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payment of \$23,322.56 should be deducted ratably from each of the funds in the hands of Patton, at the time the decree of the 12th day of June, in the year of our Lord 1820, was made.

*WILLIAM HUNTER, Appellant, v. UNITED STATES, Appellees. [*173

Priority of the United States.—Assignments in insolvency.—Discharge of debt.—Release from imprisonment.—Laches of public officer.

In the original bill, filed by the United States in the circuit court of Rhode Island, the claim of the United States to payment of a debt due to them, was asserted, on the ground of an assignment made to the United States by an insolvent debtor, who was discharged from imprisonment, on the condition, that he should make such an assignment; the debtor had been previously discharged under the insolvent law of Rhode Island, and had made, on such discharge, a general assignment for the benefit of his creditors. Afterwards, an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States, by the act of congress, against their debtors who have become insolvent; it was objected, that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case; but the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing, they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains.

The same right of priority which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government.

The assignment under the insolvent law of Rhode Island could only take effect from the time it was made; until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party; it is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If, before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, as though he had not applied for the benefit of the law; and if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution.

The property placed in the inventory of an insolvent may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor who obtains a judgment before the assignment.

The United States obtained a judgment against Smith, an insolvent debtor, previous to his assignment under the insolvent laws of Rhode Island; under his assignment, debt for money paid by him to the United States, as surety on duty bonds for the Crarys, passed to his assignee; the Crarys had claims upon Spain, which were afterwards paid under the Florida treaty; and the assignee of Smith received the amount of the said Spanish claim, in satisfaction of the payments made for the duty bonds by Smith. The judgment by the United States against Smith, having preceded the assignment, and the receipt and distribution of the money received from the Spanish claim, under the insolvent law; the government having an unquestionable right of priority on all the property of Smith, it extended to the claim of Smith on the Crarys; if the right of *the United States to a priority of payment covers any part of the property [*174 of an insolvent, it must extend to the whole, until the debt is paid.

The claim of Smith on the Crarys was properly included in his assignment under the insolvent laws, however remote the probability may have been, at the time, of realizing the demand; it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the general government; if, under such circumstances, the priority of the government does not exist, it would be difficult to present a stronger case for the operation of this prerogative.

By a special act of congress, the principal debtor was discharged from imprisonment, and the expression was omitted in this act, which is used in the general act passed June 6th, 1798, "pro-

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viding for the relief of persons imprisoned for debts due to the United States," that "the judgment shall remain good and sufficient at law;" in the special act, it was declared, that any estate which the debtor "may subsequently acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and discharged." The special act did not release the judgment, and did not affect the rights of the United States against the surety.

That the same rules of contract are applicable, where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear.

The act of government in releasing both the principal and surety from imprisonment, was designed for the benefit of unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy; if the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be, that the principal must remain in jail, until the process of the law was exhausted against the surety; this would operate against the liberty of the citizen, and should be avoided, unless required to secure the public interest.

A discharge from prison, by operation of law, does not prevent the judgment-creditor from prosecuting his judgment against the estate of the defendant. To this rule, a discharge under the special provisions of the bankrupt law, may form an exception.

The secretary of the treasury was authorized to deduct from the sum payable to a debtor to the United States, the sum due to the United States, and he paid to his assignee the whole sum which was awarded to him under the Florida treaty, omitting to make the deduction of the debt due to the United States. It cannot be admitted, that an omission of duty of this kind, as a payment, by mistake, by an officer, shall bar the claim of the government. If, in violation of his duty, an officer shall knowingly, or even corruptly, do an act injurious to the public, can it be considered obligatory? He can only bind the government by acts which come within the just exercise of his official powers.

Where a fund was in the hands of an assignee of an insolvent, out of which the United States asserted a right to a priority of payment, in such a case, proceedings at law might not be adequate, and it was proper to proceed in equity.

United States v. Hunter, 5 Mason 62, affirmed.

APPEAL from the Circuit Court of Rhode Island. *The appellant, *175] William Hunter, was the assignee of Archibald Crary and Frederick Crary, under the insolvent law of Rhode Island; the Crarys obtained the benefit of that law, in June 1809; William Hunter was duly appointed one of their assignees, and was the sole surviving assignee. One Jacob Smith had, as surety in a custom-house bond, been compelled to pay to the United States, for the Crarys, about \$2125; this payment was made in May 1808. Jacob Smith soon afterwards became himself insolvent, viz., in October 1809; obtained the benefit of the same insolvent law; and William Hunter was his sole surviving assignee. Jacob Smith and one William McGee were sureties for William Peck, as collector of taxes for the Rhode Island district, and the United States obtained a judgment for a large sum, viz., \$13,508, against the principal and sureties, in August 1811; the suit was commenced in May of the same year. Upon his commitment to prison, by force of the execution issued in this case, Smith petitioned the then secretary of the treasury for relief; in which petition, he stated, that he was reduced to poverty, that he had obtained the benefit of the Rhode Island insolvent law, and surrendered all his property, as compelled by that law, to his assignee. He stated in that petition, that his own insolvency was hurried, if not occasioned, by his having paid considerable sums on account of suretyship at the custom-house; and in particular, this very sum of two thousand some hundred dollars for the Crarys, in the year 1809. Upon this full statement of the case, relief was granted him, and he was dis-

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charged from prison, in compliance with a warrant from the treasury, on the 17th day of October 1811.

Before his discharge, Smith executed an assignment of his property to the United States. The assignment purported to convey all and the same property, which was conveyed by his previous assignment under the insolvent law. He recited and included his sworn inventory under the insolvent law, and referred to his demand against the Crarys. After the release of Smith, the surety, the United States, in 1812, imprisoned Peck, the delinquent principal; and congress discharged him from that imprisonment, upon his assignment and conveyance of all his estate, real and personal, *which he then owned or might be entitled to; this was done on the 12th of June 1812. In July 1824, under the peculiar circumstances [*176 of delay, difficulty and embarrassment, set forth in the answer, the assignee of the Crarys recovered and received from the United States, under their treaty with Spain, and in conformity to statutes by them enacted, the sum of money as stated in the bill, and as admitted in the answer.

The appellant, in his answer, contended, that so much of this sum as by operation of law belonged to Smith, he, as the assignee of Smith, was bound to pay over to the ascertained creditors of Smith, for whose benefit the assignment, under the state insolvent law, was made. In the original bill, the claim of the United States was rested upon the assignment made to them by Smith; but afterwards, an amended bill was filed, in which their right to payment of the whole amount of the judgment against Smith was asserted, on their right of priority under the laws of the United States.

The circuit court of Rhode Island made a decree in favor of the United States, and the defendant appealed to this court.

The case was argued by *Hunter*, for the appellant; and by *Berrien*, Attorney-General, for the United States.

For the appellant, it was contended: 1. That so far as the claim of the United States rests upon the assignment made to them by Smith, it is unavailing; as Smith had, when the same was executed, nothing to convey. That assignment was nominal and voluntary, and is opposed to a previous assignment, well known to the United States, and referred to in the assignment to the United States. 2. So far as the claim of the United States is made to depend on the law of priority, that law is not applicable to this case. 3. If the law of priority is applicable to such a case as this, it has been, by various, deliberate and definite acts on the part of the United States, waived and renounced. 4. The release of Peck, the principal, by the act of congress, is, combined with the circumstance of the case, a release of Smith, the surety. 5. The absence of all demand on the part of the United States for so many years, implies a relinquishment of their *claim, and subjects it to such imputations of staleness and after-thought as are [*177 incompatible with the principles of benignity, policy and justice which actuate courts of justice. There is no equity in the plaintiff's bill, and an unwarrantable resort to a chancery jurisdiction.

Hunter argued, that the original bill and the amended bill set up different grounds of claim. The original bill cannot be suppressed, and must be taken into view by the court; as it shows the ground of the claim of the

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United States to have been exclusively the assignment made by Jacob Smith in 1811, under the law authorizing the discharge of Smith by the secretary of the treasury. The suit by the United States against Smith, as surety of Peck, was commenced in May 1811, and judgment obtained and execution issued, the same year. The bill states the insolvency of Smith in 1811. Smith had paid for the Crarys the amount which the United States ask to recover, and this was one of the known causes of his insolvency, and so represented in his petition for a discharge. The bond of Peck to the United States, in which Smith was surety, was signed some years before ; and when Smith was discharged by the state insolvent code, nothing was due to the United States by him. Thus, when the claim of the United States was established, the claim of Smith on the Crarys had passed under his assignment made in 1808, and belonged to his creditors at the time of his discharge.

The acts of congress, which gave the United States a right to priority of payment, apply to debts due at the time of the insolvency of their debtors ; to sustain the right of priority there must be a debt actually due. When the judgment against Jacob Smith was obtained by the United States, he had no property upon which this ascertained, and not until then existing, debt to the United States could attach ; all his property had passed from him, under the insolvent law of Rhode Island, and belonged to his creditors. The date of the inventory, 1809, fixes the period of the insolvency ; and from that time, in judgment of law, as well as according to the provisions of the Rhode Island statute, the assignee of the insolvent is deemed in possession. These principles are also recognised in *United States v. *Bryan and Woodcock*, *178] 9 Cranch 374 ; *United States v. Fisher*, 2 Ibid. 258.

There was no notice to the assignee under the insolvent law, of the claim of the United States. The want of notice of this claim is fatal. The lien of the United States is a latent invisible claim. The act of taking the assignment is evidence that the claim of priority did not exist ; it superseded the right of priority ; both cannot stand together. The priority of the United States was also waived, by the payment of the money to the assignee of Crary, under the award of the commissioners of the United States, acting under the Florida treaty. The lien of the United States was at common law, and the act of congress relative to payments made under the Florida treaty, authorized the United States to retain for money due to them, by those whose claims were allowed by the commissioners. They did not retain this money, and thus they relinquish their rights. They had a full knowledge of this claim belonging to their debtor Smith, and that it had passed to his assignee under the insolvent law ; and therefore, no allegation of mistake can be made. *Jac. & Walk.* 262 ; 1 *Gallis.* 392.

The release of Peck, the principal, was a release of Smith, as his surety ; after that release, the surety could not proceed against him. After the judgment on the bond, the parties to that judgment became co-debtors ; and the release of Peck from imprisonment was an extinguishment of the whole debt due upon the judgment. 2 *Dane's Abr.* 651 ; 2 *Dall.* 373 ; 3 *Serg. & Rawle* 465-6 ; 13 *Mass.* 148 ; 16 *Ibid.* 581 ; 8 *Ibid.* 40 ; 6 *T. R.* 525 ; 2 *Bro. C. C.* 164 ; 2 *Ves. jr.* 540 ; 17 *Johns.* 384 ; 13 *Ibid.* 174 ; 16 *Ibid.* 77 ; 10 *Ibid.* 587, 174, 383 ; 15 *Ibid.* 435 ; 6 *Ves.* 607 ; 6 *Dow* 238.

The delay of the United States to proceed against their principal debtor,

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Peck, discharges the surety. The principle of *nulhum tempus*, will not protect the claim of the United States. Here, there has been more than delay ; acts have been done, which show the purposes of the delay, and that it was the purpose to discharge the surety. The bond was executed in 1802 ; no suit was instituted until 1811, and this bill was not *filed until 1825. [*179 On principles of peace, acquiescence and security, a release will be presumed. Then, all these combine with *laches* and positive acts ; the assignee of Smith has been permitted to procure the payment of the claim under the treaty.

The United States have a clear remedy at law, and cannot, therefore, proceed in a court of chancery. By this proceeding, the defendant is deprived of a trial by jury, and is subjected to heavy expenses. No discovery was required, as the claim of the United States rests upon testimony in their own possession ; as all they seek to recover would be obtained, if any claim exists, in an action for money had and received, that form of action should have been resorted to. The provisions of the judiciary act, which require that the jurisdiction of courts of law shall be resorted to, in all cases in which such courts afford a remedy, was not without meaning, and should be applied to this case. In any stage of a cause in which a want of chancery jurisdiction is discovered, the bill will be dismissed.

Berrien, Attorney-General, for the United States.—The claim of the United States does not rest on the assignment of Smith. It is presented under the sanction of the right of priority, which, if it existed, could not be affected by the first proceedings in the case. The fund which the United States ask to have appropriated for their payment, is in the hands of the assignee of the Crarys, for distribution ; and Smith, being a creditor of the Crarys, is entitled to a preference, for the extent of payments made by him on custom-house bonds. By the 65th section of the duty act, he is substituted in place of the United States. This preference passed to the United States. Peck and Smith were debtors to the United States in 1805. Judgment was obtained against them in August 1811, and the assignment to the appellant was in September of that year. The right of Smith was thus vested in the appellant, for his creditors ; and attached on this fund which he held liable to distribution among the creditors of Smith. The United States, being a priority creditor, claim their preference ; the *assignment made by Smith was an act of insolvency, which con- [*180 summated the rights of the United States. *United States v. Fisher*, 2 Cranch 358.

There was a debt due from Peck and Smith in 1805. That debt existed, and was acknowledged, when the bond was executed, and the judgment in 1811 did no more than ascertain the amount of the debt. But if the court do not adopt this view of the facts, a debt was fully established in 1811, and the priority of the United States would, from that time, attach upon any fund which was in the hands of the assignee of Smith for distribution, or which might afterwards come into his hands, with notice of the claim of the United States.

The law of the United States, which authorized the secretary of the treasury to retain for the payments to be made under the Florida treaty, did not apply to this case. The provision is made for cases in which the

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person to whom the award is made, is a debtor ; and in this case, the award was in favor of the Crarys. Thus, no waiver can be asserted. It was not a case for the action of the officers of the treasury.

The release of Peck was not a discharge of Smith. Peck was only discharged from imprisonment, reserving a right against his property ; for the debt to the United States, his property continued liable. The judgment against him was continued in force ; and the provisions of the special act for his discharge do not vary from those of the general act of 1798, authorizing the secretary of the treasury to discharge in similar cases. 5 East 147 ; 1 Gallis. 32. The proper inquiry is, what was the intention of the legislature ? It was a mere release from imprisonment, which was not to affect the rights of the United States, but against the person of their debtor.

This is not a stale demand. There is nothing in the case which shows, that from 1809 to 1825, Smith had any funds out of which payment of the debt could have been made ; unless the secretary of the treasury could have retained, which could not be. A demand is considered stale in equity, where there has been *laches* in enforcing the claim. But no such *181] **laches* are to be imputed to the government. As to *laches*, he cited 1 Sch. & Lef. 413 ; 2 Meriv. 171. The defendant stands precisely in the same situation as Smith himself, and he could not set up *laches*.

The case is one peculiarly proper for a court of equity. The appellant is a trustee to distribute funds among creditors ; and the case is not the ordinary one of money had and received. The United States do not claim a distributive share, but their claim is an exclusive right to the fund, as the creditor of Smith, who was the creditor of the Crarys. The case of the *United States v. Howland and Allen*, 4 Wheat. 108, is very much in point in this case.

McLEAN, Justice, delivered the opinion of the court.—This is a suit in chancery, brought to this court, by an appeal from the decree of the circuit court of Rhode Island. The material facts in the case are these :

William Hunter, the defendant in the court below, is the surviving assignee of Archibald and Frederick Crary, who, in June 1809 obtained the benefit of the insolvent law of Rhode Island. One Jacob Smith, as surety on a custom-house bond, had been compelled to pay to the United States, in May 1808, for the Crarys, about \$2125. In February 1810, Smith filed his petition for the benefit of the insolvent law, and in August 1811, Hunter and one Littlefield, now deceased, were appointed assignees. On the 3d day of September following, Smith made to them an assignment of his property. Smith and one McGee were sureties for William Peck, as marshal of the Rhode Island district, who became a defaulter to the government, and against whom and his sureties, in August 1811, a judgment was recovered for \$13,500. Upon his being afterwards committed to prison, on an *alias* execution, issued in pursuance of this judgment, Smith petitioned the secretary of the treasury for relief ; and stated, that he was reduced to poverty, and had assigned all his property under the insolvent law. His *182] insolvency, he alleged, had been accelerated, if not produced, by his having paid large sums, *as surety, on certain custom-house bonds,

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and particularly the above sum for the Crarys. He was discharged by the secretary, on the 17th day of October 1811, on his making a formal assignment of all his effects to the United States. This assignment purports to convey the same property which he had previously assigned. In 1812, the United States imprisoned Peck, the principal, on execution, and in the month of June, in the same year, he was discharged by act of congress. In July 1824, Hunter, as the assignee of the Crarys, obtained from the United States, under their treaty with Spain, the sum of \$8158.81. Out of this sum, Smith was entitled to the amount he paid for the Crarys; and the United States claim the same from Hunter, as assignee, in part satisfaction of their judgment against Smith. Hunter claims this sum in behalf of the creditors of Smith, under his first assignment.

By the original bill, the government rested its claim on the second assignment. This clearly cannot be sustained. Smith, under the insolvent law of Rhode Island, having assigned all his property for the benefit of his creditors, could not, by a subsequent assignment to the United States, affect the first transfer. The government can set up no right, under the second assignment, which might not be claimed by any other creditor. This ground is abandoned by the amended bill, and the claim of the government is placed on its priority, under the act of congress. By this act, a preference is given to a government debt over all others; and if the debtor be insolvent, such debt must first be satisfied. It is true, as the defendant insists, that the original bill still remains in the record, and forms a part of the case. But the amendment presents a new state of facts, which it was competent for the complainants to do; and on the hearing, they may rely upon the whole case made in the bill, or may abandon some of the special prayers it contains.

The same right of priority, which belongs to the government, attaches to the claim of an individual, who, as surety, has paid money to the government. Under this provision, Smith could claim a preference to other creditors, for the *money he paid as surety for the Crarys; and on his [*183 right, the priority of the government is asserted.

The defendant resists this demand, on various grounds. He contends, in the first place, that the doctrine of priority is not applicable in this case. This prerogative of the government can only operate, it is insisted, on a debt due at the time. That it cannot reach a debt which depends upon a future contingency; and such was the claim of the Crarys, under the Spanish treaty. It was not realized until in June 1824, nearly thirteen years after the benefit of the insolvent law had been extended to the claimants. It is also contended, that the first assignment of Smith had relation back, and took effect, from the date of his inventory, which was prior to the judgment obtained against him, by the United States. This being the case, the priority of the government could not attach, it is urged; for it can only act on a debt, and there was no debt, in this case, as against Smith, until judgment was entered.

The assignment under the insolvent law could only take effect from the time it was made. Until the court, in the exercise of their judgment, determine that the applicant is entitled to the benefit of the law, and in pursuance of its requisitions, he assigns his property, the proceedings are inchoate, and do not relieve the party. It is the transfer which vests in the assignee the property of the insolvent, for the benefit of his creditors. If,

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before the judgment of the court, the petitioner fail to prosecute his petition, or discontinue it, his property and person are liable to execution, the same as though he had not applied for the benefit of the law. And if, after the judgment of the court, he fail to assign his property, it will be liable to be taken by his creditors on execution. The property placed upon the inventory of an insolvent, may be protected from execution, while he prosecutes his petition; but this cannot exclude the claim of a creditor, who obtains a judgment, before the assignment. If this Spanish claim had passed into the hands of the assignee of Smith, and been distributed by him, before the debt of the United States was established, or notice of its existence had been *184] given to him, no controversy could have arisen on the subject. *The defendant, as assignee, could not have been held responsible, under such circumstances; nor could the creditors who received payment, have been compelled to refund to the government.

If the judgment of the government had not preceded the assignment of Smith, there might have been some ground to question the right of priority which is contended for. But the judgment preceded the assignment, which gave the government an unquestionable right of priority on all the property of Smith. Did not this right extend to the claim on the Crarys? It would seem, that no doubt can exist on this subject. If the right cover any part of the property of the insolvent, it must extend to the whole, until the debt is satisfied. It was proper for Smith to include in his assignment the claim on the Crarys. However remote the probability may have been, at that time, of realizing this demand, still, under the insolvent law, it was an assignable interest. If, at the time of the assignment, this claim was contingent, it is no longer so; it has been reduced into possession, and is now in the hands of the representative of the debtor to the government. If, under such circumstances, the priority of the government does not exist, it cannot be said to exist in any case. It would be difficult to present a stronger case for the operation of this prerogative.

But it is contended by the defendant below, that if the doctrine of preference or priority be applicable to this case, the United States, by various acts, have waived it. The release of Peck from imprisonment by the act of congress, under the circumstances of the case, it is urged, was a release of Smith, the surety. This act was passed the 24th of June 1812, and it provided, that before his discharge, Peck, should assign "all his estate, real and personal, which he may now own or be entitled to, for the use and benefit of the United States." And it also provided, "that any estate, real or personal, which the said William Peck may hereafter acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and *185] discharged." *By the act providing for the relief of persons imprisoned for debt due to the United States, passed June 6th, 1798, the secretary of the treasury is authorized to discharge, in certain cases, and the individual so discharged, it is declared, "shall not be liable to be imprisoned again for the same debt, but the judgment shall remain good and sufficient in law." As in the act of 1798, there is an express provision that "the judgment shall remain good," which is omitted in the act discharging Peck, a doubt has been raised, whether the judgment against him can be further prosecuted. If, by this act, the judgment be released against Peck, as a matter of course, his surety is discharged. This act specially provides,

"that any estate which Peck may subsequently acquire, shall be liable to be taken, in the same manner as if he had not been imprisoned and discharged." From this provision, it clearly appears, that the release from imprisonment was the only object of the statute, and a proper construction of it does not release the judgment. If the property of Peck may be taken, "in the same manner as if he had not been imprisoned," it may be taken under the same judgment.

That the same rules of contract are applicable, where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment, without releasing the debt, is clear. And how can such a release discharge the surety? Does it embarrass his recourse against the principal? In this case, if Smith had paid the debt to the government, he might have resorted to all the remedies against Peck, which the law allows in any case. The recourse of the government against the property of Peck still remains unimpaired; consequently, the judgment remains unsatisfied, and no act has been done to the prejudice of the surety. The cases in 2 Dane's Abr. 155; 3 Serg. & Rawle 465, 466; and 2 Dall. 373, were cited, to show that while a defendant is charged in execution, the debt is considered as satisfied; and that a discharge of one co-debtor is a discharge of all. The imprisonment of a defendant is a means to enforce the payment of the judgment, and is only considered a satisfaction *of it, so far as to suspend all other process. If, by the operation of law, by an escape, or by any other means, without the [*186 assent of the plaintiff, the defendant be released from prison, the judgment still remains in full force against him. The imprisonment of Peck, the principal, was no bar to an execution against the body of his surety. In the case under consideration, Smith had been imprisoned and discharged, before Peck was confined. These proceedings were all regular, however great the hardship may have been to the surety; and did not, in any manner, lessen the responsibility of either principal or surety. The authorities read on the argument, going to show a release of the sureties, where the creditor, without their assent, enlarges the time of payment, &c., are not considered as opposed to the doctrines here laid down.

The act of the government, in releasing both the principal and surety from imprisonment, was designed for the benefit of the unfortunate debtors, and no unnecessary obstructions should be opposed to the exercise of so humane a policy. If the discharge of the principal, under such circumstances, should be a release of the debt against the surety, the consequence would be, that the principal must remain in jail, until the process of the law was exhausted against his surety. This would operate against the liberty of the citizen; and should be avoided, unless required to secure the public interest. A discharge from prison by operation of law, does not prevent the judgment-creditor from prosecuting his judgment against the estate of the defendant. To this rule, a discharge under the special provisions of a bankrupt law, may form an exception. In the cases under consideration, the defendants were discharged under laws which expressly reserved the right to the government to enforce the judgment against the property of the defendants. In 1 Pet. 573, this court decided, on a full consideration of the case, that a discharge of the principal, under an act of congress, did not release the debt against the surety.

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By an act of congress of the 24th of May 1824, respecting payments under the Spanish treaty, it is provided, "that in all *cases where *187] the person or persons in whose name, or for whose benefit and interest, the aforesaid awards shall be made, shall be in debt and in arrears to the United States, the secretary of the treasury shall retain the same out of the amount of the aforesaid awards," &c. Under this provision, it is contended, that it was the duty of the secretary to retain the amount of Smith's demand against the Crarys; and not having done so, the payment must be considered as an abandonment of the claim. That the secretary must have had notice of Smith's claim, is insisted on, because it was stated on his schedule which was assigned to the United States; and also in his petition to the secretary of the treasury, on which he was released from imprisonment. Having a knowledge of this claim of Smith's against the Crarys, it was in the power of the secretary, under the law, to withhold it, and appropriate it in part discharge of the judgment. The priority which first attached to Smith, and through him to the Crarys, would have enabled the government, without the aid of the other provision, to retain the money. But can the payment of it, under such circumstances, operate as a release to Smith?

It might be dangerous, to give the same effect to a voluntary payment by an agent of the government, as if made by an individual in his own right. The concerns of the government are so complicated and extensive, that no head of any branch of it can have the same personal knowledge of the details of business, which may be presumed in private affairs. And if, in the case under consideration, some clerk in the treasury department, or even the secretary, did pay to the assignee of the Crarys the amount claimed by Smith, which might, and perhaps ought to have been, retained, is it an abandonment of the claim? Where an officer of the government is in arrears, his salary is required to be withheld, until the sum in arrears shall be paid. In such a case, the books of the treasury would furnish its officers with notice of the delinquency; and yet, would it be contended, that a payment of the salary, which ought to have been retained, would release the debt? It cannot be admitted, that an omission of duty of this kind, as a *188] payment through mistake, by an officer, shall bar *the claim of the government. If, in violation of his duty, an officer shall, knowingly, or even corruptly, do an act injurious to the public, can it be considered obligatory? He can only bind the government by acts which come within a just exercise of his official power. The payment to the assignee of the Crarys can in no respect affect the claim now set up against the assignee of Smith.

An objection is urged, on the ground that the United States have failed to prosecute their claim with sufficient diligence, and that it is subject to the imputation of staleness. Until the sum of money in controversy was received by the assignee of Smith, in 1824, the United States could not be charged with a want of diligence in prosecuting their claim against Smith. They had obtained a judgment in 1811, and there was no property within the reach of any process on that judgment, by which it could be satisfied. To subject the above claim to this judgment, the bill in the present case was filed, in 1824. If, therefore, a want of diligence could in any case be

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charged against the government, there is no ground to make the charge in this case.

The last objection urged by the defendant is, that there was full and ample relief to be obtained at law ; and consequently, chancery cannot take jurisdiction of the case. In his capacity as trustee, the government seeks to make Hunter liable ; he bears the same relation to the creditors of Smith. It was proper in him, conceiving as he did, that the fund in his hands should be paid to these creditors, to resist the claim of the government. Until its right of priority, under all the circumstances of the case, was judicially established, he, in the exercise of his discretion, might withhold the payment. The trustee can only be desirous of making the payment, as the law requires. How is this liability to be enforced ? What process at law would be adequate to give the relief prayed for in the bill ? It is the peculiar province of equity, to compel the execution, of trusts. In this case, it is conceived, the proceeding at law would not be adequate ; the fund to be reached was in the hands of a trustee ; and it was important that it should not pass from his hands to the creditors of Smith ; the amount of the claim against the Crarys might be *disputed ; the trustee was entitled to his commissions, and other difficulties were likely to arise, [*189 in the progress of the investigation, which could only be fully adjusted, at the instance of the United States, by a court of chancery. No doubt exists, therefore, that a resort to the equity jurisdiction of the circuit court in this case was proper and necessary. The judgment of the circuit court must be affirmed, but without costs.

THIS cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Rhode Island, and was argued by counsel : On consideration whereof, it is ordered and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, without costs.

**Ex parte* NATHANIEL CRANE and SAMUEL KELLY : In the matter of JAMES JACKSON, *ex dem.* JOHN JACOB ASTOR and others, [*190 *v.* NATHANIEL CRANE ; and JAMES JACKSON, *ex dem.* JOHN JACOB ASTOR and others, *v.* SAMUEL KELLY.

Mandamus.—Bills of exception.

The supreme court has power to issue a *mandamus* directed to a circuit court of the United States, commanding the court to sign a bill of exceptions, in a case tried before such court.¹ In England, the writ of *mandamus* is defined to be a command issuing, in the king's name, from the court of king's bench, and directed to any person, corporation or inferior court of judicature, within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or, at least, supposes, to be consonant to right and justice ; it issues to the judges of any inferior court, commanding them to do justice, according to the powers of their office, wherever the same is delayed. It is apparent, that this definition, and this description of the purposes to which it is applicable, by the court of king's bench, as supervising the conduct of inferior tribunals, extends to the case of a refusal by an inferior court to sign a bill of excep-

¹ See notes to *Ex parte Bradstreet*, 4 Pet. 102.