptcy, by an unsuspected operation of law, constructively drawn from an expired act of congress; which argument, in like manner, has disposed of all the pensions or gatuities yet to be granted by our government to the officers of the revolution. They have all changed hands, unconsciously to the owners, who are petitioning, not for themselves, but the assignees of their creditors, in all instances of bankruptcy or insolvency. Can such an operation of law be possible or tolerable? Was such the intention of the framers of the act of congress, to establish an uniform system of bankruptcy throughout the United States? If so, and by dint of successful hostilities, a century hence, the claims on England, which have been relinquished by treaty, should be revived and acknowledged, their indemnity, if paid, will belong to assignees, not to sufferers. That the parties in this instance never thought of such result, has been shown. If congress, nevertheless, so enacted it, such enactment, it has also been shown, transcends the English bankrupt statutes, and contravenes all the established and familiar principles of the common law. It may be added, that *the French, it is believed also, the Dutch, and all other bankrupt systems, [*210 are the same. By the French, the things assigned are goods, money, furniture, effects, and *choses in action*. Code Civ. Commerce, liv. 3, t t. Prem., *de la Faillite*, § 2. Nowhere do possibilities, contingencies, mere rights of action for torts, or demands for unliquidated damages, pass from bankrupts or insolvents to their assignees. The American adjudications are uniform and strong in their current to that conclusion. *Shoemaker* v. *Keeley*, 2 Dall. 213; *Sommer* v. *Wilt*, 4 S. & R. 28; *North* v. *Turner*, 9 Ibid. 248–9; *O'Donnel* v. *Seybert*, 13 Ibid. 54; *Dusar* v. *Murgatroyd*, 1 W. C. C. 13; *Bird* v. *Clark*, 3 Day 272; *Krumbaar* v. *Burt*, 2 W. C. C. 406. The last case is in point; is a stronger case than the present; and has been acknowledged by the community as the settled law in Pennsylvania, for the last twenty years. To inquire whether the possibility of Vasse's recovery, would, in case of his death, have passed by will, or in course of administration, is but petitioning

the principle in contest. Even conceding the affirmative, does not affect the question, which depends on the construction of the act of congress; but it would be wrong to concede it against the authority of Preston, the case in 2 Swanston, and the case of *Krumbaar* v. *Burt*.

Story, Justice, delivered the opinion of the court.—This was an action of *assumpsit*, brought by Ambrose Vasse, in the circuit court for the district of Pennsylvania, to recover from the plaintiffs in error (who were defendants in the court below), a certain sum of money, received by them under the following circumstances:

Previous to the year 1802, Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured, and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the act of congress of 4th April 1800, ch. 19. An assignment was made accordingly to Jacob Shoemaker (who is deceased), and the defendants, Comegys and Pettit, who proceeded to take upon themselves the duties of assignees, and have ever since continued to perform the same. Vasse was discharged under the commission; and his certificate of discharge bears date the 28th of May 1802. In the year 1824, the sum of $8846.14, was received by the defendants, from the treasury of the United States; being the sum awarded by
*211] the commissioners sitting at Washington, *under the treaty with Spain, which ceded Florida to the United States, dated 22d of February 1819, on account of the captures and losses aforesaid. On the 9th of December 1823, Vasse filed a bill in equity, in the circuit court of the district of Columbia, which is in the case; upon which, it seems, no final proceedings were had on the merits. Under the commission of bankruptcy, Vasse made a return of his effects to the commissioners; which is in the case. Upon these facts, a general verdict was found for the plaintiff, Vasse, for the sum of $8846.14, subject to the opinion of the court, with liberty for either party to turn the same into a special verdict; and the circuit court gave judgment upon the facts in favor of the original defendant. The present is a writ of error, brought for the purpose of ascertaining the correctness of that judgment.

Three questions have been argued at the bar: 1. Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse (which is assumed to be the true state of the fact), is conclusive upon the rights of Vasse; so as to prevent his recovery in the present action? 2. If not, whether the abandonment of the vessels and cargoes to him, as underwriter, by the owners, and his payment of the losses, entitled him to the compensation awarded, independent of his bankruptcy? 3. If so, then, whether his right and title to the compensation, passed by the assignment of the commissioners of bankruptcy, to the defendants, as his assignees, by the true intent and terms of the bankrupt act of 1800, ch. 19?

1. As to the first point.—The treaty with Spain, of the 22d of February 1819, was ratified on the 13th of February 1821, by the government of the United States. In the 9th article, it provides, that the high contracting parties

"reciprocally renounce all claims for damages or injuries, which they themselves, as well as their respective citizens and subjects may have suffered, until the time of signing this treaty;" and then proceeds to enumerate, in separate clauses, the injuries to which the renunciation extends. The 11th article provides, that the United States, exonerating Spain from all demands in future, on account of the claims of their citizens, to which the renunciations herein contained, extend, and considering them entirely cancelled; undertake to make satisfaction for the same, to an amount not exceeding $5,000,000. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, &c., shall be appointed, &c., and within the space of three years from the time of their first meeting, shall "receive, examine and decide upon the amount and validity of all claims *included within the descriptions above [*212
mentioned." The remaining part of the article is not material to be mentioned.

It has been justly remarked, in the opinion of the learned judge, who decided this cause in the circuit court, that it does not appear from the statement of facts, who were the persons who presented or litigated the claim before the board of commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable, owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bonâ fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed, that it was the intention of either government to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass

into the hands of any claimant; and his own rights, as well as those of all others, who asserted a title to the fund, be left to the ordinary course
*213] *of judicial proceedings in the established courts, where redress could be administered according to the nature and extent of the rights and equities of all the parties. We are, therefore, of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners. The case of *Campbell* v. *Mullett*, 2 Swanst. 551, is distinguishable. The claim in that case had been laid before the commissioners, and rejected by them, on the ground, that the party was alien enemy; and if so, he certainly did not come into the purview of the treaty. It was not pretended, that the party had any title to the indemnity, unless it could be deemed partnership property, and as a partner, he was entitled to share in it. The court considered that it was not partnership property in which he had a title; that his claim to any portion of it had been rejected, upon the ground, that such claim was not within the treaty; and the indemnity had been granted to the other partners, for their shares only of the joint property, and they took no more than their own shares. The court then proceeded, upon the ground, that there neither was an original, nor a derivative title to the indemnity, in the party now seeking to set it up. If an assignment had been shown from them to him, of their own interest in the claim or award, before or after it was made, the case might have admitted of a very different consideration. Whatever, therefore, might be the authority of that case, upon general principles (upon which it is unnecessary to pass any opinion), it is inapplicable to the present.

2. The next question, which is not noticed in the opinion of the circuit court, turns upon the nature and effect of an abandonment for a total loss, to the underwriters. Much argument has been employed, and many authorities introduced, to prove what rights and interests, possibilities and expectancies, may or may not pass by assignment; we do not think it necessary to review these authorities, or the principles upon which they depend, upon the present occasion. In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment. But the material consideration here, is, whether upon the principles of the law-merchant, the right, title, interest or possibility (call it which you may), to the indemnity awarded in this case, did not pass by the abandonment to Vasse.

We do not think, that, upon an examination of the doctrines of insur-
*214] ance, there is any difficulty in this part of the case. It *does not appear on the record, whether there was, in this instance, any formal instrument of abandonment, or not, nor is it material, for the law gives to the act of abandonment, when accepted, all the effects, which the most accurately drawn assignment would accomplish. By the act of abandonment, the assured renounces and yields up to the underwriter, all his right, title and claim to what may be saved; and leaves it to him to make the most of it, for his own benefit. The underwriter then stands in the place of the assured, and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers, and is fully borne

out by Mr. Marshall and Mr. Park, in their treatises on insurance. Marsh. on Ins. b. 1, ch. 14; Park. on Ins. ch. 9, p. 228, 279. "Where (says Mr. Marshall), as in case of capture, the thing insured, and every part of it, is completely gone out of the power of the assured, it is just and proper, that he should recover at once, as for a total loss, and leave the *spes recuperandi* to the insurer; who will have the benefit of a re-capture, or of any other accident, by which the thing may be recovered." Mr. Park uses equally strong language, he says, "the assured has a right to call upon the underwriter for a total loss, and, of course, to abandon, as soon as he hears of such a calamity having happened; his claim to an indemnity not being at all suspended, by the chance of a future recovery of part of the property lost; because, by the abandonment, that chance devolves upon the underwriters." It is very clear, that neither of these learned writers meant to confine these remarks to cases, where the specific property itself, or its proceeds, were restored; for the whole current of their reasoning, in the context, goes to show, that whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters. And for this purpose, they refer to the case of *Randal* v. *Cockran*, 1 Ves. 98, before Lord HARDWICKE, where this very point was adjudged. In that case, the king had granted letters of reprisal against the Spaniards, for the benefit of his subjects, in consideration of the losses which they had sustained by unjust captures, and he appointed commissioners to distribute the produce of these reprisals among the sufferers; and the commissioners would not suffer the underwriters, but only the owners, to make claim for the losses; although the owners were already satisfied for their loss, by the underwriters. Lord HARDWICKE decreed, that the owner should account for the same to the underwriter; and said, "the person who originally sustained the loss, was the owner, but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the assured stood as a trustee for the insurer, in proportion to what he paid, although the commissioners did right to avoid being entangled in accounts, and in adjusting [*215 the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to whom he assigned his interest, as it was in effect after satisfaction made." This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive, that the assignment by abandonment, is competent not only to pass the property itself, or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord HARDWICKE was the stronger, because the indemnity was awarded to the party, by his own sovereign, and not by the sovereign of the captors. Mr. Marshall and Mr. Park manifestly contemplate the case as establishing the principle, that any indemnity, however arising, is a trust for the underwriters, after they have paid the loss. Park on Ins. ch. 8, p. 229; Marsh. on Ins. b. 1, ch. 14, § 4.

The case of *Gracie* v. *New York Ins. Co.*, 8 Johns. 237, recognises the same principle, in its full extent. That was a case of abandonment, after a capture, and where there had been a final condemnation, not only by the

courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was whether the jury were at liberty to deduct from the total loss, the value of the *spes recuperandi*. The court held that they were not. Mr. Chief Justice KENT, in delivering the opinion of the court, said, "if France should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants (the underwriters), if they should pay the amount, &c." The case of *Watson* v. *Insurance Co. of North America*, 1 Binn. 47, proceeds upon the same principles. It admits, that the *spes recuperandi* passes by an abandonment to the underwriter; and the question there was, whether its value, when not abandoned, was to be deducted from the total loss. We consider it, then, clear, upon authority, that the right to the compensation in this case, was in its nature assignable, and passed, by abandonment, to Vasse; and upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own courts, or by his own extraordinary interposition and grants, upon private petition, or upon public negotiation, is a right attached to the *ownership of the property itself, and passes by cession, to the use of the ultimate sufferer. If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

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The case of *Campbell* v. *Mullet*, 2 Swanst. 551, already adverted to, has been pressed upon the attention of the court as indicating, certainly not as deciding, a doctrine somewhat different. In that case, the compensation had been awarded by the commissioners, under the British treaty of 1794, to American citizens, for unjust captures made by British cruisers; and there had been condemnations by the highest appellate courts of prize. One argument was, that the compensation so granted, was not to be deemed a mere donation to the parties who received it for their own use, but an indemnity. The master of the rolls, in answer to this, said: "It is said, that the sums awarded by the commissioners are not matter of bounty or donation. Can they be a matter of right? What is right? That which may be enforced in a court of justice. Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain, after that condemnation, is not founded in right, but in policy between the nations, providing compensation to individuals, who have lost property by sentences, which are thought unjust. The grounds of relief before the commissioners are, the want of any redress in any municipal courts. Whatever the individual obtains, is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without anything in the nature of a consideration, yet for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund, belonging to an independant authority, a grant to the sufferer for what he lost." Such is the language of the learned judge, and we cannot say, that the reasoning is at all satisfactory. It is not universally, though it may ordinarily be, one test of right, that it may be enforced in a

court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain, nor the government of the United States, is suable in the ordinary courts of justice, for debts due by either. Yet, who will doubt, that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right, both upon the justice of his own and the foreign sovereign. The *theory, too, that an indemnification for unjust captures is to be deemed, if not a mere donation, as in the nature of a donation, as contrasted with [*217 right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, § 7? That where American citizens have sustained losses or damages, "by reason of irregular or illegal captures, or condemnations of their vessels, or other property, under color of authority or commissions from his Majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants." The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood, that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal court of justice. The case of *Randal* v. *Cockran*, 1 Ves. 98, stands upon the true gound. It considers the right of indemnity as travelling with the right of property. In that case, it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the crown, out of funds provided by reprisals. So, perhaps, the commissioners thought; but Lord HARDWICKE decided otherwise. There cannot be a doubt, that if the party injured had died before or after the treaty was made; and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators. The remarks which have been made upon this case, are equally applicable to the provisions for indemnity, under the treaty with Spain. It recognised an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain.

We may now come to the point, which indeed is the only one of any intrinsic difficulty in the cause—whether the right, so vested in Vasse, to compensation, passed, under the bankruptcy assignment, to his assignees? That this is a question free of doubt, will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the court below. The true solution of it must be found in a just exposition of the object, intent, and language of the statute of bankruptcy of 1800, ch. 19. The act begins by an enumeration of the persons who are liable to be declared *bankrupts, and among them are "underwriters or marine insurers." This plainly shows the sense of the legislature, that such [*218

persons might, by the ordinary course of their business, be reduced to insolvency, and be justly placed within the beneficial operation of such a law. It tends also to the presumption, that it might have been the intent of the legislature, that the rights devolved upon them, from the nature of the losses for which they were liable, so far as under any circumstances they might or could be valuable rights, should be available as a fund for the benefit of their creditors, in case of their bankruptcy. As the legislature meant to exonerate the underwriter from all future liability for his debts; it would seem natural, that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees, for the benefit of his creditors. If he possessed claims by abandonment, to the amount of $100,000, which might, by future events, be rendered more or less productive, and which might be (as they have often been) salable and transferrible in the market; such funds, present or expectant, might well be deemed within the legislative policy, and fit to pass to the creditors by assignment. It might otherwise happen, that large recoveries might ultimately vest in the bankrupt, for his own exclusive benefit, upon rights pre-existent, and vested at the time of his bankruptcy.

If such a course of legislation would not be unnatural, let us next see, what is the precise language of the statute itself. The fifth section declares, that it shall be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, real and personal, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c.; and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen or appointed." These words are certainly very general and comprehensive. "All the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the rights, devolved upon Vasse by the abandonment, would, in case of his death, have passed to his personal representative; and when the money was received, be distributable as assets. Why
*219] then should it not be asset in the hands of the assignees? *Considering it in the light in which Lord HARDWICKE viewed it, as an equitable trust in the money, it is still an interest, or at all events, a possibility coupled with an interest. Besides, "all deeds, books, accounts, papers and writings of the bankrupt," are to be taken into possession. Now, the abandonment, and other documents connected with it, fall precisely within these terms; and as we shall immediately see, whatever is taken possession of by the commissioners, is to be passed to the assignees. The sixth section provides "that the commissioners shall assign, transfer or deliver over, all and singular the said bankrupt's estate and effects aforesaid, with all muniments and evidences thereof," to the assignees chosen. And for the most part, the words "estate and effects," are used throughout the act, as descriptive of the property passing under the assignment. The 11th, 12th and 13th sections of the act respect more particularly the transfer of

the real estate, of the mortgages, and of the debts of the bankrupt. It is only necessary to say, that they contain no language abridging the proper inference deducible from the language of the fifth section.

The 18th section contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall "fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom, and upon what consideration, and at what time or times, he or she hath disposed of, assigned or transferred, any of his or her goods, wares or merchandise, moneys, or other effects and estate; and of all books, papers and writings relating thereunto, of which he or she was possessed; or in which he or she was in any way interested or entitled, or which any person or persons shall then have, or shall have had, in trust for him or her, or for his or her use, at any time before or after the issuing of the said commission; or whereby such bankrupt, or his or her family, then hath, or may have or expect, any profit, possibility of profit, benefit or advantage whatsoever, &c." It then goes on further to provide, that the bankrupt shall, upon such examination, execute, in due form of law, such conveyance, assurance and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners, to vest the same in the "assignees;" and also requires the bankrupt to deliver up "all books, papers and writings relating thereunto," which are in his possession, custody or power, at the time of the examination: upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of *the fifth section, we think it is cleared up and illustrated by that of the present. Here, [*220 the words "profit, possibility of profit, benefit, or advantage whatsoever," are used, and show that mere interests *in præsenti*, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, "whereby the bankrupt then hath, or may have or expect, any profit."

It has been supposed, that this clause looks solely to property, which was not capable of assignment, at the time of the bankruptcy, because not then vested; inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it. If this were so, it would not affect the present case, because we are of opinion, that the claim under consideration, was completely vested in right and interest in Vasse, at the time of his bankruptcy. We think, however, that this clause does not justify so narrow an interpretation. The disclosure is required of estate and effects, in which the bankrupt was interested, as well before as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, "whatsoever and wheresoever." The object of the provision was to make such conveyances auxiliary to, and confirmatory of, the assignments made by the commissioners; and we believe, that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the act has been supposed to demonstrate the correctness of the

construction of the statute contended for by the counsel for the original plaintiff. It declares, "that if any estate, real or personal, shall descend, revert to, or become vested in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c., all such estate shall, by virtue of this act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, &c." This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy. The cases put, are of property descending, reverting to, or becoming vested in the bankrupt. In respect to a descent cast, after the bankruptcy, it is manifest, that nothing could pass by any antecedent assignment of the commissioners. The heir, during the lifetime of his ancestor, has no right, claim, title or interest, in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor, at all times, and in no just sense, a possibility of interest, a right in the thing itself. The other words, "reverting *to, or become vested" in the
*221] bankrupt, require a like interpretation. They allude to cases, where the party had nothing vested in him, as a subsisting interest, either absolute or contingent, *in esse* or *in futuro*, until after the bankruptcy; and when any such interest falls in, before the certificate of discharge, the commissioners, and not the bankrupt, are to assign it; a circumstance, which demonstrates that no stress ought to be laid upon that part of the 18th section, already alluded to, respecting a conveyance by the bankrupt himself, except as a confirmation, and not as a principal assurance. It seems to us, then, that the 50th section aids, rather than shakes, the interpretation of the statute, which has been already announced. It applies to no possibility of profit, benefit or advantage vested at the time of the bankruptcy (as the present case is), but to interests accruing to the party for the first time, *de jure* as well as *de facto*, after the bankruptcy.

This view of the matter renders it unnecessary to consider, whether there is any substantial difference between the English statutes of bankruptcy and our own, on this subject; and of course, in the authorities applicable to it. Our opinion proceeds upon the purview and objects, and on the terms of our own statute. And we are accordingly of opinion, that the judgment of the circuit court ought to be reversed, and a judgment entered in favor of the original defendants. It is to be understood, that, upon the last point, this is the opinion of the majority of the court. The cause must be remanded, with directions to enter a judgment accordingly, for the original defendants.

This cause came on, &c.: On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said circuit court, in this cause, be and the same is hereby reversed and annulled; and that a judgment be entered in the suit, in favor of the plaintiffs in error, Cornelius Comegys and Andrew Pettit; and the cause remanded to said circuit court, with directions to enter judgment for the plaintiffs in error in this court, Cornelius Comegys and Andrew Pettit, accordingly.