*Daniel Parker, Plaintiff in error, *v.* United States.

Army officers.—Rations.—Separate post.—Military department.

The adjutant and inspector-general of the army of the United States, was not entitled to double rations, from the 30th of September 1818, to the 31st of May 1821.

The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post; the law granting this authority, is not imperative; and in the exercise of his discretion, the president may allow, or refuse to allow, additional rations, as in his opinion he may deem proper. p. 296.

The secretary of war, as the legitimate organ of the president, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command. p. 297.

No officer is entitled to the addititional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.[1] p. 297.

In the discharge of his ordinary duties, the adjutant and inspector-general, has no distinct command; his duties consist in details of service, and not in active military command. p. 297.

An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command in the neighborhood; he must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. p. 297.

The general order of the war department, of 16th March 1816, directing double rations to be allowed to officers commanding military departments is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding such department; it does not relate to the law of the 3d of March 1813, "for the better organization of the general staff of the army." p. 297.

Error to the Circuit Court of the District of Columbia, for the County of Washington.

This case was submitted to the court, without argument, by *Jones*, for the plaintiff in error; and by *Wirt*, Attorney-General, for the United States. All the material facts of the case are stated in the opinion of the court; which was delivered by—

Duvall, Justice.—An action was commenced in the circuit court, by the United States, against the plaintiff in error, to recover the sum of $2337.60, which he had received from Mr. Leslie, the paymaster, then stationed at the seat of government, on a claim for double rations, due him in his capacity of adjutant and inspector-general of the army of the United
*294] States, from the *30th of September 1818, to the 31st of May 1821. On the settlement of the account of the paymaster, this item was disallowed by the second auditor, who considered it as wrongfully paid; and the amount was afterwards directed to be charged to the personal account of General Parker.

The office of adjutant and inspector-general of the army, with the rank, pay and emoluments of a brigadier-general, was created by the act of March 3d, 1813. The plaintiff in error was appointed to that office; and his commission bears date on the 1st May 1816, with the rank of brigadier-general, from 22d November 1814. The pay and emoluments of the officers of the

[1] The fact of appropriations having been made by congress for double rations, does not determine what officers are entitled to them United States *v.* Freeman, 3 How. 557.

army are fixed by the act of 16th March 1802, and the act of 12th April 1808. By the fifth section of the first-mentioned act, it is provided, that the commanding officers of each separate post shall be entitled to such additional number of rations, as the president of the United States shall, from time to time, direct, having respect to the special circumstances of each post. Under this authority, the president has, at various times, designated military posts and stations, and allowed double rations to the commanding officers; and in the case of General Wilkinson, when stationed at New Orleans, and commanding there, in quality of a commanding officer, at a separate post, he allowed that officer treble rations. It appears by the record and documents referred to in this case, that on the 25th of August 1812, the president ordered, that generals commanding separate armies, should receive double rations. In February 1814, an order was issued by the war department, on the subject of double rations, of which the following is an extract: "It is ordered, that general or other officers commanding districts, shall, while so doing, receive double rations; which will supersede all other grants of double rations, at posts within the district." On the 6th March 1816, a general order was issued, in the words following:—" Generals commanding divisions; officers commanding military departments; and all officers, while in the command of permanent posts and garrisons, separate from the stations of commandants of departments, which subject them to the additional expense of independent commands, are allowed double rations. No more than one officer can be entitled to double rations, at the same station."

The adjutant and inspector-general performed the duties of his office, from November 1814, and charged the compensation as allowed by law, until the year 1816, when a difficulty arose on the subject of his fuel and quarters, from the circumstance of there being no disbursing office in the quartermaster's department, at the seat of government; and from the regulations *of the war department, then in force, prohibiting an allowance in money, to be made to officers in lieu of these emoluments. The secretary of war then issued the following order: " A commutation of double rations is allowed to the adjutant and inspector-general, in lieu of fuel and quarters." Under this authority, he claimed and was allowed double rations from November 1814; refunding to the government the allowance he had received for fuel and quarters, from the time of his acceptance, until the date of the above order. He continued to receive double rations, making no charge for fuel and quarters, until an order was issued by the secretary of war, on the 10th of August 1818, to the following effect: "The reason for the allowance to the chief of the engineers, and to the adjutant and inspector-general, in lieu of fuel and quarters, no longer existing, since the establishment of the quartermaster's department, at the termination of the present quarter, such allowance will cease; and the quartermaster-general will, on requisition, furnish them with fuel and quarters, agreeably to their respective ranks." The commutation of double rations, ceased accordingly; and the adjutant and inspector-general continued to charge and receive single rations only, from the first of October 1818, to the 31st of May 1821, when the office was abolished. [*295

The defendant in the court below, now plaintiff in error, in support of his claim, produced a certificate from Richard Cutts, second comptroller of

the treasury; "that the senior officer of the engineer department, stationed at Washington, has charged and been allowed double rations, since the first of January 1818. The senior officers of the quartermaster's, subsistence and ordnance departments, have charged and been allowed double rations since the 27th July 1821; and Major-General Brown has charged and been allowed double rations, since the 1st of June 1821, when he was stationed in this city." And also the following regulations: The regulation and general order of the 27th July 1821, issued by the war department, allowing to the quartermaster-general, commissary-general of subsistence, the colonel of engineers, and the chief of the ordnance department (while stationed at the seat of government), double rations from the date of the said order.

The regulations of general order, duly issued from the war department, dated 21st of May 1821, addressed to the defendant, as adjutant and inspector-general, directing him, among other things, to hand over the records and files of his office to Major-General Brown, on the next day, being the first of June 1821; and said major-general having from the time he had assumed command, and has relieved the said adjutant and inspector-general, *296] at the seat of government, pursuant to the *last-mentioned order, been allowed and paid double rations, as certified by the second comptroller; which regulation or general order is in the following words: "The adjutant-general, under the law of the 2d of March last, being attached to the major-general commanding the army, and now absent, you will, to-morrow, pass over the records and files of your office to Major-General Brown and will assume the duties of paymaster-general. Major-General Brown has been advised of this order; and Colonel Towson will be instructed to hand over the papers and records of the pay department to you." That the brigadiers-general of the army of the United States, have all been regularly allowed double rations, since the said general order and regulation of the 6th of March 1816. That the defendant continued at the head of the department of adjutant and inspector-general, and stationed at the seat of government, from the time of his appointment and commission, as such, until the 31st of May 1821, and until he was relieved by Major-General Brown, as before mentioned.

The defendant then proved, by Thomas S. Jessup, quartermaster-general, that in his opinion, and according to the general usage of the army, the department of adjutant and inspector-general was a military department; and that the defendant, whilst exercising that office, was commandant of a military department; and as such, was subject to the additional expense of an independent command.

The declaration in this cause is founded on a transcript from the treasury, certified in the usual form, and contained a count for money had and received, and other counts not necessary to be mentioned; issue was joined on the plea of *non assumpsit;* and by agreement of counsel, a verdict for the United States was taken for the sum claimed, subject to the opinion of the court upon the laws of the United States relative to the pay and emoluments of the officers of the army, and the regulations and orders of the executive department, issued in pursuance of those laws. The court, on consideration, gave judgment in favor of the United States; and the cause is now before this court, by writ of error, for their decision.

The claim of the plaintiff in error to double rations, as charged, rests

altogether upon a correct construction of the 5th section of the act of the 16th of March 1802, and of the regulations and orders of the executive department, issued in pursuance of that section. The president of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just; having respect to the special circumstances of each post. The law granting this authority, is not imperative, and in the exercise of his discretion, the president may allow, or *refuse to allow, additional rations, as in his opinion he may deem just. [*297

The reason of the authority to grant the allowance is obvious. By an independent command, at a separate post, the officer is subject to additional expense, and an increase of duty. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer, in command in the neighborhood. He must then issue the necessary orders to the troops under his command; it being impracticable to receive them from a superior officer; his authority is the source from which they must flow.

There can be no controversy about additional rations, if the president makes the allowance. He may issue the order himself, or it may be done by the secretary of war, with his approbation. The secretary of war, as the legitimate organ of the president, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command. The language of the law is plain and unambiguous. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the executive. The allowance cannot be made to more than one officer at the same station.

It is not contended, in the case under consideration, that the grant was made by the president; but the plaintiff in error claims it, under the orders which have been recited, and which are spread upon the record; and because officers of equal rank, and in his opinion similarly circumstanced, have received the additional allowance. Double rations form no part of the regular and legal emoluments of a brigadier-general, and can only be claimed under circumstances before enumerated. The plaintiff in error seems to rely, with more confidence, on the order of the 6th of March 1815, taken in connection with the opinion of General Jessup. That order directs the additional allowance to be made to generals commanding divisions, and to officers commanding military departments, &c.; and General Jessup was of opinion, that, according to the general usage of the army, the department of adjutant and inspector-general, was a military department; and that whilst exercising that office, he was commandant of a military department; and, as such, subject to the expense of an independent command.

The record contains no evidence, that the adjutant and inspector-general was ever ordered to an independent or separate command. In the discharge of his ordinary duties, he has no distinct command; his duties consist in details of service, and not in active military command. The order of the *16th of March 1816, directing double rations to be allowed to officers commanding military departments, is construed to relate to [*298 the geographical sections of country, into which the two divisions of the army are divided, and which were denominated departments; and intended to designate the extent of actual command, given to the officer commanding

each department; and that it does not relate to the law of the 3d of March 1813, for the better organization of the general staff of the army. This appears to have been the construction given to the order by the war department, as none of the staff officers created by that act, with exception of the plaintiff in error, ever made a claim for double rations; and the claim under consideration was disallowed by the accounting officers of the war department.

During the time the adjutant and inspector-general was stationed at the seat of government, comprehending the space for which double rations are claimed, it does not appear, that there was any recognised commanding officer. The staff officers, then stationed at the seat of government, were subject to the authority of the secretary of war, and under his direct and exclusive control.

It is the opinion of the court, that the claim of the plaintiff in error, is not sanctioned by the act of the 16th of March 1802, nor by the regulations and orders of the executive department, issued in pursuance of that law. The judgment of the circuit court is affirmed, with costs.

Judgment affirmed.

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*299] *Mechanics' Bank of Alexandria, Appellants, *v.* Louisa and Anna Maria Seton, Appellees, by their Guardian, etc.

Chancery.—Specific performance.—Parties.—Depositions.—Trustees.—Notice.—Transfer of interest.

Although it seems to be a general rule, that a court of chancery will not decree specific performance of contracts, except for the purchase of lands, or things which relate to the realty and are of a permanent nature, and that where contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty, have been enforced in chancery; but courts will weigh with greater nicety, contracts of this description, than such as relate to lands.[1] p. 305.

Although an objection, for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail, upon the final hearing of an appeal; except in very strong cases, and where the court perceives a necessary and indispensable party is wanting. p. 306.

All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree; the relief granted, will always be so modified, as not to effect the interests of others.[2] p. 306.

The cross-examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of the deposition. p. 307.

By the rules of this court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found

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[1] See Roundtree *v.* McLain, Hempst. 243; Ross *v.* Union Pacific Railway Co., 1 Woolw. 26; Sunbury and Erie Railroad Co. *v.* Cooper, 33 Penn. St. 278; Dungan *v.* Dohnert, 11 W. N. C. 330 n.; Sank *v.* Union Steamship Co. 5 Phila. 499; Philadelphia and Reading Railroad Co. *v.* Stichter, 11 W. N. C. 325; Foll's Appeal, 91 Penn. St. 434; White *v.* Schuyler, 31 How. Pr. 38.

[2] The circuit court cannot make a decree, in the absence of a party whose right must necessarily be affected by it, and the objection may be taken at any time, upon the hearing, or in the appellate court. Coiron *v.* Millaudon, 19 How. 113.