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48.

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

JANUARY TERM, 1849.

By BENJAMIN C. HOWARD,

Counsellor at Law, and Reporter of the Decisions of the Supreme Court of the United States.

VOL. VII.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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SUPREME COURT OF THE UNITED STATES.

Hon. ROGER B. TANEY, Chief Justice.

Hon. JOHN McLEAN, Associate Justice.

Hon. JAMES M. WAYNE, Associate Justice.

Hon. JOHN CATRON, Associate Justice.

Hon. JOHN McKINLEY, Associate Justice.

Hon. PETER V. DANIEL, Associate Justice.

Hon. SAMUEL NELSON, Associate Justice.

Hon. LEVI WOODBURY, Associate Justice.

Hon. ROBERT C. GRIER, Associate Justice.

Isaac Toucey, Esq., Attorney-General.

William Thomas Carroll, Esq., Clerk.

Benjamin C. Howard, Esq., Reporter.

Robert Wallace, Esq., Marshal.

RULE OF COURT.

No. 53.

ORDERED, that no counsel will be permitted to speak, in the argument of any case in this court, more than two hours, without the special leave of the court, granted before the argument begins.

Counsel will not be heard, unless a printed abstract of the case be first filed, together with the points intended to be made, and the authorities intended to be cited in support of them arranged under the respective points. And no other book or case can be referred to in the argument.

If one of the parties omits to file such a statement, he cannot be heard, and the case will be heard *ex parte*, upon the argument of the party by whom the statement is filed.

This rule to take effect on the first day of December Term, 1849.

WAYNE, J., dissents from this rule.

WOODBURY, J., does not concur in this rule.

LIST OF ATTORNEYS AND COUNSELLORS

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

JANUARY TERM, 1849.

MARTIN LUTHER, PLAINTIFF IN ERROR, *v.* LUTHER M. BORDEN ET AL., DEFENDANTS IN ERROR.*

RACHEL LUTHER, COMPLAINANT, *v.* LUTHER M. BORDEN ET AL., DEFENDANTS.

At the period of the American Revolution, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second, making only such alterations, by acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent State.

But no mode of proceeding was pointed out by which amendments might be made.

In 1841 a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution, to be submitted to the people for their adoption or rejection.

This convention framed a constitution, directed a vote to be taken upon it, declared afterwards that it had been adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island.

Under it, elections were held for Governor, members of the Legislature, and other officers, who assembled together in May, 1842, and proceeded to organize the new government.

But the charter government did not acquiesce in these proceedings. On the contrary, it passed stringent laws, and finally passed an act declaring the State under martial law.

In May, 1843, a new constitution, which had been framed by a convention called together by the charter government, went into operation, and has continued ever since.

The question which of the two opposing governments was the legitimate one, viz. the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.[1]

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*Mr. Justice Catron, Mr. Justice Daniel, and Mr. Justice McKinley were absent on account of ill health when this case was argued.

[1] CITED. *Phillips* v. *Payne*, 2 Otto, 132; *Keith* v. *Clark*, 7 Id., 474; *United States* v. *Lee*, 16 Otto, 209.

The courts of Rhode Island have decided in favor of the validity of the charter government, and the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.[2]

*2] *The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding.

The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation.[3]

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[2] CITED. *East Hartford* v. *Hartford Bridge Co.*, 10 How., 539.

[3] CITED. *Murray* v. *Hoboken Land &c. Co.*, 18 How., 285; *White* v. *Hart*, 13 Wall., 649.

The argument of Mr. Webster may be found in his works, Vol. VI., p. 617. See also North American Review for April, 1844, p. 371. The views, on this case, of Mr. Calhoun may be found in his works, Vol. VI., 219; also those of Mr. Reverdy Johnson in a note in 2 Story, Const., 507, n. 1 (4th ed.). "It is not to be denied that, under the fourth section of the fourth article of the constitution of the United States, 'it rests with Congress to decide what government is the established one in a State' (citing this case), and whether such government is republican. These are political, and not judicial questions. So, too, are those relating to the admission of senators and representatives." 2 S. C. (N. S.), 283, 294.

The admission of a State into the Union as one of the States is a direct and positive declaration by Congress that the government created by its constitution was republican in form, and that its constitution is not inconsistent with that of the United States. *Blair* v. *Ridgely*, 41 Mo., 63.

The approval by Congress of a constitution of a State, at the time it is admitted as a State, does not give it the force and effect of an act of Congress. 2 Rich. (S. C.), 216; *The Homestead Cases*, 22 Gratt. (Va.), 266; *Hardeman* v. *Downes*, 39 Ga., 425, 443; *Marsh* v. *Burroughs*, 1 Woods, 463, 472; *Hutch* v. *Burroughs*, Id., 439.

There is no power in the Federal constitution to compel a State to organize courts, and afford remedies to enforce contracts. *Cutts* v. *Hayden*, 39 Ga., 350; *Ogden* v. *Saunders*, 12 Wheat., 350; *Shorter* v. *Cobb*, 39 Ga., 285, 287.

When a State forms a constitution, which is approved by Congress, it is estopped to deny its validity. The action of Congress cannot be inquired into, for the judicial is bound to follow the action of the political department. *White* v. *Hart*, 39 Ga., 306; *Powell* v. *Boon*, 43 Ala., 459.

The question as to whether the adoption of the constitution of Georgia, of 1868, was the act of the people of the State, is a political one in which the courts must follow the action of the political department of the government; but this statement has reference only to the United States courts and the United States government. *Marsh* v. *Burroughs*, *supra*.

The question whether a State constitution was regularly and legally adopted, after the same has been acted upon, and the State government is, in fact, being administered under it, is a political rather than a judicial question. A court organized under a constitution would be *ipso facto* if it should declare such constitution null for irregularity and illegality in its adoption. *Brittle* v. *People*, 2 Neb., 198.

But the State courts have full power to declare that an *amendment* to the constitution has not been properly adopted, even though it has been so declared by the political department of the State. *Secombe* v. *Kittleson*, 29 Minn., 555; s. c., 12 N. W. Rep., 519; *State* v. *Young*, 29 Minn., 474; *State* v. *McBride*, 4 Mo., 305; *State* v. *Swift*, 69 Ind., 505; *Collier* v. *Frierson*, 24 Ala., 100.

In the *Opinion of the Judges*, 6 Cush. (Mass.), 573, it was held, that if the legislature should submit to the people the expediency of calling a convention of delegates for the purpose of revising or altering the constitution of the commonwealth in any

The President of the United States is vested with certain power by an act of Congress, and in this case he exercised that power by recognizing the charter government.

Although no State could establish a permanent military government, yet it may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands.[4]

After martial law was declared, an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object; and if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.

THESE two cases came up from the Circuit Court of the United States for the District of Rhode Island, the former by a writ of error, and the latter by a certificate of division in opinion. As the allegations, evidence, and arguments were the same in both, it is necessary to state those only of the first. They were argued at the preceding term of the court, and held under advisement until the present.

Martin Luther, a citizen of the State of Massachusetts, brought an action of trespass *quare clausum fregit* against the defendants, citizens of the State of Rhode Island, for breaking and entering the house of Luther, on the 29th of June, 1842. The action was brought in October, 1842.

At November term, 1842, the defendants filed four pleas in justification, averring, in substance,—

An insurrection of men in arms to overthrow the government of the State by military force.

That, in defence of the government, martial law was declared by the General Assembly of the State.

That the plaintiff was *aiding and abetting* said insurrection. That at the time the trespasses were committed, the State was under martial law, and the defendants were enrolled in the fourth company of infantry in the town of Warren, under the command of J. T. Child.

That the defendants were ordered to arrest the plaintiff, and, if necessary, to break and enter his dwelling-house.

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specific part thereof, and the people should, by the terms of their vote, decide to call a convention of delegates to consider the expediency of so altering the constitution; the delegates would derive their whole authority and commission from such vote, and would have no right, under the same, to act upon and propose amendments in other parts of the constitution not so specified. The constitution then in force provided a way for its amendment, and that such provision, by implication, excluded all other modes of amending that instrument. *Wells* v. *Bain*, 75 Pa. St., 39; *Trustees* v. *McIver*, 72 N. C., 76.

[4] EXPLAINED. *Ex parte Milligan*, 4 Wall., 129, 130.

That it was necessary, and they did break and enter, &c., doing as little injury as possible, &c., and searched said house, &c.

To these pleas there was a general replication and issue.

The cause came on for trial at November term, 1843, when the jury, under the rulings of the court, found a verdict for *3] *the defendants. During the trial, the counsel for the plaintiff took a bill of exceptions, which was as follows.

RHODE ISLAND DISTRICT, *sc.*:

MARTIN LUTHER
v.
LUTHER M. BORDEN ET ALS.

Circuit Court of the United States, November Term, 1843.

Be it remembered, that, upon the trial of the aforesaid issue before said jury, duly impanelled to try the same,—

The defendants offered in evidence, in support of their first, second, and third pleas:—

1st. The charter of the Colony of Rhode Island and Providence Plantations, and the acceptance of the same at a very great meeting and assembly of all the freemen of the then Colony of Rhode Island and Providence Plantations, legally called and held at Newport, in the said Colony, on 24th day of November, A. D., 1663.

That on the 25th day of November, A. D., 1663, the former lawful colonial government of the said Colony dissolved itself, and the said charter became and was henceforth the fundamental law or rule of government for said Colony. That, under and by virtue of said charter, and the acceptance thereof as aforesaid, the government of said colony was duly organized, and by due elections was continued, and exercised all the powers of government granted by it, and was recognized by the inhabitants of said Colony, and by the king of Great Britain and his successors, as the true and lawful government of said Colony, until the 4th day of July, A. D., 1776.

That the General Assembly of said Colony, from time to time, elected and appointed delegates to the General Congress of the delegates of the several Colonies of North America, held in the years 1774, 1775, and 1776, and to the Congress of the United States of America, in the years 1776 and 1778. And that said delegates of said Colony of Rhode Island and Providence Plantations were received by, and acted with, the delegates from the other Colonies and States of America, in Congress assembled, as the delegates representing the said

Colony and State of Rhode Island and Providence Plantations; and that on the 4th day of July, A. D., 1776, said delegates of the said Colony of Rhode Island and Providence Plantations united with the delegates of the other Colonies as representatives of the United States of America, and as such assented to and signed in behalf of said Colony the Declaration of the Independence of the United States of America.

*That afterward, to wit, at the July session of the General Assembly of said State of Rhode Island and Providence Plantations, said General Assembly, by resolution thereof, did approve the said Declaration of Independence made by the Congress aforesaid, and did most solemnly engage that they would support the said General Congress in the said Declaration with their lives and fortunes. [*4

That afterwards, to wit, on the 9th day of July, 1778, the said State of Rhode Island and Providence Plantations, by her delegates duly authorized thereunto, became a party to the articles of confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia, and ratified and confirmed the same; and, as one of the United States of America under said articles of confederation and perpetual union, was received, recognized, and acted with and by the other States of the said confederation, and by the United States of America in Congress assembled, during the continuation of said confederacy.

That after the dissolution of said confederacy, to wit, on the 29th day of May, A. D., 1790, said State of Rhode Island and Providence Plantations, in convention duly called, elected, and assembled under an act of the General Assembly of said State, ratified the Constitution of the United States, and under the same became, and ever since has been, one of the said United States, and as such, under the Constitution and laws of the United States, and of the said State of Rhode Island and Providence Plantations, hath ever elected and sent, and doth now send, Senators and Representatives to the Congress of the United States, who have been since, and now are, received and recognized as such by the said United States, and in all respects have ever been received and recognized by the several States, and by the United States, as one of the said United States under the said Constitution thereof.

That from the said 4th of July, A. D., 1776, to the present

time, the said charter and the said government of the said State of Rhode Island and Providence Plantations, organized under the same, hath ever been acted under and recognized by the people of said State, and hath been recognized by each of the said United States, and hath been recognized and guaranteed by the said United States as the true, lawful, and republican constitution and form of government of said State; and that the said charter continued to regulate the exercise and distribution of the powers of said government of said State, and, except so far as it hath been modified by the Revolution and the new *order of things consequent thereon, continued to be the fundamental law of said State, until the adoption of the present constitution of said State, and the organization of the government under the same.

*5]

That all the officers of the said government of said Colony and State of Rhode Island and Providence Plantations, organized under said charter as aforesaid, were elected in conformity with said charter and with the existing laws, from the first organization of the government under the said charter until the organization of the government under the present constitution of said State, and were and continued to be in the full exercise of all the powers of said government, and in the full possession of all the State-houses, court-houses, public records, prisons, jails, and all other public property, until the regular and legal dissolution of said government by the adoption of the present constitution, and the organization of the present government under the same.

2d. That the General Assembly of said State, at their January session, in the year of our Lord one thousand eight hundred and forty-one, passed resolutions in the words following, to wit:—

"*Resolved* by this general Assembly, (the Senate concurring with the House of representatives therein,) That the freemen of the several towns in this State, and of the city of Providence, qualified to vote for general officers be, and they are hereby, requested to choose, at their semiannual town or ward meetings, in August next, so many delegates, and of the like qualifications, as they are now respectively entitled to choose representatives to the General Assembly, to attend a convention, to be holden at Providence, on the first Monday of November, in the year of our Lord one thousand eight hundred and forty-one, to frame a new constitution for this State, either in whole or in part, with full powers for this purpose; and if only for a constitution in part, that said convention have under their especial consideration the expedi-

ency of equalizing the representation of the towns in the House of Representatives.

"*Resolved*, That a majority of the whole number of delegates which all the towns are entitled to choose shall constitute a quorum; who may elect a president and secretary; judge of the qualifications of the members, and establish such rules and proceedings as they may think necessary; and any town or city which may omit to elect its delegates at the said meetings in August may elect them at any time previous to the meeting of said convention.

"*Resolved*, That the constitution or amendments agreed upon by said convention shall be submitted to the freemen in open town or ward meetings, to be holden at such time as may be *named by said convention. That said constitution or amendments shall be certified by the president and secretary, and returned to the Secretary of State; who shall forthwith distribute to the several town and city clerks, in due proportion, one thousand printed copies thereof, and also fifteen thousand ballots; on one side of which shall be printed "(*Amendments* or *Constitution*) adopted by the convention holden at Providence, on the first Monday of November last"; and on the other side, the word *approve* on the one half of the said ballots, and the word *reject* on the other half. [*6

"*Resolved*, That at the town or ward meetings, to be holden as aforesaid, every freeman voting shall have his name written on the back of his ballot; and the ballots shall be sealed up in open town or ward meeting by the clerks, and, with lists of the names of the voters, shall be returned to the General Assembly at its next succeeding session; and the said General Assembly shall cause said ballots to be examined and counted, and said amendments or constitution being approved of by a majority of the freemen voting, shall go into operation and effect at such time as may be appointed by said convention.

"*Resolved*, That a sum not exceeding three hundred dollars be appropriated for defraying the expenses of said convention, to be paid according to the order of said convention, certified by its president."

That at their May session, in the year of our Lord one thousand eight hundred and forty-one, the said General Assembly passed resolutions in the words following, to wit:—

"*Resolved* by this General Assembly, (the Senate concurring with the House of Representatives therein,) That the delegates from the several towns to the State convention to

be holden in November next, for the purpose of framing a State constitution, be elected on the basis of population, in the following manner, to wit:—Every town of not more than eight hundred and fifty inhabitants may elect one delegate; of more than eight hundred and fifty, and not more than three thousand inhabitants, two delegates; of more than three thousand, and not more than six thousand inhabitants, three delegates; of more than six thousand, and not more than ten thousand inhabitants, four delegates; of more than ten thousand, and not more than fifteen thousand inhabitants, five delegates; of more than fifteen thousand inhabitants, six delegates.

"*Resolved*, That the delegates attending said convention be entitled to receive from the general treasury the same pay as members of the General Assembly.

"*Resolved*, That so much of the resolutions to which these are in amendment as is inconsistent herewith be repealed."

*7] "And that at their January session, in the year of our Lord one thousand eight hundred and forty-two, the said General Assembly passed resolutions in the words following, to wit:—

"*Whereas* a portion of the people of this State, without the forms of law, have undertaken to form and establish a constitution of government for the people of this State, and have declared such constitution to be the supreme law, and have communicated such constitution to the General Assembly; and whereas many of the good people of this State are in danger of being misled by these informal proceedings, therefore,—

"It is hereby *resolved* by this General Assembly, That all acts done by the persons aforesaid, for the purpose of imposing upon this State a constitution, are an assumption of the powers of government in violation of the rights of the existing government, and of the rights of the people at large.

"*Resolved*, That the convention called and organized in pursuance of an act of this General Assembly, for the purpose of forming a constitution to be submitted to the people of this State, is the only body which we can recognize as authorized to form such a constitution, and to this constitution the whole people have a right to look, and we are assured they will not look in vain, for such a form of government as will promote their peace, security, and happiness.

"*Resolved*, That this General Assembly will maintain its own proper authority, and protect and defend the legal and constitutional rights of the people."

And that at their January session, in the year of our Lord

one thousand eight hundred and forty-two, the said General Assembly passed an act in the words following, to wit: —

"An act in amendment of an act, entitled an act revising the act entitled an act regulating the manner of admitting freemen, and directing the manner of electing officers in this State.

"*Whereas* the good people of this State have elected delegates to a convention to form a constitution, which constitution, if ratified by the people, will become the supreme law of the State; therefore,—

"Be it enacted by the General Assembly as follows:—All persons now qualified to vote, and those who may be qualified to vote under the existing laws previous to the time of such their voting, and all persons who shall be qualified to vote under the provisions of such constitution, shall be qualified to vote upon the question of the adoption of the said constitution.

"That under and by virtue of the resolutions and acts last aforesaid, a written constitution of government for the said State of Rhode Island and Providence Plantations was framed *by a convention legally called, elected, and assembled, and that said proposed constitution was, in pursuance [*8 of the said resolutions and acts, on the 21st, 22d, and 23d days of March, A. D., 1842, submitted for adoption or rejection to all persons qualified by the existing laws of said State to vote, and also to all persons who, under the provisions of said constitution, were qualified to vote, in the legal town and ward meetings of said State and the city of Providence, legally called and assembled, and was by a majority of the persons so qualified by law to vote thereon, and actually voting thereon, rejected. That the said Martin Luther and his confederates, in causing and fomenting the said rebellion, voted against the said adoption of said constitution; a copy of which is hereunto annexed, marked A.

3d. The defendants further offered all the acts, resolutions, and proceedings of the said General Assembly of the said Colony and State of Rhode Island and Providence Plantations, from the organization of the said government under the said charter, until the organization of the present government under the present constitution.

4th. The defendants offered evidence, that on the 24th day of June, A. D., 1842, and for a long time before, and from that time continually, until after the time when the said trespasses are alleged in the plaintiff's said declaration to have been committed, large numbers of men, among whom was the said Martin Luther, were assembled in arms in dif-

ferent parts of the said State of Rhode Island and Providence Plantations, for the purpose and with the intent of overthrowing the government of said State, and destroying the same by military force; and with such illegal, malicious, and traitorous intent and purpose, at and during the times aforesaid, did, in different parts of said State, make and levy war upon said State, and upon the government and citizens thereof, and did attempt and enterprise the hurt, detriment, annoyance, and destruction of the inhabitants of said State, and the overthrow of the government thereof.

5th. That in order to protect and preserve said State, and the government and the citizens thereof, from the destruction threatened by said rebellion and military force, the General Assembly of said State, on the 25th day of June, A. D., 1842, enacted and declared martial law in the words following:—

"*An Act establishing Martial Law in this State.*

"Be it enacted by the General Assembly as follows:—*Section* 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force, until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State."

*9] *And thereupon, on the 26th day of June, A. D., 1842, Samuel Ward King, governor, captain-general, and commander-in-chief in and over said State of Rhode Island and Providence Plantations, issued his proclamation in the words and figures following:—

"By his Excellency, Samuel Ward King, Governor, Captain-General, and Commander-in-chief of the State of Rhode Island and Providence Plantations.

"*A Proclamation.*

"Whereas the General Assembly of the said State of Rhode Island and Providence Plantations did, on the 25th day of June, A. D., 1842, pass the following, to wit:—

"'*An Act establishing Martial Law in this State.*

"'Be it enacted by the General Assembly as follows:—*Section* 1. The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State.'

"I do, therefore, issue this my proclamation, to make known the same unto the good people of this State, and all others, that they may govern themselves accordingly. And I do warn all persons against any intercourse or connection with the *traitor* Thomas Wilson Dorr, or his deluded adherents, now assembled in arms against the laws and authorities of this State, and admonish and command the said Thomas Wilson Dorr and his adherents immediately to throw down their arms and disperse, that peace and order may be restored to our suffering community, and as they will answer the contrary at their peril. Further, I exhort the good people of this State to aid and support by example, and by arms, the civil and military authorities thereof, in pursuing and bringing to condign punishment all engaged in said unholy and criminal enterprise against the peace and dignity of the State.

"In testimony whereof, I have caused the seal of said State to be affixed to these presents, and have signed the same with my hand. Given at the city of Providence,
[L. S.] on the 26th day of June, A. D., 1842, and of the Independence of the United States of America the sixty-sixth.

"SAMUEL WARD KING.

"By his Excellency's command.

"HENRY BOWEN, *Secretary.*"

*6th. That at the time when the trespasses mentioned and set forth in the plaintiff's said declaration [*10
are alleged to have been committed, and at divers other times before that time, the plaintiff was aiding and abetting the aforesaid traitorous, malicious, and unlawful purposes and designs of overthrowing the government of said State by rebellion and military force, and in making war upon said State, and upon the government and citizens thereof.

7th. That at the time when the pretended trespasses mentioned in the plaintiff's declaration are alleged to have been committed, the said State was under martial law as aforesaid, and the said defendants were enrolled in the company of infantry in the said town of Warren, in the fourth regiment of the militia of said State, and were under the command of John T. Child.

8th. That said John T. Child, on the 25th day of June, A. D., 1842, was duly commissioned and sworn as a quartermaster of the fourth regiment of the first brigade of militia of Rhode Island, and continued to exercise such command until after the time when the trespasses mentioned in the plaintiff's declara-

tion are alleged to have been committed; that on the 27th day of June, A. D., 1842, the said John T. Child received written orders from Thomas G. Turner, Esq., lieutenant-colonel commanding said regiment, and duly commissioned and sworn, "to continue to keep a strong armed guard, night and day, in the said Warren, and to arrest every person, either citizens of Warren or otherwise, whose movements were in the least degree suspicious, or who expressed the least willingness to assist the insurgents who were in arms against the law and authorities of the State."

9th. That these defendants were ordered, by the said John T. Child, their commander as aforesaid, to arrest and take the said Martin Luther, and, if necessary for the purpose of arresting and taking the said Luther, these defendants were ordered to break and enter the dwelling-house of said Luther.

10th. That these defendants, in compliance with said orders, and for the purpose of arresting and taking said Luther, proceeded to his house and knocked at the door, and, not being able to obtain admission therein, forced the latch of the door of said house, and entered the same for the purpose of making said arrest, doing as little damage as possible.

11th. That at the time these defendants were ordered to arrest the said Martin Luther, as before stated, the town of Warren was in danger of an attack from the said Martin Luther and his confederates, and the inhabitants of said town were in great alarm on account thereof.

*11] *And the counsel for the plaintiff, to maintain and prove the issue on his part, offered in evidence the following matters, facts, and things, in manner following, to wit:—

1st. The plaintiff offered in evidence the proceedings and resolutions of a convention of the State of Rhode Island and Providence Plantations, passed 29th May, 1790, a copy whereof is hereunto annexed, marked A.

2d. The plaintiff offered in evidence the report of a committee of the House of Representatives of the State of Rhode Island, &c., made in June, 1829, upon certain memorials to them directed therein, praying for an extension of the right of suffrage in said State, a copy of which is hereunto annexed, marked B.

3d. The plaintiff offered in evidence resolutions passed by the General Assembly of said State, at their session, January, 1841, a copy of which is hereunto annexed, marked C.

4th. The plaintiff then offered in evidence the memorial

addressed to said Assembly, at said session, by Elisha Dillingham and others, a copy of which is hereunto annexed, marked D.

5th. The plaintiff offered evidence to prove that, in the last part of the year 1840, and in the year 1841, associations were formed in many, if not in all, the towns in the State, called "Suffrage Associations," the object of which was to diffuse information among the people upon the question of forming a written republican constitution, and of extending the right of suffrage. To prove this, he offered the officers and members of said associations, also the declaration of principles of said associations, passed February 7, 1841, and the proceedings of a meeting thereof on the 13th day of April, 1841; and also offered witnesses to prove that a portion of the people of this State assembled at Providence, on the 17th day of April, 1841, under a call from the Rhode Island Suffrage Association, to take into consideration certain matters connected with the existing state of suffrage in said State, and to prove the proceedings of said meeting; and this he offered to prove by the testimony of the chairman of said meeting, and the clerk of the same, and of other persons present thereat; all of which proceedings and declaration, resolutions, &c., are hereunto annexed, marked E.

6th. The plaintiff offered to prove that, on the 5th day of May, A. D., 1841, a mass convention of the male inhabitants of this State, consisting of four thousand and upwards, of the age of twenty-one years and upwards, met at Newport, in said State, in pursuance of notice for that purpose; whereat, among other things, it was resolved by said convention as follows: (See copy of said resolutions hereunto annexed, marked F.)

7th. The plaintiff offered to prove that the said mass *convention at Newport aforesaid adjourned their meeting from said 5th day of May to the 5th day of July, 1841, to Providence, in said State, at which place and time last mentioned said convention reassembled, consisting of six thousand persons and upwards, of the age of twenty-one years and upwards, the same being the free male inhabitants of said State, when and where, among other things, it was resolved by said convention as follows: (See copy of said resolutions hereunto annexed, and marked G.) [*12

8th. The plaintiff offered in evidence certain resolutions of the General Assembly of said State, passed at their May session, 1841; also a certain bill (or act) presented by a member of said Assembly, at the same session, and the pro-

ceedings of said Assembly thereupon, copies of which are hereunto annexed, marked H a, H b.

9th. The plaintiff offered in evidence the minority report from the Committee on the Judiciary upon the bill or act mentioned in the eighth offer, made to said General Assembly at their June session, A. D., 1841, and the action of said General Assembly thereupon, copies of which are hereunto annexed, marked I a, I b.

10th. The plaintiff offered to prove that the said State committee, by virtue of the authority in them vested by the said mass convention, notified the inhabitants of the several towns, and of the city of Providence, in this State, to assemble together and appoint delegates to a convention, for the purpose of framing a constitution for this State aforesaid, and that every American male citizen, twenty-one years of age and upwards, who had resided in this State as his home one year preceding the election of delegates, should have the right to vote for delegates to said convention, to draft a constitution to be laid before the people of said State; and that every thousand inhabitants in the towns in said State should be entitled to one delegate, and each ward in the city of Providence to three delegates, as appears by the following request duly published and proclaimed; also an address from said committee to the people of the State. See the copies of said request and address, hereunto annexed, and marked J a, J b.

11th. The plaintiff offered to prove that the said notice, request, or call was duly published and promulgated in public newspapers printed and published in said State, and by hand-bills which were stuck up in the public houses, and at various other places of public resort, in all the towns, and in every ward in the city of Providence, in said State.

12th. The plaintiff offered to prove, that, at the adjourned mass convention aforementioned as held at Providence, in

*13] said *State, on the 5th day of July, A. D., 1841, the people of the State then present did by vote duly taken enlarge said State committee by the addition of the following-named persons, all citizens of this State, to wit:—

Providence County, Henry L. Webster, Philip B. Stiness, Metcalf Marsh.

Newport County, Silas Sissons.

Bristol County, Abijah Luce.

Kent County, John B. Sheldon.

Washington County, Wager Weeden, Charles Allen.

13th. The plaintiff offered to prove that, at the meeting of the said State committee, on the 20th day of July, 1841, at

Providence aforesaid, when the said notice, request, or call was ordered, the following members of said committee were present, and approved of the aforesaid call, and of all the proceedings then had, to wit: Samuel H. Wales, Henry L. Webster, Benjamin Arnold, Jr., Welcome B. Sayles, Metcalf Marsh, Philip B. Stiness, Dutee J. Pearce, Silas Sissons, Benjamin M. Bosworth, Abijah Luce, Sylvester Himes.

14th. The plaintiff then offered to prove that, in the month of August, 1841, citizens of this State, qualified as aforesaid, did meet in their several towns, and in the several wards in the said city of Providence, and made choice of delegates, in conformity with said notice, to meet in convention to form a draft of a constitution to be laid before the people of this State; and he offered the chairman presiding at said meetings, and the persons acting as clerks of the same, the votes or ballots then and there cast by the persons voting thereon, and of the persons then and there voting, to prove the aforesaid facts, and to prove the number of citizens so voting.

15th. The plaintiff offered to prove that the said delegates did meet in convention, in said city of Providence, in the month of October, 1841, and drafted a constitution, and submitted it to the people of said State for their examination, and then adjourned, to meet in said city of Providence, in the month of November, A. D., 1841; and he offered to prove this by the production of the original minutes, or records, of the proceedings of said convention, verified by the oaths of the presidents and secretaries thereof, and of divers persons attending the same, as members thereof, or delegates thereto.

16th. The plaintiff offered to prove that, in pursuance of said adjournment, the said delegates did again meet in convention, in said Providence, in said month of November, and then completed the draft of the following constitution, (a copy of which is hereunto annexed marked K,) and submitted the same to the people of said State for their adoption or rejection, *recommending them to express [*14
their will on the subject, at meetings to be duly presided over by moderators and clerks, and by writing their names upon their tickets, and to be holden in their several towns, and in the several wards of the city of Providence, on Monday, the 27th day of December, and on the two next successive days; and that any person entitled to vote, who, from sickness or other cause, might be unable to attend and vote in the town or ward meeting on the days aforesaid, might write his name on a ticket, and obtain the signature upon the back of the same, as a witness thereto, of a person who had

given in his vote, which tickets were in the following form, to wit:—"I am an American citizen, of the age of twenty-one years, and have my permanent residence, or home, in this State; I am (or not) qualified to vote under the existing laws of this State. I vote (for or against) the constitution formed by the convention of the people assembled in Providence, and which was proposed to the people by said convention on the 18th day of November, A. D., 1841"; which votes the moderator or clerk of any town or ward meetings should receive on either of the three days succeeding the three days before named; and which he offered to prove by the production of said original minutes and records as aforesaid, verified as aforesaid, and by the testimony of said persons aforesaid, and by the 14th article of said constitution.

17th. The plaintiff offered to prove that meetings were held in the several towns, and wards of the city of Providence aforesaid, and on the days aforesaid, for the purposes aforesaid, in pursuance of the requirements of said constitution; and the said moderators and clerks did receive, on said three successive days, such votes of persons qualified as aforesaid, and then carefully kept and made registers of all the persons voting, which, together with the tickets given in by the voters, were sealed up and returned by said moderators and clerks, with certificates signed and sealed by them, to the secretary of said convention, to be counted and declared at their adjourned meeting, on the 12th day of January, A. D., 1842; all of which he offered to prove by the testimony of the several moderators presiding at said meeting, and of the clerks of the same, and of the secretaries of said convention, and by the production of the original votes or ballots cast or polled by the persons then and there voting, the original registers of all said persons so voting, and the said certificates, signed and sealed as aforesaid, verified by the oaths of said moderators and clerks.

18th. The plaintiff offered to prove that the said convention of delegates did meet in said Providence, on the said 12th day of January, 1842, and did then and there count the said votes; *and the said convention thereafterwards, on the said 13th day of said January, did pass the preamble and resolutions following, to wit:— *15]

"Whereas, by the return of the votes upon the constitution proposed to the citizens of this State by this convention, the 18th day of November last, it satisfactorily appears that the citizens of this State, in their original sovereign capacity, have ratified and adopted said constitution by a large major-

ity; and the will of the people, thus decisively made known, ought to be implicitly obeyed and faithfully executed.

"We do therefore resolve and declare that said constitution rightfully ought to be, and is, the paramount law and constitution of the State of Rhode Island and Providence Plantations.

"And we further resolve and declare, for ourselves, and in behalf of the people whom we represent, that we will establish said constitution, and sustain and defend the same by all necessary means.

"Resolved, That the officers of this convention make proclamation of the return of the votes upon the constitution, and that the same has been adopted and become the constitution of this State; and that they cause said proclamation to be published in the newspapers of the same.

"Resolved, That a certified copy of the report of the committee appointed to count the votes upon the constitution, and of these resolutions, and of the constitution, be sent to his Excellency the Governor, with a request that he would communicate the same to the two houses of the General Assembly." A copy of which resolutions and proceedings is annexed, marked L c.

And he further offered to prove that the same was sent to said Governor, and by him communicated to the said General Assembly, and by them laid on the table; and that, by a subsequent resolution of the House of Representatives in said General Assembly, the further consideration thereof was indefinitely postponed. All these matters he offered to prove by the production of the original minutes or records of the convention aforesaid, verified by the oaths of the president, vice-presidents, and secretaries thereof; by the report of the committee appointed by said convention to count said votes, verified by the certificate of the secretaries of said convention, and by the oaths of the members of said committee, and by the certificate of Henry Bowen, Secretary of State under the then acting government, and of Thomas A. Jenks, one of the clerks of the then House of Representatives. And he further offered to prove, that, at the same session of said Assembly, a member of the House of Representatives submitted to that body, for their *action, a resolution referring all the [*16
matters connected with the formation and adoption of the aforesaid constitution to a select committee, with instructions to them to ascertain and report the number of votes cast, and the number of persons voting for the same, with full power to send for persons and papers; which resolution was rejected by said House of Representatives, as appears by cop-

ies of the records of the said House for said session, hereunto annexed, and marked L a, and the exhibit hereunto annexed, marked L b, and the testimony of witnesses.

19th. The plaintiff then offered to prove that the officers of said convention did make the proclamation required by the said resolution of the said convention; and he offered to prove this by a copy of said proclamation, certified by said officers, the oaths of said officers, and the testimony of other witnesses. See form of proclamation annexed, marked X.

20th. The plaintiff then offered to prove that the said constitution was adopted by a large majority of the male people of this State, of the age of twenty-one years and upwards, who were qualified to vote under said constitution, and also adopted by a majority of the persons entitled to vote for general officers under the then existing laws of the said State, and according to the provisions thereof; and that so much of the same as relates to the election of the officers named in the sixth section of the fourteenth article of said constitution, on the Monday before the 3d Wednesday of April, A. D., 1842, to wit, on the 18th day of said April, and all the other parts thereof on the first Tuesday of May, 1842, to wit, on the 3d day of said May, and then and there became, and was, the rightful and legal constitution of said State, and paramount law of said State; and this he offered to prove by the production of the original votes or ballots cast or polled by the persons voting for or against the adoption of said constitution, by the production of the original registers of the persons so voting, verified by the oaths of the several moderators and clerks of the meetings held for such votings, by the testimony of all the persons so voting, and by the said constitution.

21st. The plaintiff produced a copy of said constitution, verified by the certificates of Joseph Joslin, president of said convention of delegates elected and assembled as aforesaid, and for the purposes aforesaid, and of Samuel H. Wales, one of the vice-presidents, and of John S. Harris and William Smith, secretaries of the same; and offered the said Joslin, Wales, Harris, and Smith as witnesses to prove the truth of the matters set forth in said certificates; which said copy, upon the proof aforesaid, he claimed to be a true and authenticated copy of said constitution, and which constitution he claimed to be the paramount law of the said State.

*17] *22d. The plaintiff offered to prove, that, by virtue of, and in conformity with, the provisions of said constitution, so adopted as aforesaid, the people of said State entitled to vote for general officers, Senators and Representatives to the General Assembly of said State, under said con-

stitution, did meet, in legal town and ward meetings, on the third Wednesday of April next preceding the first Tuesday of May, 1842, to wit, on the 18th day of April, 1842, and did elect duly the officers required by said constitution for the formation of the government under said constitution; and that said meetings were conducted and directed according to the provisions of said constitution and the laws of said State; and this he offered to prove by the evidence of the moderators and clerks of said meetings, and the persons present at the same.

23d. The plaintiff offered in evidence that the said general officers, to wit, the Governor, Lieutenant-Governor, Secretary of State, Senators and Representatives, all constituting the General Assembly of said State under said constitution, did assemble in said city of Providence on the first Tuesday of May, A. D., 1842, to wit, on the 3d day of May, 1842, and did then and there organize a government for the said State, in conformity with the provisions and requirements of said constitution, and did elect, appoint, and qualify officers to carry the said constitution and laws into effect; and, to prove the same, he offered exemplified copies of the acts and doings of said General Assembly, hereunto annexed, and marked N a, N b, N c.

24th. The plaintiff offered in evidence a duly certified copy of that part of the census of the United States for the year 1840, which applies to the District and State of Rhode Island, &c., hereunto annexed, and marked O.

25th. The plaintiff offered in evidence a certificate signed by Henry Bowen, Secretary of State of the then existing government of the State of Rhode Island, &c., showing the number of votes polled by the freemen in said State for ten years then last past; a copy of which is hereunto annexed, marked P. Also, under the same certificate, an act marked Q, purporting to establish martial law.

26th. And the plaintiff offered in evidence an authenticated copy of an act of the General Assembly under the charter government, passed at their June session, A. D., 1842, entitled, "An Act to provide for calling a Convention of the People," &c., and an act in amendment thereto; which said copy is hereunto annexed, marked Q a. And also a copy of from the records of the House of Representatives (under said government), at their March session, A. D., 1842, hereunto annexed, marked R.

*Whereupon the counsel for the plaintiff requested the court to charge the jury, that, under the facts offered in evidence by the plaintiff, the constitution and [*18

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frame of government prepared, adopted, and established in the manner and form set forth and shown thereby was, and became thereby, the supreme law of the State of Rhode Island, and was in full force and effect, as such, during the time set forth in the plaintiff's writ and declaration, when the trespass alleged therein was committed by the defendants, as admitted in their pleas.

That a majority of the free white male citizens of Rhode Island, of twenty-one years and upwards, in the exercise of the sovereignty of the people, through the forms and in the manner set forth in said evidence, offered to be proved by the plaintiff, and in the absence, under the then existing frame of government of the said State of Rhode Island, of any provision therein for amending, altering, reforming, changing, or abolishing the said frame of government, had the right to reassume the powers of government, and establish a written constitution and frame of a republican form of government; and that having so exercised such right as aforesaid, the pre-existing charter government, and the authority and the assumed laws under which the defendants in their plea claim to have acted, became null and void and of no effect, so far as they were repugnant to and conflicted with said constitution, and are no justification of the acts of the defendants in the premises.

And the court, *pro forma*, and upon the understandings of the parties to carry up the rulings and exceptions of the said court to the Supreme Court of the United States, refused to give the said instructions, or to admit in evidence the facts offered to be proved by the plaintiff, but did admit the testimony offered to be proved by the defendants; and did rule that the government and laws, under which they assume in their plea to have acted, were in full force and effect as the frame of government and laws of the State of Rhode Island, and did constitute a justification of the acts of the defendants, as set forth in their pleas.

To which refusals of the court so to instruct the jury as prayed for, as well as to the instructions so as aforesaid given by the court to the jury, the plaintiff, by his counsel, excepted, and prayed the exceptions to be allowed by the court. And after the said instructions were so refused, and so given as aforesaid, the jury withdrew, and afterwards returned their verdict for the defendants.

And inasmuch as the said several matters of law, and the said several matters of fact, so produced and given in evidence on the part of the said plaintiff and the said defend-

ants, and by *their counsel insisted on and objected to in manner as aforesaid, do not appear by the record and verdict aforesaid; the said counsel for the plaintiff did then and there propose the aforesaid exceptions to the said refusals and opinions of said court, and requested them to put the seal of said court to this bill of exceptions, containing the said several matters so produced and given in evidence for the party objecting as aforesaid. [*19

And thereupon the judges of the aforesaid court, at the request of the counsel for the party objecting, did put their said seal to this bill of exceptions, the same being found to be true, pursuant to the law in such cases provided, at the term of said court and the trial aforesaid.

JOSEPH STORY. [SEAL.]

The papers referred to in the above bill of exceptions, and made a part of it, were so voluminous that it is impossible to insert them. They constituted a volume of 150 pages.

The case was argued by *Mr. Hallett* and *Mr. Clifford*, for the plaintiff in error, although the brief was signed by Mr. Turner, Mr. Hallett, Mr. R. J. Walker, and Mr. Clifford. On the part of the defendant in error, it was argued by *Mr. Whipple* and *Mr. Webster*.

The brief filed on behalf of the plaintiff in error recited the facts contained in the bill of exceptions and documents attached thereto, in chronological order, and concluded thus:—

Points.

And upon these facts the plaintiff in error will maintain, that, by the fundamental principles of government and of the sovereignty of the people acknowledged and acted upon in the United States, and the several States thereof, at least ever since the Declaration of Independence in 1776, the constitution and frame of government prepared, adopted, and established as above set forth was, and became thereby, the supreme fundamental law of the State of Rhode Island, and was in full force and effect, as such, when the trespass alleged in the plaintiff's writ was committed by the defendants.

That this conclusion also follows from one of the foregoing fundamental principles of the American system of government, which is, that government is instituted by the people, and for the benefit, protection, and security of the people, nation, or community. And that when any government shall

be found inadequate or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible *right to reform, alter, or abolish the same, in such manner as shall be judged most conducive to the public weal. *20]

But that, in the case at bar, the argument is sufficient, even should it limit the right (which the plaintiff disclaims) to a majority of the voting people, such majority having, in fact, adopted and affirmed the said constitution of Rhode Island.

To sustain this general view, the following proposition is submitted as the theory of American government, upon which the decision of this cause must depend.

The institution of American liberty is based upon the principles, that the people are capable of self-government, and have an inalienable right at all times, and in any manner they please, to establish and alter or change the constitution or particular form under which that government shall be effected. This is especially true of the several States composing the Union, subject only to a limitation provided by the United States Constitution, that the State governments shall be republican.

In order to support this proposition, we have to establish the following points: —

1st. That the sovereignty of the people is supreme, and may act in forming government without the assent of the existing government.

2d. That the people are the sole judges of the form of government best calculated to promote their safety and happiness.

3d. That, as the sovereign power, they have a right to adopt such form of government.

4th. That the right to adopt necessarily includes the right to abolish, to reform, and to alter any existing form of government, and to substitute in its stead any other that they may judge better adapted to the purposes intended.

5th. That if such right exists at all, it exists in the States under the Union, not as a right of force, but a right of sovereignty; and that those who oppose its peaceful exercise, and not those who support it, are culpable.

6th. That the exercise of this right, which is a right original, sovereign, and supreme, and not derived from any other human authority, may be, and must be, effected in such way and manner as the people may for themselves determine.

7th. And more especially is this true in the case of the then subsisting government of Rhode Island, which derived no power from the charter or from the people to alter or amend

the frame of government, or to change the basis of representation, or even to propose initiatory measures to that end.

Upon the foregoing hypothesis, then, the following questions arise:—

1st. Had the people of Rhode Island, in the month of *December, 1841, without the sanction or assent of the Legislature, a right to adopt a State constitution [*21 for themselves, that constitution establishing a government, republican in form, within the meaning of the Constitution of the United States?

2d. Was the evidence of the adoption by the people of Rhode Island of such a constitution, offered in the court below by the plaintiff in this cause, competent to prove the fact of the adoption of such constitution?

3d. Upon the issuing of the proclamation of the convention, by which it had been declared duly adopted, namely, on the 13th day of January, 1842, and the acts under it, did not that constitution become the supreme law of the State of Rhode Island?

If these questions are answered in the negative, then the theory of American free governments for the States is unavailable in practice.

If they be answered in the affirmative, then the consequences which necessarily follow are,—

1st. The charter government was, *ipso facto*, dissolved by the adoption of the people's constitution, and by the organization and proceedings of the new government under the same.

2d. Consequently, the act of March, 1842, "in relation to offences against the sovereign power of the State," and the act "declaring martial law," passed June 24, 1842, were both void.

3d. The act of June, 1842, being void, affords no justification of the acts complained of in the plaintiff's declaration.

4th. Those acts, by the common law, amount to trespass, the facts being admitted by the defendants.

It has already been said that *Mr. Hallett* alone argued the case on behalf of the plaintiff in error, but the Reporter is much at a loss how to give even a skeleton of the argument, which lasted for three days, and extended over a great variety of matter. The following points were discussed, and authorities read.

1st. What is a State?

Sydney on Government, pp. 15, 24, 349, 399; Locke on Government, B. 2, ch. 8, §§ 95, 96, &c.; Burgh's Pol. Dis., Vol. I., pp. 3, 4, 6; Vattel, L. N., p. 18; Virginia Convention,

1775; Wilson's Works, Vol. I., pp. 17, 304, 305; Federalist, No. 39, p. 150; 2 Dall., 419, 463, 464; 3 Dall., 93, 94; 1 Tuck. Bl. Com., App., p. 10; 1 Story, Com. on Const., p. 193, § 208; 1 Elliott's Deb., Gilp. ed., p. 65.

2d. Who are the people?

The early political writers indiscriminately use the words *community*, *society*, *state*, *nation*, *body of the community*, and *great body of the people*, to express the same idea, and sometimes the words *the governed* are used in the same sense.

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Sydney on Government, ch. 1, 2, 3; Locke on Government, B. 2, ch. 8, §§ 95 *et seq.*, ch. 13, &c.; Burgh's Pol. Dis., Vol. I. ch. 2, 3, Vol. III., pp. 275–278; Vattel, L. N., p. 18; Virginia Convention, 1775, pp. 16, 27, 42, 78; Declaration of Amer. Ind., &c.; *Trevett* v. *Weeden*, Varnum's Argument in 1787; Wilson's Works, Vol. I., pp. 17, 20, 25, 417, 420, Vol. II., p. 128, Vol. III., p. 291; Federalist, Nos. 1, 7, 14, 21, 22, 39, 40, 63; Virginia Convention, 1788, pp. 46, 57, 58, 64, 65, 67–70, 79, 87, 95, &c.; 2 Dall., 448, 449, 452, 454, 458, 470–472; 3 Dall., 86, 92–94; 1 Tuck. Bl. Com., Pt. 1, note at p. 89, App., pp. 4, 9, 87; 1 Cranch, 176; Helvidius, p. 78 (by Mr. Madison); Rayner's Life of Jefferson, 377, 378; John Taylor, of Car., pp. 4, 412, 413, 519, 447; Rawle on the Const., pp. 14–17.

He cites Vattel, and uses the word *people* in the same sense Vattel had used the word *state*.

4 Wheat., p. 404; Story's Com. on the Const., Vol. I., B. 2, §§ 201–204, &c.; Virginia Convention, 1829, 1830; Debates in Congress (Michigan), Reg. Deb., Vol. XIII., Pt. 1; Everett's Address, Jan. 9, 1836; Burke's Report.

All the American political writers, &c., use the term *people* to express the entire numerical aggregate of the community, whether state or national, in contradistinction to the *government* or *legislature*.

Mr. Burke, in his Report, cited above, says, that "the (political) people include all *free white male persons* of the age of twenty-one years, who are *citizens* of the state, are of sound mind, and have not forfeited their right by some crime against the society of which they are members."

3d. Where resides the ultimate power or sovereignty?

Sydney on Government, pp. 70, 349, 436; Locke on Government, p. 316; Burgh's Pol. Dis., Vol. I., pp. 3, 4, 6, Vol. III., pp. 277, 278, 299, 447; Paine's Rights of Man, p. 185; Roger Williams on Civil Liberty; Virginia Convention of 1775; Dec. of Amer. Ind.; Wash. Farewell Address; *Trevett* v. *Weeden*, Varnum's Argument; Wilson's Works, Vol.

I., pp. 17, 21, 25, 415, 417, 418, 420, Vol. II., p. 128, Vol. III., pp. 277, 278, 299, 447; Federalist, No. 22, p. 87, No. 39, p. 154, No. 40, p. 158, No. 46, p. 188; Virginia Deb. of 1788, pp. 46, 65, 69, 79, 187, 230, 248, 313; *Chisholm* v. *Georgia*, 2 Dall., 448 (Iredell), 454, 457, 458 (Wilson), 470–472 (Jay), 304 (Patterson); *Vanhorne's Case*, 3 Dall., 93 (Iredell); *Doane's Case*, 3 Dall., 93 (Iredell); 1 Tuck. Bl. Com., App., pp. 4, 9, 10; 1 Cranch, 176; Rayner's Life of Jefferson, pp. 377, 378; *John Taylor, of Car., pp. 412, 413, 489, 490; 4 Wheat., p. 404 (Marshall); Rawle on the Const., p. 17; 1 Story, Com. on the Const., pp. 185, 186, 194, 195, 198–300; Virginia Convention of 1829, 1830; Admission of Michigan (Buchanan, Benton, Strange, Brown, Niles, King, Vanderpoel, Toucey); Everett's Address, p. 4; 4 Elliott's Deb., 223; R. I. Declaration of Rights, Art. 2 and 3. [*23

4th. The right of the people to establish government.

Sydney, Locke, Burgh (cited *ante*); Dec. of Amer. Ind.; Wash. Farewell Ad.; Virginia Convention of 1775; Roger Williams; Wilson; The Federalist; Virginia Deb. of 1778; 2 Dall.; 1 Tuck. Bl. Com., App.; 1 Cranch; Rayner's Life of Jefferson; John Taylor, of Caroline; 4 Wheat.; Rawle on the Constitution; 1 Story, Com. on Const.; Virginia Convention of 1829, 1830; Admission of Michigan; 2 Elliott's Debates, 65 (Pat. Henry).

5th. The mode in which the right may be exercised.

The English authors already cited, although they all assert the right of the people to change their form of government as they please for their own welfare, do not in any instance come nearer to pointing out any specific mode of doing it than by saying that "they may meet when and where they please, and dispose of the sovereignty, or limit the exercise of it."*

Sydney on Government, ch. 3, § 31, p. 399.

In the Virginia Declaration of June 12, 1776, Art. 3, they say it may be done "in such manner as shall be judged most conducive to the common weal."

Declaration of American Independence; Wilson's Works, Vol. I., pp. 17, 21, 418, 419, Vol. III., p. 293; Federalist, No. 21, p. 78, No. 39, p. 154, No. 40, p. 158, No. 43, p. 175; Virginia Convention of 1788, 2 Elliott's Deb., pp. 46, 65, 67; 2 Dall. Rep., p. 448 (Iredell), p. 464 (Wilson, Jay); 1 Tuck. Bl. Com., part 1, p. 89, *n.*; Appendix, pp. 92–94; Rayner's Life of Jefferson, pp. 377, 378; 4 Wheat., p. 404 (Marshall);

*For the reason, see Madison, 2 Ell. Deb., 95, and Pinckney, 4 Ell. Deb., 319, that for our system "we cannot find one express example in the experience of the world."

Rawle on the Const., p. 17; 1 Story, Com. on the Const., pp. 198, 300, 305, 306; Virginia Convention of 1829, 1830, p. 195.

The anti-republican doctrine that legislative action or sanction is necessary, as the mode of effecting a change of State government, was broached for the first time, under the United States government, by one Senator in the debate in Congress upon the admission of Michigan, December, 1846. See *Congressional Globe and Appendix for 1836, 1837. It was opposed in the Senate by Mr. Buchanan, pp. 75, 147, Mr. Benton, pp. 78, 79, Mr. Strange, p. 80, Mr. Brown, p. 81, Mr. Niles, pp. 82, 83, Mr. King, p. 85; in the House by Mr. Vanderpoel, p. 131, Mr. Toucey, p. 185.

*24]

See *Kamper* v. *Hawkins*, 1 Va. Cas., 28, 29, 36, 37, 46, 47, 50, 51, 57, 58, 62, 64, 65, 67–74.

The instances of Tennessee, Michigan, Arkansas, and the recent case of New York.

So far as the foregoing authorities are proof of any thing they establish the following positions, viz.:—

1. That in the United States no definite, uniform mode has ever been established for either instituting or changing a form of State government.

2. That State legislatures have no power or authority over the subject, and can interfere only by usurpation, any further than, like other individuals, to recommend.

3. That the great body of the people may change their form of government at any time, in any peaceful way, and by any mode of operations that they for themselves determine to be expedient.

4. That even where a subsisting constitution points out a particular mode of change, the people are not bound to follow the mode so pointed out; but may at their pleasure adopt another.

5. That where no constitution exists, and no fundamental law prescribes any mode of amendment, there they must adopt a mode for themselves; and the mode they do adopt, when adopted, ratified, or acquiesced in by a majority of the people, is binding upon all.

6th. When and by what act does a State constitution become the paramount law?

A constitution, being the deliberate expression of the sovereign will of the people, takes effect from the time that will is unequivocally expressed, in the manner provided in and by the instrument itself.

The Constitution of the United States became the supreme

law upon its ratification by nine States, in the mode pointed out by the Constitution itself.

A similar rule of construction has been adopted by the several States ever since.

Constitution of New York, p. 123 of Amer. Const.; Pennsylvania, p. 139; Delaware, p. 157, § 8; Kentucky, p. 241; Louisiana, p. 300, § 7; Mississippi, p. 316, § 5; Michigan, p. 392, § 9.

This constitution was adopted in convention, May 11, 1835, —*ratified by the people on the first Monday of October,—a legislature elected in the same month,—held a [*25 session in November,—organized their judiciary, March, 1836, but were not admitted into the Union until January 26, 1837. Validity has been given to her legislative acts passed in March, 1836; therefore her constitution took effect as the supreme law, upon its ratification by the vote of the people, on the first Monday of October, 1835.

That this constitution was so considered, see speech of Mr. Morris, in Gales & Seaton's Cong. App., p. 68; Mr. Benton, Mr. King, Mr. Vanderpool, Mr. Toucey, Congressional Globe and Appendix, 1836–7.

See also 1 Story, Com. on Const. Judge Nelson says (1 Va. Cas., p. 28),—"It is confessedly the assent of the people which gives validity to a constitution." Judge Henry, p. 47; 9 Dane, Abr., p. 18, § 8, p. 26, § 14, p. 22, § 11, when the United States Constitution became binding, p. 38, § 28, p. 41, § 32, p. 44, § 35.

These authorities establish the position, that constitutions take effect and become binding from the time of their ratification by the vote of the people; which, in the language of Washington, is of itself "an explicit and authentic act of the whole people."

7th. The difference between a change of government and a revolution.

2 Dall., 419, 464, 308; Wilson's Works, Vol. 1., pp. 383, 384, "A change of government has been viewed," &c.; Id., pp. 20, 21; Federalist, No. 21 (Hamilton), p. 78, No. 39, p. 154, No. 40, p. 158, No. 43, p. 175 (Madison); Washington's Farewell Address; the several State constitutions; Helvidius (Madison); Rawle on the Const.; 1 Story, Com. on Const., p. 300; 1 Cranch, p. 176 (Marshall); 9 Dane, Abr., pp. 67, 68, § 56.

All these go to establish the constitutional right of changing State forms of government. But the right of revolution, in the common and European acceptation of the term, implying a change by force, is nowhere sanctioned, so far as individual

States are concerned, in the Constitution of the United States, if it may be in that of any of the States. On the contrary, as such revolution may involve insurrection and rebellion, as in the cases of Massachusetts and Pennsylvania, the Constitution of the United States, Art. 1, Sect. 8, §§ 14 and 18, makes express provision to resist all such force with the whole military force of the nation, if required, and the act of Congress of February 28, 1795, for calling out the militia, was passed to carry that provision into effect. So that, under
*26] the American *system of government, a revolution and a mere peaceful change of government are entirely distinct and different things,—one being provided for, the other, in effect, guarded against.

8th. Why a revolution to change the form of a State government can never be resorted to within the limits of the United States Constitution, while a State remains in the Union.

The United States Constitution, Art. 4, Sect. 4, provides that "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence."

Now, therefore, if *revolution* includes *insurrection* and *rebellion* (all of which are attempts to change a subsisting government by force), then they create that "domestic violence" which is contemplated by the Constitution, and which, by the act of 1795, they have by law provided for suppressing. How, then, can revolution be resorted to, to change a State government? With respect to the Constitution of the United States the case may, I think, be different.

As to the decision of State courts.

The rule applies to cases where the decision of a State court has become a rule of property, and to the construction of local statutes. *Green* v. *Neal*, 6 Pet., 291. It must be a fixed and received construction. *Shelby* v. *Guy*, 11 Wheat., 361; *Gardner* v. *Collins*, 2 Pet., 85.

But the Rhode Island court, in the trial of Governor Dorr for treason, refused to consider the people's constitution, or to decide between that and the charter government. They held (p. 38) that, "if a government had been set up under what is called the people's constitution, and they had appointed judges to give effect to their proceedings, and deriving authority from such a source, such a court might have been ad-

dressed upon a question like this; but we are not that court."

The rule of State decision does not apply to this case,—

1. Because it involved no rule of property nor construction of a statute enacted by a legislature acknowledged by both parties, but related to the existence of a constitution and government under it.

2. The court never decided which was the valid constitution, but refused to take jurisdiction of that question or to hear it at all.

3. The excitement of the times forms an exception.

4. It was made a political question, and not a judicial construction, as far as it entered into the case.

*Mr. *Whipple*, for the defendant in error, said that the question to be decided was, whether a portion of the voters of a State, either the majority or minority, whenever they choose, assembling in mass meeting without any law, or by voting where there is no opportunity of challenging votes, may overthrow the constitution and set up a new one? But he would leave the discussion of general principles to his associate, and confine himself to the more minute facts of the case. [*27

The court below ruled out the evidence offered by the plaintiff in error. Were they right? They offered parol proof of a new constitution, which was said to have been adopted by an out-door proceeding, not recognized by any law. No parallel can be found to this case in any government, the freest that ever existed, where it was attempted by such a summary proceeding to bind all those who had no participation in it.

The charter and laws of Rhode Island were liberal and even radical. It was eminently a government of the people. (*Mr. *Whipple* here went into a particular examination of the charter and laws to illustrate this point.) The usage has been always for the legislature to receive and act upon petitions for extension of the right of suffrage, and this usage constitutes the law. All changes must originate with the legislature.

The following proposition is true, viz.:— That no resistance to law is to be countenanced, unless in case of oppression irremediable otherwise. Was this the case here? Difficulties had existed for thirty years in the way of framing a constitution, not consisting in an electoral vote, but in the basis of representation. Towns had grown up and claimed a greater share in representation in the legislature. But in conventions, the allotment of representatives was according to the scale of

representation then existing in the legislature, and they kept things just as they were. Power remained in the same hands. In January, 1841, the legislature passed resolutions calling a convention, organized upon the same basis upon which it stood itself, and on the 7th of February, 1841, the Suffrage Association adopted a declaration of principles, one of which was as follows, viz.:—

"*Resolved*, That whenever a majority of the citizens of this State who are recognized as citizens of the United States shall, by delegates in convention assembled, draft a constitution, and the same shall be accepted by their constituents, it will be, to all intents and purposes, the law of the State."

Yet in the petition upon which the legislature acted it is said,—"Your petitioners would not take the liberty of suggesting to your honorable body any course which should be *pursued, but would leave the whole affair in your hands, trusting to the good sense and discretion of the General Assembly."

And yet, within a fortnight after the legislature had provided for a convention, in conformity with this petition, these same persons took the affair into their own hands, and issued the declaration of principles above mentioned. Was there ever a case where a legislature submitted alterations of a constitution to be voted upon by any other than qualified voters? And yet Rhode Island did more than this. By the resolutions of January, 1841, she permitted every male inhabitant to vote upon the adoption of the constitution which might be proposed. (*Mr. Whipple* here read and commented on many documents, to show that the friends of the "people's constitution" only wanted to get ahead of the legislative convention, and that of course there was no case of irremediable oppression.)

The "declaration of principles" above mentioned is founded upon the idea, that the people can change the constitution whenever they choose to do so, according to the resolution above quoted; and yet the thirteenth article of the Dorr constitution says that all propositions to amend the constitution must originate in the legislature, and then be ratified by the people. Although our amended constitution gave to the petitioners all they asked, yet they voted against it when before the people for adoption, and it was rejected by a small majority. (*Mr. Whipple* here commented on the irregularities in voting upon the adoption of the Dorr constitution.)

It has been contended by the opposite counsel, that they had a right, in the court below, to prove, by parol, the adoption of their constitution; that every male inhabitant over twenty-

one years of age has a natural right to vote; that their votes are binding upon the government; that their government had a right to take the military arsenal by force; and that this court has a right to decide that our government, now and always represented in Congress, was not a legitimate government.

There is no such thing as a natural right to vote. There are three classes of rights: natural, such as those recognized in the Declaration of Independence; civil, such as the rights of property; and political rights. Society has nothing to do with natural rights except to protect them. Civil rights belong equally to all. Every one has the right to acquire property, and even in infants the laws of all governments preserve this. But political rights are matters of practical utility. A right to vote comes under this class. If it was a natural right, it would appertain to every human being, females and minors. Even the Dorr men excluded all under twenty-one, and those who *had not resided within the [*29
State during a year. But if the State has the power to affix any limit at all to the enjoyment of this right, then the State must be the sole judge of the extent of such restriction. It can confine the right of voting to freeholders, as well as adults or residents for a year. The boasted power of majorities can only show itself under the law, and not against the law, in any government of laws. It can only act upon days and in places appointed by law.

But it is urged by the opposite counsel, that the great doctrine of the sovereignty of the people, and their consequent power to alter the constitution whenever they choose, is the American doctrine, in opposition to that of the Holy Alliance of Europe, which proclaims that all reforms must emanate from the throne. Let us examine this so-called American doctrine. I say that a proposition to amend always comes from the legislative body. (*Mr. Whipple* here examined, *seriatim*, the Constitution of the United States, and the constitutions of each State, to show that this principal ran through the whole of them.)

Look at the subject in another aspect. In Congress each House must agree, and even then the President may veto a bill. Sixteen millions of people in the large States may be in favor of amending the Constitution, but their will may be thwarted by four millions in the small States. What then becomes of this vaunted American doctrine of popular sovereignty, acting by majorities? There is no such thing in the United States as a forcible revolution. The Constitution forbids it. The framers of it gave to the federal government

power to put down a rebellion, because they saw that remedies for all grievances were provided by law.

Mr. Webster, on the same side.

This is an unusual case. During the years 1841 and 1842, great agitation existed in Rhode Island. In June, 1842, it subsided. The legislature passed laws for the punishment of offenders, and declared martial law. The grand jury indicted Dorr for treason. His trial came on in 1844, when he was convicted and sentenced to imprisonment for life. Here is a suit in which the opposite counsel say that a great mistake has happened in the courts of Rhode Island; that Governor King should have been indicted. They wish the governor and the rebel to change places. If the court can take cognizance of this question, which I do not think, it is not to be regretted that it has been brought here. It is said to involve the fundamental principles of American liberty. This is true. It is always proper to discuss these, if the appeal be made to reason,

*30] *and not to the passions. There are certain principles of liberty which have existed in other countries, such as life, the right of property, trial by jury, &c. Our ancestors brought with them all which they thought valuable in England, and left behind them all which they thought were not. Whilst colonies, they sympathized with Englishmen in the Revolution of 1688. There was a general rejoicing. But in 1776 the American people adopted principles more especially adapted to their condition. They can be traced through the Confederation and the present Constitution, and our principles of liberty have now become exclusively American. They are distinctly marked. We changed the government where it required change; where we found a good one, we left it. Conservatism is visible throughout. Let me state what I understand these principles to be.

The first is, that the people are the source of all political power. Every one believes this. Where else is there any power? There is no hereditary legislature, no large property, no throne, no primogeniture. Every body may buy and sell. There is no equality of rights. Any one who should look to any other source of power than the people would be as much out of his mind as Don Quixote, who imagined that he saw things which did not exist. Let us all admit that the people are sovereign. Jay said that in this country there were many sovereigns and no subject. A portion of this sovereign power has been delegated to government, which represents and speaks the will of the people as far as they chose to delegate their power. Congress have not all. The

State governments have not all. The Constitution of the United States does not speak of the government. It says the United States. Nor does it speak of State governments. It says the States; but it recognizes governments as existing. The people must have representatives. In England, the representative system originated, not as a matter of right, but because it was called by the king. The people complained sometimes that they had to send up burgesses. At last there grew up a constitutional representation of the people. In our system, it grew up differently. It was because the people could not act in mass, and the right to choose a representative is every man's portion of sovereign power. Suffrage is a delegation of political power to some individual. Hence the right must be guarded and protected against force or fraud. That is one principle. Another is, that the qualification which entitles a man to vote must be prescribed by previous laws, directing how it is to be exercised, and also that the results shall be certified to some central power so that the vote may tell. We know no other principle. If you go beyond these, you go wide of the American track. *One principle is, that the people often limit their government; another, that they often limit themselves. They secure themselves against sudden changes by mere majorities. The fifth article of the Constitution of the United States is a clear proof of this. The necessity of having a concurrence of two thirds of both houses of Congress to propose amendments, and of their subsequent ratification by three fourths of the States, gives no countenance to the principles of the Dorr men, because the people have chosen so to limit themselves. All qualifications which persons are required to possess before they can be elected are, in fact, limitations upon the power of the electors; and so are rules requiring them to vote only at particular times and places. Our American mode of government does not draw any power from tumultuous assemblages. If anything is established in that way, it is deceptive. It is true that at the Revolution governments were forcibly destroyed. But what did the people then do? They got together and took the necessary steps to frame new governments, as they did in England when James the Second abdicated. William asked Parliament to assemble and provide for the case. It was a revolution, not because there was a change in the person of the sovereign, but because there was a hiatus which must be filled. It has been said by the opposing counsel, that the people can get together, call themselves so many thousands, and establish whatever government they please. But others [*31

must have the same right. We have then a stormy South American liberty, supported by arms to-day and crushed by arms to-morrow. Our theory places a beautiful face on liberty, and makes it powerful for good, producing no tumults. When it is necessary to ascertain the will of the people, the legislature must provide the means of ascertaining it. The Constitution of the United States was established in this way. It was recommended to the States to send delegates to a convention. They did so. Then it was recommended that the States should ascertain the will of the people. Nobody suggested any other mode.

The opposite counsel have cited the examples of the different States in which constitutions have been altered. Only two provided for conventions, and yet conventions have been held in many of them. But how? Always these conventions were called together by the legislature, and no single constitution has ever been altered by means of a convention gotten up by mass meetings. There must be an authentic mode of ascertaining the public will somehow and somewhere. If not, it is a government of the strongest and most numerous. It is said, that, if the legislature refuses to call a con-
*32] vention, the case then *resembles the Holy Alliance of Europe, whose doctrine it was that all changes must originate with the sovereign. But there is no resemblance whatever. I say that the will of the people must prevail, but that there must be some mode of finding out that will. The people here are as sovereign as the crowned heads at Laybach, but their will is not so easily discovered. They cannot issue a ukase or edict. In 1845, New York passed a law recommending to the people to vote for delegates to a convention; but the same penalties against fraud were provided as in other elections. False oaths were punished in the same way. The will of the people was collected just as in ordinary occasions.

What do the Constitution and laws of the United States say upon this point? The Constitution recognizes the existence of States, and guarantees to each a republican form of government, and to protect them against domestic violence. The thing which is to be protected is the existing State government. This is clear by referring to the act of Congress of 1795. In case of an insurrection against a State, or the government thereof, the President is to interfere. The Constitution proceeds upon the idea, that each State will take care to establish its own government upon proper principles, and does not contemplate these extraneous and irregular alterations of existing governments.

Let us now look into the case as it was tried in the court below, and examine,—

1st. Whether this court can take judicial cognizance of, and decide, the questions which are presented in the record.

2d. Whether the acts which the plaintiff below offered to prove were not criminal acts, and therefore no justification for any body.

3d. Whether in point of fact any new government was put into operation in Rhode Island, as has been alleged.

(*Mr. Webster* here examined the pleas, &c., and narrative of proceedings, as above set forth.) The new constitution was proclaimed on the 13th of January, 1842. On the 13th of April, officers were appointed under it, and Mr. Dorr was chosen governor. On the 3d of May the legislature met, sat that day and the next, and then adjourned to meet on the first Monday in July, in Providence. But it never met again. What became of it? The whole government went silently out of existence. In November, 1842, the people voted to adopt a constitution which had been framed under legislative authority, and in May, 1843, this new constitution went into operation and has ever since continued. If this displaced Mr. Dorr's government, then there was an interregnum in the State of nearly a year. But *between the first [*33
Monday in July, 1842, and May, 1843, what had extinguished this government of Mr. Dorr? It must have gone out of itself, and, in fact, only lasted for two days, viz. the 3d and 4th of May, 1842. In August, 1842, Dorr was indicted for treason, tried in March, 1844, and found guilty. (*Mr. Webster* here read an extract from the charge of Chief Justice Durfee.)

To return to the first point mentioned. Can this court, or could the court below, take cognizance of the questions which are raised in the record? If not, the proof was properly rejected.

The question which the court was called upon to decide was one of sovereignty. Two legislatures were in existence at the same time. Both could not be legitimate. If legal power had not passed away from the charter government, it could not have got into Dorr's. The position taken on the other side is that it had so passed away, and it is attempted to be proved by votes and proceedings of meetings, &c., out of doors. This court must look elsewhere,—to the Constitution and laws, and acts of the government, of the United States. How did the President of the United States treat this question? Acting under the Constitution and law of 1795, he decided that the existing government was the one

which he was bound to protect. He took his stand accordingly, and we say that this is obligatory upon this court, which always follows an executive recognition of a foreign government. The proof offered below, and rejected by the court, would have led to a different result. Its object was to show that the Dorr constitution was adopted by a majority of the people. But how could a court judge of this? Can it know how many persons were present, how many of them qualified voters, and all this to be proved by testimony? Can it order to be brought before it the minutes and registers of unauthorized officers, and have them proved by parol? The decisions of the legislature and courts of Rhode Island conclude the case. Will you reverse the judgment in Dorr's case?

The second proposition is a branch of the first, viz.: —

If the court below had admitted the evidence offered by the other side, and the facts which they alleged had been established by proof, still they would not have afforded any ground of justification. The truth of this proposition is sufficiently manifest from these two considerations, namely, that the acts referred to were declared to be of a criminal nature by competent authority, and no one can justify his conduct by criminal acts.

3. Let us now inquire whether, in point of fact, any new *government was put into operation in Rhode Island, as has been alleged.

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It has been before stated that the government of Mr. Dorr, if it ever existed at all, only lasted for two days. Even the French revolution, rapid as it was, required three. During those two days, various officers were appointed; but did any one ever hear of their proceeding to discharge their several duties? A court was appointed. But did any process ever issue under its authority? Was any person ever sued or arrested? Or did any officer, so appointed, venture to bring his official functions into practical operation upon either men or property? There was nothing of this. The government was nothing but a shadow. It was all paper and patriotism; and went out on the 4th of May, admitting itself to be, what every one must now consider it, nothing but a contemptible sham.

Mr. Clifford (Attorney-General) concluded the argument on behalf of the plaintiff in error. He confined his attention almost exclusively to the point, that a State had no right to declare martial law. But of his argument the Reporter has no notes.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has arisen out of the unfortunate political differences which agitated the people of Rhode Island in 1841 and 1842.

It is an action of trespass brought by Martin Luther, the plaintiff in error, against Luther M. Borden and others, the defendants, in the Circuit Court of the United States for the District of Rhode Island, for breaking and entering the plaintiff's house. The defendants justify upon the ground that large numbers of men were assembled in different parts of the State for the purpose of overthrowing the government by military force, and were actually levying war upon the State: that, in order to defend itself from this insurrection, the State was declared by competent authority to be under martial law: that the plaintiff was engaged in the insurrection, and that the defendants, being in the military service of the State, by command of their superior officer, broke and entered the house and searched the rooms for the plaintiff, who was supposed to be there concealed, in order to arrest him, doing as little damage as possible. The plaintiff replied, that the trespass was committed by the defendants of their own proper wrong, and without any such cause; and upon the issue joined on this replication, the parties proceeded to trial.

The evidence offered by the plaintiff and the defendants is *stated at large in the record; and the questions decided by the Circuit Court, and brought up by the [*35 writ of error, are not such as commonly arise in an action of trespass. The existence and authority of the government under which the defendants acted was called in question; and the plaintiff insists, that, before the acts complained of were committed, that government had been displaced and annulled by the people of Rhode Island, and that the plaintiff was engaged in supporting the lawful authority of the State, and the defendants themselves were in arms against it.

This is a new question in this court, and certainly a very grave one; and at the time when the trespass is alleged to have been committed it had produced a general and painful excitement in the State, and threatened to end in bloodshed and civil war.

The evidence shows that the defendants, in breaking into the plaintiff's house and endeavouring to arrest him, as stated in the pleadings, acted under the authority of the government which was established in Rhode Island at the time of the declaration of Independence, and which is usually called the charter government. For when the separation from Eng-

land took place, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second in 1663; making only such alterations, by acts of the legislature, as were necessary to adapt it to their condition and rights as an independent State. It was under this form of government that Rhode Island united with the other States in the Declaration of Independence, and afterwards ratified the Constitution of the United States and became a member of this Union; and it continued to be the established and unquestioned government of the State until the difficulties took place which have given rise to this action.

In this form of government no mode of proceeding was pointed out by which amendments might be made. It authorized the legislature to prescribe the qualification of voters, and in the exercise of this power the right of suffrage was confined to freeholders, until the adoption of the constitution of 1843.

For some years previous to the disturbances of which we are now speaking, many of the citizens became dissatisfied with the charter government, and particularly with the restriction upon the right of suffrage. Memorials were addressed to the legislature upon this subject, urging the justice and necessity of a more liberal and extended rule. But they failed to produce the desired effect. And thereupon meetings were held and associations formed by those who were in favor of a more extended right of suffrage, which finally resulted in the election *of a convention to form a new constitution to be submitted to the people for their adoption or rejection. This convention was not authorized by any law of the existing government. It was elected at voluntary meetings, and by those citizens only who favored this plan of reform; those who were opposed to it, or opposed to the manner in which it was proposed to be accomplished, taking no part in the proceedings. The persons chosen as above mentioned came together and framed a constitution, by which the right of suffrage was extended to every male citizen of twenty-one years of age, who had resided in the State for one year, and in the town in which he offered to vote for six months, next preceding the election. The convention also prescribed the manner in which this constitution should be submitted to the decision of the people,—permitting every one to vote on that question who was an American citizen, twenty-one years old, and who had a permanent residence or home in the State, and directing the votes to be returned to the convention.

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Upon the return of the votes, the convention declared that the constitution was adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. And it communicated this decision to the governor under the charter government, for the purpose of being laid before the legislature; and directed elections to be held for a governor, members of the legislature, and other officers under the new constitution. These elections accordingly took place, and the governor, lieutenant-governor, secretary of state, and senators and representatives thus appointed assembled at the city of Providence on May 3d, 1842, and immediately proceeded to organize the new government, by appointing the officers and passing the laws necessary for that purpose.

The charter government did not, however, admit the validity of these proceedings, nor acquiesce in them. On the contrary, in January, 1842, when this new constitution was communicated to the governor, and by him laid before the legislature, it passed resolutions declaring all acts done for the purpose of imposing that constitution upon the State to be an assumption of the powers of government, in violation of the rights of the existing government and of the people at large; and that it would maintain its authority and defend the legal and constitutional rights of the people.

In adopting this measure, as well as in all others taken by the charter government to assert its authority, it was supported by a large number of the citizens of the State, claiming to be a majority, who regarded the proceedings of the adverse party as *unlawful and disorganizing, and [*37
maintained that, as the existing government had been established by the people of the State, no convention to frame a new constitution could be called without its sanction; and that the times and places of taking the votes, and the officers to receive them, and the qualification of the voters, must be previously regulated and appointed by law.

But, notwithstanding the determination of the charter government, and of those who adhered to it, to maintain its authority, Thomas W. Dorr, who had been elected governor under the new constitution, prepared to assert the authority of that government by force, and many citizens assembled in arms to support him. The charter government thereupon passed an act declaring the State under martial law, and at the same time proceeded to call out the militia, to repel the threatened attack and to subdue those who were engaged in it. In this state of the contest, the house of the plaintiff, who was engaged in supporting the authority of the new

government, was broken and entered in order to arrest him. The defendants were, at the time, in the military service of the old government, and in arms to support its authority.

It appears, also, that the charter government at its session of January, 1842, took measures to call a convention to revise the existing form of government; and after various proceedings, which it is not material to state, a new constitution was formed by a convention elected under the authority of the charter government, and afterwards adopted and ratified by the people; the times and places at which the votes were to be given, the persons who were to receive and return them, and the qualification of the voters, having all been previously authorized and provided for by law passed by the charter government. This new government went into operation in May, 1843, at which time the old government formally surrendered all its powers; and this constitution has continued ever since to be the admitted and established government of Rhode Island.

The difficulties with the government of which Mr. Dorr was the head were soon over. They had ceased before the constitution was framed by the convention elected by the authority of the charter government. For after an unsuccessful attempt made by Mr. Dorr in May, 1842, at the head of a military force, to get possession of the State arsenal at Providence, in which he was repulsed, and an assemblage of some hundreds of armed men under his command at Chepatchet in the June following, which dispersed upon the approach of the troops of the old government, no further effort was made to establish it; and until the constitution of 1843 went into operation the charter government continued
*38] to assert its authority *and exercise its powers, and to enforce obedience, throughout the State, arresting and imprisoning, and punishing in its judicial tribunals, those who had appeared in arms against it.

We do not understand from the argument that the constitution under which the plaintiff acted is supposed to have been in force after the constitution of May, 1843, went into operation. The contest is confined to the year preceding. The plaintiff contends that the charter government was displaced, and ceased to have any lawful power, after the organization, in May, 1842, of the government which he supported, and although that government never was able to exercise any authority in the State, nor to command obedience to its laws or to its officers, yet he insists that it was the lawful and established government, upon the ground that it was ratified by a large majority of the male people of the State of the age

of twenty-one and upwards, and also by a majority of those who were entitled to vote for general officers under the then existing laws of the State. The fact that it was so ratified was not admitted; and at the trial in the Circuit Court he offered to prove it by the production of the original ballots, and the original registers of the persons voting, verified by the oaths of the several moderators and clerks of the meetings, and by the testimony of all the persons so voting, and by the said constitution; and also offered in evidence, for the same purpose, that part of the census of the United States for the year 1840 which applies to Rhode Island; and a certificate of the secretary of state of the charter government, showing the number of votes polled by the freemen of the State for the ten years then last past.

The Circuit Court rejected this evidence, and instructed the jury that the charter government and laws under which the defendants acted were, at the time the trespass is alleged to have been committed, in full force and effect as the form of government and paramount law of the State, and constituted a justification of the acts of the defendants as set forth in their pleas.

It is this opinion of the Circuit Court that we are now called upon to review. It is set forth more at large in the exception, but is in substance as above stated; and the question presented is certainly a very serious one. For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and *compensation to its officers [*39
illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.

Certainly, the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the State courts. In forming the constitutions of the different States, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has

always determined whether the proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. In Rhode Island, the question has been directly decided. Prosecutions were there instituted against some of the persons who had been active in the forcible opposition to the old government. And in more than one of the cases evidence was offered on the part of the defence similar to the testimony offered in the Circuit Court, and for the same purpose; that is, for the purpose of showing that the proposed constitution had been adopted by the people of Rhode Island, and had, therefore, become the established government, and consequently that the parties accused were doing nothing more than their duty in endeavouring to support it.

But the courts uniformly held that the inquiry proposed to be made belonged to the political power and not to the judicial; that it rested with the political power to decide whether the charter government had been displaced or not; and when that decision was made, the judicial department would be bound to take notice of it as the paramount law of the State, without the aid of oral evidence or the examination of witnesses; that, according to the laws and institutions of Rhode Island, no such change had been recognized by the political power; and that the charter government was the lawful and established government of the State during the period in contest, and that those who were in arms against it were insurgents, and liable to punishment. This doctrine is clearly and forcibly stated in the opinion of the Supreme Court of the State in the trial of Thomas W. Dorr, who was the governor elected under the opposing constitution, and headed the armed force which endeavoured to maintain its authority.

Indeed, we do not see how the question could be tried and *40] *judicially decided in a State court. Judicial power presupposes an established government capable of enacting laws and enforcing their execution, and of appointing judges to expound and administer them. The acceptance of the judicial office is a recognition of the authority of the government from which it is derived. And if the authority of that government is annulled and overthrown, the power of its courts and other officers is annulled with it. And if a State court should enter upon the inquiry proposed in this case, and should come to the conclusion that the government under which it acted had been put aside and displaced by an opposing government, it would cease to be a court, and be incapable of pronouncing a judicial decision upon the question it undertook to try. If it decides at all as a court, it necessarily

affirms the existence and authority of the government under which it is exercising judicial power.

It is worthy of remark, however, when we are referring to the authority of State decisions, that the trial of Thomas W. Dorr took place after the constitution of 1843 went into operation. The judges who decided that case held their authority under that constitution; and it is admitted on all hands that it was adopted by the people of the State, and is the lawful and established government. It is the decision, therefore, of a State court, whose judicial authority to decide upon the constitution and laws of Rhode Island is not questioned by either party to this controversy, although the government under which it acted was framed and adopted under the sanction and laws of the charter government.

The point, then, raised here has been already decided by the courts of Rhode Island. The question relates, altogether, to the constitution and laws of that State; and the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State.

Upon what ground could the Circuit Court of the United States which tried this case have departed from this rule, and disregarded and overruled the decisions of the courts of Rhode Island? Undoubtedly the courts of the United States have certain powers under the Constitution and laws of the United States which do not belong to the State courts. But the power of determining that a State government has been lawfully established, which the courts of the State disown and repudiate, is not one of them. Upon such a question the courts of the United States are bound to follow the decisions of the State tribunals, and must therefore regard the charter government as the lawful and established government during the time of this contest.

*Besides, if the Circuit Court had entered upon this inquiry, by what rule could it have determined the [*41
qualification of voters upon the adoption or rejection of the proposed constitution, unless there was some previous law of the State to guide it? It is the province of a court to expound the law, not to make it. And certainly it is no part of the judicial functions of any court of the United States to prescribe the qualification of voters in a State, giving the right to those to whom it is denied by the written and established constitution and laws of the State, or taking it away from those to whom it is given; nor has it the right to determine what political privileges the citizens of a State are

entitled to, unless there is an established constitution or law to govern its decision.

And if the then existing law of Rhode Island which confined the right of suffrage to freeholders is to govern, and this question is to be tried by that rule, how could the majority have been ascertained by legal evidence, such as a court of justice might lawfully receive? The written returns of the moderators and clerks of mere voluntary meetings, verified by affidavit, certainly would not be admissible; nor their opinions or judgments as to the freehold qualification of the persons who voted. The law requires actual knowledge in the witness of the fact to which he testifies in a court of justice. How, then, could the majority of freeholders have been determined in a judicial proceeding?

The court had not the power to order a census of the freeholders to be taken; nor would the census of the United States of 1840 be any evidence of the number of freeholders in the State in 1842. Nor could the court appoint persons to examine and determine whether every person who had voted possessed the freehold qualification which the law then required. In the nature of things, the Circuit Court could not know the name and residence of every citizen, and bring him before the court to be examined. And if this were attempted, where would such an inquiry have terminated? And how long must the people of Rhode Island have waited to learn from this court under what form of government they were living during the year in controversy?

But this is not all. The question as to the majority is a question of fact. It depends upon the testimony of witnesses, and if the testimony offered by the plaintiff had been received, the defendants had the right to offer evidence to rebut it; and there might, and probably would, have been conflicting testimony as to the number of voters in the State, and as to the legal qualifications of many of the individuals who had voted.

*42] The decision would, therefore, have depended upon the *relative credibility of witnesses, and the weight of testimony; and as the case before the Circuit Court was an action at common law, the question of fact, according to the seventh amendment to the Constitution of the United States, must have been tried by the jury. In one case a jury might find that the constitution which the plaintiff supported was adopted by a majority of the citizens of the State, or of the voters entitled to vote by the existing law. Another jury in another case might find otherwise. And as a verdict is not evidence in a suit between different parties, if the courts of the United States have the jurisdiction contended for by

the plaintiff, the question whether the acts done under the charter government during the period in contest are valid or not must always remain unsettled and open to dispute. The authority and security of the State governments do not rest on such unstable foundations.

Moreover, the Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department.

The fourth section of the fourth article of the Constitution of the United States provides that the United States shall guarantee to every State in the Union a republican form of government, and shall protect each of them against invasion: and on the application of the legislature or of the executive (when the legislature cannot be convened) against domestic violence.

Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.[1] And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above-mentioned article of the Constitution, providing for cases of domestic violence. *It rested with Congress, too, to determine upon the means proper to be adopted to fulfil this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when the contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the act of February 28, [*43

[1] Applied. *Texas* v. *White*, 7 Wall., 730.

1795, provided, that, "in case of an insurrection in any State against the government thereof, it shall be lawful for the President of the United States, on application of the legislature of such State or of the executive (when the legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act upon the application of the legislature or of the executive, and consequently he must determine what body of men constitute the legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a Circuit Court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government, call witnesses before it and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government which the President was endeavouring to maintain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offences and crimes the acts which it before recognized, and was bound to recognize, as lawful.

*44] *It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it

should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrongdoers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

It is said that this power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. When citizens of the same State are in arms against each other, and the constituted authorities unable to execute the laws, the interposition of the United States must be prompt, or it is of little value. The ordinary course of proceedings in courts of justice would be utterly unfit for the crisis. And the elevated office of the President, chosen as he is by the people of the United States, and the high responsibility he could not fail to feel when acting in a case of so much moment, appear to furnish as strong safeguards against a wilful abuse of power as human prudence and foresight could well provide. At all events, it is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals.

A question very similar to this arose in the case of *Martin* v. *Mott*, 12 Wheat., 29–31. The first clause of the first section of the act of February 28, 1795, of which we have been speaking, authorizes the President to call out the militia to repel invasion. It is the second clause in the same section which authorizes the call to suppress an insurrection against a State *government. The power given to the President in each case is the same, — with this difference [*45 only, that it cannot be exercised by him in the latter case, except upon the application of the legislature or executive of

the State. The case above mentioned arose out of a call made by the President, by virtue of the power conferred by the first clause; and the court said, that, "whenever a statute gives a discretionary power to any person to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." The grounds upon which that opinion is maintained are set forth in the report, and we think are conclusive. The same principle applies to the case now before the court. Undoubtedly, if the President in exercising this power shall fall into error, or invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it.

The remaining question is whether the defendants, acting under military orders issued under the authority of the government, were justified in breaking and entering the plaintiff's house. In relation to the act of the legislature declaring martial law, it is not necessary in the case before us to inquire to what extent, nor under what circumstances, that power may be exercised by a State. Unquestionably a military government, established as the permanent government of the State, would not be a republican government, and it would be the duty of Congress to overthrow it. But the law of Rhode Island evidently contemplated no such government. It was intended merely for the crisis, and to meet the peril in which the existing government was placed by the armed resistance to its authority. It was so understood and construed by the State authorities. And, unquestionably, a State may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war; and the established government resorted to the rights and usages of war to maintain itself, and to overcome the unlawful opposition.[1] And in that

[1] QUOTED. *The Prize Cases*, 2 Black, 697.

state of things the officers engaged in its military *service might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection; and might order a house to be forcibly entered and searched, when there were reasonable grounds for supposing he might be there concealed. Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it. No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable.[1] [*46

We forbear to remark upon the cases referred to in the argument, in relation to the commissions anciently issued by the kings of England to commissioners, to proceed against certain descriptions of persons in certain places by the law martial. These commissions were issued by the king at his pleasure, without the concurrence or authority of Parliament, and were often abused for the most despotic and oppressive purposes. They were used before the regal power of England was well defined, and were finally abolished and prohibited by the petition of right in the reign of Charles the First. But they bear no analogy in any respect to the declaration of martial law by the legislative authority of the State, made for the purposes of self-defence, when assailed by an armed force; and the cases and commentaries concerning these commissions cannot, therefore, influence the construction of the Rhode Island law, nor furnish any test of the lawfulness of the authority exercised by the government.

Upon the whole, we see no reason for disturbing the judgment of the Circuit Court. The admission of evidence to prove that the charter government was the established government of the State was an irregularity, but is not material to the judgment. A Circuit Court of the United States sitting in Rhode Island is presumed to know the constitution and law of the State. And in order to make up its opinion upon that subject, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer. But this error of the Circuit Court does not affect the result. For whether this evidence was or was not received, the Circuit Court, for

[1] Relied on *in dissenting opinion*. *Dow* v. *Johnson*, 10 Otto, 170.

the reasons herein before stated, was bound to recognize that government as the paramount and established authority of the State.

Much of the argument on the part of the plaintiff turned upon political rights and political questions, upon which the *court has been urged to express an opinion. We decline doing so. The high power has been conferred on this court of passing judgment upon the acts of the State sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums. No one, we believe, has ever doubted the proposition, that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure. But whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it.

*47]

The judgment of the Circuit Court must therefore be affirmed.

Rachel Luther v. *Luther M. Borden et al.*

Mr. Chief Justice TANEY delivered the opinion of the court.

This case has been sent here under a certificate of division from the Circuit Court for the District of Rhode Island. It appears, on the face of the record, that the division was merely formal, and that the whole case has been transferred to this court, and a multitude of points (twenty-nine in number) presented for its decision. We have repeatedly decided that this mode of proceeding is not warranted by the act of Congress, authorizing the justices of a Circuit Court to certify to the Supreme Court a question of law which arose at the trial, and upon which they differed in opinion. And many cases in which, like the present one, the whole case was certified, have been dismissed for want of jurisdiction.

The same disposition may be made of this. The material points, however, have been decided in the case of Martin Luther against the same defendants, in which the opinion of this court has been just delivered, and which was regularly brought up by writ of error upon the judgment of the Circuit Court. The case before us depends mainly upon the same principles, and, indeed, grew out of the same transaction; and the parties will understand the *judgment of this court upon all the material points certified, from the opinion it has already given in the case referred to. [*48

This case is removed to the Circuit Court.

Martin Luther v. *Luther M. Borden et al.*

Mr. Justice WOODBURY, dissenting.

The writ in this case charges the defendants with breaking and entering the plaintiff's dwelling-house, on the 29th of June, 1842, and doing much damage.

The plea in justification alleges, that, on June 24th, 1842, an assembly in arms had taken place in Rhode Island, to overawe and make war upon the State. And therefore, in order to protect its government, the legislature, on the 25th of that month, passed an act declaring the whole State to be under martial law. That the plaintiff was assisting in traitorous designs, and had been in arms to sustain them, and the defendants were ordered by J. Child, an officer in the militia, to arrest the plaintiff, and, supposing him within the house named in the writ, to break and enter it for the purpose of fulfilling that order; and, in doing this, they caused as little damage as possible.

The replication denied all the plea, and averred that the defendants did the acts complained of in their own wrong, and without the cause alleged.

To repel the defence, and in vindication of the conduct of the plaintiff, much evidence was offered; the substance of which will be next stated, with some leading facts proved on the other side in connection with it.

The people of Rhode Island had continued to live under their charter of 1663 from Charles the Second, till 1841, with some changes in the right of suffrage by acts of the legislature, but without any new constitution, and still leaving in force a requirement of a freehold qualification for voting. By the growth of the State in commerce and manufactures, this requirement had for some time been obnoxious; as it excluded so many adult males of personal worth and possessed of intelligence and wealth, though not of land, and as

it made the ancient apportionment of the number of representatives, founded on real estate, very disproportionate to the present population and personal property in different portions and towns of the State.

This led to several applications to the legislature for a change in these matters, or for provision to have a convention of the people called to correct it by a new constitution. These all failing, voluntary societies were formed in 1841, *and a convention called by them of delegates, selected [*49] by the male adults who had resided one year in the State, with a view chiefly to correct the right of suffrage and the present unequal apportionment of representatives. This, though done without the formalities or recommendation of any statute of the State, or any provision in the charter, was done peacefully, and with as much care and form as were practicable without such a statute or charter provision. A constitution was formed by those delegates, a vote taken on its ratification, and an adoption of it made, as its friends supposed, and offered to prove, by a decided majority, both of the freehold voters and of the male adults in the State.

Political officers for the executive and legislative departments were then chosen under it by those in its favor, which officers assembled on the 3d of May, 1842, and took their respective oaths of office and appointed several persons to situations under the constitution, and among them the existing judges of the superior court.

After transacting some other business the next day, — but the old officers in the State under the charter not acknowledging their authority, nor surrendering to them the public records and public property, — they adjourned till July after, and never convened again, nor performed any further official duties. Nor did they institute actions for the possession of the public records and public property; but T. Dorr, the person elected governor, at the head of an armed force, on the 25th of June, 1842, in his supposed official capacity, made some attempt to get possession of the public arsenal; but failing in it, he dismissed the military assembled, by a written order, on the 27th of June, and left the State. He stated as a reason for this, "that a majority of the friends of the people's constitution disapprove of any further forcible measures for its support."

In the mean time, the officers under the old charter, having, as before suggested, continued in possession of the public records and property, and in the discharge of their respective functions, passed an act, on the 24th of June, placing the State under martial law. A proclamation was

then issued by the governor, warning the people not to support the new constitution or its officers, and another act was passed making it penal to officiate under it. An application was made to the President of the United States for assistance in quelling the disturbances apprehended, but was answered by him on the 29th of May, 1842, not complying with the request, though with expressions of willingness to do it, should it, in his opinion, afterwards become necessary.

Nothing further seems to have been done by him in the premises, except that on the 29th of June, the day of [*50
the trespass complained of in this action, a proclamation was prepared under his direction, but not issued, denouncing such of the supporters of the new constitution as were in arms to be "insurgents," and commanding them to disperse.

It was next shown by the respondents, that Dorr, the governor elect under the new constitution, was, in August, 1842, indicted for treason against the State, and being apprehended in 1844, was then tried and convicted.

It further appears that the court at the trial of the present cause, ruled out the evidence offered by the plaintiff in support of his conduct, and admitted that which went to justify the defendants, and decided that the old charter, and not the new constitution, was in force at the time the act passed declaring martial law, and that this law was valid, and, as pleaded, justified the defendants in their behaviour.

Without entering here at more length into details concerning the unhappy controversy which agitated Rhode Island in 1842, it is manifest that it grew out of a political difficulty among her own people, in respect to the formation of a new constitution. It is not probable that the active leaders, and much less the masses, who were engaged on either side, had any intention to commit crimes or oppress illegally their fellow-citizens. Such, says Grotius, is usually, in civil strife, the true, liberal view to be taken of the masses. (Grotius on War, B. 3, ch. 11, sec. 6.) And much more is it so, when, in a free country, they honestly divide on great political principles, and do not wage a struggle merely for rapine or spoils. In this instance each side appears to have sought, by means which it considered lawful and proper, to sustain the cause in which it had embarked, till peaceful discussions and peaceful action unexpectedly ripened into a resort to arms, and brother became arrayed against brother in civil strife. Fortunately, no lives were destroyed, and little property injured. But the bitterness consequent on such differences did not pass off without some highly penal legis-

lation, and the extraordinary measure of the establishment of martial law over the whole State. Under these circumstances, it is too much to expect, even at this late day, that a decision on any branch of this controversy can be received without some of the leaven of former political excitement and prejudice, on the one side or the other, by those who were engaged in its stirring scenes. Public duty, however, seems to require each member of this court to speak freely his own convictions on the different questions which it may be competent for us to decide; and when one of those members, like myself, has the misfortune to differ in any respect from the rest, to explain *with frankness, and undeterred by consequences, the grounds of that difference. *51]

This difference, however, between me and my brethren extends only to the points in issue concerning martial law. But that being a very important one in a free government, and this controversy having arisen in the circuit to which I belong, and where the deepest interest is felt in its decision, I hope to be excused for considering that point fully; and for assigning, also, some additional and different reasons why I concur with the rest of the court in the opinion, that the other leading question, the validity of the old charter at that time, is not within our constitutional jurisdiction. These two inquiries seem to cover the whole debatable ground, and I refrain to give an opinion on the last question, which is merely political, under a conviction that, as a judge, I possess no right to do it, and not to avoid or conceal any views entertained by me concerning them, as mine, before sitting on this bench and as a citizen, were frequently and publicly avowed.

It must be very obvious, on a little reflection, that the last is a mere political question. Indeed, large portions of the points subordinate to it, on this record, which have been so ably discussed at the bar, are of a like character, rather than being judicial in their nature and cognizance. For they extend to the power of the people, independent of the legislature, to make constitutions,—to the right of suffrage among different classes of them in doing this,—to the authority of naked majorities,—and other kindred questions, of such high political interest as during a few years to have agitated much of the Union, no less than Rhode Island.

But, fortunately for our freedom from political excitements in judicial duties, this court can never with propriety be called on officially to be the umpire in questions merely political. The adjustment of these questions belongs to the people and their political representatives, either in the State or general

government. These questions relate to matters not to be settled on strict legal principles. They are adjusted rather by inclination,—or prejudice or compromise, often. Some of them succeed or are defeated even by public policy alone, or mere naked power, rather than intrinsic right. There being so different tastes as well as opinions in politics, and especially in forming constitutions, some people prefer foreign models, some domestic, and some neither; while judges, on the contrary, for their guides, have fixed constitutions and laws, given to them by others, and not provided by themselves. And those others are no more Locke than an Abbé Sieyes, but the people. Judges, for constitutions, must go to the people of their own country, and must *merely enforce [*52
such as the people themselves, whose judicial servants they are, have been pleased to put into operation.

Another evil, alarming and little foreseen, involved in regarding these as questions for the final arbitrament of judges would be, that in such an event all political privileges and rights would, in a dispute among the people, depend on our decision finally. We would possess the power to decide against as well as for them, and under a prejudiced or arbitrary judiciary the public liberties and popular privileges might thus be much perverted, if not entirely prostrated. But, allowing the people to make constitutions and unmake them, allowing their representatives to make laws and unmake them, and without our interference as to their principles or policy in doing it, yet, when constitutions and laws are made and put in force by others, then the courts, as empowered by the State or the Union, commence their functions and may decide on the rights which conflicting parties can legally set up under them, rather than about their formation itself. Our power begins after theirs ends. Constitutions and laws precede the judiciary, and we act only under and after them, and as to disputed rights beneath them, rather than disputed points in making them. We speak what is the law, *jus dicere*, we speak or construe what is the constitution, after both are made, but we make, or revise, or control neither. The disputed rights beneath constitutions already made are to be governed by precedents, by sound legal principles, by positive legislation, clear contracts, moral duties, and fixed rules; they are *per se* questions of law, and are well suited to the education and habits of the bench. But the other disputed points in making constitutions, depending often, as before shewn, on policy, inclination, popular resolves, and popular will, and arising not in respect to private rights,—not what is *meum* and *tuum*,—but in relation to politics, they belong

to politics, and they are settled by political tribunals, and are too dear to a people bred in the school of Sydney and Russel for them ever to intrust their final decision, when disputed, to a class of men who are so far removed from them as the judiciary; a class, also, who might decide them erroneously as well as right, and if in the former way, the consequences might not be able to be averted except by a revolution, while a wrong decision by a political forum can often be peacefully corrected by new elections or instructions in a single month. And if the people, in the distribution of powers under the constitution, should ever think of making judges supreme arbiters in political controversies, when not selected by nor, frequently, amenable to them, nor at liberty to follow such various considerations in their judgments as *belong to mere political questions, they will dethrone themselves and lose one of their own invaluable birthrights; building up in this way—slowly, but surely—a new sovereign power in the republic, in most respects irresponsible and unchangeable for life, and one more dangerous, in theory at least, than the worst elective oligarchy in the worst of times.[1] Again, instead of controlling the people in political affairs, the judiciary in our system was designed rather to control individuals, on the one hand, when encroaching, or to defend them, on the other, under the Constitution and the laws, when they are encroached upon. And if the judiciary at times seems to fill the important station of a check in the government, it is rather a check on the legislature, who may attempt to pass laws contrary to the Constitution, or on the executive, who may violate both the laws and Constitution, than on the people themselves in their primary capacity as makers and amenders of constitutions.

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Hence the judiciary power is not regarded by elementary writers on politics and jurisprudence as a power coördinate or commensurate with that of the people themselves, but rather coördinate with that of the legislature. *Kendall* v. *United States*, 12 Pet., 526. Hence, too, the following view was urged, when the adoption of the Constitution was under consideration:—"It is the more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the *latter* within the limits assigned to their authority." (Federalist, No. 77, by Hamilton.) "Nor does the conclusion by any means suppose a superiority of the judicial to the

[1] APPROVED. *Dodge* v. *Woolsey*, 18 How., 373.

legislative power. It only supposes that the power of the people is superior to both," &c., &c.

But how would this superiority be as to this court, if we could decide finally on all the political claims and acts of the people, and overrule or sustain them according only to our own views? So the judiciary, by its mode of appointment, long duration in office, and slight accountability, is rather fitted to check legislative power than political, and enforce what the political authorities have manifestly ordained. These last authorities are, by their pursuits and interests, better suited to make rules; we, to expound and enforce them, after made.

The subordinate questions which also arise here in connection with the others, such as whether all shall vote in forming or amending those constitutions who are capable and accustomed to transact business in social and civil life, and none others; and whether, in great exigencies of oppression by the legislature itself, and refusal by it to give relief, the people may not take the subject into their own hands, independent of the *legislature; and whether a simple [*54
plurality in number on such an occasion, or a majority of all, or a larger proportion, like two thirds or three fourths, shall be deemed necessary and proper for a change; and whether, if peacefully completed, violence can afterwards be legally used against them by the old government, if that is still in possession of the public property and public records; whether what are published and acted on as the laws and constitution of a State were made by persons duly chosen or not, were enrolled and read according to certain parliamentary rules or not, were in truth voted for by a majority or two thirds;—these and several other questions equally debatable and difficult in their solution are in some aspects a shade less political. But they are still political. They are too near all the great fundamental principles in government, and are too momentous, ever to have been intrusted by our jealous fathers to a body of men like judges, holding office for life, independent in salary, and not elected by the people themselves.

Non nostrum tantas componere lites. Where, then, does our power, as a general rule, begin? In what place runs the true boundary-line? It is here. Let the political authorities admit as valid a constitution made with or without previous provision by the legislature, as in the last situation Tennessee and Michigan were introduced into the Union. (See Federalist, No. 40, and 2 Ell. Deb., 57; 13 Regis by Y., 95, 1164, and Cong. Globe, App., 78, 137, 147.) Let the collected will of the people as to changes be so strong, and so

strongly evinced, as to call down no bills of pains and penalties to resist it, and no arming of the militia or successful appeals to the general government to suppress it by force, as none were in some cases abroad as well as in America, and one recently in New York, which might be cited beside those above. (See A. D., 1846, and opinion of their judges.) In short, let a constitution or law, however originating, be clearly acknowledged by the existing political tribunals, and be put and kept in successful operation. The judiciary can then act in conformity to and under them. (*Kemper* v. *Hawkins*, 1 Va. Cas., 74, App.) Then, when the claims of individuals come in conflict under them, it is the true province of the judiciary to decide what they rightfully are under such constitutions and laws, rather than to decide whether those constitutions and laws themselves have been rightfully or wisely made.

Again, the Constitution of the United States enumerates specially the cases over which its judiciary is to have cognizance, but nowhere includes controversies between the people of a State as to the formation or change of their constitutions. *(See Article 3, § 2.) Though at first the federal judiciary was empowered to entertain jurisdiction where a State was a party in a suit, it has since been deprived even of that power by a jealous country, except in cases of disputed boundary. (Art. 3, § 2; Amendment 11th; *Massachusetts* v. *Rhode Island*, 12 Pet., 755.)

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If it be asked what redress have the people, if wronged in these matters, unless by resorting to the judiciary, the answer is, they have the same as in all other political matters. In those, they go to the ballot-boxes, to the legislature or executive, for the redress of such grievances as are within the jurisdiction of each, and, for such as are not, to conventions and amendments of constitutions. And when the former fail, and these last are forbidden by statutes, all that is left in extreme cases, where the suffering is intolerable and the prospect is good of relief by action of the people without the forms of law, is to do as did Hampden and Washington, and venture action without those forms, and abide the consequences. Should strong majorities favor the change, it generally is completed without much violence. In most states, where representation is not unequal, or the right of suffrage is not greatly restricted, the popular will can be felt and triumph through the popular vote and the delegates of the people in the legislature, and will thus lead soon, and peacefully, to legislative measures ending in reform, pursuant to legislative countenance and without the necessity of any

stronger collateral course. But when the representation is of a character which defeats this, the action of the people, even then, if by large majorities, will seldom be prosecuted with harsh pains and penalties, or resisted with arms.

Changes, thus demanded and thus supported, will usually be allowed to go into peaceful consummation. But when not so allowed, or when they are attempted by small or doubtful majorities, it must be conceded that it will be at their peril, as they will usually be resisted by those in power by means of prosecutions, and sometimes by violence, and, unless crowned by success, and thus subsequently ratified, they will often be punished as rebellious or treasonable.

If the majorities, however, in favor of changes happen to be large, and still those in power refuse to yield to them, as in the English revolution of 1688, or in our own of 1776, the popular movement will generally succeed, though it be only by a union of physical with moral strength; and when triumphant, it will, as on those occasions, confirm by subsequent forms of law what may have begun without them.

There are several other questions, also, which may arise under our form of government that are not properly of judicial *cognizance. They originate in political matters, [*56
extend to political objects, and do not involve any pecuniary claims or consequences between individuals, so as to become grounds for judicial inquiry. These questions are decided sometimes by legislatures, or heads of departments, or by public political bodies, and sometimes by officers, executive or military, so as not to be revisable here. (See *Decatur* v. *Paulding*, 14 Pet., 497.)

Looking to all these considerations, it appears to me that we cannot rightfully settle those grave political questions which, in this case, have been discussed in connection with the new constitution; and, as judges, our duty is to take for a guide the decision made on them by the proper political powers, and, whether right or wrong according to our private opinions, enforce it till duly altered. But it is not necessary to rest this conclusion on reasoning alone. Several precedents in this court, as well as in England, show the propriety of it.

In *Foster et al.* v. *Neilson*, 2 Pet., 309, where the title to the property depended on the question, whether the land was within a cession by treaty to the United States, it was held that after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that the question was a political one, the decision of which, having been made in this manner, they must conform to. (See, also, 6 Pet., 711, and *Garcia* v. *Lee*, 12 Pet., 520; 13 Pet.,

419.) In *The Cherokee Nation* v. *The State of Georgia*, 5 Pet., 20, the court expressed strong doubts whether it was not a political question, not proper for their decision, to protect the Cherokee Indians in their possessions, and to restrain the State of Georgia and construe and enforce its treaty obligations. Justice Johnson seemed decisive that it was.

In *Massachusetts* v. *Rhode Island*, 12 Pet., 736, 738, it was held that the boundaries between States was a political question *per se*, and should be adjusted by political tribunals, unless agreed to be settled as a judicial question, and in the Constitution so provided for. (*Garcia* v. *Lee*, Id., 520.)

In *Barclay* v. *Russel*, 3 Ves., 424, in respect to confiscations, it was held to be a political question, and a subject of treaty, and not of municipal jurisdiction. (p. 434.)

In *Nabob of the Carnatic* v. *The East India Company*, 2 Ves., 56, the court decided that political treaties between a foreign state and subjects of Great Britain, conducting as a state under acts of Parliament, are not a matter of municipal jurisdiction, and to be examined and enforced by the judiciary.

Another class of political questions, coming still nearer this, is, Which must be regarded as the rightful government abroad *between two contending parties? That is never settled by the judiciary, but is left to the decision of the general government. (*The Cherokee Case*, 5 Pet., 50; and *Williams* v. *Suffolk Ins. Co.*, 13 Pet., 419; 2 Cranch, 241; *Rose* v. *Himely*, 4 Cranch, 268; *United States* v. *Palmer*, 3 Wheat., 634, and *Gelston* v. *Hoyt*, Id., 246; *The Divina Pastora*, 4 Wheat., 64; 14 Ves., 353; 11 Ves., 583; 1 Edw. Adm., 1.)

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The doctrines laid down in *Palmer's case* are as directly applicable to this in the event of two contending parties in arms in a domestic war as in a foreign. If one is recognized by the executive or legislature of the Union as the *de facto* government, the judiciary can only conform to that political decision. See, also, *The Santissima Trinidad*, 7 Wheat., 336, 337; and, further, that if our general government recognizes either as exclusively in power, the judiciary must sustain its belligerent rights, see 3 Sumn., 270. In the case of the *City of Berne* v. *The Bank of England*, 9 Ves., 348, it was held that "a judicial court cannot take notice of a foreign government not acknowledged by the government of the country in which the court sits." The same rule has been applied by this court in case of a contest as to which is the true constitution, between two, or which possesses the true legislative power in one, of our own States,—those citizens acting under the new constitution, which is objected to as irregularly made, or those under the old territorial government therein. *Semb. Scott et*

al. v. *Jones et al.*, 5 How., 374. In that case we held that no writ of error lies to us to revise a decision of a State court, where the only question is the validity of the statute on account of the political questions and objections just named. It was held, also, in *Williams* v. *Suffolk Ins. Co.*, 3 Sumn., 270, that, where a claim exists by two governments over a country, the courts of each are bound to consider the claims of their own government as right, being settled for the time being by the proper political tribunal. And hence no right exists in their judicial authorities to revise that decision. (pp. 273, 275; S. C., 13 Pet., 419.) "*Omnia rite acta.* It might otherwise happen, that the extraordinary spectacle might be presented of the courts of a country disavowing and annulling the acts of its own government in matters of state and political diplomacy."

This is no new distinction in judicial practice any more than in judicial adjudications. The pure mind of Sir Matthew Hale, after much hesitation, at last consented to preside on the bench in administering the laws between private parties under a government established and recognized by other governments, and in full possession *de facto* of the records and power of the kingdom, but without feeling satisfied on inquiring, as a *judicial question, into its legal rights. [*58
Cromwell had "gotten possession of the government," and expressed a willingness "to rule according to the laws of the land,"—by "red gowns rather than red coats," as he is reported to have quaintly remarked. And this Hale thought justified him in acting as a judge. (Hale's Hist. of the Com. Law, p. 14, Preface.) For a like reason, though the power of Cromwell was soon after overturned, and Charles the Second restored, the judicial decisions under the former remained unmolested on this account, and the judiciary went on as before, still looking only to the *de facto* government for the time being. Grotius virtually holds the like doctrine. (B. 1, ch. 4, sec. 20, and B. 2, ch. 13, sec. 11.) Such was the case, likewise, over most of this country, after the Declaration of Independence, till the acknowledgment of it by England in 1783. (3 Story, Com. on Const., §§ 214, 215.) And such is believed to have been the course in France under all her dynasties and *régimes*, during the last half-century.

These conclusions are strengthened by the circumstance, that the Supreme Court of Rhode Island, organized since, under the second new constitution, has adopted this principle. In numerous instances, this court has considered itself bound to follow the decision of the State tribunals on their own constitutions and laws. (See cases in *Smith* v. *Babcock*,

2 Woodb. & M.; 5 How., 139; *Elmendorf* v. *Taylor*, 10 Wheat., 159; *Bank of United States* v. *Daniel et al.*, 12 Pet., 32.) This, of course, relates to their validity when not overruling any defence set up under the authority of the United States. None such was set up in the trial of Dorr, and yet, after full hearing, the Supreme Court of Rhode Island decided that the old charter and its legislature were the political powers which they were bound to respect, and the only ones legally in force at the time of this transaction; and accordingly convicted and punished the governor chosen under the new constitution for treason, as being technically committed, however pure may have been his political designs or private character. (Report of Dorr's Trial, 1844, pp. 130, 131.) The reasons for this uniform compliance by us with State decisions made before ours on their own laws and constitutions, and not appealed from, are given by Chief Justice Marshall with much clearness. It is only necessary to refer to his language in *Elmendorf* v. *Taylor*, 10 Wheat., 159.

Starting, then, as we are forced to here, with several political questions arising on this record, and those settled by political tribunals in the State and general government, and whose decisions on them we possess no constitutional authority to revise, all which, apparently, is left for us to decide is
*59] the *other point,—whether the statute establishing martial law over the whole State, and under which the acts done by the defendants are sought to be justified, can be deemed constitutional.

To decide a point like this last is clearly within judicial cognizance, it being a matter of private personal authority and right, set up by the defendants under constitutions and laws, and not of political power, to act in relation to the making of the former.

Firstly, then, in order to judge properly whether this act of Assembly was constitutional, let us see what was the kind and character of the law the Assembly intended, in this instance, to establish, and under which the respondents profess to have acted.

The Assembly says:—"The State of Rhode Island and Providence Plantations is hereby placed under martial law, and the same is hereby declared to be in full force until otherwise ordered by the General Assembly, or suspended by proclamation of his Excellency the Governor of the State." Now, the words "martial law," as here used, cannot be construed in any other than their legal sense, long known and recognized in legal precedents as well as political history. (See it in 1 Hallam's Const. Hist., ch. 5, p. 258;

1 MacArthur on Courts-Martial, 33.) The legislature evidently meant to be understood in that sense by using words of such well-settled construction, without any limit or qualification, and covering the whole State with its influence, under a supposed exigency and justification for such an unusual course. I do not understand this to be directly combated in the opinion just delivered by the Chief Justice. That they could mean no other than the ancient martial law often used before the Petition of Right, and sometimes since, is further manifest from the fact, that they not only declared "martial" law to exist over the State, but put their militia into the field to help, by means of them and such a law, to suppress the action of those denominated "insurgents," and this without any subordination to the civil power, or any efforts in conjunction and in coöperation with it. The defendants do not aver the existence of any civil precept which they were aiding civil officers to execute, but set up merely military orders under martial law. Notwithstanding this, however, some attempts have been made at another construction of this act, somewhat less offensive, by considering it a mere equivalent to the suspension of the habeas corpus, and another still to regard it as referring only to the military code used in the armies of the United States and England. But when the legislature enacted *such a system "as martial law," what right have we to say that they intended to establish something else and something entirely different? A suspension, for instance, of the writ of habeas corpus,—a thing not only unnamed by them, but wholly unlike and far short, in every view, of what they both said and did? Because they not only said, *eo nomine*, that they established "martial law," but they put in operation its principles; principles not relating merely to imprisonment, like the suspension of the habeas corpus, but forms of arrest without warrant, breaking into houses where no offenders were found, and acting exclusively under military orders rather than civil precepts. [*60

Had the legislature meant merely to suspend the writ of habeas corpus, they, of course, would have said that, and nothing more. A brief examination will show, also, that they did not thus intend to put in force merely some modern military code, such as the Articles of War made by Congress, or those under the Mutiny Act in England. They do not mention either, and what is conclusive on this, neither would cover or protect them, in applying the provisions of those laws to a person situated like the plaintiff. For nothing is better settled than that military law applies only to the

military; but "martial law" is made here to apply to all. (Hough on Courts-Martial, 384, note; 27 State Trials, 625, in *Theobald Wolfe Tone's case.*)

The present laws for the government of the military in England, also, do not exist in the vague and general form of martial law, but are explicitly restricted to the military, and are allowed as to them only to prevent desertion and mutiny, and to preserve good discipline. (1 Bl. Com., 412; 1 MacArthur on Courts-Martial, p. 20.) So, in this country, legislation as to the military is usually confined to the general government, where the great powers of war and peace reside. And hence, under those powers, Congress, by the act of 1806 (2 Stat. at Large, 359), has created the Articles of War, "by which the armies of the United States shall be governed," and the militia when in actual service, and only they. To show this is not the law by which *other* than those armies shall be governed, it has been found necessary, in order to include merely the drivers or artificers "in the service," and the militia after *mustered* into it, to have special statutory sections. (See articles 96 and 97.) Till mustered together, even the militia are not subject to martial law. (5 Wheat., 20; 3 Story, Com. Const., § 120.) And whenever an attempt is made to embrace others in its operation, not belonging to the military or militia, nor having ever agreed to the rules of the service, well may they say, we have not entered into such bonds,—*in hæc vinculæ non veni.* *(2 H. Bl., 99; 1 Bl. Com., 408, 414; 1 T. R., 493, 550, 784; 27 St. Tr., 625.) Well may they exclaim, as in Magna Charta, that "no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land." There is no pretence that this plaintiff, the person attempted to be arrested by the violence exercised here, was a soldier or militiaman then mustered into the service of the United States, or of Rhode Island, or subject by its laws to be so employed, or on that account sought to be seized. He could not, therefore, in this view of the case, be arrested under this limited and different kind of military law, nor houses be broken into for that purpose and by that authority.

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So it is a settled principle even in England, that, "under the British constitution, the military law does in no respect either supersede or interfere with the civil law of the realm," and that "the former is in general subordinate to the latter" (Tytler on Military Law, 365); while "martial law" overrides them all. The Articles of War, likewise, are not only authorized by permanent rather than temporary legislation, but they are prepared by or under it with punishments and

rules before promulgated, and known and assented to by those few who are subject to them, as operating under established legal principles and the customary military law of modern times. (1 East, 306, 313; *Pain* v. *Willard*, 12 Wheat., 539, and also 19; 1 MacArthur, Courts-Martial, 13 and 215.) They are also definite in the extent of authority under them as to subject-matter as well as persons, as they regulate and restrain within more safe limits the jurisdiction to be used, and recognize and respect the civil rights of those not subject to it, and even of those who are, in all other matters than what are military and placed under military cognizance. (2 Stephen on Laws of Eng., 602; 9 Bac. Abr., *Soldier*, F; Tytler on Military Law, 119.) And as a further proof how rigidly the civil power requires the military to confine even the modified code martial to the military, and to what are strictly military matters, it cannot, without liability to a private suit in the judicial tribunals, be exercised on a soldier himself for a cause not military, or over which the officer had no right to order him; as, for example, to attend school instruction, or pay an assessment towards it out of his wages. (4 Taunt., 67; 4 Maul. & Sel., 400; 2 H. Bl., 103, 537; 3 Cranch, 337; 7 Johns. (N. Y.), 96.)

The prosecution of Governor Wall in England, for causing, when he was in military command, a soldier to be seized and flogged so that he died, for an imputed offence not clearly military and by a pretended court-martial without a full trial, and executing Wall for the offence after a lapse of twenty years, *illustrate how jealously the exercise of any martial power is watched in England, though in the army itself and on its own members. (See Annual Register for 1802, p. 569; 28 State Trials, p. 52, Howell's ed.) [*62

How different in its essence and forms, as well as subjects, from the Articles of War was the "martial law" established here over the whole people of Rhode Island, may be seen by adverting to its character for a moment, as described in judicial as well as political history. It exposed the whole population, not only to be seized without warrant or oath, and their houses broken open and rifled, and this where the municipal law and its officers and courts remained undisturbed and able to punish all offences, but to send prisoners, thus summarily arrested in a civil strife, to all the harsh pains and penalties of courts-martial or extraordinary commissions, and for all kinds of supposed offences. By it, every citizen, instead of reposing under the shield of known and fixed laws as to his liberty, property, and life, exists with a rope round his neck, subject to be hung up by a military despot at the

next lamp-post, under the sentence of some drum-head court-martial. (See Simmon's Pract. of Courts-Martial, 40.) See such a trial in Hough on Courts-Martial, 383, where the victim on the spot was "blown away by a gun," "neither time, place nor persons considered." As an illustration how the passage of such a law may be abused, Queen Mary put it in force in 1558, by proclamation merely, and declared, "that whosoever had in his possession any heretical, treasonable, or seditious *books*, and did not presently burn them, without reading them or showing them to any other person, should be esteemed a *rebel*, and without any further delay be executed by the *martial law*." (Tytler on Military Law, p. 50, ch. 1, sec 1.)

For convincing reasons like these, in every country which makes any claim to political or civil liberty, "martial law," as here attempted and as once practised in England against her own people, has been expressly forbidden there for near two centuries, as well as by the principles of every other free constitutional government. (1 Hallam's Const. Hist., 420.) And it would be not a little extraordinary, if the spirit of our institutions, both State and national, was not much stronger than in England against the unlimited exercise of martial law over a whole people, whether attempted by any chief magistrate or even by a legislature.

It is true, and fortunate it is that true, the consequent actual evil in this instance from this declaration of martial law was smaller than might have been naturally anticipated. But we must be thankful for this, not to the harmless character of the law itself, but rather to an inability to arrest many, *63] or from the *small opposition in arms, and its short continuance, or from the deep jealousy and rooted dislike generally in this country to any approach to the reign of a mere military despotism. Unfortunately, the legislature had probably heard of this measure in history, and even at our Revolution, as used by some of the British generals against those considered rebels; and, in the confusion and hurry of the crisis, seem to have rushed into it suddenly, and, I fear, without a due regard to private rights, or their own constitutional powers, or the supervisory authority of the general government over wars and rebellions.

Having ascertained the kind and character of the martial law established by this act of Assembly in Rhode Island, we ask next, how, under the general principles of American jurisprudence in modern times, such a law can properly exist, or be judicially upheld. A brief retrospect of the gradual, but decisive, repudiation of it in England will exhibit many of the

reasons why such a law cannot be rightfully tolerated anywhere in this country.

One object of parliamentary inquiry, as early as 1620, was to check the abuse of martial law by the king which had prevailed before. (Tytler on Military Law, 502.) The Petition of Right, in the first year of Charles the First, reprobated all such arbitrary proceedings in the just terms and in the terse language of that great patriot as well as judge, Sir Edward Coke, and prayed they might be stopped and never repeated. To this the king wisely replied,—"*Soit droit fait come est desire*,—Let right be done as desired." (Petition of Right, in Stat. at L., 1 Charles 1.) Putting it in force by the king alone was not only restrained by the Petition of Right early in the seventeenth century, but virtually denied as lawful by the Declaration of Rights in 1688. (Tytler on Military Law, 307.) Hallam, therefore, in his Constitutional History, p. 420, declares that its use by "the commissions to try military offenders by martial law was a procedure necessary within certain limits to the discipline of an army, but unwarranted by the constitution of this country." Indeed, a distinguished English judge has since said, that "martial law," as of old, now "does not exist in England at all," "was contrary to the constitution, and has been for a century totally exploded." (*Grant* v. *Gould*, 2 H. Bl., 69; 1 Hale, P. C., 346; Hale, Com. Law, ch. 2, p. 36; 1 MacArthur, 55.) This is broad enough, and is correct as to the community generally in both war and peace. No question can exist as to the correctness of this doctrine in time of peace. The Mutiny Act itself, for the government of the army, in 36 Geo. 3, ch. 24, § 1, begins by reciting, "Whereas, no man can be forejudged of life or limb, or *subjected in time of peace to any punishment within the realm by martial law." (Simmon's Pract. of Courts-Martial, 38.) [*64

Lord Coke says, in 3 Inst., 52:—"If a lieutenant, or other that hath commission of martial authority in time of peace, hang or otherwise execute any man by color of martial law, this is murder." "Thom. Count de Lancaster, being taken *in open insurrection*, was by judgment of martial law put to death," and this, though during an insurrection, was adjudged to be murder, because done in time of peace, and while the courts of law were open. (1 Hallam's Const. Hist., 260.) The very first Mutiny Act, therefore, under William the Third, was cautious to exonerate all subjects except the military from any punishment by martial law. (Tytler on Military Law, 19, note.) In this manner it has become gradually established in England, that in peace the occurrence of civil strife does not

justify individuals or the military or the king in using martial law over the people.

It appears, also, that nobody has dared to exercise it, in war or peace, on the community at large, in England, for the last century and a half, unless specially enacted by Parliament, in some great exigency and under various restrictions, and then under the theory, not that it is consistent with bills of rights and constitutions, but that Parliament is omnipotent, and for sufficient cause may override and trample on them all, temporarily.

After the civil authorities have become prostrated in particular places, and the din of arms has reached the most advanced stages of intestine commotions, a Parliament which alone furnishes the means of war—a Parliament unlimited in its powers—has, *in extremis*, on two or three occasions, ventured on martial law beyond the military; but it has usually confined it to the particular places thus situated, limited it to the continuance of such resistance, and embraced in its scope only those actually in arms. Thus the "Insurrection Act" of November, 1796, for Ireland, passed by the Parliament of England, extended only to let magistrates put people "out of the king's peace," and subject to military arrest, under certain circumstances. Even then, though authorized by Parliament, like the general government here, and not a State, it is through the means of the civil magistrate, and a clause of indemnity goes with it against prosecutions in the "king's ordinary courts of law." (Annual Register, p. 173, for A. D., 1798; 1 MacArthur, Courts-Martial, 34.) See also the cases of the invasions by the Pretender in 1715 and 1745, and of the Irish rebellion in 1798. (Tytler on Military Law, 48, 49, 369, 370, App., No. 6, p. 402, the act passed by the Irish Parl.; Simmon's *Practice of Courts-Martial, App., 633.)

*65] When speaking of the absence of other and sound precedents to justify such martial law in modern times here, I am aware that something of the kind may have been attempted in some of the doings of the British Colonial governors towards this country at the Revolution.

In the Annual Register for 1775, p. 133, June 12th, it may be seen that General Gage issued his proclamation, pardoning all who would submit, except Samuel Adams and John Hancock, and further declaring, "that, as a stop was put to the due course of justice, *martial law* should take place till the laws were restored to their due efficacy."

Though the engagements at Lexington and Concord happened on the 19th of April, 1775, though Parliament had in February previous declared the Colonies to be in a state of

rebellion (Id., p. 247), and though thousands of militia had assembled near Bunker Hill before the 12th of June, no martial law had been established by Parliament, and not till that day did General Gage, alone and unconstitutionally, undertake, in the language of our fathers, to "supersede the course of the common law, and, instead thereof, to publish and order the use and exercise of martial law." (Id., p. 261; Journal of Old Cong., 147, a declaration on 6th July, 1775, drawn up by J. Dickenson.)

Another of these outrages was by Lord Dunmore, in Virginia, November 7th, 1775, not only declaring all the slaves of rebels free, but "declaring martial law to be enforced throughout this Colony." (Annual Register for 1775, p. 28; 4 American Archives, 74.) This was, however, justly denounced by the Virginia Assembly as an "assumed power, which the king himself cannot exercise," as it "annuls the law of the land and introduces the most execrable of all systems, martial law." (4 American Archives, 87.) It was a return to the unbridled despotism of the Tudors, which, as already shown, one to two hundred years before, had been accustomed, in peace as well as war, to try not only soldiers under it, but others, and by courts-martial rather than civil tribunals, and by no settled laws instead of the municipal code, and for civil offences no less than military ones. (2 H. Bl., 85; 3 Instit., 52; Stat. at L., 1 Charles 1; Tytler on Military Law, *passim.*)

Having thus seen that "martial law" like this, ranging over a whole people and State, was not by our fathers considered proper at all in peace or during civil strife, and that, in the country from which we derive most of our jurisprudence, the king has long been forbidden to put it in force in war or peace, and that Parliament never, in the most extreme cases of rebellion, allows it, except as being sovereign and unlimited in power, *and under peculiar restrictions, the next inquiry is, whether the legislature of [*66 Rhode Island could, looking to her peculiar situation as to an constitution, rightfully establish such a law under the circumstances existing there in 1842. And, to meet this question broadly, whether she could do it, regarding those circumstances, first, as constituting peace, and next, as amounting to war. In examining this, I shall refrain from discussing the points agitated at the bar, whether the old charter under which it took place was a wise one for a republic, or whether the acts of the legislature rendering it so highly penal to resort to peaceful measures to form or put into operation a new constitution without their consent, and establishing "martial

law" to suppress them, were characterized by the humanity and the civilization of the present age towards their own fellow-citizens. But I shall merely inquire, first, whether it was within the constitutional power of that legislature to pass such a law as this during peace, or, in other words, before any lawful and competent declaration of war; leaving all questions of mere expediency, as belonging to the States themselves rather than the judiciary, and being one of the last persons to treat any of them with disrespect, or attempt to rob them of any legitimate power.

At the outset it is to be remembered, that, if Parliament now exercises such a power occasionally, it is only under various limitations and restrictions, not attended to in this case, and only because the power of Parliament is by the English constitution considered as unlimited or omnipotent. But here legislative bodies, no less than the executive and judiciary, are usually not regarded as omnipotent. They are in this country now limited in their powers, and placed under strong prohibitions and checks. (8 Wheat., 88; 3 Sm. & M. (Miss.), 673.)

This court has declared that "the legislatures are the creatures of the Constitution. They owe their existence to the Constitution. They derive their powers from the Constitution. It is their commission, and therefore all their acts must be conformable to it, or else they will be void." (*Vanhorne's Lessee* v. *Dorrance*, 2 Dall., 308; Vattel, ch. 3, sec. 34.) In most of our legislatures, also, as in Rhode Island in A. D., 1798, by a fundamental law, there has been incorporated into their constitutions prohibitions to make searches for papers or persons without a due warrant, and to try for offences except by indictment, unless in cases arising in the army or navy or militia themselves.

The genius of our liberties holds in abhorrence all irregular inroads upon the dwelling-houses and persons of the citi-
*67] zen, *and with a wise jealousy regards them as sacred, except when assailed in the established and allowed forms of municipal law. Three of the amendments to the Constitution of the United States were adopted, under such influences, to guard against abuses of power in those modes by the general government, and evidently to restrict even a modified "martial law" to cases happening among military men, or the militia when in actual service. For one of them, amendment fourth, expressly provides, that "the right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable

cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The others are amendments third and fifth. And who could hold for a moment, when the writ of habeas corpus cannot be suspended by the legislature itself, either in the general government or most of the States, without an express constitutional permission, that all other writs and laws could be suspended, and martial law substituted for them over the whole State or country, without any express constitutional license to that effect, in any emergency? Much more is this last improbable, when even the mitigated measure, the suspension of the writ of habeas corpus, has never yet been found proper by Congress, and, it is believed, by neither of the States, since the Federal Constitution was adopted. (3 Story, Com. on Const., § 1325.)

Again, the act of June 24th, 1842, as an act of legislation by Rhode Island, was virtually forbidden by the express declaration of principles made by the Rhode Island Assembly in 1798; and also by the views expressed through the delegates of their people upon adopting the Federal Constitution, June 16th, 1790. These may be seen in 1 Elliot's Deb., 370, declaring, in so many words, "that every person has a right to be secure from all unreasonable searches and seizures of his person, his papers, or his property," and warrants to search without oath and seizures by general warrant are "oppressive," and "ought not to be granted."

But as these views were expressed in connection with the constitution of the general government, though avowed to be the principles of her people generally, and as the doings in 1798 were in the form of a law, and not a constitution, it was subject to suspension or repeal; and hence it will be necessary to look into the charter to Rhode Island of 1663, her only State constitution till 1842, to see if there be any limitation in that to legislation like this, establishing martial law.

So far from that charter, royal as it was in origin, permitting *an unlimited authority in the legislature, it will be found expressly to forbid any laws "contrary and [*68 repugnant unto" "the laws of this our realm of England," and to require them to be, "as near as may be, agreeable" to those laws. (See Document, p. 12.)

This, so far from countenancing the establishment of martial law in Rhode Island, contrary to the Petition of Right in England and her Bill of Rights, regulated it by the same restrictions, "as near as may be." Nor did our Revolution of A. D., 1776, remove that restraint, so far as respects what was

then the body of English laws. For although Rhode Island chose to retain that charter with this restriction after the Revolution, and made no new constitution with other limitations till 1842 or 1843, yet probably "the laws of England" forbidden to be violated by her legislature must be considered such as existed when the charter was granted in 1663, and as continued down to 1776. After that, her control over this country *de jure* ceasing, a conformity to any new laws made would not be required. But retaining the charter as the sole guide and limit to her legislature until she formed a new constitution, it seems clear that her legislature had no right, on the 25th of June, 1842, to put the whole State under martial law by any act of Parliament in force in England in 1663 or in 1776, because none such was then in force there, nor by any clause whatever in her charter, as will soon be shown, nor by any usages in her history, nor by any principles which belong to constitutional governments or the security of public liberty.

To remove all doubt on this subject, the charter does expressly allow "martial law" in one way and case to be declared, and thus impliedly forbids it in any other. *Expressio unius est exclusio alterius.* But so far from the martial law allowed by it being by permission of the legislature and over the whole State, it was to be declared only in war waged against a public enemy, and then by the "military officer" appointed to command the troops so engaged; and then not over their whole territory and all persons and cases, but he was to "use and exercise the law martial in such cases only as occasion shall necessarily require." (p. 15.)

Even this power, thus limited, as before shown, related to the troops of the State, and those liable to serve among them in an exigency, and when in arms against an enemy. They did not touch opponents, over whom they could exercise only the municipal laws of non-combatants, and only the law of nations and belligerent rights when in the field, and after war or rebellion is recognized as existing by the proper authorities. Again, it would be extraordinary indeed if in England
*69] *the king himself is restrained by Magna Charta and by the Petition as well as Declaration of Rights, binding him to these limits against martial law since the Revolution of 1688 (4 Bl. Com., 440; 2 Pet., 656), and yet he could grant a charter which should exonerate others from the obligations of Magna Charta and the general laws of the kingdom, or that they could be exonerated under it as to the power of legislation, and do what is against the whole body of English laws since the end of the sixteenth century, and what Parliament itself, in its omnipotence and freedom from

restrictions, has never, in the highest emergencies, thought it proper to do without numerous limitations, regulations, and indemnities, as before explained.

Beside this, it may well be doubted whether, in the nature of the legislative power in this country, it can be considered as anywhere rightfully authorized, any more than the executive, to suspend or abolish the whole securities of person and property at its pleasure; and whether, since the Petition of Right was granted, it has not been considered as unwarrantable for any British or American legislative body, not omnipotent in theory like Parliament, to establish in a whole country an unlimited reign of martial law over its whole population; and whether to do this is not breaking up the foundations of all sound municipal rule, no less than social order, and restoring the reign of the strongest, and making mere physical force the test of right.

All our social usages and political education, as well as our constitutional checks, are the other way. It would be alarming enough to sanction here an unlimited power, exercised either by legislatures, or the executive, or courts, when all our governments are themselves governments of limitations and checks, and of fixed and known laws, and the people a race above all others jealous of encroachments by those in power. And it is far better that those persons should be without the protection of the ordinary laws of the land who disregard them in an emergency, and should look to a grateful country for indemnity and pardon, than to allow, beforehand, the whole frame of jurisprudence to be overturned, and every thing placed at the mercy of the bayonet.

No tribunal or department in our system of governments ever can be lawfully authorized to dispense with the laws, like some of the tyrannical Stuarts, or to repeal, or abolish, or suspend the whole body of them; or, in other words, appoint an unrestrained military dictator at the head of armed men.

Whatever stretches of such power may be ventured on in great crises, they cannot be upheld by the laws, as they prostrate the laws and ride triumphant over and beyond them, however the Assembly of Rhode Island, under the exigency, may have hastily supposed that such a [*70 measure in this instance was constitutional. It is but a branch of the omnipotence claimed by Parliament to pass bills of attainder, belonging to the same dangerous and arbitrary family with martial law. But even those have ceased to succeed in England under the lights of the nineteenth century, and are expressly forbidden by the Federal Constitution; and neither ought ever to disgrace the records of any

free government. Such laws (and martial law is only still baser and more intolerable than bills of attainder) Mr. Madison denounces, as "contrary to the first principles of the social compact, and to every principle of sound legislation." (Federalist, No. 44.)

In short, then, there was nothing peculiar in the condition of Rhode Island as to a constitution in 1842, which justified her legislature in peace, more than the legislature of any other State, to declare martial law over her whole people; but there was much in her ancient charter, as well as in the plainest principles of constitutional liberty, to forbid it. Considering this, then, and that some cases already cited show that domestic violence is still to be regarded, not as a state of war, giving belligerent rights, but as conferring only the powers of peace in a State, through its civil authorities, aided by its militia, till the general government interferes and recognizes the contest as a war, this branch of our inquiries as to martial law would end here, upon my view of the pleadings, because the defendants justify under that law, and because the State legislature alone possessed no constitutional authority to establish martial law, of this kind and to this extent, over her people generally, whether in peace or civil strife. But some of the members of this court seem to consider the pleadings broad enough to cover the justification, under some rights of war, independent of the act of the Assembly, or, as the opinion just read by the Chief Justice seems to imply, under the supposed authority of the State, in case of domestic insurrection like this, to adopt an act of martial law over its whole people, or any war measure deemed necessary by its legislature for the public safety.

It looks, certainly, like pretty bold doctrine in a constitutional government, that, even in time of legitimate war, the legislature can properly suspend or abolish all constitutional restrictions, as martial law does, and lay all the personal and political rights of the people at their feet. But bolder still is it to justify a claim to this tremendous power in any State, or in any of its officers, on the occurrence merely of some domestic violence.

We have already shown that, in this last event, such a claim *71] *is entirely untenable on general principles, or by the old charter of Rhode Island, and was denounced as unlawful by our fathers when attempted against them at the Revolution, and has in England been punished as murder when exercised to kill one, though taken in open arms in an insurrection. (See cases, *ante*.)

The judgment which the court has pronounced in this case

seems to me, also, to be rested, not on any right of this kind in peace, but, on the contrary, to uphold the act of martial law only as a war measure. But the grounds have not been shown, to my conviction, for supposing that war and war measures, and the rights of war, existed legally in Rhode Island when this act passed. And, finally, it seems to me that the insurrection then existing was not in a stage of progress which would justify any mere belligerent rights; but if any, it was such rights in the general government, and not in the legislature of the State, obtained, too, by mere implication, and, as to so formidable a measure as this, operating so loosely and recklessly over all its own citizens.

It is admitted that no war had duly been declared to exist, either by Rhode Island or the United States, at the time this war measure was adopted, or when the trespass under it was committed. Yet, had either wished to exercise any war powers, they would have been legalized in our political system, not by Rhode Island, but the general government. (Const., Art. 1, sec. 8; 3 Story, Com. on Const., §§ 215, 217; 1 Bl. Com. by Tucker, App., p. 270.)

It may not be useless to refresh our minds a little on this subject. The Constitution expressly provides that "the Congress shall have power to declare war." (Art. 1, § 8.) This is not the States, nor the President, and much less the legislature of a State. Nor is it foreign war alone that Congress is to declare, but "war,"—war of any kind existing legitimately or according to the law of nations. Because Congress alone, and not the States, is invested with power to use the great means for all wars,—"to raise and support armies," "to provide and maintain a navy," "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions," and "to provide for organizing, arming, and disciplining the militia." The largest powers of taxation, too, were conferred on Congress at the same time, and in part for this cause, with authority to borrow money on the credit of the Union, and to dispose of the public lands. But the States, deprived of these means, were at the same time properly relieved from the duty of carrying on war themselves, civil or foreign, because they were not required to incur *expenses to suppress even "domestic violence," or [*72
"insurrections," or "rebellions." By a provision (§ 4, art. 3), "the United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and, on application of the legislature (or of the executive when the legislature cannot be convened), against domestic violence." This

exclusiveness of the war power in Congress in all cases, domestic or foreign, is confirmed, too, by another authority given to Congress, not only to organize and discipline the militia, no less than to have regular armies and navies, but "to provide for calling forth the militia" "to suppress insurrections." (§ 8, art. 1.) And lest it might be argued that this power to declare war and raise troops and navies was not exclusive in the general government, as is the case with some other grants to it deemed concurrent, about weights and measures, bankrupt laws, &c. (see cases cited in *Boston* v. *Norris*, *post*, *283), the reasons for this grant as to war, and an express prohibition on the States as to it, both show the power to be exclusive in Congress. Thus, the reasons as to the power itself are cogent for having it exclusive only in one body, in order to prevent the numerous and sudden hostilities and bloody outbreaks in which the country might be involved, with their vast expenses, if thirty States could each declare and wage war under its own impulses. (1 Bl. Com. by Tucker, App., p. 270.) And, to remove all doubt on that point, the Constitution proceeded expressly to provide in another clause a prohibition on the States (§ 10, art. 1),—that "no State shall, without the consent of Congress," "keep troops or ships of war in time of peace," "or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

This accorded with the sixth and ninth articles of the old Confederation, which vested in it exclusively the power to declare war, and took the power of waging it from the States, unless in case of sudden attacks by Indians or pirates, or unless actually invaded by enemies, or in such imminent danger of it that time cannot be had to consult Congress. (1 Laws of U. S., 15, 16, Bioren's ed.)

No concurrent or subordinate power is, therefore, left to the States on this subject, except by occasional and special consent of Congress, which is not pretended to have been given to Rhode Island; or unless "actually invaded" by some enemy, which is not pretended here; or unless "in such imminent danger as will not admit of delay," which manifestly refers to danger from a foreign enemy threatening invasion; or from Indians and pirates. Another circumstance to prove this, beside *the language itself being used in connection with foreign invasions and the danger of them, and not insurrections, is the like clauses in the old Confederation being thus restricted. One of those (article 9th) declares that "the United States in Congress assembled shall have the *sole and exclusive* right and power of determining on peace

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and war, except in the cases mentioned in the sixth article." (1 Laws of U. S., 16, Bioren's ed.) And the sixth article, after providing against foreign embassies, troops, and vessels of war by a State, adds:—"No State shall engage in any war unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." Nor, by an additional provision, could a State grant commissions to ships of war or letters of marque, "except it be after a declaration of war by the United States," and only against the kingdom or state against whom the war had been declared, "unless such State be infested by pirates, in which case vessels of war may be fitted for that occasion," &c. (1 Laws of U. S., 15, Bioren's ed.)

It is impossible to mistake the intention in these provisions, and to doubt that substantially the same intention was embodied by restrictions in the present Constitution, similar in terms, though not entering into so great details. What is, however, decisive as to this intent in the Constitution is the action on it by the second Congress, only a few years after, and of which some were members who aided in framing the Constitution itself. That Congress, May 2d, 1792, authorized force to be used by the President to aid in repelling the invasions here referred to in the Constitution, and they are described in so many words, as "shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe." (1 Stat. at L., 264.) So again in the act of Feb. 28, 1795 (1 Stat. at L., 424), and still further sustaining this view, the power to aid in suppressing insurrections in a State is given in a separate section, showing that they were not deemed the invasions and the "imminent danger" of them expressed in different sections of the act of Congress as well as of the Constitution. If, however, this "imminent danger" could, by any stretch of construction, be considered broader, it did not exist here so as to prevent "delay" in applying to the President first; because, in truth, before martial law was declared, time had existed to make application to Congress and the President, and both had declined to use greater force, or to declare war, and the judicial tribunals of the State were still unmolested in *their course. Besides this, at the [*74
time of the trespass complained of here, the few troops which had before taken up arms for the new constitution had been disbanded, and all further violence disclaimed.

Whoever, too, would justify himself under an exception in

a law or constitution, must set it up and bring his case within it, neither of which is attempted here as to this exception; but the justification is, on the contrary, under this head, placed by the defendant and the court on the existence of war, and rights consequent on its existence.

Some mistake has arisen here, probably, from not adverting to the circumstance, that Congress alone can declare war, and that all other conditions of violence are regarded by the Constitution as but ordinary cases of private outrage, to be punished by prosecutions in the courts; or as insurrections, rebellions, or domestic violence, to be put down by the civil authorities, aided by the militia; or, when these prove incompetent, by the general government, when appealed to by a State for aid, and matters appear to the general government to have reached the extreme stage, requiring more force to sustain the civil tribunals of a State, or requiring a declaration of war, and the exercise of all its extraordinary rights. Of these last, when applied to as here, and the danger has not been so imminent as to prevent an application, the general government must be the judge, and the general government is responsible for the consequences. And when it is asked, what shall a State do, if the general government, when applied to, refrains to declare war till a domestic force becomes very formidable, I reply, exert all her civil power through her judiciary and executive, and if these fail, sustain them by her militia, coöperating, and not independent, and if these fail, it is quite certain that the general government will never hesitate to strengthen the arm of the State when too feeble in either of these modes to preserve public order. And how seldom this will be required of the general government, or by means of war, may be seen by our unspotted, unbroken experience of this kind, as to the States, for half a century, and by the obvious facts, that no occasion can scarcely ever, in future, arise for such interference, when the violence, at the utmost, must usually be from a minority of one State, and in the face of the larger power of the majority within it, and of the coöperation, if need be, of the whole of the rest of the Union.

Carry these constitutional provisions with us, and the facts which have existed, that there had been no war declared by Congress, no actual invasion of the State by a foreign enemy, no imminent danger of it, no emergency of any kind,

*75] *which prevented time or delay to apply to the general government, and remember that, in this stage of things, Congress omitted or declined to do any thing, and that the President also declined to consider a civil violence or insur-

rection as existing so as to justify his ordering out troops to suppress it. The State, then, in and of itself, declared martial law, and the defendants attempted to enforce it. In such a condition of things, I am not prepared to say that the authorities of a State alone can exercise the rights of war against their own citizens; persons, too, who, it is to be remembered, were for many purposes at the same time under the laws and protection of the general government. On the contrary, it seems very obvious, as before suggested, that in periods of civil commotion the first and wisest and only legal measure to test the rights of parties and sustain the public peace under threatened violence is to appeal to the laws and the judicial tribunals. When these are obstructed or overawed, the militia is next to be ordered out, but only to strengthen the civil power in enforcing its processes and upholding the laws. Then, in extreme cases, another assistance is resorted to in the suspension of the writ of habeas corpus. And, finally, if actual force, exercised in the field against those in battle array and not able to be subdued in any other manner, becomes necessary, as *quasi* war, whether against a foreign foe or rebels, it must first, as to the former, be declared by Congress, or recognized and allowed by it as to the latter, under the duty of the United States "to protect each of them against invasion" and "against domestic violence." (Art. 4, sec. 4.) When this is not done in a particular case by Congress, if then in session, it is done by the President in conformity to the Constitution (Art. 1, § 8) and the act of Congress of February 28th, 1795 (1 Stat. at L., 424), "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions."

Under all these circumstances, then, to imply a power like this declaration of martial law over a State as still lawfully existing in its legislature would be to imply what is forbidden by all constitutional checks, forbidden by all the usages of free governments, forbidden by an exclusive grant of the war power to Congress, forbidden by the fact that there were no exceptions or exigencies existing here which could justify it, and, in short, forbidden by the absence of any necessity in our system for a measure so dangerous and unreasonable, unless in some great extremity, if at all, by the general government, which alone holds the issues of war and the power and means of waging it.

Under these views and restrictions, the States have succeeded well, thus far,—over half a century,—in suppressing domestic *violence in other ways than by martial law. The State courts, with the aid of the militia, as in [*76

Shays's rebellion and the Western insurrection, could, for aught which appears, by help of the *posse comitatus*, or at least by that militia, have in this case dispersed all opposition. They did this in both of those instances, so much more formidable in numbers, and made no resort to martial law. (See before, and Minot's History, 163, 178.) In one of them, not even the writ of habeas corpus was suspended by the State, and never by the United States, though empowered to do that in dangerous emergencies. (2 Kent, Com., 24; 2 Story, Com. on Const., § 1335.) But if civil process, aided by the militia, should fail to quell an insurrection against State laws, which has never yet happened in our history, then an appeal lies, and is appropriate, to the general government for additional force, before a resort can be had to supposed belligerent rights, much less to any exploded and unconstitutional extremes of martial law.

As before shown, such an appeal had been made here, but not complied with, because, I presume, the civil authority of the State, assisted by its own militia, did not appear to have failed to overcome the disturbance. How, then, let me ask, had the State here become possessed of any belligerent rights? how could it in any way be possessed of them, at the time of the passage of the act declaring martial law, or even at the time of the trespass complained of? I am unable to discover. Congress, on this occasion, was in session, ready to act when proper and as proper, and it alone could, by the Constitution, declare war, or, under the act of May 2d, 1792, allow the militia from an adjoining State to be called out. (1 Stat. at L., 264.) But Congress declared no war, and conferred no rights of war. The act of Feb. 28th, 1795 (1 Stat. at L., 424), seems to be made broader as to the power of the President over *all* the militia, and, indeed, over the regular troops, to assist on such an occasion, by another act of March 3d, 1807 (2 Stat. at L., 443). But the President, also, did nothing to cause or give belligerent rights to the State. He might, perhaps, have conferred some such rights on the militia, had he called them out, under the consent of Congress; but it would be unreasonable, if not absurd, to argue that the President, rather than Congress, was thus empowered to declare war, or that Congress meant to construe such insurrections, and the means used to suppress them, as wars; else Congress itself should in each case pronounce them so, and not intrust so dangerous a measure to mere executive discretion. But he issued no orders or proclamations. Had he done so, and marched troops, through the action of the Ex-

ecutive under *the standing law is not waging war, [*77
yet, I concede, it is attempting to suppress domestic violence by force of arms, and in doing it the President may possess and exert some belligerent rights in some extreme stages of armed opposition. It is he, however, and those acting under his orders, who, it will be seen, may possibly then, at times, use some such rights, and not the State or its organs. Nor is it till after the President has interfered that such rights arise, and then they arise under the decision and laws and proceedings of the general government. Then the organs of that government have come to the conclusion, that the exercise of force independent of the civil and State authorities has become necessary. (Federalist, No. 29.) The President has been considered the paramount and final judge as to this, whether in invasion or rebellion, and not the governors or legislatures of States. This was fully settled during the war of 1812 with England. (3 Story, Com. on Const., § 1206; 11 Johns. (N. Y.), 150.) He may then issue his proclamation for those in insurrection to disperse, and, if not dispersing, he may afterwards call out the militia to aid in effecting it. (*Martin* v. *Mott*, 12 Wheat., 30.) But not till then do any belligerent rights exist against those even in arms, and then only by or under him. It is a singular coincidence, that, in England, it is held to be not "lawful" for the chief magistrate to order out the militia in case of "rebellion and insurrection," without "the occasion being first communicated to Parliament, if sitting, and, if not sitting, published by proclamation." (1 MacArthur, 28; 12 Stat. at L., 432, 16 George 3, ch. 3; 8 Stat. at L., 634, § 116.) And here, under the act of 1793, the President himself could not call out the militia from another State to assist without consulting Congress, if in session, much less could he declare war. (1 Stat. at L., 264, § 2.)

When the President issues his orders to assemble the militia to aid in sustaining the civil authorities of the State to enforce the laws, or to suppress actual array and violence by counter force, obedience to those orders by the militia then undoubtedly becomes a military duty. (12 Wheat., 31.) So in England. (8 Stat. at L., § 116; 11 Johns. (N. Y.), 150; 4 Burr., 2472; 12 Johns. (N. Y.), 257.) And a refusal to obey such a military summons may be punished in due form, without doubt, by a court-martial. (*Houston* v. *Moore*, 5 Wheat., 1, 20, 35, 37; 3 Story, Com. on Const., § 120.) When such troops, called out by the general government, are in the field on such an occasion, what they may lawfully do to others, who are in opposition, and do it by any mere

belligerent rights, is a very different question. For, now, I
*78] am examining only whether any *belligerent rights before this event existed, on the part of the State, as matters then stood, commensurate with this strong measure of putting martial law in force over the whole State. The precedents, as well as the sound reasons and principles just adverted to, are all, in my view, the other way.

Under our present Constitution, the first, if not nearest, precedent in history as to the course proper to be followed in any State insurrection is Shays's rebellion in Massachusetts. Having occurred in 1787, before the formation of the Federal Constitution, and having been suppressed by the State alone under its own independent authority (Minot's History of Shays's Insurrection, p. 95), it was untrammelled by any of the provisions now existing about war and insurrections in that Constitution. But the course pursued on that occasion is full of instruction and proof as to what was deemed the legal use of the militia by the State, when thus called out, under the old Confederation, and the extent of the rights of force incident to a State on a rebellion within its limits. We have before shown that the provisions in the old Confederation as to war were much the same in substance as in the present Constitution. Now, in Shays's rebellion the resort was not first had at all to the military, but to civil power, till the courts themselves were obstructed and put in jeopardy. And when the militia were finally called out, the whole State, or any part of it, was not put under martial law. The writ of habeas corpus was merely suspended for a limited time, and the military ordered to aid in making arrests under warrants, and not by military orders, as here. They were directed to protect civil officers in executing their duty, and nothing more, unless against persons when actually in the field obstructing them. (Id., 101.)

The language of Governor Bowdoin's orders to Major-General Lincoln, January 19th, 1787, shows the commendable caution deemed legal on such an occasion:—"Consider yourself in all your military offensive operations constantly as under the direction of the civil officer, saving where any armed force shall appear and oppose your marching to execute these orders."

This gives no countenance to the course pursued on this occasion, even had it been attempted to be justified in the pleadings as a right of war, though in a domestic insurrection, and not yet recognized as existing so as to require countenance and assistance through the interposition of force by the general government. Even General Gage did not, though

illegally, venture to declare martial law in 1775 till the fact occurred, as he averred, that the municipal laws could not be executed. Much less was it unlikely here that these laws could not have *been executed by the civil power, or at least by that assisted by the militia, when the judges of the Supreme Court of Rhode Island had been appointed their own judges, and been approved by those who were considered in an insurrectionary condition. [*79

In substantial accordance with these views was, likewise, the conduct of the general government in the insurrection against its own laws in the only other case of rebellion of much note, except the controverted one of Burr's, in our national history. It was in Western Pennsylvania, in 1793, and where the rebellion, or violent resistance, and even treason, as adjudged by the courts of law in *The United States* v. *The Insurgents of Pennsylvania*, 2 Dall., 335, were committing against the government of the United States.

So far, however, from martial law having then been deemed proper or competent to be declared by Congress, and enforced anywhere, or even the writ of habeas corpus suspended, the troops were called out expressly to coöperate with the civil authorities, these having proved insufficient. (Findley's Hist., App., 316, 317.) But that of itself did not seem to be considered as *per se* amounting to war, or as justifying war measures. The government, therefore, neither declared war, nor waged it without that declaration, but did what seems most humane and fit on such occasions, till greater resistance and bloodshed might render war measures expedient; that is, marched the troops expressly with a view only to "cause the laws to be duly executed."

Nor was this done till Judge Peters, who officiated in that district in the courts of the United States, certified that he had issued warrants which the marshal was unable to execute, without military aid. (1 American State Papers, 185.) The acts of Congress then required such a certificate, before allowing the militia to be called out. (1 Stat. at L., 264.) The marshal also wrote, that he needed "military aid." (1 Am. State Papers, 186.) The additional force, authorized by Congress, was expressly for that same purpose, as well as to suppress such combinations. (1 Stat. at L., 403.) And though with these objects, so fully did it seem proper to reach this last one by means of the first, the orders in the field were to a like effect, and the arrests made were by authority of the civil officers, and those seized were carried before those authorities for hearing and trial. (Findley, 181.)

The Secretary of War, likewise, issued public orders, in

which, among other things, it is stated, that "one object of the expedition is to assist the marshal of the district to make prisoners," &c. "The marshal of the District of Pennsylvania will move with you and give you the names of the offenders, their *descriptions, and respective places of abode, who are to be made prisoners under criminal process." And so exclusively did Congress look to the laws of the land for a guide, that special sessions of the Circuit Court nearer the place of offence were allowed (March 2d, 1793, 1 Stat. at L., 334) to be called, when necessary, to try offenders.

*80]

The President, throughout the excitement, evinced the characteristic moderation and prudence of Washington, constantly enjoined a subordination of the military to the civil power, and accompanied the troops in person to see that the laws were respected. (Findley's History of the Western Insurrection, p. 144.) "He assured us," says Findley (p. 179), "that the army should not consider themselves as judges or executioners of the laws, but as employed to support the proper authorities in the execution of them." That he had issued orders "for the subordination of the army to the laws." (p. 181.) This was in accordance with the course pursued in England on some similar occasions. (1 MacArthur on Courts-Martial, 28.) And though some arrests were to be made, they were to be in a legal civil form, for he said, "Nothing remained to be done by them but to support the civil magistrate in procuring proper subjects to atone for the outrages that had been committed." (Findley, 187.) The orders or warrants executed seem to have emanated from the federal judge of the Pennsylvania District. (pp. 200, 201, 204, ch. 16.)

The arrests in 1805 and 1806, in what is called Burr's conspiracy, furnish another analogy and precedent. They were not made till an oath and warrant had issued, except in one or two cases. And in those the prisoners were immediately discharged, as illegally arrested, as soon as writs of habeas corpus could be obtained and enforced. By the Constitution (Art. 3, sec. 9), "the privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it."

And Congress then declined to suspend that writ, much less to declare martial law, even where the supposed rebellion existed. Nor was the latter done by the States, in the rebellions of 1787 and 1794, as before explained, but merely the writ of habeas corpus suspended in one of them. It is further characteristic of the jealousy of our people over legis-

lative action to suspend the habeas corpus, though expressly allowed by the Constitution, that, after a bill to do it in 1807 seems to have passed the Senate of the United States, through all its readings in one day, and with closed doors, the House of Representatives rejected it, on the first reading, by a vote of 113 to 19. (See the Journals of the two Houses, 25th and 27th *Jan., 1807.) And this although the bill to suspend the habeas corpus provided it should be done only when one is charged *on oath* with treason or misdemeanour affecting the peace of the United States, and imprisoned by warrant on authority of the President of the United States, or the Governor of a State or Territory. It was not deemed prudent to suspend it, though in that mild form, considering such a measure at the best but a species of dictatorship, and to be justified only by extreme peril to the public safety. And Mr. Jefferson has left on record his opinion, that it was much wiser, even in insurrections, never even to suspend the writ of habeas corpus. (2 Jefferson's Cor. and Life, 274, 291.) But what would have been thought then of a measure of "martial law," established over the whole country, acting too without oath or warrant, and under no grant by the Constitution, instead of a mere suspension of a writ, and which suspension was permitted by the Constitution in certain exigencies? Again, if only to repeal or suspend the habeas corpus requires a permissive clause in the Constitution, how much more should the repeal or suspension of all municipal laws? Indeed, the Mutiny Act itself, as for instance that of 53 George 3, ch. 18, § 100, does not allow the military to break open a house to arrest so bad a culprit as a deserter without a warrant and under oath. (38 Stat. at L., 97.) [*81

So, though a rebellion may have existed in Burr's case in the opinion of the Executive, and troops had been ordered out to assist in executing the laws and in suppressing the hostile array, this court held that an arrest by a military officer of one concerned in the rebellion, though ordered by the Executive, was not valid, unless he was a person then actually engaged in hostilities, or in warlike array, or in some way actually abetting those who then were so. (*Bollman and Swartout's case*, 4 Cranch, 75, 101, 126; 1 Burr's Tr., 175.) And if an arrest was made without an order of the commander-in-chief, the court would discharge at once. (*Alexander's case*, 4 Cranch, 75, 76, in note.) It should also be by warrant, and on oath; and, in most cases, these were then resorted to by General Wilkinson. (Annual Register for 1807, p. 84.) And so jealous were the people

then of abuses, that a neglect by him of obedience to the requisitions of the habeas corpus, in some respects, led to a presentment against his conduct by the grand jury of New Orleans. (Annual Register for 1807, p. 98.) But here no actual arrest was made, though attempted, and, what was less justifiable, without oath or warrant the house was broken into, and hence any justification by martial law failing which might be set up for the former would seem more clearly to fail for the latter. Certainly it must *82] *fail unless the latter was proper in this way, under all the circumstances, though no one was there liable to be arrested, and none actually arrested.

This doctrine of their failing is familiar in municipal law in breaking houses to seize persons and property on legal precept, when none are found there liable to be seized. (5 Coke, 93, *a*; Bac. Abr., *Execution*, W.)

In civil dissensions, the case stands very differently from foreign ones. In the latter, force is the only weapon, after reason and negotiation have failed. In the former, it is not the course of governments, nor their right, when citizens are unable to convince each other, to fly at once to arms and military arrests and confiscations. The civil power can first be brought to bear upon these dissensions and outbreaks through the judiciary, and usually can thus subdue them.

All these principles, and the precedents just referred to, show that the course rightfully to be pursued on such unfortunate occasions is that already explained; first resorting to municipal precepts, next strengthening them by coöperation of the militia if resisted, and then, if the opposition are in battle array, opposing the execution of such precepts, to obtain further assistance, if needed, from the general government to enforce them, and to seize and suppress those so resisting in actual array against the State.

But affairs must advance to this extreme stage through all intermediate ones, keeping the military in strict subordination to the civil authority except when acting on its own members, before any rights of mere war exist or can override the community, and then, in this country, they must do that under the countenance and controlling orders of the general government. Belligerent measures, too, must come, not from subordinates, but from those empowered to command, and be commensurate only with the opposing array,—the persons, places, and causes where resistance *flagrante bello* exists of the reckless character justifying violence and a disregard of all ordinary securities and laws. It is not a little desirable that this doctrine should prove to be the true one, on account

of its greater tendency to secure orderly and constitutional liberty instead of rude violence, to protect rights by civil process rather than the bayonet, and to render all domestic outbreaks less bloody and devasting than they otherwise would be.

There having been, then, no rights of war on the part of the State when this act of Assembly passed, and certainly none which could justify so extreme a measure as martial law over the whole State as incident to them, and this act being otherwise unconstitutional, the justification set up under it must, in *my opinion, fail. If either government, on the 24th of June, possessed authority to pass an act [*83 establishing martial law to this extent, it was, of course, that of the United States,—the government appointed in our system to carry on war and suppress rebellion or domestic violence when a State is unable to do it by her own powers. But as the general government did not exercise this authority, and probably could not have done it constitutionally in so sweeping a manner, and in such an early stage of resistance, if at all, this furnishes an additional reason why the State alone could not properly do it.

But if I err in this, and certain rights of war may exist with one of our States in a civil strife like the present, in some extreme stage of it, independent of any act of Congress or the President recognizing it, another inquiry would be, whether, in the state of affairs existing at this time, such rights had become perfected, and were broad enough, if properly pleaded, to cover this measure of martial law over the whole State, and the acts done under it, in the present instance. The necessities of foreign war, it is conceded, sometimes impart great powers as to both things and persons. But they are modified by those necessities, and subjected to numerous regulations of national law and justice, and humanity. These, when they exist in modern times, while allowing the persons who conduct war some necessary authority of an extraordinary character, must limit, control, and make its exercise under certain circumstances and in a certain manner justifiable or void, with almost as much certainty and clearness as any provisions concerning municipal authority or duty. So may it be in some extreme stages of civil war. Among these, my impression is that a state of war, whether foreign or domestic, may exist, in the great perils of which it is competent, under its rights and on principles of national law, for a commanding officer of troops under the controlling government to extend certain rights of war, not only over his camp, but its environs and the near field of his military operations. (6 American Archives, 186.) But no further, nor wider. (*Johnson* v. *Davis*

et al., 3 Mart. (La.), 530, 551.) On this rested the justification of one of the great commanders of this country and of the age, in a transaction so well known at New Orleans.

But in civil strife they are not to extend beyond the place where insurrection exists. (3 Mart. (La.), 551.) Nor to portions of the State remote from the scene of military operations, nor after the resistance is over, nor to persons not connected with it. (*Grant* v. *Gould et al.*, 2 H. Bl., 69.) Nor, even within the scene, can they extend to the person or property of citizens against whom no probable cause exists which
*84] *may justify it. (*Sutton* v. *Johnston*, 1 T. R., 549.) Nor to the property of any person without necessity or civil precept. If matters in this case had reached such a crisis, and had so been recognized by the general government, or if such a state of things could and did exist as to warrant such a measure, independent of that government, and it was properly pleaded, the defendants might perhaps be justified within those limits, and under such orders, in making search for an offender or an opposing combatant, and, under some circumstances, in breaking into houses for his arrest.

Considerations like these show something in respect to the extent of authority that could have been exercised in each of these cases as a belligerent right, had war been properly declared before and continued till that time (6 American Archives, 232), neither of which seems to have been the case. It is obvious enough that, though on the 24th of June, five days previous, Luther had been in arms at Providence, several miles distant, under the governor appointed under the new constitution, in order to take possession of some of the public property there, and though in the record it is stated that the defendants offered to prove he was at this time in arms somewhere, yet, the fact not being deemed material under the question of martial law, on which the defence was placed, it does not seem to have been investigated. How it might turn out can be ascertained only on a new trial. But to show it is not uncontroverted, the other record before us as to this transaction states positively that Mrs. Luther offered to prove there was no camp nor hostile array by any person in the town where this trespass was committed, on the 29th of June, nor within twenty-five miles of it in any part of the State, and that Dorr had, on the 27th instant, two days previous, published a statement against "any further forcible measures" on his part, and directing that the military "be dismissed."

The collection which had there happened, in relation to the disputed rights as to the public property under the new constitution, seems to have been nothing, on the evidence, be-

yond a few hundreds of persons, and nothing beyond the control of the courts of law, aided by the militia, if they had been wisely resorted to,—nothing which, when represented to the Executive of the United States, required, in his opinion, from its apprehended extent or danger, any war measures,—the calling out of the militia of other States, or aid of the public troops, or even the actual issue of a proclamation; and the persons who did assemble had, it appears, two days before the trespass, been disbanded, and further force disclaimed, without a gun being fired, or blood in any way shed, on that occasion.

*Under the worst insurrections, and even wars, in our history, so strong a measure as this is believed never to have been ventured on before by the general government, and much less by any one of the States, as within their constitutional capacity, either in peace, insurrection, or war. And if it is to be tolerated, and the more especially in civil feuds like this, it will open the door in future domestic dissensions here to a series of butchery, rapine, confiscation, plunder, conflagration, and cruelty, unparelleled in the worst contests in history between mere dynasties for supreme power. It would go in practice to render the whole country—what Bolivar at one time seemed to consider his—a *camp*, and the administration of the government a *campaign*. [*85

It is to be hoped we have some national ambition and pride, under our boasted dominion of law and order, to preserve them by law, by enlightened and constitutional law, and the moderation of superior intelligence and civilization, rather than by appeals to any of the semibarbarous measures of darker ages, and the unrelenting, lawless persecutions of opponents in civil strife which characterized and disgraced those ages.

Again, when belligerent measures do become authorized by extreme resistance, and a legitimate state of war exists, and civil authority is prostrate, and violence and bloodshed seem the last desperate resort, yet war measures must be kept within certain restraints in all civil contests in all civilized communities.

"The common laws of war, those maxims of humanity, moderation, and honor," which should characterize other wars, Vattel says (B. 3, ch. 8, sec. 294 and 295), "ought to be observed by both parties in every civil war." Under modern and Christian civilization, you cannot needlessly arrest or make war on husbandmen or mechanics, or women and children. (Vattel, B. 3, ch. 8, sec. 149.) The rights of war are against enemies, open and armed enemies, while enemies and

during war, but no longer. And the force used then is not to exceed the exigency,—not wantonly to injure private property, nor disturb private dwellings and their peaceful inmates. (Vattel, B. 3, ch. 8, sec. 148.) Much will be allowed to discretion, if manifestly exercised with honesty, fairness, and humanity. But the principles of the common law, as opposed to trials without a jury, searches of houses and papers without oath or warrant, and all despotic invasions on private personal liberty,—the customary usages to respect the laws of the land except where a great exigency may furnish sufficient excuse,—should all limit this power, in many respects, in practice. (2 Stephens on Laws of England, 602.) The *more especially must it be restrained in civil strife, *867] operating on our own people in masses and under our system of government in distributing authority between the States and the Union, as the great powers of war are intrusted to the latter alone, and the latter is also to recognize when that which amounts to a rebellion exists, and interfere to suppress it, if necessary, with the incidents to such interference. Under the right of war the defence must also rest, not only on what has been alluded to, but, as before suggested, on the question whether the insurrection at the time of this trespass was not at an end. For if one has previously been in arms, but the insurrection of war is over, any belligerent rights cease, and no more justify a departure from the municipal laws than they do before insurrection or war begins. If any are noncombatants, either as never having been engaged in active resistance, or as having abandoned it, the rights of civil warfare over them would seem to have terminated, and the prosecution and punishment of their past misconduct belongs then to the municipal tribunals, and not to the sword and bayonet of the military.

The Irish Rebellion Act, as to martial law, was expressly limited "from time to time during the continuance of the said rebellion." (Tytler on Military Law, 405.) And in case of a foreign war it is not customary to make prisoners and arrest enemies after the war has ceased and been declared abandoned, though the terms of peace have not been definitely settled. And if any of them voluntarily, like Bonaparte, abandon the contest, or surrender themselves as prisoners, the belligerent right to continue to imprison them after the war is at an end, much less to commit violence, as here, on others, with a view to capture them, is highly questionable, and has been very gravely doubted. (Vattel, B. 3, ch. 8, sec. 152, 154.) Circumstances like these make the rule of force and violence operate only to a due extent and for a

due time, within its appropriate sphere, and secure beyond that extent and time the supremacy of the ordinary laws of the land. Much more in a social or civil war, a portion of the people, where not then in arms, though differing in opinion, are generally to be treated as noncombatants, and searched for and arrested, if at all, by the municipal law, by warrant under oath, and tried by a jury, and not by the law martial.

Our own and English history is full of such arrests and trials, and the trials are held, not round a drum-head or cannon, but in halls of justice and under the forms of established jurisprudence. (See State Trials, *passim*.) The writ of habeas corpus, also, unless specially suspended by the legislature *having power to do so, is as much in force [*87 in intestine war as in peace, and the empire of the laws is equally to be upheld, if practicable. (Id., 532; 4 Cranch, 101; 2 H. Bl., 69.)

To conclude, it is manifest that another strong evidence of the control over military law in peace, and over these belligerent rights in civil strife, which is proper in a bold and independent judiciary, exists in this fact, that whenever they are carried beyond what the exigency demands, even in cases where some may be lawful, the sufferer is always allowed to resort, as here, to the judicial tribunals for redress. (4 Taunt., 67, and *Baily* v. *Warder*, 4 Mau. & Sel., 400. See other cases before cited.)

Bills or clauses of indemnity are enacted in England, otherwise officers would still oftener be exposed to criminal prosecution and punishment for applying either belligerent rights or the military law in an improper case, or to an excess in a proper case, or without probable cause. (1 MacArthur on Courts-Martial, 33, 34; Tytler on Military Law, 49 and 489; see last act in Appendix to Tytler and Simmons.) And when in an insurrection an opponent or his property is treated differently from what the laws and constitution, or national law, sanction, his remedy is sacred in the legal tribunals. And though the offender may have exposed himself to penalties and confiscations, yet he is thus not to be deprived of due redress for wrongs committed on himself.

The plaintiff in one of these records is a female, and was not at all subject to military duty and laws, and was not in arms as an opponent supporting the new constitution. And if the sanctity of domestic life has been violated, the castle of the citizen broken into, or property or person injured, without good cause, in either case a jury of the country should give damages, and courts are bound to instruct them

to do so, unless a justification is made out fully on correct principles. This can and should be done without any vindictive punishment, when a party appears to have acted under a supposed legal right. And, indeed, such is the structure of our institutions, that officers, as well as others, are often called on to risk much in behalf of the public and of the country in time of peril. And if they appear to do it from patriotism, and with proper decorum and humanity, the legislature will, on application, usually indemnify them by discharging from the public treasury the amount recovered for an injury to individual rights. In this very case, therefore, the defence seems to be by the State, and at its expense. It shows the beautiful harmony of our system, not to let private damage be suffered wrongfully without redress, but, at the same time, not to let a public agent suffer,
*88] *who, in a great crisis, appears to have acted honestly for the public, from good probable cause, though in some degree mistaking the extent of his powers, as well as the rights of others. But whether any of the rights of war, or rights of a citizen in civil strife, independent of the invalid act of the Assembly declaring martial law over all the State, have here, on the stronger side against the feebler, been violated, does not seem yet to have been tried. The only point in connection with this matter which appears clearly to have been ruled at the trial was the legality or constitutionality of that act of Assembly. I think that the ruling made was incorrect, and hence that there has been a mistrial.

The judgment should, in this view, be reversed; and though it is very doubtful whether, in any other view, as by the general rights of war, these respondents can justify their conduct on the facts now before us; yet they should be allowed an opportunity for it, which can be granted on motion below to amend the pleas in justification.

ORDERS.

Martin Luther v. Luther M. Borden et al.

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 now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

Rachel Luther v. Luther M. Borden et al.

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 on the questions and points on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, and it appearing to this court, upon an inspection of the said transcript, that no point in this case, within the meaning of the act of Congress, has been certified to this court, it is thereupon now here ordered and decreed by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Circuit Court to be proceeded in according to law.

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*Charles Wilkes Plaintiff in error, v. Samuel Dinsman. [*89

In a suit brought by a marine against the commanding officer of a squadron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evidence a letter which he had written to the Secretary of the Navy, relating to the circumstances of the enlistment.

An acquittal of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual.

The act of Congress passed on the 2d of March, 1837 (5 Stat. at L., 153), authorized a reënlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the navy." Prior laws recognize marines as a part of the navy.

Under the same act, the commander of the squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it.[1]

At the time of enlistment, the marine corps being subject to such laws and regulations as might, at any time, be established for the better government of the navy, it was a part of the contract of enlistment that the party should obey them, whenever passed. It was, therefore, no objection to such laws, that they were passed after his entering the service.

By the third article for the government of the navy, the commander is authorized to cause twelve lashes to be inflicted, for scandalous conduct, without a court-martial. Every successive disobedience of orders is a fresh offence, and subject to additional punishment.[2]

The commander had not only a right to cause corporal punishment to be inflicted, but to resort to any reasonable measures necessary to insure submission. He had, therefore, a right to imprison the refractory party on shore, if done without malice.

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[1] Further decision. *Dinsman* v. *Wilkes*, 12 How., 390, where it is held that his decision upon this question is conclusive, and non-conformance with it by a marine, is ground for punishment.

[2] Punishment of refractory sailors in the navy is now regulated by Rev Stat., § 1624.

The commander was acting as a public officer, invested with certain discretionary powers, and cannot be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. His position is quasi judicial.

Hence, the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable.

It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for Washington county in the District of Columbia.

It was an action of trespass *vi et armis*, for assault and battery and false imprisonment, brought, in the Circuit Court, by Dinsman, a marine in the service of the United States, who served in the Exploring Expedition, which was commanded by Wilkes.

The facts were these.

On the 14th of May, 1836, Congress passed an act (5 Stat. at L., 23), authorizing the President to send out a surveying and exploring expedition to the Pacific Ocean and South Seas, and appropriating $150,000 for the object.

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[3] CITED. *Townsend* v. *Jemison*, *post*, *720. S. P. *Kendall* v. *Stokes*, 3 How., 87; *Gould* v. *Hammond*, McAll., 235; *State* v. *Prescott*, 31 Ark., 30; *Spitznogle* v. *Ward*, 64 Ind., 30; *Edwards* v. *Ferguson*, 73 Mo., 686. But where the law requires the performance of a ministerial duty by a public officer, which duty he refuses to perform, he is responsible in damages to a person injured thereby, notwithstanding such refusal was based upon a mistaken idea as to his duty, and was made with honest intentions. *Amy* v. *The Supervisors*, 11 Wall., 136. S. P. *Brewer* v. *Watson*, 65 Ala., 88; *Olmsted* v. *Dennis*, 77 N. Y., 378, 382. Where, however, the performance of such duty by the officer is demanded in an abusive and insulting manner by the person entitled to its performance, the officer is not responsible for refusing to comply with the demand. *Boyden* v. *Burke*, 14 How., 575.

This principle of official non-liability is carried to its greatest extent when applied to the alleged wrongful acts of judges of courts of superior or general jurisdiction. Such officers "are not liable to civil actions for their judicial acts even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly." If, however, the wrongful act was done in the "clear absence of all jurisdiction over the subject-matter," the officer will be liable. *Bradley* v. *Fisher*, 13 Wall., 335, 351. "This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." Ib., 350 n. S. P. *Lange* v. *Benedict*, 73 N. Y., 12; *Marton* v. *Crane*, 39 Mich., 526; *Pickett* v. *Wallace*, 57 Cal., 555. And the rule has been held to extend to arbitrators. *Jones* v. *Brown*, 54 Iowa, 74; s. c., 37 Am. Rep., 185; and to municipal officers appointed to award contracts to the lowest responsible bidders. *East River Gas Light Co.* v. *Donnelly*, 25 Hun (N. Y.), 614; and to grand jurors. *Turpen* v. *Booth*, 56 Cal., 65; s. c., 38 Am. Rep., 48.

On the 21st of November, 1836, Dinsman enlisted in the marine corps of the United States for four years.

*On the 2d of March, 1837, Congress passed an act [*90
(5 Stat. at L., 153), entitled, "An act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen." The second section was as follows, viz.:—

"That when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer of the fleet, squadron, or vessel in which such person may be to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof."

In October, 1837, Thomas Ap Catesby Jones, then commanding the vessels which were preparing to sail on the expedition, issued a general order, proposing to give three months' pay as bounty, and forty-eight hours of liberty on shore, to all the petty officers, seamen, and marines who should reënter for three years from the first of the ensuing November.

In the same month, viz. October, 1837, a contract was made between Jones and the non-commissioned officers and privates of marines, which was as follows:—

"We, the subscribers, non-commissioned officers and privates of marines, do, and each of us doth, hereby agree to and with Thomas Ap Catesby Jones, captain of the United States navy, in manner and form following, that is to say: In the first place, we do hereby agree, for the consideration hereinafter mentioned, to enter into the South Sea surveying and exploring service of the United States, and in due and seasonable time to repair on board such armed vessel or vessels as may be ordered on that service; and to the utmost of our power and ability, respectively, to discharge our several services or duties, and in every thing to be conformable and obedient to the several requirings and lawful commands of the naval officers who may, from time to time, be placed over us.

"Secondly. We do also oblige and subject ourselves to serve during the term of the cruise; and we do severally oblige ourselves, by these articles, to comply with, and be

subject to such rules and discipline of the navy of the United States as are, or that may be, established by the Congress of the United States.

*91] *"Thirdly. The said Thomas Ap Catesby Jones, for and in behalf of the United States, doth hereby covenant and agree to and with the said non-commissioned officers and privates of the marines, who have hereunto signed their names, and each of them, that they shall be paid for such services the amount per month which, in the column hereunto annexed, is set opposite to each of their names, respectively; and likewise to advance to each and every of them *three months' bounty*, the receipt whereof they do hereby acknowledge; and that they shall be punctually discharged at the expiration of the term of their enlistment, or as soon thereafter as each vessel of the expedition shall return to a port of safety in the United States.

Name.	Grade.	Pay per Month.	Signatures.	Witness.
Philip Baab	Private	$7	his Philip ✕ Baab mark.	James Edelin.
Samuel Dinsman	Private	7	his Samuel ✕ Dinsman mark.	James Edelin."

On the 25th of October, 1837, a part of the bounty was paid, amounting to $15, and soon afterwards the remaining $6, making together three months' pay.

On the 20th of April, 1838, Lieut. Com. Charles Wilkes was appointed to the command of the squadron.

On the 2d of August, 1838, A. O. Dayton, the Fourth Auditor of the Treasury Department, wrote letters to the pursers of the vessels, directing them to charge the marines with the amount of bounty which had been paid to them, alleging that it was prohibited by law.

In the course of the month of August, 1838, the expedition sailed.

On the 1st of September, 1838, Captain Wilkes addressed a letter to the Secretary of the Navy, expressing surprise that the pursers had been directed by the Fourth Auditor to charge the marines with the amount paid to them as bounty, and informing the Secretary that he had ordered the pursers not to do so. With this letter were sent some other papers, illustrative of the transaction. The pursers obeyed the order of Captain Wilkes.

In the months of November and December, 1840, the transactions occurred, which are set forth with great particularity in the bill of exceptions.

On the 24th of November, 1842 (the squadron having returned home), Dinsman brought this action against Wilkes. *In the mean time, however, a court-martial had been held upon Wilkes, one of the charges before which was "cruelty and oppression," founded upon the same occurrences which are set forth in the bill of exceptions. The finding of the court was, that the accused was "not guilty." [*92

In March, 1845, the cause came on for trial before the Circuit Court, the counsel on both sides having previously agreed that the defendant might give the special matter in evidence as though it was fully pleaded. The jury found a verdict of guilty, and assessed the damages of the plaintiff at five hundred dollars.

The following bills of exceptions were taken in the progress of the trial:—

Plaintiff's 1st Bill of Exceptions.

Samuel Dinsman v. *Charles Wilkes.*

At the trial of this case, the plaintiff, to suport the issues on his part joined, read in evidence, to have the same effect, by consent of parties, as if the original enlistment of the said plaintiff were produced, the certificate of Major Parke G. Howle, adjutant of the marine corps of the United States; and also read in evidence, for the purpose of showing the forms and mode of such enlistment, without objection, certain blank forms, used and adopted in all regular enlistments or reënlistments into said marine corps. And said Howle testified, he being examined as a witness, that, by the rules and regulations of said corps, the said forms of said enlistment were required to be indorsed by the recruiting officer, for the purpose of identifying the officer by whom such enlistment was made, and that such enlistment was regularly made.

The said plaintiff then gave evidence, further tending to prove, that he embarked, under orders as a private in said marine corps, in the United States Exploring Expedition, which sailed from the United States on or about the 18th day of August, A. D., 1838, under the command of the defendant, who was a lieutenant in the navy of the United States; that afterwards, while the United States ship Vincennes, one of the vessels of the said expedition, was at the island of Oahu, one of the Sandwich Islands, in the Pacific

Ocean (from which American vessels frequently sailed to the United States), the term of four years, for which the said plaintiff had enlisted as aforesaid, expired and was fully ended; and the said plaintiff, then and there, to wit, on the 16th day of November, A. D., 1840, on board said ship, claimed of the defendant his discharge from the service of the United States, and refused to perform the duties required of him by
*93] the defendant (still *commanding said expedition and said ship) and his subordinate officers; whereupon the defendant, then and there, committed the trespasses, as alleged in the declaration in this case on the part of the said plaintiff; and afterwards the said expedition and the said ship sailed from the said island, carrying said plaintiff on board of said ship, commanded by the said defendant in person; and that, while the said plaintiff was on board of said ship, as last aforesaid, he was repeatedly flogged and put in irons, by order of said defendant, for refusing to perform the duties of a marine on board of said ship, required of him by order of said defendant; and the said plaintiff was detained on board said ship, or some other vessel of said expedition, continually, by order of said defendant, and against his consent, until the return of said ship or other vessel to the United States, about the 15th of June, A. D., 1842, although the said ship touched at various foreign ports before her said return to the United States, and after the term for which said plaintiff had enlisted, as aforesaid, was completed and expired.

The said plaintiff then rested his case.

And thereupon the defendant offered evidence tending to show, that, after the passage, by the Congress of the United States, of the act of 1836, making appropriations for the naval service, the President of the United States proceeded to carry the said act into effect, and appointed Thomas Ap C. Jones, a captain in the United States navy, to command the expedition authorized by said act; that the vessels designed for the expedition were assembled at New York, under the command of said Jones, and were there in the month of October, 1837, and on the 21st day of said October the said Jones issued his general order No. 2; that the said general order was read to the ship's crew of the ship Relief, on which ship the said plaintiff was at that time serving as a marine under his said enlistment; that it was read by the officer then in command of said ship, and by him placed in the "booby-hatch," a conspicuous part of said ship, to which all the men had access, for their perusal, and remained there during the greater part of the morning; that the said Jones also addressed an order to the pursers of the squadron, herein-

after appended; the defendant then produced to the court the following written papers, viz.: a paper purporting to be a contract between said Jones and the plaintiff, with other persons, and a paper purporting to be a receipt for bounty, and then proved to the court, by the subscribing witnesses thereto, that said papers were signed by the said plaintiff as they purport to be, and that before signing the same the said papers were read to said plaintiff; and that said first paper, purporting to be a contract as aforesaid, was prepared by order *of said Jones, and that the subscribing witnesses thereto were commissioned officers of the United States; and that, after the signing of said papers, the said plaintiff received, on the 25th of October, 1837, the sum of $15, and subsequently the further sum of $6, making $21 in all, being a sum equal to three months' pay, and the same was paid to and received by said plaintiff as bounty; and the defendant further offered evidence to the court, tending to show, that from that time forth to his return to the United States, in the said month of June, 1842, the said plaintiff received from the said United States his monthly pay of $7 per month, being the amount stipulated in the said shipping articles, over and above the sum of $21, paid and received as aforesaid as bounty; and he further offered evidence to the court to show, that the said Jones resigned his said command before the sailing of the said expedition; and that, on the 20th of April, 1838, it was given to the defendant by order of the Secretary of the Navy of that date. [*94

That said defendant sailed from the United States in the month of August, 1838, in command of the said squadron under the instructions of the President, which it is agreed may be read from the printed history of the said expedition.

That, about the time of the sailing of the said expedition, the pursers thereof received from the Fourth Auditor of the Treasury a communication, inquiring by what authority the said bounty had been paid to the marines, of whom one was the said plaintiff, and disallowing it in the accounts of said pursers, and requiring them to charge the same to the men on their pay accounts, and deduct the same therefrom, which said last communication was reported by said pursers to the defendant; and thereupon the defendant issued his order of the 14th September, 1838, now read to the court, which order was thereupon obeyed by said pursers, and the said "bounty money" never was charged to said men.

And the said defendant then offered to read in evidence to the jury the said written papers, so as aforesaid signed by the plaintiff, and also the said letter of said defendant, addressed

to the pursers as aforesaid, in connection with each other, and with all the evidence hereinbefore stated; but the plaintiff, by his counsel, objected to the admissibility of the said written paper, purporting to be a contract or shipping articles, and also to the admissibility of the said receipt for bounty, and also to the admissibility of the said letter of the said defendant, whether the same are offered as independent evidence, or in connection with each other, or with other evidence; but the court overruled said objections, and suffered all of said papers and the said letter to be read
*95] in evidence to the jury, as *competent testimony. And the said plaintiff excepts to the opinion of the court, and to the admissibility of each and every of said papers, and said letter so admitted, and claims the same benefit of exception as if each of said papers and the said letter were separately excepted to; and this, their bill of exceptions, is signed, sealed, and enrolled this 24th day of April, A. D., 1845.

W. CRANCH. [SEAL.]

To this bill of exceptions were attached the following papers, referred to in a preceding part of this statement, viz.:—

1. The date of enlistment, in November, 1836.
2. A blank form of enlistment.
3. An order from Commander Thomas Ap Catesby Jones to the pursers, directing them to pay three months' bounty.
4. The contract between Jones and the marines.

Defendant's 1st Bill of Exceptions.

On the further trial of this cause, and after all the evidence contained in the foregoing bills of exceptions, as well those taken by the plaintiff in his said first bill, as also those taken by defendant, and the rulings of the court therein contained, the defendant, further to maintain the issue on his part joined, offered to give evidence tending to show, that, after the sailing of the said squadron under his command, to wit, in August, 1838, from the waters of the United States, and after the receipt by the pursers of the said squadron of the said letter of the Fourth Auditor, inquiring by what authority the said pursers had paid the said bounty to the said marines, and requiring them to charge them therewith, the marines on board his said ship murmured at the said requisition of the said Fourth Auditor, and that said plaintiff was on board the said ship, and so continued up to the time of the said supposed grievances, without objection; and after

the said supposed grievances he continued to serve as a marine in the said squadron, and received pay as such marine, until his arrival in the United States, where he was discharged. And, also, that Simeon A. Stearns was the non-commissioned officer in command of said marines during the whole cruise, from the time of their sailing to their arrival in the United States, there being no commissioned officer of marines attached to the said expedition; that he also acted as quartermaster of marines, and he was the only medium of communication, according to the rules and regulations of the service, between the said marines and the said defendant, commanding as aforesaid. And, thereupon, he offered further evidence to show *that the defendant, at the time he issued to the said pursers the said order, contained and set out in plaintiff's first bill of exceptions, not to charge the men with the said bounty, he communicated the said order, so issued by him as aforesaid, to the then Secretary of the Navy, by a letter, in the words and figures following, to wit (copied in the record), and accompanied the said offer with proof that the said letter was received by the said Secretary of the Navy; and also offered to read the said letter, (or report in the form of a letter,) made by the said Sergeant Simeon A. Stearns to the defendant, and referred to in his, the defendant's said letter, last mentioned, to the said Secretary of the Navy, accompanying the said offer with proof of the handwriting of said Stearns, and that he is now (if living) out of the jurisdiction of the United States. [*96

And the plaintiff, by his counsel, objected to the reading of the same, or either of them, to the jury, and the said court refused to permit the said papers, or either of them, to be read in evidence to the jury; and thereupon the defendant, by his counsel, excepts to the said ruling of the said court, and prays that this bill of exceptions may be signed, sealed, and enrolled, according to the statute, which is done accordingly, this 25th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 2d Bill of Exceptions.

And on the further trial of the said issues, the said defendant, after all the evidence contained in the foregoing bills of exceptions, made part hereof, and the several rulings of the court set out therein, offered in evidence the proceedings of a court-martial, held in the city of New York, (and which it is admitted was lawfully called and proceeded in,) for the trial of the said defendant, Charles Wilkes, on certain charges and

specifications prepared against him by the Executive of the United States; and among others, upon the charge and specification hereinafter appended; and that the said court-martial duly proceeded to try the said Charles Wilkes on the said charge and specification, and that, on the trial thereof, the said Philip Baab, one of the plaintiffs in said trial, was examined as a witness, and the judgment of the said court on the said charge and specification was as hereinafter appended. And the said plaintiff agreeing that the said extracts may be made from the said record, and considered as if the whole record were herein inserted, objects to the reading of any part of the said record as evidence in this cause, except the statements of said plaintiff Baab, contained in said record, which the plaintiff's counsel does not object to, so far as they
*97] are relevant to the issues *joined; and the court sustains the said objection, and refuses to permit the same to be given in evidence; and the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this exception, and to cause the same to be enrolled according to the statute, all which is done and ordered, this 25th day of April, 1845.

W. CRANCH. [SEAL.]

Specification referred to in the foregoing bill of exceptions, to wit:—

Charge 4th.—Cruelty and Oppression.

Specification.

In this, that the respective terms of service of Samuel Pensyl, Philip Baab, George Smith, and Samuel Dinsman, "private marines," then serving on board the United States ship Vincennes, having fully expired on the 16th day of November, 1840, the said Wilkes did refuse to give said marines their discharge, in conformity with the terms of their enlistment; that upon said marines declining to do further duty, the said Wilkes did cause them, on or about the 16th of November, 1840, to be put in double irons, and shortly after, on the same day, to be sent on shore at Honolulu, and to be confined in the fort at a place infested with vermin; that, upon the second day of their confinement, they were separated and kept in solitary confinement; that on the 27th of November, 1840, by order of said Wilkes, they were deprived of one-half their ration, which consisted mostly of "poe" and goat's meat; that on the 2d of December, 1840, the said marines were taken out and carried on board the United States ship

Vincennes, in irons, except George Smith, who was taken on board the Peacock; that said Wilkes asked them if they would go to duty, and upon their respectfully stating that the term of their enlistment had expired, the said Wilkes then confined them in double irons in the brig, a place of confinement for prisoners in said ship; that on the 4th of December, he, the said Wilkes, had the said Samuel Pensyl, Philip Baab, and Samuel Dinsman seized up in the gangway, and inflicted on them one dozen lashes each; that he again confined them; that on the 7th of the same month, he had inflicted on them another dozen of lashes each; that after this system of lashing and confinement, for the preservation of their lives, the said marines were compelled, against the terms of their enlistment and against their free will, to do duty in the squadron, under the command of said Wilkes.

*Judgment of Court-Martial. [*98

Judgment of the court-martial on the above specification, referred to in defendant's second exception, to wit:—

The 4th charge.

That the specification of the 4th charge is not proven, and
That the accused, of the 4th charge, is not guilty.

Defendant's Statement of Evidence.

On the further trial of this cause, and after the evidence contained in the aforegoing bills of exceptions on the part of plaintiff and defendant, and made part hereof, the defendant further gave evidence to show that the said squadron, under the command of the said defendant, continued on the said cruise, and proceeded to the great southern seas, and explored and surveyed the Antartic region as far as it was possible, and in that service the said ship Vincennes received extensive and serious injury; that, proceeding on her said cruise, the said ship Vincennes, in the month of September, 1840, arrived in the Port of Honolulu, in the island of Oahu, one of the Sandwich Islands, in the Pacific Ocean, and there came to anchor in the inner harbour, and close to the shore, and proceeded to refit and repair; that it was necessary to the safety of the ship, while undergoing these repairs, to be thus close to the shore, and in the inner harbour, and it would have been unsafe, if not entirely impracticable, to have made them elsewhere; that she had then made a long voyage, and had been constantly at sea for a long period of time, during which her

foremast had received such injuries that it was found necessary to take it out; her seams were open, and the whole hull required repairing, to be recaulked and painted; her hold had to be broken up, and her stowage overhauled; the water-casks were taken out, the sails taken off, and the ship almost stripped and dismantled; that about this time the period of service of some of the seamen who had not shipped for the whole cruise was about to expire, and the defendant, anxious to retain them in the service, addressed the ship's crew, and endeavoured to prevail on each of the seamen whose term of service was about to expire to reship, and, as an inducement to them, offered to give them liberty on shore; and as a reward to all those who had served so long and faithfully, and who were yet bound to continue on the cruise, in the exploration and survey of the Northern Pacific, he offered the same favour to them; leave was granted to all, and after their leave had expired, they set about overhauling and repairing the ship; while this work
*99] was going on, *the natives, many of whom live almost in the water, were exceedingly troublesome, and surrounded the ship continually, and thus kept up a communication with the men on duty; that soon after the arrival of the said ship at said port, the officers charged with the exploration and survey, and with other scientific duties, went on shore, taking with them their instruments, and such men as were necessary to enable them to perform their duties; the defendant himself being also engaged at the observatory, on shore, pursuing his duty, aided by such officers and men as were necessary, yet keeping within sight of the ship, having a constant communication with her, and going on board as often as was found necessary, and throughout retaining the command; that the general charge of the ship was left to the first lieutenant, who, it is admitted, was a competent, faithful, intelligent, and vigilant officer, aided from day to day by such officers as could be spared from the discharge of other duties pertaining to the expedition; that the general object of the expedition was a peaceful voyage, to explore and survey coasts, seas, and islands, and to make such investigations as might be found practicable in aid of science; and these general objects being held the primary purpose, for the most part, the detail of the ship's service and duty was made subordinate to them, and thus more of the officers and men were for the time withdrawn from the immediate duties of the ship than otherwise would have been; that under these circumstances, while lying in the said port, the marines on board being employed, among other duties, in keeping guard over such men as were from time to time imprisoned in the

ship, and before the happening of the events complained of in the declaration, on one occasion, a man confined in double irons, under charge of the marines, was during the night permitted to escape, having first managed to get his irons off; it being the duty of the sentinel to be close to and keep constant guard over him, and, the sentinels or guards being changed every two hours, it was found impossible to discover during whose watch the escape had been made; on another occasion, a man thus imprisoned was, against the rules, &c., of the ship, furnished with liquor, and, while under guard, permitted to get drunk; on another occasion, a man thus imprisoned under guard of the marines was permitted to make his escape, and it thus became evident to the defendant that there was among the marines on board great relaxation of vigilance and neglect of duty; and on the 16th of November, 1840, Baab and two other marines, separately and collectively, the defendant then being engaged in duty on shore, and the first lieutenant having charge of the ship, refused any longer to do duty as such *marines, pretending their term of [*100
service was up, and saying they wished to be sent
home; that the first lieutenant immediately reported these facts to the defendant, who came on board and summoned the said Baab, and the other two marines, before him, and inquired of them if they still refused to do duty: they replied, as they had before to the first lieutenant, and did refuse; thereupon the defendant ordered them into custody, and directed that they should be sent on shore, and imprisoned in the fort on the island; that, a few days afterwards, Dinsman in like manner refused to do duty, and was sent to the said fort. The defendant then offered the evidence of four officers of the said ship, to show that it would have been unsafe, if not impracticable, in the then condition of the said ship, to have confined the said plaintiff on board; that the fort on the said island, in which the plaintiff was confined, was used as a place of confinement for the seamen of merchant-vessels lying in the said port; and that seamen who had been confined therein were enlisted in said port, and brought from said fort into the said ship Vincennes; that the governor professed Christianity, spoke English, and resided within the said fort, where he was visited from time to time by various officers of the said ship; that the prison of the said fort is nothing more than the houses erected for the military, and is composed of small huts or houses built in the native fashion, having the back toward the wall of the fort, with the front looking out upon an open space, in front also of the governor's house; that there are no doors to close these huts or cells, the climate

being so mild as not to require them, and, the doors being always open, they are thus allowed a freer circulation of air, and rendered more comfortable; that the furniture consists, in some instances, of a matting on the floor, matting around the walls, and a bunk filled with matting for sleeping; in others there is no mat on the floor, (the floor of all is of earth,) matting only on two sides, and a bunk filled with mats on the floor; that the food supplied to the prisoners is the common food of the inhabitants, and wholesome, palatable, and invigorating, consisting of a vegetable called "taro," and fish; that the plaintiff was allowed to go out once a day, out of the walls of the fort, under the charge of a native officer, and his irons were then taken off; that the sergeant of the marines, there being no commissioned officer in command, commanded them, and was also their quartermaster, and as such was bound to look after their comfort, and report their wants to the defendant; and according to the discipline of the ship, and the rules and usage of the service, he was the only person to whom the marines could look, and through whom *they could communicate with the defendant; that the said sergeant did visit the plaintiff while in prison, and never did report that he was suffering from confinement or otherwise in want of proper food or raiment; that such report, if ever made, must have been made through the first lieutenant of the said ship, and never was made to or through him; they further showed, that, according to the discipline of the said ship, and the rules and regulations of the navy, it was the duty of said sergeant of marines to make report to said first lieutenant of every case in which any vermin of any sort or description were found upon any marine, or among his clothing, and no such report was made to the said first lieutenant by the said sergeant of or concerning the said plaintiff; and also that, in the execution of the duties required of the defendant and the officers and men under his command, in and by the instructions of the President, as set out in the said printed book, no part of the armed force employed in the said expedition was more important than the marines, who were not only required on board said ships for the ordinary duties thereof, but who were more essential for the protection of the officers and men on shore, while making explorations, surveys, and observations, and gathering the information and facts directed by said instructions; that their services were deemed at the time the said vessels were at Honolulu most requisite in the subsequent part of the cruise; that the said ships were then to visit the wild shores, and the officers and men to come into contact with the

*101]

ferocious savages, of the Northwest Coast of America, where the marine force was especially needed; and it was deemed of the utmost importance to keep that force as large as possible, and that the after experience of the voyage confirmed these impressions; that it was with this view deemed essential to the public interest to keep said plaintiff on board said ship, and to require him to perform the duty of a marine; that the said defendant, with all reasonable despatch, proceeded with the repairing and refitting of the said ships, which was not completed until the survey and exploration of the said island of Oahu had been finished, and so soon as the said ship was in order the said plaintiff was brought on board; that, upon being brought on board, he was required by the defendant to go to duty, and refused, and was ordered to be imprisoned in irons; the next day he was brought up, the ship being then under weigh, and having left the said port, and again interrogated by the defendant, and required to go to duty; that he expostulated with said plaintiff, and explained his position, and his duty to punish him if he persisted in such refusal; that he called before said plaintiff the sergeant who commanded him, *and who had signed with him the said articles contained in the said contract marked A, and [*102
required him to state to said plaintiff explicitly the terms of that contract; that the said sergeant did, in fact, explain it to him, and inform him that he was bound to serve out the cruise; that plaintiff denied having signed any such contract, and refused to go to duty; that defendant pointed out to plaintiff how essential his services were to the public interest, and he still refused; that defendant then ordered him to receive twelve lashes on his bare back, and the punishment was accordingly inflicted in the manner pointed out in the rules and regulations of the navy; that defendant then ordered him to be released, and permitted to go at large among the crew, stating that he did so to give him an opportunity to converse with his comrades, and learn his obligations, and return to duty; that, on the evening of the same day, the sergeant again reported plaintiff as refusing to do duty; he was again called before defendant, and required to go to duty, and again refused, and was committed to prison as before, and the next morning again brought before defendant, required to go to duty, refused to do so, and was punished according to the said usage and discipline, and rules and regulations; that he afterwards went to duty; the defendant then further gave evidence, by the said naval officers, and other civilians attached to said expedition, and on board the said ship, that, on the several occasions of punishment aforesaid, the defen-

dant did not exhibit any appearance of violence or passion, but was calm, temperate, and cool, and expressed his regret at the necessity he was under of punishing the said plaintiff.

And the defendant further gave evidence, tending to show that said plaintiff was not confined in double irons, or separately, in the said prison, but was at large within the walls of said fort; and that said fort was a comfortable place of residence, and more so than the prison of the ship in the situation in which the said ship was during the time of said improvement; and further, that defendant had reasonable cause to fear the spread of the disaffection among the said marines; and the officers knew not whom to trust at the time and times of the imprisonment aforesaid of said plaintiff; and that, shortly before the imprisonment of said plaintiff, two marines on board the ship Peacock had been arrested, and sent on board the ship Vincennes; that, previous to the arrest of said plaintiff, he, with other men, had agreed among themselves, before they reached Honolulu, to demand their discharge as soon as the terms of their enlistment had expired, and they were in a port where they could be sent *home; that, on arriving at Honolulu, and after most of the seamen had reshipped, and no offer had been made to the marines to reship, they had a conversation, and required their sergeant to report to the captain that their terms were up, and they required to be discharged in that port where there were vessels to take them home; and that, while the said ship Vincennes and the Peacock were lying in the said port of Honolulu, two of the marines on board the Peacock were arrested for insubordination and disobedience, and they, together with an orderly seaman, were sent on board the Vincennes, about the 7th of October, and confined in the said ship Vincennes until a court-martial was convened for their trial, which was held on board the Peacock, and by which they were sentenced to be punished, which sentence was carried into effect; and after that time the said ship Peacock underwent a thorough overhauling, and very extensive repairs. While she was lying in the said harbour, and while she was undergoing such repairs, some of her men deserted from her; and it was long after the said court-martial, and after the execution of its sentence on the said two marines, and they were discharged from imprisonment, and returned to duty, that the said plaintiff refused to go to duty.

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Plaintiff's Statement of Evidence.

After the evidence contained in the plaintiff's first exception, made part hereof, and the foregoing statement of defendant, the plaintiff further gave evidence, tending to show, that, at the time of committing the trespasses in the first count of the declaration alleged, and during all the time that said trespasses continued, the defendant could have securely confined said plaintiff on board the said ship Vincennes, without any difficulty and with safety to said ship Vincennes, her officers and crew; and further, that the said United States ship Peacock, and the other vessels belonging to said squadron, and under the command of the said defendant, were at the time of the said imprisonment of said plaintiff in said fort at Oahu, present in the harbour of Honolulu, at said island, and that said ship Peacock was lying within the distance of one hundred yards from the said ship Vincennes, at the time the said plaintiff was sent to be imprisoned in the said fort; and further, that said ship Peacock was at that time in a state of good discipline, and that said plaintiff could without any difficulty have been confined on said ship Peacock with perfect safety to said ship, her officers and crew, and that the defendant had no reasonable or probable cause to believe that he could not have securely confined the said plaintiff on board either of the said ships, *without any difficulty, [*104
and with perfect safety to said ships, their officers and crew, and without any danger of their causing mutiny, or insubordination.

And the said plaintiff further gave evidence tending to show that he was by order of the defendant imprisoned in the said fort, in a cell in said fort, in solitary confinement, for a period of 15 days (Baab 18 or 20 days); that said fort was a low, damp, filthy place, was the common prison for criminals and malefactors among said native inhabitants of Oahu, and the cell in which plaintiff was confined was dark and was not ventilated, and that the same was abounding in vermin; that said fort was distant a half mile from said ship Vincennes, during all the time of said imprisonment; that, during all the time the said plaintiff was so imprisoned in said fort, he was in double irons, by order of the defendant, and was under the control and discipline of the native governor of said fort, and the native sentinels therein; that, during said imprisonment, the only food allowed or supplied to said plaintiff was supplied by the native officers of said fort, and was only "taro" and fish, and nothing else; and that said fish was sometimes, when so supplied, in a rotten state, and

said "taro" was an unpalatable and unwholesome food to those unaccustomed to feed on it.

That, during the said imprisonment, a change of clothing, nor any part thereof, was not supplied to said plaintiff, but the same was refused to be supplied; and that he became filthy in his person, and when he was brought away from said fort, and put on board said ship Vincennes, by order of defendant, that said plaintiff was filled with vermin. That, during the whole of said imprisonment in said fort, the said plaintiff was abandoned by the defendant to the sole care, attention, and discipline of the native officers about said fort. That, during the whole time of said imprisonment of said plaintiff in said fort, the defendant securely kept and confined on said ship Vincennes, as prisoners, a chief of the Fejee Islands, and others of the crew of the said ship; and that on the said ship Peacock more than four or five prisoners were at that time securely confined; and gave evidence by the first lieutenant of said ship Peacock, tending to prove that, at the time of said imprisonment of said plaintiff in said fort, fifty-five marines could have been securely confined in said ship Peacock.

And the said plaintiff further gave evidence tending to prove that the trespasses by floggings and imprisonments inflicted on said plaintiff, by order of the defendant, on said ship Vincennes, as alleged in the declaration in this cause, were immoderate, excessive, disproportionate to the offence alleged against him, and of greater severity than is allowed *105] by the rules and *regulations for the government of the navy of the United States, or the laws and customs in such cases at sea; and that the detention of the plaintiff on said ship or ships, by order of the defendant, after the expiration of his term of enlistment into the said marine corps, was not essential to the public interest, and that defendant had no reasonable or probable cause to believe that such detention was essential to the public interest. That, soon after the enlistment of said plaintiff had expired at the island of Oahu, and he had requested his discharge and leave to return to the United States, the defendant discharged about fifteen seamen, at their request to be discharged, and permitted them to go to the United States; that the marine guard of said ship Vincennes was larger in numbers and force of men, by three or four, than the usual and customary complement of marines on vessels of her class in the navy of the United States; that the defendant, of his own authority, and against his instructions from the President of the United States, deviated from the course of his

cruise, as directed in said instructions, and of his own authority prolonged the cruise of said vessels belonging to said exploring expedition.

Defendant's 3d Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff signed the said contract marked A, and afterwards received the bounty stipulated therein, and signed a receipt therefor, and remained and continued on board a vessel of the United States under the command of an officer of the United States navy, employed in the expedition in the said contract named, doing duty as a marine, and receiving wages therefor until the return of the said expedition to the United States in the month of June, 1842 (except when imprisoned as hereinafter stated); and that after the signing of said contract by said plaintiff, the defendant, then being an officer in the navy of the United States, by order of the President took the command of said expedition, and continued in command thereof during the whole cruise; that the said plaintiff sailed from the United States in the ship Vincennes, one of the ships of the United States navy detailed for the said service, and under the immediate command of the defendant; that the said ship, with the said defendant as commander, and the said plaintiff as one of the marines on board, sailed to the Southern Pacific Ocean and the South Seas, and during her cruise received such injuries and became so much out of repair as to render it necessary to overhaul and repair her; and that she reached the port of Honolulu, in the island of Oahu, in the month of *September, 1840, and was there, for the purpose of the said repairs and the safety [*106 of the ship, brought into the inner harbour and close to the shore; and while there for the purpose of said repairs and refitting, her foremast was taken out, her hold broken up, and other extensive work done on board; and that, while said repairs were being made, the defendant and other officers, and such men as were necessary for that purpose, were on shore, making such explorations, surveys, and observations as were required by the instructions of the President.

And that while said repairs were so as aforesaid being made, and the said defendant and other officers and men were so employed on shore, the marine guard on board said ship suffered men placed under their guard to escape, and another to get drunk while under guard; and afterwards the plaintiff, with other marines, severally and collectively refused to do

duty on board said ship, and were therefore ordered by the defendant to be confined in a fort on the island, in charge of the natives of the island. And if they shall be of opinion further, from the facts and circumstances, and the whole evidence, that it would have been unsafe to confine the said plaintiff on board the said ship, and that the said fort was under the charge of a governor who spoke English, and was used as the place of confinement for the seamen of the merchant service, of this and other countries, in the said island; that the sergeant of marines was the officer in command of said marines and the plaintiff on board the said ship, and was also their quartermaster; and that it was his duty to report to the defendant the situation of the said marines, from time to time, and to look after their comfort; and that the said sergeant of marines visited the said fort while said plaintiff was confined there, and made no report to the defendant; that the prisons of the said fort had no doors to them, and the said plaintiff was kept as other prisoners were, and that they were again brought on board the said ship so soon as they could with safety be brought there; then such imprisonment was within the lawful authority and duty of the said defendant, and he is not liable therefor in this action.

And if they shall further find that the said plaintiff was brought from the said fort on board the said ship as soon as it was safe to bring him there, and, upon being brought on board, the said defendant, still being in command of said ship, required him to go to duty, and he refused to do so, and thereupon he had him confined in prison on board said ship, in irons, and the next day caused plaintiff to be brought before him, and remonstrated with him, and caused his immediate officer to explain to him his obligation, and the nature of the contract, *and then required him to go to duty, and he refused, and thereupon he ordered him to be punished, and he was punished, according to the rules and regulations of the navy; which rules and regulations it has been agreed the jury may find; and after such punishment, directed him to go at large among the crew, that he might converse with them, and so learn his duty, and he did go at large; and on the evening of the same day again refused to go on duty, and was again imprisoned by the defendant; and was again the next day brought before the defendant, and refused to go to duty, and was punished as aforesaid; then it was lawful for the said defendant to punish the said plaintiff as often as, being called upon as aforesaid, he refused to go to duty; and the said defendant is not liable in this action for the said imprisonment and corporal punishment.

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Which instruction the court refused to give; and, on refusing, assigned, as reasons therefor, and so instructed the jury, that the word "*unsafe* seems too vague, uncertain, and equivocal to justify in law such an imprisonment in the fort on the island, in charge of the natives. I think the jury must be satisfied, by the evidence, that there was an urgent necessity of using the fort, in order to justify such imprisonment, especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept."

On the second part of the instruction prayed, the court said:—"I think it is not a sufficient justification to find that the punishment was according to the rules and regulations of the navy. In the petty offences which by those rules are punishable by flogging, there is a limit within which the officer has a discretion, which should be exercised soundly and reasonably; and, in order to justify the officer, the jury must be satisfied that it was so exercised. In the case of such petit offences I think each punishment settles all previous offences of that kind. If, after such punishment, a new offence be committed, it will of course be liable to a new punishment. The shipping articles alone did not justify the corporal punishment. In no case, unless by express statute, can corporal punishment be lawful, unless it be reasonable, according to the aggravation and circumstances of the case, and the reasonableness must be found by the jury, or the punishment cannot be justified." To which refusal by the court to give the said instruction so prayed by the defendant, and also to the opinion and instructions so given by the court to the jury, the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, and to cause the same to be enrolled according to the statute; which is done this 29th day of April, 1845.

W. CRANCH. [SEAL.]

*Defendant's 4th bill of Exceptions. [*108

And thereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury should not find that the said plaintiff made the said contract and received the said bounty, but that he was, previous to the said alleged grievances, an enlisted marine on board the said United States ship Vincennes, a public vessel of the United States employed on foreign service under the command of the defendant, and that the defendant was the commander of the expedition on which she was employed, and the time of service

of the said plaintiff, enlisted as aforesaid, expired while he was on board said ship on foreign service, and his detention was deemed essential to the public interests by the said commander, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy; which instruction the court refused to give, in the form in which it was prayed, being of opinion, and so instructed the jury, that the burden of proof was on the defendant to show that the detention of the said plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander; and thereupon the said defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done; and the same is ordered to be enrolled, according to the statute, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 5th Bill of Exceptions.

Whereupon the defendant prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the day of , enlisted as a marine in the naval service of the United States, and was never discharged therefrom by the President of the United States; and, being so enlisted, he was, during his term aforesaid, ordered on board the Vincennes, a United States man-of-war, under the command of the defendant, on foreign service, and while on board said vessel, on such foreign service, his term of service expired; and if, from the said evidence, the jury shall further find that the detention of the said plaintiff on board the said ship was essential to the public interests, then it was lawful for the defendant so to detain the said plaintiff as aforesaid, and, being so detained, he was thereby subject to the rules and regulations of the navy of the United States; and if the jury shall further find that the said plain-

*109] tiff, being so detained *as aforesaid, refused to do duty on board the said ship, upon being required to do so by the defendant, then it was lawful for the defendant to punish him with stripes, according to the said rules and regulations, for every offence not exceeding twelve lashes; and every such refusal was a new offence, for which he was subject to punishment; and every such punishment was a full satisfaction for every such offence to the time of the infliction thereof. Which instruction the court refused to give; and

thereupon the said defendant, by his counsel, excepts thereto, and prays the court to sign and seal this bill of exceptions, which is done, according to the statute, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 6th Bill of Exceptions.

Whereupon the defendant further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury shall find that the said plaintiff, on the day of , enlisted into the marine corps of the United States; and afterwards, on the day of April, 1838, while in the said service, and during the said enlistment, was ordered on board the Vincennes, a vessel in the navy of the United States, and, as such marine, proceeded in the said ship on foreign service, under the command of the defendant; and the time of service of the said plaintiff, enlisted as aforesaid, expired while he was on board the said ship on foreign service, and his detention was deemed essential, by the commander of the expedition in which he was engaged, to the public interests, then it was lawful for the said defendant, commander as aforesaid, to detain the said plaintiff on board the said ship; and the said plaintiff was thereby made subject to the laws and regulations for the government of the navy, and being so subject, if he refused to do duty on board said vessel when required by said commander, then it was lawful for the said commander, in his discretion, to punish him under the rules and regulations of the navy, not exceeding twelve lashes for every such refusal, provided the said punishment was inflicted between each of said refusals, and he is not liable therefor in this action; which instruction the court refused to give; and thereupon the defendant, by his counsel, excepts, and prays the court to sign and seal this bill of exceptions, which is done accordingly, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 7th Bill of Exceptions.

Whereupon the plaintiff, by his attorney, prayed the court *to instruct the jury, that if the jury believe, from the [*110
evidence aforesaid, that the said defendant could have securely kept and confined the said plaintiff on board the said ship Vincennes, or on board the said ship Peacock, with safety to the said ships, their officers and crews, then the defendant had no right to imprison said plaintiff in said fort in the island of Oahu; and the jury may give such damages

therefor as upon the whole evidence aforesaid they may think the said plaintiff entitled to, provided the jury shall find that the said ships Vincennes and Peacock were together, at the time of said imprisonment, in the said harbour of Honolulu, and were under the command of the defendant, and that said imprisonment in said fort was caused and continued by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his attorney, excepts, and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 8th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if, from the evidence aforesaid, the jury believe that the floggings and imprisonments of the said plaintiff, on board the said ship Vincennes, alleged in the declaration in this cause, were immoderate, excessive, unreasonable in degree, and disproportioned to the alleged offences, and that such punishment was severer in degree than the rules and regulations for the government of the navy of the United States, or the laws and customs in such cases at sea, authorize, then the plaintiff may recover such damages therefor as, upon the whole evidence, the jury may think he ought to have; provided the jury shall find that the said floggings and imprisonments were inflicted by order of the defendant; which instruction the court gave as prayed; to which instruction the defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

Defendant's 9th Bill of Exceptions.

Whereupon, the plaintiff further prayed the court to instruct the jury, that if the jury believe, from the evidence aforesaid, that the detention of the plaintiff, as alleged in the declaration in this cause, after the term of his said enlistment in the marine corps had fully expired, was not essential to the public interests, then such detention was unlawful, and the *111] plaintiff *is entitled to recover such damages therefor as, in the opinion of the jury, from the whole evidence, he ought to have; provided the jury shall find that the said plaintiff was detained by order of the defendant; which instruction the court gave as prayed; to which instruction the

defendant, by his counsel, excepts; and this his bill of exceptions is signed, sealed, and ordered to be enrolled, this 30th day of April, 1845.

W. CRANCH. [SEAL.]

The case came up to this court upon these bills of exceptions, and was argued by *Mr. Bradley* and *Mr. Toucey* (Attorney-General), for the plaintiff in error, and *Mr. May*, for the defendant in error.

The points raised by *Mr. Bradley*, the opening counsel, which were contested by *Mr. May* and sustained by the Attorney-General, were as follows:—

I. The court erred in ruling out the evidence in the first exception, because,—

1. The papers were official reports by the defendant, *ante litem motam*, tending, (1.) to show that the reënlistment was recognized by the government, and that the government approved the detention of the men during the cruise, as being essential to the public interest; (2.) to rebut any presumption of malice.

II. The court erred in ruling out the evidence of the court-martial, because,—

1. It was a bar to any recovery by the plaintiff.

2. It tended to meet every presumption of malice, by showing that his conduct had undergone a judicial investigation for these matters before a competent court.

3. It tended to show a complete recognition and sanction by the government of all the acts complained of, and it then depends upon the authority of the government.

III. The court erred in refusing the prayer stated in the third exception; and also in the instruction they gave.

1. If the word *unsafe* was too indefinite, the prayer might have been refused; but the qualification and instruction that there must be "an urgent necessity" was equally indefinite, and is not in itself accurate.

2. The rules and regulations of the navy import a justification.

IV. And there is error in each and every one of the other exceptions.

1. Because the question of detention is within the discretion of the commander, and imports a justification. If not conclusive, it is *primâ facie*, and the burden of proof [*112 was on the plaintiff to impeach it, and aver and prove malice.

2. (1.) Because, if he was lawfully detained, the plaintiff was lawfully subject to the rules and regulations of the navy,

and for refusing to go to duty he was liable to be punished not exceeding twelve stripes, by order of the commander, for every such offence, and the refusals given in evidence were independent and substantive offences. (2.) A refusal to go to duty is not such a disobedience of orders as necessarily implies a mutinous spirit or intent. There is a discretion in the officer to determine whether it is one of those petty offences which tend to corrupt the morals of the crew, and which may be punished by order of the commander, or of that higher grade which requires severer punishment.

3. Because the court limited the question of "safety" to the ships, officers, and crews, without regard to the prisoner himself; and the word *safety* is equally indefinite with the word *unsafe*.

4. (1.) Because they submitted to the jury the interpretation of the rules and regulations of the navy, and to find also "the laws and customs at sea governing the national vessels of the United States." (2.) Because the contract of enlistment and the reënlistment given in evidence subjected the plaintiff to the rules and regulations of the navy, independent of any laws and customs at sea, except in cases not provided for by said rules and regulations; and this case was provided for by them.

5. (1.) Because the ninth exception either excludes from consideration the effect of the reënlistment, which the court was bound to interpret; or if it is left open by the phrase, "if he did so detain them," it is too obscure, and the jury may well have been misled by it into the supposition that the court had taken that matter from them. (2.) It does not put the detention on the ground of constraint, and being against the will of the plaintiff.

With respect to the first exception, *Mr. Bradley* cited the acts of Congress referred to in the statement of this case, and contended that Dinsman had voluntarily made a contract by which he agreed to obey all the laws for the regulation of the navy, and, at all events, the evidence ought to have gone to the jury to rebut the presumption of malice.

2d exception. The judgment of the court-martial was sanctioned by the President, and consequently Wilkes's detention of Dinsman was approved. Perhaps it was not a legal bar to the action, but was good evidence to show that Wilkes was acting under a sense of duty, and not actuated by malice. Bull. N. P., 19. 12 Mass., 579.

*113] *3d exception. The terms of reënlistment were the same as the original except in two points, namely, that it provided for a term of service in the Exploring Expedition,

and for an indefinite time. Could not Congress legislate for this? They passed an act to regulate the Exploring Expedition, and the contract with Jones was in fact a contract with the United States. We say, therefore, that the chastisement which was inflicted was authorized by law. The opinion of the court below would destroy all discipline in the navy. On the subject of imprisonment on shore in the merchant service, and to inflict corporal punishment, he cited Shee's Abbott on Shipping, ch. 4, part 2, p. 177; 1 Ware, 18, 19, 207, 230, 371, 503; 1 Story, 106; 4 Mason, 511, 512; 5 Mason, 193; 1 Sumn., 397, 398.

Under the contract, therefore, without reference to the statute, Wilkes had a right to inflict this punishment.

But the navy regulations also justified it. The marine corps is a part of the navy. Naval Laws, 100, 156, 164. The act of 1837 necessarily gave the commanding officer a discretion to judge whether or not the interests of the service required the detention of Dinsman. If the jury were satisfied that he deemed it expedient to do so, it was enough. The law protected him unless malice was shown, and it was for the other side to prove malice.

5th exception. Every refusal to do duty was a fresh offence. Rules and Regulations for the Navy, Art. 3, 14, 30. Act of April 23, 1800.

7th and 8th exceptions. The power of the officer over the man, and the interpretation of the navy regulations, were not matters of fact for the jury. They were questions of law. The court ought to have decided whether or not the contract of reënlistment was binding.

Mr. May, for defendant in error, recited all the facts in the case, and proceeded to examine what were the rights of Wilkes in the case, and how acquired. The earlier laws were almost all repealed by the act of June 30, 1834. See Naval Laws, 156.

The enlistment took place on the 21st of November, 1836, and was for four years. Consequently it expired on the 21st of November, 1840. But it has been argued that a reënlistment was made, to extend over the entire cruise. There is no authority in any law for such a contract; none which justifies an indefinite enlistment. If there is, let it be shown. The agreement with Jones was not a valid contract. Jones had no authority to make it. Besides, the man was already enlisted *for four years, and whilst thus in service was incapable of making another and different contract. [*114

The act of March 2, 1833, provides that no bounty shall be

allowed, and the Fourth Auditor was right in taking this view of it. The contract was therefore in violation of law, and cannot be binding. Even supposing the contract with Jones to be good, it was only with him personally, and did not pass to his successor. Where a public contract is made under legal authority, and in the line of duty, by an officer, it is binding. 1 Cranch, 363. But Jones had no legal authority.

It is argued that this contract is like those which are made in the merchant service. The form of these is given in Abbott on Shipping (Story's ed.), page 550. The term of service is required to be fixed for the protection of seamen.

Suppose that the contract of reënlistment with Jones was valid, what were Wilkes's rights under it? They must be only what Congress gave by the act providing rules and regulations for the navy. Do these authorize an imprisonment out of the ship? Let the other side show any such.

But it has been said that the act of 1837 gave to Wilkes a right to detain this man. That act relates only to seamen and boys. It does not include marines, either in the title or body of the law. Whenever any act of Congress intends to include the marine corps, it always says so. The late Attorney-General, Mr. Legaré, gave an opinion that marines were not included in this act. The act was passed after the enlistment was made, and cannot be retroactive. The enlistment took place on the 14th of November, 1836, and the act was passed on the 2d of March, 1837. On the subject of retrospective laws, *Mr. May* cited 1 Gall., 139; 4 Serg. & R. (Pa.), 408; 2 Peters, 657; 6 Cranch, 174; 16 Mass., 245.

Wilkes's rights over Dinsman were not unlimited or despotic. They were regulated either,—1st by statute; 2d by usage.

(*Mr. May* then examined the statutes and navy regulations, and contended that the authority which he had exercised was not justified by them.)

2d. Usage.

The authorities show that the power of a captain is not unlimited. 2 Carr. & P., 148; Shee's Abbott on Ship., 177, 178; 1 Hagg. Adm., 272; 2 Stark., 452; 1 Cowp., 161; 14 Johns. (N. Y.), 119; Gilp., 232; 4 Mason, 511, 512; 1 Story, 106; 1 Ware, 18, 19, 372, 503; Pet. Adm., 174, 175; Ware, 224, where the whole subject is traced; 1 Woodb. & M., 267.

If the master inflicts an unusual punishment, he is responsible. It is very doubtful whether he can lawfully confine a *seaman in a foreign jail. The eighth article of the Constitution of the United States says, that cruel and unusual punishments shall not be inflicted; and the question

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whether or not a punishment is one of this forbidden class is a question of fact for a jury.

1st exception. Wilkes wished to read his own letter to the Secretary of the Navy. This was not proper evidence, and could not even mitigate damages, because it afforded no proof of the state of his mind, two years after it was written, when these severe punishments were inflicted. The exception does not state the purpose for which it was offered. It is now said that it was to show that the government approved his conduct. But there was no evidence offered below, that the Secretary of the Navy approved of or even answered it.

2d exception. Dinsman was no party to the record of the court-martial by which Wilkes was acquitted. Bull. N. P., and 12 Mass., 597, have been referred to; but, in both these cases, the plaintiff was a party to the proceeding. The opinions of officers of the court-martial are no evidence of Wilkes's state of mind; and, besides, there were many other charges upon which he was tried.

3d exception. The prayer here is based upon the contract with Jones. But this contract was void, and therefore the court below was right. There is no authority anywhere given by law, by which an officer of the navy can confine a man on shore. The rules of the merchant service do not apply, because vessels of war have ample means of imprisonment within themselves. The prayer proposed to submit to the jury whether or not Dinsman was punished according to the rules and regulations of the navy. But this was a question of law. The rules, &c., were not offered in evidence, and therefore the jury could not decide.

4th exception. The act of Congress does not leave it to the mere *arbitrium* of an officer whether to detain a seaman or not. The burden of proof is upon him, to show that the detention was essential to the interests of the service. The act of Congress directs the officers to "report to the navy department," and implies therefore that he is responsible for his acts.

5th exception. It has been said that every refusal to do duty is a fresh offence. If this argument be sound, a man might be whipped to death for refusing to perform duty after the term of his enlistment had expired.

6th exception. This depends on the same principle.

7th and 8th exceptions. If the above principles are correct, the prayers in these exceptions are even less beneficial than we had a right to expect, and are not erroneous.

*9th exception. We are not bound to prove malice. The law infers it from the acts done. 3 East, 599; 1 [*116

Greenl. Ev., § 34; 2 Id., § 94; 1 Sumn., 399; 2 Starkie, Ev., 904, 905.

Mr. Toucey (Attorney-General), for the plaintiff in error.

The letter to the Secretary of the Navy and the proceedings of the court-martial, mentioned in the first and second bills of exception, were improperly ruled out. The letter was an official letter relating to public duty. The court-martial had acquitted Captain Wilkes.

The third bill of exceptions, as to the plaintiff's imprisonment in the fort.

The court refused to let the defence rest upon the point of the safety of the ship to which the plaintiff belonged; but put the validity of the defence upon urgent necessity, as something more than the mere safety of the ship. The clause, "especially if the jury should be satisfied there was another armed vessel of the United States in the port, in which the plaintiff might have been safely kept," does not qualify the charge; because, if the jury did not find this, the charge still remained. Here the court says the *safety* of the ship is not a sufficient justification for removing a mutineer to the fort, but there must be an *urgent necessity*, and that would justify it. The jury must necessarily have been misled by this instruction, and great injustice done to an officer who looked to the safety of his ship as the first and principal point of duty.

The court refused to charge the jury, that, if the plaintiff refused to go to duty, and was punished for it according to the rules and regulations of the navy, it was a sufficient defence; but charged affirmatively, that this was not a sufficient justification. The court charged very correctly, that, "in the petty offences which, by those rules, are punishable by flogging, there is a limit within which the officer has a discretion"; and then charged the other way, that the jury must judge whether he exercised that discretion soundly and reasonably. In other words, that he has no discretion which he can exercise, but the jury must exercise it for him, upon the testimony of witnesses, after the occasion has passed away.

The court further instructed the jury, that the shipping articles alone did not justify the corporal punishment, and that the reasonableness of it must be found by the jury. The shipping articles in this case is the contract of enlistment. The plaintiff expressly agreed to be subjected to the rules and discipline of the navy. If punished in a given case precisely according to those rules, the act is justified by the agreement,

*117] and the *charge that its reasonableness must be found by the jury is misapplied and erroneous. The ques-

tion of "reasonableness" arises in those cases only where the law authorizes the application of reasonable force. But where the law, and the consent of the party, authorize the application of force according to certain definite rules, the only question is, whether it has been applied according to those rules.

The fourth and ninth bills of exceptions may be considered together.

By the fourth, the court refused the instruction, that, if the plaintiff's detention was deemed essential to the public interests by the commander, the defendant, as such commander, had a right to detain him, and that the plaintiff was thereby made subject to the rules and regulations for the government of the navy. The court further instructed the jury affirmatively, that the burden of proof was on the defendant, to show that the detention of the plaintiff was essential to the public interests, and that it was not confided absolutely to the discretion of the commander.

By the ninth, the court, at the plaintiff's request, charged, that, if the jury believed the detention not essential to the public interests, the plaintiff might recover.

The act of the 2d of March, 1837 (5 Stat. at L., 153), provides, "that when the time of service of any person enlisted for the navy shall expire when he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer, &c., to send him to the United States in some public or other vessel, unless his detention be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer immediately to make report to the Navy Department of such detention, and the causes thereof." It further provides, that the person so detained "shall be subject in all respects to the laws and regulations for the government of the navy, until their return to the United States, and all such persons as shall be so detained, and all such as shall voluntarily reënlist to serve until the return of the vessel in which they shall be serving and their regular discharge therefrom in the United States, shall, while so detained, and while so serving under their reënlistment, receive an addition of one fourth to their pay." Are the marines comprehended in these terms? The words are, "when the time of service of any person enlisted for the navy shall expire." Marines are enlisted for the navy. The court assumed they were within the law. They are preeminently within its reason, and are precisely

*118] within its *letter. The contract with them was only commensurate with the power conferred by that act. It was to take effect after the existing term expired; it was not material when it was made; it might be necessary to make it before the cruise; it is enough that it secured consent to what the law authorized.

The charge of the court absolutely excluded the agreement to serve during the cruise; it submitted to the jury the question which the commander was authorized by the act of Congress to decide, and by his duty as an officer required to decide. The question is one of discretion, a question of government, a mere political question. It must be decided before the person or crew could be detained. The necessity is a present one, in foreign parts. The duty is devolved on the commander to act one way or the other, to send the men home, or detain them according to that decision. It is expressly made his duty to report the causes of the detention, that is, the grounds of the decision, which would be impossible unless he made it. The power to be exercised of detaining the men is expressly conferred on him. It is the declared consequence of its exercise, that they shall be subject to the rules and regulations for the government of the navy. Others are to act upon that decision thus made, and are not required to revise it, or permitted to question it. It is the duty of all the subordinate officers, and of the crews of the different ships, to obey the orders of the commanding officer founded on that decision, and such order is not only a sufficient warrant for their obedience, but they are liable to the penalty of death if they disobey it. It is the duty of the Treasury Department and Pension Office to act upon it. The power itself, in its essential character, is a practical power of government. It is part and parcel of the executive power, as applicable to the navy, and belonging to its officers. Without its certain exercise, there could be no authority or discipline. It is impossible that the grounds of the order should be submitted to a jury before it be known whether it is to be obeyed. Nor can they be submitted to a jury upon evidence. It would not be practicable to prove them. No one knows what those grounds are, except the officer who makes the order. They lie often within his own knowledge exclusively, and he cannot be a witness. They are often the result of his sagacity and foresight, as well as observation, and are incapable of proof. It is the greatest absurdity to suppose that an act of Congress has left it doubtful, and to be ascertained afterwards by the verdict of a jury, whether a fleet in actual service is a voluntary association, or a legally organized body

under the government of law; whether the crews of a squadron are in the naval service or not; whether the commander or any of *his subordinate officers have any lawful [*119
command; or that these questions are to be decided, perhaps years afterwards, in each particular case, according to the uncertain and varying opinions of a jury. And the cruelty of it would be as great as its absurdity. It would be a refinement of cruelty to require an officer to act upon a combination of circumstances incapable of proof, and upon his own knowledge, judgment, and sagacity, and then punish him for want of proof, or perhaps for being wiser than twelve men ignorant upon the subject. The government has a general power independent of the act. The true view is, that the point was decided by the government. The action of Commodore Jones here at home in the presence of the government; the payment of the bounty; the action of the Treasury Department in paying the men as in the service; the absence of any disapproval; the approval of the acquittal on the charge for detaining and coercing them. Whether the matter was decided by the President personally through the Navy Department, or through the commander of the expedition, the same result follows,—the decision is conclusive upon the judicial department. As to the rule relative to the discretion of a public officer, when it is made his duty to decide and to act, and of others to act according to that discretion. The question is an important one. It involves a great principle, essential to the powers of government. The discretion within the limits assigned to it, though in an executive officer, partakes of the character of judicial discretion. The authorities are conclusive. *Drew* v. *Colton*, 1 East, 565, in note; *Seamen* v. *Patten*, 2 Cai. (N. Y.), 312; *Vanderheyden* v. *Young*, 11 Johns. (N. Y.), 150; *Martin* v. *Mott*, 12 Wheat., 19; *Decatur* v. *Paulding*, 14 Pet., 497; *Kendall* v. *Stokes*, 3 How., 97, 98; *Brashear* v. *Mason*, 6 How., 101, 102.

The court also held, that when, in the discharge of his duty to the best of his judgment, the commander had decided to detain the men, it was to be presumed that he had acted wrong, and the burden of proof lay upon him to show that he had acted right. In *Martin* v. *Mott*, this court lay down the contrary rule.

The fifth bill of exceptions.

The court refused the instruction, that, if the jury should find the detention of the plaintiff essential to the public interests, it was lawful for the defendant to detain him, and, for a refusal to do duty, to punish him according to the rules

and regulations of the navy, with stripes not exceeding twelve, &c. In such case clearly he was liable to be detained; he was subject to the rules and discipline of the navy; he was liable to be punished for mutiny or insubordination under those rules. The *act of 30th June, 1834 (4 Stat. at L., 712), provides, "that the said corps shall, at all times, be subject to and under the laws and regulations which are or may hereafter be established for the better government of the navy, except when detached with the army by order of the President."

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The instruction refused in the sixth bill of exceptions is similar to the last, except that it was lawful for the commander in his discretion to punish, under the rules and regulations of the navy.

The seventh bill of exceptions.

The court, at the plaintiff's request, instructed the jury, that, if the defendant could have securely kept and confined the plaintiff in the Vincennes or the Peacock, with safety to the ships, their officers and crews, the defendant had no right to imprison the plaintiff in the fort. The breadth of the proposition is, that, had it required the exclusive attention of every officer, seaman, and marine to have kept and confined the plaintiff on board safely, the defendant could not justify sending the mutineer to the fort during the stay at the island. The jury could not do otherwise than convict, under this instruction; because it was doubtless possible for the commander, officers, and men safely to confine one man on board either of the ships, and save them, their officers and crews, from destruction.

The eighth bill of exceptions.

At the plaintiff's request, the court charged, that, if the punishment was immoderate, excessive, unreasonable, disproportioned, severer than the rules of the navy or the laws and customs in such cases at sea authorize, the plaintiff might recover. This excluded the commander from the protection of the rules and regulations for the navy. If, in the opinion of the jury, the punishment was immoderate, &c., and, though not more severe than the rules and regulations of the navy authorized, yet more severe than the laws and customs in such cases at sea authorized, they were directed to convict the defendant.

By the instructions given and withheld, the defendant was deprived,—

1st. Of the benefit of showing the sanction of his government in every form known to the laws.

2d. Of the fundamental rule of the safety of the ship, as a

guide to the officer exercising discretionary power conferred for that end.

3d. Of the benefit of the renewed contract of enlistment, by which the men agreed to be detained during the cruise.

4th. Of the benefit of the act of 1837, giving him power to detain the men abroad, after the expiration of their terms, when the public interests require it.

*5th. Of the protection of the rules and regulations for the government of the navy, when acting within them. [*121

6th. Of the discretionary use of the consular prisons, when necessary in the suppression of mutiny.

7th. Of the usual presumption in favor of the exercise of official discretion.

8th. And finally, of legal protection in the upright exercise of discretionary power conferred on him as a public officer for public ends, where the law imposed on him the duty to exercise it.

1. The commander of the Exploring Expedition was a public officer, intrusted with power which it was his duty to exercise, and it was his right to show on the trial that he acted by direction of his government, or with its sanction.

2. The safety of the ship or squadron was a fundamental rule to guide him in the exercise of the discretion which the law had given him. It is the law of the highest necessity.

3. After the passage of the act of March 2d, 1837, it was competent for him to make with the men the agreement of October, 1837, that they would serve during the term of the cruise, and until the vessel should return to a port of safety in the United States.

4. Independently of this contract, he had legal power under the act to require the men thus to serve. Thus intrusted with certain power for a public object, it was his duty to exercise that power according to his view of the exigency, that is, according to his view of present circumstances, and he is protected by the law which imposed that duty, if he discharged it uprightly.

5. Whether the case be one of renewed contract, or of detention under the act, the marines, during the period of such service, were subject to the rules and regulations established for the government of the navy, and liable to be punished for mutiny or insubordination according to such rules and regulations, and the officer conforming to them is justified by them.

6. Within those rules and regulations he has the power of confining an offender, and as they do not limit him to any particular place of confinement, and it is admitted he may

use the consular prison, it is necessarily intrusted to him to determine whether the ship's prison or the consular prison shall be used for that purpose; and if he decide that question in good faith, with pure motives, he is not answerable for any error in judgment.

7. If his decision may be reviewed and reversed by a jury upon the mere question of expediency, there is neither law, reason, nor propriety which forbids the commander to remove *122] a mutineer from the squadron to the consular prison, though it *may be possible to confine him in some one of the ships with safety. Even in the case of a private vessel it may be done, if it be safer or better to do so, or a great offence has been committed. *Wilson* v. *The Mary*, Gilp., 32; *Magee* v. *The Moss*, Id., 233; *United States* v. *Wickham*, 1 Wash. C. C., 316; *Thorn* v. *White*, 1 Pet. Adm., 168; Abbott on Shipping, Story's ed., 137.

8. It is to be taken, *primâ facie*, that a public officer has done his duty. It is not to be presumed that he has been guilty of an act of infidelity to the public trust committed to him. As declared by this court in *Martin* v. *Mott*, every public officer is presumed to act in obedience to his duty, until the contrary be shown. The *onus probandi* does not lie on him.

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was trespass by a marine in the Exploring Expedition against its commanding officer.

It will be seen, by the statement of the case, that the injury complained of was a punishment inflicted on the plaintiff by the defendant, in November, 1840, near the Sandwich Islands, for disobedience of orders, or a refusal to perform duty when directed.

The plaintiff claimed, that the term for which he was bound to serve as a marine had then expired; that the defendant had no right or justification to detain him longer on board; and that, his refusal to do duty longer being the only reason, and an insufficient one, for punishing him at all, under such circumstances he was entitled to recover damages of the defendant for subjecting him to receive twelve lashes, and for a repetition of punishment on a subsequent day, after another request and refusal by him to obey. And also, in the mean time, for putting him in irons, and confining him in a native prison on the island of Oahu.

The defendant pleaded the general issue; and by agree-

ment of parties, any special matter was allowed to be given in evidence under that issue.

Various questions of law arose during the trial, which are presented on the record in nine separate bills of exceptions by the defendant, and one by the plaintiff. Some of them are of an ordinary character; but others possess much interest, and are important in their consequences, but not only to these parties, but to the government and the community at large.

In a public enterprise like the Exploring Expedition, specially authorized by Congress in 1836, (see Act of Congress of 14th May, 1836, 5 Stat. at L., 29, § 2,) for purposes of commerce and science, very valuable to the country, and not *entirely without interest to most of the civilized world, it was essential to secure it from being defeated by any discharge of the crews before its great objects were accomplished, or by any want of proper authority, discretionary or otherwise, in the commander, to insure, if possible, a successful issue to the enterprise. [*123

It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression, founded on considerations independent of public ends.

The humblest seaman or marine is to be sheltered under the ægis of the law from any real wrong, as well as the highest in office. Considerations connected with these views are involved in most of the points ruled by the court below.

But the first and second exceptions taken by the defendant raise incidental questions, which it may be better to dispose of separately, before proceeding to the principal points involved.

One of these questions is the propriety of rejecting a letter written by the defendant, in relation to the bounty given to the seamen and marines on their reënlisting or contracting to serve till the expedition should terminate.

As this letter related to that material transaction, and was a part of the *res gestæ*, it seems competent. *Ridley* v. *Gyde*, 9 Bing., 349, 354; *Hadley* v. *Carter*, 8 N. H., 40; *Aiken* v. *Bemis*, 2 Woodb. & M.

It was also official correspondence of the commander in

respect to official matters, and seems to have been justifiable as evidence on that account. 1 Greenl. Ev., § 491.

The other question relates to the propriety of excluding the proceedings of a court-martial, which, after the return of Captain Wilkes, was convened, and acquitted him of this among other charges.

We think that such proceedings were not conclusive on the plaintiff here, though a bar to subsequent indictments in courts of common law for the same offence,[1] the parties then being the same likewise, and the tribunal acquitting competent to examine and acquit. *Aspden et al.* v. *Nixon et al.*, 4 How., 467; *Burnham* v. *Webster*, 1 Woodb. & M., 172. And though sometimes, yet questionably, they have been deemed a bar to civil suits for damages, where the plaintiff was the prosecutor before the court-martial for that injury. Bull. N. P., 19; *Hannaford* v. *Hunn*, 2 Carr. & P., 146, *semble*.

*124] *But here the parties were not the same, nor the plaintiff a complainant before the court-martial, and the courts of common law have jurisdiction over the wrong, though committed at sea. *Warden* v. *Bailey*, 4 Taunt., 70-75; 1 MacArthur on Courts-Martial, 268; *Wilson* v. *McKenzie*, 7 Hill (N. Y.), 95; O'Brien on Military Law, 223, *semble*; *Luscomb* v. *Prince*, 12 Mass., 579.

The remaining exceptions relate first to the leading question, whether the duty of service by the plaintiff had expired when the punishment for the disobedience of orders was inflicted.

It is conceded that the term of his original enlistment for four years had then terminated. But after that term commenced, in 1836, Congress passed a new law, March 2d, 1837, which is supposed to reach a case of this kind, and to have justified a contract of reënlistment made by the plaintiff, which extended beyond the original term, and till after the punishment complained of. 5 Stat. at L., 153.

This new law, to be sure, speaks in its title of the "enlistment of seamen"; but in the body of it provision is made as to the "service of any person enlisted for the navy."

It is enacted there, that it shall be lawful to enlist persons to serve for five years, and a premium is given to such as "shall voluntarily reënlist to serve until the return of the vessels." (See 3d section of act of March 2d, 1837.)

In the present instance, the Exploring Expedition having been detained in this country by obstacles in the preparations, and a change in the commander, till it became probable the original terms of service of the seamen and marines

[1] Disapproved. *United States* v. *Cashiel*, 1 Hughes, 558.

would expire before the cruise ended, the Secretary of the Navy, in September, 1837, after the above act passed, and before the squadron sailed, authorized "a bounty to the petty officers, seamen, and marines," who would reënlist and engage to serve during the term of the cruise. Thereupon many did so reënlist and engage to serve, and among them the plaintiff, and the bounty was paid to them all on so doing, in October, 1837.

The papers admitted to show this, though excepted to by the plaintiff, we think entirely competent.

After this it would be very difficult to hold that the plaintiff had not legally become liable to serve during the cruise, instead of merely his original term of four years. Because, though marines are not, in some senses, "seamen," and their duties are in some respects different, yet they are, while employed on board public vessels, persons in the naval service, persons subject to the orders of naval officers, persons under the government of the naval code as to punishment, and persons amenable to the Navy Department.[1] Their very name of "marines" indicates the place and and nature of their duties generally. And, beside the analogies of [*125 their duties in other countries, their first creation here to serve on board ships expressly declared them to be a part "of the crews of each of said ships." Act of 27th March, 1794, 1 Stat. at L., 350, § 4. Their pay was also to be fixed in the same way as that of the seamen. Sec. 6, p. 351.

So it was again by the act of April 27th, 1798. 1 Stat. at L., 552. And they have ever since been associated with the navy, except when specially detailed by the President for service in the army. See Act of Congress, 11th July, 1798, 1 Stat. at L., 595, 596.

Thus paid, thus serving, and thus governed like and with the navy, it is certainly no forced construction to consider them as embraced in the spirit of the act of 1837 by the description of persons "enlisted for the navy."

The reason of the law on such occasions for reënlistment applies with as much force to them as to ordinary seamen, because, when serving on board public vessels where their first term seems likely to expire before the cruise ends, their services may, under the public necessities, be equally needed with those of the seamen till the cruise ends; and hence all of them may rightfully reënlist for the cruise, at any time, in anticipation of this.

Such was the construction put on this section at the time by the Navy Department and navy officers on board, by

[1] Quoted. *Reid* v. *United States*, 18 Ct. of Cl., 638, 640.

making proposals and paying a bounty to both marines and seamen who would reënlist. But what is calculated to remove any doubts as to the justice of this view is, that such was the construction adopted by the plaintiff himself, and fully acquiesced in by his conduct in voluntarily agreeing beforehand to reënlist for the cruise, and receiving the bounty for it, and sailing under that engagement.

He thus waived any doubt, and, proceeding to sea under such new engagements supposed to be authorized by the act of Congress, he would seem to be morally as well as legally estopped to deny their validity, and the liabilities to duty and to punishment consequent upon them. *Volenti non fit injuria.*

If, however, the legal right of the commander was imperfect to require and enforce longer performance of duty under the engagements, there is another provision of the act of March, 1837, by which it seems quite clear that, without such voluntary reënlistment and engagement, the commander had power to detain the plaintiff after his original term expired, if, in his opinion, the public interest required it. In the second section of the law (5 Stat. at L., 153) *126] it is *enacted, that, "when the time of service of any person enlisted for the navy shall expire while he is on board any of the public vessels of the United States employed on foreign service, it shall be the duty of the commanding officer to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he may be serving shall return to the United States," &c., &c.

Now, considering the marines as embraced in the spirit, if not the exact letter, of this provision, for reasons heretofore assigned, connected with its language and object, and their position in conjunction with the navy, it would follow that the commander, supposing the detention of the plaintiff on board "essential to the public interests," could rightfully direct him to remain; and in the event he did so, as is averred here, the third section of the act of 1837 provides that the plaintiff should be "subject in all respects to the laws and regulations for the government of the navy, until" his return to the United States. 5 Stat. at L., 153.

There is still another statute, which, in our view of it, adds more strength to these conclusions. It is an act as early as June 30th, 1834 (4 Stat. at L., 713), and by the second section it provides as to the marine corps, "that the said corps shall at all times be subject to and under the laws and regu-

lations which are or may hereafter be established for the better government of the navy," &c. That corps thus, in some respects, became still more closely identified with the navy. The term "the better government of the navy" need not be restricted to mere punishment, or to courts-martial, but may include any provision by law intended to secure the safety of the crew and vessel, and insure due subordination and sound discipline in any exigency of the public service. The continuance of all serving on board till the cruise ended was afterwards wisely provided for, when required "by the public interests." The plaintiff was, therefore, bound to submit to it. He must be presumed to have known this provision before his new contract of enlistment, and before he sailed, and indeed to have known before his first enlistment that he was to be subject to any new laws which might be enacted for the better government of the navy, and hence that the defendant, after the act of 1837 passed, could continue, under the public exigencies, to require the performance of duty by him till the cruise ended, and to punish him when disobedient,—if not overstepping the limits prescribed by the naval code, and the usages consistent therewith which prevail in maritime service. *Nor was it competent for him to object to this detention, as if retrospective in its operation, being authorized by an act passed after his first enlistment, because before that enlistment, Congress, June 30th, 1834, had enacted, as before cited, that the marine corps should be subject to and under the laws and regulations which are or *may be hereafter* established for the better government of the navy. [*127

Having thus ascertained that the defendant had further jurisdiction over the plaintiff, and it being admitted that the latter refused to perform his orders, and, in the language of the fourteenth article, that he disobeyed the lawful orders of his superior officer (2 Stat. at L., 47), and this on an important subject, and under circumstances likely to extend to many more of the crew, and to end in mutiny or an abandonment of the expedition, if not suppressed with promptitude and decisive energy, the next inquiry is whether the punishment was inflicted within the license of the law.

It is not the province of the judiciary to decide on the expediency or humanity of the law, but merely its existence and the conformity or non-conformity to it by the defendant.

Where a private in the navy, therefore, is guilty of any "scandalous conduct," the commander is, by the third article of the laws for the government of the navy, authorized to

inflict on him twelve lashes, without the formality of a court-martial. 2 Stat. at L., 47.

If disobedience was not such conduct, but, under the fourteenth article, exposed the offender to severe punishment by a court-martial, the plaintiff could hardly complain that it was mitigated to only the twelve lashes which the captain was authorized to inflict without calling such a court, by article thirtieth, as well as article third (Id., 49), and no more stripes were given here for any one act of disobedience than the third and thirtieth articles warrant.

Nor were they accompanied by any circumstance of unusual severity or of cruelty, either in the manner or the instrument employed. After an interval of two or three days, according to the counts in the writ, as well as the proposed proof, and after explanations and exhortations to duty, and time given for reflection, followed by renewed disobedience, the same number of stripes was repeated, because deemed necessary in order to enforce duty.

After another interval for like purposes, on a subsequent day, upon a new refusal, the punishment was again inflicted, and the plaintiff thereupon returned to duty.

If precedents were needed to justify this course, it has *128] been settled in a penal prosecution that a like act, when prohibited, *if distinctly repeated, even on the same day, constitutes a second offence, and incurs an additional penalty. *Brooks qui tam* v. *Milliken*, 3 T. R., 509.

Again, if this disobedience could not be considered a technical offence under either of the articles already referred to, it surely is an offence in nautical service, and one of much magnitude at times, and the thirty-second article provides that all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea. 2 Stat. at L., 49.

In the discipline of the merchant service, where an act of disobedience is persisted in, and endangers the due subordination of others, the captain is justified, not only in punishing personally, but in resorting to any reasonable measures necessary to produce submission and safety. See *Cobley* v. *Fuller*, 2 Woodb. & M., and cases there cited, and 9 Law Rep., 386.

Under this portion of the inquiry arises also the question as to the ruling about putting the plaintiff in irons, and about the confinement of him on shore in a prison of the natives.

This appears to have been done under the same aspect of the case, looking to the preservation of sound discipline, and

the safe imprisonment of the plaintiff till he consented to return to his duties.

It appears that several other marines in the squadron were taking like insubordinate ground with the plaintiff, and that the escape of two prisoners confined on board had already been allowed; that many more appeared anxious to quit the vessels, doubtless under the seductive attractions of the islands near; that several of the officers and men were engaged at a distance in making scientific observations; and that, under such circumstances, a confinement of the plaintiff on shore for a few days might be a prudent precaution to prevent a defeat of the chief objects of the expedition.

This, therefore, without proof of malice, is not actionable, nor does it amount to putting a seaman on shore in a foreign country to desert him there, contrary to the act of Congress, as that must be done maliciously, and then is properly punishable by statute, no less than on principles of admiralty law. (4 Stat. at L., 117, sec. 10; Abbott on Shipping, 177; *Jay* v. *Allen*, 1 Woodb. & M., 268; *United States* v. *Netcher*, 1 Story, 307.) But if it was only to imprison him there for a few days, and, under all the circumstances, was considered by the defendant to be with more propriety and safety than in the squadron, it was justifiable, unless accompanied by malice. *(*The William Harris*, 1 Ware, 367, and *The Nimrod*, Id., 9; *Wilson* v. *The Mary*, Gilp., 31; 3 Kent, Com., 182.) [*129

As to the cleanliness of the prison, the healthfulness of the food, and the general treatment while there, the evidence is contradictory, and is not now a matter for our decision.

The only remaining consideration, in order to dispose of all which is left in any of the exceptions, is the competency of the commander to decide on these various questions without being amenable to the plaintiff in an action at law for any mere error of judgment in the exercise of his discretion, which may have been involuntarily committed under the exigencies of the moment.

In order to settle this point correctly, it being in itself a very important one, as well as running through several of the exceptions, it will be necessary to advert to the circumstances, that Captain Wilkes was not acting here in a private capacity and for private purposes; but, on the contrary, the responsible duties he was performing were imposed on him by the government as a public officer. In the next place, those duties were not voluntarily sought or assumed, but met and discharged in the routine of his honorable and gallant profession, and under high responsibilities for any omission or

neglect on his part, instead of being a volunteer, as in most of the cases of collectors and sheriffs made liable. (2 Str., 820; 6 T. R., 443.) Now, in respect to those compulsory duties, whether in reënlisting or detaining on board, or punishing or imprisoning on shore, while arduously endeavouring to perform them in such a manner as might advance the science and commerce and glory of his country, rather than his own personal designs, a public officer, invested with certain discretionary powers, never has been, and never should be, made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. (See the cases hereafter cited.)

Nor can a mandamus issue to such an officer, if he is intrusted with discretion over the subject-matter. (*Paulding* v. *Decatur*, 14 Pet., 497; *Brashear* v. *Mason*, 6 How., 102.)

His position, in such case, in many respects, becomes *quasi* judicial, and is not ministerial, as in several other cases of liability by mere ministerial officers. 11 Johns., 108; *Kendall* v. *United States*, 12 Pet., 516; *Decatur* v. *Paulding*, 14 Pet., 516. And it is well settled that "all judicial officers, when acting on subjects within their jurisdiction, are exempted from civil prosecution for their acts." (*Evans* v. *Foster*, 2 N. H., 377; 14 Pet., 600, App.)

Especially is it proper, not only that a public officer, situ-
*130] ated *like the defendant, be invested with a wide discretion, but be upheld in it, when honestly exercising, and not transcending, it as to discipline in such remote places, on such a long and dangerous cruise, among such savage islands and oceans, and with the safety of so many lives and the respectability and honor of his country's flag in charge.

In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." 12 Wheat., 30.

Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or

attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble the victim. (2 Carr. & P., 158, *n.*; 4 Taunt., 67.)

When not offending under such circumstances, his justification does not rest on the general ground of vindicating a trespass in private life, and between those not acting officially and not with a discretion. Because then, acts of violence being first proved, the person using them must go forward next, and show the moderation or justification of the blows used. (2 Greenl. Ev., § 99.)

The chief mistake below was in looking only to such cases as a guide. For the justification rests here on a rule of law entirely different, though well settled, and is, that the acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable. (*Gidley* v. *Palmerston*, 7 Moo., 111; *Vanderheyden* v. *Young*, 11 Johns. (N. Y.), 150; 6 Har. & J. (Md.), 329; *Martin* v. *Mott*, 12 Wheat., 31.)

This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown. (1 Greenl., §§ 35–37.) But that the officer, being intrusted with a discretion for public purposes, is not to be punished *for the exercise of it, unless it is first proved against [*131
him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression, or, in the words of Lord Mansfield, in *Wall* v. *McNamara*, that he exercised it as "if the heart is wrong." (2 Carr. & P., 158, note.) In short, it is not enough to show he committed an error in judgment, but it must have been a malicious and wilful error. *Harman* v. *Tappenden et al.*, 1 East, 562, 565, *n.*

It may not be without some benefit, in a case of so much interest as this, to refer a moment further to one or two particular precedents in England and this country, and even in this court, in illustration of the soundness of these positions.

Thus in *Drewe* v. *Coulton*, 1 East, 562, *n.*, which was an action against the defendant, who was a public returning officer, for refusing a vote, Wilson, J. says:—"This is, in the nature of it, an action for misbehaviour by a public officer in his duty. Now, I think that it cannot be called misbehaviour unless maliciously and wilfully done, and that the action will not lie for a mistake in law." "By *wilful* I understand contrary to a man's own conviction."

"In very few instances is an officer answerable for what he does to the best of his judgment in cases where he is compellable to act, but the action lies where the officer has an option whether he will act or no." (See these last cases collected in *Seaman* v. *Patten*, 2 Cai. (N. Y.), 313, 315.)

In a case in this country, *Jenkins* v. *Waldron*, 11 Johns. 121, Spencer, J. says, for the whole court, on a state of facts much like the case in East:—"It would, in our opinion, be opposed to all the principles of law, justice, and sound policy, to hold that officers called upon to exercise their deliberate judgments are answerable for a mistake in law, either civilly or criminally, when their motives are pure, and untainted with fraud or malice." Similar views were again expressed by the same court in the same volume, (p. 160,) in *Vanderheyden* v. *Young*. And in a like case, the Supreme Court of New Hampshire recognized a like principle. "It is true," said the chief justice for the court, "that moderators may decide wrongly with the best intentions, and then the party will be without remedy. And so may a court and jury decide wrongly, and then the party will also be without remedy." But there is no liability in such case without malice alleged and proved. *Wheeler* v. *Patterson*, 1 N. H., 90

Finally, in this court, like views were expressed, through Justice Story, in *Martin* v. *Mott*, 12 Wheat., 31:—"Whenever a statute gives a discretionary power to any person, to be *exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statutes constitute him the sole and exclusive judge of the existence of these facts." "Every public officer is presumed to act in obedience to his duty, until the contrary is shown."

*132]

Under these established principles and precedents, it will be seen that the rulings below must be held erroneous whenever the court departed from them, and required the defendant, as on several occasions, to go forward, and in the first instance to prove details rebutting any error or excess.

As, for illustration, to prove in the outset facts showing a necessity to detain the plaintiff, before the latter had offered any evidence it was done from malice or without cause; or to prove that the prison on shore was safer and more suitable for the plaintiff's confinement than the vessels, under the peculiar circumstances then existing, until the plaintiff had first shown that no discretion existed in the defendant to place him there, or that he did it *malâ fide*, or for purposes of cruelty and oppression; or to prove that the punishment inflicted was not immoderate, and not unreasonable, when it is admitted to have been within the limits of his discretion,

as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as *primâ facie* right till the opposite party disprove this presumption.

The judgment below must therefore be reversed, and a *venire de novo* awarded, and the new trial be governed by the principles here decided.

HUGH M. PATTON, ADMINISTRATOR, AND HUGH M. PATTON AND OTHERS, HEIRS OF ROBERT PATTON, DECEASED, APPELLANTS, *v.* JAMES TAYLOR, ADMINISTRATOR, AND JAMES TAYLOR, JOHN W. TIBBATTS AND ANN W. HIS WIFE, GEORGE T. WILLIAMSON AND JANE M. HIS WIFE, AND HORATIO T. HARRIS AND KETURAH L. HIS WIFE, HEIRS OF JAMES TAYLOR, DECEASED.

A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.

Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.[1]

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[1] DISTINGUISHED. *Fehrle et ux.* v. *Turner*, 77 Ind., 535. CITED. *Baker et al.* v. *Nachtrieb*, 19 How., 130; and see *post*, *159 *n*; *Hart* v. *Hannibal &c. R. R. Co.*, 65 Mo., 509; *Blanks* v. *Walker*, 54 Ala., 117; *Chapman* v. *Lee*, 55 Id., 616; *Harding* v. *Commercial Loan Co.*, 84 Ill., 251; *Jones* v. *Fulghum*, 3 Tenn. Ch., 193; *Strong* v. *Waddell*, 56 Ala., 471; *Wyatt* v. *Garlington*, Id., 570; *Dietz* v. *Mock*, 47 Iowa, 451; *Tobin* v. *Bell*, 61 Ala., 125; *Oakes* v. *Buckley*, 49 Wis., 592; *Ryerson* v. *Willis*, 81 N. Y., 277, 280. A *general allegation* of fraud and duress will not suffice. *Sullivan* v. *Sullivan*, 21 Law Rep., 531.

It is an established rule in equity, that when the vendor of lands has not the power to make a title, the vendee may, *before the time of performance*, enjoin the payment of the purchase-money, until the ability to comply with the agreement is shown; but then the court will give a reasonable time to procure the title, if it appears probable that it may be procured. *Galloway* v. *Finley et al.*, 12 Pet., 264. Compare *Buford* v. *Guthrie*, 14 Bush (Ky.), 690; *Schilling* v. *Short*, 15 W. Va., 780.

But except in special cases, a vendee *in possession* cannot, at law or in equity, contest the payment of the purchase-money by showing an alleged defect of title; he must rely on the covenants, if any there are, in his deed. *Wanzer* v. *Truly*, 17 How., 585. But where fraud and insolvency on the part of the vendor are shown, the vendee may resist payment by cross-bill, setting forth the defects of title, and charging the fraud and insolvency. *Leird* v. *Abernathy*, 10 Heisk. (Tenn.), 626; or he may have an injunction against the collection of the unpaid balance of the purchase-money. *Houston* v. *Hurley*, 2 Del. Ch., 247. The purchaser cannot recover back the price paid, or resist its payment, so

It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested, when, as a mere naked trustee, he held certain notes only for the purpose of paying the money over to his clients, when recovered.

*133] *THIS was an appeal from the Circuit Court of the United States for the District of Kentucky, sitting as a court of equity.

Patton was a citizen of Virginia, and Taylor of Kentucky.

On the 30th of January, 1818, Taylor addressed a letter, dated Frankfort, Kentucky, to Patton, in Virginia, in which he gave an account of certain other lands, and then proceeded as follows:—

"I shall go from this to Lexington, to the court which commences this week, and do what I think right. I think your price too high for your land for me to make much, if any, profit from it; but must conclude to take it at five thousand dollars, for the two tracts of 1000 acres each, payable one half in one year from the time you send me the deed, and the other half in two years from that time; I mean the two tracts entered and surveyed in the name of Thos. Gaskins; It appears to have been patented in the name of Hicks & Campbell; you can have the deed made out, as I suppose you have the patents, and I suppose the chain of title, which it will be necessary to forward, also to be recorded here, if it is not done; I shall expect a general war-

long as he retains possession of the land. *Long* v. *Saunders*, 88 Ill., 147; *Simmerall* v. *Graham*, 62 Ga., 729; *Haynes* v. *White*, 55 Cal., 38; *Pershing* v. *Canfield*, 70 Mo., 140; *Tarleton* v. *Daily*, 55 Tex., 92; *Cartwright* v. *Culver*, 74 Mo., 179. But see *McLaren* v. *Irvin*, 63 Ga., 275. The doctrine that a purchaser who has paid the price, and who has not been disturbed in his possession, cannot demand the restitution of the price, has no application to a contract entered into in error produced by the fraud of the vendor. *Formento* v. *Robert*, 27 La. Ann., 489.

When the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase-money, and may offset the damages occasioned by the breach of the covenants of seizin or warranty against such unpaid purchase-money. *Woodruff* v. *Bunce*, 9 Paige (N. Y.), 443.

In Alabama, a court of equity will rescind the contract at the suit of a vendee who contracted for a good title, and who has abandoned the possession on the discovery of want of title in his vendor; although the proof shows only a mistake on the part of the vendor in his assertions of title, without fraudulent misrepresentations, and although the vendee might have a remedy by action at law for deceit, or on his covenant of warranty. *Baptiste* v. *Peters*, 51 Ala., 158. Such also is the rule in Tennessee. *Puckett* v. *Draper*, 58 Tenn., 295; *Saint* v. *Taylor*, 12 Heisk., 488; *Johnson* v. *Siesfield*, 6 Baxt., 41. S. P. *McManus* v. *Cook*, 59 Ga., 485. So, also, where the purchaser has been evicted by paramount title. *Adams* v. *Kibler*, 7 So. Car., 47.

ranty deed, expressing more or less as to the mode of authenticating the deed; our mutual friend, Col. Mercer, can give you information if you should be at loss, as he has conveyed to me several times. The land lies in the Virginia military district, and in the county of Hopkins. I presume you will have no objection to making the conveyance, and taking my bonds; and indeed this shall oblige me to consider the contract binding on me, as above stated, on receiving the deed as aforesaid for the said land, payable as aforesaid.

"If you want any security, or a mortgage, say so."

The letter then proceeded to speak of other matters. It may be proper to remark, that it was contended in the argument, that, in transcribing and printing, an error had occurred in the punctuation. The words "if it is not done" belonged, it was said, to the words which follow them, viz. "I shall expect," &c., which, it was argued, would materially change the meaning.

On the 13th of July, 1818, Patton replied, by a letter from which the following is an extract:—

"*Fredericksburg*, 13*th July*, 1818.

"GEN. JAMES TAYLOR:—

"Dear Sir,—I am favored with yours of the 22d of June, and not less surprised than you seem to be about the 2,000 acres of land, in name of Thomas Gaskins, offered you, the 17th of March last year, at 15*s.* per acre; and, in yours of the *5th of July, you advise me to take $4,000, as the lands in that quarter were generally of an inferior [*134 quality, and could not rise in value. In that month I wrote to you that I would not take less than 15*s.* per acre; to this letter, though one was requested, I never had any reply, nor did you ever say you would accept my offer, until the 30th of January, six months after the last offer was made, for the letter of the 18th of December was only putting you in mind of the offer made in July. This letter, I will candidly acknowledge, I did not remember having written, not having kept any copy. There is something in the extended delay of your answer which I do not like, nor do I think it right; but I am anxious to avoid all misunderstanding, and, during my whole life, have never stood on trifles. You may, therefore, have the land at 17*s.* per acre, one half payable in twelve months from the time my offer was renewed, and the remainder twelve months afterwards. Your own bonds will be considered as sufficient security for the amount. By this decision I am placed in an awkward situation with the

young man with whom I made a conditional contract, and who has not, as I am informed of, returned from that county.

"The land patents are in the name of Thomas Gaskins, for whose services the land was rendered, were by him conveyed to William Forbes, and by him to Hicks & Campbell, of whom I received and will give you a deed, with a warranty, as soon as you reply to this letter. I hope Willis's representatives will not buy, and you are at liberty to take any lot you think best, but I will not take 15*s.* for any part of it."

On the 3d of September, 1818, Patton and wife executed a deed in fee simple to Taylor for the land in question, with a covenant for further assurances and a general warranty.

The bonds for the purchase-money appear to have been previously executed, and were as follows, viz.:—

"I, James Taylor, of the county of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay to Robert Patton, of the town of Fredericksburg, and State of Virginia, the sum of $2,500, in current money, on the 30th day of January, 1819, as witness my hand and seal, this 5th day of August, 1818. JAMES TAYLOR.

"Witness: PHILIP H. JONES."

On which there were the following receipts, to wit:—

Receipt for $600.

"July 1st, 1817, received from James Taylor the sum of six hundred dollars of the within. HUGH M. PATTON."

*135] *By direction of Hugh M. Patton, agent of Robert Patton, the within note is credited with $450, as due January 30, 1819; and I this day received from James Taylor three hundred and seventy-three and eighty-two hundredths dollars, November 19, 1819.

T. F. TALBOTT,

373\frac{82}{100}$. *Attorney for Robert Patton.*"

"I, James Taylor, of the county of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay Robert Patton, his heirs or assigns, of the town of Fredericksburg, and State of Virginia, the sum of $2,500, in cur-

rent money, on the 30th January, 1820, as witness my hand and seal, this 1st day of July, 1818.

JAMES TAYLOR. [SEAL.]"

On which there was the following assignment, to wit:—

Assignment.

"For value received, I assign the within bond to Theo. F. Talbott. ROBERT PATTON,

By H. M. Patton, his Att'y in fact.

"July 1st, 1819."

In May, 1819, Hugh M. Patton, the son and agent of Robert Patton, went to Kentucky, and there executed the assignment above mentioned to Talbott, as security for a debt due by Robert Patton, and for the collection of which Talbott was the attorney.

On the 23d of October, 1819, Taylor addressed to Patton the following letter:—

"*Newport, October 23d*, 1819.

"Sir,—At the time you forwarded me the deed for the land I bought of you in the county of Hopkins, patented to Thos. Gaskins, you sent me nothing to show how the title had passed to you. The land is listed on the auditor's books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you. When your son, Hugh M. Patton, your agent, was here, I inquired of him how you derived your title from Southcombe, and whether he had a regular conveyance from Gaskins. He told me that you had some kind of transfer from Southcombe for all his debts, lands, &c., but did not seem to know much about it, but promised me, immediately on his getting home, to inform you of my uneasiness and doubts whether the chain of title was perfect, and to notify me, and indeed to request of you to send me a copy of the different conveyances, or, if they were in this county, to inform me where they could be found. I have not *had a line [*136 from either of you since his return. I also consider myself very badly treated on another score. Your son had drawn a bill for $300, in favor of Talbott, of Lexington, on which he procured Mr. Talbott to be indorser; and, to indemnify him for doing so, he had lodged with him my bond to you for the first payment of the said land. Your son wished to get the bond released, and requested of me to give Mr. Talbott a

guarantee that the bill should be duly honored. This I did not hesitate to do. A few weeks ago I received a notification from the F. and M. Bank of Lexington, that the bill, although accepted by you, had been returned to the bank protested for non-payment; and I am called on by Mr. Talbott to take up the bill, and relieve him. I made every exertion in my power, when your son was here, to aid him in discharging a debt due here, which was in the hands of Mr. Talbott for collection, and was largely in advance for your taxes in this State and Ohio. The times, as to a good circulating medium, are truly embarrassing; but, had I been sure the title to the land sold me had been secure, I could have made sales to have met the payments, or nearly so; but I have been deterred from selling one acre, although offered the specie funds for a considerable purchase. Taking the whole transaction together, I must confess it is not such as I expected from Mr. Robert Patton of Fredericksburg. If there had been any little defect in the title to this land, which can be removed, and I had been notified of it and had it explained, I should not have been disposed to throw difficulties in the way, if there was a prospect to have any difficulty removed. When I go up, I shall have the records examined, and, if no chain of title can be found, I shall refuse to pay any more money till these difficulties are removed. I am sure you cannot think I am acting incorrectly in the course I am about to pursue. I am, Sir, your obedient servant, JAMES TAYLOR.

"ROBERT PATTON, ESQ."

On the 29th of February, 1820, Taylor addressed to Patton the following letter:—

"*Washington City, February* 29, 1820.

"ROBERT PATTON, ESQ.:—

"Sir,—I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land sold me by you, lying in Hopkins county, on the waters of Pogue's Creek, and which I understood you purchased of Thos. Southcombe, to which letter I am without an answer, and at which I confess I am much surprised. *137] I *examined the records at Frankfort, Ky., and it appears to me the conveyances are regular down to Southcombe; and, if you have a proper conveyance from him (Southcombe), all will be right, I think. I assure you I wish you and myself to arrange our business in the most amicable manner;

but you must be sensible into what difficulties I was thrown by not receiving the wished-for information, which was promised me by your son and agent, Hugh M. Patton, Esq., and then requested of you in my letter aforesaid, addressed to you specially on the subject, and particularly when I was compelled to take up your said son's bill for 300 and odd dollars, which I had, at the request of your said son, guaranteed should be paid by you, which you failed to do, and which I had to pay, to exonerate Theo. F. Talbott, in the F. and M. Bank of Lexington. The true state of this business I did not understand till after I had paid the bill, and I do not think said Talbott treated either yourself or myself with fairness; as he afterwards informed me he was authorized to redraw, but which he told me he had no idea of doing, to make himself responsible. Under all these embarrassments, I informed you I could not think of selling the land, until I was assured the legal title was in you before you sold to me. Will you be good enough to give my agent, Philip H. Jones, the necessary information, and, if you have them, the proper conveyance from Thos. Southcombe to you for the said tract of land; and, if not, to send me the document, or an authenticated copy of it, under which you claim the said tract of land. I am, very respectfully, Sir, your obedient servant,

JAMES TAYLOR."

On the 20th of June, 1820, Patton addressed the following letter to Taylor, which closed the correspondence:—

"*Fredericksburg, 20th June*, 1820.

"GEN. JAMES TAYLOR:—

"Dear Sir,—Hearing of your being in Washington in the spring, and calculating on a certainty of seeing you in this place, I was greatly disappointed at not having had some conversation with you during your stay, or previous to your departure from the city. By a letter just received from Mr. Talbott, covering a duplicate of one of yours to him of the 1st instant, wherein you say you will resist the payment of the bonds assigned Talbott by my son, when in Kentucky. This information has surprised and astonished me much. And surely, my dear Sir, you will not persist in this course, but, on mature consideration, pay the amount. When I sold you these 2,000 acres of land, Southcombe had long been dead; hence, as his agent, which you know I was, I could not make *a deed as such, but I did what you required. I made you a deed in my own name, with a general warranty, and no objection was made to this conveyance until [*138

the money was required. I sent you the original patents by Murdock Cooper, of your State, and I now subjoin a short history of this land. Your 2,000 acres, together with 1,500 more, were granted Col. Gaskins for military services, by him sold to William Forbes, by Forbes sold to Robert Campbell, of Richmond (once Hicks & Campbell), and by Robert Campbell and Ann, his wife, conveyed to Thomas Southcombe; which last deed is in my possession. All Southcombe's matters have been settled long ago, when this land was rated at $2, and paid for by me. And there is not a human being has a shadow of claim to this land but myself; and I have secured it to you by my conveyance. We have long been acquainted; we have long been friends. You have acted as my agent much to my satisfaction; and I ever reposed the fullest confidence in your honor and integrity. Under these circumstances, it would give me great pain if any misunderstanding should arise between us; and I cannot help thinking that, on due consideration, you will change your course, and pay the bonds assigned Talbott, which was done under very peculiar circumstances, and may have placed that gentleman in a very disagreeable situation respecting them. I am, dear Sir, your most obedient servant,

ROBERT PATTON."

On the 7th of July, 1820, Patton brought a suit against Taylor upon the bonds, in the Circuit Court of the United States for Kentucky, and at November term, 1820, obtained judgment by default.

At the same term, viz. November, 1820, Taylor filed his bill on the equity side of the court, reciting the purchase and continuing thus:—

"And at the time of the purchase aforesaid, and the execution of the said promissory notes, your orator entertained no doubt that the said Patton had a good title to the said land, and was enabled to convey the same to your orator; but now, so it is, may it please your honors, your orator has since discovered that the said Patton has no title for the said land from the said Southcombe, who is dead, and whose heirs are unknown to your orator. That the said Patton has nevertheless commenced actions on the said notes, on the common law side of this court. And your orator, being unable to make defence at law, the said Patton has recovered judgments on the said notes. Your orator annexes hereto, as a part of this bill, a letter from the said Patton, acknowledging
*139] his defective title to *the said land. That your orator has already made sundry payments on account of said

notes. And he apprehends that the said Patton will proceed to enforce payment of the residue, unless prevented by the interposition of this honorable court, which would be contrary to equity. In tender consideration whereof," &c., &c.

The bill then prayed for an injunction, which was granted.

In December, 1822, Patton filed his answer, admitting he had no legal title to the land, but insisting that he had bought it from Southcombe, and paid him for it on a final settlement of their affairs; that he had a power of attorney from Southcombe to sell it, which he did not act upon, owing to Southcombe's death; that he took possession of the land more than twenty years past, paid the taxes regularly, till he sold to Taylor, who entered and has held the possession ever since, and has sold part of the land; that Taylor was for years his agent to pay taxes on his lands in Kentucky, knew his titles generally, and particularly the defect of the title to this land, and bought relying upon his warranty; and that the possession under him prevented any reasonable apprehension from adverse claims. The answer further alleged, that, having received a payment of part of the first note on the 1st of July, 1819, the defendant thereupon, with the consent and in the presence of Taylor, assigned the notes to T. F. Talbott, to be applied in payment of a debt held by Witherspoon, and relies that the assignment prevents a cancelment of the notes.

At the May term, 1823, Taylor filed an amended bill, charging that the purchase was by letter; that Patton had become insolvent, having been at the time of sale a man of wealth; and exhibiting copies of three letters addressed by him to Patton of the 30th January, 1818, 23d October, 1819, and 29th February, 1820, and calling upon Patton to produce the originals or to admit the copies to be correct, and to show what evidence he had of a conveyance from Southcombe.

Robert Patton having died, Taylor, in November, 1829, filed a bill of revivor against Hugh M. Patton and others, his children and heirs at law, alleging that their ancestor died insolvent and intestate, and that no administration had been granted upon his estate.

The heirs of Robert Patton answered in July, 1844, and stated that they knew nothing of the contract between Taylor and their father; and that they adopted the answer of the latter. Hugh M. Patton stated, that, as the agent of his father, he went to Kentucky to pay off a decree, which had been obtained by Bledsoe's heirs, and assigned to Talbott, an attorney at law, in satisfaction of a debt to Witherspoon and Muirhead; *that he received from Taylor $600 on the first note, and then drew upon him, in favor of Tal- [*140

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bott, a draft, which he would not accept; and that he afterwards assigned the notes to Talbott, without having heard of any objection by Taylor to the title of the land. And in conclusion, the heirs all say that they cannot exhibit the originals of the letters shown by Taylor; nor have they any testimony, written or other, to show in what manner their father derived his title from Southcombe, other than he states in his answer.

In November, 1844, Hugh M. Patton appeared in the suit as administrator of his father, and adopted the answer already filed as his response in that character.

In May, 1845, the cause came on for hearing, a general replication having been filed.

On the opening of the cause, the complainant moved the court to reject and suppress the deposition of Theodore F. Talbott, taken and filed on the part of the defendants, and when it was offered on their part for proof, objected to its being read, on the ground that the witness was, when he deposed, interested in the event of the suit against him, the complainant, and with the defendants; and, for proof of his ground of objection, relied on the matter stated by the witness himself, in his deposition, and read the bond of the witness, as the surety of the defendants' intestate and ancestor, for costs, in his action at law against the complainant, wherein the judgment herein enjoined was recovered by default; and also read the assignment to the witness of one of the promissory notes of the complainant, the one payable on the 30th of January, 1820, on which the judgment enjoined was rendered in these words:—

"For value received, I assign the within note to Theodore F. Talbott. ROBERT PATTON,

By Hugh M. Patton, his attorney in fact.

"July 1st, 1819."

But the decision of the matter not having been insisted on, it was reserved for discussion, with the merits of the cause. Whereupon, the complainant read the depositions of Matthew T. Scott, Patterson Rayne, and James E. Davis, for proof that the witness was not credible, in case of the decision of the court that he is competent to testify. Whereupon the cause progressed, and this matter having been therein fully discussed, and the court now sufficiently advised thereof, it seems to the court that the deposition of Talbott, on the grounds of objections by the complainant, and because the matters stated as facts by the witness, neither of themselves,

nor in connection *with the other proofs, are in any way material in the cause, ought to be rejected and disregarded. But in order that, on any revision of the decree which shall be rendered, the defendants may have the benefit of the matters stated in the deposition, if worth to them any thing, and the witness is competent, whilst the complainant has the benefit of his objections to the competency of the witness, or of his proofs to establish that he is not credible, the depositions are all allowed and read, subject to the above objections, and so retained in the record, to be respectively good for what they are worth, or held for naught, according to the law of the case. [*141

On the 13th of May, 1845, the Circuit Court decreed a perpetual injunction against Patton, rescinded the sale and conveyance of the land, and gave directions for placing the parties in the condition they were in at the time of the contract.

From this decree the heirs of Patton appealed to this court.

The cause was argued by *Mr. A. H. Lawrence* and *C. S. Morehead* with whom was *Mr. Badger*, for the appellants, and by *Mr. Loughborough* and *Mr. Underwood*, with whom was *Mr Ewing*, for the appellees.

The argument on the part of the appellants was as follows:—

This is a bill for the rescission of an executed contract for the sale of land, on the ground of defect of title and the insolvency of the vendor. No mistake, no fraud, no misrepresentation being set forth as the grounds of equitable interference; but the facts that the complainant had received a defective title with warranty, not knowing of the defect, and that the warrantor had since become insolvent, are relied on as the reasons for the interposition of a court of equity.

I. The first position which the counsel for the plaintiffs in error take is, that there are not set forth in the original and amended bill sufficient legal grounds to rescind an executed contract; and that, if every allegation therein had been admitted by the defendant, the court could not properly have decreed according to the prayer of the complainant.

II. The second position is, that the important allegations in the bill, though they should in themselves be deemed sufficient in law, have neither been admitted nor sustained by proof.

The first proposition, then, is, that there are not sufficient

grounds set forth in the bill and its amendment for the rescission of an executed contract, even if all the allegations had been admitted in the answer.

What are those allegations? Why, that the complainant, Taylor, purchased from Patton, the defendant, 2,000 acres of *land for $5,000, for which he gave two several promissory notes. That Patton executed a conveyance to complainant for said land, with a covenant of general warranty. That at the time of said purchase, complainant "entertained no doubt that the said Patton had a good title to the said land." That complainant has since discovered that the said Patton has no title to the said land, and that defendant has nevertheless commenced actions on the said notes; and that, at the time of said purchase, defendant was supposed to be a man of opulence, but has since become insolvent. This embraces every material averment of the bill and amendment. A purchase, conveyance with general warranty, defect of title, ignorance on the part of the vendee of such defect, and the insolvency of the vendor, compose the gravamen of the complainant's allegations. There is no charge, either technically or substantially, of fraud, artifice, misrepresentation, or circumvention of any sort, actual or constructive.

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In discussing the legal sufficiency of this bill, we leave out of view all of the cases cited in the printed brief on the other side, in which misrepresentation, or fraudulent concealment, or fraud of any kind, formed an element. For the present we take the bill as it is.

The decisions (and we quote, more especially, those in Kentucky) may be reduced to the following heads, as to the rescission of contracts in the absence of fraud:—

1st. Where the contract is executory, the vendee may, under circumstances, obtain a rescission, if the vendor has no title. *Miller* v. *Long*, 3 A. K. Marsh. (Ky.), 326; *Cummins* v. *Boyle*, 1 J. J. Marsh. (Ky.), 481; *Gale* v. *Conn*, 3 Id., 540; *Payne* v. *Cabell*, 7 Monr. (Ky.), 202; *Waggener* v. *Waggener*, 3 Id., 556.

2d. Where the contract is executed by conveyance, with warranty of title, there can be no rescission in any case that has not been tainted by fraud. *Simpson* v. *Hawkins*, 1 Dana (Ky.), 305; 1 J. J. Marsh., 481; *Gale* v. *Conn*, 3 Id., 540; *Wiley* v. *Fitzpatrick*, 3 Id., 583; *Campbell* v. *Whittingham*, 5 Id., 100; 7 Monr., 202; *Thompson* v. *Jackson*, 3 Rand. (Va.), 504.

3d. There is no relief in equity, by injunction or otherwise, where the contract has been executed by conveyance

with warranty, and the vendee let into possession, unless the warranty has been broken, and an eviction taken place. *Simpson* v. *Hawkins*, 1 Dana (Ky.), 305, 328; *Rawlins* v. *Timberlake*, 6 Monr. (Ky.), 232; *Taylor* v. *Lyon*, 2 Dana, 278; *Luckett* v. *Triplett's Adm'r*, 2 B. Monr., 40; *Bumpus* v. *Platner*, 1 Johns. (N. Y.) Ch., 218; *Abbot* v. *Allen*, 2 Id., 523; *Edwards* v. *Morris*, 1 Ohio, 532.

*4th. There may be relief in equity of some sort, as [*143
by arresting the payment of the purchase-money, or a part thereof, in case of eviction and the insolvency of the warrantor, or the appropriation of the purchase-money to remove an incumbrance, where the warrantor is insolvent and unable to remove it, but not a rescission of the contract. *Morrison's Adm'r* v. *Beckwith*, 4 Monr. (Ky.), 75; *Rawlins* v. *Timberlake*, 6 Id., 232; *Simpson* v. *Hawkins*, 1 Dana (Ky.), 305; 2 Id., 278, 279; 2 B. Monr. (Ky.), 40.

5th. Possession taken generally amounts to a waiver of the ordinary equitable right of objection to the title. *Calcraft* v. *Roebuck*, 1 Ves., 226; *Burrough* v. *Oakley*, 3 Swanst., 168; *Fleetwood* v. *Green*, 15 Ves., 594; *Margravine* v. *Noel*, 1 Mad., 316; *Burnell* v. *Brown*, 1 Jac. & W., 173; *Fluyder* v. *Cocker*, 12 Ves., 26.

II. But suppose we are wrong in this view of the case, still it is contended that the essential allegations in the bill have neither been admitted nor proved; or, in other words, that, upon the pleadings and proof, the complainant was not entitled to the relief sought.

A preliminary inquiry of importance arises as to the admissibility and effect of the letters contained in the record.

The only letters alleged to have passed between Patton and Taylor, which have been so proved as to make them legal evidence against the defendant, are those marked A and B, on pages 32 and 33 of the record. The letter in Patton's name, which is made an exhibit in the case, and is found on page 4 of the record, is not proved to have been written by Patton; and the letters from Taylor, alleged copies of which are filed as exhibits with the amended bill, and are found on pages 8, 9, 10, and 11 of the record, are not proved either to have been written or received. They are, consequently, not evidence in the case. They are not admitted in the answer to the amended bill, and are consequently denied, and are no proof against the defendant, though (being allegations of the complainant) they are evidence in his favor. 2 Dan. Ch. Pr., 974–976; *Young* v. *Grundy*, 6 Cranch, 51.

If we are right in this, then the complainant's case is

stripped of every vestige of support from evidence as to the essential allegations of the bill.

But we go further, and assert, that if these letters were all proved, as alleged, the case of the complainant would not be materially changed.

How would the case then stand upon the pleadings and proof? The vital allegation in the bill is, that, at the time of the purchase, complainant "entertained no doubt that Pat-
*144] ton *had a good title to said land," but has since discovered that he had none, &c. (Record, p. 3.)

The answer (p. 6) denies the allegation of ignorance of the defect on the part of the complainant, and avers, on the contrary, that he was his (Patton's) agent for many years; well knew the nature of his titles in general, and well knew the title to these 2,000 acres in particular; and was well apprised of the defective link in the chain of title thereto; and accepted a deed with general warranty, relying on the warranty, &c.

Here, then, the parties are at issue. The complainant alleges that he was ignorant of any defect in the defendant's title, and the defendant positively denies that allegation. Has the complainant proved it, even admitting all the letters in the record to be properly in the case? We think that not only has he failed to prove the allegation, but that the evidence in the case fully sustains the denial.

There is not one scintilla of direct evidence that the complainant made this purchase in ignorance of the title. And the only indirect or circumstantial evidence of that fact is, the general presumption that a man would not buy a defective title, knowing it to be so, and the literal construction of a letter of the 13th July, 1818. (Record, p. 32.)

That letter is not (like the others) an exhibit in the case, but is introduced on proof of handwriting. It is relied on in the brief on the other side as the main prop of the complainant's case. An interpretation is given to it entirely different from that which we shall hereafter show properly belongs to it; but take it as the other side understand it, and does it support the allegation in the bill, that Taylor was ignorant of the state of Patton's title? What is their interpretation of it? Why, they make it amount to a misrepresentation by Patton to Taylor respecting the title; they make it amount to an assertion that he (Patton) had a conveyance of the land to himself. Now, suppose the letter does amount to a misrepresentation of the title (which we deny), does that prove Taylor's ignorance of the real state of the title at the time of the purchase? We think not, for two reasons:—

1st. That there is no logical or legal connection between the falsehood of one party and the belief of the other party in that falsehood. It is a *non sequitur*, as well in law as in morals, that a man must be ignorant of the truth because another man has uttered an untruth in his presence.

2d. Because this letter was written six months after the time when the bargain was concluded by the acceptance of Patton's previous offer.

The amended bill alleges (Record, p. 8) that the complainant *agreed to the purchase by a letter dated 30th January, 1818, and exhibits a copy of the letter; and [*145 yet the brief on the other side asserts that it was the letter of the 13th of July, 1818, which induced Taylor to make the purchase, which Taylor himself says he had made by letter the January previous, and produces the letter to prove it.

It is manifest, then, that the complainant has utterly failed to prove the most important allegation in his bill.

Having thus shown that the complainant's case, as set forth in his bill, is not sufficient in law for the rescission of an executed contract, and that, if it were, it is not supported by requisite proof, we would now ask the attention of the court to a position taken by the other side, in the printed brief, though not disclosed by the pleadings.

It is, that the proof presents a clear case of actual fraud, such as courts of equity have always recognized as sufficient in itself for the setting aside of any contract.

To this view of the case we have several answers, either of which in itself would be sufficient:—

1st. Fraud is not alleged in the bill, either formally or in substance; and, consequently, if it should be proved, cannot be made the ground of a decree. It should have been put in issue by the pleadings. *Vattier* v. *Hinde*, 7 Pet., 282; *Boone* v. *Chiles*, 10 Pet., 177; *Bein* v. *Heath*, 6 How., 241; also, 3 Rand. (Va.), 507; 5 Johns. (N. Y.) Ch., 82, 83; 11 Ves., 239.

2d. There is nothing proved which is a sufficient ground for the cancelling of an executed contract, even admitting all the letters to be properly in the case.

We take the law as it is laid down by this court in *Smith* v. *Richards*, 3 Pet., 36, adopting the views of Justice Story in 1 Eq. Jur., §§ 200, 202. That a misrepresentation, in order to constitute a fraud relievable in equity, must be of something material, constituting an inducement or motive to the act or omission of the other, and by which he is actually misled to his injury; and it must be of something in which the other party places a known trust and confidence in the

other, and not equally open to both parties for examination and inquiry.

Let us apply this doctrine to the facts in this case.

The only representation of any sort, as to title on the part of Patton, to be found in the whole record, is the letter of July 13th, 1818.

In this letter Patton says:—"The land patents are in the name of Thos. Gaskins, for whose services the land was rendered, were by him to Wm. Forbes, and by him to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty, as soon as you reply to this letter."

*146] *On this letter *Mr. Loughborough* relies to make out his proof of fraud; and in it (if anywhere) resides all the misrepresentation to be found in the case.

With regard to this letter, we would first remark, that the character and relation of the parties, and the circumstances of the case, go strongly to show that it never was intended by the writer, and was never understood by him to whom it was written, to convey the idea which a casual reading of it might convey to a stranger. There were relations between these parties which rendered an indistinct allusion as intelligible as a labored explanation. Taylor was the agent of Patton, who, in regard to these lands, was himself the agent of Southcombe, in whose name these lands had for years stood and been taxed, and in whose name Taylor himself had for years paid those taxes. Patton knew that Taylor was aware of Southcombe's title, and yet he sets down and writes to Taylor a letter, which, if it meant what the other side suppose, he well knew Taylor would at once perceive to be false. If the expression "to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty," means that Hicks & Campbell had conveyed this land to him in his own name, why, it was not only a falsehood, but the most idle of all falsehoods, because told to a man who he knew was perfectly aware of the intermediate title of Southcombe. The parties to this transaction were no higglers for a bargain; they were men of character and standing; they were men of sense. The construction, then, which would make a single expression in a hasty letter the ground of so serious an accusation against such a person should be an unavoidable construction. Such is not the case here. There is a plain and fair construction of this expression, which is consistent with the truth and the good faith of Patton. It is the literal meaning of the language. He did receive a deed from Hicks & Campbell, not in his own name, but in the name of his principal, Southcombe; and he means exactly what he means

in the letter found on the 4th page of the record, where he says, "and by Robert Campbell and Anne, his wife, conveyed to Thomas Southcombe; which last deed is in my possession."

If, then, it had been his intention to deceive Taylor, would he not have said that he had a deed from Southcombe, rather than from Hicks & Campbell? How, then, was the matter to be explained? Why, Patton was Southcombe's agent, and Taylor knew it, with a full power of attorney to sell lands. As such agent, he had received a deed for Southcombe; and, as such agent, he then had the power to give a deed. Had Southcombe lived, there would never have been any difficulty. But Southcombe having died, and of course the power of *attorney having died with him, Patton, [*147 who had in the mean time bought the lands, and acquired an equitable title thereto, had not procured a legal title.

There can be no doubt that this is the true explanation, from the character of the men and their relation to each other; and there can be no doubt that it was so understood by them at the time, and afterwards, inasmuch as Taylor never once alludes to any misrepresentation in this letter; never speaks of any inconsistency between the letter and Patton's statement of the chain of title in his letter of June 20th, 1820; takes no notice of any misrepresentation, either in his original or amended bill, does not even make this letter an exhibit in the case; and always speaks afterwards of Southcombe's title as a matter well known to him. We think, therefore, that we are justified in asserting that the construction now put by counsel upon that letter was not that which the parties put upon it.

But if an unfavorable construction of this letter is insisted on (as it doubtless will be), then we say that Taylor was not misled or deceived by it. It stated what he knew to be false. It gave a chain of title without embracing Southcombe's title at all, and yet Taylor had the best reason in the world for knowing that Southcombe had until recently, and for years, been the owner of the land in controversy.

Taylor, in his letter dated October 23d, 1819, says,—"The land is listed on the auditor's books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you."

Also, in his letter of February 29th, 1820, he says,—"I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land

sold me by you, &c., and which I understood you purchased of Thomas Southcombe," &c.

And the deposition of Winston says that, in 1815, "I was requested to visit said lands by General James Taylor, who acted as agent for Robert Patton, of Fredericksburg, Virginia, who was agent for Thomas Southcombe."

Taylor then knew that Patton had not, in his own name, received a deed from Hicks & Campbell, but that, if he had any valid conveyance at all, it must have been from Southcombe.

And further, if the letter of July 13th, 1818, contained a downright misrepresentation, still it did not lead to, nor form any inducement to, the contract sought to be cancelled.

We have already referred to the allegation in the amended bill, commencing as follows:—"Your orator further shows, that the contract for the purchase of the land from the *defendant was made between the parties by letters; your orator agreeing to the purchase by a letter, under date of January 30th, 1818, addressed to the defendant at Fredericksburg." Here, then, the complainant himself avers that he had agreed to the contract six months prior to this letter of July 13th, 1818. Admitting, then, that this letter of July 13th contained a downright falsehood, and admitting that at the time Taylor believed it, still it did not lead to the contract; it did not form an inducement on Taylor's part to that contract, and can therefore have no weight with the court upon the question of rescinding that contract.

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But it is further maintained, that Taylor has an indefeasible title, by twenty years' adverse possession.

Taylor received legal possession of the land with his deed, which bears date September 3d, 1818, and has never been disturbed in his possession up to the day of trial.

In an analogous case, *Jarboe* v. *McAfee's Heirs*, 7 B. Monr. (Ky.), 282, the following language is used:—"In the duration of the possession, it ought to be brought up to the time of trial, and not to be made stop at the commencement of the suit." The possession of the vendee up to that period inures to the benefit of, and goes to strengthen, his vendor's title. See *Voorhies* v. *White's Heirs*, 2 A. K. Marsh. (Ky.), 28; *Coussmaker* v. *Sewall*, 2 Sug. App., 336.

The sale of a portion of the land, for the direct tax, and the marshal's deed to McLean, can present no difficulty in the case. It shows on its face that the land was sold as the property of Gaskins, the patentee, when all parties agree, and the record shows, that it was then the property of South-

combe, entered in his name, and the taxes paid for him by Taylor himself.

If this were not the case, it is not shown that the requisitions of the law were complied with by the marshal, and the law is well settled that no presumption is indulged in favor of such a deed. See *Taylor's Heirs* v. *Whiting*, 2 B. Monr. (Ky.), 269–272; 9 Cranch, 69; 3 Cond. Rep., 271–274; Id., 395.

In the case of lands sold for the non-payment of taxes, the marshal's deed is not even *primâ facie* evidence that the prerequisites of the law have been complied with; but the party claiming under it must show positively that they have been complied with. *Williams* v. *Peyton*, 4 Wheat., 77.

The case thus far has been discussed without reference to the assignment of the notes upon which the judgment enjoined was obtained, or to the controverted deposition of Talbott.

The deposition of Talbott states that the notes were transferred to him for the benefit of Witherspoon and Muirhead, and that Taylor had notice of and assented to the assignment.

*Is Talbott a competent witness? [*149

1st. He held the notes of Taylor as a mere trustee, to be applied, when collected, to the extinguishment of a debt due Witherspoon and Muirhead. They were assigned to him for that purpose only. That a trustee is a competent witness, see 1 Stark Ev., 168; 6 Binn. (Pa.), 481; 1 Rand. (Va.), 219; 2 Id., 563; Doug., 139; 4 Burr., 2254; 1 P. Wms., 287, 3 Atk, 604; 13 Mass., 61.

2d. Without any contract whatever, he states that he expected to charge five per cent. commission whenever he should collect the debt of his clients. This has never been held a disqualification of itself alone. An agreement for a sum contingent on success might perhaps affect his competency.

3d. Talbott executed a bond, as surety for Patton, to pay the costs in the action at law against Taylor. The condition of that bond was, that it was to be void if Patton or Talbott should pay "all cost, that may be incurred in said suit, or with which he may become legally chargeable."

The common law suit having been decided in favor of Patton, Talbott did not become legally chargeable with any costs to Taylor; and the result of the present suit cannot, in any manner, change his liability. The costs against Taylor of the action at law may be perpetually enjoined, yet Talbott would be no further bound than if the injunction were dissolved. In either case, his liability on his bond would be precisely the

same. It is not perceived, therefore, how his having executed this bond can affect his competency as a witness.

But Talbott's credibility has been assailed by depositions of three witnesses.

Objection might be taken to the kind of evidence given to impeach the character of Talbott. But, allowing its admissibility for that purpose, we say that the testimony of Talbott is corroborated in its material statements. The answer of Hugh M. Patton, so far as it goes, corroborates Talbott's deposition.

Talbott's statement, also, that a receipt for $ 1,500 was written on the wrong note, which note was afterwards destroyed, and a new one written and dated on that day, is corroborated by the fact, that one of the notes in the record is dated as he says.

The case, as the counsel for the appellants conceive, stands thus. The complainant in the court below files a bill in which he alleges that he had purchased from the defendant 2,000 acres of land, and that he had received a deed, with a warranty, supposing the title of his vendor to be good. He alleges the subsequent insolvency of the vendor, the failure of the title, and prays that the contract may be annulled

*150] The defendant *denies the allegation of the complainant's ignorance of the state of the title, which puts the complainant to the proof of the fact. For proof he offers copies of letters from himself to the defendant, which are not admitted by the answer, nor shown to have been ever received, and are therefore not evidence in the case. He also offers, upon proof of handwriting, a letter written and dated six months after the time when he himself alleges the contract to have been concluded, in proof of his ignorance of the state of the title at the conclusion of the contract, and of fraudulent misrepresentation on the part of the defendant. This constitutes the substance of the complainant's case.

For the appellants it is insisted, that whatever equity there is in the bill is sworn away by the answer; that the evidence offered, so far as it is admissible, is not pertinent to the point in issue, namely, the ignorance of complainant of the defect in title, or, if pertinent, does not establish that fact; and that as to the alleged fraudulent misrepresentation, (even if it amounted to such,) inasmuch as it was not put in issue by the pleadings, did not mislead the complainant to his injury, was long subsequent to the date of the contract, and therefore formed no inducement to it, and was upon a subject equally open to both parties, it was consequently not suffi-

cient in law or equity to establish that fraud upon which an executed contract will be rescinded.

The argument on the part of the appellees was as follows:—

I. Before noticing the principal questions in the cause, the counsel for Taylor will ask the attention of the court to the objections, sustained by the Circuit Court, to the competency of Talbott as a witness.

1. His deposition states, that, as attorney for Witherspoon and Muirhead, he had obtained judgments against West, who assigned to him eight tenths of a decree of Bledsoe's heirs against Patton, which he took as a security, and for the use of Witherspoon and Muirhead. That H. M. Patton, on his visit to Kentucky, in 1819, drew bills on his father, by which the means were raised to obtain the remaining two tenths of the decree; and assigned to him, and placed in his hands, the two notes of Taylor, to be collected and applied in payment of the decree.

Talbott, then, was the agent and attorney of Witherspoon and Muirhead for the collection of their claim against Patton on the decree, and he was the trustee of Patton to collect the amount due from Taylor, and apply it in discharge of the decree. He says the notes were assigned to him. They were assignable by the law of Kentucky, and the assignee has the *legal right of action. The assignment of one of the notes appears in the record. [*151

Assuming his statement to be true, had he not such an interest in the subject as disqualified him? He holds and legally owns the debt which Taylor seeks to enjoin. He should have sued at law in his own name as assignee; and his use of the name of Patton as plaintiff was in some sense a fraud, to give the Circuit Court jurisdiction, or perhaps designed to enable him to be a witness. Had Taylor appeared in the action at law, he might have successfully pleaded the assignment to Talbott in bar. *Neufong* v. *Wells*, Hard. (Ky.), 562.

May an assignee, by suing in the name of his assignor, make himself a competent witness? That he cannot was decided in *Gallagher* v. *Milligan*, 3 Pa., 178; *McKinley* v. *McGregor*, 3 Whart. (Pa.), 399. Talbott, the assignee, suing in the name of Patton, might have been attached for the costs. *Ontario Bank* v. *Worthington*, 12 Wend. (N. Y.), 597.

2. But Talbott was not a trustee merely. He had a material interest to be promoted by the success of the party in

whose behalf he testified. He says Patton and West are insolvent. Then the debt due to Witherspoon and Muirhead can only be made out of Taylor. True, the witness says he has no interest in the suit or its event, other than the compensation he may be entitled to for his services; and that he has no conditional or contingent fee depending on the recovery. Yet, on cross-examination, it appears that, if he had received the money, he would have charged a commission on it of five per cent., and he yet expects to charge it when the money is collected. Such commission is not unreasonable; and doubtless, if Talbott had received the money, he would have been permitted to retain it. Neither West nor Patton himself could interpose between him and Taylor, or the marshal, and prevent his receiving the debt, nor would there be any necessity for a prior engagement to enable Talbott to retain the commission. Then does not the witness testify in the view that, if the party producing him succeeds, he will get a fund out of which to retain a commission, and that, if he fails, it will be lost? A witness so situated was held incompetent, in *Maryland* v. *Jefferson*, 2 Pick. (Mass.), 240; *New York State Co.* v. *Osgood*, 11 Mass., 60.

3. Talbott gave bond, as the surety of Patton, to pay the costs of the action at law against Taylor. He was thereby rendered incompetent in that case. *Chadwick* v. *Upton*, 3 Pick. (Mass.), 442; *Jones* v. *Savage*, 6 Wend. (N. Y.), 658; *Miller* v. *Henshaw*, 4 Dana (Ky.), 333; *Jack* v. *Carneal*, 2 A. K. Marsh. (Ky.), 518; *Brandigee* v. *Hale*, 13 Johns. (N. Y.), 125.

*152] *The ultimate liability for these costs depends upon the result of this suit. If Taylor fails, he will have to pay all the costs at law. If he succeeds, Talbott will have to pay all that portion of them provided for in the bond. He has therefore the same disqualifying interest in this cause that he would have had in the action at law. He will gain or lose by the direct operation of the decree.

II. But if Talbott can be heard as a witness, the attention of the court is asked to the depositions of Davis, Bayne, and Scott, which discredit him.

III. The equity of Taylor cannot be affected by a transfer made without his knowledge.

IV. But suppose Taylor was present at, or assented to, the assignment, is he thereby precluded from asserting his equity?

V. The copies of Patton's letters are evidence.

(The argument upon these preliminary points is omitted.)

VI. We will now proceed to the questions arising upon the merits.

In the first place, it will be observed that the treaty for the sale, and the sale itself, were wholly by letters between Taylor, at Newport, Kentucky, and Patton, in Fredericksburg, Virginia. That between these parties there existed friendship, and an honorable confidence, and that Taylor was the agent to pay taxes on Patton's lands in Kentucky.

The land which was the subject of the sale is in Hopkins county, Ky., 200 miles from Taylor's residence. Taylor had never seen it prior to the purchase, nor has he since, so far as appears in the case.

The sale was first proposed by Patton.

(The argument here reviewed the letters.)

The tenor of these letters leaves no room to doubt that Taylor was not hunting for objections to get clear of the contract, but the contrary; though he had lost sales by not getting the title, he still desired to complete the bargain, and to perform it on his part.

At last, on the 20th of June, 1820, Patton by letter confessed that he had no title, and falsified the representation in his letter of July 13th, 1818. He stated that Southcombe was the proprietor of the land by regular deeds from the grantee, that he was Southcombe's agent, and had a power of attorney to sell the land, which died with Southcombe, and that he had settled Southcombe's matters, and allowed him $2 per acre for the land.

The letter does not make a case upon which Patton could in equity obtain the title. It does not state, nor does it anywhere appear in the cause, that he had any writing from Southcombe, or that he had in fact paid him for the land. There is no proof on this point, neither has [*153 Patton or his heirs endeavoured to get the title from Southcombe.

VII. There is, then, in this case every fact necessary to entitle Taylor to the relief which the Circuit Court gave to him. He placed confidence in the statements of Patton. Patton knew that Taylor was about to purchase trusting to his assurance, and the most material point, of fact not opinion, inducing the purchase, the title of the vendor, was falsely represented by Patton. Taylor had no means of knowing the truth, and Patton knew he had not, and knew also that, if he had, the confidence reposed in him would prevent a pursuit of them. It does seem that if there can be such a misrepresentation as will avoid a sale of land, it is the one in this case, and, however honest in his intent Patton may have been, from the belief, (if he cherished it,) that the heirs of Southcombe would not claim the land, his representation to

Taylor that he had the title, being untrue, and necessarily known by him to be so, amounts to that actual fraud which all the authorities concur in stating to be sufficient to avoid the sale. 1 Story, Eq., §§ 200–202; *Neville* v. *Wilkinson*, 1 Bro. Ch., 546; *Fulton* v. *Roosevelt*, 5 Johns. (N. Y.) Ch., 174.

This court has rescinded sales of land made upon misrepresentation of title by the vendor. In *Boyce's Ex'or* v. *Grundy*, 3 Pet., 210, a sale of land was set aside, at the instance of the vendee, on the ground of misrepresentation of title and quality, leading to the purchase; and the court overruled the objection, too, that the powers of the Circuit Court sitting in chancery were, under the sixteenth section of the Judiciary Act, incompetent to afford relief to the vendee, after judgment at law against him for the purchase-money.

The case of the gold mine, *Smith* v. *Richards*, 13 Pet., 26, applies and enforces the principle, that a misrepresentation, whether fraudulent or by mistake, is a sufficient ground in equity to set aside any conveyance.

VIII. This is the case of a purchase by a vendee who confided in a material and fraudulent misrepresentation of his title by the vendor, and who did not discover the fraud until after the conveyance had been made, and after the vendor had become insolvent; and who, on these grounds, asks that he shall not be compelled to pay for what he has not obtained, and cannot obtain.

Shall he be told that he must rely solely on the insolvent vendor's warranty?

If the purchaser has dealt with his eyes open, and with a knowledge of the facts,—has obtained and yet peaceably enjoys *the possession,—he may have no right to anticipate his legal remedy upon the warranty to which he has fairly trusted. But it would be unjust to throw a party upon a warranty in a case where, from the fraud of the other party, he did not think he should ever have need to rest upon it. To hold him bound in such a case would be to make, not to enforce, a contract. The simple principle is, that the vendor shall not object to the claim of the vendee that which would not have existed but for his own fraud. Accordingly, it is held that, where there was fraud in the sale of land, the vendee may have relief in chancery, before eviction or disturbance. Butler's note (332) to Co. Litt., 384; *Edwards* v. *McLeay*, Coop. Cas., 308.

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In Kentucky it has always been held that a fraudulent misrepresentation or concealment by the vendor respecting his title will entitle the vendee to relief in chancery, though he has a warranty.

In *Breckinridge* v. *Moore*, 3 B. Monr. (Ky.), 635, the purchaser was relieved, on the ground of a misrepresentation by the vendor of his title. The rule laid down was, that the vendor was bound to disclose the defects in his title.

In the late case of *Vance* v. *House's Heirs*, 5 B. Monr. (Ky.), the settled doctrine of the court is stated to be, that the vendee in possession, and with a warranty, may have relief upon either of the grounds of fraud, insolvency, or non-residence of the vendor. No rescission was made in that case, because neither of these facts existed, and the vendee did not appear to be in any danger of losing the land.

So in *Simpson* v. *Hawkins*, 1 Dana (Ky.), 303, the court recognized the rule, that for fraud the vendee may claim a rescission. The majority of the court in that case refused to rescind, because there was no fraud; and the defect in the title was merely technical,—such as might never injure the vendee, and such as, from the facts of that case, he was presumed to have known.

In this case, Taylor did not live in the county in which the land was, nor had he ever been there. The taxes had been paid on the land at the seat of government, as Southcombe's. Patton assured him he had a chain of title and conveyances complete to himself. He had no opportunity of knowing that this was untrue. Patton knew this, and that as to the title Taylor would, as he did, repose upon his statements. Patton's title, if he had one, would not necessarily appear upon record, in the county in which the land was, even if Taylor had visited it. The record of a deed is not necessary to its operation; the title passes by the delivery of the instrument, though creditors and purchasers may assail it, if not recorded. All *that Patton said in his letter of July, 1818, to Taylor [*155
may have been true, and yet no traces of the deed to him have been found on record in the county; and so, on the other hand, if Taylor had searched the records and found no deed to Patton, it would not thence follow that the latter had stated an untruth. He was the agent of Patton, and between persons standing in the relation of principal and agent, the rules of equity require in their dealings the utmost degree of good faith. Story, Eq. Jur., 224, and the cases there cited. It is obvious from the correspondence, that Patton knew the full extent of the confidence which Taylor yielded to his assertions.

But Taylor agreed to take the deed with the chain of Patton's title. He expected both. The letters prove beyond doubt, that Taylor looked to receive the chain of title with the deed. It was not sent, nor was Taylor informed where

he could find it on record. But the deed which was sent contained a covenant that Patton would do any thing further necessary to confirm the land to Taylor,—that he would furnish the conveyances under which he held and sold. Taylor applied for these repeatedly by letters, and through H. M. Patton. They were never furnished, and neither Patton nor his heirs ever took any steps to get the title from the heirs of Southcombe.

But it would not be a sufficient answer, even if true in fact, that Taylor might, by inquiry, have discovered the misrepresentation. Equity will not tolerate a party to say to his vendee, "Though I have told you a falsehood as to the title, believing which, you bought the land, still you ought not to have believed me; you should have suspected, not confided." It would be a strange rule of equity, that would permit fraud to escape on such a ground. True it is said, in some cases, that the assertion of a falsehood as to the quality of a thing which is present at the sale, and which the vendee sees or may see is false, shall give him no claim. And this because the law justly supposes he trusted to his own senses rather than to the statements of the other. But the principle does not apply where the thing sold is at a distance, and much less does it apply to statements about title.

And a misrepresentation of the title, though it be on record, is a fraud that will entitle the vendee to a rescission, even if he has a warranty, and is in possession. *Young* v. *Hopkins*, 6 Monr. (Ky.), 23. In this case the court said,—"It is in effect assumed by the court below that, the title-deeds being matter of record, Young was bound to look into them, and must be presumed to have seen them, as he took a deed for the lot. If this is to excuse from the effect of false represen-
*156] tations with *regard to title, it would obviate the consequences of fraud in nearly all landed controversies, as all our titles are matters of record. Indeed, men prudent and cautious will examine them before they purchase, as the title papers are the safest guide. But we know that, in many cases, the credulous and confiding dealers do not do so, but act on seeing how the possession is held, and the representations of the vendor. If these representations are false, the maker of them is, in such case, responsible."

And in *Campbell* v. *Whittingham*, 2 J. J. Marsh. (Ky.), 100, the court said,—"Had the nature of Campbell's title to the lot purchased by Whittingham and Peters been fraudulently concealed, or had he made fraudulent representations on that subject, by which the purchasers were seduced into the contract, and induced to accept an insufficient title, it would

have presented a clear case for rescission, notwithstanding the title and the encumbrances on the lot might have been matters of record; for it does not present a satisfactory defence to an allegation of fraud in the sale of land as to the title, to show that the conveyance had been recorded, whereby the vendee might, with proper diligence, have discovered the defect complained of, and respecting which the fraud was practised." In this case, the vendee was in possession under a deed with covenants of seizin and of warranty, and the rescission was because of the failure of the vendor to disclose an encumbrance existing by matter of record, in the county in which the parties and the land were. These are the principles of the law applicable to sales of land, in the State from which this cause came.

The principle of equity is happily expressed by the late chief justice of this court, in the case of *Garnett* v. *Macon*, 2 Brock., 250, in these words:—"Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser in making a contract may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement."

IX. It is shown on all sides that Patton, who was esteemed wealthy when the sale was made, became hopelessly insolvent, and so died. This fact has always been held sufficient to enjoin the collection of the purchase-money where there is a defect of title, even in cases free from fraud. The purchaser who is in danger of losing his land shall not be thrown upon the warranty of an insolvent vendor. *Simpson* v. *Hawkins*, 1 *Dana (Ky.), 303. The attention of the court is asked to the remark upon this point of Judge Nicholas, at page 318. [*157

In *Morrison's Adm'r* v. *Beckwith*, 4 Monr. (Ky.), 73, the vendor's insolvency was made the ground of an injunction.

And where relief by injunction has been refused to the vendee (as in the cases in 7 Monr. (Ky.), 198; 3 J. J. Marsh. (Ky.), 584; 2 B. Monr. (Ky.), 40), it was upon the ground that insolvency was not proved as alleged, not in fact existing. In all these and other cases, the rule in case of insolvency was recognized.

(The rest of the argument is omitted.)

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States held in and for the District of Kentucky, by the district judge.

Taylor, the complainant below, filed a bill against Robert Patton, the intestate and ancestor of the defendants, praying relief against two judgments recovered against him at law, upon securities given for the purchase-money of two thousand acres of land situate in the State of Kentucky, and sold and conveyed by the latter to the former. The bill was filed at the November term, in the year 1820; and the suit has been pending ever since. The sale and conveyance of the land took place September 3d, 1818, the consideration being $5,000, payable one half on the 30th of January, 1819, and the other in one year thereafter. The deed contained covenants for further assurance, and of warranty, and the grantee entered into possession of the premises, and has held it ever since.

The only allegations in the bill upon which the complainant relied for staying the collection of the judgments, and setting aside the sale and conveyance, are, that the said Patton had no title to the land at the time of the purchase, nor since; and that he had become insolvent, and possessed no personal responsibility.

The defendant admits, in his answer, that he had no legal title, and that it was, at the time, in the heirs of one Thomas Southcombe, but insists that he had purchased the land of Southcombe, had paid for it, and had been in the peaceable possession of the same, and paid the taxes thereon, for more than twenty years, and until the time of the sale; and that the complainant well knew the nature and condition of the title at the time of the purchase, and the taking of the deed.

The answer also sets up an assignment of the securities taken for the purchase-money, from the defendant to Witherspoon and Muirhead, in payment of a decree in chancery which they held against him; that it was made in the presence, and with the knowledge and consent, of the complainant, and that *the suits were brought, and the judg- *158]
ments in question recovered, by them and for their benefit.

On the death of Robert Patton, the complainant revived the suit against his heirs and personal representatives, on the 13th of November, 1829. The answer to this bill, which relies mainly upon the facts set forth in the previous answer of Patton, was put in and filed in July, 1844.

The cause was heard on the pleadings and proofs on the 13th of May, 1845, and thereupon it was adjudged and decreed by the court, that the contract entered into between the complainant and Robert Patton, for the purchase and sale of the land for the sum of $5,000, as set forth in the bill and admitted in the answer, be rescinded and annulled; that the judgments recovered at law for the purchase-money be perpetually enjoined; and that the deed of the 3d of September, 1818, be cancelled and held for naught.

The decree then provides for the repayment by the heirs of Patton of such portions of the purchase-money as had been paid by Taylor, after deducting the rents and profits which he may have received from the premises, over and above expenditures for necessary repairs and improvements; and on such repayment, the possession is ordered to be delivered up to the heirs, and a reconveyance to be made by the complainant to them, with a covenant against his own acts affecting the title; and also providing that the heirs shall hold the lands in trust for the benefit of Witherspoon and Muirhead, the assignees and owners of the judgments at law.

The cause is then referred to the master, to take and state an account of the rents and profits, improvements, &c., upon the principles settled, and to report to the court.

There is some evidence in the case tending to prove that the defendant, Robert Patton, represented to the complainant during the negotiation between them for the sale and purchase of the lands in question, that he held at the time the legal title; and that the complainant had reason to believe that he would be invested with it by the conveyance of the 3d of September, 1818.

The circumstances, however, that Taylor was, at the time, and for several years before had been, the general agent of Patton in Kentucky to take charge of his lands in that State, including the premises in question, to pay the taxes, and negotiate sales to purchasers, lead to the conclusion, that he must himself have had some knowledge of the title, and that he was willing to risk it, on receiving a warranty deed from Patton, who was supposed to be a man of wealth. Where the truth of this matter lies, it is not material to inquire; for no such *question is made on the pleadings, or was [*159
involved at the hearing. It is not surprising, therefore, that the proofs in respect to it to be found on the record are vague and unsatisfactory; as, probably, the attention of neither party was particularly drawn to it. Indeed, it could not consistently have been, as the charge of fraud or misrep-

resentation is not to be found in the bill as originally drawn, nor in the amended bill filed some two years and a half afterwards. Nor is it made in the bill of revivor, which was filed as late as November, 1829.

The relief prayed for is put, both in the original and amended bills, entirely upon the defect of legal title in Patton at the time of the conveyance, and in connection with this, his subsequent insolvency; and unless this ground alone is sufficient to sustain it, the decree of the court below cannot be upheld. And that it is not, we need only refer to the authorities on the subject. *Bumpus* v. *Platner*, 1 Johns. (N.Y.) Ch., 213–218; *Abbot* v. *Allen*, 2 Id., 519, *Gouverneur* v. *Elmendorf*, 5 Id., 79; *Simpson* v. *Hawkins*, 1 Dana (Ky.), 305, 308, 312; *James* v. *McKernon*, 6 Johns. (N. Y.), 543.

These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase-money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed. That if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed. And further, that relief will not be afforded, even on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.[1]

It follows that the court below erred, and that the decree should be reversed, and the bill dismissed.

There is another point in the case in respect to which we think the court also erred, and which we will for a moment notice, namely, the rejection of the deposition of Talbott offered in evidence by the defendants below. The deposition tended to prove that the notes given for the purchase-money had been assigned and transferred by Patton to Witherspoon and Muirhead, his creditors, with the knowledge and assent of Taylor, in consideration of which the creditors agreed to postpone the payment of the demand against Patton. Talbott was rejected on the ground of interest, as it appeared upon the face of his own deposition,—1. as surety for Patton in the suit at law; and 2. as assignee of the notes for the benefit of Witherspoon and Muirhead.

In answer to the first ground, it is sufficient to say, that

[1] Followed. *Refield et al.* v. 8 Otto, 60. Cited. *Van Rensselaer v. Kearney*, 11 How., 322. *Woodfolk*, 22 How., 328; *Noonan* v. *Lee*, 2 Black. 508; *Peters* v. *Bowman*,

*judgments had been recovered by default in the suits at law in favor of Patton. And to the second, that, according to the deposition, Talbott had no interest whatever in the result of the suit. He held the notes as a naked trustee, the proceeds of which, when collected, were to be applied to the payment of the debt of Witherspoon and Muirhead, his clients. He had no charge upon the fund, by any agreement or understanding with Patton, or his clients, for costs or commissions, as attorney or otherwise, that would make him an interested witness. There was no foundation, therefore, for the exclusion of his evidence. But it is unnecessary to pursue this inquiry, as the ground already stated sufficiently disposes of the case. [*160

Decree below reversed, and bill dismissed, with costs.

ORDER.

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 Kentucky, and was argued by counsel; on consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of complainant, with costs.

10 How. 182
16 How. 481
30 Fed. Rep. 756

EDWARD P. FOURNIQUET AND HARRIET JANE FOURNIQUET, HIS WIFE, APPELLANTS, *v.* JOHN PERKINS.[1]

The jurisdiction of courts of probate in Louisiana is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over cases of alleged fraud or waste, or embezzlement of the estate.

The District Courts are courts of general civil jurisdiction.[2]

Hence, where a petition was filed in the Court of Probate against an administrator, praying that he might account and also be held liable for maladministration and spoliation, it was proper to transfer the case for trial to the District Court.

The judgment in the District Court, being generally for the defendant, must be supposed to cover the whole case, and not to have rested upon only a branch of it, viz., a release which was pleaded by the defendant.

[1] Further decisions, 14 How., 313; 16 Id., 82.

[2] See *White* v. *Cannon*, 6 Wall., 443–450; *Dow* v. *Johnson*, 10 Otto, 182.

Therefore, where a bill was filed in the Circuit Court by the same petitioners against the same defendant, it was correct for that court to consider the question as *res judicata*.

The Louisiana decisions upon the jurisdiction of the Probate and District Courts examined.

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

In the year 1818, Mary Bynum, the widow of Benjamin Bynum deceased, was living in the parish of Concordia, State of Louisiana, with four children, of whom Harriet, the wife of the appellant, was one.

*181] *In August, 1818, Mrs. Bynum intermarried with John Perkins, the present appellee.

In August, 1824, Mrs. Perkins died.

In March, 1827, Perkins filed two inventories and appraisements in the Parish Court; one, of the estate of Benjamin Bynum, deceased, amounting to $26,055, and the other of Mrs. Mary Perkins, deceased, amounting to $6,575. About the same time, Perkins was appointed administrator of the estate of Benjamin Bynum, and guardian of the infant children.

In May, 1827, he filed an account, showing an administration of the estate as far back as 1817. The account was filed by him as *curator ad bona* and tutor to the minor heirs.

In 1834, after the marriage of Harriet with Fourniquet (the present appellants), Perkins stated his account as guardian of Harriet Bynum separately, bringing her in debt to him $550.81, which sum Fourniquet paid by a check on the Planters' Bank. The following receipt was also subsequently given to Perkins by Fourniquet and wife:—

"Received, Natchez, May 27th, 1834, of John Perkins, in settlement of an account, debts due, and demands, whatsoever, to the present day, one hundred dollars in full; having, on a previous occasion, received from him, as guardian of my wife, Mrs. Harriet Fourniquet, late Miss Bynum, all the estate, portion, and share she inherited by the death of her late father, Benjamin Bynum, late of Concordia, Louisiana, deceased, or her mother, Mrs. Mary Perkins, of the county of Adams and State of Mississippi, and brothers, Benjamin S. Bynum, of the county of Claiborne, State last aforesaid, deceased, and do, by these presents, jointly with my said wife, release, and for ever discharge, the said Perkins, either as guardian, or otherwise, growing out of the estate aforesaid, or in any other manner or shape whatsoever, and forever exonerate him, by these presents, his heirs, executors, and administrators, therefrom.

"In witness whereof, we have hereunto set our hands and seals, the day and year first above written, to wit, in the year of our Lord one thousand eight hundred and thirty-four, in the presence of Elijah Bell and John E. Maddox, whose names are hereunto subscribed as witnesses thereto, the said John Perkins being also personally present, and by these presents accepting.

"Signed, sealed, and delivered.

(Signed,) E. P. FOURNIQUET, [SEAL.]
HARRIET J. FOURNIQUET, [SEAL.]
JOHN PERKINS. [SEAL.]

"Witness present:
ELIJAH BELL,
JOHN E. MADDUX.

*"*State of Mississippi, Adams County:*

"Personally before me, Woodson Wren, a justice of [*162 the peace for the county of Adams, appeared E. P. Fourniquet and Harriet J. Fourniquet, his wife, and John Perkins, whose names are subscribed to the foregoing instrument, and acknowledged that they signed, sealed, and delivered the same, as their act and deed, on the day and for the uses and purposes therein mentioned.

"Given under my hand and seal, the 28th May, 1834.

(Signed,) "WOODSON WREN. [SEAL.]"

In 1837, the parties mutually confirmed the above instrument by the following acknowledgment:—

"*State of Louisiana, Parish of Concordia:*

"I, George W. Keeton, judge of the said parish, duly commissioned and qualified, do hereby certify and attest, unto all whom it doth or may concern, that Harriet J. Bynum, wife of Edward P. Fourniquet, and Edward P. Fourniquet, and John Perkins, personally appeared before me, and acknowledged that they had signed and sealed the foregoing instrument of writing as and for their proper act and deed. To the due execution thereof, an act being requested, the same under my seal of office to serve as occasion may require.

"Done and passed at my office, in the town of Vidalia, on [SEAL.] the thirteenth day of January, A. D. eighteen hundred and thirty-seven.

(Signed,) J. W. KEETON, *P. Judge.*"

In December, 1838, Fourniquet and wife, then residing in

the State of Mississippi, filed their petition in the Court of Probates for the parish of Concordia, in the State of Louisiana, preferring their claim against Perkins for a large amount of property alleged by them to have come to his hands, and alleging that the receipt obtained from them had been given through ignorance and error, and in direct contravention of a provision of the law, and was therefore void. They charged upon Perkins, both as administrator and *curator ad bona* of the children of Mrs. Perkins, spoliations to a large amount, and prayed that he might render a full account of his transactions with respect to the successions of Benjamin Bynum and Mrs. Perkins, and with respect to his guardianship, and be compelled to make full compensation to the petitioners. In February, 1839, Perkins filed his answer, first interposing three exceptions to the prayer of the petition. The two first of these exceptions it is not material here to notice; the third was in effect a plea in bar, insisting on the receipt and release above set forth. The *answer followed the allegations of the petition, and controverted them all, alleging that the respondent had discharged his duty with fidelity.

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A supplemental petition and answer were afterwards filed, which it is not necessary to state particularly.

On the 10th of December, 1840, the case was transferred, by consent, to the Ninth District Court, in the parish of Concordia.

On the 24th of December, 1840, the cause came on for trial in the District Court, when the jury found a verdict for the defendant, and the court thereupon pronounced judgment in his favor.

In June, 1844, Fourniquet and wife filed a bill on the equity side of the Circuit Court of the United States in and for the District of Louisiana. It claimed, in right of the wife, part of her inheritable portion of the estates of her father and mother, and prayed for a full account of the use and profits thereof from August, 1824, to May, 1827. It averred that Benjamin Bynum, the father of Harriet, left a large, unencumbered estate at his death; that it was out of debt, and had a large amount of money on hand and debts due to it at the time when Mrs. Bynum intermarried with Perkins; that Perkins took possession of all the property, maladministered and used it as his own; that he presented false and fraudulent accounts to the Court of Probate. The bill admitted the execution of the receipt and release, but charged them to have been obtained by false representations; it stated that a suit had been brought in the Probate Court by the complain-

ants, and that it had been transferred by consent of all the parties to the District Court, but protested that the District Court had no jurisdiction of the subject-matter thereof, and therefore its judgment could be no bar to the complainants' present suit. The bill then prayed for an account and general relief.

To this bill Perkins pleaded in bar the record, proceedings, and judgment of the District Court, averring that these embraced and concluded the whole matter set forth and complained of in the bill. The plea was supported by an answer, which denied all the allegations of the bill.

On the 10th of April, 1845, the Circuit Court pronounced the following decree:—

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, as follows, viz.: That the plea of the said defendant, by him pleaded in bar to the bill of the said complainants, be sustained and judged a good and sufficient bar to the said plaintiff's action as set forth in his bill, and that the said complainants' bill be dismissed, with costs."

An appeal from this decree brought the case up to this court.

*It was argued by *Mr. Fendall* and *Mr. Henderson*, for the appellants, and *Mr. Coxe* and *Mr. Downs*, with whom was *Mr. Mayer*, for the appellee. [*164

That part of the argument for the appellants which related to the point upon which the decision of this court turned was as follows.

3d. But as matter of law, the jurisdiction of the court which pronounced the judgment pleaded in bar was a naked usurpation. It had no authority whatever, *ratione materiæ*. Its decision was therefore wholly void, and required not to be excepted to by plea. Louisiana Code of Practice, Art. 333.

And consent could not aid or give jurisdiction in such case. Id., Art. 92; 1 Mart. (La.) N. S., 704; 14 La., 179.

Such adjudication is void. 1 Pet., 340; 2 Pet., 169; 13 Pet., 511; 12 Pet., 719; 3 How., 762.

The Code of Practice was adopted on the 2d of September, 1825, and in force throughout the State on the 2d of October, 1825. 11 La., 515.

Before this code the probate powers were somewhat distributed among the courts, and not well regulated or defined. The reported cases, therefore, before the year 1825, furnish no rule as to the jurisdiction involved in the present

inquiry. See *Tabor* v. *Johnson*, 3 Mart. N. S., 674. Art. 924 of the Code of Practice provides, that "Courts of Probate have the exclusive power,—2. To appoint tutors and curators for minors, &c. 4. To appoint curators to vacant estates. 5. To make inventories and sales of the property of successions which are administered by curators, &c. 9. To compel such administrators (*all* such) to render an account when required," &c.

And by the act of the Legislature of March 25th, 1828, sec. 14, it is enacted, "That all suits brought against curators and other administrators during the time of their administration or curatorship shall, after the expiration of said time, and even after said curators and administrators have rendered their account to the heirs, be and remain in the Court of Probates,"—there to be continued and tried, &c. See the act in Code of Practice, ed. 1839, pp. 194–198, or Bullard and Curry's Digest.

So stands the State law, as to the exclusive jurisdiction in the Probate Court of the matters in the suit pleaded in bar, as adjudged in the District Court. The jurisdiction of District Courts is shown in Art. 126 of the Code of Practice, and that of the Parish Court in Art. 128.

In the case from the District Court, 6 Mart. N. S., 212, it was adjudged by the Supreme Court of Lousiana, in 1827, (after the Code of Practice was in operation,) that the Pro-
*165] bate Court *had the exclusive jurisdiction to compel the defendant, whose office of tutor had expired, to account and pay over money in his hands. And that the District Court was without such authority, and thereupon dismissed the case.

But the case in 7 Mart. (La.) N. S., pp. 105–107, decided in 1828, is precisely the case pleaded in bar. The suit was instituted in the Probate Court against the curator of a minor. The judge recused himself, and the suit, by consent of parties, was transferred for trial to the District Court. Held, that under the old code, where such consent was given, the adjudication was not void; but by the Code of Practice the Probate Court alone had power to try such cases, and consent of parties could not confer the power on the District Court. Judgment therefore annulled.

To like effect is the case in 4 La., 539, and 10 La., 219, and many more could be cited.

The case in 5 La., 355, which might seem to conflict with the previous decisions, refers in its judgment to an adjudication by the District Court made before the Code of Practice.

Mr. Coxe, for the appellee, argued the case orally, and *Mr. Mayer* filed an elaborate brief. The reporter selects the following, however, from the brief of *Mr. Downs*, because it enables him to state the points upon that side rather more succinctly.

The following points are submitted against the bill, and to sustain the plea and answer:—

1. The District Court of Louisiana has jurisdiction, and was competent in law to decide such a case, with the consent of the parties, and the judgment so rendered was valid. That court was one of general jurisdiction, extending to "all civil" cases above a certain amount. The language is clear and unequivocal:—"The jurisdiction of District Courts, excepting the court of the first district, extends over all civil cases where the amount in dispute exceeds fifty dollars." Code of Practice, Art. 125, *n.* 1, and the cases there referred to; *Tabor* v. *Johnson*, 3 Mart. (La.) N. S., 675; *Foucher* v. *Caraby*, 6 Id., 550; *Dangerfield* v. *Thruston*, 8 Id., 241; *Donalson* v. *Rust*, 6 Mart. (La.), 261; 12 Id., 235.

The reasoning of the Supreme Court of Louisiana in these cases is much strengthened by a paragraph in the 924th article, defining the jurisdiction of the Courts of Probate, which, it is contended, have exclusive jurisdiction of such cases. This paragraph, the fifteenth, provides that whenever the parish judge, who is judge of the Court of Probate, is in any way disqualified from trying such cases, "the District Court or parish judge of the adjoining parish shall have jurisdiction thereof."

*It may well be doubted whether Courts of Probate [*166
have jurisdiction on questions of tort, contract, or fraud and dangers, as in this case. *McDonough* v. *Spraggins*, 1 La., 64; *Hurst* v. *Hyde*, 6 Id., 451.

2. The case was in fact tried by the judge of the Court of Probate, who was called into the District Court for that purpose; the process, depositions, and all the proceedings were in the Court of Probate up to the moment of trial, when it was by consent of parties transferred to the District Court for the purpose of a trial by jury.

This case, then, was in fact rather a reference of an intricate and long account to experts or arbitrators, under the provisions of the laws of Louisiana, and their award or finding or report could be objected to or set aside only in the way pointed out by law. Code of Practice, Art. 442, 443, 456.

But even if the judgment was invalid, and the complainants have a right to demand its nullity, they have no right to demand it in the Circuit Court of the United States. This

is not left in our system of jurisprudence to general principles or authorities at home or abroad, but in this, as in many other cases, our legislature has provided a specific and an appropriate remedy, and declared the tribunals in which alone it may be sought. Before the promulgation of the Code of Practice, in 1825, there was some doubt and uncertainty in the laws of Louisiana on that subject, but it was entirely removed by the admirable provisions of that code on this subject, under the title of "Nullity of Judgment." Art. 604–613, inclusive. *McCombs* v. *Dunbar*, 1 La., 21; *Melancton* v. *Broussard*, 2 Id., 15.

It seems clear, then, when we apply the principles of these articles and decisions to the case before the court,—

1. That the judgment in this case is invalidated by none of the nullities which authorize its being set aside.

The third paragraph of the 606th article does not weaken this position. The judge of the District Court was not incompetent, either from the amount in dispute or from the nature of the cause, as shown in the authorities previously cited under the first head. If a Court of Probate had rendered judgment on a question of title, or contract, or fraud, or tort, being a court of special and limited jurisdiction, its nullity might have been demanded; but not so with the District Court, to which the law expressly gives jurisdiction in "all civil cases."

2. But even if there was nullity in the judgment, it might have been demanded in the same court by motion for a new trial or action of nullity, or by appeal to the Supreme Court under the restrictions and within the time provided by law, but *could not be demanded in any other court, especially a court of the United States.

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3. That the complainants cannot maintain this action of nullity, because they acquiesced in the execution of the judgment for nearly four years before this action was brought, not even asking a new trial, or taking any appeal. Art. 612.

Mr. Justice DANIEL delivered the opinion of the court.

Although the decree of the Circuit Court is accompanied by no opinion or argument setting out *in extenso* the grounds on which the bill of the appellants (the plaintiffs below) was dismissed, yet the foundation of this decree is plainly disclosed by reference to the plea of defendant below, referred to and sustained by the Circuit Court in its fullest extent. This plea assumes the position that the matters drawn into controversy by the bill had been previously litigated between

these parties, and by a court of competent jurisdiction adjudged and settled against the complainants. The insertion of this plea here is deemed proper, as the character of the proceedings which enter into its averments, and constitute the bar set up thereby, will furnish the readiest key to the exceptions urged against the decree of the Circuit Court. The plea is in the following words:—

"*In the Circuit Court of the United States for the Fifth Circuit and Eastern District of Louisiana.*

"E. P. FOURNIQUET AND WIFE *v.* JOHN PERKINS.

"The plea and answer of the defendant, John Perkins, to the bill of complaint and discovery of the said complainants.

"This respondent, saving and reserving all benefit, &c., &c., shows, that, on or about the 15th day of December, 1838, the said complainants did institute a suit in the Court of Probates in and for the parish of Concordia, in the State of Louisiana, against this respondent, for the same cause of action as is set forth in the said complainants' bill. That the said suit was duly and regularly transferred for trial and judgment upon all matters in issue therein to the District Court of the ninth judicial district of the State of Louisiana, held in and for the said parish of Concordia, when and where such proceedings and pleadings were had, and such issue joined, as embraced the whole matters set forth and complained of in and by the said complainants' bill in this behalf filed and exhibited; and that in the further due and lawful proceedings in said suit, and upon final hearing thereof, judgment was rendered in favor of this defendant, upon all the matters in issue therein; all which will appear by a transcript of the record of the proceedings *in the said suit, [*168
duly authenticated, which is hereto annexed and exhibited, and made part hereof; which said judgment is final and conclusive between the said parties, as to all the matters of the said complainants' bill; and this respondent pleads and sets up the same as a full and complete bar to the said bill, and prays that he may have the benefit thereof as such."

If this plea be correct in form and true in substance, there can be no doubt that, the subject now in controversy having become *res adjudicata*, the decision of the Circuit Court dismissing the bill of the complainants is vindicated from just exception. But exception is urged to that decision upon alleged legal grounds, said to be disclosed on the face of the plea and of the record adduced in its support, and that these being inadequate to sustain the decision, the latter cannot be

supported. This is the material point in this cause, requiring, therefore, particular examination.

It is insisted for the appellants, that the proceedings instituted by them in the Probate Court of Concordia against Perkins, for an account of his administration of the successions of Benjamin Bynum and of Mrs. Perkins (formerly Bynum), and for an account of his guardianship of the wife of Fourniquet, as well as to render him liable for lands, slaves, crops, and moneys belonging to those successions and to the children of Bynum, were the proper proceedings for attaining the object sought thereby, and that no other tribunal in the State of Louisiana than the Probate Court could legally take cognizance of those proceedings; and that the transfer, therefore, of the case in question from the Probate Court to the District Court of the State, though by the consent expressly given of all the parties, could not confer jurisdiction on the latter, whose decision, consequently, would be void, and could not be pleaded in bar of this suit. Again it is said, that, conceding the power of the District Court to take cognizance of a case like the present, still the proceedings before this latter court and its decision did not embrace the rights and interests of the parties as set forth in the petition to the Probate Court, but were limited to the single question of the validity of the release executed by the complainants to the defendant on the 27th of May, 1834. With regard to this second ground of exception, it may be remarked, that there is some want of precision in the record of the District Court, as to the subjects embraced within the issue which seems to have been submitted to the jury by the court; but there is no more reason for supposing that issue to have been limited to the mere fact of the validity of the release mentioned, than there is for extending it to the whole matter in controversy. The petition brought up before *169] *the court was the same presented to the Court of Probate,—covered the whole gravamen of the complainants' case. All their alleged rights and wrongs were embraced within its statements and prayers. This is not understood to have been a suit in equity, nor to have been one not cognizable by a jury. The fair presumption is, that the jury had the entire case before them. No exception to their cognizance of the whole case seems to have been interposed or thought of, and they rendered a general verdict for the defendant, to which verdict no exception was taken. On other grounds it seems inadmissible to suppose that the case submitted to the jury was limited to some specific fact or inquiry, or that the judgment of the court was necessarily

founded upon any such fact alone. By the consent order transferring the cause from the Probate to the District Court, we find a very comprehensive arrangement as to the procurement and the forms of the testimony to be used; and in the entry of the judgment upon the record of the District Court we find the language,—"By reason of the law and the evidence, and the verdict being in favor of the defendant, it is therefore ordered, adjudged, and decreed, that judgment be rendered in favor of the defendant." Thus it appears that the mind of the court was directed to the entire case before it, and not merely to an isolated question; that its judgment has embraced the whole cause as presented upon the petition, the exceptions, and the answer of the defendant, and although the proceedings which led to the decision may seem to be irregular and anomalous, that decision must stand as a judgment, binding between the parties thereto, unless shown to be void for want of jurisdiction in the tribunal which pronounced it, or that it has been reversed and annulled by some competent supervisory authority. This brings us back to the inquiry into the competency of the District Court of the State to take cognizance of the subject on which its decision was made.

By Art. 126 of the Code of Practice it is declared that the jurisdiction of the District Courts extends over all civil causes where the amount in dispute exceeds fifty dollars. The natural import of this provision is to render the District Courts of Louisiana courts of general jurisdiction in all civil causes not embraced within the above exception. But their powers have not been left to be now deduced for the first time from the language of the article above cited. They appear to have been defined and established by the supreme judicial authority of the State, and plainly distinguished from the functions of the Probate Courts with reference to subjects like those involved in the present case. The jurisdiction of the Courts of Probate appears to be confined to cases which seek a settlement *and an accounting for [*170
effects presumed to be in the possession of the representative of a succession, holding those effects in his representative character. Where the purpose is to charge the executor or curator personally for fraud, maladministration, waste, or embezzlement of the succession, the Court of Probate has not jurisdiction, but in such cases jurisdiction is vested in District Courts. The law appears to have been so ruled in many cases by the Supreme Court of Louisiana. A few of these will be adverted to. Thus, in the case of *McDonough* v. *Spraggins*, 1 La., 63, on an appeal from the

Court of Probates, the point is thus succinctly stated by Mathews, Justice, in delivering the opinion of the court:—"This suit was commenced against the defendant in his capacity of curator, to obtain a judgment rendering the succession which he represents liable to pay and satisfy the plaintiffs' demand, and also to obtain a decree against him personally, on the event of the property being insufficient to pay all just claims against it, as having illegally administered the succession of the intestate." The Court of Probates decided against the application, and the Supreme Court, in passing upon that decision, lay down the law in these words:—"As an administrator *de son tort*, or as an intermeddler, he may be answerable to creditors for waste; but those pursuits against him must take place in a court of ordinary jurisdiction." The next case on this point is that of *Bouquette's Guardian* v. *Donnet*, 2 La., 193. There Porter, Justice, pronouncing the decision, says—"It appears to us this is a demand against the executor in his personal capacity for the value of the property sold by him contrary to law. In other words, for a tort done by him. We think the Probate Court had no jurisdiction of the case, and that the petition must be dismissed, with costs in both courts." In 6 La., 449 is the case of *Hurst* v. *Hyde, Executor*, in which it is ruled, that "the Court of Probates has no jurisdiction in an action for damages occasioned by an act of the executor not legally done in relation to the administration of the succession." The last authority which will be cited to this point is one of later date. It is the decision of the Supreme Court of Louisiana in the case of *Hemken* v. *Ludwig, Curatrix*, a decision made in 1845, and reported in 12 Rob. (La.), 188, upon an appeal from the Court of Probates of Ouachita. This was a petition brought to subject the curatrix for what, in the legal language of Louisiana, is called a maladministration of the succession, corresponding with the term *waste* at the common law. At page 191 of the volume, Judge Simon, in delivering the opinion of the court, thus states the law:—"It is clear, the Court of Pro-
*171] bates was without jurisdiction to decide on the *matters set out in the plaintiff's petition in relation to the defendant's personal liability. It is true she is sued as curatrix, but one of the principal grounds alleged against her from which she is said to have incurred personal responsibility is, that she has concealed property belonging to the estate and has converted it to her own use, whereby she has lost the benefit of her renunciation, and has become liable, personally, to pay the debts of her husband. The main

object of the suit is to obtain judgment against her individually, and such was virtually the judgment appealed from. It is not pretended that the property which she failed to include in the inventory is in her possession as curatrix; but that she claims the same as her own, and refuses to give it up. It is well settled that courts of probate have no jurisdiction of a claim against an administrator personally for maladministration."

That the petition of Fourniquet and wife presented to the Probate Court, and subsequently transferred to the District Court, contained charges of maladministration cannot be denied. Indeed, with respect to the succession of Mary Bynum, the mother, and Benjamin Bynum, the father, of the petitioner, Harriet, and with respect to the release charged to have been fraudulently abstracted from both the petitioners, it alleged, not merely acts of maladministration, but instances of dishonesty and spoliation extraordinary in character and extent, and claimed of the defendant, in consequence thereof, a heavy personal liability for lands, slaves, and money, unjustly appropriated to his own purposes. From Art. 126 of the Code of Practice, we have seen that the jurisdiction of the District Courts of Louisiana extends over all civil cases where the amount in dispute is over fifty dollars; in other words, that these courts are courts of general civil jurisdiction. By the authorities cited from the Supreme Court of Louisiana, it is equally apparent that the Probate Courts are not courts of general, but of special, limited jurisdiction; and that from their cognizance are excluded cases of fraud, torts, waste, or maladministration generally, committed by executors and administrators; and that these cases belong peculiarly to the cognizance of the District Courts. Such being the conclusions warranted by a review of the law, and the facts of this case being of a character to fall directly and regularly within its operation, it may well be asked what just exception can be taken to the jurisdiction of the District Court in this case? It was not a jurisdiction depending at all upon *consent*, which, it is said, cannot invest a court with power not belonging to it by its constitution. It was a transfer of a litigation, by consent, from a tribunal confessedly without authority to decide it, to a tribunal in every respect competent to *take cognizance [*172
of the subject-matter,—whose peculiar province and duty it was to take cognizance of it. The exception, at the utmost, resolves itself into matter of form, which the parties were competent to waive, and which they did waive, for it is expressly stated upon the record, that the removal of the cause from the Court of Probate into the District Court was

by the consent of all concerned. It cannot be pretended that the forms of pleading may not be dispensed with by suitors; as it is certain that the benefit of matters both of substance and form may be lost by mere neglect or omission, where no intention of the renunciation of either is apparent or ever existed. We must conclude that the District Court had rightfully jurisdiction of the cause removed into it from the Probate Court; that its judgment is and must be binding upon the parties to it, until it shall be annulled or reversed by a competent authority. The parties to that judgment, the subject-matter thereof, and embraced within the proceedings on which it was founded, being identical with those comprised in the bill in the Circuit Court of the United States for the Ninth Circuit, now under review, the judgment was well pleaded in bar of the claims set up by the bill, and the decree of the Circuit Court sustaining this plea we hold to be correct, and the same is therefore hereby affirmed.

ORDER.

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 Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

JAMES ERWIN, PLAINTIFF IN ERROR, *v.* ALFRED J. LOWRY, CURATOR OF ALEXANDER MCNEILL, DECEASED.

Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed, in the Circuit Court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee, and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a State court against a purchaser at the sale, and attempt to prove that the Circuit Court had no jurisdiction over the case, because the executor was not a citizen of Louisiana. Evidence dehors the record cannot be introduced to disprove it.[1]

[1] DISTINGUISHED. *Holmes* v. *Oregon &c. R. Co.*, 9 Fed. Rep., 244; s. c., 7 Sawy., 400. FOLLOWED. Id., 237, 392. CITED. *Davis* v. *Gaines*, 14 Otto, 392; *Draper* v. *Town of Springport*, 15 Fed. Rep., 331. See *Hutchinson* v. *Green*, 2 McCrary, 476; s. c., 6 Fed. Rep., 838.

A judicial sale and title acquired under the proceedings of a court of competent jurisdiction cannot be questioned collaterally, except in case of

Where a lien existed on property by a special mortgage before the debtor's death, and *the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid.[2] [*173

The Circuit Court of the United States, having jurisdiction over the parties and subject-matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts.[3]

Although the marshal did not give the notice required by law to the executor against whom the petition was filed, yet, if the executor was served with process on the spot where the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate.

Where the judgment of the state court may be sustained on error, on any ground within the exclusive cognizance of that court, this court will not reverse such judgment merely because some point which can be examined here, was erroneously ruled.[4]

Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error.[5]

THIS case was brought up from the Supreme Court for the Western District of Louisiana, by a writ of error issued under the 25th section of the Judiciary Act.

In the beginning of the year 1835, Dawson and Nutt were the owners of some land situated in the parish of Carroll, in the State of Louisiana, on the waters of the Walnut Bayou, amounting to 640 acres, and also of a number of slaves. On the 8th of January, 1835, they sold the land and slaves to Alexander McNeill, of the State of Mississippi, for one hun-

fraud in which purchaser was a participant. *Griffith* v. *Bogert*, 18 How., 158, 164, and cases cited. S. P. *Succession of Fontelieu*, 28 La. Ann., 638; *Kindell* v. *Titus*, 9 Heisk. (Tenn.), 727.

[2] DISTINGUISHED. *Peale* v. *Phipps*, 14 How., 375. CITED. *Andrews* v. *Smith*, 19 Blatchf., 108.

[3] FOLLOWED. *Miller* v. *United States*, 11 Wall., 301. Every presumption is in favor of the regularity of the proceedings of a court having a general jurisdiction. *Sprague* v. *Litherberry*, 4 McLean, 442; *Biggs* v. *Blue*, 6 Id., 148; *Nat. Bank of Monticello* v. *Bryant*, 13 Bush (Ky.), 419. And that the requisite prior proceedings to confer jurisdiction were taken. *Lathrop* v. *Stuart*, 5 McLean, 167; *Rich* v. *Lambert*, 12 How., 347; *McCulloch* v. *Woodlief*, 20 Id., 221; *Elliott* v. *Van Voorst*, 18 Leg. Int., 396; *Neff* v. *Pennoyer*, 3 Sawy., 271; *People* v. *Cole*, 84 Ill., 327; *Kilgour* v. *Gockley*, 83 Ill., 109; *Pacific Pneumatic Gas Co.* v. *Wheelock*, 80 N. Y., 278.

The rule is subject to the exception that the jurisdiction of any court exercising authority over a subject may be inquired into in any other court, when the proceedings in the former are relied upon, and brought before the latter, by *a party claiming the benefit* of such proceedings. *Williamson et al.* v. *Berry*, 8 How., 495.

[4] S. P. *Williams* v. *Oliver*, 12 How., 111; *Same* v. *Same*, Id., 125.

[5] FOLLOWED. *O'Hara* v. *MacConnell*, 3 Otto, 154.

dred and five thousand dollars, payable in five payments; the first four of twenty-five thousand dollars each, and the last of five thousand. McNeill gave a mortgage upon the land and slaves to secure the last four payments.

Whether notes were given for all these payments, and when they were to be made, the record did not show. But by an indorsement upon the mortgage under date of January 15th, 1838, it appeared that all the payments had been made except the fourth.

About the 28th of May, 1839, Alexander McNeill died, in Mississippi.

By his will, which contains several legacies of small value, he bequeathed the mass of his estate to Hector McNeill, also a resident and citizen of Mississippi, whom he appointed his testamentary executor. On the 6th of June, 1839, this executor, stating himself to be a citizen of Coahoma county, in Mississippi, presented a petition to the judge of probates of the parish of Madison, in which, after stating that his testator had died on the date above stated, in Mississippi, and left a will, in which he was appointed sole executor and principal legatee, an authenticated copy of which was annexed to the petition, he *procceds to say, that two large estates [*174] were in the possession of his testator, situated in this parish.

He says further, that, by the laws of Mississippi, as executor of the will, he was bound to present it for probate in Warren county in that State, without delay; but as the court would not sit for some weeks, he could not then have the will proved and recorded, nor could he then present a duly certified copy of it to be recorded in the said Probate Court of Madison. He says he is "desirous of taking on himself the succession of his deceased brother's estate, according to the terms of his last will and testament, and the laws of the State; he therefore prays that an inventory of all the property in the parish, belonging to the estate of said Alexander McNeill, deceased, be taken." And he prays the judge to grant him the succession of the deceased Alexander McNeill, according to the terms of the will and the laws of the State; and that he will grant any other and whatever order may be necessary to entitle him (Hector) to the possession and succession of the property left by the deceased. Upon this petition no order or judgment was given by the probate judge; but on the 2d of July following, he proceeded to make an inventory of the property composing Alexander McNeill's succession, which is signed by Hector McNeill, as executor. The will was probated in Warren county, Mississippi, on the 24th of June,

1839, and a copy of it, and the proceedings in the aforesaid court, recorded in the Probate Court of Madison on the 1st of July, 1839, one day before the taking of the inventory, but no order taken on it, further than to record it.

By the inventory and appraisement, the whole property of the deceased in that parish amounted to $245,317.

On the 1st of November, 1839, Hector McNeill presented the following petition:—

"To the Honorable Richard Charles Downes, Parish Judge in and for the Parish of Madison, State of Louisiana.

"Hector McNeill, heretofore a resident of Warren county, State of Mississippi, respectfully represents to your honor, that he is the owner of large possessions in this parish, consisting of plantations, negroes, &c., &c.; that he is desirous of acquiring residence, and to be entitled to the privileges, &c., &c., of a resident of this parish; that he is aged thirty-one years; that he is from the State of Mississippi, as aforesaid, and that he desires to pursue planting in this parish, and to reside and make his permanent domicile and home on the Walnut Bayou, parish of Madison, Louisiana. Wherefore, he prays this notice may be duly filed and recorded.

(Signed,) H. McNEILL.

"*Walnut Bayou, La., Nov. 1st*, 1839."

*On the 23d of May, 1840, Andrew Erwin filed the following petition in the Circuit Court of the United States:— [*175

"To the Honorable the Judges of the Circuit Court of the United States for the Ninth Circuit of Louisiana.

"The petition of Andrew Erwin, a citizen of the State of Tennessee, therein residing, respectfully shows:—That Hector McNeill, testamentary executor of Alexander McNeill, a citizen of the State of Louisiana, residing in the parish of Madison, within the jurisdiction of this honorable court, is justly indebted to your petitioner in the sum of seventeen thousand five hundred dollars, besides interest on the promissory notes hereto annexed for reference and greater certainty, drawn on the 8th of January, 1835, and payable four years after date, and duly protested when due for want of payment, as will further appear from the protests thereof hereunto annexed for reference; one of which notes was payable to the order of Conway R. Nutt, a citizen of the

State of Mississippi, and by him duly indorsed to your petitioner, and the other to Henry S. Dawson, also a citizen of the State of Mississippi, and by him duly indorsed to your petitioner; who avers that the assignors of said notes could have maintained an action in your honorable court on the said notes, against the said Alexander McNeill, previously to the assignment thereof; that on the balance of one of said notes, seven thousand five hundred dollars, interest is due at the rate of ten per cent. per annum, from the 11th of January, 1839, until paid; and on the balance of the other, five thousand dollars, interest is due from the same date, 11th of January, 1839, until paid, and which, though amicably requested, the said Alexander McNeill, as well as his testamentary executor, has neglected to pay.

"Your petitioner further shows, that said notes were given in purchase of a plantation situated in the parish of Madison aforesaid, and certain slaves; and for securing the payment thereof, the said plantation and slaves were duly mortgaged, as will further appear from a certified copy thereof, hereto annexed to make part and parcel of this present petition, and to which, for greater certainty, your petitioner refers; and thence your petitioner is entitled to an order of seizure and sale for the payment of the balance aforesaid of seventeen thousand five hundred dollars, with the interest from the 11th of January, 1839, of ten per cent. on the sum of seven thousand five hundred dollars, and on ten thousand dollars interest at the rate of five per cent. until paid, and the costs of the protests of said notes, ten dollars and fifty cents. Wherefore your petitioner prays that an order of
*176] seizure and sale may issue *against the said plantation, and the negroes mentioned and described in the act of sale and mortgage aforesaid, hereunto annexed, to pay and satisfy said sum of seventeen thousand five hundred dollars, with interest as aforesaid, from the 11th of January, 1839, until paid, with $10.50 costs of protest, and the costs of suit. And your petitioner prays for all such other and further relief as the nature of the case may require, and to equity and justice may appertain; and as in duty bound will ever pray your petitioner. (Seventeen thousand and five hundred dollars, besides interest and costs, claimed.)

(Signed,) ALFRED HENNEN,
Attorney for Petitioner."

On the day of the filing of the petition, the following order was issued, viz.:—

"Inasmuch as the mortgage within mentioned imports a confession of judgment, let an order of seizure and sale issue for the sale of the property mortgaged, if the sum within claimed is not paid after legal notice.

(Signed,) P. K. LAWRENCE, *U. S. Judge.*

"*New Orleans, 23d May*, 1840."

Afterwards, to wit, on the 23d of May, 1840, the following writ of seizure and sale was issued:—

"*United States of America:*

"The President of the United States to the Marshal of the Eastern District of Louisiana, or his lawful deputy, greeting:

"You are hereby commanded to seize and sell, after legal demand, for cash, the following described property, to wit." (Then followed a list of the property, namely, land and slaves.)

The return of the marshal was as follows:—

"Received this order of seizure and sale on the 25th of May, 1840, and on the 29th of May I delivered the order of court and copy of mortgage issued by the clerk of this court to the defendant; also a copy of a notice of demand, which notice is herewith returned (marked A). On the 1st day of June, I seized the land and fifty-seven slaves, mentioned in this order of seizure and sale, and delivered to said defendant a copy of notice of said seizure, which is also herewith returned (marked B). On the 4th day of June, 1840, I affixed copies of an advertisement (marked C), and herewith filed, to the door of the court-house, the door of the parish judge's office, and at other places, in the parish of Madison and State of Louisiana, in which the said *property is situated, announcing that the said [*177
property would be offered for sale on the said premises, to the highest bidder for cash, on Monday, the 6th day of July, 1840, being full thirty days, exclusive of the day on which the advertisements were posted up, viz. the 4th day of June, 1840, and the day of sale. On the said 6th day of July, 1840, I repaired to the premises aforesaid, and after the appraisers, James Brooks and Jesse Couch, duly qualified citizens of Louisiana, selected by the plaintiff and defendant in this case for that purpose, were duly sworn, they proceeded to appraise the said land and forty-four of the negroes in this order of seizure and sale, and the same conveyed by deed from the marshal to the purchaser, bearing date the 7th of July, 1840, and of record of this court. Thirteen of the said fifty-seven

negroes which were seized by me, proving to be others than those named in this process, were not appraised, neither could the said thirteen be found, as reported by the said appraisers in their report, now filed in the court, and marked D. The said land was appraised at $13 per acre; the 640 acres at $13, amount $8,320. The said forty-four negroes were appraised separately and in families, and the amount of the whole when added was $15,525, making the aggregate amount for the land and negroes $23,845. After said appraisement was completed, and between the hours of 12 A.M. and 1 P.M., I offered the said land and forty-four negroes for sale; after making all the declarations required by law, in relation to the nature and description of the same, and after exhibiting and reading, in an audible voice, a certificate of the recorder of mortgages of the said parish of Madison; and after repeatedly crying the said property, James Erwin, Esq., bid the sum of $16,000, which being the highest and last bid, and more than two thirds of the appraisement thereof, the said land and negroes were adjudged to him, and on the 7th of July, 1840, were conveyed by deed, now of record in this court."

On the 7th of July, 1840, the marshal executed a deed of the above property to James Erwin, reciting the circumstances attending the public sale.

On the 23d of March, 1841, the Court of Probate in the parish of Madison, appointed Alfred J. Lowry, the curator of the vacant succession of Alexander McNeill.

On the 16th of August, 1841, Lowry, the curator filed a petition in the ninth judicial District Court in and for the parish of Madison (State court). It represented that McNeill, at his death, was the owner of the estate, and that James Erwin had illegally, and by fraud and collusion, taken possession of it. It then prayed for a restoration of the property, and an account of the rents and profits.

*178] *On the 5th of May, 1842, Erwin filed his answer, reciting the above facts and claiming title under the sale.

Evidence having been taken, the District Court, at December term, 1842, pronounced a judgment in favor of the petitioner, the curator.

An appeal was taken by Erwin from this judgment to the Supreme Court of the State, which, in October, 1843, affirmed the judgment of the court below. A writ of error, sued out under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

It was argued by *Mr. Brent* and *Mr. Badger*, for the plain-

tiff in error, and *Mr. Bradley* and *Mr. Jones*, for the defendant in error.

The points made by the counsel for the appellant were the following, viz.:—

Upon the whole record, it will be contended by the appellant, that the judgment must be reversed.

1. Because the proceedings of the Circuit Court of the United States, under which the appellant claims title, disclose a proper case for the jurisdiction of that court, and therefore the regularity or validity of said proceedings cannot be collaterally impeached.

2. Because the judgment under which the appellant claims, even if rendered upon a record defective as to the averments proper to give jurisdiction, cannot be thus collaterally impeached.

3. Because the proceedings under which the appellant derives title were all regular and *bonâ fide;* but if they were otherwise, they cannot be inquired into by the courts of Louisiana.

4. Because the judgment of the Supreme Court of Louisiana was otherwise erroneous and illegal, and more particularly in decreeing the appellant to be a possessor in bad faith.

The Reporter was necessarily absent during the argument, and has no notes of it.

Mr. Justice CATRON delivered the opinion of the court.

Alfred J. Lowry sued James Erwin in the District Court for the ninth district of Louisiana, for a tract of land of about six hundred acres, and forty-four slaves, who were employed in cultivating the land by growing cotton thereon. The property was situate in the parish of Madison, in that State. The suit was commenced in 1841, by petition, which alleges that about July, 1840, one James Erwin, illegally, and by fraud and collusion, and without any legal title thereto, took possession of *all the above described property, and is [*179
still in possession of the same, has appropriated and wrongfully converted to his own use all the fruits and revenues of said property, and pretends to be the owner thereof, and refuses to deliver to the petitioner the possession. The property was not claimed by Lowry in his own right, but as curator of the estate of Alexander McNeill.

To this petition Erwin answered, among other things not within the cognizance of this court, that on the 6th day of July, 1840, he became the purchaser of the property at public auction, at a sale made thereof by the marshal of the United States, who sold the same under a judgment, and on

a writ of seizure and sale, issued from the Circuit Court of the United States for the Eastern District of Louisiana, in a case wherein Andrew Erwin was plaintiff, and Hector McNeill, testamentary executor of Alexander McNeill, deceased, was defendant; and that he paid the sum of sixteen thousand dollars in cash therefor, which was applied to the payment of a debt due by mortgage by the succession of Alexander McNeill; and he exhibited a copy of the proceedings on which the sale was founded, and his bill of sale made by the marshal for the land and negroes. These proceedings and the marshal's deed were given in evidence by the defendant on the trial before the State District Court. A judgment was there given against Erwin, and the property decreed to Lowry as curator; from which Erwin appealed to the Supreme Court of Louisiana, where the judgment of the District Court was affirmed; and to this judgment Erwin prosecuted a writ of error out of this court, under the twenty-fifth section of the Judiciary Act of 1789, on the ground that there was drawn in question the validity of an authority exercised under the United States, and that the decision of the Supreme Court of Louisiana was against its validity. That such was the fact, and that this court has jurisdiction, is not and cannot be controverted. The judgment ordering the seizure and sale was declared void, for several reasons. Such of them as are subject to our cognizance we will proceed to consider.

The whole proceeding, commencing with the petition of Andrew Erwin demanding a seizure and sale, to James Erwin's deed from the marshal, was the exercise of one authority; and the question submitted for our consideration is, whether the marshal's sale was void on any legal ground;—that is to say, whether the deed by the marshal to James Erwin was void for the reason that it was not supported by a lawful judgment, or that, for want of a compliance with any legal requirements in conducting the seizure and sale, the deed was void. If void on any one ground, it would be altogether
*180] useless to reverse *the judgment because an error had been committed on some other ground; as, on the cause being remanded, the State court would pronounce the deed void a second time on the true ground. This court was compelled so to hold in *Collier* v. *Stanbrough*, 6 How., 14.

The deed, in the case before us, was held void by the Supreme Court of Louisiana:—First, because Hector McNeill was not a citizen of that State when Andrew Erwin's petition was filed. This fact the court ascertained by proof dehors the record. The petition alleges that Andrew Erwin was a citizen of the State of Tennessee, therein residing; and that

Hector McNeill was a citizen of the State of Louisiana, residing in the parish of Madison, and within the jurisdiction of the court. On being served with process, Hector McNeill did not dispute the fact, nor make any defence; the purchaser found the fact established by the record, nor could it be called in question in a collateral action and disproved, and the purchaser's title defeated by inferior evidence. On this question the case of *McCormick* v. *Sullivan*, 10 Wheat., 192, is entitled to great weight. There neither party was averred to be a citizen of any State; and the attempt was made by a second suit to treat the purchaser's title as a nullity, because of this defect in the proceeding on which the purchase was founded; but it was held that the purchaser took a good title. In the case before us, the record on its face was perfect, and evidence was let in to contradict and to overthrow it, which we deem to be wholly inadmissible in any collateral proceeding. Hector McNeill was estopped to deny the fact; and so is the present party, his successor.

The next question decided below was, that the property when it was seized and sold was part of a succession, and, being in the course of administration in the Probate Court, could not be seized and sold by an execution founded on a proceeding in another court. This question we declined to decide in the case of *Collier* v. *Stanbrough*, and ruled that cause on another ground. That a special mortgage, where no succession has occurred, may be foreclosed by this mode of proceeding,—that is, by an order of seizure and sale in the Circuit Court of the United States held in Louisiana,—we have no doubt. But the question here is, whether jurisdiction could be exercised over mortgaged property whilst it was in a course of administration. That no jurisdiction existed in the United States Circuit Court was held in the case before us; and so it had been held by the Supreme Court of Louisiana in previous cases. But in 1847 that court reviewed its previous decisions, in the case of *Dupuy* v. *Bemiss*. In the opinion there given, *the jurisdiction of the [*191] Federal court held in Louisiana is so accurately and cogently set forth, and the relative powers and duties of the State and Federal judiciaries are so justly appreciated, as to relieve us from all further anxiety and embarrassment on the delicate question of conflict arising in the case of *Collier* v. *Stanbrough*, and again in this cause. It was held in the case of *Dupuy* v. *Bemiss*, that, where a lien existed on property by a special mortgage before the debtor's death, and the property passed by death and succession, with the lien attached, into the hands of a curator, and was in the course of

administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, and to enforce the creditor's lien, and to decree a sale of the property, and that such sale was valid. We accord to this adjudication our decided approbation; but take occasion to say, that, had we unfortunately been compelled to decide the question without this aid, our judgment would have been, that the decision of the Supreme Court of Louisiana in the cause under consideration was erroneous. It was also assumed by the Supreme Court of Louisiana, "that no explanation was given how the notes secured by the mortgage got into Andrew Erwin's hands in Tennessee, and that no transfer of the mortgage was proved to have been made to him; without which, no State judge could have granted an order of seizure and sale without a violation of law." We hold that wherever a judgment is given by a court having jurisdiction of the parties and of the subject-matter, the exercise of jurisdiction warrants the presumption, in favor of a purchaser, that the facts which were necessary to be proved to confer jurisdiction were proved. It was so held by this court in the case of *Grignon's Lessee* v. *Astor*, 2 How., 319, and to the principles there laid down we refer for the true rule. The Circuit Court may have erred in granting the order of seizure and sale, but this does not affect the purchaser's title.

The Supreme Court of Louisiana next held, that "it is well settled in our jurisprudence, that, in forced alienations of property, there must be a reasonable diligence in, and compliance with, the forms of the law, under a penalty of nullity. When a party resorts to the summary and more severe remedies allowed by law, he is then held to a stricter compliance with every legal formality, and the executory process of seizure and sale may be considered as one of severity. It is obtained *ex parte*, and all the proceedings under it are to be scrutinized closely. It necessarily follows, that, if the law has not been complied with, the property is not transferred, and the purchaser acquires no title." This was the doctrine
*182] adopted by *us in the case of *Collier* v. *Stanbrough*, and is no more open to question in the Circuit Court of Louisiana than it is in the State courts of that State; and the question is, how far the marshal complied with the legal formalities in conducting the seizure and sale. He was bound to give three days' notice to the debtor before the seizure, if he resided on the spot, and if he did not, to count in addition a day for every twenty miles between the residence of the debtor and the residence of the judge to whom the petition

was presented. (Code of Practice, 735.) The notice was given to Hector McNeill on the 29th day of May, 1840, requiring him to pay within three days; the property was seized on the 1st day of June; the advertisements were posted up on the 4th of June, and the property sold on the 6th day of July following. The notice was given in the parish of Carroll, about four hundred miles from New Orleans, where the judge resided, so that more than twenty days less than the due time required by law was allowed to the defendant, Hector McNeill, to appear before the judge, obtain an injunction, and make opposition to the proceeding instituted by Andrew Erwin; and for this reason the sale would be void, if the defendant, McNeill, had not acted in the matter. But the marshal's returns are required by the practice in Louisiana to show the various steps in the proceedings, and are part of the record on which James Erwin's title depends; these returns show that McNeill was served with process on the spot where the property was, and where the advertisements were posted. When the sale came on, the marshal returns, that, "by agreement of the plaintiff and defendant in the suit, that is, Andrew Erwin and Hector McNeill, the following individuals were selected as appraisers, to wit: James Brooks was selected by the plaintiff, and Jesse Couch was selected by the defendant; who, being duly sworn, proceeded to appraise all the property mentioned in the order of seizure and sale; that they appraised the negroes and the land; that is, each slave separately, and the land separately." Both land and slaves being immovable property, if two thirds of the appraised value had not been bid at the sale, a second was necessary by the laws of Louisiana. (Code of Practice, 670, 671, &c.) And by Art. 676, "Slaves seized must be appraised, either by the head or by families; and the other effects must be appraised with such minuteness that they may be sold together or separately, to the best advantage of the debtor, and as he may direct.

The marshal's deed to James Erwin recites in general terms all the necessary steps required to be taken previous to the sale; and, after describing in detail all the property, the deed says, that "the marshal proceeded to cry the aforesaid land and *negroes to go together, at the request of the defendant, [*183
Hector McNeill; and that James Erwin became the purchaser, for the sum of sixteen thousand dollars; being more than two thirds the appraised value of the land and negroes." The general principle as respects third persons is, that where one having title stands by and knowingly permits another to

purchase and expend money on land, under the erroneous impression that he is acquiring a good title, and the one who stands by does not make his title known, he shall not afterwards be allowed to set it up against the purchaser. We understand the decisions in Louisiana to conform to this principle, and that it is applicable there in cases of execution sales; and, as lands and slaves stand on the same footing in Louisiana, the rule applies equally to both.

Testing the sale by this principle, how does it stand? The purchaser saw the debtor and the marshal select the appraisers, and saw the appraised value, so that bidders could regulate their bids by it; he heard the debtor order the marshal to sell the plantation and slaves together, and they were so sold. Nor did the debtor make any objection to the sale, but by his acts and presence sanctioned it; and therefore it cannot be impeached because formal steps were not strictly complied with.

In our opinion, the order of seizure and sale, and the steps taken in its execution, were such as to support the sale adjudicated to James Erwin by the marshal; but we only adjudge the force and effect of the legal proceeding. As to any other questions involved in the cause (if there be any), this court has no jurisdiction, and consequently leaves them with the State courts.

At October term, 1843, the curator, Lowry, had judgment, but the court below ordered, "that no writ of possession issue in this case to put the plaintiff in possession of the plantation and slaves until he pay the defendant, or deposit in the hands of the sheriff of the parish to the credit of the defendant, $436.55, with interest thereon, at the rate of 5 per cent. per annum, from the 18th day of March in the year 1843, until the day of payment or deposit."

In August, 1844, Lowry paid over the money to the sheriff of the parish of Madison; and the sheriff paid it over to Erwin in November, 1844. The writ of error was sued out in May, 1845; and there accompanied the record an assignment of errors. The defendant in error now comes forward, and asks to have the writ of error dismissed on production of a copy of Erwin's receipt to the sheriff, on the ground that, by receiving the money, Erwin released the errors complained of.

In the first place, we think the motion comes too late to be *heard; but that if it could be heard, it is no bar. The proceeding was of a mixed character, partaking more of the nature of a proceeding in equity than one at law; and although it can only come here by writ of error, yet this does not change its character. A writ of error in equity proceedings is not peculiar. The twenty-second section of the

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Judiciary Act of 1789 gave a writ of error in chancery cases, and so the law continued until 1803. (Ch. 40.) And we take the rule to be, that although a decree in equity is fully executed, at the instance of the successful party, he cannot complain of his own voluntary acts, if he does perform a condition imposed upon him before he can have the fruits of the decree, although the other party derives a benefit from such performance. If it was otherwise, a writ of error in such a case as the present, or an appeal in equity, might be defeated after the writ of error or appeal was sued out, where there was no supersedeas; and here there was none.

Five years is the time allowed for prosecuting appeals to and writs of error out of this court, and in many cases decrees and judgments are executed before any step is taken to bring the case here; yet in no instance within our knowledge has an appeal or writ of error been dismissed on the assumption that a release of errors was implied from the fact that money or property had changed hands by force of the judgment or decree. If the judgment is reversed, it is the duty of the inferior court, on the cause being remanded, to restore the parties to their rights.

For the reasons above stated, we order the judgment of the Supreme Court of Louisiana to be reversed.

Mr. Justice WAYNE and Mr. Justice DANIEL dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court for the Western District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Supreme Court, with directions to proceed therein in conformity to the opinion of this court.

*185] *THE UNITED STATES, COMPLAINANTS, v. THE CITY OF CHICAGO.

Although the motion under argument in the Circuit Court was addressed to its discretion, yet if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions.[1]

So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point.[2]

The corporate powers of the city of Chicago have no right to open streets through property belonging to the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government.

Their right was limited to that part which, by a sale of the government, had become private property.

The fact, that streets had been laid out by an agent of the government, did not amount to a dedication of them to public use, so as to vest the control over them in the city.

The United States, having been the proprietor of all the land and reserved a part for military purposes, hold this part by a different title than where land is purchased by them in a State.[3]

THIS case came up, on a certificate of division in opinion, from the Circuit Court of the United States for the District of Illinois.

In 1839, soon after the decision of the Supreme Court in *Wilcox* v. *Jackson*, 13 Pet., 498, deciding that southwest fractional quarter-section ten, township thirty-nine north, range fourteen east, in the Chicago land district, having been selected and used for military purposes, was not subject to preëmption, the Secretary of War, in virtue of the authority vested in him, directed the sale of a portion thereof.

The act under which the Secretary of War derived this authority is the act of the 3d of March, 1819, entitled "An act authorizing the sale of certain military sites," which enacts, "that the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become, useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for into the Treasury of the United States, to make,

[1] CRITICISED. *United States* v. *Rosenburg*, 7 Wall., 582. CITED. *Daniels* v. *Railroad Co.*, 3 Wall., 255.

[2] See note to *Nesmith* v. *Sheldon*, 6 How., 43.

[3] CITED. *Union Pacific R'y Co.* v. *Burlington &c. R. R. Co.*, 1 McCrary, 466.

execute, and deliver all needful instruments conveying and transferring the same in fee; and the jurisdiction which had been specially ceded for military purposes to the United States by a State over such site or sites shall thereafter cease."

Mr. Birchard, then Solicitor of the Treasury, was appointed by the Secretary of War to make the sale, and to cause the land to be surveyed and platted, as an addition to Chicago. A plat was accordingly made, dividing the land into blocks and lots, with intersecting streets. This plat, together with a *description of the same, was recorded in the office of the recorder of Cook county, under the title of [*186 "Fort Dearborn addition to Chicago."

By this plat, several streets then existing in Chicago were prolonged, and laid out through all the property which belonged to the government. Lots were also laid off upon both sides of the projected streets. But a portion of the property was expressly reserved from sale, and marked by dotted lines lettered "Line of reservation." Within the reserved line, there were many public buildings belonging to the United States.

On the 11th of April, 1845, the following proceedings were had by the Common Council of the city of Chicago:—

"Alderman Ogden, from committee on the judiciary, reported in favor of the petition of E. Bowen and others, for the removal of obstructions at the north end of Michigan Avenue. Received and laid on the table. And,

"On motion of Alderman Scammon, it was ordered, that the street commissioner be directed forthwith to open the street (Michigan Avenue), and remove the obstructions therefrom; and that the city attorney be directed to prosecute all persons offering any resistance to the street commissioner whilst opening said street."

The city of Chicago was incorporated by an act of the Legislature of Illinois on the 4th of March, 1837. See Session Laws, 1836–37, p. 50. By the first section it is enacted, "That the district of country in the county of Cook, in the State aforesaid, known as the east half of the southeast quarter of section thirty-three, in township forty, &c., . . . and fractional section ten, excepting the southwest fractional quarter of section ten, occupied as a military post, until the same shall become private property, &c., . . . in township thirty-nine north, range number fourteen east, of the third principal meridian, in the State aforesaid, shall hereafter be known by the name of the city of Chicago."

The inhabitants are incorporated by the name of the city

of Chicago, and the corporation is authorized to take, hold, purchase, and convey such real and personal estate as the purposes of the corporation may require.

The twenty-fourth section prescribes the duties of the street commissioner,—"to superintend the making of all public improvements ordered by the Common Council, and to make contracts for the work and materials which may be necessary for the same, and shall be the executive officer to carry into effect the ordinances of the Common Council relative thereto," &c.

The powers of the Common Council over streets are conferred by the thirty-seventh, thirty-eighth, fortieth, and forty-third *sections. The thirty-seventh enacts, that "the said Common Council shall have the exclusive power to regulate, repair, amend, and clear the streets and alleys of said city, bridges, side and cross walks, and of opening said streets, and of putting drains and sewers therein, and to prevent the encumbering of the same in any manner, and to protect the same from encroachments and injury," &c.

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The thirty-eighth enacts, that "the Common Council shall have power to lay out, make, and assess streets, alleys, lanes, highways, in the said city, and make wharves and slips at the end of streets on property belonging to said city; and to alter, widen, contract, straighten, and discontinue the same; but no building exceeding the value of one thousand five hundred dollars shall be removed in whole or in part without the consent of the owner. They shall cause all streets, alleys, lanes, or highways laid out by them to be surveyed, described, and recorded in a book to be kept by the clerk, and the same, when opened and made, shall be public highways." The remainder of the section prescribes the manner in which the damages shall be assessed to the owners of land taken.

The fortieth enacts, that "the Common Council shall have power to cause any street, alley, lane, or highway in said city to be graded, levelled, paved, repaired, macadamized, or gravelled," &c.

And the forty-third enacts, that "the land required to be taken for the making, opening, or widening of any street, alley, lane, or highway, shall not be so taken and appropriated until the damages assessed therefor shall be paid or tendered to the owner or his agent."

A few days after the passage of the ordinance by the Common Council, directing the street commissioner to open Michigan Avenue, the United States filed their bill of complaint in the Circuit Court, setting their case fully forth, and praying for a writ of injunction against the city of Chicago,

its officers, agents, servants, counsellors, and solicitors, to restrain them from entering upon the unsold and reserved portion of the southwest fractional quarter-section ten aforesaid, embraced within the dotted lines of the small map, marked "Line of reservation," for the purpose of opening "Michigan Avenue," or the other proposed streets, or from committing any waste or spoil upon said land, buildings, or inclosures.

The district judge granted the injunction, and on hearing a motion for its continuance in the Circuit Court, the opinions of the judges were opposed upon the following points:—

1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

*2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of the government, has become private property. [*188

3d. Whether the streets laid out and dedicated to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets "private property," so as to authorize said city of Chicago to keep said streets open.

The cause was argued by *Mr. Toucey* (Attorney-General), on behalf of the United States, no counsel appearing for the city of Chicago.

Mr. Toucey presented the following points:—

1st. The city of Chicago has no jurisdiction within Fort Dearborn.

2d. There was no dedication of any street within the fort.

3d. The fort being reserved, there was no power to dedicate a street within it.

4th. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there.

I. The city has no jurisdiction within the fort. The part sold became private property. The lots were sold by their numbers, and were, in fact, bounded on the streets. The title passed to the centre of the streets, subject to the easement. The adjoining proprietors own to the centre, subject to the way, as if it had been laid out by public authority. This is the legal presumption, liable to be rebutted. English authorities: *Goodtitle* v. *Alker*, 1 Burr., 143; *Pring* v. *Pearsey*, 7 Barn. & C., 306; *Stevens* v. *Whistler*, 11 East, 51;

Cook v. *Green*, 11 Price, 136. Maine: *Howard* v. *Hutchinson*, 1 Fair., 335. New Hampshire: *Makepeace* v. *Worden*, 1 N. H., 16. Massachusetts: *United States* v. *Harris*, 1 Sumn., 21; *Adams* v. *Emerson*, 6 Pick., 57. Connecticut: *Peck* v. *Smith*, 1 Conn., 103; *Watrous* v. *Southworth*, 5 Id., 305; *Hart* v. *Chalker*, Id., 311; *Chatham* v. *Brainard*, 11 Id., 60. New York: *Cortelyou* v. *Van Brundt*, 2 Johns., 357; *Gedney* v. *Earl*, 12 Wend., 98; *Willoughby* v. *Jencks*, 20 Id., 96. Virginia: *Bolling* v. *Mayor*, 3 Rand., 563. South Carolina: *Witler* v. *Harvey*, 1 McCord, 67.

When the highway is dedicated, the title of the land remains in him who dedicates, and will pass to his grantee. The public take an easement only. *Lade* v. *Shepherd*, 2 Str., 1044; *Cincinnati* v. *White*, 6 Pet., 437; *Barclay* v. *Howell's Lessee*, *Id., 513; *Hobbs* v. *Lowell*, 19 Pick. (Mass.), 408, Shaw, C. J.; *Pearsall* v. *Post*, 20 Wend. (N. Y.), 126, 131, 132, Cowen, J.

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The jurisdiction of the city extends as far as the line of private property, which is the line of reservation on the plat, the present boundary-line of the fort. It has none beyond. See the act incorporating the city of Chicago, Illinois Session Laws, 1836–37, p. 50. The streets outside of the fort were effectually dedicated when the lands were sold, the streets opened, accepted by the public, and used as public streets. *Cincinnati* v. *White*, 6 Pet., 431; *Barclay* v. *Howell's Lessee*, Id., 498; *New Orleans* v. *United States*, 10 Pet., 662.

II. There was no dedication of any street within the fort. The present fort is the part not sold. It was expressly reserved by the United States when the sales commenced. The whole interest is in the United States. The proposed streets within the fort or line of reservation have not been opened, nor dedicated, nor lots sold on them. They are covered in part by the necessary buildings of the fort. The United States own them, and the land on both sides; and the Executive Department retained to the line of reservation for the purposes of the government, before any of the land beyond that line had been disposed of. The first act of dedication or disposition had not taken place. The map recorded, without any other act done, would be immaterial. If the sale had been entirely countermanded, the recorded survey would have been a dead letter; it is so now within the line where they were countermanded, or not authorized. The plan of Birchard was disallowed to the extent of the present fort. That order was effective, and is to be taken as the order of the President. A dedication is founded upon user. Dedication is the act of giving up land to the public. It must be enjoyed

in pursuance of the gift. An enjoyment for a less period than that prescribed by the statute of limitations may suffice, if accompanied by other decisive acts. Maps, plans, declarations, are evidence. Dedication is applicable only to the creation of public rights. Private rights are measured by the grant. Mercer Street, 4 Cow. (N. Y.), 542.

III. The fort being reserved, there was no power to dedicate a street within it. This was a military post, and under the control of the War Department. By the act of Congress of the 3d of March, 1819, (3 Stat. at L., 520,) the Secretary had power to sell a military site, become useless for military purposes, and give a deed in fee. But the act does not authorize the Secretary to lay out a road through a fort reserved from sale. It does not authorize him to encumber it, when retained as useful for military purposes, or to divert it from those purposes. It must be condemned as useless for military purposes *before it can be sold. Here is executive responsibility; and when upon that responsibility the [*190 site is retained, and not sold, there can be no conveyance. None is authorized. But if that were otherwise, before any sale he ordered the fort, block-house, powder-magazine, mess-hall, shops, and other necessary buildings, with the land where they stood, to be reserved. The subordinate had no authority to come with his sales within the line of reservation. It is to be presumed that he conformed to his instructions, in the absence of proof to the contrary. It is, indeed, admitted that the fort was reserved from sale to the line of reservation.

IV. The State of Illinois has no power to remove the buildings of the United States within the fort, or to make a highway there. The site of Fort Dearborn, in the judgment of the Executive, is wanted as a military post. The reservation is conclusive on this point. If private property, it could be taken under the Constitution, upon making compensation, and applied to this use. But the United States already own the land, and have applied it to this use. The road having never been opened, the State cannot now condemn the land to any other public use than that to which it is applied by the government, thereby causing an interference or collision. A State cannot open a convenient highway through a powder-magazine, or into the entrenchments of a fort, which exist by order of a government supreme within its sphere.

If, then, the city has no jurisdiction within the limits of Fort Dearborn; or if this street was never dedicated to the public by the Secretary of War, or his subordinate; or if neither had authority to dedicate it; or if the State of Illinois

has no authority to open a road in this fort in either case, the injunction must be sustained, to restrain the city from demolishing the buildings of the fort to open a road there; and corresponding answers must be given to the questions submitted by the court below.

Mr. Justice WOODBURY delivered the opinion of the court.

This case comes before us on a certificate of a division of opinion between the judges of the Circuit Court in the District of Illinois.

A preliminary question has arisen as to our jurisdiction, which first deserves attention.

The proceedings in the court below were a bill, filed on the 19th of April, 1845, by the United States against the city of Chicago, to obtain an injunction not to lay out certain streets through land belonging to the United States, which the city was preparing to open.

*191] *Before the return day a temporary injunction was issued, and when the term arrived, a motion was made to continue that injunction till the merits of the bill were decided. No answer had been put in to the merits, but a hearing was had on affidavits as to the motion, and in that hearing the division of opinion occurred which is now before us.

Two leading objections have been suggested to our jurisdiction over the matter. One is, that the division arose, not in a hearing of the merits, but of a preliminary motion, resting in the discretion of the court; and the other is, that several questions are certified, covering the whole case rather than a single point.

In respect to the first objection, we do not propose to decide whether the grant of a preliminary and temporary injunction is a matter of discretion merely, rather than of right. Because, whichever it may be, the questions of division presented here are not those on matters of mere discretion in the court below, but involve the right of the United States in the land proposed to be laid out as a street by the city. The adjudged cases, where a certificate has not been sustained on account of some discretion connected with the subject, are chiefly those where the question presented involved merely a matter of discretion, rather than arising in the consideration of a motion or point, which was one of discretion. (*Smith* v. *Vaughan*, 10 Pet., 366; *Packer* v. *Nixon*, 10 Pet., 411.) It must be obvious, that, in deciding a matter of discretion, a point may arise which is one of right and very material.

Other cases not sustained were decided on the ground that they occurred after the merits of the cause were decided, and in proceedings subsequent thereto, whether discretionary or not. (*Bank of United States* v. *Green*, 6 Pet., 28; *United States* v. *Daniel*, 6 Wheat., 548; *Devereaux* v. *Marr*, 12 Wheat., 212; 5 Cranch, 11, 187; 4 Wash. C. C., 633.) The act of Congress seems to reach only matter arising in the progress of the cause, and not afterwards, because the proviso is, "that nothing herein contained shall prevent the cause from proceeding," &c., and hence implies it must be in the progress of the cause. See Act of Congress, April 29th, 1802, 2 Stat. at L., 159, 160; 6 Wheat., 548. But the present question, occurring before a final decision, comes expressly within the words of the law,—"that whenever any question shall occur before a Circuit Court, upon which the opinions of the judges shall be opposed, the point" of disagreement shall be certified, &c. (2 Stat. at L., 159.) And this provision, manifestly, is broad enough to cover any material question of right thus arising, whether the subject on hearing was one of discretion or of right.

*The second ground of objection, that these questions are several in number, and so material as to decide the whole cause, might prevail, if they had not arisen at one time, at one stage in the cause, and involved little beyond one point. Because, if they are several in number and apply to different stages of the trial, and relate to independent points, they are generally not proper. *United States* v. *Baily*, 9 Pet., 267; *Nesmith* v. *Sheldon*, 6 How., 43; *White* v. *Turk*, 12 Pet., 238; *United States* v. *Stone*, 14 Pet., 524; *Saunders* v. *Gould*, 4 Pet., 392; *Grant* v. *Raymond*, 6 Pet., 218. [*192

That these three questions require an opinion virtually on only one point, namely, the right of the United States to the place proposed to be opened as a street, is manifest, when we see that the decision of this one way disposes of them all, and of the whole case. And the principle embraced in the other branch of this objection, to acting on several points which dispose of the whole case, is, not that the whole case may not properly be disposed of by our decision on what is certified, but that the decision must in substance be, not on several questions arising in various stages of the cause, and some of them anticipated and presented, so as to cover the whole case. *Leland* v. *Wilkinson*, 10 Pet., 294.

There has justly been a leaning in this court to decline jurisdiction in cases of decisions below where it is doubtful; because the power vested here in such cases, it is believed, was meant to be much more restricted than is often practised,

and is in the most favorable view rather an anomaly. But by considering questions, if certified here, only when real divisions of opinion occur on them, and at one and the same time, no danger exists of extending this branch of our jurisdiction beyond what Congress intended. On the contrary, it is divisions of opinion *pro forma*, and from courtesy to counsel, and on a variety of points, and at times, some not then having actually arisen, but being anticipated, which appear to transcend the original design of vesting such a power here.

We have, therefore, for several years, declined to consider a certificate of such a variety of points so arising. (See cases before cited.) And although an indulgence has sometimes been given to certificates, where, in important cases, a division was certified *pro forma* (*Jones* v. *Van Zandt*, 5 How., 224), yet we do not feel justified in repeating it.

To proceed to a consideration of the principal matter involved in these questions, it will be necessary first to advert briefly to some of the admitted facts in the case.

The United States became the owners of the land occupied by Fort Dearborn, near Chicago, in the State of Illinois, under *the original cession of the Northwest Territory. It was occasionally a station for troops from 1804 to 1824, when the whole fractional quarter-section on which the fort stood was reserved by the General Land Office for military purposes, on the application of the Secretary of War. See *Wilcox* v. *Jackson*, 13 Pet., 502. In that case, which is better known as the Beaubean claim, this court decided that this was a legal appropriation of that quarter-section of land to a public purpose, and exempted it from the rules as to the mass of public lands and their usual liabilities.

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From that time till A. D., 1839, it was occasionally occupied as a fort by the United States, and a light-house was erected on it under the authority of Congress, when the Secretary of War, thinking that a portion of the same might be sold without injury to the public interests, proceeded, with the approbation of the President, to make such a sale, under the act of Congress of March 3d, 1819. (3 Stat. at L., 520.)

He did this by an agent, who first made a plan of the whole quarter-section, calling it "Fort Dearborn addition to Chicago," and laying it down in lots, without exhibiting on it any buildings or reservations. But he did not sell the whole, the government not then concluding to part with the fort, or land and buildings immediately contiguous. On that plan certain streets were also laid down running into the whole quarter-section. The sales, however, being made of only the

lots and land outside of what was reserved, the United States allowed the proposed streets only so far as there laid down to be opened by the city of Chicago, and used by the adjoining owners, in conformity to the plan. And when the city undertook to open the streets within the line of reservation, and where no sales of land had been made, and where opening them would prostrate some of the public buildings, and materially injure and impair the public uses of the station, the United States applied for the injunction before named.

On the motion to continue the temporary injunction till the bill was answered and heard, the judges being opposed in opinion on the right of the city to open streets on the public land of the United States situated like this, the three questions certified were in form:—

"1st. Whether the corporate powers of the city of Chicago have a right to open the streets through that part of the ground laid out in lots and streets, but not sold by the government.

"2d. Whether the corporate powers of the city are not limited to that part of the plat which, by sale of the government, has become private property.

"3d. Whether the streets laid out and dedicated [*194 to public use by Birchard were not, by his surveying the land into lots and streets, making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby made the ground embraced by said streets 'private property,' so as to authorize said city of Chicago to keep said streets open."

But, as has been explained, the whole of them in substance depend upon the extent and character of the rights of the United States in the place where the new streets were proposed to be opened. What, then, were those rights? 1st. The place was where the title of the government had never been parted with, after the original cession. 2d. It was where the land had been appropriated and legally set apart for a special public use. 3d. It was where the opening of these streets would essentially impair, if not destroy, that public use. 4th. It was where streets had never been opened and used, or actually dedicated in that way to purchasers of land there, or to the community in that neighbourhood. 5th. It was where the city charter, by its act of incorporation, did not extend, as the charter expressly excepted from its limits "the southwest fractional quarter of section ten, occupied as a military post, till the same shall become private property."

Now, though this court possesses a strong disposition to sustain the rights of the States, and local authorities claiming under them, when clearly not ceded, or when clearly reserved,

yet it is equally our duty to support the general government in the exercise of all which is plainly granted to it and is necessary for the efficient discharge of the great powers intrusted to it by the people and the States. The erection of forts belongs to one of those powers, and the building and employment of light-houses belongs to another.

Under the circumstances of this case just recited, then, very clear facts or principles must exist, which impair the rights of the United States, before streets can be opened upon their soil, when situated, reserved, and used as this is.

It is not questioned that land within a State purchased by the United States as a mere proprietor, and not reserved or appropriated to any special purpose, may be liable to condemnation for streets or highways, like the land of other proprietors, under the rights of eminent domain.

But that was not the condition of this quarter-section, being a part of the land originally ceded to the United States as the Northwest Territory, and afterwards specially set apart for their use for military purposes. Here the opening of these streets would, also, injure, if not destroy, the great objects of *the reservation. Nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon. It seems, too, that, though land purchased within a State for ordinary purposes by the general government must yield to the local public demands, yet land, when held like this, at first by an original cession to that government, and afterwards appropriated for a specific public object, cannot easily be shown liable to be taken away for an ordinary local object, though public, and especially one under another government and by mere implication. (*United States* v. *Ames*, 1 Woodb. & M., 88.)

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It must be for a public object, clearly superior or paramount, or to which preference is expressly given by law or the Constitution, in order to make the right clear to seize and condemn land so situated. *West River Bridge* v. *Dix*, 6 How., 543, 544, and cases there cited; 4 Gill & J. (Md.), 108, 150.

But the correctness of this proposition, being open to some debate, is not further explained, nor is it decided here, because not necessary to a disposition of the case.

On other grounds, the idea seems entirely untenable which is entertained by the city and presented in one of the questions, that, because streets had been laid down on the plan by the agent, parts of which extended into the land not sold, those parts had, by this alone, become dedicated as highways, and the United States had become estopped to object.

Persons who looked only at this plan, and did not know

that all of the quarter-section was not then to be sold, might be misled in their opinion or expectation how far some of the streets might extend. And if becoming purchasers, such persons might have given something more, under an impression that their lots were on a street which would be longer and more important.

But the bill avers, that the agent, at the time of the sale, gave notice that the lots within the line of reservation were not to be sold. How, then, could a right to open streets there pass, or purchasers be misled? The streets could not pass as an appurtenant to the side lots there; because they were not sold. The streets did not pass by any deed of them, or of any easement or servitude in them, as none was made. There had been, also, no condemnation of them for public ways.

It is said, however, and justly, that land may be dedicated by the owner to highways, and without deed or much formality. Thus, if one allows his land long to be occupied by the public as a highway, such a dedication may be presumed. *McConnel* v. *The Trustees of Lexington*, 12 Wheat., 582. So if the actual user has not been long, but clearly acquiesced in. *Jarvis* *v. *Dean*, 3 Bing., 447; 1 Campb., 262; *City of Cincinnati* v. *White*, 6 Pet., 431. So if one makes a [*196 map of land proposed to be sold, with streets contiguous and for the accommodation of side owners, and sells accordingly, it may generally be presumed that he thus dedicates the land contiguous for the streets. See *Matter of Thirty-second Street*, 19 Wend. (N. Y.), 128; *Wyman* v. *Mayor of New York*, 11 Id., 486; *Lewis Street*, 2 Id., 473; 8 Id., 85.[1] And certainly, if he allows them afterwards to be so occupied. 6 Pet., 431.

But here, as before shown, no such occupation had been allowed within the reserved line, nor any such sale made there of the contiguous lots. On the contrary, all the streets so laid down on the plan, where the lots contiguous were sold, have been allowed to be opened without opposition by the United States. And it is entirely unsupported by principle or precedent, that an agent, merely by protracting on the plan those streets into the reserved line and amidst lands not sold, nor meant then to be sold, but expressly reserved, could deprive the United States of its title to its real estate, and to its important public works. Nor, under such circumstances, have the purchasers of land elsewhere, or the city, any equitable ground of complaint, that the streets thus protracted on paper are not opened.

[1] CITED. *Irwin* v. *Dixion et al.*, 9 How., 31.

Let the opinion of this court, then, be certified in conformity to these views, which will be, as applied to the questions formally, in the negative as to the first and third, and in the affirmative as to the second.

Mr. Justice CATRON, dissenting.

On a bill in equity being presented by the United States to the district judge, he granted an injunction against the city of Chicago, to restrain the corporation from running a street through the public property attached to a military post within the corporate limits. By the act of February 1st, 1807, injunctions granted by district judges in vacation only remain in force until the next term of the Circuit Court. Accordingly, at the next term a motion was made to continue the injunction granted by the district judge, and the judges were opposed in opinion whether an injunction should or should not be granted. The entire matters of law and fact arising on the face of the bill, and affidavits and documents introduced by the defendant to resist the motion, were sent up to this court, covered by three points, on which the judges assume to have been opposed. And the motion to renew the injunction is presented to us, as it was to the Circuit Court. And the question is, Have we any power to grant the injunction? By the *Constitution, the judicial power is vested in the Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish. In cases affecting public ministers and consuls of other countries, and in cases where States are the parties, this court has original jurisdiction. In all other cases, the Constitution provides, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make. That is to say, with such exceptions to the exercise of appellate jurisdiction as Congress shall interpose; as that no cause shall come up, unless the matter in controversy exceeds the sum or value of two thousand dollars, nor shall a writ of error lie in a criminal cause, nor from a District Court, &c. That the original jurisdiction of the Supreme Court is limited to the two classes of cases above referred to was held by this court in *Marbury* v. *Madison*, 1 Cranch, 174. Is, then, the granting an injunction an exercise of original jurisdiction? It may be done out of court by the circuit judge; and so an expired injunction may be renewed at any time by him, the courts of equity being always open for such purpose by our present rules. This bill and affidavits are placed before us as they were before the Circuit Court, and for the

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same purpose of founding an original motion on them, thereby to procure an order for the restraining writ to issue. We are asked to take an original incipient step, as the court below was, before any answer is filed, and before anything could be adjudged between the parties by the Circuit Court, so as to bind their rights.

What is appellate jurisdiction in the sense of the Constitution? Our practice under the thirteenth section of the Judiciary Act of 1789 has settled the meaning of the term. It is to reëxamine, and to reverse or affirm, the judgment, sentence, order, or decree of an inferior court,—to pass on that which has been adjudged. Here, nothing was adjudged in the court below.

From the threatening nature of this precedent, it is deemed improper to pass over it unnoticed, as I have done in other cases. If a division can be certified in this instance, so there may be in every other where an injunction is applied for in open court, and the judges see proper to send us the cause, —for as to real divisions, they hardly exist at present. The cases are sent here by agreement of counsel, with the assent of the Circuit Court, usually without any examination below.

I, therefore, am of opinion, that we have no jurisdiction, and that the matter before us should be dismissed.

ORDER.

This cause came on to be heard on the transcript of the *record of the Circuit Court of the United States for [*199
the District of Illinois, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,— 1st. That the corporate powers of the city of Chicago have no right to open the streets through that part of the ground laid out into lots and streets, but not sold by the government. 2d. That the corporate powers of the city are limited to that part of the plat which, by sale of the government, has become private property And 3d. That the streets laid out and dedicated to public use by Birchard, by his surveying the land into lots and streets, and making and recording a map or plat thereof, did not convey the legal estate in the streets to the city of Chicago, and thereby make the ground embraced by said streets "private property," so as to authorize said city of

Chicago to keep said streets open. Whereupon, it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

JENNET SMITH, CALVIN S. POWE, AND THOMAS A. POWE, PLAINTIFFS IN ERROR, *v.* JOSEPH KERNOCHEN.

When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice.[1]

If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction.[2]

The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late.[3]

A former suit in chancery between the original parties to the mortgage involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee claiming to recover by virtue of the same mortgage. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it.[4]

There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined.[5]

The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State.

THE Reporter finds the following statement of the case, prepared by Mr. Justice Nelson, and prefixed to the opinion of the court.

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[1] CITED. *Perrine* v. *Town of Thompson*, 17 Blatchf., 20. S. P. *Jones* v. *League*, 18 How., 76; *Briggs* v. *French*, 2 Sumn., 252.

[2] DISTINGUISHED. *Manufacturing Co.* v. *Bradley*, 15 Otto, 180. CITED. *Deshler* v. *Dodge*, 16 How., 631; *Hawley* v. *Kepp*, 2 Flipp., 178; *Bleckburn* v. *Selma &c. R. R. Co.*, Id., 538. S. P. *Wilkes* v. *Newberry*, 4 McLean, 220; *Starling* v. *Hawks*, 5 Id., 318; *Jones* v. *League*, 18 How., 76.

[3] APPLIED. *Sheppard et al.* v. *Graves*, 14 How., 511. FOLLOWED. *Holmes* v. *Oregon &c. R. Co.*, 7 Sawy., 392; s. c., 9 Fed. Rep., 238. CITED. *In Sobry* v. *Nicholson*, 3 Wall., 423; *Williams* v. *Nottawa*, 14 Otto, 211; *Roe* v. *Grand Trunk R'y Co.*, 14 Fed. Rep., 402; *Gause* v. *City of Clarksville*, 1 McCrary, 80 *n*. See note to *McKenna* v. *Fisk*, 1 How., 241.

[4] CITED. *New Orleans &c. R. R. Co.* v. *City of New Orleans*, 14 Fed. Rep., 376; S. P. *Tyler* v. *Hyde*, 2 Blatchf., 308.

[5] FOLLOWED. *Garton* v. *Botts*, 73 Mo., 276.

*This is a writ of error to the Circuit Court of the United States for the Southern District of the State of Alabama. [*199

The plaintiff below, Kernochen, a citizen of New York, brought an action of ejectment against the defendants to recover the possession of eleven hundred and sixty acres of land, situate in that State, and to which he claimed title.

On the trial it appeared that Archibald K. Smith, being the owner in fee of the premises, executed a mortgage of the same, on the 9th of April, 1839, to the Alabama Life Insurance and Trust Company, a corporation duly incorporated by the legislature of the State of Alabama, to secure the sum of seven thousand five hundred dollars, payable in five equal annual payments, with interest. And, further, that the mortgage had been duly assigned and transferred by that company to Kernochen, the plaintiff, in consideration of the sum of one thousand dollars, on the 26th of August, 1844. Possession being admitted by the defendants, the plaintiff rested.

It appeared, on the part of the defence, that the mortgage and bond accompanying it, with other securities belonging to the Life and Trust Company, were placed in the hands of Hunt, an agent of the company, to procure a loan of money in New York; and that one thousand dollars was loaned, at his instance and request, by the plaintiff to the company, for the security of which the assignment of the above mortgage was made. That the motive of the company in making the assignment was to obtain a decision of the Federal courts upon the questions decided in the court below, but that Kernochen was not advised of the motive at the time of the advance of the money, nor was he in any way privy to it.

It further appeared, that a bill of foreclosure of the mortgage had been filed in the Court of Chancery of Wilcox county, State of Alabama, by the company, against Smith, the mortgagor, which was defended by him. In the answer he admitted the execution of the bond and mortgage, but denied their validity, setting out the consideration, which consisted of bonds and obligations of the company made and delivered to him for the like sum of seven thousand five hundred dollars, payable at a future day, with six per cent. interest. The mortgage in question bore eight per cent.

The proofs taken in the case sustained the answer, and showed that the transaction between the company and the mortgagor, consisted simply in an exchange of securities with

each other, with an advantage to the former of two per cent. profit.

The chancellor decreed that the contract was valid, and the bond and mortgage binding upon the defendant, and *200] that, *unless the principal and interest were paid within thirty days, the mortgage be foreclosed.

Upon an appeal to the Supreme Court of the State, this decree was reversed, and a decree entered dismissing the bill. That court held, that the charter of the Life and Trust Company conferred no authority upon it to lend its credit, or issue the bonds for which the mortgage in question was given, and that the bond and mortgage taken therefor were inoperative and void.

The charter of the company, together with several amendments of the same, were given in evidence.

When the evidence closed, the defendants prayed the court to charge the jury, that, if they believed that the transfer of the mortgage to the plaintiff was made for the purpose of giving jurisdiction to the Federal courts, and to enable the company to prosecute its claim therein, and that the plaintiff was privy to the same, the deed was void, and did not pass any title to the plaintiff which the court would enforce.

The defendants further prayed the court to charge, that the judgment and decree of the Supreme Court of Alabama between the company and Smith, the mortgagor, was conclusive upon the parties in this suit; and that neither the mortgagees, nor those claiming under them, since the rendition of the decree, could recover the lands embraced in the mortgage at law or in equity.

The court refused to charge according to the above prayers, and charged as follows:—

1. That any matters which might abate the suit should have been pleaded in abatement, and that, after the plea of the general issue, the facts proved by the defendants, as set forth in the bill of exceptions, could be of no avail, and were insufficient to abate the suit. And,

2. That the defendants, claiming title under Smith, the mortgagor, were estopped from denying the consideration of the mortgage as set forth in that instrument, and that the consideration as there stated was good, and valid, according to the charter of the company, and sufficient to sustain the validity of the mortgage and title of the plaintiff.

The jury found a verdict for the plaintiff.

A writ of error brought the case up to this court.

It was argued by *Mr. Dargan*, for the plaintiffs in error, and *Mr. Sergeant*, for the defendant in error.

Mr. Dargan, for the plaintiffs in error.

The facts of this case may be thus stated. The Alabama Life Insurance and Trust Company held the bond and mortgage of Archibald R. Smith, executed and [*201 delivered to said company. They filed a bill in equity in the State of Alabama to foreclose the mortgage. Smith resisted a decree and set up a defence, that the consideration of the bond and mortgage was illegal, in this, that the consideration of the company to him was the bonds of the company to an amount equal to his bond, payable in New York, which bonds of the company bore interest, payable semiannually, and were in the form described in the bill of exceptions. That said company had no power or capacity to deal by way of exchanging credits. The Supreme Court of the State of Alabama dismissed the bill of the company, declared the consideration illegal, and the bond and mortgage void.

This is shown by the record of the case, reported in 4 Ala., 558, which case, as reported, is made part of the bill of exceptions. It was also shown by the secretary of the company, that the consideration of the bond and mortgage was stated correctly in the report of said case. After this decision was rendered, the company transferred the bond and mortgage to Kernochen by an assignment on the back of the mortgage, marked exhibit B in the bill of exceptions.

Tisdale, the secretary of the company, testified, that the transfer of the bond and mortgage to Kernochen was for $1,000. That the object of the transfer was to obtain a decision of the question in the courts of the United States. That he did not know whether Kernochen was informed of the motive of the transfer; that the company had never had any other transaction with him, and that this was done through J. Hunt, their agent.

The defendant in the court below showed, also, that Smith had resisted the mortgage in his lifetime, and denied its validity; of this the company was apprised; also, that, since the death of Smith, the land had been sold under execution, and bought by Powe, one of the defendants. The defendants requested the court to charge the jury, that if the transfer of the mortgage was for the purpose of giving jurisdiction to the Federal courts, and to enable the Alabama Life Insurance and Trust Company to prosecute its claim in this court, and that the lessor of the plaintiff was privy to this intention, that the deed was void, and could give the lessor of the

plaintiff no title which this court would enforce. This charge was refused. The defendant also requested the court to charge the jury, that the consideration of said mortgage was illegal, and therefore the mortgage was void, and the plaintiff could not recover; which was refused.

*202] *Also, that the judgment and decree of the Supreme Court of Alabama, as delivered in the case of *Smith* v. *The Alabama Life Insurance and Trust Company*, was conclusive, and that neither the mortgagors nor those claiming under the mortgage, since the rendition of said decree, could recover the land described in the mortgage; which was refused. Also, that, if the jury believed that, at the time of the transfer to the lessor of the plaintiff, the defendants held the land, denying the validity of the mortgage, the transfer was void as to them, and that the plaintiff could not recover; which was refused.

And the court charged, that any matter in abatement should have been pleaded in abatement, and that the facts proved by the defendant on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit.

The court also charged, that the defendants and Archibald R. Smith were estopped from denying the consideration as set forth in the mortgage, and that the consideration, as expressed therein, was sufficient, according to the laws regulating the Alabama Life Insurance and Trust Company, to sustain the contract set forth in the mortgage.

Also, that the judgment and decree of the Supreme Court of Alabama was not conclusive, and could not bar the plaintiff in this suit.

It will be seen by the bill of exceptions, that the case, as reported in 4 Alabama Reports, as well as the acts of the legislature incorporating the company, and altering and amending the charter, are part of the bill of exceptions.

I intend to present the following questions:—

1st. The court erred in refusing to charge the jury, that, if they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce.

The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given.

The Constitution did not intend to confer on the Federal

tribunals jurisdiction to determine on the rights of citizens residing in the same State, unless the subject-matter was of admiralty jurisdiction, and where citizens of the same State held grants to the same land from different States.

A deed, therefore, which is merely intended to give jurisdiction to this court, and is not for the purpose of transferring the *right to the thing to the vendee, but as [*203
between vendor and vendee the interest and right is still with the vendor, contravenes the spirit and intention of the Constitution; shall it be effectual for this purpose? If so, it appears to me that the framers of the Constitution ought to have added, or rather that we now add to the Constitution, after the words, "between citizens of different States," "and between citizens of the same State where one of the parties has transferred his right to a citizen of another State, with the view to give jurisdiction to the Federal courts."

Justice Washington, in 1 Washington's Circuit Court Reports, 82, decided that a deed for such a purpose was void, and could not effect its object. I think that this court came to the same conclusion in the case of *McDonald* v. *Smalley*, 1 Pet., 558; in concluding the opinion, Chief Justice Marshall uses this language:—"The case, we think, depends on the question, whether the transaction between McArthur and McDonald was real or fictitious; but there being nothing in the record from which the court could pronounce it was fictitious, the deed was maintained. But suppose the evidence had shown that the deed was fictitious, that McDonald was suing merely for McArthur, what would have been the decision? It seems to me, from the whole case, that the deed would have been pronounced void,—a fiction merely; and, therefore, it could not have given title so as to effectuate the very fictitious design for which it was intended; that is, to coerce the adjudication of the title in the Federal courts."

The District Court seemed to think it was matter in abatement; now Kernochen was a citizen of the State of New York, the plaintiff in error, of Alabama; the Circuit Court, therefore, had jurisdiction so far as the parties on the record are concerned. And the only question was, Had the plaintiff the better title? He had the title the mortgage gave him, if the transfer was valid in law; if it was not valid in law, he had no title, and the question was therefore properly raised in bar. True it is, that, in 1 Pet., the question seems to have arisen on a question of jurisdiction to the court; but the court will perceive that the question still must have been,

Did the deed from McArthur to McDonald give title to McDonald? If it did give title, as McDonald resided in Alabama, the jurisdiction was perfect; if it gave no title, McDonald could not recover; therefore the question was, did the transfer of the mortgage, for the purpose of prosecuting the suit for the Alabama Life Insurance and Trust Company, being intended to give fraudulent jurisdiction to the court, convey to him any title, or such a title as this court would enforce?

*204] *Deeds given for illegal purposes are void, and courts will not execute the purpose. This transfer was made to enable the Alabama Life Insurance and Trust Company, a corporation of Alabama, to litigate its rights with citizens of Alabama in the Federal courts.

The company was prevented by the Constitution from doing this. They try by this deed to do it, and for this purpose they make it; will the court execute the purpose, or declare the deed void? If void, no title passed, none at least that this court would enforce; for, if it did, it would be carrying out, or permitting the Alabama Life Insurance and Trust Company to carry out, their illegal purpose.

The whole testimony fully authorized the request asked. A decision had been rendered on the case in the Supreme Court of the State, pronouncing the mortgage void. The company never had had any transaction with the plaintiff. The secretary admitted that the object was to enable the company to try the question in the Federal courts; only a thousand dollars was received. It might well have been left to the jury to say, Is this not all a fiction, a design and trick between Kernochen and the company? and if so, I think this court will establish the rule, that such a transaction will not convey such a title as this court will enforce.

2d. The consideration of the mortgage is illegal. The Supreme Court of the State of Alabama has decided, on this very same mortgage, that the consideration was illegal, and not authorized by the charter of the company; and this decision was made directly, when the validity of the mortgage was put in issue, and the decision depended on the construction of the charter and its amendments.

The rule is fully recognized in this court, that the decision of the State courts, construing a statute of their own State, is conclusive on this court. That is, whether the construction be right or not, it will be adopted as a rule of decision. So strongly has this court adhered to this rule, that, in a case from Tennessee, where the Supreme Court of Tennessee had reversed a former decision on the construction of the statute

of limitations, this court adopted the last decision as conclusive, although they believed the former decision was correct. See, also, *Greever* v. *Neal*, 6 Pet., 291. It may be well to inquire why this court has adopted this rule of decision. The answer is, that the jurisdiction or sovereignty, as it may be called, has an unquestionable right to construe its own statutes, and that its own courts and its own people understand its own laws, and that no other people or government can or ought of right to construe those laws for them. Now, I would submit that, in construing an act of the legislature creating a corporation, we could not adopt a [*205 different rule; if so, every charter granted by the States must come before this court for its final construction, and we should deny to the sovereignty that created the being the right to judge of its powers and capacities.

But, if I am wrong in this view, the decision of the Supreme Court, as delivered by Justice Ormond, will clearly show, I think, that the company had no right to issue their bonds, and thus deal in an exchange of credits. If they had the right to issue the bonds described in the bill of exceptions, their contracts to the same purport would have been valid without their seal, and their obligations could have as well been payable on demand as at a future day; as well in the shape of a bank-note, as in any form; and thus, by construction, they would have fairly been entitled to banking privileges, which was certainly never designed or contemplated by the charter. Whether, therefore, this court will construe the charter, or adopt the construction of the Supreme Court of Alabama as correct, the result will be the same, that the consideration of the mortgage is illegal.

Then comes the question, Can we show by parol proof that the consideration is illegal, when the consideration expressed in the mortgage is legal, and different from the consideration shown by the proof, which is recited to be seven thousand four hundred dollars in cash? To hold that this recital precludes proof of the illegality of consideration would set the whole law at defiance, so far as contracts are concerned, and would be saying, however immoral or vicious the consideration of a contract may be, you may preclude an inquiry into it by stating a legal consideration on its face.

The rule of evidence is, that parol evidence shall not be received to vary or contradict a deed or other written evidence. This rule, however, can only apply when the evidence seeks to contradict or vary the terms or legal effect of a deed; not seeking, however, to destroy the deed altogether as a legal instrument or contract; for the rule is well settled,

that fraud or illegality of consideration may be given in evidence to defeat a deed, that is, to show the deed is a nullity.

This is the doctrine laid down in 4 Kent, 465, 466; Greenl. Ev., § 284; 1 Smith, Lead. Cas., 154; 2 Wils., 347; 9 East, 408; 5 Mass., 61. Indeed, a different rule would destroy all law by the form of the contract.

I therefore submit, that the language of the deed cannot preclude the plaintiffs in error from showing that the consideration was illegal; and being illegal, the mortgage is *206] void; and *therefore the court erred in refusing the charge asked, and in charging as it did as to the validity of the deed.

Another question is, Could the Alabama Life Insurance and Trust Company transfer a title, after Smith had denied the validity of the mortgage, and held the possession adverse to the company? Could the company make a deed that would be valid as against the adverse possessor? At common law he could not, for livery of seizin could not be given. See 2 Co. Litt. by Thomas, 409, and note (Y). And this is the rule recognized by the Supreme Court of Alabama. See *Allen and Dexter* v. *Nelson*, 6 Ala., 68. True it is, that the mortgagor cannot deny the title of the mortgagee, and he is considered as the tenant of the mortgagee. But the principle of this doctrine is, that where there is a valid mortgage, the mortgagor shall not set up a paramount title to the mortgage; but here the validity of the mortgage was denied. The possession was adverse to the mortgage. Does not the rule of the common law apply?

Mr. Sergeant, for the defendant in error.

The facts of this case appear in the record, as fully, and at the same time as succinctly, as they could be presented here. To the record the court is respectfully referred for the general view of them, and the questions they give rise to, saving the right of stating particular facts, as they may become material in the course of the discussion of the matters of law involved in the case.

From the printed argument submitted by the learned counsel of the plaintiffs in error, it appears that they rely upon two principal objections to the judgment below, and one that is subordinate, and, seemingly, not much confided in. These are all the assigned errors, therefore, before the court, and to these answers will now be given, without further introduction.

I. "The court erred in refusing to charge the jury, that, if

they believed the transfer to Kernochen was made with the view to enable the Alabama Life Insurance and Trust Company to litigate their claim in this court, the transfer was void, and could give no title that this court would enforce. The response of the court to this request, as will be seen by the charge given, was, that this fact could have no influence after the general issue had been pleaded. That, if it was true, it was but matter in abatement. This is the substance of the charge given."

The first of these differs, in one particular, from the printed argument, namely, in requiring the judge to leave to the *jury whether the lessor of the plaintiff was [*207
"privy to his intention."

The second differs, it is thought, materially from the charge actually given, as will be presently seen.

To this error, thus assigned, there are several answers.

1. There was no evidence whatever of any privity of the lessor of the plaintiff. The only witness examined on the point said, "He did not know whether Kernochen was informed of the motive; that he never had any intercourse with him on the subject, nor had the company ever had any other transaction with him." As a matter of fact, it thus stood without any proof. It is respectfully submitted, that the court cannot be required to give a charge upon what is not in evidence. If a fact is important to the party, it is for him to substantiate it by proof; but where there is absolutely no proof at all, he cannot require the judge to charge the jury as to its effect, and there is no error in the judge declining to do so. The learned counsel for the plaintiffs in error seems to be of the same opinion, for in his argument, as has been seen, he omits the matter of privity altogether. By and by it will be seen whether the fact itself, if proved, would have been of any consequence. It is submitted that it would not.

2. The judge was required to charge the jury, that, upon the hypothesis presented, without any color of support from the evidence, the assignment of the mortgage was void, and could give the lessor of the plaintiff no title which the court would enforce. The grounds in law upon which the judge could be asked to declare the deed void, and to decide that it could give no title which the court could enforce, are nowhere exhibited in the argument, unless they are supposed to be somehow involved in the general question of jurisdiction, which will be considered presently. The prayer is simply that the court will charge the jury that the assignment is void, and therefore that one link is wanting in the

derivation of title of the lessor of the plaintiff. The proper termination of the objection is not to the jurisdiction at all, but to the right to recover, equally fatal in all jurisdictions, State or Federal.

It is nowhere denied that the assignment was duly signed, sealed, and delivered, was upon a sufficient consideration, and, between the parties, a good and valid transfer, sufficient in law to pass the right of the mortgagee, whatever it was, to the transferee. How it can be said that such a deed is void is altogether inconceivable. Probably the explanation of what is meant is to be sought in the words which follow,—that it "could give no title which this court" (the Circuit Court) "would enforce." The reasoning, then, *208] would be, it is good *elsewhere, but it is void here; and the ground must be, that it is so void because it was made to give this court jurisdiction. This position is answered authoritatively by one of the decisions of this high court, quoted in the printed argument of the plaintiff in error. In *McDonald* v. *Smalley*, 1 Pet., 620, (A. D., 1828,) Chief Justice Marshall, in page 624, declares the motive to be of no consequence. The case is very similar to the present, and what is there said is now considered to be the settled doctrine of this court. The reasons of it will be found very fully stated in an opinion of the late Judge Story, in his circuit, which will be again referred to in a later stage of the argument. (*Briggs* v. *French*, 2 Sumn., 251.) The motive, therefore, is not an unlawful one to entertain or to act upon, and cannot affect the validity of the deed, if in other respects valid and good. "This court" (the Circuit Court) would enforce it as fully as any other court. It would have been error to decline the jurisdiction.

3. The judge is charged with error in deciding, as alleged, that this, if true, was matter in abatement, that it ought to have been pleaded, and could have no influence after the general issue pleaded.

What the judge really did say is in the bill of exceptions, and is as follows:—"And the court charged, that any matter in abatement should have been pleaded in abatement; and that the facts proved by the defendant, on the trial, as set forth in the bill of exceptions, after the plea of the general issue, could be of no avail to the defendant, and could not abate the suit."

If the facts proved by the defendant could be of no avail, either upon a plea in abatement or upon the general issue, then the decision of the judge, as imputed to him, would be wholly immaterial, and therefore it is not error to reverse the

judgment. Authority (which is abundant) need not be quoted for this obvious conclusion of common sense. If it could not be made available in either way, the case was against the defendant, and the decision must be against him, so that what was said by the judge could neither help nor hurt him. This point was thus immaterial.

But the charge of the judge must be understood with reference to all that had previously occurred in the case, and in fairness must be interpreted as intended to express, in a concise way, his opinion upon the several points the case presented upon the evidence or upon the requirement of counsel. It must be remembered, therefore, in the first place, that there was not the least pretence of evidence to affect the lessor of the plaintiff, or to impugn the integrity of his conduct. All that *was before the court was the evidence as to [*209
the motive of the mortgagee, which, as already stated, was of no manner of consequence. In his charge, he begins with stating the law,—"that any matter which abates the suit should have been pleaded in abatement," which, undoubtedly, is true,—universally true, unless this be an exception. The remainder of the sentence must be understood to say, that, if so pleaded, they would be insufficient, under the circumstances proved, "to abate the suit."

It is not worth while, however, to occupy the time and attention of the court with an effort to bring this question to the most exact precision. Interpreted in either way, the charge is right, and there is no error in it. If the court should be of opinion that the learned judge below meant to say that the matter alleged could be of no avail to the defendant, after pleading the general issue, we contend that he was right, and there was no error.

The plaintiff's argument, it will be seen, embraces two propositions in law, namely, that, upon the trial of the general issue, the evidence in the case was competent and was sufficient to oust the jurisdiction, and also that no plea in abatement was necessary to entitle the evidence to be heard, and to produce this legal effect.

To maintain these propositions, but one case is cited, namely, *Maxfield's Lessee* v. *Levy*, reported in 2 Dall., 381, and more at large in 4 Dall., 330. Reference is also made to two *dicta* of a later period, which will be noticed hereafter.

What *Maxfield's Lessee* v. *Levy* decided, it seems to have been difficult to express in legal language. In the first of the reports, the purpose of the deed, and that there was no consideration, are stated as the grounds of the decision. In the index to the second, it is thus stated:—"A fictitious convey-

ance of land, to give jurisdiction to the Federal court, detected, and the suit dismissed." The word "fictitious" here used will be found to be adopted afterwards, but what it means is nowhere stated or defined. The word is an ambiguous one, as here applied, and the two cases where it is subsequently found did not require attention to its meaning, because the objection founded upon it was answered decisively by other matter. All that need be said is, that if the "purpose" or "motive" is held to make it "fictitious" and unlawful, it is contrary to what has been decided by this court in the case already referred to.

The decision of the Circuit Court, however, is not authority here. It is entitled to respect so far only as it is reasonable and consistent with law; and to that respect it is entitled only in cases where the facts and circumstances are the same.

*210] *Now they are not so, in the present case, as must be most obvious.

In *Maxfield's Lessee* v. *Levy* there was no question of the competency of the evidence upon the general issue, nor of its sufficiency to oust the jurisdiction. It does not appear that the general issue had been pleaded, or any other plea, nor, of course, that the defendant, by pleading, had waived his right to except to the jurisdiction. The case was decided upon a rule to show cause why the ejectment should not be dismissed from the record.

Again, in *Maxfield's Lessee* v. *Levy* the grantor and the grantee were both parties to the purpose which the learned judge denounced as vitiating the deed. That is not the case here. There is no evidence at all that the assignee was privy to it.

Further, there was no consideration in *Maxfield's Lessee* v. *Levy*. This was clearly and distinctly proved, and much stress is laid upon it by the learned judge, as may be seen in 4 Dall., 334. It was, indeed, the chief ground of his decision. In the present case, there was a valuable consideration paid.

Not admitting that, under these circumstances, the decision in *Maxfield's Lessee* v. *Levy* can be supported, yet there are such differences between that case and the present, as fully justify us in concluding that the learned judge who decided *Maxfield's Lessee* v. *Levy* would not have decided *Kernochen* v. *Smith* otherwise than Judge Crawford has done.

Independently of these considerations,—which, it is submitted, are sufficient here,—could *Maxfield's Lessee* v. *Levy* be maintained at the present day, if it were now to present itself with the same facts and circumstances, precisely, as were before the late Judge Iredell? The case occurred, it

will be remembered, as early as the year 1797, when the Constitution had been very recently made, its institutions were new and untried, and they were both regarded with jealousy, as likely to encroach upon and swallow up the States. The judiciary, of course, had its full share of the effects of this feeling. Experience has shown that it was groundless. The courts of the United States have carefully kept themselves within the narrowest limits. They have settled, in the first place, that they can occupy no more of the ground belonging to the United States by the Constitution than is assigned to them by acts of Congress. They have, in the next place, settled that their jurisdiction is limited, though they are not inferior courts. And, finally, that their jurisdiction must appear upon the record. The neglect, in this last particular, may be taken *advantage of at any time, even in error. But they have never gone the length [*211 of saying that the want of jurisdiction from matters out of the record may be alleged at any time, in any form, or in total disregard of all rule. Still less have they countenanced the position, that a deed, good and real by the laws of the State, and which would be so held in any State tribunal, becomes void by being offered in evidence in a court of the United States, and is to be regarded as fictitious.

The case of *Maxfield's Lessee* v. *Levy* has received no countenance or support in this court. It has never been followed, as far as known, by any judge. In the two cases referred to on the other side, there is a reference merely to the subject of "fictitious conveyances," but in both the jurisdiction was supported, without any examination of the doctrine.

It is unnecessary to examine the argument in *Maxfield's Lessee* v. *Levy*, because this has already been done by the late Judge Story, in the case of *Briggs* v. *French*, 2 Sumn., 252. With the force of ability, learning, and experience, and the high judicial authority, which that eminent and lamented judge could bring to the discussion, it would be a work of supererogation, if not of presumption, especially in this court, where he was so well known as a judge and a jurist, to attempt to add a word to what he has said. This decision was in the year 1835, with the light of nearly half a century upon the law and practice of the courts of the United States.

Two things, however, irresistibly force themselves upon the mind of any one who reads that case. The one is, how it can be that a court of the United States, constituted to administer, in certain cases, the laws of the States, can declare a deed void which is good by the State law, or hold it fictitious when by the same law it is real. The other, how can a court

constituted a court of law or equity deem itself at liberty to reject a rule of pleading of universal adoption, and conducive to order and justice, to replace it by a mode of proceeding which leads only to confusion, surprise, and wrong?

But it is believed, also, that the decisions of this court have established the contrary. One remark only will be made before referring to them. The jurisdiction in question is founded exclusively upon the character of the parties, and not at all upon the subject-matter. It is not perceived how the latter can affect the former. The one exception made by Congress, with perfect accuracy, in the act of 1789, is founded upon the subject-matter, namely, assignable instruments. No matter who sues upon them, or who is sued, if there was not jurisdiction between the original parties, there is none, in the excepted case, where the assignee is plaintiff. *212] This is plain and practicable. *The purpose or motive is not regarded, and the simple fact, as to the subject-matter, is the determining test. The exception only proves the rule. In all other cases, the character of the parties decides the jurisdiction, whatever may be the subject-matter. Congress could have gone further, if they had thought fit to do so. They can do so still, if they so incline. Probably Congress and the people are by this time convinced that the jurisdiction is a beneficial one, and ought to be cavilled at or curtailed.

But now for the decisions of this court, leaving to it, without particular suggestions, to discern how they contradict and overthrow the doctrine of *Maxfield's Lessee* v. *Levy*.

Instances of pleas to the jurisdiction will be found in *Sere* v. *Pilot*, 6 Cranch, 332; *Mollan* v. *Torrance*, 9 Wheat., 537; *Shelton* v. *Tiffin*, 6 How., 163. Doubtless there are many others.

In *D'Wolf* v. *Rabaud*, 1 Pet., 498, (A. D., 1828,) it was decided that the question of citizenship must be pleaded in abatement. Said to have been so recently decided, on full consideration.

In *Evans* v. *Gee*, 11 Pet., 80,—see page 83, opinion of Judge Wayne,—(A. D., 1837,) the same point was decided. In *Sims* v. *Hundley*, 6 How., 1, (A. D., 1848,) that, upon the plea of *non assumpsit*, evidence cannot be received relating to the residence of the party, bearing upon the jurisdiction of the court. So, in *Bailey* v. *Dozier*, 6 How., 23 (same year). See, also, *Briggs* v. *French*, 2 Sumn., 251.

In *Bonnafee* v. *Williams*, 3 How., 574,—see page 577,—(A. D., 1845,) this court decided as follows:—"Where the citizenship of the parties gives jurisdiction, and the legal

right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. A person having the legal right may sue, at law, in the Federal courts, without reference to the citizenship of those who may have the equitable interest."—McLean, J.

Putting these decisions together, it is most clear that the opinion of the learned judge below (Judge Crawford), even in its most extreme construction, was right, and that there is no error in it.

II. The error alleged under this head (except a subordinate matter hinted at in the conclusion of the printed argument, which will be noticed hereafter) is founded upon the second and third of the charges of the learned judge, to be considered with the instructions asked for by the defendant below.

To begin with the third. No authority has been shown to establish that a decree in chancery is a bar at law, or a judgment at law a bar in equity. The contrary is well settled. *Lessee of Wright* v. *Deklyne*, 1 Pet., C. C., 199, 202. [*213

For the same reason, the arguments of a chancery court must be deemed inapplicable, except to the very case before the court; for, in equity, the decision itself may depend (and does so in this case) upon which party it is that applies for relief. A decree is not a bar even in chancery, when the position of the parties is changed. It is lawful and equitable for a party to use the means he has at law to force his adversary into a condition to oblige him to go into chancery, and thus free himself from obstructions which lie in the way of administering what is plain and substantial justice. What that justice here is must be very apparent.

The defence attempted is a very ungracious one. There is no denial that the company fulfilled its agreement, gave the bonds, and in due time paid them, and that the party who received converted them, in such way as seemed best to him, to his own use. The defence now is, simply, that the company were not authorized to issue the bonds. It is not said, even, that there was a prohibition by law. It was, therefore, at most, a common mistake, and one party, having obtained the full benefit of the contract, now seeks to turn the mistake to the wrong of the other party, by stripping him of the equivalent he received. No court, either of law or equity, will favor him. If he come into equity, he must do equity.

The statutes of usury, for example, declare the usurious contract void. But wherever the case is in the power of a court, either of law or equity, they require the payment of

principal and interest. The cases are collected by counsel in *Bank of United States* v. *Waggener*, 9 Pet., 390. Among them is the case of one suing for a pledge or security.

The question now is, and the only one, What are the rights of this mortgagee at law against the mortgagor, and those deriving under him? What are his legal rights? This is a question which was not, and could not, be before the court of chancery, as the case was there presented. The decree of that court did not touch it, nor intend to touch it. It only refused its aid to foreclose the mortgage. But the court neither condemned the mortgage, nor enjoined the plaintiff from proceeding at law, nor meddled with or affected his legal rights. They remain exactly as they were before.

What are his rights at law? This is the only question at present. If he should attempt to use them inequitably, the mortgagor may apply to equity for relief. Difference between application by mortgagor and mortgagee, 1 Pow. on Mort., 336.

*214] *At law, a mortgage is a conveyance of land. The statute of Alabama executes the use, and the courts of Alabama have decided that the mortgagee is entitled to possession as soon as the deed is made. *Duval's Heirs* v. *McCloskey*, 1 Ala., 708. The contract is *executed* by force of the deed and the statute. Aik. Dig., 94, § 37; Clay's Dig., 156, §35. The contract is executed, and no longer executory. The consideration is not to be inquired into.

The doctrine of the court of Alabama above quoted is the universal doctrine. *Hughes* v. *Edwards*, 9 Wheat., 389. "The mortgagor, after forfeiture," (which is the case here,) "has no title at law, and none in equity, but to redeem upon terms of paying the debt and interest." (p. 499.) The mortgagee may proceed at law and in equity at the same time. A real action may be brought upon a mortgage in fee. *Dexter* v. *Harris*, 2 Mason, 531. See also the opinion of this court in *Conard* v. *The Atlantic*, 1 Pet., 441; and, still later, in *Bronson* v. *Kinzie*, 1 How., 318, where the nature of the estate of the mortgagee is very distinctly stated, and his rights at law. It is good against the priority of the United States. *United States* v. *Hooe*, 3 Cranch, 73; *Thelusson* v. *Smith*, 2 Wheat., 396. "In contemplation of law, the mortgagee was a perfect stranger as to any legal estate." *Cheetham* v. *Williamson*, 1 Smith, 278, *per* Lord Ellenborough.

The mortgagor cannot dispute the title of the mortgagee, because no man is permitted to dispute his own solemn deed. 1 Powell on Mortgages, 166; Coote, 347, 348. Payment is

good at law only by Stat. 7 Geo. 2, ch. 20, and that strictly taken. 1 Powell, 168, note 2.

The right at law, equity will not interfere with. *Cholmondeley* v. *Clinton*, 2 Mer., 359; *Williams* v. *Medlicott*, 6 Price, 496, note at the end of the case. They will not prevent him from assuming possession.

At law the mortgagor and those claiming to derive under him cannot dispute the right. 1 Powell, *ut sup.* It is to be observed here, that the alleged purchaser has never been in possession. The family of the mortgagor have remained in possession. See Record, p. 7, sixth paragraph from the top, the last sentence. If he had been, however, this would make no difference. They cannot at law dispute the deed. Doe d. *Roberts* v. *Roberts*, 2 Barn. & Ald., 367, 370; *James* v. *Bird's Adm'r*, 8 Leigh (Va.), 510; *Pownal* v. *Taylor*, 10 Id., 172; *Newman* v. *Chapman*, 2 Rand. (Va.), 93; *Thomaston Bank* v. *Stimpson*, 21 Me., 195; *Smith* v. *Hubbs's Adm'r*, 1 Fair. (Me.), 71; *Reed* v. *Moore*, 3 Ired. (N. C.), 310; *Logan* v. *Simmons*, 1 Dev. & B. (N. C.), 16. See, also, 7 Johns. (N. Y.), 160; 4 Mass., 355; 4 Hill, (N. Y.), 424; 3 Ves., 612; Cro. Jac., 270; 16 Johns. (N. Y.), 189.

*All the questions in this case, however, have been deliberately considered and decided by the Supreme Court of Ohio. They are reported in the seventh volume of Ohio Reports, *Raguet* v. *Roll*, and Doe dem. *Raguet* v. *Roll*. The first was a proceeding by *scire facias* to sell, a remedy of an equitable nature for the mortgagee; and the second, an ejectment at law. They presented, of course, the very same questions as are now before the court, and nothing need be said to recommend their reasonableness, and their conformity to law. The printed volume has not been within our reach. We are obliged to submit a manuscript copy, which is herewith. [*215

There remains nothing further to trouble the court with, but the one subordinate point before referred to, which will be easily disposed of. This point is, that the deed of transfer was void on account of adverse possession. There was no adverse possession. In *Chapman* v. *Armistead*, 4 Munf. (Va.), 382, the court decided as follows:—"The possession of the mortgagor, continuing with the permission of the mortgagee, is to be considered as the possession of the mortgagee, so that when the latter could recover in ejectment, his deed assigning the mortgage will enable the assignee to recover in like manner."

Further references for the court.—*Elliott* v. *Piersoll*, 1

Pet., 340; *Bank of U. S.* v. *Planters' Bank of Georgia*, 9 Wheat., 904.

Mr. Justice NELSON, after reading the statement of the case prefixed to this report, proceeded to deliver the opinion of the court.

We are of opinion, that the charge of the court below upon the question of jurisdiction was substantially correct.

It might have been placed upon ground less open to objection. The case admits that Kernochen, the plaintiff, was not chargeable with notice of the motive of the company in assigning the mortgage to a citizen of another State; he was not chargeable, therefore, with the legal consequences that might result from the existence of such knowledge. He advanced his money, and took the security in good faith, and became thereby possessed of all the title that belonged to the mortgagees; and had a right to enforce it in any court having cognizance of the same.

The most that can be claimed is, that the company intended a fraud upon the eleventh section of the Judiciary Act, in seeking to obtain a decision of the Federal courts upon the validity of the mortgage between themselves and the defendants, both parties residents and citizens of the same State, using the name of the plaintiff as a cover for that purpose. But admitting this to be so, still, upon general principles, the rights of the plaintiff under the assign-
*216] ment could not be affected by the *fraud, unless notice was brought home to him. Till then, he stands on the footing of a *bonâ fide* purchaser without notice.

But the charge, we think, may also be sustained upon the ground on which it was placed by the court below. For, even assuming that both parties concurred in the motive alleged, the assignment of the mortgage, having been properly executed and founded upon a valuable consideration, passed the title and interest of the company to the plaintiff. The motive imputed could not affect the validity of the conveyance. This was so held in *McDonald* v. *Smalley*, 1 Pet., 620.

The suit would be free from objection in the State courts. And the only ground upon which it can be made effectual here is, that the transaction between the company and the plaintiff was fictitious and not real; and the suit still, in contemplation of law, between the original parties to the mortgage.

The question, therefore, is one of proper parties to give jurisdiction to the Federal courts; not of title in the plain-

tiff. That would be a question on the merits, to decide which the jurisdiction must first be admitted.

The true and only ground of objection in all these cases is, that the assignor, or grantor, as the case may be, is the real party in the suit, and the plaintiff on the record but nominal and colorable, his name being used merely for the purpose of jurisdiction. The suit is then in fact a controversy between the former and the defendants, notwithstanding the conveyance; and if both parties are citizens of the same State, jurisdiction of course cannot be upheld. (1 Pet., 625; 2 Dall., 381; 4 Id., 330; 1 Wash. C. C., 70, 80; 2 Sumn., 251.)[1]

Assuming, therefore, everything imputed to the assignment of the mortgage from the company to the plaintiff, the charge of the court was correct. The objection came too late, after the general issue. For when taken to the jurisdiction on the ground of citizenship, it must be taken by a plea in abatement, and cannot be raised in the trial on the merits. *D'Wolf* v. *Rabaud*, 1 Pet., 417; *Evans* v. *Gee*, 11 Id., 80; *Sims* v. *Hundley*, 6 How., 1.

But we are of opinion the court erred in giving the second instruction, which denied the conclusiveness of the decree in the bill of foreclosure against the right of the plaintiff to recover in this action.

The suit in chancery was between the original parties to the mortgage, and involved directly the validity of that instrument; it was the only question put in issue by the bill and answer, and the only one decided by the court. The mortgage was held to be void, on the ground that the bonds of the company which were given in exchange for it were illegal, *and created no debt or liability for which a [*217 mortgage security could be taken or upheld; that every part of the transaction was beyond any of the powers conferred upon the company by its charter, and therefore wholly unauthorized and void. On these grounds, the court decreed that the bill be dismissed. The present is an action of ejectment, brought by the assignee of the complainants in that suit against defendants representing the interest of the mortgagor, and in which the right to recover depends upon the force and validity of the same instrument.

A mortgagee, or any one holding under him, may recover possession of the mortgaged premises, after default, on this action, unless it appears that the debt has been paid, or is extinguished, or the mortgage security for good cause held

[1] Followed. *Barney* v. *Baltimore City*, 6 Wall., 288.

ineffectual to pass the title. Here it has been shown to have been declared null and void by a court of competent jurisdiction, in a suit between parties under whom the present derive title, and in which, as we have seen, the question of its validity was put directly in issue. The case, therefore, falls within the general rule, that the judgment of a court of concurrent jurisdiction directly upon the point is as a plea, a bar, or as evidence conclusive between the same parties or privies upon the same matters, when directly in question in another court.

It is suggested on the brief submitted on the part of the plaintiff below, that a decree in equity between the same parties is not a bar to an action at law; and hence, that the decree in the bill of foreclosure in this case is no bar to the action of ejectment; and the case of the *Lessee of Wright* v. *Deklyne*, Pet. C. C., 199, is referred to as sustaining that position. On looking into the case, it will be seen that the decree dismissing the bill, which was set up as a bar to the action of ejectment, was placed upon the ground that the complainant had a complete remedy at law, and did not, therefore, involve the legal title to the property in question. The court say, that, if a complainant seeks in a court of equity to enforce a strictly legal title, when his remedy at law is plain and adequate, the dismissal of his bill amounts to a declaration that he has no equity, and the court no jurisdiction; but it casts no reflection whatever upon his legal title; it decides nothing in relation to it, and consequently can conclude nothing against it. It was admitted that the decision of a court of competent jurisdiction directly upon the point was conclusive where it came again in controversy.

The case of *Hopkins* v. *Lee*, 6 Wheat., 109, illustrates and applies the principle which governs this case. There Hopkins purchased of Lee an estate, for which he agreed to pay *$18,000; $10,000 in military lands at fixed prices, and to give his bond for the residue. The estate was mortgaged for a large sum, which encumbrance Lee agreed to raise. The whole agreement rested in contract. Hopkins filed a bill against Lee, charging that he had been obliged to remove the encumbrance, and claiming the repayment of the money, or, in default thereof, that he be permitted to sell the military lands which he considered as a pledge remaining in his hands for the money. Lee put in an answer denying the allegations in the bill, whereupon the cause was referred to a master, who reported that the funds with which Hopkins had lifted the mortgage belonged to Lee, upon which report a decree was entered accordingly. The suit in 6 Wheaton,

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was an action of covenant brought by Lee against Hopkins, to recover damages for not conveying the military lands which he had agreed to convey upon the aforesaid encumbrance being removed. The defence was, that the encumbrance had not been removed. And upon the trial Lee relied upon the suit and the decree in chancery as conclusive evidence of the fact that he had complied with the condition, which was admitted by the court below, and the decision sustained here on error.

The court, after referring to the general rule, observed, that a verdict and judgment of a court of record, or a decree in chancery, although not binding upon strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is, and ought to be, no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise.

If any further illustration of the principle were necessary, we might refer to the case of *Adams* v. *Barnes*, 17 Mass., 365, where it appeared that a mortgagee had brought an action to recover possession of the mortgaged premises, in which the mortgagor had defended on the ground of usury, but, failing in the defence, the mortgagee had judgment. The mortgagor afterwards conveyed his interest to a third person, who brought a writ of entry against the mortgagee to recover the possession, relying upon the usury in the mortgage as invalidating that instrument, and rendering it null and void. But the court held the parties concluded by the previous judgment, the same point having been there raised and decided in favor of the mortgagee.

The same principle will be found in *Betts* v. *Starr*, 5 Conn., 550, where it was held, that a judgment recovered upon a *note secured by the mortgage, notwithstanding the [*219
plea of usury, precluded the mortgagor from setting up that defence again, in an action of ejectment by the mortgagee to recover the possession of the mortgaged premises.

Further illustrations of the principle will be found by referring to Cowen & Hill's Notes to Phillips on Ev., p. 804, note 558; and 2 Greenl. on Ev., §§ 528–531.

The case of *Henry Raguet* v. *Peter Roll*, 7 Ohio, 76, has been referred to as maintaining a different doctrine. That was a *scire facias* on a mortgage to charge the lands in execution. The defence set up was, that the mortgage had been given to secure the payment of a note of five hundred dol-

lars, which was made to the mortgagee to compound a felony. There had been a suit between the same parties on the note, in which the same defence was set up and prevailed. The case is reported in 4 Ohio, 400. But this former suit was not interposed or relied on in the *scire facias* on the mortgage, and the question here, therefore, was not involved in that case, and, probably, could not have been. For, on looking into the report of the suit upon the note, it appears to have been brought, originally, in the Common Pleas, where the plaintiff recovered. This judgment was afterwards reversed by the Supreme Court on error, without any further order in the case. This left the parties and the note as they stood before the judgment in the Common Pleas. Cowen & Hill's Notes, p. 826, note 587.

There is another principle that would, probably, be decisive of this case, over and above the ground here stated, upon a second trial, arising out of the thirty-fourth section of the Judiciary Act, which provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.

The highest court of the State of Alabama has given a construction to the act of the legislature chartering this company, which we have seen is fatal to a recovery. It belongs to the State courts to expound their own statutes; and when thus expounded the decision is the rule of this court in all cases depending upon the local laws of the State. 7 Wheat., 361; 6 Pet., 291.

It is unnecessary, however, to pursue this inquiry, as the grounds already mentioned are, in our judgment, conclusive upon the rights of the parties.

In every view we have been able to take of the case, we think the court erred in the second instruction given to the jury, and that the judgment below must be reversed.

ORDER.

*220] *This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Alabama, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

Bridget McLaughlin, Appellant, v. The Bank of Potomac and others.

Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal.[1]

A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law.[2]

A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards.

Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to pursue and exhaust that trust-property before proceeding against the indorser and his

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[1] Followed. *Johnson* v. *Harmon*, 4 Otto, 379. See also *Warner* v. *Norton*, 20 How., 448; *Brockett* v. *Brockett*, 3 Id., 691.

[2] Fraud is actual and constructive; the former is generally a question of fact, the latter (the facts being found) is always a question of law. *Postmaster-General* v. *Reeder*, 4 Wash. C. C., 678.

In the following instances the question of fraud has been held to be one of law for the court: What acts of fraud in procuring the execution of a will are sufficient to invalidate it. *Yoe* v. *McCord*, 74 Ill., 33. Whether the fraudulent alteration of a note was material or not. *Belfast Bank* v. *Harriman*, 68 Me., 522; *Overton* v. *Matthews*, 35 Ark., 146.

In the following cases it was held to be one of fact for the jury: Whether a note was altered, and, if so, whether fraudulently or not. *Belfast Bank* v. *Harriman*, 68 Me., 522. Whether a statement as to the speaker's financial condition was an expression of opinion or a fraudulent representation. *Morse* v. *Shaw*, 124 Mass., 59; *Stubbs* v. *Johnson*, 127 Id., 219. Whether a sale of chattels was made with intent to hinder, delay, or defraud creditors. *Blaut* v. *Gabler*, 8 Daly (N. Y.), 48; s. c., 77 N. Y., 461.

A chancellor does not need a verdict to inform his conscience when the answer denies fraud in the abstract, but admits all the facts and circumstances necessary to constitute it in the concrete. *Doss et al.* v. *Tyack et al.*, 14 How., 298. Though the evidence is contradictory, the chancellor is not bound to direct an issue if he is satisfied that the weight of evidence is on one side. *Hord* v. *Colbert*, 28 Gratt. (Va.), 49. S. P. *Abbott* v. *Monti*, 3 Col., 561; *Cook* v. *Houston County Comm'rs*, 62 Ga., 223; *Huntington* v. *Moore*, 1 New Mex., 489. A feigned issue should not be awarded when the truth of the facts can be conveniently and satisfactorily ascertained by the court itself. *Goodyear* v. *Providence Rubber Co.*, 2 Fish. Pat. Cas., 490; *Howe* v. *Williams*, Id., 395. That an issue will not be directed upon a mixed question of law and fact, see *Clendaniel's Estate*, 11 Phil. (Pa.), 50.

The verdict of a jury on an issue out of chancery is advisory merely. *Quinby* v. *Conlan*, 14 Otto, 420. S. P. *Rusling* v. *Rusling*, 8 Stew. (N. J.), 120; *McCan* v. *O'Neil*, 5 Col., 58. No judgment can be rendered on it until the chancellor has given his opinion on the facts. *Gadsden* v. *Whaley*, 9 So. Car., 147. If his decree rests wholly on the verdict, it is erroneous. *Charlotte &c. R. R. Co.* v. *Earle*, 12 So. Car., 53. On the coming in of the verdict, the court may set it aside and find the facts itself. *Wallace* v. *American Linen Thread Co.*, 16 Hun (N. Y.), 404.

property. A judgment had been obtained against the administrator of the indorser, which fixed his liability.

This judgment against the administrator in which a devastavit had been suggested, and a return of *nulla bona* to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate.

Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate.

Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit, and the personal property was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable.

In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative.

THIS was an appeal from the Circuit Court of the United States for the District of Columbia and County of Alexandria, sitting as a court of chancery.

The bill was filed in the Circuit Court by the President, Directors, and Company of the Bank of Potomac, Elijah Dallett and Elijah Dallett, Jr., trading under the firm of *221] Elijah Dallett *& Co., William H. Miller, and A. C. Cazenove & Co., who sue in behalf of themselves and such other creditors of the estate of Edward McLaughlin, deceased, as will make themselves parties and contribute to the expense of this suit, against Edward Sheehy, in his own right and as administrator of Edward McLaughlin, and Ann Sheehy, wife of said Edward and one of the children and heirs at law of said Edward McLaughlin, Bridget, otherwise called Biddy McLaughlin, another of the children and heirs at law of said Edward McLaughlin, and surety for said Edward Sheehy's administration on said estate, and Edmund I. Lee, trustee under a deed of trust from the said Edward Sheehy.

The narrative of the case is as follows.

Edward Sheehy's notes, indorsed by Edward McLaughlin, were discounted at the Bank of Potomac as follows, viz.:—

1828.—Dec. 12, 1 note for	. . . .	$2,000
1830.—Jan. 15, 1 " "	. . . .	2,000
Feb. 5, 1 " "	. . . .	2,000

And they were curtailed and renewed from time to time, until they all became due the 20th January, 1832, viz.:—

1 note for	$1,375
1 " "	1,900
1 " "	1,975
Amounting to	$5,250

when they were amalgamated, and one note substituted for the three, which note was renewed from time to time until 15-18 April, 1834, when it became due and was protested.

Whilst these notes were running on, namely, on the 27th of September, 1830, one James Robinson conveyed certain property in Alexandria to Bridget McLaughlin, who was the daughter of Edward McLaughlin, the indorser of the above notes. Sheehy, the maker, was married to another daughter. One of the allegations in the bill was, that this property was secretly paid for by Edward McLaughlin, who, it was alleged, procured it to be conveyed to his daughter for the purpose of placing it out of the reach of his creditors.

On the 24th of November, 1830, Sheehy conveyed a lot of ground in the town of Alexandria to Edmund I. Lee, in trust, to secure McLaughlin against his indorsements in the Bank, as far as the sum of $3,950. Lee was to sell it whenever McLaughlin requested him, in writing, to do so.

On the 6th of November, 1832, Edward McLaughlin conveyed to his daughter Bridget four lots in Alexandria, in fee simple, reserving to himself a life estate.

*On the 15th of March, 1833, Sheehy and wife conveyed to McLaughlin certain other real property and [*222 slaves, and other personal property. It was an indemnity against loss from the indorsement of McLaughlin upon the notes in question and other notes.

On the 9th of November, 1833, McLaughlin executed another deed in fee simple of certain property to his daughter Bridget.

In April, 1834, the note mentioned in the beginning of this narrative became due and was protested. Its amount was $5,250.

In May, 1834, the Bank of Potomac brought suit upon the note, and in August, 1834, obtained judgment by default, against Edward McLaughlin.

On the 15th of September, 1834, McLaughlin executed another deed for certain other property in fee simple to his daughter Bridget.

In September, 1834, after the execution of the above deed, McLaughlin died.

On the 12th of November, 1834, Sheehy took out letters of

administration upon his estate, and Bridget McLaughlin became the security upon his bond. It is not necessary to state the appraisement, or the measures pursued by other creditors than the Bank of Potomac. No administration account was filed.

In June, 1835, the judgment which the bank had obtained against McLaughlin in his lifetime was revived, by *scire facias*, against his administrator, upon which an execution was issued. The return was, that no effects of the said McLaughlin, in the hands of his administrator, were to be found whereon to levy the said execution.

In April, 1836, the bank brought an action against Sheehy, suggesting a devastavit, and in June, 1837, obtained a judgment against him *de bonis propriis*. Execution was also issued upon this, the return to which was, that no goods and chattels of the said Sheehy were to be found.

In January, 1838, the bank filed its bill on the equity side of the court, suing for itself and such other creditors of the estate of Edward McLaughlin as chose to make themselves parties and contribute to the expense of the suit. The bill recited the above facts; averred that a large amount of personal property came into the hands of the administrator; that the said administrator, and his said surety, combining together to defraud the creditors of the said McLaughlin, caused his personal estate to be appraised at prices greatly below its value, and then sent off the said slaves to distant parts for sale, where they *were actually sold for sums greatly exceeding the said appraisement; that no account of the sales of the said McLaughlin's personal estate had ever been returned to the said Orphans' Court, nor had the said administrator ever made any settlement of his administration accounts; that large sums of money of the said estate yet remain unaccounted for, and misapplied to their own use by the said administrator and his surety; that McLaughlin had combined and confederated with his daughter Bridget fraudulently to convey and transfer his property to her, with a view to protect it from liability for his debts; that all the said deeds were fraudulent and void; that the deceased left no real estate, having thus conveyed it all fraudulently away; that his personal estate had been made away with and misapplied by the administrator and his surety, the said Bridget; that the bank had a right to be substituted to the benefit of the trust deeds. The bill then prayed a discovery and account of the personal estate; that the fraudulent deeds might be set aside and annulled, and the property mentioned in them

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be applied to the payment of the debts of the estate, and for general relief.

A supplemental bill and answer were filed in the course of the proceedings, which did not essentially vary the state of the case.

In May, 1838, Bridget filed her answer, which was afterwards withdrawn, and another filed in May, 1842. Sheehy and wife filed their answer in May, 1839. The answer of Bridget denied all the allegations in the bill, and especially a legal recovery against Sheehy for said debt, but, if proved, contested that she was bound for the same, being no party thereto. She further admitted giving the bond as surety for Sheehy, but denied that it was binding on her, or that personal property of more value than $1,653.28 came to his hands, as shown in the inventory thereof. She denied any combination to defraud the creditors of Edward McLaughlin, by undervaluing his personal estate, or selling it higher than the appraisement, or not having it accounted for. She denied the existence of any indebtedness now by Edward McLaughlin, or at his death, as indorser for Sheehy, which existed in September, 1830, and averred that notice of protest was necessary to make him so liable, which had never taken place, and that the deed then given to her was not fraudulent as to the bank. She further averred that the deeds were not void, because Sheehy was the principal debtor, and possessed sufficient real estate then to satisfy the debt. She further alleged, that the real estate of her father was liable in the hands of his heirs only for specialty debts, which this was not. She proceeded to deny fraud in the various other *deeds to her, and to allege a moneyed consideration [*224
therefor. She admitted the conveyances in trust by Sheehy, and averred that the bank had never requested the land held in trust to be conveyed and applied to the discharge of this debt, or it would have been done, and that it ought now to be done before a resort to the personal estate. She denied the validity of the judgments against Sheehy as affecting her, and proceeded to answer the special interrogatories addressed to her.

Sheehy and wife, in their answer, denied all fraud in the inventory or management of the estate; admitted that no account of his administration had been rendered by Sheehy, but averred his readiness to do so; that although he was the nominal administrator, yet Bridget McLaughlin transacted all the business, and denied all combination with Bridget, or with any other person, to defraud the creditors of Edward McLaughlin.

In April, 1839, the court passed a decree for the sale of the property mentioned in the two deeds of Sheehy to Lee, of the 24th of November, 1830, and Sheehy and wife to Edward McLaughlin, of the 15th of March, 1833. The reports of sale need not be further adverted to.

In May, 1843, the cause standing under a general replication and issue, the court ordered it to be tried at law, for the purpose of ascertaining,—

1st. Whether any, and what, valuable consideration was paid or given, and by whom, to James Robinson, for the property conveyed by him to the said Bridget McLaughlin in the bill mentioned; and whether the said property, in the said deed mentioned, was purchased *bonâ fide* by the said Bridget, with her own funds.

2d. Whether the deeds of the 6th of November, 1832, and the 9th of November, 1833, in the bill mentioned, from the said Edward McLaughlin and the said Bridget McLaughlin, or either, and which of said deeds, were or was made with intent to hinder, delay, or defraud the complainants of their just and lawful actions as creditors of the said Edward McLaughlin, or whether the said deeds were made for valuable consideration, and *bonâ fide*.

3d. Whether the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder or delay the said complainants, or *bonâ fide*, and for valuable consideration.

The jury, being unable to agree, were discharged, and the record transferred to Washington county, where the cause was tried at March term, 1844. The certificate was as follows:—

"Upon the first issue joined the jury say, that the valuable consideration expressed in the deed referred to in the said
*225] issue *was paid by Bridget McLaughlin to said James Robertson, and that the said property mentioned in said deed was purchased *bonâ fide* by the said Bridget, with her own funds.

"And we find, as to the second of the said issues, that the said deeds of the 6th of November, 1832, and the 9th of November, 1833, in the said bill mentioned, from said Edward McLaughlin to said Bridget McLaughlin, were, and both and each of them were made by the said Edward with intent to hinder, delay, and defraud the said complainants of their just and lawful action as creditors of the said Edward McLaughlin, and that the said Bridget had notice of said intent, and that they were not, nor were either of them, made for an adequate

valuable consideration, nor were either of them made *bonâ fide* between the said parties.

"And as to the third of the said issues, we find that the deed of the 15th of September, 1834, from the said Edward McLaughlin to the said Bridget, was made with a like intent to hinder and delay the said complainants, and was not *bonâ fide;* and the same was not made for a valuable consideration.

"And we find upon the second and third issues for the complainants."

In the course of this trial, sundry bills of exceptions were taken, which it is unnecessary to specify, because the points made were not brought before the court which sent the issue to be tried at law, and therefore it was held that they should not come before this court for review.

In June, 1845, the Circuit Court of Alexandria passed the following final decree:—

"The court, on consideration of the above matters, do now here, this 10th day of June, 1845, order, adjudge, and decree, that the aforesaid deed from James Robertson to Bridget McLaughlin, dated the 27th day of September, 1830, in the bill of the complainants mentioned, was not made with intent to hinder or defraud the creditors of the said Edward McLaughlin, and is not fraudulent and void. And they do further adjudge and decree, that the several deeds dated the 6th of November, 1832, and the 9th of November, 1833, and the 15th of September, 1834, from the said Edward McLaughlin to his daughter, the said Bridget McLaughlin, were made without valuable consideration, and were made with intent to delay, hinder, and defraud the creditors of the said Edward McLaughlin, and are, therefore, fraudulent and void as against them, and that the said deeds be set aside and annulled.

"And the court, proceeding to grant to the complainants such relief as they are entitled to, and as sought in their said bills, do further adjudge, order, and decree, that the real estate *described and mentioned in the above last-mentioned deeds, from the said Edward to the said Bridget [*226 McLaughlin, and by this decree declared fraudulent and void, be subjected to the payment of the debts of the complainants, in the manner hereinafter directed; and that the commissioners hereinafter named do proceed to make out of the said property, by a sale of the same, or so much thereof as may be requisite, and in such lots as to the said commissioners shall seem best, at public auction, to the highest bidder, after giving thirty days' notice of the time, place, and terms of sale, by publication in the Alexandria Gazette, the following

several sums, that is to say" (proceeding then to distribute the fund amongst the creditors).

An appeal from this decree brought the case up to this court.

It was argued by *Mr. Francis L. Smith* and *Mr. Brent*, for the appellant, and *Mr. Bradley* and *Mr. Davis*, for the appellees.

The points raised by the counsel for the appellant were the following, viz:—

1st. That so far as regards the claim of the Bank of Potomac, the principal plaintiff, the property conveyed by Sheehy to Lee and McLaughlin in the deeds of trust should first have been exhausted, and appropriated to the payment of the debt. 15 Wend. (N. Y.), 588; 5 Id., 661.

2d. The bank might have made its debt by pursuing properly its remedy at common law. The suit against Sheehy as drawer of the note was brought to May term, 1834, and an office judgment was confirmed at November term, 1834. No execution was issued on this judgment, although the person of Sheehy, by the laws then in force, might have been taken in execution, and his lands sold under a *fi. fa.*, and although it appears from the record that he held the lands.

3d. The personal property of McLaughlin is the fund primarily liable for the payment of his debts; and before a sale of the realty could properly have been decreed, the administration account of Sheehy on his estate should have been settled, in order to ascertain the exact amount for which the realty was liable. 1 Story, Eq. (ed. 1846), § 548; 4 Johns. (N. Y.) Ch., 619.

4th. The real estate of McLaughlin could not be sold as long as there was any personalty. Act of Congress, 24th of June, 1812, putting real estate in the county of Alexandria on the same footing with that in the county of Washington. For laws of Maryland, see 1 Har. & J., 469; 4 Gill & J., 296; 8 Pet., 128.

5th. The complainants rely alone on judgments against the administrator, which we contend are no evidence against *227] Bridget *McLaughlin, as grantee in the possession of the property. 1 Mass., 445; 8 Pet., 528; 5 Gill & J. (Md.), 433; 4 Har. & Jo. (Md.), 126, 270; 6 Johns. (N. Y.) Ch., 360; 11 Leigh (Va.), 38; 4 Phil. Ev. (ed. 1843), note 639, page 921, where the authorities are collected.

6th. The liability of Bridget McLaughlin, if any, was on the administration bond as surety for Sheehy, which could not be enforced by the creditors at large. The doctrine is

well settled, in equity, that a suit to set aside a deed of real estate for fraud cannot be maintained until there is a judgment at law. 2 Leigh (Va.), 84; 1 Story, Eq., §§ 375, 376.

7th. There is no averment in the bill that the indorser, McLaughlin, was ever notified of the non-payment of the note on which the bank has sued. 6 Wheat., 146, 572–574.

Some other points were made relating to the instructions given in the court of law, to which an issue was sent to be tried; but the decision of this court being that those instructions were not properly before it, it is not deemed necessary to insert them.

These points were severally resisted by the counsel for the appellees.

Mr. Justice WOODBURY delivered the opinion of the court.

(He first gave a synopsis of the bill and answers, and then, after some reference to the evidence, proceeded as follows.)

A preliminary point to be considered in this case is in respect to the exceptions made at the trial by a jury of the issue at law, sent from the court of chancery, on the equity side of the Circuit Court of the United States. On the return of that issue to the equity side of the court, exceptions to the rulings were not made, or renewed against the correctness of the finding of the verdict, and consequently no opinion on them has ever been rendered by the court sitting in chancery. It is quite clear, then, that they are not before us on this appeal, which is only from a decree on the equity side of that court.

We wish it to be distinctly understood, as a matter of practice in like cases, that this court cannot express any opinion on matters ruled in any other court, or side of the court, than that appealed from; and if it be necessary to go into other courts to get verdicts or decisions on any portion of the case in its progress below, any objections to rulings on the points arising in those trials or decisions must be presented for revision to the court which orders the issue, and be acted upon there, if we are expected to take cognizance of them here.[1] *Brockett* v. *Brockett*, 3 How., 691; *Van Ness* v. *Van Ness*, 6 How., 62; *Mayhew* v. *Soper*, 10 Gill & J. (Md.), 372. Such, too, is substantially *the doctrine in England. 2 Dan., Ch. Pr., 746; *Bootle* v. *Blundell*, 19 Ves., 500. [*228

It is next objected, that there was an error in the court in ordering such an issue to be tried by a jury, as it did in the present case. But we are not satisfied that, in referring the

[1] FOLLOWED. *Johnson* v. *Harmon*, 4 Otto, 379.

question of fraud in the conveyances to a jury for their verdict to aid the court in its inquiries, any thing improper was submitted. It did not, as has been contended, refer a question of law only. Fraud is often, as here, a mixed question of law and fact. *Seward* v. *Jackson*, 8 Cow. (N. Y.), 406, 439; *Brogden* v. *Walker's Executor*, 2 Har. & J. (Md.), 291. And it might be very useful to have the views of a jury on it, taking care to instruct them concerning the law, and leaving to their exclusive consideration, as was probably done here, merely the facts as connected with that law. Such feigned issues are not for the assistance of parties so much as of the court. 2 Dan., Ch. Pr., 730. And though they may not always be well made up, yet, as the court are influenced by the finding or not, as seems to it proper (19 Ves., 500; *Allen* v. *Blunt*, 3 Story, 746), it is very rare that ordering such an issue can be deemed a ground of error. It may, however, be conceded, that, if such an issue be one of mere law, or idle, or impertinent, it is erroneous. 2 Dan., Ch. Pr., 315, 420, 730; *Nicol* v. *Vaughan*, 5 Bligh, 540–545; 3 Ves. & B., 43. Disregarding, then, those exceptions made in the trial of this feigned issue, as not being legally before us, and overruling the objection to the propriety of the issue itself, the finding of the jury, and the opinion of the court sitting in chancery on that part of the case relating to the fraudulent conveyances, would seem to be correct. At least, this court appears bound to consider it so, *primâ facie*; and we see nothing in the evidence itself, if reconsidered here, which would show the weight of it not to accord with their results. 2 Rand. (Va.), 398; *Hoye* v. *Penn*, 1 Bland (Md.), 28; *Kipp* v. *Hanna*, 2 Id., 26; 2 Har. & J. (Md.), 292.

Those results are, that all the deeds except the first one were fraudulent against creditors. The next inquiry is, whether the plaintiffs can legally be considered creditors at the time these deeds were executed. It is true, there must usually be a debt preëxisting. *Sexton* v. *Wheaton*, 8 Wheat., 229. In our view, a preëxisting debt by a note, which was only renewed afterwards, with the same indorser, continued to be the same preëxisting debt for this purpose as it stood originally, both as to the maker and indorser. They both regarded it virtually as the same, as no new consideration ever arose between the parties. Especially on the equity side of this court, and of the Circuit Court below, where the question arises, such a case *ought to be regarded as much within the mischief of the statute against fraudulent conveyances as if the action leading to judgment against

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the administrator had been on the original indorsement of the original note.

But further, it is objected that the debt here, at the time of the conveyances, was not absolute, as it should be in order to predicate fraud concerning it. But a contingent debt, likely to become absolute, and which afterwards does become absolute, is, both on principle and precedent, enough to furnish a motive to make a fraudulent conveyance to hinder or avoid its eventual payment. And this may be presumed to have been done here, provided circumstances exist indicative of fraud. *King* v. *Thompson*, 9 Pet., 220; *Heighe* v. *Farmers' Bank*, 5 Har. & J. (Md.), 68. Such circumstances must exist; and when the liability is contingent, like that of a warrantor or indorser, the conveyance cannot be considered as *per se* fraudulent. *Seward* v. *Jackson*, 8 Cow. (N. Y.), 406, 439. But all the attendant facts here were scrutinized, and the inference of fraud seems to have been fairly deduced from the whole. 5 Gill & J. (Md.), 533.

There is another objection to a recovery by this bill in equity, because the original debtor, Sheehy, had made a conveyance in trust to Lee for the indemnity of Edward McLaughlin, and it is argued that the plaintiffs should have resorted to that rather than to a suit against the administrator of Edward McLaughlin. But where the maker and indorser have both had their liability fixed on a note, an action will lie against either. Here both had become liable, else the indorser had not, for the latter is never liable unless the maker is also; and that the indorser had here become liable is to be presumed strongly from the actual recovery against his administrator.

The next objection is, that the judgment against the administrator of the indorser, the only evidence of a debt offered here, is no evidence against the surety of the administrator, or against a fraudulent grantee of the intestate debtor, as is Bridget McLaughlin. But we think otherwise. The administrator and his intestate are privies, and the former is liable after one recovery against the goods in his hands, and another against himself, suggesting a devastavit on a return of *nulla bona*. 2 Brock., 213, 214.

If the administrator, then, in such case, be estopped, as he is, to deny the indebtedness of the debtor whom he represents, so must be his surety, *primâ facie* at least. 1 Brock., 135, 268; 4 Johns. (N. Y.) Ch., 620, 2 Rand. (Va.), 398. So in a bill in chancery, charging, like this, fraud in the administrator and a grantee, we think that such a judgment, till impeached, is good against the fraudulent grantee. *Birely*

*230] v. *Staley*, 5 Gill & J. (Md.), 433; **Alston* v. *Munford*, 1 Brock., 279; 2 Rand. (Va.), 398. As to the heir, the question is different, and the force of the recovery may be much less. 2 Leigh (Va.), 84; *Bank of United States* v. *Ritchie*, 8 Pet., 128; 4 Har. & J. (Md.), 270, 271; 1 Munf. (Va.), 437, 455. Not being a privy in estate or deed with the administrator, it may not be *res judicata* or even *primâ facie* valid, so as to bind either the heir or a devisee. 1 Brock., 145, 247; 1 Munf. (Va.), 1, 437, 445; 5 Gill & J. (Md.), 433. But a fraudulent grantee stands in a different relation, and his rights are in several respects unlike theirs.

The form of proceeding which has been adopted here against the surety is also excepted to. There is another mode, to be sure, of proceeding against the surety, which is on the administration bond. But in that case, a judgment like this against the administrator would be presumptive evidence against the surety, though open, perhaps, to proof, if any existed, of collusion or fraud in the judgment. In this way, also, though the creditor has a double remedy, if the surety has combined to commit a fraud and waste of the estate, and may proceed against him for that in a bill, or proceed on the administration bond, yet this double remedy is not unusual, nor exceptionable; and bills like these may well include all who have colluded with the administrator, or improperly intermeddled with the property, like executors *de son tort*. *Holland* v. *Orion*, 1 Myl. & K., 240; 1 Vez. Sr., 105; 2 Keen, 534; Story, Eq. Pl., § 178. *Chamberlayne* v. *Temple*, 2 Rand. (Va.), 398. But whether fraud is charged or not, such bills should usually include all persons who may be affected by being interested in the estate. Story, Eq. Pl., § 178; *Bowsher* v. *Watkins*, 1 Russ. & M., 277. This is expedient in order to settle all the liabilities and exceptions in one proceeding, and to ascertain how much ought to be charged on real, and how much on the personal estate. Story, Eq. Pl., §§ 172–176. Here the collusion and waste are imputed to both the administrator and surety, and the same surety is charged with fraud in the purchase of the land, and this proceeding against them, whatever other remedy may exist, must therefore be deemed proper. Story, Eq. Pl., § 178; 1 Myl. & K., 237, 240; 1 Russ. & M., 281, note; 5 Gill & J. (Md.), 432, 453; 2 Rand. (Va.), 398, 399; 10 Gill & J., 65, 100.

The next objection is, that, by the laws prevailing in Alexandria, the first resort for payment of such a debt should be to the personal estate, before going to the real. There seems to be not much doubt of this, as a general principle, under

the laws of Maryland, by 5 Geo. 2, c. 7, before the cession of the northern portion of the District of Columbia. Those laws were adopted in that District, February 27th, 1801 (2 Stat. at L., 103, 756; *1 Har. & J. (Md.), 469; 2 Har. & M. (Md.), 12); and her laws in this respect [*231 appear to have been extended to Alexandria, June 24th, 1812. Davis's Laws of District of Columbia, 264. The laws of Virginia prevailing there before do not seem on this point to have been materially different. 2 Leigh (Va.), 84; 2 Lomax, Ex. 512. There the real estate was made liable for certain debts, under an act of Parliament, as early as 1732, extending in terms to the Colonies. *Tessier* v. *Wyse*, 3 Bland (Md.), 44; 2 Id., 325. But still, "in a creditor's suit" or bill, the personal estate should first appear on the hearing to be insufficient. 1 Brock., 79; 2 Bland (Md.), 317, 347; *Wyse* v. *Smith*, 4 Gill & J. (Md.), 302; 2 Har. & McHen., 12. It does so appear here in substance. Here it is alleged, and not denied, that the personal estate has never been accounted for by the administrator or surety. It would seem on the evidence to have been left chiefly in charge of the surety, and to have been improperly applied to her own use. The objection, therefore, comes with a very ill grace from her. The administrator has also been found guilty of a devastavit in respect to it, and it is manifest there never was enough, either as sold or appraised, to defray the debt of the bank alone. Under these circumstances, then, a resort was proper to the real estate. *Gordon's Adm'r* v. *Frederick*, 1 Munf. (Va.), 1; 2 Bland (Md.), 347.

It is further objected, that such a resort cannot be had, unless it is averred in the bill, as well as proved, that the personal estate has been all exhausted in the payment of debts. The fact of the personal estate being exhausted in some way before the real is taken from the heir, as heir, and applied, may, as before remarked, be proper to be first proved. But the necessity to aver it in so many words, even in the bill to charge an heir, is questionable. 1 Brock., 79; 2 Lomax, Ex. 250; 2 Story, Eq. Pl., §§ 174, 176. See forms in 2 Gratt. (Va.), 532, and 3 Id., 371; Equity Draftsman, 157, 161, 180; *Tessier* v. *Wyse*, 3 Bland (Md.), 44. Such an averment does not affect the merits, because, whether averred or not, the court will not generally charge the land till satisfied that the personal estate has been wasted or is insufficient. *Stevens* v. *Gregg*, 10 Gill & J. (Md.), 143. And it is usual, also, to have the prayer of the bill state, in some way, that the personal assets are insufficient. Such is the form in *Beall* v. *Taylor*, 2 Gratt. (Va.), 532. But this

deficiency need not be alleged to have arisen from the actual payment of debts. Some seem to consider it enough to aver that waste has been committed of the personal estate. 2 Bland (Md.), 347. Others, that it will suffice to state and to show judgment against it and execution unsatisfied. *Rhodes* v. *Cousins*, 6 Rand. (Va.), 190; *Liggat* v. *Morgan*, 2 Leigh (Va.), 84. The English practice is, not to require any *averment that the personal estate is exhausted, but merely to ask the land to be charged, if the personal estate be not enough. 3 Bland (Md.), 43; *Davy* v. *Pepys*, Plowd., 439; 3 P. Wms., 92, 333. So is it in New York. *Thompson* v. *Bruce*, 4 Johns. (N.Y.) Ch., 620. It would seem, also, to be permissible in Virginia, where the heir or devisee for such debts as are chargeable on the land is joined in a creditor's bill with the executor or administrator, to examine into the condition of the personal estate, irrespective of any averment about its sufficiency, and, if found to be enough, to dismiss the bill as to the heir (1 Brock., 79); and if not enough, to sustain the bill against the heir for the deficiency. Such seems to be the practice, also, in some other places. 4 Johns. (N.Y.) Ch., 621; Story, Eq. Pl., §§ 172, 174, 176; *Hammond* v. *Hammond*, 2 Bland (Md.), 306, 359; *Tessier* v. *Wyse*, 3 Id., 59; *Gibson* v. *McCormick*, 10 Gill & J. (Md.), 65.

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Many of the cases in Maryland, looking to the propriety of a fuller and direct averment that a deficiency has happened from the payment of debts, arise under laws passed since 1801, and after her prior laws had been adopted in this District, and relate to heirs or devisees, rather than fraudulent grantees. *Gibson* v. *McCormick*, 10 Gill & J., 102. The following cases were those of heirs who were infants or lunatics, and hence requiring the aid and vigilance of chancery to protect them, by having debts clearly proved, and the personal estate first exhausted. 3 Bland, 49, 84; *United States Bank* v. *Ritchie*, 8 Pet., 128; *Wyse* v. *Smith*, 4 Gill & J., 302.

Considering, then, that in Maryland and Virginia, no less than elsewhere, something is permissible short of a direct averment as to the exhaustion of the personal estate in the payment of debts in a bill against an ordinary heir as such, certainly the reason does not apply in a proceeding against a fraudulent grantee for anything fuller or more direct, if so full. 5 Gill & J., 433. Such a grantee has no protection, like the heir, from want of privity or misconduct, and though he may be, in fact, the heir, as in this case, yet he takes by his deed, *prior in tempore*, and holds any surplus after paying

debts as a voluntary and good grantee in respect to that surplus, and not as heir.

When, therefore, in a bill against such a fraudulent grantee, the fraud is averred, as here, and a waste of the personal estate, and the clause is stated to be made on that account, all is alleged which seems necessary for full notice, and for a decree against such grantee, if at the hearing the fraud is substantiated, and the personal assets are proved to be wasted or insufficient.

To show that the averments in this bill come quite up to the usual standard in this respect, we need only cite from it [*233 the following, as to Edward McLaughlin:—"That he left no real estate, having fraudulently conveyed and disposed of the whole of it in favor of the said Bridget McLaughlin, as before stated. That his personal estate has been made away with, and misapplied by his administrator, and the surety of said administrator, as before charged. Your orators are advised, that the personal estate of the said McLaughlin is, in the first place, liable to the payment of their debts, if he left sufficient for that purpose, and that the said administrator and his surety are bound to render an account thereof. That if the said personal estate be insufficient, then that the real estate, fraudulently conveyed by him as aforesaid, is liable to make good any deficiency."

Our conclusions, then, on this point, are, that these allegations must be considered ample and explicit enough for a proceeding against a fraudulent administrator and surety and fraudulent donee, whether looking to the Maryland, Virginia, or English practice as prevailing in Alexandria. Being also a proceeding in chancery, if in some respect argumentative, the averment is clear enough not to be mistaken, and opens for consideration the whole merits. Because, as regards the defendants, if on principle they are answerable for personal estate squandered and misapplied by themselves, and land fraudulently conveyed to one of them is not to be shielded from liability in consequence of the waste of personal estate by herself, then the allegations here are the proper ones, and, being the true ones also, need no amendment. The facts established under them fully justify the decree below.

So far from the principal defendant insisting or showing, at the hearing in this case, that the personal assets were large enough to pay this debt, or have been so applied, and the land in her possession has been thus relieved from the charge, she contended that they were less in amount than the plaintiffs did; and the latter prove clearly that she joined the administrator in committing waste of what did exist, that is, con-

sumed the very property she urges the creditors should resort to before calling on her. And though she is an heir of Edward McLaughlin, the proceeding here is against her, not as heir, but as surety to a defaulting administrator of the personal estate, and as fraudulent grantee of the real estate.

Their is no heir to this land, claiming it as heir, in any part of these proceedings, but a grantee of it, claiming by a deed, and which, if fraudulent, still entitles the grantee to hold it as grantee against the heirs of the grantor, of whom there is one other not here, and places the heirs as such entirely out of the case,—*hors de combat*.

*234] *As no other question arises on the appeal which is material and has not been arranged in submitting to a sale of the trust property, it is only necessary to add that the judgment below must be affirmed.

Mr. Justice McKINLEY dissented.

ORDER.

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 Columbia, holden in and for the county of Alexandria, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

PETER K. WAGNER, AND SIDONIA PIERCE WAGNER, HIS WIFE, JOHN LAWSON LEWIS, LOUISA MARIA LEWIS, THEODORE LEWIS, ELIZA CORNELIA LEWIS, ALFRED J. LEWIS, JOHN HAMPDEN LEWIS, ALGERNON SIDNEY LEWIS, GEORGE WASHINGTON LEWIS, AND BENJAMIN FRANKLIN LEWIS, ALL RESIDENTS AND CITIZENS OF THE CITY OF NEW ORLEANS AND STATE OF LOUISIANA, AND JOHN BOWMAN, AND MARY PIERCE BOWMAN, HIS WIFE, LATE MARY PIERCE LAWSON, RESIDENTS AND CITIZENS OF THE STATE OF TENNESSEE, AND GEORGE C. THOMPSON, A RESIDENT AND CITIZEN OF THE STATE OF KENTUCKY, COMPLAINANTS AND APPELLANTS, *v.* JOHN BAIRD AND OTHERS, RESPONDENTS.

There is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases the court often act upon their own inherent doc-

trine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights.

The rule upon this subject, originally laid down by Lord Camden, in *Smith* v. *Clay*, 3 Bro. Ch., p. 640, note, and adopted by this court in 1 How., 189, again asserted.[1]

Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor.[2]

The party guilty of such laches cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability.

The facts in this case bring it within the operation of the above principles, and the bill must, therefore, be dismissed.

THIS was an appeal from the Circuit Court of the United States for the District of Ohio, sitting as a court of equity.

*The case, as set forth by the complainants, is contained in the following extract from the brief of Mr. Ewing, one of their solicitors. [*235

The bill, which was filed on the 18th day of November, 1840, charges, that on or about the 21st of November, 1783, Brigadier-General Robert Lawson obtained of the State of Virginia a military land-warrant, No. 1,921, for 10,000 acres of land due him for military services in the Revolutionary war, in the Virginia line on Continental establishment.

That prior to the 12th of January, 1788, said warrant was lodged in the office of Richard C. Anderson, then principal surveyor of the Virginia military lands, and that prior to the 4th of June, 1794, divers entries had been made on said warrant, to wit: entries Nos. 1,704, 1,705, 1,706, 1,707, 1,714, 1,715, 1,716, 1,717, 1,718, and 1,719, of 1,000 acres each; and that Nos. 1,704, 1,705, and 1,706 had been withdrawn and reëntered, so as to leave Nos. 1,707 and 1,714 the first subsisting entries made for the said Robert Lawson on the surveyor's books.

That on the 4th day of June, 1794, the said Robert Lawson, by deed of indenture of three parts, between him, the said Robert Lawson, of the first part, his wife Sarah Lawson, of the second part, and James Speed, George Thompson, Joseph Crocket, and George Nicholas, of the third part, for the consideration therein expressed, conveyed to the said Thompson, Crocket, and Nicholas, for the uses and purposes therein specified, 2,000 acres of land, described as situate on White Oak Creek, on the northwest

[1] See note to *Bowman* v. *Wathen*, 1 How., 189.

[2] FOLLOWED. *Landsale* v. *Smith*, 16 Ohio, 392.

side of the Ohio River, being the land mentioned in the first entry made for said Robert on the surveyor's books; which said 2,000 acres of land is averred to be the land embraced, not in a single entry, but in entries Nos. 1,707 and 1,714, made January 12th and February 11th, 1788.

That the said Robert Lawson, by the same deed, conveyed to the said trustees five other tracts of land of 1,000 acres each, described as being the last entries made on said warrant in the name of said Robert Lawson; which, it is averred, embrace the land contained in entries Nos. 1,718 and 1,719, made the 11th of February, 1788; entry No. 1,704, made February 11th, 1793; and entries Nos. 1,705 and 1,706, made the 21st of January, 1793.

Complainants file a certified copy of said deed, aver that the same was duly recorded in Fayette county, Kentucky, and on the 26th of February, 1798, a certified copy, from the records in Fayette county, Kentucky, was recorded in the recorder's office of Hamilton county, in the Northwestern Territory, in which county the lands in controversy lay. The original deed of trust is lost; due search has been made for it, and the *complainants verily believe that the original was consumed by fire in the recorder's office in Kentucky.

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That on the 16th of August, 1796, John O'Bannon procured of Lawson an assignment of 3,333⅓ acres of said warrant. That Lawson, at the time he made this assignment, was habitually intemperate, and mentally incapable of transacting business. O'Bannon well knew this,—knew of the deed of trust,—and procured the assignment by fraud, and on the false pretences that he was the locator of the whole tract of 10,000 acres.

That afterwards, on the 25th of August, 1796, O'Bannon, knowing that entry No. 1,707 had been conveyed to the trustees aforesaid, fraudulently withdrew so much of said warrant 1,921 as was entered in said No. 1,707, and caused the same to be entered on the lands in controversy; and, on the 29th of August, 1796, surveyed the same, and returned the plat to the surveyor-general's office.

That prior to the 12th of February, 1799, O'Bannon applied for a patent in his own name for said survey; and that on said day the trustees, in the deed of trust aforesaid, by Joshua Lewis, their agent, filed a caveat against the issuing of patents to the assignees on said warrant 1,921, and with it a copy of the deed of trust.

That O'Bannon continued to urge the department to issue patents on his claims under said assignment; which was for

a long time postponed, and, on the 9th of May, 1811, refused or suspended, because said assignment was in violation of the deed of trust aforesaid. That said deed of trust, among other things, directed the trustees aforesaid to convey the 2,000 acres of land first above mentioned to either of the sons of said Robert and Sarah Lawson that the said Sarah might direct, unless it should be necessary to dispose of the same for the use of the family; that the last-named 5,000 acres should be conveyed, 1,000 to America Lawson, 2,000 to John P. Lawson, and 2,000 to Columbus Lawson.

That the said Sarah did not, in her lifetime, direct the conveyance of the said 2,000 acres; and the said trustees did not convey the same, nor any part of the 5,000 acres. That all the trustees are dead, and that the last survivor of them, George Thompson, died on the 22d of March, 1834, leaving the complainant George C. Thompson his only child and heir at law.

That America Lawson intermarried with Joshua Lewis, December 23d, 1797. General Lawson died March 1, 1805, leaving three children, John Pierce Lawson, America Lewis, and Columbus Lawson, his heirs at law. That on the 10th of *June, 1809, said Sarah Lawson died. That on the [*237
7th of January, 1807, John Pierce Lawson conveyed
to Joshua Lewis all his interest in said lands. That on the 1st of June, 1809, John P. Lawson died, leaving Mary P. Lawson, now Mary P. Bowman, his only child and heir at law, who intermarried with complainant John Bowman. That on the 8th of January, 1815, Columbus Lawson died unmarried and intestate, leaving said America Lewis and Mary P. Bowman his heirs at law.

That about the 1st of January, 1813, John O'Bannon died, leaving Robert Alexander and George T. Cotton executors of his last will and testament. That Cotton, who qualified, applied to the General Land Office for a patent on survey No. 1,707, of 965 acres, as executor of said O'Bannon, but the patent was withheld, and the record thereof cancelled.

That, about the 21st of December, 1816, the said Cotton deposited in the General Land Office a paper, purporting to be a certificate of, and signed by, Robert Lawson, dated the 27th of November, 1802, and purporting to be witnessed by J. Bootwright and C. McCallister. Said certificate was false and forged; but by means thereof the patent was procured to be issued.

That Cotton died testate; complainants exhibit a copy of the will of O'Bannon, and of Cotton. The devisees of said John O'Bannon and George T. Cotton are not residents of

the district of Ohio; prays process of subpœna against them, or such of them as may be found in the said district; and that they, and such others as will voluntarily appear, be made defendants.

That on the 1st of October, 1830, America Lewis died; on the 20th of June, 1833, Joshua Lewis died, and left complainants their only surviving children and heirs at law. Aver that the remaining 3,000 acres of land, of warrant 1,921, not included in the deed of trust, vested in them as heirs of Robert Lawson, through America Lewis.

That America Lawson, afterwards Lewis, was under the disability of infancy or coverture during her whole natural life; and that at the time of issuing the patent to George T. Cotton, and from that time till her death, she was under the disability of coverture. That Columbus Lawson was an infant at the time of the death of his brother, John P. Lawson, and that he was killed at the battle of New Orleans, on the 8th of January, 1815; and that neither of the trustees in the deed of trust, nor either of the persons under whom complainants claim title, was ever resident in the State of Ohio.

That John Baird, James W. Campbell, Thomas Jennings, Isaac E. Day, Duncan Evans, William King, Victor King, Absalom King, William More, and Christian Snedecher, *238] (who are *made defendants,) are in possession of, and claim to have derived title to, portions to said tract No. 1,707, of 965 acres, mediately or immediately from George T. Cotton, executor of John O'Bannon, deceased. Call upon defendants to exhibit their title. Aver that they had full notice of the title of complainants and the fraud of O'Bannon; pray subpœna, &c.

An affidavit of search for the deed of trust, and belief that it is lost or consumed, is attached to the amended bill.

The defendants, terre-tenants, severally plead that they are *bonâ fide* purchasers, without notice of complainants' title. They answer jointly, putting in issue the material allegations of the bill; set forth specifically their own derivation of title; aver that the claim of complainants is stale, and that a part of the persons named as trustees have been in the State of Ohio since the execution of the deed of trust, and before the issuing of the patent. That the caveat was filed by Joshua Lewis without authority from the trustees, and that the patent was wrongfully suspended at the General Land Office. They refer to the certificate of Lawson, November 27th, 1802; the affidavit of James Speed, November 20th,

1803; and the certificate of James Morrisson, December 9th, 1816.

To these answers there is a replication.

The above statement of the case is taken, as was before remarked, from the brief of Mr. Ewing, and presents it in as strong a point of view, for the complainants and appellants, as can be given to it.

In the progress of the cause in the court below, a great mass of evidence was taken, and many exhibits were filed, which it is unnecessary to set forth.

In December, 1842, the Circuit Court dismissed the bill, with costs, an appeal from which decree brought it up to this court.

It was argued at the preceding term, by *Mr. Ewing* and *Mr. Scott* (in a printed argument), for the appellants, and *Mr. Stanberry*, for the appellees.

It is unnecessary to give any of the arguments of counsel, except upon the point of lapse of time, as the decision of the court turned upon that point.

Mr. Ewing, for the appellants.

And lastly, the defendants rely on the lapse of time.

The statute of limitations of Ohio, January 25th, 1810, bears directly upon this case. 1 Chase, 656, § 2. By the second section of this statute, all actions or suits for the recovery of possession, title, or claims to land are barred in twenty-one years; with a proviso, in these words:—"That if any person *or persons who are, or shall be, entitled [*239 to have, sue, or bring any suits, action or actions, as aforesaid, shall be within the age of twenty-one years, insane, feme covert, imprisoned, or beyond sea at the time when any such suit, action or actions, may or shall have accrued, then every such person or persons shall have a right to have, sue, or bring any action or actions aforesaid within the time hereby before limited in this act after such disability shall have been removed."

Unlike this, the statute of 21 James 1, c. 16, (4 British Stat., 751,) enumerates several forms of real actions, and bars or saves them; and there is nothing which can, in general terms, include a case in equity.

But we here come within the direct operation of the statute, and also within the direct action of the proviso. The law gives us twenty-one years, after disability removed, to bring this suit. It is subject to no discretion; we have a right to it.

And so are the decisions. *Larrowe* v. *Beam*, 10 Ohio, 502;

Tuttle v. *Wilson*, Id., 25; *Fales* v. *Taylor*, Id., 107; *Elmendorf* v. *Taylor*, 10 Wheat., 168–177; *Carey* v. *Robinson*, 13 Ohio, 181; *Lockwood* v. *Wildman*, Id., 452; *Ludlow* v. *Cooper*, Id., 582, foot of page.

The complainants are within the saving in the proviso. The trustees all resided out of the State until the death of Thompson, March 22, 1834. All of the *cestuis que trust* were absent from the State until their deaths. America Lewis died in 1830; Joshua Lewis, 1833.

In this state of things, there is no principle of equity which warrants the court in holding the complainants barred by time, until time would constitute a bar by the direct application of the statute of limitations.

Mr. Scott, on the same side.

The defendants cannot successfully repel the claim, here asserted by the complainants, on the ground assumed, that these claims are barred by the statute of limitations, which took effect June 1st, 1810 (see Ch. 18, Vol. VIII., p. 63). That statute does not commence running against land claims in this district until patent emanates. (See *Lessee of Wallace* v. *Miner*, 6 Ohio, 366, and 7 Id., 249.) The words "beyond sea," in the statute, are construed to mean out of the State. (*Richardson* v. *Richardson*, 6 Ohio, 125; *Wirt* v. *Homer*, 7 Ohio, 235; *Whitney* v. *Webb*, 10 Ohio, 513.) When the action accrued under the act of 1810, it is not barred by the subsequent act. (*Putnam* v. *Reese*, 12 Ohio, 21.)

*240] The right of action in those under whom the complainants have derived title accrued, under the act of 1810, in *December, 1816, when the patent to Cotton was obtained; but as they were, and continued to be, non-residents, the statute of limitations never commenced running, against the claims now asserted by the complainants, until 1830, on the death of their mother, America Lewis, and in 1833, on the death of their father, Joshua Lewis. The statute commenced running against three sixth-parts of the lands now claimed in the bill on the death of Mrs. Lewis; and as respects two sixth-parts thereof, it commenced running on the death of Mr. Lewis. But the statute has never commenced running against the remaining sixth part, which is claimed by Mrs. Bowman. After the statute begins to run, it requires twenty-one years to complete the bar. And the Supreme Court of Ohio, sitting in bank, in the case of *Carey's Administrators* v. *Robinson's Administrators*, 13 Ohio, 181, has recently decided, that, where non-residents are within the

saving clause of the act of limitations of 1810, the statute does not begin to run until their death; and that their heirs may commence suit within the period of twenty-one years, limited in the statute, after the death of such ancestor. And, in accordance with this decision, the same court, at the same term, in the case of *Lockwood and others* v. *Wildman and others*, decided, that, under the act of 1810, persons residing out of the State at the commencement of adverse possession are not barred under twenty-one years after the disability is removed. These decisions have overruled the decision made by the same court, at a previous term, in the case of *Whitney* v. *Webb*, 10 Ohio, 513, and demonstrate that the claims here asserted by the complainants are not barred by the statute of limitations.

The complainants are not barred on the ground that their demand is stale by reason of the lapse of time. The rules in equity, which allow lapse of time to be interposed as a bar to equitable relief, have been adopted in analogy to the statute of limitations in cases at law, and are governed by precisely the same principles. And here it is worthy of remark, that the statute of limitations of Ohio, in one important particular, is essentially different from any of the statutes of limitations of the British Parliament which have come under our notice. In the British statutes the particular suits are named, to which a limitation, as to the time of bringing them, is fixed; but as no suits in equity are named in those statutes, the courts have adjudged that those statutes, in direct terms, did not apply to suits in equity. The statutes of Ohio limit the time for bringing "actions of ejectment, or any other action for the recovery of the title or possession of lands," &c., to twenty-one years. In Ohio, there is no other action or *suit known to the law for the recovery of the title [*241
to land, except an action or suit in equity. And we, therefore, insist that this is an action or suit, and the only one the law authorized us to bring, for the recovery of the title and possession of the lands in question, and consequently it falls within the letter and spirit of our statutes of limitations. And if our construction of the statute be correct, it consequently results that the plea of the lapse of time has no application to this case, as the statute itself furnishes the rule, and the only rule, by which we can be barred. But suppose we are mistaken, in the construction we have contended for, will the condition of the defendants be improved? We think not: because the courts of equity, in England and in this country, have adopted the statute of limitations as fur-

nishing reasonable equitable rules for the limitation of suits in equity.

His honor, Mr. Justice McLean, in delivering his opinion in this case, in the Circuit Court, said,—"Had the statute of limitations remained open for our contemplation, and we construed it as above intimated, which would not bar the complainants' rights, still I should have been clearly of the opinion that they were barred by the lapse of time." The position here assumed by the learned judge will, I trust, be deemed a sufficient apology, on my part, for dwelling a little longer on this branch of the case than I originally intended. The Supreme Court of this State, in the case of *Amelia Fahr, Administrator of Casper Fahr*, v. *James Taylor and others*, 10 Ohio, 106, decided that chancery will not set up lapse of time against a claim, when an action of debt for its recovery would not be barred by the statute of limitations. In the case of *Ridley and others* v. *Holtman and others*, 10 Ohio, 521, the court decided that equity ordinarily acts in analogy to the law, giving effect to the statute of limitations, and therefore, where the owner of an older entry and junior patent, who was never in the State, died, with an adverse possession, under a junior entry and older patent, against him, equity, after the lapse of twenty-one years from his death, will allow the act of limitations to be set up, as a bar against his heirs, seeking to get in the legal title under the older entry. And, in the case of *Larrowe* v. *Beam*, 10 Ohio, 498, the court said:—"We do not know that there is any case in which the defence has been distinctly placed upon this ground (lapse of time), where there was a statute of limitations in force applicable to the case. If the party be guilty of such laches in prosecuting his title as would bar him if his title were solely at law, he should be barred in equity."

Mortgages are held not to be within the words of the statute *of limitations; and no positive rule hath, as yet, been fixed upon which shall be an absolute bar to redemption. But the making up of accounts, after long periods of time, being very difficult, and attended with great hardship on the mortgagee, it hath been thought reasonable to establish in equity, in analogy to the statute, a period at which, *primâ facie*, the right of redemption shall be presumed to be deserted by the mortgagor, unless he be capable of producing circumstances to account for his neglect, such as imprisonment, infancy, coverture, or by having been beyond seas, and not by having absconded, which is an avoiding or retarding of justice. (See *Knowles* v. *Spence*, Mos., 225; 1 Eq. Cas. Abr., 315; *Ord* v. *Smith*, Sel. Ch. Cas., 9, 10;

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Id., 56; *Jenner* v. *Tracy*, 3 P. Wms., 287, *n.*; *Belch* v. *Harvey*, Id.; 3 Sugden on Vend., App., *n.* 15; *Saunders* v. *Hoard*, 1 Ch. R., 184; *Clapham* v. *Bowyer*, Id., 206; 3 Atk., 313; *Bony* v. *Ridgard*, 1 Cox, Ch. Cas., 149; *Hever* v. *Livingston*, 1 P. Wms., 263; *Trash* v. *White*, 3 Bro. Ch., 289; *Leman* v. *Newnham*, 1 Ves., 51; and *Shipbrook* v. *Hinchingbrook*, 13 Ves., 387.) And to preserve uniformity between the proceedings in courts of law and equity, twenty years after forfeiture and possession taken by the mortgagee, no interest having been paid in the mean time and the mortgagor laboring under none of the disabilities enumerated in the statute of limitations, hath been fixed upon as the period beyond which a right of redemption shall not be favored. (See 3 Johns. (N. Y.) Ch., 134; and *Lamer* v. *Jones*, 3 Har. & M. (Md.), 328; and *Doe* v. *Culvert*, 5 Taunt., 170.)

It has been said that this rule is not founded on the presumption of an absolute conveyance, but is merely a positive rule, introduced for the sake of quieting the title, after so long a neglect to redeem. *Per* Eyre, C. B., in *Corbet* v. *Barker*, 1 Anstr., 143. The rule was first hinted at in *Winchcomb* v. *Hall*, 1 Ch. R., 40, and *Porter* v. *Emery*, 1637, Id., 97; then in *Saunders* v. *Hoard*, 1 Ch. R., 184; and *Clapham* v. *Bowyer*, Id., 206; and afterwards adopted as a rule of court, by Lord Keeper Bridgman and the Master of the Rolls, in *Pearson* v. *Pulley*, 1 Ch. Cas., 102; and followed by Lord King, in *White* v. *Ewer*, 2 Ventr., 340. But the rule seems not to have been permanently settled till about the middle of the last century. So late as the year 1722, an appeal came on in the House of Lords, wherein the doctrine was but imperfectly acknowledged. It was, however, there held, that a mortgagee in possession for seventy years, under legal title, should not be redeemed or disturbed; for so long an acquiescence should be taken as an implied waiver of the right to redeem, especially when the rents were insufficient to keep down the interest for more than *fifty years. *Stone* v. *Byrne*, 2 Bro. P. C., 399; S. P., 3 Johns. (N. Y.) Ch., 129. [*243

The rule, however, may now be considered as permanently established; and the principles on which it is founded are perfectly understood and clearly developed. It is true, courts of equity, by their own rules, independently of any statute of limitations, give great effect to length of time; but it is equally true, that they refer frequently to the statute of limitations, for the purpose of furnishing a convenient measure for the limitation of time, which might operate

as a bar, in equity, to any particular demand. (See *Beckford* v. *Wade*, 17 Ves., 87.)

In *Kane* v. *Bloodgood*, 7 Johns. (N.Y.) Ch., 9 (affirmed in 8 Cow., 360), Chancellor Kent remarked, in substance, that the limitation of suits, being founded in public convenience, and attended with so much utility, the courts of equity have adopted principles analogous to those established by the statutes of limitations, as positive rules for their conduct.

Lord Camden, in *Smith* v. *Clay*, 3 Bro. Ch., 639, note, said, that laches and neglect were always discountenanced in equity; and therefore, from the beginning of that jurisdiction, there was always a limitation to suits. *Expedit reipublicæ ut sit finis litium*, was a maxim that had prevailed in chancery at all times, without the help of an act of Parliament. As, however, the court had no legislative authority, it could not define the bar by a positive rule. It was governed by circumstances. But as often as Parliament had limited the time of actions and remedies to a certain period, in legal proceedings, the Court of Chancery had adopted that rule, and applied it to similar cases in equity; for when the legislature had fixed the time at law, it would have been preposterous for equity to continue laches beyond the period to which they had been confined by Parliament; and therefore, in all cases where the legal right has been barred by Parliament, the equitable right to the same thing has been concluded by the same bar.

Lord Redesdale, in *Hovenden* v. *Annesley*, 2 Sch. & L., 607, said:—"I think the statute of limitations must be taken, virtually, to include courts of equity; for when the legislature limited the proceedings at law, in certain cases, and provided no express limitations for proceedings in equity, it must be taken to have contemplated that equity followed the law; and therefore it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also."

In the case of the *Marquis of Cholmondely* v. *Lord Clinton* (see 2 Meriv., 171, and 2 Jac. & W., 190), upon appeal to the House of Peers, Lord Eldon said he could not agree to, and had never heard of, such a rule, as that adverse *244] *possession, however long, would not avail against an equitable estate; and he concluded by stating his opinion to be, that an adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseizin, abatement, or intrusion, with respect

to legal estates; and that, for the quiet and peace of titles, and of the world, it ought to have the same effect. During that whole period of twenty years, in which Lord Clinton had held adverse possession of the premises in question, the Marquis of Cholmondely, or those under whom he claimed, was not laboring under any of the disabilities enumerated in the statute. So that the bar in chancery, in analogy to the statute of limitations, was complete. Lord Redesdale was clearly of the opinion, that the plaintiffs were barred by the effect of the statute of limitations; and that the bill, therefore, should be dismissed. He wished it to be understood that his decision rested, principally, on that ground. He remarked that it had been argued that the Marquis of Cholmondely might, at law, have had a writ of right,—that was, a writ to which peculiar privileges were allowed; but courts of equity had never regarded that writ or writs of formedon, or others of the same nature. They had always considered the provision in the statute of James which related to rights and titles of entry, and in which the period of limitation was twenty years, as that by which they were bound, and it was that upon which they had constantly acted. He considered that the statute was a positive law, which ought to bind courts of equity, and that the legislature must have supposed that they would regulate their proceedings accordingly, by it. The decree of Sir Thomas Plumer was confirmed. The following clauses in Sir Thomas Plumer's opinion have a direct bearing on this question, viz.:—"Mrs. Damer, the devisee, is, on all sides, admitted to be the only person who could have had any claim of title under Horace, Earl of Orford, to this estate; and the full period of twenty years having elapsed since the death of George, Earl of Orford, when that title, if at all, first accrued, the remedy would have been taken away by the statute, in consequence of the laches and non-claim. The lapse of twenty years affords a substantive, insuperable plea in bar. It is the fixed limit to the remedy,—the *tempus constitutum;* one day beyond is as much too late as one hundred years. This is the peremptory, inflexible rule of law, fixed by positive statutes, if there has been adverse possession, and no disability or fraud. No plea of poverty, ignorance, or mistake can be of any avail. However clear and indisputable the title, if the merits could be inquired into," &c.

*Lord Chancellor Manners, in *Medlicott* v. *O'Donnell*, 1 Ball & B., 164, thus expressed himself:—"I think, then, I stand well supported by principle and authority in saying that the court is bound to regulate its proceedings by [*245

analogy, or in obedience to the statute of limitations. Upon a uniform concurrence of a long train of the highest authorities, I can entertain no doubt in the present case. It is clear that, had it been the claim of a legal estate, in a court of law, the remedy must, by analogy be equally barred in a court of equity." On the same ground, another case, between the same parties, has since been decided; the Lord Chancellor observing, that, where there has been adverse possession for twenty years, not accounted for by some disability, as coverture, &c., a court of equity ought not to interfere. 1 Turn., 107.

In New York, the analogy between the right to redeem in equity and the right of entry at law is complete and entire throughout. *Demarest* v. *Wynkoop*, 3 Johns. (N. Y.) Ch., 134.

Lord Manners, in the case of *Medlicott* v. *O'Donnell*, to which reference is had above, said:—"It has been suggested that I lay too much stress upon length of time, and that I attach more credit to it than Lord Redesdale or any of my predecessors have done. I confess, I think the statute of limitations is founded upon the soundest principles and the wisest policy, and that this court, for the peace of families and to quiet titles, is bound to adopt it, in cases where the equitable and legal title so far correspond, that the only difference between them is that the one must be enforced in this court, and the other in a court of law."

In *Cook* v. *Arnham*, 3 P. Wms., 287, the rule was put on this footing, that where length of time will not bar the right to bring an ejectment, then it shall not bar the right to file a bill in equity; and Sir Joseph Jekyll, in *Toyer* v. *Larington*, 1 P. Wms., 270, placed the rule on the same footing; and, in that shape, it was approved by Lord Redesdale in the cases above cited.

In *Nelson* v. *Carrington*, 4 Munf. (Va.), 332, and *Lamar* v. *Jones*, the court decided that lapse of time is permitted, in equity, to defeat an acknowledged right, on the ground only of its affording evidence of presumption that such right has been abandoned; and it never prevails where the presumption is outweighed by opposing facts and circumstances.

From the cases of *Topliss* v. *Baker*, 2 Cox, Ch. Cas., 122, in the Exchequer; *Turnstall* v. *McLelland*, Hardr., 519; *Hele* v. *Hele*, 2 Ch. Cas., 28; *Sibson* v. *Fletcher*, 1 Ch. R., 59; *Leman* v. *Newnham*, 1 Ves., 51; *Trash* v. *White*, 3 Bro. Ch. Cas., 291; *Hatcher* v. *Fineaux*, 1 Ld. Raym., 740; and *Blewitt* v. *Thomas*, 2 Ves., 669, we deduce these points:—

*246] that no rule exists, in equity, for presuming a release or satisfaction of a mortgage, after the lapse of twenty years,

or any other particular period of time, on the ground that no notice has been taken of the debt, either by payment of the interest on one side, or demand of principal and interest on the other; and that if a jury should on that ground presume the bond to be satisfied, yet the mortgagee will not thereby be prevented from showing the truth of the case to the court; and the court will, on proof that the money is due, or in the absence of proof that it has been paid, decree in favor of the mortgagee, notwithstanding a period of more than twenty years may have elapsed between the making of the mortgage and the last demand of principal and interest. But it will be incumbent on the mortgagee and his representatives to define, particularly, the period and essence of the acknowledgments which he avers to have taken place, and to show with accuracy the commencement and continuance of every disability which he suggests as the cause of forbearance.

Lord Chancellor Erskine, in the case of *Hillary* v. *Waller*, 12 Ves., 239, said:—"The presumption in courts of law, from length of time, stands upon a clear principle, built upon reason, the nature and character of man, and the result of human experience. It resolves itself into this, that a man will naturally enjoy what belongs to him; that is the whole principle.—Then, as to presumptions of title: 1st. As to bond taken, and no interest paid for twenty years, nay, within twenty years, as Lord Mansfield has said; but upon twenty years the presumption is that it has been paid, and the presumption will hold unless it can be repelled; unless insolvency, or a state approaching it, can be shown; or that the party was a near relative; or the absence of the party having the right to the money; or something that repels the presumption, that a man is always ready to enjoy what is his own." In that case, a definite period was fixed, in analogy to the time at which courts of law raised similar presumptions, namely, "not less than twenty years"; implying that, *primâ facie*, after twenty years, a court of equity will raise the presumption of a reconveyance from the mortgagee or his heirs; the period wherein the presumption of payment of the mortgage money will arise. But all these presumptions may be repelled by evidence. The lapse of twenty years is only a circumstance on which to found a presumption of payment, and is not, of itself, a legal bar. *Jackson* v. *Pierce*, 10 Johns. (N. Y.), 414; *Ross* v. *Norvell*, 1 Wash., 14.

In the case of *Chalmer* v. *Bradley*, 1 Jac. & W., 63, the plaintiffs stated that they were ignorant of the facts. [*247
It was *possible, said Sir Thomas Plumer, they might

be so. But was there not any thing that might lead them to that knowledge? Nothing appearing in the case, his honor directed an inquiry whether the plaintiffs had any notice of these circumstances, implied or otherwise; observing, that the reason why he directed this inquiry was, that, though he was impressed with the impolicy of permitting stale demands to be brought forward, though he knew that, on the principle stated in *Smith* v. *Clay*, Amb., 645, and 3 Bro. C. C., 639, note, a court of equity was not to be called into action by those who were not vigilant in support of their rights, and was aware of the monstrous inconvenience that would result at some period if the door was not shut to litigation, yet he fell in entirely with the opinion expressed by Lord Alvanley in *Pickering* v. *Stamford*, 2 Ves., 272. There the suit was commenced, after a lapse of thirty-five years, by persons who declared themselves ignorant of their rights. Lord Alvanley, under the circumstances of that case, could not be sure they were not ignorant, and therefore, stating strongly his opinion in favor of the general principle, that a party ought to be barred by length of time, and lamenting that he could not, in that instance, follow it, he directed similar inquiries; stating, at the same time, that if he (Lord Alvanley) were then to decide the case before him, he would decide it against the plaintiffs; and that, by the inquiries, he did not decide one way or the other; and would afterwards consider whether there was sufficient equity in the bill or not. It was, therefore, because there was not before him any direct and positive evidence to totally exclude all doubt upon it, that Sir Thomas Plumer directed the inquiries in *Chalmer* v. *Bradley*, to obtain some light on the circumstances under which the disputed enjoyment of the property had gone, reserving to himself to judge what should be the effect of the facts which might be found by the master, or what, even without that result, he might think right to be done.

The observations of Lord Camden, in *Smith* v. *Clay*, 3 Bro. C. C., 640, on which his honor, Mr. Justice McLean, in deciding this case, seemed to place so much reliance, do not, we respectfully submit, when rightly understood, conflict with the principles of the preceding cases. The words of Lord Camden are:—"A court of equity, which is never active in a relief against conscience, has always refused its aid to stale demands where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence."

A demand in equity is never stale during that period in

which, were it a legal demand, it would not be barred by the *statute of limitations. The complainants have been basely defrauded of their rights, and do not, therefore, defile their consciences by the prosecution of this suit. The complainants never acted in bad faith towards the defendants. They have never slept upon their rights. They were constantly active in asserting their claims, by caveat, until Cotton obtained his patent, which gave him a right of entry. At that time, those under whom the complainants claim were laboring under disabilities, and this suit was commenced in less than twenty-one years after those disabilities were removed. The law has defined what reasonable diligence is, namely, the institution of a suit within the period limited in the law. [*248

We are unable to perceive the bearing which the case of *Piatt* v. *Vattier*, 9 Pet., 413, can have on the present case. In that case, Piatt merely set out the claim which he had procured by assignment, and asked the court to decree a conveyance of a doubtful equity where there had been an adverse possession of more than thirty years; yet he did not, in his bill, charge that he, or those under whom he claimed, had been, during the whole period in which such adverse possession had been held, laboring under any of the disabilities enumerated in the statute of limitations; nor did he charge a single fact or circumstance to excuse the delay in bringing his suit, so as to shield his claim against the operation of the bar in analogy to the statute of limitations. Of what avail, then, was his proof?—as neither proof without allegation, nor allegation without proof, will warrant a decree. The complainants in this suit have averred and proved, not only that their claim, if a legal one, would not be barred by the statute of limitations, but they have also charged and proved such facts and circumstances as, independent of the statute, relieve their claim from the operations of the bar adopted in equity in that class of cases in which a bar in analogy to the statute would be applied.

A legacy given out of real property is only recoverable in a court of equity, and therefore is not within the express words of the statute of limitations. And it follows, that length of time alone will not bar it, but it will raise a presumption of payment, which, unless repelled by evidence of particular circumstances, will be conclusive. (See 1 Vern., 256; 2 Id., 21; and 2 Ves., 11.)

Time will not run against pure technical trusts, nor will it commence running in cases of fraud until the fraud has been discovered. (See *Bicknell* v. *Gough*, 3 Atk., 558; *Alden* v.

Gregory, 2 Eden, 280; 2 Vern., 503; 1 Ridg., 337; 2 Ves., 280; Cas. Temp. Talb., 63; 2 Sch. & L., 101; and Id., 474.)

*249] *The presumptions drawn by courts, against stale demands, are founded in justice and policy. Those presumptions are matters of evidence, and not, in most cases, *proprio jure*, matters of plea in bar; and a court of equity, equally with a court of law or jury, may draw the conclusion, if the lapse of time be put in issue by the pleadings, and the lapse of time be not satisfactorily accounted for.

Lapse of time imputed as laches may be excused by the obscurity of the transaction, whereby the plaintiff was disabled from obtaining full information of his rights, (*Muncy* v. *Palmer*, 2 Sch. & L., 487,) and equity will relieve against the mere lapse of time unaccounted for without misconduct in the lessee, or where the lessee has lost his right by the fraud of the lessor (*Lamar* v. *Napper*, 2 Sch. & L., 682, 689). These authorities need no comment, as they clearly demonstrate, when applied to the facts of this case, that the complainants' claim is not barred by lapse of time in analogy to the statute of limitations, nor by lapse of time independent of that statute, or by any other cause.

There is, however, one class of cases, in which a court of law will, in furtherance of justice, presume a conveyance in less than twenty years. This rule, however, only applies to cases of pure technical trusts, where the trustee is bound to convey to his *cestui que trust* at a particular period, or on the happening of a particular event, after the period has arrived, or the event had happened, on which the estate was to be conveyed, if the *cestui que trust* convey the estate to another, and an action or suit be brought by the bargainee against a person in possession. The court will not permit the plaintiff to be prevented from recovering, on the ground that the legal title is outstanding in the trustee, but will leave it to the jury to presume a conveyance from the trustee; upon these grounds, namely, that the court will presume that the trustee has done his duty, and that what had been done by the *cestui que trust* was rightfully done. (See *England* v. *Slade*, 4 T. R., 682, and *Doe* v. *Lyburn*, 7 T. R., 2.) It will at once be perceived that this class of cases has no application to the case at bar.

There is no particular hardship in this case which ought to weigh with the court, and incline the scale in favor of the defendants. Should a decree be pronounced, eventually, in favor of the complainants, the defendants will, in reality sustain no loss. The complainants must pay them for all their lasting and valuable improvements, and moneys expended in

payment of taxes, less the rents and profits; and their warrantors must refund to them the expenses of this suit, ordinary and extraordinary, and the consideration paid, if any were *paid, and interest. This will throw the loss back upon those who originally perpetrated the fraud, [*250 to be relieved from which the complainants have been compelled to resort to this court. And we respectfully submit, that they are entitled to the relief which they ask. In extending relief to the complainants, we also submit, that no portion of the land ought to be decreed to the defendants, on the ground that the lands in question had been located and surveyed by O'Bannon; because, first, said location and survey were not made in pursuance of any contract; and if they were, the defendants do not show such a connection with O'Bannon as would justify this court in substituting them in his place. This court cannot make a contract for the parties, and then decree its specific execution.

Mr. Stanberry, for the appellees, in reply to *Mr. Scott*.

Lastly, if all other defence fails us, we rely upon the lapse of time and the staleness of the claim; and this is, under all the circumstances, a sure reliance. It is difficult to imagine a case to which this wholesome doctrine would better apply.

Whether the complainants trace their claim to the deed of trust, or by descent from Lawson, they come at too late a day into a court of equity to assert it. From the 16th of August, 1796, a claim adverse to theirs has been set up, and for twenty-seven years prior to the filing of the bill undisturbed possession of the land accompanied that adverse claim. However it may have been in the beginning, no single circumstance of fraud or notice attaches to this adverse title during this long possession.

Look now to the change of circumstances in this great lapse of time. All the parties to the transactions dead, and the subject-matter of the claim, worth only a few cents per acre in the beginning,—worth only $2.50 per acre when the possession commenced, and then a wilderness,—now turned into highly cultivated farms, and worth $30 per acre.

Now what sort of a case do these complainants make to overcome such a defence?

Let us take the title as claimed under the deed of trust in the first place. I have shown already that this land was not covered by that deed; but, if it be held to pass, though obscurely, by that deed, then what sort of a deed was that?

A voluntary post-nuptial settlement, a sort of conveyance barely tolerated, requiring the most favorable circumstances

for its support, and of little avail against present creditors and subsequent purchasers.

The counsel for complainants, in his printed brief, takes quite a new view of this kind of conveyance. He says, that *251] *"each of the three considerations named in the deed is valuable, and sufficient to sustain it against creditors and subsequent purchasers."

In answer to this, it is only necessary to refer to *Cathcart v. Robinson*, 5 Pet., 264, which establishes, or more properly recognizes, the doctrine, that a subsequent sale by the husband to an innocent purchaser is presumptive evidence of fraud in the settlement.

The great object of this conveyance was a reconciliation between Lawson and his wife, which soon fell through. Very shortly after the making of the settlement, we find Mr. and Mrs. Lawson making a joint application to one of the trustees for the sale of a part of the lands to meet their current expenses, but nothing is ever done by the trustees in the administration of the trust.

Between the date of the deed of trust and the year 1800, Lawson disposed of the entire 10,000 acres to various persons. The fact was known to the trustees and the *cestuis que trust.* All parties seem to have abandoned it, for not a single item of the property, real or personal, mentioned in it was ever administered under its provisions. Lawson and his family separated for ever. The complainants allege, that, for years before his death, he was reduced to a miserable wreck, both in body and mind, wholly unable to take care of himself. Strange that, under such circumstances, he should have been left altogether to the care of strangers.

He died between 1802 and 1805, and his wife and three surviving children, the youngest of whom (Columbus) was then sixteen, the other two considerably past their majority, were left to look after their property.

Mrs. Lawson died in 1809, her three children, then all of full age, surviving her.

Long before this date, all these parties were advised that this land was claimed by assignments from General Lawson, and as early as February 12th, 1799, a caveat against patents to the assignees was filed in the General Land Office by Joshua Lewis, who had married the daughter of General Lawson. Although under that caveat the patent for this 965 acres was suspended for sixteen years, not a step farther seems to have been taken to sustain it or make any proof.

Mrs. Lawson and her children continued to reside in Ken-

tucky, just where, if there were any proof to invalidate the claims set up under Lawson, it could be had.

On the 9th of January, 1807 one of the three children, John P. Lawson, conveys all his interest in the 7,000 acres embraced in the deed of trust to his brother-in-law, Lewis. This deed *contains the recital that the 7,000 acres, since the date of the deed of trust, had been conveyed by [*252 Robert Lawson to divers persons, and carefully provides that John P. Lawson should not be held to warrant against the claims of such purchasers.

John P. Lawson died about the 1st of June, 1809, leaving the complainant, Mary Pierce Bowman, his only child and heir at law.

Columbus Lawson died unmarried, about the 8th of January, 1815, leaving his sister, Mrs. Lewis, and his niece, Mrs. Bowman, his heirs at law.

Mrs. Lewis died about the 1st of October, 1830, and her husband about the 20th of June, 1833.

Ten years after the death of the last of Lawson's children, she having lived to the age of fifty-two, the grandchildren of Lawson, eleven in number, and all of full age, bring this suit.

Here, then, is a case of full notice of the adverse claim, brought home to the ancestors of these complainants more than half a century ago. They take but one step in all that time towards the assertion of their claim, and that step was taken before the present century commenced, and was never afterwards followed up. Perhaps they did not consider the property worth the cost and trouble of its pursuit. Now, after they are all gone, and all the parties to the fraud, if there was any, have also disappeared,—now, when the land is in hands very remote from the original owners, improved and subdivided into a cluster of farms, and made valuable by the labor of the occupants, at this late day, this long-abandoned claim is set up, and a court of equity is asked to dispossess these defendants.

If we look at the claim by descent, and not through the deed of trust, it is, if possible, still worse. Then it assumes the aspect of a bill brought to impeach an equitable title older than the one set up by the complainants,—a bill to set aside an assignment apparently good by matter *in pais*, exhibited just forty-four years after the voidable assignment was made.

But it is said, in answer to this great lapse of time, that it goes for nothing, for the reason that the statute of limitations, in consequence of non-residence, &c., would not bar the complainants if they had a legal title.

Very clearly it would bar them, if a legal title had descended to the children of Lawson instead of an equity, unless we pile one disability upon another. But there is no question of any statute of limitations as to the complainants. They never had the right to bring an action at law, for they have never had a legal title. No such cause of action has ever accrued to them. The legal title, as has been shown, was first vested in Cotton, and nothing appears in the case to
*258] prevent the operation of the *statute upon that title, the only one upon which it could operate. But if the case were otherwise, it is quite too late to contend that a court of equity will never refuse relief if the statute does not cover the case.

Piatt v. *Vattier*, 9 Pet., 405, is a leading case to the contrary. The court in that case act independently of the statute, and adopt the language of Lord Camden, as follows:—"A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights, or acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing: laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

In *Bowman* v. *Wathen*, 1 How., 189, the same doctrine is fully recognized, and the principle upon which a court of equity denies relief to stale claims is strongly enforced and illustrated. The language of Sir William Grant is adopted, and quoted with approbation:—"Courts of equity, by their own rules, independently of any statutes of limitation, give great effect to length of time, and they refer frequently to the statutes of limitation, for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity to any particular demand."

So, also, the language of Lord Redesdale, that "it never can be a sound discretion in the court to give relief to a person who has slept upon his rights for such a lapse of time; for though it is said, and truly, that the plaintiffs in this suit, and those under whom they claim, were persons embarrassed by the fraud of others, yet the court cannot act upon such circumstances."

And, again, what is said by the same Chancellor, that "every new right of action in equity that accrues to a party,

whatever it may be, must be acted upon, at the utmost, within twenty years."

If such is the doctrine in England, and has been found necessary there, it should find peculiar favor in this country, especially in reference to stale claims against real estate,—a species of property so much the subject of traffic among our people, and constantly undergoing such changes in value.

Mr. Stanberry, in reply to *Mr. Ewing*.

Mr. Ewing, in answer to lapse of time, relies upon the act for limitation of actions (which he says must govern this case), *passed January 25th, 1810 (1 Chase, 656). He claims that the second section provides the rule of limitation for all suits in equity, and that the proviso saves this case. [*254

This is a novel construction of this act. It is entitled "An act for the limitation of actions," which carries the idea of common law proceedings.

The first section specially names all the personal actions, and affixes their respective bars.

The second section provides for the other description of actions, mixed and real, by enumerating the writ of ejectment or other action for the recovery of the possession, title, or claim of, to, or for any land, tenements, or hereditaments, and limits the time of bringing them within twenty-one years next after the right to such action or suit shall have accrued.

The proviso then saves the rights of persons entitled to any such actions, if under the disability of nonage, coverture, insanity, or absence from the State, until the full time of limitation has passed after the removal of the disability.

We say the language, "or other action for the recovery of the possession, title, or claim of, to, or for any land, tenements, or hereditaments," is intended to bar all forms of real actions. Such has been its uniform construction in Ohio. *Holt* v. *Hemphill*, 3 Ohio, 239.

Similar language has been used in all the Ohio acts of limitations. The act now in force, of June 1st, 1831 (Swan, 553), uses this language:—"Actions of ejectment, or other action for the recovery of the title or possession of lands," &c.

Larrowe v. *Beam*, 10 Ohio, 498, applies the statute of 1810 to a petition for dower. Grimke, J., says (p. 503), "that, at the time the right of the petitioner accrued, the mode of proceeding was by writ of dower, and so continued until 1824, when the petition in chancery was substituted."

Tuttle v. *Wilson*, 10 Ohio, 502, also a petition for dower,

and held to be barred by the statute. Wood, J., says (p. 26), —"The petition for dower is substantially, when prosecuted, a possessory action."

The actions at common law for the recovery of dower were classed under the form of real actions. They were either the writ of right of dower, or more commonly the writ of dower *unde nihil habet*. Booth on Real Actions, 118, 166.

The right to dower is strictly a legal right for the recovery of a legal estate. It is only for convenience that a remedy by petition in equity is given in Ohio. The courts of Ohio have not said that the statute of limitations applies directly to any other proceeding in equity.

The complainants are not, therefore, within the bar or the *255] *savings of the statute. It neither binds them nor precludes them. No cause of action, such as the statute contemplates, ever vested in them, for they never had a legal title or any right to sue in a court of law. For nearly half a century their claim has stood upon a voluntary settlement conveying only an equity. The case shows it was in effect abandoned, before the present century began, by all parties interested in it. But one step was ever taken to assert it, and that was as long ago as February, 1799, at the instance of Joshua Lewis. The caveat then filed did not so much as name O'Bannon, or caution any one against his assignment.

Besides this presumptive abandonment, the other facts shown by the complainants themselves would be sufficient, without this lapse of time, to protect the subsequent purchasers.

In *Cathcart* v. *Robinson*, 5 Pet., 264, this court, in reference to a post-nuptial settlement, refer to the subsequent control over the property by the husband; his notoriously offering it for sale, the trustee not intervening to prevent it; the letter of the wife to the trustee requesting him to assign part of the property to pay the husband's debts,—as evidence of fraud upon subsequent purchasers.

This case presents a similar state of facts, even to the interference of the wife.

Now, after the death of all the parties to this family arrangement, made chiefly for their own accommodation, and soon abandoned by them,—after the death of all their children, this long forgotten claim is set up by the grandchildren of the original parties, eleven in number, not one of whom was in being at the time of the settlement,—the youngest now thirty, and the oldest fifty, years of age!

We see who make this claim, and now what do they ask?

In this case, property worth $30,000. But if they are entitled to this, there is nothing to save from their claim the other 6,000 acres, of equal value; altogether, a property worth more than $200,000, which, at the date of the deed, was not worth $1,000.

And then from whom is this property to be taken? Honest purchasers, who paid a full value, and who have been in the undisturbed possession for thirty-five years.

Mr. Justice GRIER delivered the opinion of the court.

The appellants in this case filed their bill in the Circuit Court of the United States for the District of Ohio, claiming a certain tract of land in possession of the defendants, and praying a decree for the title and possession of the same.

The bill sets forth that Robert Lawson, under whom *complainants claim, had received for his services as [*256 an officer in the Revolutionary war a military warrant (No. 1,921) for ten thousand acres of land, which, before the 4th of June, 1794, was located in the Virginia military district, in tracts of one thousand acres each, under the following numbers of entries: 1,704, 1,705, 1,706, 1,707, 1,714, 1,715, 1,716, 1,717, 1,718, 1,719.

On the 4th of June, 1794, an indenture tripartite was executed between Robert Lawson, of the first part, Sarah, his wife, of the second part, and James Speed, George Thompson, Joseph Crocket, and George Nicholas, of the third part, by which, for the consideration therein expressed, Robert Lawson conveyed to the parties of the third part, among other things, "two thousand acres of military land, situated on White Oak Creek, on the north side of the Ohio, being the land mentioned in the first entry made for the said Lawson on the surveyor's books," in special trust, that they will "permit said Lawson and his wife, and the survivor, and the said Sarah, if she should again separate from her husband, to use, occupy, possess, and enjoy, during their natural lives and the life of the survivor, the lands on Fayette county, Kentucky," &c. And also that they will convey the two thousand acres of land on White Oak Creek to either of the sons of marriage to whom the said Sarah shall direct, &c. And the said Lawson covenanted with the trustees that he would, at no future time, "offer any personal violence or injury to his wife, and that he would abstain from the intemperate use of every kind of spirituous liquors, and that, if he should at any time thereafter again offer any personal violence or injury to his wife," the trustees were authorized to dispossess him of the hundred and fifty acres of land, &c.

The complainants aver, also, that the two entries numbered 1,707 and 1,714 covered the two thousand acres conveyed by this deed.

The bill further states, that on the 16th of August, 1796, Lawson made an assignment to one John O'Bannon of three thousand three hundred and thirty-three acres of his warrant which had not been surveyed; and charges, that, at the time of making said assignment, Robert Lawson was, as O'Bannon well knew, habitually intemperate, and had been so for a long time previous; that the faculties of his mind were much impaired, and that he was wholly incapable of making any valid contract; that the said assignment was without consideration, and procured by O'Bannon under false and fraudulent pretences.

That O'Bannon, well knowing that the aforesaid entry of *257] 1,707 had been conveyed by the trust deed, on the 25th of *August, 1796, fraudulently withdrew it, and reëntered in his own name nine hundred and sixty-five acres under the same number on the waters of Straight Creek,—the tract in controversy in the present suit. That O'Bannon having obtained the plat and certificate, deposited them, before the 12th of February, 1799, in the Department of State, and applied for a patent; and Joshua Lewis, the son-in-law of Lawson, as agent for the trustees, entered on that day a caveat against the issuing of a patent to O'Bannon.

Lawson and his wife lived together but a short time after the execution of the trust deed. Mrs. Lawson went to Virginia, where she died in 1809, never having appointed, as provided by the trust deed, to whom conveyance should be made. Lawson died in Virginia, in 1805, the victim of intemperance. They left three children; America, intermarried with Joshua Lewis in 1797, and two sons, under whom complainants claim. In 1800, George Nicholas, one of the trustees, died, and some time afterwards James Speed and Joseph Crocket; and the trust thus became vested in George Thompson, the survivor. In 1834, George Thompson died, leaving George C. Thompson, one of the complainants, his son and heir at law, in whom the trust vested.

John O'Bannon died in January, 1812, having made a will and appointed Robert Alexander and George T. Cotton, his son-in-law, his executors. Alexander never qualified as executor. Cotton, as acting executor, on the 16th of July, 1813, executed a deed of the nine hundred and sixty-five acres to William Lytle, under whom the defendants claim. The deed of Cotton recites a patent to John O'Bannon in his lifetime, and warrants the title. Afterwards, on the 21st

of December, 1816, a patent issued from the United States to Cotton, "as executor of the last will and testament of John O'Bannon, in trust for the uses and purposes mentioned in his will."

The defendants plead in bar, that they are purchasers from Lytle, and those claiming under him, without notice, and exhibit their deeds. They also file an answer in support of their plea, in which the fraud alleged in the bill, and all facts going to show equity in the claim of complainants, are denied. And in an amended answer they set up the plea of the statute of limitations, and insist "that the deed of trust, under which complainants claim, is a stale claim, not attended with any circumstances to relieve it from such staleness, and that the bill should be dismissed on that account."

Various questions have been made before us, as to the nature and character of this deed of trust: whether its loss is sufficiently accounted for; whether, as a settlement of family * difficulties, it was not abandoned by all the [*258 parties concerned in it; whether it described the land in controversy; whether O'Bannon purchased with notice of it; whether he paid any consideration; whether the assignment to him by Lawson was fraudulently obtained; whether the legal title was vested in defendants by virtue of the patent to Cotton and his warranty; and whether the statute of limitations operated as a bar to complainants' claim.

On these and on other questions, which were argued with so much ability by the learned counsel, it is not the intention of the court to express an opinion; because, in our view of the case, they are not necessary to a correct decision of it.

The important question is, whether the complainants are barred by the length of time.

In cases of concurrent jurisdiction, courts of equity consider themselves bound by the statutes of limitation which govern courts of law in like cases; and this rather in obedience to the statutes, than by analogy. In many other cases they act upon the analogy of the limitations at law; as where a legal title would in ejectment be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate.[1]

But there is a defence peculiar to courts of equity, founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases courts of equity often act upon their own inherent doc-

[1] Quoted. *Godden* v. *Kimmell*, 9 Otto, 210.

trine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. (2 Story, Eq., § 1520.)

A court of equity will not give relief against conscience or public convenience where a party has slept upon his rights. "Nothing," says Lord Camden (4 Bro. Ch., 640), "can call forth this court into activity but conscience, good faith, and reasonable diligence; when these are wanting, the court is passive, and does nothing." Length of time necessarily obscures all human evidence, and deprives parties of the means of ascertaining the nature of original transactions; it operates by way of presumption in favor of the party in possession. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. The party guilty of such laches cannot screen his title * from the just imputation of staleness merely by the allegation of an imaginary impediment or technical disability.

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This doctrine has been so often asserted by this court, that it is unnecessary to vindicate it by argument. It will be sufficient to refer to *Piatt v. Vattier*, 9 Pet., 405, a case much resembling the present, and *Bowman v. Wathen*, 1 How., 189.

Can the complainants' case stand the test of this reasonable and well-established rule of equity?

The bill does not assert that either the trustees or the *cestuis que trust* were ignorant of the transaction between Lawson and O'Bannon, or of the fraud practised on Lawson, if any there was. Yet, with the exception of the caveat filed in Washington, in 1799, they show no assertion of claim under this voluntary post-nuptial settlement, from its date (June, 1794) till the filing of this bill in 1840. John O'Bannon lived till 1812; yet in all this time (sixteen years), no bill is filed to set aside his assignment from Lawson for the fraud *now* alleged, while the circumstances were fresh and capable of proof or explanation.

In 1813 (perhaps in 1811) the defendants, or those under whom they claim, entered upon these lands; they paid large and valuable considerations for their respective portions, without any knowledge of this lost deed of family settlement, or reason to suspect fraud in the transfer to O'Bannon. And whether the patent obtained by Cotton, and his warranty, had the effect of conferring on them the legal title or not, they

reposed in confidence on it. By their industry and expenditure of their capital upon the land for a space of twenty-seven years, they have made it valuable; and what was a wilderness, scarce worth fifty cents an acre, is now enhanced by their labor a hundred fold.

No bad faith, concealment, or fraud can be imputed to them. If the trustees or *cestuis que trust* chose to reside in Kentucky, and not look after these lands for near half a century, they can have no equity from a disability that was voluntary and self-imposed. The residence of the trustees in Kentucky was not considered as an obstacle or objection, in the minds of those who executed the deed, to their assuming the trust and care of lands in Ohio. There was no greater impediment to the prosecution of their claim in a court of equity at any time within forty years than there is now. They have shown nothing to mitigate the effect of their laches and long acquiescence, or which can entitle them to call upon a court of equity to investigate the fairness of transactions after all the parties to them have been so long in their graves, or grope after the truth of facts involved in the mist and obscurity consequent on the lapse of nearly half a century.

*We are all of opinion, therefore, that the lapse of [*260] time in the present case is a complete bar to the relief sought, and that the decree of the Circuit Court dismissing the bill should be affirmed, with costs.

ORDER.

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 Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

Mr. Justice McKINLEY did not sit in this cause.

MARIA MATHESON, JOHN DARRINGTON, ROBERT D. JAMES, BILLUPS GAYLE, JOHN GAYLE, AND EDWARD M. WARE, PLAINTIFFS IN ERROR, *v.* THE BRANCH OF THE BANK OF THE STATE OF ALABAMA AT MOBILE, DEFENDANTS.

Where the highest court of a State affirmed the judgment of a court below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act.

The intention of the parties to raise a constitutional question is not enough. It must be actually raised and decided in the highest court of the State.[1]

THIS case was brought up from the Supreme Court of the State of Alabama, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

In 1845, the Branch Bank of Mobile obtained a judgment in the Circuit Court of Mobile county (State court) against Maria Matheson, John Darrington, and Robert D. James, for the sum of ten thousand five hundred and seventy-three dollars and eighty-two cents.

On the 29th of May, 1846, the defendants sued out a writ of error, returnable to December term, 1846, of the Supreme Court of the State of Alabama. Billups Gayle, John Gayle, and Edward M. Ware became their securities upon the appeal bond.

On the 22d of January, 1847, being a day of the December term, 1846, the counsel of the Branch Bank filed a certificate of the clerk of the court below, stating the judgment and writ of error; when it appearing that no transcript of the record was filed, the Supreme Court of the State of Alabama
*261] *affirmed the judgment of the court below, and also entered up judgment against the securities in the appeal bond.

In April, 1847, the defendants sued out a writ of error, and brought the case up to this court.

Mr. Inge, counsel for the defendants in error, moved to dismiss the case for want of jurisdiction, apparent upon the record, which motion was resisted by *Mr. Gayle*, counsel for the plaintiffs in error.

Mr. Chief Justice TANEY delivered the opinion of the court.

The record in this case is a very brief one. It states that a certificate was filed in the clerk's office of the Supreme Court of the State of Alabama, from the clerk of the Circuit Court for Mobile county, setting forth that a judgment had been obtained in that court by the bank against the plaintiffs in error for the sum of $10,573.82 and costs, from which judgment they had presented a writ of error to the Supreme Court; and that this certificate having been produced in the Supreme Court by the attorney for the bank, and the transcript of the record in the Circuit Court not having been filed, the writ of error was thereupon dismissed, and

[1] See note to *Commercial Bank* v. *Buckingham*, 5 How., 317.

the judgment of the Circuit Court affirmed. It is upon this judgment that the writ of error has been presented to this court.

It appears from the argument against the motion, that the question intended to be raised here is whether the acts of the State of Alabama creating a bank and branches are not in violation of the tenth section of the first article of the Constitution of the United States, which declares that "no State shall emit bills of credit."

But in order to bring that question before this court, it should have been raised in the Supreme Court of the State, and have been there decided. There are many cases in the reports in which this court have so ruled. In this case the Supreme Court of the State dismissed the writ of error to the Circuit Court, and affirmed its judgment, because the plaintiffs in error had not filed a transcript of the record; and no question as to any matter of right in contest in the suit was raised or decided. There is nothing, therefore, in the record which this court is authorized to review, and the writ of error must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, and it appearing to the court upon an inspection of the said transcript that *there is nothing in the record which this court is authorized to review, it is thereupon now here [*262 ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for want of jurisdiction.

DUNCAN MCARTHUR'S HEIRS, COMPLAINANTS, *v.* WALTER DUN'S HEIRS.

The proviso in the second section of the act passed on the 1st of March, 1823 (3 Stat. at L., 773), entitled, "An act for extending the time for locating Virginia military land-warrants and returning surveys thereon to the General Land Office,"—which proviso is as follows, viz. "Provided, that no locations, as aforesaid, in virtue of this or the preceding section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act shall be considered null and void,"—protected an entry which had been

made in the name of a dead man in 1822. And a subsequent conflicting entry came within the prohibition of the statute, and was therefore void.[1]
The cases of *Galt* v. *Galloway*, 4 Pet., 345; *McDonald's Heirs* v. *Swalley*, 6 Pet., 261; *Jackson* v. *Clarke*, 1 Pet., 628; *Taylor's Lessee* v. *Myers*, 7 Wheat., 23; and *Galloway* v. *Finley*, 12 Pet., 264, reviewed.

THIS case came up from the Circuit Court of the United States for the District of Ohio, on a certificate of division in opinion between the judges thereof.

It was before this court at January term, 1842, and was then remanded to the Circuit Court, upon the ground that a material error had been committed by the clerk in stating the point intended to be certified. It now came back with the error corrected.

It was, originally, a bill filed on the equity side of the Circuit Court by Dun against McArthur, in which the same matters of controversy were involved as in the present case. Dun obtained a decree against McArthur in 1836

In 1838, McArthur filed the present bill of review. The following table presents a view of their conflicting titles to the land in question:—

McArthur's Title.	*Dun's Title.*
1822, Nov. 23. Entry in the name of Means, who was dead.	
1823, March 1. Act of Congress passed.	
1823, March 18. Survey.	
1824, Dec. 10. . . .	Entry by Galloway.
1824, Dec. 15. . .	Survey.
1825, Jan. 3. Patent.	
1825, April 4. . . .	Patent.

*263] *All the facts in the case are stated in the certificate of division in opinion, which was as follows, viz.:—

"This cause having been remanded from the Supreme Court of the United States to this court, for a further order touching the point upon which the opinions of the judges of this court upon the hearing thereof were opposed, in compliance with said mandate of said Supreme Court, the said point of disagreement of said judges is now ordered to be restated more specially and at large. The said point of disagreement arose out of the following facts, stated and set forth in the original bill of said Walter Dun, and admitted to be true by the demurrer of said Duncan McArthur thereto, who was the

[1] APPLIED. *Niswanger* v. *Saunders*, 1 Wall., 439.

respondent to said original bill, viz.: That said McArthur, on the 3d of January, A. D., 1825, obtained a patent for the tract of land in controversy, which is situate in the Virginia military reservation, in the State of Ohio, on an entry made on a Virginia military land-warrant in the name of Robert Means, assignee, on the 23d of November, A. D., 1822, followed by a survey of said entry made in the name of the said Robert Means, assignee, on the 18th of March, A. D., 1823, which said Robert Means before said entry, and as early as the year A. D., 1808, had departed this life. And that, on the 4th day of April, 1825, another patent for the same tract of land was issued to one James Galloway, on an entry thereof made in the name of said Galloway, on the 10th of December, A. D., 1824, on another Virginia military land-warrant, and which was duly surveyed in his (said Galloway's) name, on the 15th of the same month of December, A. D., 1824, and which tract of land was subsequently conveyed by said Galloway to said Walter Dun. Upon which said state of facts, touching the titles of the said parties to said tract of land, this point was raised by the counsel for the complainant in said bill of review, upon the hearing and argument thereof, viz.:— Whether the said location and survey of said tract of land in the name of said Galloway, and the patent issued to him for the same, are not null and void, as being made and done in contravention of the proviso to the second section of the act of Congress of the 1st of March, A. D., 1823, entitled 'An act extending the time for locating Virginia military land-warrants, and returning surveys thereon to the General Land Office.'

"And upon the point so as aforesaid raised by the counsel for the complainants in review, the opinions of the judges of this court being opposed, the said point of disagreement is, on motion of said complainants' counsel, stated as above, under the direction of said judges, and is hereby ordered to be certified to the Supreme Court of the United States at its next session to be hereafter holden, for its final decision upon said point of disagreement."

*The proviso referred to was in these words (3 Stat. at L., 773):—"Provided, that no locations as aforesaid, [*264 in virtue of this or the preceding section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this act, shall be considered null and void."

The cause was argued by *Mr. Vinton*, on behalf of the complainants, and *Mr Ewing* and *Mr. Thurman*, for Dun's heirs.

Mr. Vinton, for the complainants, reviewed and commented upon the following cases.

12 Pet., 297, and also referred to the act of 20th May, 1836 (5 Stat. at L., 31).

7 Wheat., 23; 1 Pet., 638; 4 Pet., 332; 6 Pet., 261, 666; 7 Ohio, 177, which last case, he contended, misconstrued the judgment of this court in 6 Pet.

The brief filed by *Mr. Thurman*, and enlarged upon by *Mr. Ewing*, was as follows.

I. An entry in the name of a dead man is, on general principles, void. *Galt* v. *Galloway*, 4 Pet., 345; *McDonald's Heirs* v. *Smalley*, 6 Pet., 261; *Lessee of Wallace* v. *Saunders*, 7 Ohio (Part 1), 173.

II. Being void, it is not protected by the proviso in question. *Lindsey* v. *Miller's Lessee*, 6 Pet., 666; *Lessee of Wallace* v. *Saunders*, above cited.

III. There is no difference, in this respect, between a survey in the name of a dead man made after, and one made before, the passage of the act of 1807. The terms of the proviso apply to the one as much as to the other. And no reason can be given why the proviso should protect a survey made after its enactment, and not protect one made prior thereto, and to the land covered by which no right of a third party had intervened. It protects neither.

IV. *Galloway* v. *Finley*, 12 Pet., 264, is not, I respectfully submit, decisive of the present case. Because,—

1. The point now under consideration did not necessarily arise in that case. The court held that Galloway could not, while standing in the relation of a purchaser, be permitted to avail himself of the defect he relied on in his vendors' title, to defeat his agreement to purchase. Whether he could do so was the main and only necessary question in that case.

2. The entry in that case was made on patented lands. In this case, it was on lands not patented. The difference is material; for the court, in deciding that case, said:—"It is *265] *difficult to conceive how an irregular patent could exist, unless it passed no title. We will not perplex the decision with supposed cases of irregular surveys, but examine the act of Congress and ascertain its effect as regards the grant in the name of Charles Bradford." (p. 298.)

And again:—"Congress had the power, in 1807, to with-

hold from location any portion of the military lands; and having done so in regard to that previously patented in the name of Charles Bradford, the complainant, Galloway, had no right to enter the same." (p. 299.)

It would seem, from these extracts, that the court did not intend that its decision should extend beyond what was required by the facts of the case then under consideration, and that, consequently, it is not decided that a void unpatented survey is protected by the act of 1807.

So, in *Hoofnagle* v. *Anderson*, 7 Wheat., 212, (S. C., 5 Cond. R., 271,) a broad distinction was made between patented and unpatented surveys. A patent for a survey made on a "State line" warrant, was held to appropriate the land. The survey, before patent issued, was a nullity, and the land was subject to entry. *Miller* v. *Kerr*, 7 Wheat., 1; S. C., 5 Cond. R., 202: *Lindsey* v. *Miller*, and *Galloway* v. *Finley*, above cited.

3. The court distinguish the case of *Galloway* v. *Finley* from the case of *Lindsey* v. *Miller* by the fact that the survey in the former case was on a proper warrant, and in the latter on a State line warrant; wherefore there was an equity in the former that did not exist in the latter case.

But in *Hoofnagle* v. *Anderson*, the court seemed to think there was very little difference in the equities. Both were equities of which a court could not take cognizance, and both claims were of an equally meritorious character.

The court (in deciding that the patent for the survey made on the State line warrant appropriated the land, and prevented its subsequent location) said:—"The equity of the one cannot be so inferior to that of the other, as to justify the court in considering the patent of the one as an absolute nullity in favor of the other, who has attempted to appropriate the same land after such a patent had been issued." 5 Cond. R., 273.

4. The court, in *Galloway* v. *Finley*, say:—"Congress had the power, in 1807, to withold from location any portion of the military lands."

But ought it to be supposed that Congress intended to withhold a portion to which no person had acquired any title?

V. The case under consideration is not affected by the act of May 20th, 1836, entitled, "An act to give effect to patents for public lands issued in the names of deceased persons." (5 Peters's Laws, 31.) Because,— [*266

1. It could not have been the intention of Congress, in passing that act, to interfere with the rights of third persons.

2. If such were the intention, the act is, to that extent,

void; Congress having no power to give the lands of A to B, without consideration and against the will of A.

3. The point certified does not include the question, whether the rights of the parties are affected by the act of 1836, and consequently that question cannot be considered in this court. *Wayman* v. *Southard*, 10 Wheat., 1; s. c., 5 Cond. R., 1.

If the above propositions are sound, it follows that the judgment of the court must be for Dun's heirs, the entry and survey in the name of Means (under which the complainant claim) having both been made after his death.

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before this court upon a certificate of division of opinion between the judges of the Circuit Court of the United States for the District of Ohio, upon a bill of review exhibited in that court. The character of the cause as made upon the pleadings and evidence, and the question on which the judges were divided in opinion, are so succinctly and at the same time so clearly disclosed in the statement of the judges, that they will be best presented by a simple repetition of that statement in these words:—

"This cause having been remanded from the Supreme Court of the United States to this court, for a further order touching the point upon which the opinions of the judges of this court upon the hearing thereof were opposed, in compliance with said mandate of said Supreme Court, the said point of disagreement of said judges is now ordered to be restated more specially and at large. The said point of disagreement arose out of the following facts, stated and set forth in the original bill of said Walter Dun, and admitted to be true by the demurrer of said Duncan McArthur thereto, who was the respondent to said original bill, viz.: That said McArthur, on the 3d of January, A. D., 1825, obtained a patent for the tract of land in controversy, which is situate in the Virginia military reservation, in the State of Ohio, on an entry made on a Virginia military land-warrant, in the name of Robert Means, assignee, on the 23d of November, A. D., 1822, followed by a survey of said entry, made in the name of said Robert Means, assignee, on the 18th of March, A. D., 1823; which said Robert Means before said entry, and as early as the year A. D., 1808, had departed this life. And

*267] that, on the 4th day of April, 1825, another patent *for the same tract of land was issued to one James Galloway, on an entry thereof made in the name of the said Galloway, on the 19th of December, A. D., 1824, on another Virginia military land-warrant, and which was duly surveyed in

his (said Galloway's) name, on the 15th of the same month of December, A. D., 1824, and which tract of land was subsequently conveyed by said Galloway to said Walter Dun. Upon which said state of facts, touching the titles of the said parties to said tract of land, this point was raised by the counsel for the complainant in said bill of review, upon the hearing and argument thereof, viz.:—Whether the said location and survey of said tract of land in the name of said Galloway, and the patent issued to him for the same, are not null and void, as being made and done in contravention of the proviso to the second section of the act of Congress of the 1st of March, A. D., 1823, entitled 'An act extending the time for locating Virginia military land-warrants and returning surveys thereon to the General Land Office.'"

Thus it will appear that the only question for consideration here arises on the proper construction of the proviso contained in the second section of the act of Congress above mentioned. This act—after providing in the first section that the officers and soldiers of the Virginia line or Continental establishment, their heirs or assigns, entitled to bounty lands within the country reserved by the State of Virginia, between the Little Miami and Scioto Rivers, shall be allowed a further time of two years from the 4th day of January, 1823, to obtain warrants and complete their locations, and the further time of four years from the same period to return their surveys and warrants to the General Land Office to obtain patents—contains in the second section a proviso in the following words:—"Provided, that no locations as aforesaid in virtue of this or the preceding section of this act shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act shall be considered null and void." 3 Stat. at Large, 773. Upon this proviso, which appears to be a literal transcript of the proviso contained in the first section of the act of 1807, the question for our consideration, as has been already remarked, is presented.

On behalf of the complainants in the bill of review (the heirs of Duncan McArthur) and the holders of the older patent, it is insisted, that, not only is their title under the prior entry and survey in the name of Means, and the patent issued in pursuance thereof, protected by the operation of the proviso *just mentioned, but that the effect of that [*268
proviso, nay, its express language, renders absolutely void the claim of title set up by the heirs of the junior pat-

entee, Dun; denying to it, and to all similar clauses, any foundation on which legally or equitably such claims can be founded. The heirs of Dun contend that the patent to McArthur having been granted upon a location and survey made in the name of Means, when in fact Means had been dead fourteen years anterior to the entry, and thirteen years previously to the survey in his name, this entry and survey, and the patent issued to McArthur thereon, were of no legal efficacy, and should be superseded by the patent to James Galloway, upon an entry made by said Galloway in 1824, under which patent the heirs of Dun derive title by purchase. In support of this position, it is said that an entry in the name of a dead man is, on general principles, void, as was ruled by the cases of *Galt* v. *Galloway*, 4 Pet., 345, and of *McDonald's Heirs* v. *Smalley*, 6 Pet., 261. These cases, though express to the single point for which they have been cited, are nevertheless by no means decisive of the question certified, if indeed they are at all applicable thereto; that question not involving simply the validity of an entry made in the name of a dead man, but embracing the legality of locations made since the enactment of the proviso, upon lands previously patented or surveyed, without reference to the circumstance of the death or life of those in whose names such previous patents may have been granted or surveys made.

The language of the proviso is broad and comprehensive enough to comprise patents and surveys in the names of persons either living or dead, and it expressly declares to be null all patents posterior in time to those surveys and patents thus generally described and protected by that language. The proviso, then, if the natural and common meaning of its terms be adopted, must extend to and protect alike patents, entries, and surveys of either description, so far as this end is accomplished by preventing the possibility of conflict with locations and patents coming into existence after its date. Its operation and effect must be thus comprehensive, unless they can be understood to have been limited and controlled by some clear and authoritative exposition. Have they been so limited? It cannot be necessary here to discuss the competency of Congress in reference either to the power of imposing a limitation upon the time within which locations upon the ceded lands should be made, or as to the conditions on which further time might be extended to persons who had been excluded by the limitations first laid on locations. These subjects have been treated with clearness by

Chief Justice Marshall, in the case of *Jackson* v. *Clarke*, 1 Pet., 628, and the power of Congress with respect to them placed beyond objection. [*269

In the next place, in the interpretation of the proviso contained in the laws of 1807 and 1823, the case of *Jackson* v. *Clarke*, we think, effectually overrules the distinction attempted in the argument of this cause between a patent and a survey in the operation of either proviso, a distinction, as we have already remarked, not taken by the language of the statute. Speaking of the survey in the case just quoted, Chief Justice Marshall says:—"The survey, having every appearance of fairness and validity given to it by the officers of the government, is sold as early as 1796 to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the act of Congress apply to it? The words taken literally certainly apply to it. Does the language of the clause furnish any distinction between the patent and the survey? Lands surveyed are as completely withdrawn as lands patented from subsequent location." Again, it is said, in the same case, that "a survey made by the proper officer, professing to be made on real warrants, and bearing on its face every mark of regularity and validity, presented a barrier to the locator which he was not permitted to approach, which he was not at liberty to examine." The case of *Jackson* v. *Clarke* may be appealed to for another illustration, which is very apposite to the present controversy. In support of the junior location and patent of Dun the court has been referred to the case of *Taylor's Lessee* v. *Myers*, 7 Wheat., 23, as an instance in which a location on land previously surveyed had been permitted subsequently to the proviso of 1807. But in the case of *Taylor's Lessee* v. *Myers* the owner had openly abandoned his location and survey, and had placed his warrant on other land. In such a case, say the court, "the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation; therefore in *Taylor's Lessee* v. *Myers*, the court said, the proviso which annuls all locations made on lands previously surveyed applies to subsisting surveys, to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest. This survey has not been abandoned by any person having an interest in it." No force, then, is perceived in the instance adduced, and no strength can be imparted by it to the position occupied by the defendants in this case; because by the abandonment the previous location and survey to every legal and operative purpose were annihilated, and there might be said in effect to have

been none such, the original locator could not be compelled to hold *or continue them; it having been expressly *270] ruled by this court that the owner of a survey or a patent may abandon either at his pleasure.

But it is contended for the defendants, that the entry and survey made in the name of Means, being by reason of his death at the date of that entry and survey absolutely void, under the authority of the decisions of *Galt* v. *Galloway*, 4 Pet., 345, and *McDonald* v. *Smalley*, 6 Pet., 261, the proviso in the act of Congress did not revive them or give them validity. That, according to the interpretation of the act of Congress in the case of *Jackson* v. *Clarke*, the proviso is extended no farther than to irregular patents. The language of the decision just mentioned does not literally apply to surveys pronounced absolutely void, by the death of the locator, or by any other cause, but it is equally true, that neither the terms nor the spirit of the reasoning of the court, nor of the decision, declare or imply any thing against the justice of such claims. The reasoning of the court in that case would apply as strongly to the justice of cases which were not perfected by reason of death, as it possibly could do to such as were not perfected in consequence of the neglect or omission of the persons interested; and surely the intrinsic character of the claim could not be affected by the former cause; its justice as against the government would remain precisely the same. The government would not have fulfilled its acknowledged obligation to the owner of the warrant or survey. There can be no question as to the power of the government to revive or confirm surveys or patents made or granted to persons not actually in life when such surveys or patents were made; there is an obvious propriety in a fulfilment of its undertakings by the government, and in its forbearance to enforce a forfeiture founded on no delinquency in those who would be affected thereby; and there is nothing in the act of Congress or in any judicial constitution thereof requiring or indicating an opposite conclusion. Indeed, the utmost which it has been attempted to deduce from the statute, or from any interpretation of the statute, is in the absence of an authoritative declaration, that surveys and patents made or issued in the names of persons not living at the periods of their respective dates have not in fact been reserved and confirmed. But is not this deduction directly at war with the unequivocal authority of this court, in open conflict with the decision of *Galloway* v. *Finley*, reported in 12 Pet., 264? We hold that it is. In order to escape from this decision, it has been argued that the case last mentioned ruled nothing

beyond this, that Galloway, as the vendee of Finley, should not be permitted to avail *himself of information de- [*271
rived from his vendor, and use it with a view to impeach the vendor's title, and as a means to obtain a better title in himself, in opposition to the title of that vendor. It is true that the point here stated was ruled in the case, but the decision was by no means limited to that single point. Under the pleadings and proofs in that case, the title of Finley was necessarily brought into review; its character and the effect of the act of Congress with respect to it were discussed and decided upon. In that case, as in the present, it was contended that the statute operated upon titles merely irregular or defective, and did not embrace such as were void. In refutation of this interpretation the court proceed thus:—"It is insisted that the section had reference to imperfect, and not to void titles. The legislature merely affirmed a principle not open to question, if this be the true construction. Had an effective patent issued, the government would not have had any title remaining, and a second grant would have been void of course. Something more undoubtedly was intended than the protection of defective, yet valid, surveys and patents." Again the court say,—"The death of the grantee is an extrinsic fact, not impairing the equity of the claim as against the government. The defects of all others most common in the military districts of Kentucky, Tennessee, and Ohio were where the soldier had died, and the entry, survey, and grant had been made in the name of the deceased. In his name the warrant almost uniformly issued; who the heirs were was usually unknown to the locator, and disregarded by the officers of the government when perfecting the titles. In Tennessee and Kentucky, provision was made at an early day that the heir should take by the grant; and why should we presume that Congress did not provide for the protection of his claim to the lands purporting to have been granted, when the legislation of the federal government was of necessity controlled in this respect by the experience of members coming from States where there were military lands? The statute is general, including by name all grants, not distinguishing between void and valid; and the plainest rules of propriety and justice require that the courts should not introduce an exception, the legislature having made none.—Congress had power in 1807 to withhold from location any portion of the military lands, and, having done so in regard to the lands of C. Bradford, the complainant Galloway had no right to enter the same."

Authority so directly in point leaves little room for com-

ment; indeed, it may be said that, *mutate nomine*, the case of *Galloway* v. *Finley* is the case of McArthur's heirs against the heirs of Dun. Upon the plain and natural import of the *272] *proviso in the statutes of 1807 and of 1823, upon the reasoning of this court in the case of *Jackson* v. *Clarke*, 1 Pet., 628, but chiefly upon the very pointed authority of the case of *Galloway* v. *Finley*, we are of the opinion that the location and survey of the land in question in the name of James Galloway, and the patent issued to him for the same, as mentioned in the certificate of division, are null and void, as being made and done in contravention of the proviso to the second section of the act of Congress on the 1st of March, A. D., 1823, entitled, "An act extending the time for locating Virginia military land-warrants, and returning surveys thereon to the General Land Office," and we do order this opinion to be certified to the Circuit Court of the United States for the District of Ohio.

ORDER.

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 Ohio, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the location and survey of the land in question in the name of James Galloway, and the patent issued to him for the same, as mentioned in the certificate of division, are null and void, as being made and done in contravention of the proviso to the second section of the act of Congress of the 1st of March, A. D., 1823, entitled, "An act extending the time for locating Virginia military land-warrants, and returning surveys thereon to the General Land Office." Whereupon it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

TIMOTHY L. MACE, PLAINTIFF IN ERROR, *v.* JARED WELLS.

By the fifth section of the United States Bankrupt Act (5 Stat. at L., 444), the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act.[1]

Therefore, where the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it.[2]

THIS case was brought up from the Supreme Court of Judicature of the State of Vermont, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

*The following statement of facts was argued upon by the counsel in the court where the cause was originally tried. [*273

Orange County Court, December Term, 1844.

JARED WELLS *v.* TIMOTHY L. MACE AND TRUSTEES.

Action of Assumpsit for money paid.

The parties agree to the following facts in this case:—That the plaintiff signed two notes with the defendant, of the dates and tenor following:—

"$35.00. *Wells River, July* 9, 1840.

"For value received, I promise to pay Hiram Tracy, or order, thirty-five dollars, in four months, with interest annually.

TIMOTHY L. MACE,
JARED WELLS."

"$157.48. *Wells River, August* 14, 1840.

"For value received, we jointly and severally promise to pay Hutchins & Buchanan, or order, one hundred and fifty-seven dollars and forty-eight cents, in one year, with interest annually.

TIMOTHY L. MACE,
JARED WELLS."

Said first note was paid by said Wells to said Tracy on the 12th day of July, A. D., 1841. Said note was given for the sole and proper debt of said Mace, and Wells signed only as

[1] CITED. *Davis* v. *McCurdy*, 50 Wis., 576.

[2] CITED. *Thomas* v. *Liebke*, 9 Mo. App., 428.

surety; and the whole was a mere matter of accommodation on the part of Wells.

Said second note was given also for the proper debt of said Mace, and was his to pay. Wells was only surety for said Mace, although the note was "jointly and severally," and had no interest or part in the debt. Said note was paid by said Wells on the 6th day of March, A. D., 1844, being, at that date, the sum of one hundred and ninety-four dollars and eleven cents. Said Wells has kept both said notes since they were so taken up by him, and they are now in his custody.

That after their signing of said last note, and before the payment of the same, but subsequent to the payment of the first by said Wells, said Mace duly obtained a discharge of his debts as a bankrupt, in pursuance of the provisions of the act of Congress passed August 19th, 1841, commonly called the "bankrupt law." Said Mace's certificate is dated March 22d, 1843, a copy of which is annexed, and made a part of the case.

It is agreed the court shall give the same effect to said discharge as if the same were specially pleaded.

Now, if the court shall be of the opinion that the plaintiff is entitled to recover on the foregoing facts, judgment is to *274] be *rendered for him to recover of the defendant the amount of said notes, or either of them, as the court shall adjudge, and his cost; if for both notes, the sum of $248.93; if for the small note, $45.12; if for the large note, only $203.81; if for neither, then defendant to recover his cost.

A. UNDERWOOD, *Defendant's Attorney.*
J. W. D. PARKER, *Plaintiff's Attorney.*

At December term, 1844, on the foregoing case stated, the court rendered judgment for the plaintiff to recover of the defendant $203.81 damages, and his costs. The defendant excepted to the opinion, and the case was carried to the Supreme Court of Judicature, where the judgment of the court below was affirmed.

A writ of error, issued under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

Mr. Collamer, for the plaintiff in error.

As Wells, the plaintiff below, did not pay the last note until after the bankruptcy, and as it did not, until paid by him, become a debt in his favor, the court held that it was not discharged by the previous bankruptcy of Mace, the defendant below. Mace claimed that, by a right construction of the

United States statute of bankruptcy, he, by his discharge, was entitled to the privilege and exemption from this debt; and the construction of that statute being thus drawn in question, and the decision being against this privilege and exemption, the case comes clearly within the jurisdiction of this court, by virtue of the twenty-fifth section of the Judiciary Act.

I. The plaintiff in error insists, that a discharge in bankruptcy released from all debts and other engagements which are provable under the act. (Bankrupt Law, sec. 4, 5 Stat. at L., 444.) The claim of Wells at the time Mace became bankrupt and was discharged was a note outstanding in the hands of a creditor, overdue, signed by Wells as surety for Mace; and even if it were regarded as to Wells a contingent claim, still it was provable under the act. Our statute is much more general and extensive than the English statute on this point. All those cases particularly provided for in sections 51, 52, 53, 54, 55 of the 6th Geo. 4, c. 16, are included in our statute generally by name, as debts due at a future day, annuitants, bottomry and respondentia bonds, policies of insurance, sureties, indorsers, and bail. But it is insisted that the remainder of our statute, as to contingent claims, is much more extensive and comprehensive than the remaining 56th section of the English law. By the words of that law, and by the *decisions of their courts, no contingent [*275 claim can be proved under the commission, unless it be at the time of the bankruptcy an existing debt, payable on a contingency; not such a claim as was to become a debt on a contingency. (6 Geo. 4, c. 16, § 56; *Law* v. *Burghart*, 42 Com. Law Rep., 313.) Our statute includes all "uncertain and contingent demands."

II. Even if our statute be construed as of the same extent as the English, and no broader, still this was and would be a provable claim. It was an existing debt actually due, and might have been presented and proved against Mace by the creditor; and whatever can be proved by the creditor may be by the surety, and he cannot permit it to lay unpaid and unproved until after the discharge, and then by payment revive it in his own favor. *Jackson* v. *Magee*, 3 Ad. & Ell., 47; 43 Com. Law Rep., 625; *Westcott* v. *Hodges*, 6 Barn. & Ald., 12.

III. Indeed, the case is within the very words of our statute. It gives the power of proving claims to sureties. Now, who is a surety? It is he who is holden for another. It cannot mean him who has already actually paid a debt, for then he has ceased to be a surety, and has become a creditor;

and so the court below regarded this defendant in error, for they declined giving him judgment for the note which he had, as surety, paid before bankruptcy.

It would be an extraordinary construction of this statute, which discharges the bankrupt from his creditors, and expressly reserves the claim of the creditor against the joint debtor and surety, to hold, that, when enforced against such surety, the debt is revived against the bankrupt. Little, indeed, would its relief be to the great body of merchants and business men, on most of whose paper are other names than their own.

Mr. Justice McLEAN delivered the opinion of the court.

This case is brought before the court by a writ of error to the Supreme Court of the State of Vermont, under the twenty-fifth section of the Judiciary Act of 1789.

Wells, as the surety of Mace, became bound in two joint and several notes, both of which were due before the passage of the bankrupt law, in August, 1841. In July, 1841, Wells paid one of these notes. Mace was discharged, under the bankrupt law, on the 22d of March, 1843. In March, 1844, Wells paid the other note, and then sued Mace for the recovery of the money on both notes. The facts being submitted to the county court, judgment was entered for the plaintiff for the amount of the note last paid; which judgment was affirmed by the Supreme Court of the State.

The fourth section of the bankrupt law provides that a *276] "discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," &c.

By the fifth section of the act, it is provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them," &c.

Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it, as security, and that gave him a right to prove the claim under the fifth section. And the fourth section declares, that from all such demands the bankrupt shall be discharged. This is the whole case.

It seems to be clear of doubt. The judgment of the State court is reversed.

ORDER.

This cause came on to be heard on the transcript of the record of the Supreme Court of Judicature of the State of Vermont, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Court of Vermont in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Supreme Court of Vermont, for further proceedings to be had therein in conformity to the opinion of this court.

WILLIAM S. BODLEY AND THOMAS E. ROBBINS, APPELLANTS, *v.* WILLIAM M. GOODRICH.

The Commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly, rendered it proper that a general assignment should be made for the benefit of its creditors and completion of the railroad"; it therefore assigned all its property, real, personal, and mixed, to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding $250,000, to allow claims against the bank of a certain description, and out of the proceeds collected first to pay the principal and interest of the above loan; after the completion of the said road, dividends were to be made *pro rata* amongst the creditors of the bank who had filed their [*277 claims, should there not be a sufficient amount to pay all the claims; the trustees to receive eight thousand dollars each per annum for their services.

This deed was fraudulent and void as to all creditors of the bank who did not become parties to it by filing their claims.[1]

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

The facts of the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Samuel C. Reid, jr.*, and *Messrs. Stockton* and *Steele*, in a printed argument, for the defendant in error, no counsel appearing for the appellants.

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[1] REVIEWED. *Chafee v. Fourth Nat. Bank of New York*, 71 Me., 527.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court of the United States for the District of Louisiana.

The complainants represent that they and William Frazer are the legal owners of a tract of land in East Ouachita land district, containing four thousand one hundred and twenty-six acres, as the assignees of the president, directors, and company of the Commercial and Railroad Bank of Vicksburg, a banking and railroad institution, duly incorporated, in the State of Mississippi. And they charge the defendant with setting up a claim to the land by a purchase made by him at sheriff's sale. And they pray that the defendant may be decreed to release to them his title.

The defendant denies, in his answer, that the complainants have either the equitable or legal title to the above land by virtue of the above assignment, on the ground, among others, that the president and directors of the bank and railroad company had no power to assign the property of the bank, and thereby change the trust committed to them. And the defendant alleges that he purchased the land for a valuable consideration, *bonâ fide*, at sheriff's sale, and that the proceedings of such sale were regular and according to law.

The deed of assignment, under which the complainants claim, is dated February 13th, 1840. As a reason for the assignment, the deed states "the embarrassed situation of the president, directors, and company of the Commercial and Railroad Bank, and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly"; and they come to the conclusion, "that an assignment of the property, debts, and effects of the said corporation should at once be made for the benefit of its creditors, as will most effectually promote the interest of the creditors of the institution, and protect its *278] debtors from loss *and sacrifice; and at the same time furnish means to finish and complete the railroad immediately, and to protect and secure to the stockholders of the road the franchise granted by the charter."

And the president, directors, and company of the bank, in consideration of the premises, &c., "granted, bargained, sold, assigned, and transferred, and set over, &c., to William Frazer, Thomas E. Robbins, and William S. Bodley, and to the survivor of them, and to their heirs, executors, administrators, and assigns, &c., all the property, real, personal and mixed, which, either in law or equity, belongs to the bank and its branches, wherever such property shall be found."

And the assignees were authorized to sell the effects as-

signed, to collect all debts due the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding two hundred and fifty thousand dollars, to allow claims against the bank of a certain description, &c., and out of the proceeds collected first to pay the principal and interest of the above loan. After the completion of the railroad, dividends were to be made *pro rata* among the creditors of the bank who had filed their claims, should there not be a sufficient amount to pay all the claims. The trustees were to receive "out of the proceeds, as a full compensation for their labor, trouble, and responsibility in the premises, at the rate of eight thousand dollars each per annum."

It appears from the deed of assignment, that the creditors of the bank were designed to be parties to it on filing their claims, &c. But the creditor who obtained the judgment on which the property was sold never became a party to the deed. The loan authorized was effected, but no dividend has ever been made among the creditors.

Upon its face this deed shows an intention by the bank to postpone its creditors, use the effects of the bank for the completion of the railroad, pay the trustees enormous salaries, and make no dividend among the creditors of the bank until these objects were accomplished. This was proposed to be done with the consent of creditors, and if that consent had been given, there could be no objection to the arrangement. The motive avowed, to complete the railroad, the greater part of which had been made, and by which an income would be secured for the benefit of the creditors and stockholders of the bank, would have been legal, and perhaps wise, had the creditors consented. But the plaintiff in the judgment under which the property claimed by the plaintiffs was sold did not consent; consequently he was not bound by the deed of assignment. It was fraudulent as against him and all other creditors of the bank who did not become parties to the deed.

*This view is so clearly sustained on general principles, that it is unnecessary to consider the other questions raised in the case. The Supreme Court of Mississippi in the case of *Arthur* v. *The Bank*, 9 Sm. & M. (Miss.), 394, held this deed to be fraudulent against creditors; and also the Supreme Court of Louisiana, in *Fellows* v. *The Commercial and Railroad Bank of Vicksburg*, 6 Rob. (La.), 246. The judgment of the Circuit Court is affirmed, with costs. [*279

ORDER.

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 Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed, with costs.

WILLIAM CRAWFORD AND DAVID FILES, PLAINTIFFS IN ERROR, *v.* THE BRANCH BANK OF ALABAMA AT MOBILE.

A statute of the State of Alabama, directing that promissory notes given to the cashier of a bank may be sued and collected in the name of the bank, is a law which affects the remedy only, and, although passed after the note was executed, does not impair the obligation of the contract.

Besides, the record does not show that the question of the consistency of the statute with the Constitution of the United States was raised in the State court; and therefore a writ of error issued under the twenty-fifth section of the Judiciary Act must be dismissed on motion.[1]

THIS was a writ of error sued out under the twenty-fifth section of the Judiciary Act, and directed to the Supreme Court of Alabama.

In May, 1841, the following promissory note was executed:—

"$3,817.50.

"Two hundred and fifteen days after date, we jointly and severally promise to pay to B. Gayle, cashier, or order, three thousand eight hundred and seventeen $\frac{50}{100}$ dollars, negotiable and payable at the Branch of the Bank of the State of Alabama, at Mobile, for value received, this 31st day of May, 1841.

"WILLIAM CRAWFORD,
DAVID FILES,
R. G. GORDON."

On the 4th of December, 1841, the legislature passed an act, from which the following is an extract:—"All notes, *280] bills, *bonds, or other evidences of debt, held by the State Bank or branch banks, payable to the cashier or

[1] See note to *Commercial Bank* v. *Buckingham*, 5 How., 317.

to the person who has filled the office of cashier of said bank or branch banks, may be sued and collected in the name of the several banks, in the same manner as if they had been made payable directly to said bank or branch banks by which the paper has been taken or discounted." "No notice, writ, declaration, or judgment which has been issued, filed, or rendered on such papers, shall be abated, set aside, or reversed, on account of the want of assignment, transfer, or indorsement of said papers by the officer or person acting as cashier to whom it was so made payable. But the legal title to such paper for all purposes of collection shall be deemed to have been in said bank or branch bank by whom the paper was discounted." See Clay's Dig., p. 112, §§ 47, 48.

In May, 1844, judgment was entered up upon the above note in a summary manner, upon motion and thirty days' notice, according to the law of that State. A jury was sworn, who assessed the damages at $4,537.20.

The defendants took the following bill of exceptions, viz.:—

"Upon the trial of this cause, the plaintiff produced the original papers hereto attached, marked A, being the notice, the certificates and returns, the note, and protest, and moved for judgment without further proof of the same. The defendants objected to the court taking cognizance of the case or allowing judgment, which was overruled and judgment entered; to which the defendants object, and pray the court to sign and seal this bill, which is done.

"SAMUEL CHAPMAN, *Judge*. [SEAL.]"

Upon this bill of exceptions the case was carried to the Supreme Court of the State of Alabama, and the following errors assigned.

Assignment of Errors.

And the said William Crawford comes, when, &c., and says, that there is error in the record and proceedings of the court below, in this, to wit:—

1. That it appears from the record and the note upon which the suit is founded, and which is made a part of it by the bill of exceptions, that the said promissory note was made payable to B. Gayle, cashier, and that the said note has not been assigned to the said branch bank, nor was it alleged or proved, as the judgment entry shows, that the said note was made or given to the said branch bank by the name of B. Gayle, nor that B. Gayle acted as the agent of the said bank in taking

*281] *said note; and that it doth not appear, from the record, that the said branch bank has any interest in the said note.

2. That there is error in this, that it was not proved to the court below that Jacob J. Marsh, who returned the notice executed, styling himself agent for the said branch bank, nor that his handwriting was proved; but, on the contrary, it is stated in the bill of exceptions that there was no proof to that effect.

WILLIAM CRAWFORD, *for himself*.

The Supreme Court of Alabama affirmed the judgment of the court below, and a writ of error brought the case up to this court.

Mr. Inge moved to dismiss the case for want of jurisdiction. After stating the case, he argued that no question was shown by the record to have been raised in the Supreme Court of Alabama, which could give this court jurisdiction. The validity of the statute did not appear to have been drawn in question on account of its incompatibility with the Constitution of the United States; and if it had been, it must appear that it only affected the remedy, without at all impairing the obligation of the contract.

Mr. Crawford filed a printed argument, in order to show that the validity of the statute must necessarily have been passed upon by the Supreme Court of Alabama, and that the statute changed altogether the terms of the contract. The plaintiffs in error had made a contract with one person, and by virtue of the statute they were declared to have made this contract with another person, namely, the bank. The passage of the act by the State of Alabama, and its application in favor of a bank owned by it, are admissions by those interested, and in fact by the plaintiffs below in this cause, under another name, that the contract was not with the Bank of the State of Alabama, but with B. Gayle.

Mr. Justice McLEAN delivered the opinion of the court.

A summary mode of proceeding, authorized by its charter, was instituted by the Branch Bank of Alabama, in the Circuit Court of the State, against the defendants below, on a promissory note for three thousand eight hundred and seventeen dollars fifty cents, dated 31st May, 1841, payable to B. Gayle, cashier, or order, two hundred and fifteen days after date.

A jury being called and sworn, found a verdict for the plaintiffs, on which judgment was entered. On the trial the defendant excepted to the opinion of the court, admitting as evidence the note, protest, &c. A writ of error being prosecuted *to the Supreme Court of Alabama, the judg- [*282
ment of the Circuit Court was affirmed.

In the Supreme Court the following assignment of errors was made:—

"1. That it appears from the record and the note upon which the suit is founded, and which is made a part of it by the bill of exceptions, that the said promissory note was made payable to B. Gayle, cashier, and that the said note has not been assigned to the said branch bank, nor was it alleged or proved, as the judgment entry shows, that the said note was made or given to the said branch bank by the name of B. Gayle, nor that B. Gayle acted as the agent of the said bank in taking said note; and that it doth not appear, from the record, that the said branch bank has any said interest in the said note.

"2. That there is error in this, that it was not proved to the court below that Jacob J. Marsh, who returned the notice executed, styling himself agent for the said branch bank, nor that his handwriting was proved; but, on the contrary, it is stated in the bill of exceptions that there was no proof to that effect."

A motion is made to dismiss this cause for want of jurisdiction, and on looking into the record it is clear there is no ground on which this court can revise the judgment of the Supreme Court of Alabama. No question was made under the twenty-fifth section of the Judiciary Act of 1789; nor does it appear that any law of Alabama, which impaired the obligation of the contract, influenced the judgment of the Supreme Court.

The note was made payable to B. Gayle, cashier. And this designation as cashier was not made, it is presumed, as matter of description, but to show that the note was given to the agent of the bank, and for its use. A law was passed in Alabama authorizing suits to be brought on such notes in the name of the bank; and it is contended that this law impairs the obligation of the contract, especially as regards contracts made prior to its passage.

The law is strictly remedial. It in no respect affects the obligation of the contract. Neither the manner nor the time of payment is changed. The bank, being the holder of the note, and having the beneficial interest in it, is authorized by the statute to sue in its own name. This is nothing more

than carrying out the contract according to its original intendment. The cause is dismissed.

ORDER.

This cause came on to be heard on the transcript of the record of the Supreme Court of the State of Alabama, and on
*283] the *motion of Mr. Inge, of counsel for the defendants in error, to dismiss this writ of error for the want of jurisdiction. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction.

GEORGE SMITH, PLAINTIFF IN ERROR, *v.* WILLIAM TURNER, HEALTH-COMMISSIONER OF THE PORT OF NEW YORK.

JAMES NORRIS, PLAINTIFF IN ERROR, *v.* THE CITY OF BOSTON.

Statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, declared to be contrary to the Constitution and laws of the United States, and therefore null and void.[1]

Inasmuch as there was no opinion of the court, as a court, the reporter refers the reader to the opinions of the judges for an explanation of the statutes and the points in which they conflicted with the Constitution and laws of the United States.

THESE were kindred cases, and were argued together. They were both brought up to this court by writs of error issued under the twenty-fifth section of the Judiciary Act; the case of *Smith* v. *Turner* being brought from the Court for the Trial of Impeachments and Correction of Errors of the State of New York, and the case of *Norris* v. *The City of*

[1] APPLIED. *Ward* v. *Maryland*, 12 Wall., 432; *Cook* v. *Pennsylvania*, 7 Otto, 571–573. DISTINGUISHED. *Sherlock* v. *Alling*, 3 Otto, 102; *Doyle* v. *Continental Ins. Co.*, 4 Id., 542; *Beer Co.* v. *Massachusetts*, 7 Id., 33, 34. RECONCILED. *People* v. *Compagnie Générale Transatlantique*, 10 Fed. Rep., 360, 363. REVIEWED AND CRITICISED. *Crandall* v. *State of Nevada*, 6 Wall., 40–42, 48; *Henderson* v. *Mayor of New York*, 2 Otto, 259, 266–273. CITED. *Gilman* v. *Philadelphia*, 3 Wall., 730; *United States* v. *Dewitt*, 9 Id., 45; *State Tonnage Tax Cases*, 12 Id., 213; *Morgan* v. *Parham*, 16 Id., 475; *Railroad Co.* v. *Husen*, 5 Otto, 471; *Hall* v. *De Cuir*, Id., 516; *Machine Co.* v. *Gage*, 10 Id., 679; *Telegraph Co.* v. *Texas*, 15 Id., 465; *The Clymene*, 9 Fed. Rep., 166; *Ex parte Thornton*, 12 Id., 547; s. c., 4 Hughes, 232; *In re Watson*, 15 Fed. Rep., 512; *In re Wong Yung Quy*, 6 Sawy., 448; *Webb* v. *Dunn*, 18 Fla., 724. And see *Luther* v. *Borden*, *ante*, *72.

Boston from the Supreme Judicial Court of Massachusetts. The opinions of the justices of this court connect the two cases so closely, that the same course will be pursued in reporting them which was adopted in the License Cases. Many of the arguments of counsel relate indiscriminately to both. A statement of each case will, therefore, be made separately, and the arguments and opinions be placed in their appropriate class, as far as practicable.

SMITH *v.* TURNER.

In the first volume of the Revised Statutes of New York, pages 445, 446, title 4, will be found the law of the State whose constitutionality was brought into question in this case. The law relates to the marine hospital, then established upon Staten Island, and under the superintendence of a physician and certain commissioners of health.

The seventh section provides, that "the health-commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, *the following sums from the master of every vessel that shall arrive in the port of New York, viz.:— [*284]

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents, for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting-vessel, for each person on board, twenty-five cents; but no coasting-vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the money so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys a right to demand and recover from each person the sum paid on his account." The tenth section declares any master who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port shall forfeit the sum of one hundred dollars. By the eleventh section, the commissioners of health are required to account annually to the Comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall in any one year exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the

contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

Smith was master of the British ship Henry Bliss, which arrived at new York in June, 1841, and landed two hundred and ninety-five steerage passengers. Turner, the health-commissioner, brought an action against him for the sum of $295. To this the following demurrer was filed, viz.:—

"And the said George Smith, defendant in this suit, by M. R. Zabriskie, his attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain his aforesaid action thereof against the said defendant, and that the said defendant is not bound by law to answer the same; for that the statute of this State, in said declaration referred to, in pursuance of which the said plaintiff claims to be entitled to demand and receive from the said defendant the sum of money in said declaration named, is contrary to the Constitution of the United States, and void, and this he is ready to verify."

The plaintiff joined in demurrer, and the Supreme Court
*285] *of Judicature of the People of the State of New York overruled the demurrer, and gave judgment for the plaintiff, on the 28th of September, 1842. The cause was carried, by writ of error, to the Court for the Trial of Impeachments and Correction of Errors, which affirmed the judgment of the court below in October, 1843. A writ of error, issued under the twenty-fifth section of the Judiciary Act, brought the case up to this court.

Norris v. City of Boston.

Norris was an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain. He was the master of a vessel, and arrived in the port of Boston in June, 1837, in command of a schooner belonging to the port of St. John's, having on board nineteen alien passengers. Prior to landing, he was compelled, by virtue of a law of Massachusetts which is set forth in the special verdict of the jury, to pay the sum of two dollars for each passenger to the city of Boston.

At the October term, 1837, of the Court of Common Pleas, Norris brought a suit against the city of Boston, to recover this money, and was nonsuited. The cause was carried up

to the Supreme Judicial Court, where it was tried in November, 1842.

The jury found a special verdict as follows:—

"The jury find, that at a session of the legislature of the Commonwealth of Massachusetts, holden at the city of Boston, on the 20th of April, 1837, the following law was passed and enacted, to wit, 'An act relating to alien passengers.'

"'Sec. 1st. When any vessel shall arrive at any port or harbour within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"'Sec. 2d. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"'Sec. 3d. No alien passenger, other than those [*286 spoken of in the preceding section, shall be permitted to land until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers.

"'Sec. 4th. The officer or officers required in the first section of this act to be appointed by the mayor and aldermen, or the selectmen, respectively, shall, from time to time, notify the pilots of the port of said city or town of the place or places where the said examination is made, and the said pilots shall be required to anchor all such vessels at the place so appointed, and require said vessels there to remain till such examination shall be made; and any pilot who shall refuse or neglect to perform the duty imposed upon him by this section, or who shall through negligence or design permit any alien passengers to land before such examination shall be

had, shall forfeit to the city or town a sum not less than fifty nor more than two thousand dollars.

"'Sec. 5th. The provisions of this act shall not apply to any vessel coming on shore in distress, or to any alien passengers taken from any wreck when life is in danger.

"'Sec. 6th. The twenty-seventh section of the forty-sixth chapter of the Revised Statutes is hereby repealed, and the twenty-eighth and twenty-ninth sections of the said chapter shall relate to the provisions of this act in the same manner as they now relate to the section hereby repealed.

"'Sec. 7th. This act shall take effect from and after the passage of the same, April 20th, 1837.'

"And the jury further find, that the twenty-eighth and twenty-ninth sections, above referred to, are in the words following, to wit:—

"'Sec. 28th. If any master or commanding officer of any vessel shall land, or permit to be landed, any alien passengers, contrary to the provisions of the preceding section, the master or commanding officer of such vessel, and the owner or consignee thereof, shall forfeit the sum of two hundred dollars for every alien passenger so landed; provided always, that the provisions aforesaid shall not be construed to extend to seamen sent from foreign places by consuls or vice-consuls of the United States.

"'Sec. 29th. If any master or commanding officer of any vessel shall land any alien passenger at any place within this State other than that to which such vessel shall be destined, *287] *with intention to avoid the requirements aforesaid, such master or commanding officer shall forfeit the sum of one hundred dollars for every alien passenger so landed.'

"And the jury further find, that the plaintiff in the above action is an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain; that he arrived in the port of Boston on or about the twenty-sixth day of June, A. D., 1837, in command of a certain schooner called the Union Jack, of and belonging to said port of St. John's; there was on board said schooner at the time of her arrival in said port of Boston, nineteen persons, who were passengers in said Union Jack, aliens to each and every of the States of the United States, but none of them were lunatics, idiots, maimed, aged, or infirm.

"That prior to the landing of said passengers the sum of two dollars for each and every passenger was demanded of the plaintiff by Calvin Bailey, in the name of the city of Boston, and said sum, amounting to thirty-eight dollars, was

paid by the plaintiff to said Bailey, for permission to land said alien passengers in said Boston; said sum being paid by the plaintiff under a protest that the exacting the same was illegal.

"That said Calvin Bailey was the regularly appointed boarding officer for said city of Boston, chosen by the City Council (consisting of the mayor and aldermen) in pursuance of said act, entitled 'An act relating to alien passengers'; that as such, said Bailey demanded and received said sum of thirty-eight dollars.

"But whether upon the aforesaid facts the defendant did promise, the jury are ignorant.

"If the court shall be of opinion that the aforesaid facts are sufficient to sustain the plaintiff's claim, then the jury find that the defendant did promise, in manner and form as the plaintiff hath alleged, and assess damages in the sum of thirty-eight dollars.

"But if the court are of opinion that the aforesaid facts are not sufficient to sustain the plaintiff's claim, then the jury find that the defendant did not promise in manner and form as the plaintiff hath alleged."

Upon this special verdict the court gave judgment for the defendant, from which judgment a writ of error brought the case up to this court.

The case of *Smith* v. *Turner* was argued at December term, 1845, by *Mr. Webster* and *Mr. D. B. Ogden*, for the plaintiff in error, and by *Mr. Willis Hall* and *Mr. John Van Buren*, for the defendant in error; at December term, 1847, by the same counsel upon each side; and at December term, 1848, by *Mr. John Van Buren*, for the defendant in error. [*288

The case of *Norris* v. *The City of Boston* was argued at December term, 1846, by *Mr. Webster* and *Mr. Choate*, for the plaintiff in error, and by *Mr. Davis*, for the defendant in error; at December term, 1847, by *Mr. Choate*, for the plaintiff in error; and at December term, 1848, by *Mr. Webster* and *Mr. J. Prescott Hall*, for the plaintiff in error, and by *Mr. Davis* and *Mr. Ashmun*, for the defendant in error.

It is impossible to report all these arguments. If it were done, these cases alone would require a volume. The Reporter selects such sketches of the arguments as have been kindly furnished to him by the counsel themselves, and omits those for which he would have to rely upon his own notes.

The arguments reported are those of *Mr. D. B. Ogden* and *Mr. J. Prescott Hall*, for the plaintiff in error, and *Mr. Davis*, *Mr. Willis Hall*, and *Mr. Van Buren*, for the defendant in

error. *Mr. Ogden* argued the New York, and *Mr. J. Prescott Hall* the Boston case. On the other side, the New York case was argued by *Mr. Willis Hall* and *Mr. Van Buren*, and the Boston case by *Mr. Davis*. Although the arguments are placed in the usual order, namely, one for the plaintiff in the first place, then those for the defendant in error, and then a concluding argument for the plaintiff in error, yet it is certain that some of these counsel never heard the arguments to which, from this collocation, they might be supposed to reply, arising from the different terms at which the arguments were made. The Reporter has observed the order of time in arranging them as he has done. He knows that some injustice is done to the counsel, but it is impossible to avoid it.

The points stated upon both sides were as follows, viz.:—

NORRIS *v.* CITY OF BOSTON.

On the part of the plaintiff in error it will be contended:—

1. That the act in question is a regulation of commerce of the strictest and most important class, and that Congress possesses the exclusive power of making such a regulation.

And hereunder will be cited 11 Pet., 102; 4 Wash. C. C., 379; 3 How., 212; 14 Pet., 541; 4 Met. (Mass.), 285; 2 Pet., 245; 9 Wheat., 1; 12 Id., 436; Federalist, No. 42; 3 Cow. (N. Y.), 473; 1 Kent, 5th ed.; 2 Story's Com. on Const., 506; 15 Pet., 506; 3 N. H., 499.

2. That the act is an impost or duty on imports, and so expressly prohibited by the Constitution, or is in fraud of that prohibition.

*289] *And hereunder will be cited 4 Metc. (Mass.), 285; 12 Wheat., 436; Dig. Lib. 1, tit. 3, De Leg. et Senat. Cons., § 29; 3 Cow. (N. Y.), 738; 14 Pet., 570.

3. That it is repugnant to the actual regulations and legally manifested will of Congress. 9 Wheat., 210; 4 Metc. (Mass.), 295; 11 Pet., 137; 12 Wheat., 446; 5 Wheat., 22; 6 Pet., 515; 15 Pet., 509; 14 Pet., 576; Laws U. S. 1799, c. 128, § 46; 1 Story, Laws, 612, 1819, c. 170; 3 Story, Laws, 1722, Laws of Naturalization, 1802, c. 28; 1816, c. 32; 1824, c. 186.

D. WEBSTER,
R. CHOATE,
For Plaintiff in error.

SMITH *v.* TURNER.

The points on behalf of the defendant in error were thus stated by *Mr. Willis Hall* and *Mr. Van Buren*:—

I. This case involves precisely the same question that was submitted to this court in the case of the *City of New York v. Miln*, 11 Pet., 102, which, after two discussions, was decided, on full consideration, in favor of the State power.

II. The Constitution of the United States is a specific grant of certain enumerated powers, made to the Union by existing State sovereignties, coupled with prohibitions upon the States. If a given power is not granted to the Union or prohibited to the States, it is a demonstration that it belongs to the States.

III. The quarantine laws of the State of New York have been sanctioned and adopted by Congress, and frequently adverted to by this court with approbation.

IV. The quarantine charges are merely a common law toll, granted by the State to the Board of Health of the city of New York, in the exercise of an undoubted right, which the State has never, directly or indirectly, given up or abandoned.

V. An historical examination of the earlier laws of the State will authorize the three following conclusions, to wit:—

1. The people of the State of New York have acted in good faith. They have not, under color of quarantine or health laws, attempted to regulate commerce. They have had no object in view but protection from infectious diseases.

2. The people of the State of New York, when they adopted the Federal Constitution, did not understand it as depriving them of this right. They did not suppose their harbours were to be taken from them, but only that they were to allow the Union to use them for purposes of war and commerce. Had they understood it as now claimed, there is no hazard in saying it never would have been adopted.

3. The construction of the Federal Constitution on this *point contended for by the defendant in error is contemporaneous with its formation, and has been continued without objection for half a century. [*290

The rule in Stewart's case therefore applies, "that a contemporary exposition of the Constitution of the United States, adopted in practice, and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it."

VI. If the law in question is deemed to be in the nature of an inspection law, it lays no "duty on imports or exports," and therefore comes not within the prohibitions or provisions of the tenth section of the first article, or in any manner within the cognizance of the Federal Constitution.

But if, on the other hand, the court think the tenth section applicable to this law, then the section itself prescribes the only redress.

VII. It is not a regulation of commerce, because not so intended in fact nor by presumption of law; all the physical instruments or agents on which a regulation of commerce can act are merely means, and as such common to the States, unless expressly prohibited to them.

VIII. It is not "an impost or duty upon imports," because passengers voluntarily immigrating into the country by sea or land can in no sense be called "imports."

IX. The law in question, so far from being an infringement of Federal power, is exclusively within the State power. The end is the health of the city of New York, and of those who enter it, which is an object not committed to Congress. The means, a tax upon passengers equally removed from Federal jurisdiction.

Mr. D. B. Ogden, for the plaintiff in error.

This is a second argument in this case, which has been ordered by the court, it must be presumed, in consequence of a difference of opinion upon the case among the members of the court by whom the former argument was heard.

This admonishes me, that, however confident I may heretofore have felt that the judgment of the Court for the Correction of Errors in New York ought to be reversed, there must be great and serious doubts upon the subject. I therefore enter upon this second argument with a confidence certainly much lessened, but with a hope of success by no means extinguished.

By the Constitution of the United States, the people of the United States have vested certain powers in Congress, and the people of the several States have vested in their respective State legislatures other powers.

*291] *It is to be expected, that, in this complex system, composed of two governments, difficulties will arise as to the true line of distinction between the powers of the one government and the other.

To ascertain and point out with precision where that line is, and to say, both to the general and to the State governments, thus far shalt thou go and no farther, is the high and exalted duty of this honorable court. It is a duty imposed upon it by the people of the United States, who have declared in their Constitution that the judicial power of the government shall extend to all cases in law or equity arising under the Constitution. No court ever held so exalted a station. It represents the sovereignty of the people of a great nation. Its decrees are the decrees of the people, and it is intended to secure to the people the benefits of their Constitution by

keeping within their proper constitutional bounds all the other departments of both the general and State governments.

You are now called upon by the plaintiff in error in this case to examine and decide upon the constitutionality and validity of a law passed by one of the State legislatures. I feel and acknowledge, not only the importance, but the great delicacy, of the question before me.

I know, to use the language of the late chief justice in the great case of *Fletcher* v. *Peck*, that "this court will not declare a law of a State to be unconstitutional, unless the opposition between the Constitution and the law be clear and plain." The duty of deciding upon the constitutionality of this law, you must perform. You will decide it cautiously, not rashly,—with great care and deliberation, but at the same time with that fearlessness which the people of the United States, and my clients, who consider their constitutional rights violated by this law, have a right to expect at your hands.

Before I proceed to the argument of the particular points which arise in this case, I hope I may be pardoned in making one or two preliminary remarks. They are made with perfect respect for the court, and for every member of it; and they are made because, in my humble opinion, they ought never to be lost sight of by the court when considering a constitutional question.

In all our courts the judges are bound to decide according to the law of the land; not according to what they think the law ought to be, but according to the manner in which they find it settled by adjudged cases. The judges are bound by the most solemn obligations to decide according to the law as they find it. In cases where, perhaps, it was originally a question of great doubt what the law was, but it has now been *rendered certain by a variety of judicial decisions, no judge would, in ordinary cases, although he [*292 might think the law should have been settled otherwise, feel himself at liberty to decide contrary to a series of adjudged cases upon the subject, but would feel himself bound to yield his opinion to the authority of such cases.

This court have always, in ordinary cases between man and man, adhered to this rule.

If this were not so, it will at once be perceived that the law would remain for ever unsettled, which would be one of the greatest misfortunes in a community like ours, who are governed by fixed laws, and not by the whims and caprices of judges, or of any other set of men. Lord Mans-

field, in delivering one of his opinions, said that it was not so much matter what the law in the case was, as that it should be settled and known.

Now if, in questions originally doubtful, the good of the community requires that they should be considered as settled by adjudged cases, and what was doubtful before should be considered so no longer, I ask the court whether adjudged cases upon points of doubtful construction of the Constitution are not peculiarly within the good sense and principle of the rule? If, in ordinary questions, it is the interest of the public that there should be an end of litigation as to what the law is, is it not emphatically the interest of the public that their great organic law should be fixed and settled?—that, in points upon which the construction of the Constitution is doubtful, (and it could only be when that construction is doubtful that the case could come before this court,) the construction given by adjudged cases should be adhered to?

If in ordinary cases between man and man it is important that the law should be settled, it seems to me that it is infinitely more important to the community that the construction of the Constitution should be settled. It is all-important to every citizen of the United States that he should know what his constitutional rights and duties are. This, in many cases, can only be learned by the decisions of this court. And if those decisions are to be changed with every change of judges, what are our constitutional rights worth? To-day they are one thing, to-morrow another.

Instead of being fixed and stable, they change with the opinions of every new judge, they become unstable as the wind, and our boasted constitutional rights may be said no longer to depend upon law, but we hold them according to the whims and caprice of the judges who may happen to be on the bench of this court.

*293] *I press this point no further. I repeat it, the observations which I have made upon it are submitted most respectfully to the court. I hope I have not pressed them in an offensive manner. I certainly mean not to do so. I feel their importance to my clients and to the people at large, and I hope the court will excuse any undue earnestness in my manner.

My clients feel that their constitutional rights, as settled by former adjudications of the court, have been violated by the law of New York, and they claim the benefit of the construction of the Constitution as settled by those former adjudications.

There is one other point to which I wish to call the attention of the court prior to entering upon the argument of the case. The rights of the State governments were urged with great vehemence by the counsel for the defendant in error upon the former argument. And in every argument which I have ever heard in this court, in which the validity of State laws came in question, the same argument has been urged, and pressed with equal vehemence. I have views upon this subject which I wish briefly to submit to the consideration of the court.

We talk a great deal of the sovereignty of the United States and of the sovereignty of the several States. I hold that the only sovereignty in this country is in the people. From them, humanly speaking, proceed all the powers possessed by those who govern them. I know and acknowledge no other sovereign than the people. Whatever powers the general government possess are given to them by the people. Whatever powers the State government possess are given by the people in the several States. The whole sovereignty of the country being in the people, they have the right to parcel it out, and to place it in the hands of such agents as they, in their wisdom, think proper.

The people of the United States, and the people of every State in the Union, having, by their conventions, adopted the Constitution of the United States, and thus become parties to it, have given and vested certain powers in the government of the United States; and in the strongest terms have declared that all those powers are to be exercised independent of all authority of the local State governments, because they have made it incumbent upon the members of the several State legislatures to take an oath to support this Constitution, thus making the government of the United States, and intending to make it, supreme so far as the powers vested in it are granted by the people.

I apprehend, therefore, that the questions arising under this *Constitution are, and must be, decided by the Constitution itself, without reference to State rights or to [*294
State legislation, or to State constitutions. This Constitution, as far as it goes, is paramount to them all.

This Constitution is a most solemn instrument, to which all the people of the United States are parties. In construing it, we must look at its words. Where they are plain, and their meaning certain, there can be no doubt that in construing it we must give the words their full effect. The great object is to find out and ascertain the intent and meaning of the people in adopting the Constitution, and where the words

express that meaning clearly, there can be no room for cavil or doubt.

Where the words used are such as may bear two constructions, and it is a matter of doubt what construction they ought to receive, then we must resort to other means of construing it. We must examine, first, the reasons and objects for which the Constitution was formed and adopted, and take care that in giving a construction to it we do not thwart the object and intention of those who framed and adopted it.

In order to assist us in ascertaining what was the intention of any particular clause of the Constitution, we may refer to the proceedings of the convention by whom it was formed, and we may there discover what was their intention when they inserted the clause under consideration. And we may refer to early and contemporaneous constructions given to it by those who were called upon to act under it, because the persons who lived and acted at the time the Constitution was formed are more likely to know what was its intention than we are at this day; and it is upon this principle that contemporaneous constructions of any law are always resorted to, and deemed of great weight.

There is one other observation upon this point which I deem worthy of consideration upon this subject of State rights. The argument resorted to upon the other side is, and always has been, that the State governments were in existence anterior to the formation of the Federal government, that the State governments were perfectly free and independent governments, and that the Constitution of the United States is one of limited powers, and that all the powers not expressly given to it, and not expressly taken away from the State governments, remain in the State governments. Let us examine this argument a little.

It is true that, when the government of the United States was first organized under the Constitution, there were existing in the Union thirteen separate independent States, all having constitutions formed and established, or recognized, *295] by the *people. These governments were organized by the people in the several States with such powers as the people chose to give them, but with no other powers. When the national government was formed, the powers of the State governments were, to a certain extent, taken away, and vested in the national government.

Since the establishment of the present government of the United States, the people, in many of the States, have done away with their old constitutions, and adopted new ones. This is the case in Massachusetts, Connecticut, New York,

New Jersey, Pennsylvania, Maryland, and Virginia. Whether it be so in any other of the old States I am not sure. In Maine and Vermont in the East, and in all the new States in the West and Southwest, the State governments came into existence subsequent to the formation of the Constitution of the United States. And it is worthy of remark, that, in every one of these new constitutions, without, as I believe, a single exception, there is a provision that the members of the State legislatures and the judicial and executive officers shall take an oath to support the Constitution of the United States.

What is the meaning and effect of this provision? Does it not amount to a declaration by the people to the bodies constituted by the Constitution,—Remember, while we have given you certain powers, we apprise you that we have already given powers to the general government, and you hold the powers now given to you upon condition that you support the Constitution of the United States, and you shall take an oath to do so, before you shall exercise any of the powers with which we have intrusted you? This amounts to an acknowledgment of the supremacy of the government of the United States, and of the Constitution of the United States, so far as, by a fair construction of it, it goes. And what that construction is, this court are to decide. And, in my view of the Constitution, it is idle to talk of an invasion of State rights as a reason for not giving a fair and just construction to it.

The very thing the people intended when they adopted the Constitution of the United States was, that it should be the supreme law of the land, and that this court should have the power of construing it in all doubtful cases.

One of the wisest things ever said by Mr. Madison will be found in his account of the proceedings of the convention who formed the Constitution, at page 923, Vol. II., of the Madison Papers, where he says, "There was less danger of encroachment from the general government than from the State governments, and that the mischiefs from encroachments would be less fatal if made by the former than if made by the latter." And in page *924 he says, "Guards were more necessary against encroachments of the [*296 State governments on the general government, than of the latter on the former."

Having made these preliminary observations, which I think the case called for, and which I hope the court will not think out of place, I propose now to argue the case presented to the court by this record for its consideration. I shall confine my

remarks entirely to the case from New York. I have purposely kept myself in total ignorance as to the facts and points in the Boston case. I have no concern in that case, and kept myself, therefore, ignorant upon the subject of it, lest in the course of my argument I might be led to say something in relation to a case with which I have no business to interfere.

Before entering upon the argument, it is necessary that the court should distinctly understand the points in controversy between us.

The action in the State court, the judgment in which this court are now asked to review, was an action of debt brought by the plaintiff, the health-officer of the city of New York, against the defendant below, in order to recover the sum of one dollar for each steerage passenger brought by the defendant, the master of a British ship, which arrived in New York with two hundred and ninety-five steerage passengers, brought on board the said ship from Liverpool, in England, to the port of New York. The plaintiff below claimed to be entitled to recover this amount from the defendant, upon the ground that he was entitled to recover it under and by virtue of an act of the legislature of the State of New York.

To this declaration the defendant filed a demurrer, alleging as a cause of demurrer that the statute of New York under which the plaintiff made his claim was void, it having been passed in violation of the Constitution of the United States.

The plaintiff joined in demurrer, and the only question therefore raised by the pleadings was the validity of the statute of New York on which the action was founded.

The action was commenced in the Supreme Court of the State. Upon the argument of the demurrer, the court sustained the validity of the law, and gave judgment for the plaintiff. The defendant below brought his writ of error, and carried the case up to the Court for the Correction of Errors in New York, the highest court in that State. The Court of Errors affirmed the judgment of the Supreme Court, and the case is now brought by writ of error to this court, under the provisions of the Judiciary Act of 1789.

The single question, therefore, presented to the court by this record is, whether the statute of the legislature of New
*297] York *upon which the act is founded is an unconstitutional and invalid law, or whether it is a constitutional and valid law.

In order to decide this question, we must first understand what the law is. It will be found in the first volume of the Rev. Stat., 2d ed., p. 436.

"Sec. 7. The health-commissioner shall demand and be en-

titled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.:—

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting vessel, for each person on board, twenty-five cents; but no coasting-vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year.

"Sec. 8. The moneys so received shall be denominated hospital moneys, and shall be appropriated to the use of the marine hospital, deducting a commission of two and one half per cent. for collection.

"Sec. 9. Each master paying hospital moneys shall be entitled to demand and recover from each person for whom they shall be paid the sum paid on his account.

"Sec. 10. Every master of a coasting-vessel shall pay to the health-commissioner, at his office, in the city of New York, within twenty-four hours after the arrival of his vessel in the port, such hospital moneys as shall then be demandable from him; and every master, for each omission of such duty, shall forfeit the sum of one hundred dollars."

By the thirteenth section it is made the duty of the commissioners of health to account annually to the Comptroller of the State for all moneys received for the use of the marine hospital; and if such moneys shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as part of the contingent charges of the city of New York, they shall pay over the surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the said society.

It is by a subsequent section declared, that there shall be paid to the Society for the Reformation of Juvenile Delinquents the sum of eight thousand dollars.

By referring to the same book, 1 Rev. Stat., 2d ed., 417, it will be found that the board of health in the city of New York consists, besides the mayor of the city, [*299] of the health-officer, the resident physician, and the [300] health-commissioner.

The health-officer is to reside at the quarantine ground, to

board and examine any vessel arriving, &c., and to have the charge of the hospital at the quarantine ground.

The resident physician and the health-commissioner are to reside in the city, and shall meet daily at the office of the board of health in the city during certain portions of the year. And they are to receive an annual salary of one thousand dollars each, to be paid out of the moneys appropriated for the use of the marine hospital.

In page 425, section 48, all passengers placed under quarantine, who shall be unable to maintain themselves, shall be provided for by the master of the vessel in which they shall have arrived.

These laws, then, impose a tax upon all passengers arriving at the port of New York. Have the legislature of New York the constitutional power to impose such a tax? It is a tax, not only upon foreign passengers, but a tax upon every citizen of the United States arriving coastwise at that port. But we have in this case to deal only with that part of the act imposing a tax upon foreigners arriving in a foreign ship from a foreign port.

The principal ground upon which the validity of the law is attempted to be supported is, that it is a part of the quarantine system which it is essential for the safety and health of the city of New York that the legislature of that State should have the power of establishing, which power they never intended to part with when they adopted the Constitution of the United States.

Let us stop here and examine into the strength of this argument, which is the very corner-stone upon which the whole fabric of this statute is attempted to be reared and sustained.

That every community has a right to provide for its own safety is readily admitted. *Salus populi est suprema lex*, is a maxim always true in all nations, and is acted upon by all civilized, as well as all uncivilized, nations. I admit it in its fullest force. The quarantine laws of New York are upon this principle to be justified and maintained.

A brief reference to a part of their history may not be without its use in this case.

The Constitution having given to Congress power to regulate the commerce of the country with foreign nations and between the several States, under that power Congress have passed laws in relation to ships and vessels of the United States, as the means by which commerce is carried on, and *299] *therefore within their power as having the power to regulate commerce; and these regulations have made it incumbent on vessels arriving at the different ports of the

United States to make entries at the custom-house within a given time, with a manifest of their cargoes, &c., and make provision that the cargoes shall be entered by the importers within a given time.

It was found that some of the provisions of the quarantine laws of New York interfered with these provisions of the court of the United States. These laws compel vessels to come to anchor at the quarantine ground, in certain cases to land their cargoes there, and contain several other provisions of this kind. It was stated by one of the learned counsel, that a correspondence upon the subject of these laws, after repeated visitations of the yellow-fever, took place between John Jay, the then governor of New York, and the President of the United States, upon the subject of these laws, which correspondence produced the Act of Congress to which I shall presently draw the attention of the court.

It is certainly not necessary for me to say that John Jay was, not only one of the purest and best men this country has produced, but one of the best lawyers in the country, well acquainted with the Constitution, and familiar with all its provisions. He, together with Mr. Madison and General Hamilton, wrote the Federalist, a book well known to this court, and he was the first chief justice of this court.

Now, from the statement of the counsel, Mr. Jay was so strongly convinced that the exclusive power of regulating commerce was vested in Congress, that he believed that several of the provisions of the quarantine law interfered with the power of Congress, and that, although it was deemed by him and the legislature of the State that those provisions were essential parts of the quarantine laws, yet, in order to give them validity, an act of Congress was necessary. Hence his correspondence with the President, and hence the act of Congress to which I will now draw your attention.

It will be recollected as an historical fact, that, in the spring of 1794, Mr. Jay was sent as minister to England, for the purpose of endeavouring to make an amicable settlement of our differences with England, which then threatened an immediate war between the two countries. Mr. Jay's treaty was made in November, 1794; he returned to the United States in the spring of 1795, and was elected governor of New York during his absence.

The yellow-fever had first made its appearance, and raged with great violence, in Philadelphia, in 1793. In 1795, in the *summer, it broke out in New York, and raged there [*300
with considerable violence. It was no doubt immedi-

ately after this fever had subsided that the attention of the governor and legislature of New York was called to the quarantine laws, and thus, no doubt, the correspondence of which the counsel has spoken took place between Governor Jay and the President. And we find in 1 Story's Laws of the U. S., 432, an act passed on May 27th, 1796, entitled "An act relative to quarantine," which authorizes the President to direct the revenue-officers, and the officers commanding forts and revenue-cutters, to aid in the execution of the quarantine and health laws of the States, in such manner as may appear to him necessary. This was a short law, consisting of one short sentence, in substance as I have stated it.

In February, 1799,—in less than three years afterwards, and after the yellow-fever had again made its appearance and raged with great violence in New York in 1798,—Congress passed another law on the subject, (Id., 564,) which declares, that "the quarantines and other restraints which shall be required and established by the health-laws of any State, or pursuant thereto, respecting any vessels arriving in or bound to any port or district thereof, whether from a foreign port or place or from another district in the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States.

"And the Secretary of the Treasury is authorized, in respect to vessels which shall be subject to quarantine, to prolong the terms limited for the entry of the same, and the report and entry of their cargoes, and to vary or dispense with any other regulations applicable to such reports.

"Provided, that nothing herein shall enable any State to collect a duty of tonnage or import without the consent of Congress."

The other sections of the act relate to the manner in which cargoes are to be landed, &c.

Now this law shows, that, notwithstanding the great principle that every community has a right to provide for the safety of its people, by preventing the introduction of contagious and infectious diseases, yet, in the opinion both of Governor Jay and of Congress, so exclusive is the power of Congress to regulate commerce, that its aid and consent are necessary in order to give validity to the quarantine laws of the different States. And so cautious were Congress in giving their aid and consent, that they made an express condition in the proviso, "that nothing herein shall enable any State to collect a duty of tonnage or import without the consent of Congress."

*And if I shall hereafter succeed in proving that this tax upon passengers is an import duty, then it is not only prohibited by the Constitution, but by this act of Congress. [*301

Having given this brief history of the introduction of the system of quarantine, I shall now proceed to inquire whether the law, the validity of which is now called in question, is a quarantine law.

I would here, however, premise, that in this argument the quarantine systems, such as they were, which were established by the legislatures of the different States prior to the organization of the general government, can have no bearing upon the question now under our consideration, because anterior to that time there can be no doubt that the several State legislatures had a constitutional power to make such regulations upon the subject as they thought proper. Since the organization of the Federal government, the quarantine laws of the State are enforced by the consent of Congress in the acts to which I have already referred, subject, however, to the conditions imposed by these acts; and so far as the condition upon which the assent of Congress was given has been violated, the laws are void.

But the question which I now propose to discuss is whether the law, the validity of which is called in question, can be considered as a part of the quarantine system of the port of New York.

I understand the principle of these laws to be this. The State has the right, and it is imposed upon it as a most solemn duty, to provide for the safety of its citizens by preventing, as far as human means can prevent it, the introduction among them of contagious and infectious diseases.

This I understand to be the object and the end of all quarantine laws. In order to do this, the authorities of the State have the right to prevent the introduction into the city of New York of all persons laboring under an infectious or contagious disease. They have the right to prevent the landing of any merchandise or other thing which is deemed calculated to produce infection and disease. They have the right to prevent any ship or vessel, which is likely to have the seeds of contagion or infection on board of her, from coming to the city until properly cleansed. Having these rights, they must necessarily have all the rights and powers which are essential to their due exercise. They have, therefore, the right to board and examine every ship or vessel arriving at the port, for the purpose of ascertaining the state of health of the persons on board. They have the right to examine into the cause, as to

its nature and state and condition. They have the right to
*302] *examine into the state of the ship, and to have her properly cleansed, and they have a right to detain any ship or vessel at the quarantine ground for a length of time sufficient for all these purposes. All these rights are acknowledged and readily admitted to belong to every State in the Union. The expenses attending such examinations and searches may perhaps be considered in the light of port charges, and may therefore be properly chargeable to the ship or vessel. No complaint is made upon that subject. They are by the law charged upon the ship.

Now what has the passenger-tax to do with all this? Is it in any way necessary that this tax should be laid upon passengers? What is its declared object? It is to establish and support a marine hospital, to pay the salaries of a physician and his assistant, who reside in the city of New York, and to support a society for the reformation of juvenile delinquents or convicts.

Take the most favorable view of the case, and it is moneys raised, not to enable the authorities of New York to prevent the introduction of disease into that city, but to pay the expenses attending the exercise of the power of the State to protect its citizens from the consequences of disease already in the city. It is a tax to save the State the expense of protecting its citizens from disease within the city, and it is not a means of preventing the introduction of disease. It is a tax upon passengers for the benefit of the State of New York, and so the legislature of that State evidently consider it, by appropriating it to objects totally unconnected with the system of quarantine.

By an act of the legislature of New York, 2 Rev. Stat., 430, it will be found that the sums to be levied by the former law upon the master, mate, and seamen are no longer to be collected by the health-commissioner, but by the trustees of the seaman's fund, &c. And by section fifty-four, page 439, it is declared that the eight thousand dollars appropriated by the former act in aid of the Society for the Reformation of Juvenile Delinquents in the city of New York shall continue to be paid by the health-commissioner out of the moneys collected from passengers; but if the amount collected from passengers should be insufficient (after paying all the expenses of the quarantine establishment at Staten Island) to meet the eight thousand dollars more appropriated from the hospital funds for the support of the Society for the Reformation of Juvenile Delinquents in the city of New York, then

the balance to make up the eight thousand dollars shall be appropriated annually from the State treasury.

*This act is evidence of two things:— [*303

1st. That the passenger-tax is no part of the quarantine system, but is resorted to as a means of paying the expenses attending its execution.

2d. That the funds are applied to the relief of the State treasury.

I have thus stated the reasons why the imposition of this tax cannot be considered as any part of the quarantine laws, and by declaring it to be unconstitutional this court will not in the least interfere with the quarantine laws of the States. This law imposes a tax; it is treated as a tax levied upon passengers throughout the whole law; and the only question in the case is, whether the legislature of the State of New York can, in consistency with the provisions of the Constitution of the United States, impose and collect such a tax, and it is to this question that my argument will be applied.

Similar provisions, it is said, are made in several of the States. I do not stop to examine into the provisions of the different State laws upon the subject, for this plain reason:— the more State laws that have been passed upon this subject, the greater the necessity there is of this court's interference. If the State legislatures have the power to impose a tax upon passengers, the amount of that tax must be fixed at such a rate as the different legislatures in their wisdom may think proper to fix it at. Hence the court will perceive that the tax upon a passenger arriving in the United States may differ, and in all probability will differ, in amount in each State having a seaport, and thus destroy that uniformity of taxation upon persons arriving here which nothing but an act of Congress can establish, and which the interest of the country requires.

The question now to be discussed is, whether the legislature of the State of New York have a constitutional power to impose a tax upon foreigners arriving at the port of New York from a foreign port.

By the Constitution of the United States the people of the United States intended, instead of the old Confederation, to form a national government. However we may differ in our opinions as to the power of the general government upon some subjects relating to our internal affairs, I think all must admit, that, in regard to all our relations as a nation with other nations, or the subjects or citizens of other nations, the whole power of the country is placed by the people in the hands of the general government. Power is given to Congress

to regulate commerce with foreign nations, to collect imposts and duties, to declare war and to make peace, to raise and support an army or navy. Power is given to the national
*304] government *to make treaties, &c., with foreign nations; in short, to manage all matters which may arise between this nation and any other. This is the spirit of the whole Constitution; it was one of the causes, if not the principal cause, of its formation and adoption.

Now, what shall be the intercourse between the United States and a foreign nation, and between our citizens and their citizens or subjects, and upon what terms that intercourse shall be carried on, are clearly national questions, and as such must be decided upon by the national government. The States can have no possible constitutional power in any manner to interfere with it.

It can be no answer to this to say, that, until Congress pass some regulations upon the subject, the States may make their own regulations upon it; because this is a national question. It is a subject which the States have no right to touch or interfere with in any manner. It is a subject upon which the people have intrusted them with no power.

If I am right in this, it seems to me to follow, that whether foreigners upon their arrival in the United States shall or shall not be compelled to pay a tax, before they will be permitted to put their feet ashore in this land of liberty, is a question which belongs exclusively to the general or national government. If this be a correct view of the case, then it follows that, in passing the law the validity of which we are now discussing, the legislature of New York have exceeded their powers and authority, and have improperly trenched upon the powers of the national government, and their act is therefore void.

Let us pursue this point a little further.

If the legislature of the State of New York have the right to impose a tax upon foreigners arriving at the ports of New York, then the amount of the tax is necessarily wholly within their power and discretion. They may impose a tax of one dollar upon each passenger, or a tax of one thousand dollars. It will thus be plainly perceived that they may totally prohibit the importation of foreigners into the ports of New York, and thus thwart what may be considered the settled policy of the general government upon this subject.

Again, Congress have passed several laws in relation to passengers. They have, it is true, imposed no import duty upon their arrival in the United States. Does not this, in effect, amount to a declaration on the part of Congress that

they shall pay no such duty? Is it competent for a State legislature to say, If Congress do not impose a duty upon passengers, they have not legislated on the subject,—we will therefore impose such a duty?

*According to this argument, if Congress think no duty should be paid upon foreign passengers arriving in the United States, yet they must impose some duty, or the State legislatures may impose such a duty as they in their discretion think proper. [*305

Thus far my argument upon this point is that the whole subject of the admission of foreigners into the United States, and the terms upon which they shall be admitted, belongs, and must belong, exclusively to the national government.

I proceed now to take another view of the case.

The law of New York imposes a tax. It imposes a tax upon persons brought or imported into the United States. Is not that an impost?

The Constitution, in express terms, prohibits the State from passing any law imposing duties or imposts on imports without the consent of Congress. The precise words of this section of the Constitution are worth attending to upon this point;—"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports," &c.

Not upon goods or merchandise imported, but upon imports,—upon any and every thing imported or brought into the country. And the words include men, as well as merchandise. That the meaning of the word *imports* includes men as well as things cannot, it seems to me, be denied. In common parlance, we say, when a new manufacture is established, in which we have had no experience, we must *import* our workmen from Europe, where they have experience in these matters. When we speak of the great perfection which any particular manufacture may have arrived at in a short time, we say the workmen were imported from Europe.

But another clause in the Constitution throws great light upon this subject:—"The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importations not exceeding ten dollars for each person."

I propose detaining the court for a short time by making a few observations upon this clause of the Constitution. It is a limitation upon the powers of Congress. Now, a limitation of a power admits the existence of a power limited. Congress, then, had by the Constitution, by the admission contained in this clause of it, power to prohibit the migration

or importation of any persons other than citizens of the United States into the country, and they had the power, by the like admission, to impose a tax or duty upon such importation. If Congress had such power, whence did they derive it? What part of the Constitution gave it to them?

*306] *They had power to collect and lay duties upon imports. They had power to regulate commerce with foreign nations, and they had all the powers necessarily belonging to a general national government, as it regards foreigners.

As the limitations in that clause of the Constitution were imposed but for a limited time, and as that time has long since expired, Congress now possess all the powers which the Constitution gave them, subject no longer to the limitations contained in this clause, which has expired by its own limitation.

Congress have, therefore, now the power,—

1. To prohibit migration of foreigners altogether.

2. To impose such an import duty upon their arrival in the United States as Congress in their wisdom may think proper.

This, I presume, will not and cannot be denied.

Now, if Congress have that power, it is derived either,—

1. From the power to lay and collect import duties.

2. From the power of regulating commerce with foreign nations.

3. Or from its being an attribute necessarily belonging to the national government.

And if Congress derive the power from any one of these sources, their power is necessarily exclusive of any State authority upon the subject. As to imports, I have already shown that the States are expressly prohibited by the Constitution from laying or collecting any such duties. As to the power to regulate commerce with foreign nations, I intend to endeavour to show, in a subsequent part of my argument, that that power is also exclusive of the State legislatures. As to the authority derived from the fact, that it is an attribute of the national government, there can be no doubt that, in that view of the case, the State governments can have no concurrent power on the subject.

If, therefore, Congress possess the power of levying an import duty upon persons imported or brought into the United States, if they have the power to prohibit the importation of them altogether, no State can have such power, and the law of the State of New York is unconstitutional and void.

But it is said that this clause of the Constitution was only intended to be applicable to slaves which might be brought into the United States. It seems to me that this argument cannot avail the opposing counsel. Because, if this be so, then, as I have already shown that this clause was a limitation upon the powers of Congress, if that limitation extended only to slaves, then the powers of Congress, so far as they relate to free foreigners migrating to the United States, were left, and now exist, wholly unlimited, except so far as limitations may be *found in the words of the Constitution [*307
or in the nature of the case.

But the convention intended, as the words of the clause evidently show, that the provision should not be confined to slaves. 3 Madison Papers, 1429.

Mr. Gouverneur Morris objected, that, as the clause now stands, it implies that the legislature may tax freemen imported. Colonel Mason admitted this to be so, and said "that it was necessary for the case of convicts, in order to prevent the introduction of them." With this explanation, the clause was passed unanimously.

I shall here leave this point in the case.

I think I have shown that this tax is an impost, and that the State of New York has no constitutional power to lay and collect it, without the assent of Congress, and if collected, it must be paid into the treasury of the United States.

But we were told upon the former argument, that no import duty could be laid upon white men. I have shown that such was not the opinion of the framers of the Constitution. But what is this law of New York? It imposes a tax upon every passenger brought or imported into the port of New York. Such a tax is an impost. And if it be true that no impost can be laid upon white men, by what authority does the State of New York impose such a duty upon every passenger, white or black, bond or free? Because we call it a tax, not an impost; as if a change of the name can alter the nature of the thing.

This law is not only an impost, but a regulation of commerce; and I propose now to inquire whether, as such, it must not be considered as unconstitutional and void?

In discussing this question, it is not my intention to go into a lengthened and minute consideration of the several cases which have been heretofore decided in this court, in which the validity of State laws has been the subject of decision here. These cases are so fully considered in the License cases decided at the last term, that every member of

the court must be familiar with them. To enter now into a labored examination of them would, therefore, be little less than a waste of the time of the court.

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

What is the meaning of the word *commerce* in this clause of the Constitution? It becomes necessary to settle the meaning of the word. Chief Justice Marshall, in the case of *Gibbons* v. *Ogden*, 9 Wheat., 189, says, speaking of this word,—"The counsel for the appellee would limit it to
*308] traffic, to buying and *selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is *intercourse*. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

And in the same case, page 193, Chief Justice Marshall says,—"It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse between the United States and foreign nations."

Commerce, then, is *intercourse*, and Congress have the power of regulating that intercourse; and, as I shall contend, the exclusive power of regulating the intercourse with foreign nations. The Constitution draws a plain distinction between the *commerce with foreign nations* and the *commerce among the several States*. If there were no such distinction, the law would have been differently expressed; the power to regulate the commerce of the United States would have included both.

Why is this marked distinction made in the Constitution? The regulation of the commerce with foreign nations, including the regulation of all our intercourse with them, may, in many instances, materially affect the relation between us and foreign nations. It may often lead to war. It may become the subject of treaties. All which considerations show that it is a national question, from which the States must be absolutely excluded. Not so with the power of regulating commerce among the States. This is a mere internal matter among ourselves, with which foreigners can have nothing to do. They can know only the one government, and can do nothing with the State governments. The power to regulate this internal commerce is vested in Congress, and they may exercise it or not, as they think proper; and until they do

exercise it, it is possible that the States may have power to regulate the matter among themselves. Not so with foreign commerce. Foreign nations know nothing of the States, and can look only to the general government. With respect to foreign commerce, it is essential that the regulations should be uniform throughout the whole country, so that the different nations should know the terms upon which their commerce or intercourse with this country can be carried on.

In all cases where the right of commercial regulations comes before this court, this distinction should never be lost sight of. In cases of commerce among the States, if Congress do not exercise the powers given to them, it may be matter of doubt *whether the State legislatures may not make regulations of the commerce among themselves, and those regulations may be good until Congress shall undertake to make the regulations. And all the cases where it has been admitted by any judge of this court that the States have a concurrent power to make such regulations of commerce will be found to be of that nature. The two leading cases are *Gibbons* v. *Ogden*, 9 Wheat., 1, and *Wilson* v. *The Black Bird Creek Co.*, 2 Pet., 245. They will both be found to be cases of internal commerce among the States. [*309

In the case of the *City of New York* v. *Miln*, 11 Pet., the opinion of the court was delivered by Mr. Justice Barbour. He says,—"We shall not enter into any examination of the question whether the power to regulate commerce be or be not *exclusive* of the States, because the opinion which we have formed renders it unnecessary; in other words, we are of opinion that the act is not a regulation of commerce, but of police; and that, being thus considered, it was passed in the exercise of a power which rightfully belonged to the State.—If, as we think, it be a regulation, not of commerce, but police, then it is not taken from the States." (p. 132.)

In that case, the law of New York was considered as a part of its system of poor laws, and was, therefore, held to be constitutional. But even in that case Judge Story dissented from the opinion of the court, and stated that Chief Justice Marshall had been of opinion, upon the former argument of the case, that the law of New York was unconstitutional.

In Judge Story's opinion, we find this paragraph (p. 161):—"The result of the whole reasoning is, that whatever restrains or prevents the introduction or importation of passengers or goods into the country, authorized and allowed by Congress, whether in the shape of a tax or other charge, or whether be-

fore or after arrival in port, interferes with the exclusive right of Congress to regulate commerce."

And this is in strict conformity with the doctrine established in the case of *Brown* v. *The State of Maryland*, 12 Wheat., 419. That was also the case of an imported article from a foreign nation, upon which the plaintiff in error had paid a duty upon its importation. The State undertook, by law, to say that he should not sell it without a license.

The court decided that the duty required and paid upon the importation of the article was a regulation of commerce, and that, upon paying that duty, the importer had a right to sell the article; else the importation of it would be of no use to him, and he would have complied with the regulations of Congress to no purpose, if, after paying the duty, he could *310] not sell the *article, which was the sole and only object of its importation.

The court said, that, although the imported article was within the State, yet, so long as it remained in the original package in which it was imported, it could not be considered as having become so identified with the mass of property in the State as to subject it to the power of taxation by the State.

In support of the doctrine for which I am now contending, I beg to refer the court to the opinion of Judge Johnson in the case of *Gibbons* v. *Ogden*, 9 Wheat., 227, by which it will be found that he takes the distinction between foreign commerce and the commerce among the States. The court declared that the power to regulate is exclusive, although that was a case of collision between the State law and the law of Congress.

In the case of *Brown* v. *The State of Maryland*, the decision of the court was substantially the same.

I contend, then, both upon principle and upon authority, that the power to regulate commerce with foreign nations is vested in Congress *exclusively*; that the States have no power to interfere with it; that commerce means intercourse, and that passengers are as much a part of that commerce and intercourse as goods or merchandise; that no State has the power of making any regulations upon the subject, and most assuredly not of laying and collecting an import duty upon passengers imported or brought into the United States. 1 Tucker's Bl. Com., Appendix, page 150; 3 Madison Papers, 1585.

Before I leave this point of the case, I would call the attention of the court to the opinion of our State legislature

upon this subject,—an opinion entitled to some little weight in this case. (*Mr. Ogden* here read the resolution passed by the legislature of the State of New York, in February, 1847.)

In the opinion, then, of the legislature of New York, passengers are a part of the commerce of the country, which Congress have the power to regulate, and the regulation of it belongs to Congress by virtue of the Constitution, and the State legislature cannot legislate on the subject. This, it seems to me, is the plain language of this resolution. Now, I think taxing passengers has something to do with regulating the commerce and intercourse between the United States and foreign nations, and in the language of the legislature in this resolution, that regulation "belongs, by virtue of the Constitution, to Congress."

The case of pilots has frequently been referred to as a regulation of commerce, and therefore within the powers given to Congress; and in these cases the power of Congress has never been held to be exclusive, but State laws are constantly passed *on that subject, and their validity has [*311
never been questioned. I propose to make a few [
observations upon this subject.

The only power which Congress can possess over pilots must be derived from the power given to them to regulate commerce. There is no express power given as to the regulation of pilots. And unless the regulation of pilots can be considered as a regulation of commerce, it is not within the constitutional power of Congress.

And it may be well doubted whether the regulation of pilots can be considered as a regulation of commerce. Pilots are rather a necessary aid to the successful carrying on of commerce than a regulation of commerce itself.

A power to regulate commerce would hardly confer the power of regulating ship-carpenters, and yet they are essential to create the very means, and the only means, by which commerce can be carried on. Pilots are, it seems to me, rather to be considered as belonging to the port arrangements, such as the places where ships from different places may be anchored, as to the wharfage, &c., all of which are now considered as regulations of commerce, although the commerce of the country may be, and often is, materially affected by them.

The regulations of commerce should be uniform throughout the whole country. This never can be the case in the regulation of pilots. Different skill and experience are required at different ports. The distance which the pilot must conduct vessels is different at different ports; the dan-

gers to be avoided are more numerous and greater at some ports than others. The charges of pilotage must, therefore, be greater at some ports than at others. No uniform regulations can, therefore, be made upon the subject. The whole spirit of the Constitution is, that the commercial regulations of Congress should be uniform throughout the whole country; and as it is impossible that the regulations of pilots should be so, it affords a strong argument to prove that their regulation never was intended to be given to Congress.

Again, the regulation of pilots can hardly be considered as a regulation of foreign commerce; it is a mere local matter, confined to particular ports and harbours, and may, therefore, be considered as a subject upon which the States may legislate, and their laws be valid, until they come in conflict with the laws of Congress.

And this seems to have been the understanding of Congress. At their first session under the Constitution, in August, 1789, in "An act for the establishment and support of light-houses, beacons, buoys, and public piers," we find a section declaring that all "pilots in the bays, inlets, rivers, harbours, and ports *of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."

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The words of this section are peculiar. Congress make no regulations as to pilots, but leave them as they were regulated by the States. They are to continue subject to the regulation of State laws then existing, and such State laws as may hereafter be enacted by the States, until further provision shall be made by Congress;—seeming to act upon the principle that the State laws would be valid until interfered with by Congress.

The provision is found in an act for establishing and supporting light-houses, beacons, buoys, and public piers. The objects of the act are local, and though intended for the security and safety of the commerce of the country, they cannot be strictly called regulations of commerce. As to foreign commerce, no foreign nation could complain if we had no light-houses, no beacons, or buoys. These are things for our own advantage and convenience, by making our ports more accessible to ships and vessels. They are peculiarly advantageous to the particular ports near which they are found, and might, therefore, well be left to State legislation.

Noscitur a sociis. The provision in relation to pilots in

this law is to be judged of by the other provisions found in the law, none of which can be considered as commercial regulations in the sense in which the terms are used in the Constitution.

The only other law ever passed by Congress in relation to pilots was passed on the 2d of March, 1837, which declares that it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, to employ any pilot duly authorized by the laws of either of the said States bounded on the said waters, to pilot the said vessel to or from the said port, &c.

It will be perceived, that this act does not pretend, in any part of it, to be a regulation of pilots. It regulates shipmasters, if it can be called a regulation at all, and it authorizes them to employ certain pilots; but it is no regulation of those pilots.

I have been thus particular upon the subject of pilots, because I am confident that Congress never have attempted any regulation of them; that any uniform regulation, which is the only regulation Congress could make on the subject, is, from the nature of the subject, impossible; and that the only *provision Congress have ever pretended to make upon the subject is to consider them as local matters, [*313 like light-houses, &c., and therefore have left them properly to State laws.

There can be no doubt that any State may erect and maintain a light-house, may plant buoys and beacons for the benefit and advantage of its own ports and harbours. So may any individual, and these, although they may be extremely useful to commerce, cannot be called regulations of commerce. And pilots stand upon the same footing, and are so placed by the act of Congress of 1789.

We may say of the laws relating to pilots, as Chief Justice Marshall says of the inspection laws of the States, in his opinion in *Gibbons* v. *Ogden*:—"That these laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted."

There is another clause in the Constitution which has some bearing upon this case, and which I shall briefly consider:—"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another."

This clause, it is true, is a limitation upon the powers of Congress, and is not applicable in its terms to State legisla-

tion on the subject. But the words are general, and if Congress, who have the power of regulating the commerce of the country, and the revenue arising from that commerce, have no power to give the preference mentioned in this clause of the Constitution, surely a State which has no power to regulate commerce, and has nothing to do with the revenue derived from it, can give no such preference.

The intention of this clause in the Constitution evidently is, that the regulations of commerce and of its revenues shall be equal and uniform in all the ports of the United States. It was the inequality existing in these respects in the different ports of the United States which, more than any thing else, gave birth to the Constitution.

Now a very important part of the commerce and intercourse between the United States and Europe is the transportation of passengers. The passage-money received from passengers is a most important item in the freights carried by our merchant-ships. This tax upon passengers is in effect a tax upon the ship-owner. He may, indeed, add it to the amount he charges for the passage. If he does so, he is compelled to charge so much more for a passage to New York than is charged to any other port. The great body of our immigrants, many of whom bring with them large families, cannot afford to pay an additional dollar for themselves and each individual of their families, *and they will therefore sail for other ports. The consequence is, that the ship-owner in New York must lose the passage-money altogether, or he must consent to pay the dollar himself.

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The amount of this tax annually paid is much larger than is generally supposed. By the report of the commissioners of immigration, made on the 1st of October last, it appears that, from the 5th of May to the 30th of September, not quite five months, the number of passengers, foreigners, who arrived at New York was 101,546. For the remaining seven months of the year they may be fairly estimated at 100,000 more, making 200,000 in a year, which is a tax upon our ship-owners of $200,000 per annum.

The court will now see that these merchants have good reason for appealing to this court for the establishment of their constitutional right to be put upon an equal footing with the ship-owners in the other ports of the United States.

It is no argument against us upon this point to say, that some of the other States also impose a similar tax upon passengers. Because, if the different States have the power of imposing this tax, the amount of it will be varied according to the discretion of the different State legislatures, which

proves the necessity that this whole matter should be exclusively under the regulation of Congress, in order to produce that equality and uniformity called for by the Constitution.

My argument upon this point applies with much greater force to the case of a foreign ship or vessel importing or bringing passengers to this country. Foreigners can only know us as one nation, and certainly would have great right to complain, if compelled to pay a different rate of duty at the different ports of the United States.

I have now stated the several grounds upon which I have supposed the law of New York, the validity of which is the question in this cause, to be unconstitutional and void. The public authorities in New York have always doubted the validity of the law. Collier's Report in January, 1842; Governor Bouck's Message; the act of the legislature of 1844.

These public documents show,—

First. That the validity of the law is considered as doubtful by the government of New York.

Secondly. That they are ready to abide by, and to submit to, any decision this honorable court may make upon the subject.

As a citizen of New York, I am proud to say, that, although there is no State in the Union whose laws have been so frequently before this court as violating the Constitution, yet there is no State which has ever shown greater respect and *veneration for the Constitution and for this honorable court, by always submitting without a murmur to its [*315
decisions. The pride of New York is, that she is a member of this republic,—that the republic has a Constitution made and adopted for the purpose of preserving the peace, prosperity, and happiness of the people. She believes that on the preservation of this Constitution depends our Union, that upon our Union depend the happiness and prosperity and the liberties of the people of these United States. And however, in New York, we may differ among ourselves upon minor points, the greatest wish of our hearts is that this Constitution and this Union may be perpetual.

Norris *v.* City of Boston.

The following is a sketch of the argument of *Mr. Davis*, for the defendants.

He said he rose to address the court with unaffected distrust and diffidence in his ability to add any thing new in a case that had been so fully investigated. The only circumstance which inspired him with confidence was the order of

the court directing the rehearing, which he thought would have been more usefully executed by confiding the case to other counsel; but he had found it not entirely easy to pursue this course, as the Executive of the State had manifested a wish that he should remain in the case.

The great question involved was the constitutionality of the act of Massachusetts of 1837, regulating the introduction of alien paupers. The plaintiff's counsel alleged, substantially,—

1st. That Congress has the exclusive power to regulate foreign commerce.

2d. That in a case like that of the law of Massachusetts it is unnecessary to prove any conflict with any law of the United States, for the act of Massachusetts assumes to regulate foreign commerce, which is of itself a violation of the Constitution.

3d. That the bringing in of alien passengers is a part of foreign commerce, and hence any attempt to regulate concerning them is a regulation of commerce.

4th. That nevertheless the law of Massachusetts does in fact conflict with certain legislation and certain treaties of the United States.

5th. That the law furthermore falls within certain provisions of the Constitution, which prohibit the levying of a duty on imports, and also on tonnage.

We contend, on the other hand,—

1st. That the power of Congress over foreign commerce is
*316] *not exclusive, but is and has at all times been exercised, both in regard to foreign commerce and the commerce between the States, concurrently within the territory of the State, and that no regulation of a State within its territory has been or can be adjudged unlawful, unless it be repugnant to or incompatible with some law of the United States.

2d. That, consequently, although alien passengers are brought in by vessels engaged in foreign commerce, yet they must be subject to and obey the police laws of the State, unless such laws are in collision with laws of the United States.

3d. That the law of Massachusetts does not conflict with any act or treaty of the United States upon the subject of passengers.

4th. That it does not fall within the clause of the Constitution prohibiting the levy of duties on imports or upon tonnage, but is a police act for the regulation of paupers and pauperism.

I shall notice all these positions, but not in the order in which they have been stated.

First, I shall contend that the law of Massachusetts was not made for the purpose of regulating foreign commerce, although it affects it so far as is necessary in providing for the regulation of a class of persons connected with it, but it is in fact an act modifying the pauper laws of the State, and designed to mitigate, in some degree, the burdens attempted to be thrown upon us in subjecting us to support the alien poor.

This can be made manifest by tracing the history of our legislation upon this subject, and the causes which have led to it. It will appear that the Colony, Province, and State, each in turn, exercised a free, unrestrained authority over paupers and pauperism. I shall do little more than refer the court to some of the laws, and state in the briefest way their provisions.

In 1639, there is an act of the Colony providing for the poor, which evidently alludes to still earlier laws. (Ancient Charters and Colony Laws, 173.) This act made it the duty of towns, not only to provide for the poor, but for all alike, whether native inhabitants, alien sojourners, or transient persons.

In 1692, provision was made compelling the relatives of poor persons to contribute, when able, to their support. Ibid., 252.

In 1693, provision was made for the forcible removal of paupers, not only from one town to another, but out of the Colony; and further provision of the like kind was made in 1767. Ibid., 252, 662.

In 1720, the overseers of the poor were authorized and *required to bind out as apprentices the children of paupers. Ibid., 429. [*317

By the statute of 1793, c. 59, §§ 15 and 17, felons, convicts, and infamous persons are denied the right of landing in the Commonwealth, and shipmasters forbidden under penalties to bring in such.

By the statute of 1819, c. 165, master of vessels, if required by the overseers of the poor in any town, are obliged to give bonds to indemnify the town for three years against any cost or charge from persons brought in, who might become paupers.

By the statute of 1830, c. 150, masters of vessels are required to give bonds to indemnify the towns where they may land alien passengers against liability for their support as paupers, unless excused from so doing by the overseers of

the poor. And there is a further provision, that, by paying five dollars for any passenger, the claim for a bond should be commuted.

These various provisions were carried substantially into the Revised Statutes in 1836.

Thus stood the law at the end of nearly two hundred years from the first legislation now on record, by which it appears that the Colony, Province, and State had in succession asserted an unlimited power over paupers and pauperism. They asserted, not only the right to compel the body politic to provide for the poor, but they made the relatives within certain degrees contribute, if able; they bound out poor children, expelled from their territory paupers which belonged elsewhere, denied to such the right to come in, and also shut out convicts, felons, and infamous persons. They asserted manifestly the highest prerogative over the whole subject, and the State has, down to this time, considered its power in this respect unabridged. They went to the extent of determining for themselves of what and of whom their residents should consist, maintaining this right as well after the adoption of the Federal Constitution as before.

About the year 1830, perhaps a little later, the king of England appointed a commission to examine into the condition of the poor, and to report the evidence, and a plan of relief. By the increase of population and the introduction of machinery instead of the human hand in manufactures, the evil of pauperism had greatly increased, and demanded some expedient to mitigate its pressure.

This commission, after years of toil and taking an unexampled mass of evidence, reported it, with their comments thereon. The evidence comes from magistrates, parish officers, clergymen, &c., and discloses the most hideous details of poverty, distress, and profligacy that have ever been
*318] spread before *the public. It may all be found in the public library in this capital, but it would require a month's labor to peruse it.

The great fact material here is, that the commission found that several of the parishes had already adopted emigration as the most sure and effectual method of obtaining certain relief. They had, therefore, raised money to pay the charges of shipping paupers to foreign lands. The commission give it as their opinion, that this mode of disposing of paupers promised much, and ought to be encouraged. The fruits of this policy were soon visible among us. Indeed, such a fraudulent conspiracy to relieve themselves, not only of the

obligations of humanity, but of the expense of supporting their own helpless population, could not remain long concealed. Idiots, lunatics, the lame, the aged and infirm, women and children, were thrown upon our shore destitute of every thing, and our poor-houses were filled with foreigners in this hopeless and helpless condition.

The same plan of relief was also adopted at a later day on the Continent, and we seemed in a fair way to become the poor-house of Europe. The evil has gone on increasing, until not only the poor-houses and hospitals are full, but in Boston and New York immense sums have been expended in mitigating the sufferings of the alien poor and destitute.

The proof of these coming events was unmistakable farther back than 1837, when the act of Massachusetts now in question became a law. The State saw, not only parishes which were insensible to the dictates of humanity and capable of transporting their poor and destitute to unknown lands, there to leave them to the mercy of strangers, but relatives and kindred regardless of the ties of blood, who were willing to thrust from them the aged, the infirm, the insane, and the helpless, and to place them beyond the possibility of a return.

These were the circumstances which, in 1837, demanded legislation, and the act, in our view, met the exigency, and nothing more. It secures two things:—first, a bond to indemnify against the liability for the support of those wholly incapable of providing for themselves; and, secondly, two dollars for each and every other alien passenger. This bond and money must be furnished before the passengers are permitted to land.

It is admitted that the provisions of the act are reasonable, so far as regards the class who come *in formâ pauperis*, but the law in other respects is alleged to be invalid. It was said, among other things, that we lay hold of a ship before she comes to our jurisdiction; but this is evidently a total misapprehension, for she must, by the terms of the act, be within *our waters, in the port or harbour where the passengers are to be landed, before she is boarded and the passengers examined. [*319

The act is in every feature manifestly a pauper law, growing out of a pressing emergency, and although as lenient as the circumstances would allow, yet our right to make and enforce it is denied. We have seen that the State has exercised for two hundred years the right to make pauper laws. Can she do it now? I contend that this power is one

of her attributes of sovereignty, which she has never surrendered, and now has the right to enjoy.

That she has not granted it to the United States, and that they do not possess it, is obvious. And it is equally obvious that the States have generally exercised this power since the adoption of the Constitution. In *New York* v. *Miln*, 11 Pet., 141, the court say the police power of New York could not be more appropriately exercised than in providing against the evils of pauperism. Also, at page 142, they declare pauperism to be a moral pestilence, as much requiring protective measures as contagion or infection. In *Prigg* v. *Pennsylvania*, 16 Peters, 625, the court say the right to expel paupers and vagabonds is undoubted. The same principle is recognized and approved in the *License Cases*, 5 How., 629.

These authorities, as well as the case of *Holmes* v. *Jennison*, 14 Pet., 540, place the right of the State not only to regulate, but to expel, paupers in a very clear light. The State having this right, has she so used it as to regulate unlawfully foreign commerce, or has she usurped the taxing power of the United States? The ground assumed is, that the power of Congress to regulate commerce is exclusive, and hence the State can make no law which affects such commerce without regulating it unlawfully.

This power is not, by the terms of the grant, any more exclusive than the power over the militia, or the right to make bankrupt laws. Upon examination of the adjudged cases, it will be equally manifest that the court have not so settled the question. There are dicta which seem to look that way, and some learned judges who have sat upon this bench have expressed themselves satisfied with these dicta; but there are dicta, also, the other way, equally respectable.

The position assumed by the counsel is, that a State law made in the exercise of lawful power is unconstitutional, if it affects foreign commerce. This conclusion, I contend, cannot be maintained.

Gibbons v. *Ogden*, 9 Wheat., 1, is the leading case in which this question of exclusive authority has been agitated, and is the case supposed to give countenance to the idea, that the *320] *power is exclusive; and yet the court manifestly studiously avoid deciding the question. On the contrary, they give a construction to the powers and laws of the States irreconcilable with such exclusive rights as are now claimed. The court concede, in distinct terms, that the laws concerning pilots and pilotage, quarantine, health, harbours,—in short, police laws generally,—are constitutional, though they do interfere with, and to some extent regulate,

commerce. They rest on the police power of a State exercised for necessary purposes, and are police laws,—not laws regulating foreign commerce.

It is obvious that police and municipal laws do and must exist, to a great extent, and must, from the character of our government, deal with and affect foreign commerce. Debts must be collected and crimes punished; ships must be under sanitary and harbour regulations; pilots are indispensable; in general terms, life, property, and personal rights must be protected. All such laws, in their application to those engaged in foreign commerce, must affect and influence, nay, often tend to regulate, that commerce. They cannot be executed without, and, moreover, most of them must be State laws, and cannot be supplied by the United States if they had power to do it. The court saw all this when considering *Gibbons* v. *Ogden*, and declare, in terms not to be misapprehended, that police laws come from the acknowledged power of the State. They are, says the chief justice, police laws,—not laws regulating commerce. The fact that they do affect commerce does not make them unlawful, though the influence amounts to regulation, because they are made for other lawful purposes, and are as indispensable to the public welfare as foreign commerce.

The court were manifestly of opinion, that health laws, harbour laws, and police laws generally, do not conflict with the power of the United States to regulate commerce, nor disturb the harmony of the governments; but both the States and the United States may and ought to exercise their respective powers together in the ports which are common to both.

The doctrine distinctly maintained is, that all police laws are constitutional unless in conflict with some law of the United States. This opinion is fully sustained in the case of *New York* v. *Miln*, 11 Pet., 102, and in the *License Cases*, 5 How., 504.

This is irreconcilable with the proposition of the plaintiff's counsel, that such a law may be unconstitutional without collision with a law of the United States, and proves, moreover, that the power to regulate commerce is not exclusive.

The extent of the police powers of the State, and their right to concurrent jurisdiction over foreign commerce, for many purposes, within a State, are illustrated in the same case in another way, still more conclusive. The [*341] court say that police measures may be similar to the measures of the United States, the forms of law may be the same as those employed by the United States to regulate commerce, and yet such police acts are not unconstitutional, unless they

come in actual collision with the laws of the United States. The case, therefore, of *Gibbons* v. *Ogden* falls far short of maintaining the exclusive power over commerce which is set up in this case.

Thus stood the law in 1847, when the subject came under the consideration of the court in the *License Cases*, 5 How., when a majority of the bench concurred in opinion,—

1. That the question had not been judicially settled.

2. That the power to regulate foreign commerce is concurrent.

3. That there neither is nor can be any unconstitutionality in State laws regulating foreign commerce within State territory, unless such laws are in conflict with some law of Congress.

The question being thus finally disposed of, I come to the inquiry, whether there is any law of the United States in conflict with the law of Massachusetts. The plaintiff's counsel allege that such conflict does exist. But before examining the laws said to be in collision, I will ascertain, as far as I am able, the principles upon which unconstitutional conflict rests.

The Constitution of the United States declares that the laws of the United States shall be supreme; and it has been often held, that, in case of conflict, the law of a State must yield. But when does illegal conflict exist? What is the evidence of it? State laws must be similar to those of the United States, may act upon the same subjects and deal with the same persons, and not be in collision. State laws may control navigation, passengers, ship-owners, merchants, cargoes, &c., may enforce upon such civil process, criminal process, quarantine laws, health laws, pilotage laws, harbour laws, dock and wharfage laws, &c., and yet cause no collision, no repugnancy or incompatibility with the laws of the United States upon the same subjects.

It is not legislation upon the same subject, or every seeming conflict, then, that amounts to unconstitutional collision. The rule applicable to collision is laid down with some distinctness in 1 Story, Com., 432:—"In cases of implied limitations or prohibitions it is not sufficient to show a possible or potential inconvenience. There must be a plain incompatibility, a direct repugnancy, or an extreme potential inconvenience, leading to the same result."

*322] *A law may be potentially inconvenient, and yet constitutional. The system presupposes that the two governments must work together in the same territory, and upon the same objects, or they cannot enjoy the functions

confided to them. The first object, therefore, is to harmonize their action, and reconcile as far as possible the exercise of the powers belonging to each. The one, for example, has the care of life and health, the other of commerce; but life and health cannot be protected without controlling commerce. The object, then, should be to harmonize both, by not bringing into conflict any laws which can be reconciled by a liberal and fair interpretation of the Constitution.

Hence it is that repugnance must be direct and incompatibility plain, and hence it is that mere inconvenience is not to be regarded, and hence it is that the rule substantially excludes all cases of collision, except those which cannot be reconciled. If a navigator be arrested on board of a vessel about to sail, or the ship be seized for debt, it is attended with inconvenience. If the vessel and crew are detained at quarantine, or she is compelled to deposit ballast in a particular place, it may be inconvenient; and so it may be to take and pay a pilot. And yet it is manifest that, in most of these matters, the States do and must hold the right to make and enforce laws, and the law of collision must conform to this state of things. Congress neither can, nor was it ever designed it should, provide for all the public wants and exigencies in seaports. Hence the necessity of a concurrent, instead of an exclusive, jurisdiction in the regulation of commerce.

With these remarks, I now come to the inquiry, whether the acts which have been referred to are in collision with the law of Massachusetts.

The act of 1799, c. 110, § 46, (1 Stat. at L., 661,) exempts from duty the apparel, personal baggage, and mechanical implements of all passengers. The law of Massachusetts in no respect interferes with or impedes the execution of this act. It has no provision whatever in regard to apparel, baggage, or tools. Where, then, is the direct repugnancy, the plain incompatibility, required by the rule?

The act of 1819, c. 46, (2 Stat. at L., 488,) secures to passengers ship-room, by limiting the number to two for every five tons, and has provisions also, in regard to ship's stores. It requires, also, the master to report a list of the passengers.

These are all, except the last provision, designed to secure the comfort of the passengers while on the voyage. The law of Massachusetts neither impedes, modifies, nor changes any of the provisions. Indeed, the only thing in common to these acts and the law of Massachusetts is the fact that they relate to passengers. [*323

This last-named act was considered in *New York* v. *Miln*, and the law of that State declared not to be in conflict.

It seems to be supposed that a State has no power to legislate in regard to passengers; but this is a misapprehension. Because, as I have shown, the State has the right, as it possesses concurrent power over the subject, and because it does and has exercised the power in regard to quarantine and health, subjecting passengers to detention and rigorous restraint. The pauper law of Massachusetts is as much a police act as the health laws, and there is as urgent necessity for guarding against the evils of pauperism as against contagion.

The counsel next referred generally to the naturalization laws, leaving us to infer that the law of the State is in conflict with all of them. This may be so, but I have not sagacity enough to see in what way this conflict exists, or how the process of naturalization has any connection with foreign commerce, as it cannot occur until long after the subjects of it have arrived in the country. The connection, if any, is too remote to demand notice.

It is next said to be in conflict with the treaty of 1794 with Great Britain; but this treaty was abrogated by the war. The treaty of 1815, in its first article, is not very dissimilar from the fourteenth article of the treaty of 1794. It secures reciprocal liberty of commerce to the subjects of each country; but the terms are express, that persons doing business in the one country or the other shall be subject to the laws where they are. The laws of Massachusetts cannot, therefore, conflict with any rights secured by that treaty.

On the whole, there is no direct repugnancy or plain incompatibility with any law or treaty of the United States, and therefore no unconstitutional conflict. Indeed, it would be more than difficult to distinguish this law of Massachusetts, in its influence upon foreign commerce, from numerous police acts of the States.

If no other objection than collision can be found against the law of Massachusetts, it must remain in force. But other objections are raised. The right of the State to collect of the owners of a vessel two dollars for each alien passenger is denied, and this provision is supposed to furnish proof that the act is a regulation of commerce. It becomes necessary, therefore, to inquire what right a State has to impose taxes, and whether it is restrained from imposing this tax upon shipowners.

On this point I find the doctrines held by the court so

*precisely and clearly laid down, that I shall do little more than cite the language of the bench. In *McCulloch* v. *Maryland*, 4 Wheat., 425, the court declare, that the power of taxation is of vital importance to a State; that it is retained by the States; that it is not abridged by the grant of a similar power to the Union; that it is to be concurrently exercised; and that these are truths which have never been denied. [*324

In 2 Story's Com., 410, § 937, the author says,—"That the power of taxation remains in the States, concurrent and coextensive with that of Congress, the slightest attention to the subject will demonstrate beyond controversy."

In the *License Cases*, 5 How., 582, the chief justice says:—"The State power of taxation is concurrent with that of the general government, is equal to it, and is not bound to yield." Same case, p. 588, Justice McLean says:—"The power to tax is common to the Federal and State governments, and it may be exercised by each in taxing the same property; but this produces no conflict."

Most of these principles are fully recognized in *Providence Bank* v. *Billings*, 4 Pet., 561.

In *McCulloch* v. *Maryland*, in answer to a suggestion that the States might abuse so unlimited a power if the law of the United States is not supreme over it, the court say:—"This vital power may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the States. . . . The only security against abuse is found in the structure of the government itself." Again, at page 428,—"It is admitted that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it." Again, at page 429,—"It is obvious that the right of taxation is an incident of sovereignty, and is coextensive with it." The sovereignty is, therefore, the limit of the power.

In *Weston* v. *City of Charleston*, 2 Pet., 449, it is said,—"Where the right to tax exists, it is a right which acknowledges no limits. It may be carried to any extent within the jurisdiction of the State."

In *Providence Bank* v. *Billings*,—"The power may be exercised on any object brought within the jurisdiction."

The power, then, is vital, essential to the existence of a State, unabridged, concurrent, coextensive with that of the United States, coextensive with the sovereignty of the State, applies both to persons and property, knows no supreme law

over it, may reach any object brought within the jurisdiction, *and may be carried in its application to any extent the government chooses. *325]

This summary of the power is sufficient. It needs no commentary, being as broad, comprehensive, complete, and exclusive as can be desired; and yet we are asked if the State can tax a ship or a passenger. There is manifestly no limitation, except the prohibitions contained in the Constitution. The State may tax ships, wharves, warehouses, goods, men of every description, though engaged in commerce, unless restrained by positive prohibitions.

This brings me to inquire what the prohibitions are. In art. 1, § 10, is found the following language:—"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except, &c. . . . No State shall, without the consent of Congress, lay any duty of tonnage." These constitute the only limits to the power of taxation. It is in all other things concurrent and equal.

The law of Massachusetts imposes no duty either on imports or tonnage, unless a charge upon the owner, master, or consignee for bringing in alien passengers is a duty on imports or a duty on tonnage. What are imports? Are persons imports?

In *Brown* v. *Maryland*, 12 Wheat., 437, Chief Justice Marshall, in delivering the opinion of the court, says,—"An impost or duty on imports is a custom or tax levied on articles brought into the country."

Again, he says,—"If we appeal to usage for the meaning of the word [imports], we shall receive the same answer: they are the articles themselves which are brought into the country."

The prohibition relates to imports and tonnage alone; imports are the articles of merchandise brought into the country. Men are articles neither of merchandise nor tonnage, and cannot be imports, in any known signification of the term. No one thinks of calling men imports or exports or cargo, but passengers. They are never included in the manifest, or deemed a part of the cargo, nor are they subjected to any of the regulations which belong to imports. In *New York* v. *Miln*, 11 Pet., 136, the court say that goods are the subject of commerce; persons are not, nor do they belong to commerce.

It is supposed that the ninth section of the first article of the Constitution gives some countenance to the opinion, that men are imports; but this clause manifestly relates to slaves and the foreign slave trade, and the right to tax those persons imported was doubtless given to discourage the traffic. As soon as the twenty years ran out, Congress suppressed the

traffic, which indicates clearly the understanding in regard to the provision. *Moreover, the whole history of immi- [*326
gration shows clearly that the framers of the Constitution never anticipated interposing obstacles to it.

While, however, it is admitted that men are not usually classed with imports, yet it is contended that, in the form of imports, or as a tax generally upon commerce, the requirement of two dollars for each alien passenger is unlawful. I deny that any such inference can be drawn, without manifest violation of the constitutional rights of the States.

If any proposition is proved by authority piled on authority, it is that the right of taxation is coextensive with the jurisdiction of the State,—that it reaches all objects within that jurisdiction,—is uncontrolled by any superior power in the United States, having no limitations upon it except the prohibitions contained in the Constitution. Every thing except duties on imports and tonnage is left open for the States to exercise their authority upon it, when and in what manner they see fit.

The right to tax every thing connected with foreign commerce save these two things is unquestionable. This right is the thing declared by the court to be vital, sacred, indispensable to the existence of a State,—a right which cannot be relinquished,—a right not bound to yield to any other authority. This vital, sacred, fundamental right, the relinquishment of which cannot be presumed, is not a matter to be impaired or frittered away by construction. It cannot be diminished or invaded without plain and manifest authority for it from the Constitution. The State has a right, by the terms of the Constitution, to tax passengers, or ship-owners, or ship-masters, or any other class of men, because it had this right before the Constitution was made, and has not granted it away, or been prohibited the use of it. This substantive right is not covered or embraced by the terms of the prohibition, is a thing separate and distinct from imports and tonnage, and was designed to be left to the use of the States, as much as land or money at interest.

If the prohibition was intended to cover more than what every body understands to be imports and tonnage, if it were intended to exempt men or property from taxation because employed in foreign commerce, then the framers of the Constitution have utterly failed to express their meaning in intelligible language, which is highly improbable.

But if they did intend to limit the prohibition to imports and tonnage, as the language implies, how unjust it would be to enlarge that meaning so as to cover other things, by a

forced, unnatural construction of the language! Both justice to the States and the sacred character of this right forbid that it should be impaired by such a process.

*327] *It seems to be supposed by the plaintiff's counsel, that, if a tax has any bearing upon foreign commerce, this fact is proof that the State is regulating commerce, and has no right to maintain such a tax.

The fact, that taxes upon men or property employed in foreign commerce, or connected therewith, would have a bearing upon it, and tend to regulate it, was as well known when the Constitution was made as at this time, and yet the right to impose such taxes is manifestly left in the States.

It is said, nevertheless, that a tax upon commerce in any form tends just as much to regulate it as if it were upon imports or tonnage. This may be true; but as this power was purposely left in the States to this extent, the presumption is, that the makers of the Constitution intended they should have the power to regulate commerce to this extent.

But if the doctrine contended for be admitted, it would utterly defeat all right on the part of a State to tax any thing connected with foreign commerce, as the tendency of all taxation on such property or persons is to regulate it. Capital, ships, warehouses, goods, men, all would, upon this principle, be exempt, and yet we know, not only by practice, but from authority, that this unabridged right does extend to all these objects.

In 5 How., 576, the chief justice says:—"Undoubtedly a State may impose a tax upon its citizens, in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner."

Nothing can be given to the United States by construction, which is not taken from the States. The terms of the prohibition are plain. No State shall lay a duty on imports or tonnage. Is this a denial of right to tax men or any other thing? Is any thing reserved exclusively to the United States except imports and tonnage? And if not, how can a State be denied the right to its sources of revenue to the fullest extent?

We think the boundaries of jurisdiction are plainly marked by the language of the prohibition, and that it would be an unpardonable violation of the rights of the States to cover objects which are manifestly excluded.

But the case of *Brown* v. *Maryland*, 12 Wheat., 419, is much relied on to authorize a blow at the rights of the States. By this decision, two questions were raised and settled.

1. That a tax of $50 upon an importer, as such, for a license *to sell, and making it penal to sell the goods imported by himself before he pays such tax, is tantamount to a duty on the goods imported, and therefore within the prohibition of the Constitution. [*328

This case assumes that, if an importer is thus taxed, and denied the right to sell before he pays the tax, he is taxed because he is an importer and engaged in that business, and such a tax is evasive in form, for in substance it is a tax or duty on imports. The court take the ground, that what cannot be done directly cannot be done indirectly, but that the act, which, when done indirectly, is equivalent to its being done directly, must be clearly the same thing as that which is forbidden. In other words, it must be a manifest case of evasion,—one about which there can be no reasonable doubt. The court admit the right to tax classes of men, but deny the right to tax the importer because he imports, for that is equivalent to a duty on imports.

The decision of the first point comes to this and no more. The State may levy any tax which is not obviously a duty on imports, but it cannot, by indirection, do the precise thing forbidden. It seems to us very clear that men are not imports, nor were they ever thought of by the framers of the Constitution as reserved sources of revenue to the United States.

2. The court decided that such a tax upon the importer was a regulation of commerce, and therefore unconstitutional. The court maintained, that the importer who paid a duty to the United States was in fact the purchaser of a right to sell his goods, and they determined that this right was secured to him while the goods in the original bale remained in his hands, but no longer. The right, therefore, is limited to the importer, and to goods in the original bale in his hands.

The court were of opinion, that the right to tax imports in the original bale, if exercised by the States, might be carried so far as to defeat the sale, and in that case the tax would regulate the disposition of the goods by frustrating the trade. They therefore come to the conclusion, that the right to import implied the right to sell, under the limitations which have been stated.

This doctrine is probably pushed quite as far as the Constitution will bear. But passengers are not bales of goods, or articles of commerce, nor are they brought in to sell. No trade

is defeated or frustrated by the law of Massachusetts, nor is any commerce by water or on land regulated. The doctrine, therefore, maintained on the second point decided can have no application to the case under consideration.

There is, then, I apprehend, nothing in *Brown* v. *Maryland* *which tends to render the law of Massachusetts one of questionable authority. Men, I repeat, are not imports, or articles of trade or traffic. If they are, I would ask, Who is the importer? Who trades in them? Who claims the right to sell? Nor is there any thing in the more general view of the question which can support the view that they are constructively imports. Why do not the counsel contend that they are tonnage? This has been done in the progress of this case, though it now seems to be abandoned. It was said at one time, that one of the acts of the United States connects passengers with tonnage, as it forbids masters the right to bring more than two for each five tons of shipping, and hence the tax of Massachusetts was alleged to be a tonnage duty.

*329]

Nothing can illustrate more forcibly the danger of converting a tax upon a ship-owner or master for bringing in passengers into a duty on imports or a duty on tonnage than the fact, that ingenious minds hesitate and disagree as to which of two classes of things so utterly different in their character it shall be assigned. It proves, what is true, that there is no similarity to either, nor any congruity in the association. I trust, then, the power of the court will not be strained to diminish an obvious right of the State, in order to add to the increasing power of the United States.

I will now, without pursuing this inquiry further, return to an inquiry which I reserved in the outset. I have maintained that the law of Massachusetts is a police law, and although I have argued the two-dollar assessment as a revenue measure, yet I maintain that the police power carries with it a right to provide for the expense of executing any law which the public exigency demands.

Before considering the right of raising money, I will invite the attention of the court to the rights which the States are acknowledged to possess in regard to police authority, that we may see whether the law of Massachusetts oversteps the known limits of that power in dealing with individuals, or with the United States, or in raising money.

In 16 Pet., 625, it is said.—"We entertain no doubt whatever that the States in virtue of their general police power, possess full jurisdiction to arrest and restore runaway slaves, and remove them from their borders, and otherwise to secure themselves against their depredations and evil example, as

they certainly may do in cases of idlers, vagabonds, and paupers."

In 5 How., 629, *License Cases*, Mr. Justice Woodbury says, —"It is the undoubted and reserved power of every State as a political body to decide . . . . . who shall compose its population, who become its residents, who its citizens, who enjoy *the privileges of its laws, and be entitled to their protection and favor, and what kind of business it will tolerate and protect. And no one government, or its agents or navigators, possess any right to make another State, against its consent, a penitentiary or hospital or poor-house farm for its wretched outcasts, or a receptacle for its poisons to health and instruments of gambling and debauchery." [*330]

In *New York* v. *Miln*, 11 Pet., 141:—"There can be no mode in which the power to regulate internal police could be more appropriately exercised" (than in regard to paupers). "It is the duty of the State to protect its citizens from this evil; they have endeavoured to do so by passing, among other things, the section of the law in question. We should upon principle say that it had a right so to do." "We think it competent and as necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts, as it is to guard against physical pestilence, which may arise from unsound and infectious articles imported, or from a ship, the crew of which may be laboring under an infectious disease." (p. 142.)

In *Holmes* v. *Jennison*, 14 Pet., the same doctrine is maintained. Also in *Groves* v. *Slaughter*, 15 Pet., 516, *per* Mr. Justice Baldwin.

In 5 How., 629, *License Cases*, Mr. Justice Woodbury says, —"Who does not know that slaves [for sale] have been prohibited admittance by many of our States, whether coming from their neighbours or from abroad? And which of them [the States] cannot forbid their soil from being polluted by incendiaries and felons from any quarter?"

The constitutions of Kentucky, Mississippi, Alabama, Missouri, Arkansas,—all States admitted by the acts of Congress to the Union,—have provisions in their constitutions authorizing the legislatures to exclude slaves brought in for sale from other places. Nearly all the Slave States have laws upon this subject, forbidding the introduction of slaves as merchandise under penalties. The Free States go farther, and so do some of the Slave States, and emancipate the slaves thus brought in violation of the law. There have been, and probably now are, laws in force raising a revenue out of the sale of negroes brought from one State to another.

An account of most of these constitutions and laws may be found in *Groves* v. *Slaughter*, 15 Pet., Appendix, 75.

A particular and even minute examination of the provisions of these acts, and the power claimed by the States on this head, might be both useful and instructive; but I have no time to do more than invite the attention of the court to the subject, and make a few very obvious suggestions.

*331] *If they may, as these authorities certainly authorize them to do, exclude from their territory convicts, felons, vagabonds, paupers, and slaves, and if, as the Slave States claim, they may exclude and expel free negroes without violating the commercial powers of the United States, may they not manifestly exercise the lesser power of regulating the admission of any of these or any other classes of persons, and may they not prescribe the conditions upon which they shall be permitted to come in? If they may shut out or expel, does it not follow that the power to do so implies the power to make conditions?

Yet this is all that Massachusetts does. She says to shipmasters, If you will bring among us the insane, the imbecile, the infirm, and such as are incapable of providing for themselves, I will receive even these. I will permit those sent from the poor-houses of Europe to find a refuge here, but you shall indemnify me to some extent for the expense which will be incurred. You shall in one class of cases give bonds, in another pay a very moderate sum of money. I make this a condition upon which I open my territory to you.

I am aware that the regulations to which I have referred in regard to slaves have been considered regulations of police, and not regulations of commerce, although slaves are held and treated as property, being bought and sold like merchandise. If slavery can upon this ground be withdrawn from the commercial power of the United States, and committed exclusively to the States, then, I ask, how can those who entertain this opinion hesitate for a moment in regard to paupers and pauperism, which in no respect belong to trade, traffic, or commerce, but are manifestly subjects for police regulation? How, in a matter so clear, can the power and right of the State to regulate be doubted?

The law of Massachusetts has no reference whatever to foreign commerce, except as the instrument employed to inflict an injury upon the State. It is the avenue through which these persons are introduced, and is controlled just so far as is necessary to mitigate the evil and make it endurable, but no farther. Can we not do this? Is our right doubted and denied? Then I ask those who concede the power to enforce

penalties for a violation of non-intercourse laws in regard to slavery, and the right to raise revenue when sales are made of slaves from one State to another, on what ground these laws can be sustained. If the law of Massachusetts comes within the wide grasp of the commercial power of the United States, which goes, not only to foreign, but to commerce between the States, how are such laws to escape? How have they escaped hitherto? Have we no right to control the mercenary * shippers, who, stimulated by the hope of gain, are struggling to empty both the prisons and poor-houses of Europe upon us? I have read the language of this bench, in which they concede the right, and declare it to be our duty, to exercise our police power by protective and preventive measures. We are warned that it is as much our duty to provide against the moral pestilence of pauperism as against infection. We have not overstepped this boundary a hair's breadth; on the contrary, we have not come fully up to the advice, for we do not shut out the pestilence. [*332

What kind of measures are we authorized to adopt? We may, under the authority and sanction of this court, determine who shall reside with us; we may shut out or expel vagabonds and paupers; we may guard against moral and physical pestilence; we may protect life, health, and property; we may stop the approach of that foreign commerce which brings contagion; we may say to a ship-master, You shall take a pilot,—you shall anchor here, and deposit your ballast there. In a word, we may give as much direction to commerce as is necessary to accomplish these objects.

This is what we may do,—it is what is conceded to us by the highest authority. When we exact bonds of indemnity for lunatics, paupers, aged and infirm persons, and those incapable of supporting themselves, is it doing more than to protect ourselves by very reasonable measures? When we exact of masters two dollars for each alien brought in, to be expended in relieving these alien paupers, whom, if we receive, we must support, is this a measure outside of what is recommended?

How are we met when we attempt to exercise the power conceded to us? If we attempt to meet pauperism in the great highway of its introduction, we are rebuked for regulating foreign commerce, although everybody can see that, if this privilege be denied to us, we can take no effective measures to prevent its introduction; for we must see the persons and know their condition before we can decide what is expedient. Moreover nothing can be effectual that is not felt by

those who are chiefly instrumental in the introduction of such persons.

We may protect ourselves, say the court; but when, how, where? These are pregnant inquiries. Can we deal with paupers and pauperism as with contagion or infection? Can we hold those who bring the calamity upon us accountable? Can we protect ourselves as we do against the dangers of gun-powder and explosive articles, which put in peril life and property? We lay the burden of protective measures upon those who bring in such merchandise or such diseases.

*333] *What can a State do to avert or prevent, after the paupers and vagabonds are landed and mixed with the population? Such an exercise of the power conceded to us would be barren and useless. We must meet it on shipboard, as we do disease and dangerous merchandise. There we can put our hands upon the lunatics, idiots, aged and infirm paupers, &c. There we can learn what the ship-owner, the master, and the agents for emigration are about. There we can detect their conspiracy with the parishes of Europe to transfer their poor and their culprits to this country, to poison our morals and increase our burdens. There is the place, and the only place, to apply the corrective, where the evidence can lead to no mistake.

If we cannot meet the evil here, and regulate it here, the power to expel and the power to prevent are empty and worthless. The result will be, that ship-masters and traffickers in emigration can and will force upon us paupers, vagabonds, felons, and infamous persons, though we have an admitted power to expel them.

The Constitution was never designed to work out such results,—results which are as injurious to the United States as they are to the States. If we cannot meet and control by suitable regulations the introduction of such persons, on what principle can the laws expelling or forbidding the introduction of free negroes be sustained? Such laws exist, and I apprehend it will be found difficult to sustain them on the ground of color alone.

But I have dwelt, perhaps, sufficiently on this question of power to admit or deny to persons the right to live among us. A still more important inquiry, though secondary in principle, arises as to the power to exact two dollars for each alien, as a condition upon which he may come to abide here? I contend that this feature of the law (although, in reply to the arguments of counsel, it has been treated as a revenue measure) is, in fact, strictly a police measure.

The counsel deny that the State has a right to take any

money in execution of the law. I trust we have vindicated the right, as belonging to the reserved power of the State to tax whatever is within its territory; but whether we have or not, there can be little doubt that police laws carry with them the inherent right to raise in some form sufficient funds to execute the law.

It is upon this ground that fees are paid to pilots, and that masters are compelled to pay, whether they take a pilot or not. It is on this ground that ship-owners are obliged to pay the expenses, often large, of quarantine and health laws. It is on this ground that ballast laws and harbour laws are enforced. *All such acts subject the party, either to [*334 expense or to what is equivalent.

These police acts all stand on the firm basis of acknowledged right. The authority of a State to maintain and enforce them is admitted. They are mostly precautionary measures, found necessary for the public welfare. The principle running through them all is, that those who give occasion to resort to corrective legislation must bear the expense. It may be a great misfortune to have contagion on board of a vessel; but those who sail her bring it in, and must bear the expense of the measures necessary to preserve the public health. This right goes, not only to the requirement of money, but to the destruction of property, when safety demands it. This principle is inherent in the police system, and if it were not,—if the expense of executing such laws could not be exacted,—they could not be executed at all. The State manifestly ought not to be required to pay pilots, or for the expense of quarantine.

Is there any well-founded distinction between this mode of employing police power and that adopted by Massachusetts? Is not protection against paupers just as necessary and completely police in its character as the preservation of health?

Let us look attentively at the law of Massachusetts in this particular. It manifestly cannot be executed without expense. Officers, boats, and boatmen are necessary, for vessels must be boarded. The passengers must be examined, and bonds, in some cases, required. These are admitted to be appropriate measures, but they cannot be executed without money. Those who can give no bonds must be sent back, and this is attended with large expenses.

It is obvious that the amount of expense can neither be foreseen nor accurately estimated. What rule could, under such circumstances, be adopted for raising funds? The legislature, being left at discretion, thought, in the then ex-

isting state of things, a scale equal to two dollars each for such aliens as gave no bonds would be adequate to the exigency, and accordingly required the master to pay that much. And the Supreme Court of Massachusetts say, that it little more than covered the actual expense at the time this suit was instituted. There has since been a great increase of the number of aliens arriving annually in Massachusetts, and this fact is employed to lead the court to erroneous conclusions. We believe, however, the case is to be decided by the record, and if so, it will be seen that the record does not object to the amount of money raised, but to the right to raise any. The objection is to the power of the State to demand any. We say we have a right to enough to meet all
*335] expenses, at least, under any view of constitutional *power which may be taken, and that an excess can not be noticed by the court unless the fact appears upon the record.

I have now chiefly gone over the material considerations connected with this case, and feel deeply conscious that I have but too imperfectly discharged the duty imposed upon me. I will, however, briefly recapitulate the positions which have been assumed, that the court may, at a glance, see in connection the grounds upon which we stand.

1st. I have maintained that the law of Massachusetts is a police act for the regulation of paupers and pauperism.

2d. That the State has a right to make such laws, which are but a modification of a system which has been maintained by her people for two hundred years, who have and do claim the right of unqualified sovereignty in this particular.

3d. That although the Constitution gives to Congress the power to regulate foreign commerce, yet this is not an exclusive but a concurrent power, and that, consequently, the State may, within its own limits, regulate foreign commerce, provided it does not make laws for that purpose which are repugnant to the laws of the United States.

4th. That no such conflict or repugnancy does exist between the law of Massachusetts and any law of the United States, and therefore the law of Massachusetts is valid.

5th. That two views might be taken of that provision of the law which required the master to pay after the rate of two dollars each for all alien passengers brought into port and landed.

First, the counsel for the plaintiff maintains that it is a tax for revenue, and as such is a regulation of commerce. We meet them on this ground by saying, that the provision can be and is maintained under the taxing power of the State.

which, being concurrent and coextensive with that of the United States, and equal to it, necessarily confers the right to tax navigators, owners, passengers, or any other class of persons engaged in commerce, unless the State is restrained by the prohibitions in the Constitution; that these are limited to duties on imports and tonnage; that men are neither the one nor the other, nor are they the subjects of trade and commerce, as they are not bought, or sold, or brought into the country by any one for the purposes of trade. They are, therefore, excluded from the prohibitions, and are left to the State as a resource of revenue, and may be taxed.

The other view follows out the principle upon which we start, namely, that the law is strictly a police act made to correct an existing and growing evil, and stands upon the same basis as the quarantine and health laws of the States. In looking at the subject in this aspect we contended that the States *do, and always have, exercised an extensive concurrent jurisdiction over foreign commerce, [*396 and those employed in it; that the laws of the States which relate to shipping, wharves, docks, piers, harbours, and the men employed in foreign commerce, are innumerable, and, as was well said by Mr. Justice Catron, so numerous and diversified that Congress could not supply them in a century. I said that hence the necessity of a concurrent exercise of the power over foreign commerce was apparent. Our system, as a whole, is complicated; two governments spread over the same territory, but for different purposes, must impinge upon each other occasionally. But the day has gone by when we need feel any alarm from the strength of individual States. Virginia once held a twelfth of the political power in the Senate; now, she holds but a thirtieth, and her relative importance to the Union has waned beyond that proportion. The States, at every advance of the power and strength of the Union by an increase of the members of the confederacy, lose something of their relative importance and comparative strength. They go backward in the process, while the confederacy goes forward. This is a warning to us to take nothing from the power of the States to add to the power of the Union, for in the States lies the strength of the Union. This federal government is wholly incapable of managing the great and complicated affairs of this wide-spread country. It cannot legislate for the local wants of Maine and Texas. These are supplied by the local legislatures of the States, whose powers are so great, so diversified, and so comprehensive, that, if this government were suspended in its operations, our persons and property would remain secure. Jus-

tice would be administered, and good order just as well preserved as it is now. The only material derangement would be in the foreign trade and commerce. It is manifest that our strength, and the durability of our system, lie in the federative principle,—in the organization of States, whose powers embrace every thing except a very few national objects. The limitation of this government to such objects alone gives to it its strength and usefulness, and the most unwise if not the most fatal, course it can take will be to arrogate to itself the power of the States, by taking from them what they have been accustomed to enjoy through the whole Federal history. The counsel say the power over foreign commerce is exclusive, and no doubt this doctrine extends also to commerce between the States. Commerce consists of every thing belonging to trade and navigation. It is manifest, however, that the States have managed, controlled, and regulated at all times nine-tenths of this inter-
*337] course. Their laws prevail, not only in the *ports, harbours, cities, &c., but I know of no attempt on the part of the United States to regulate in any way the trade between New Hampshire, Vermont, Rhode Island, and Massachusetts, or that between New Jersey, Connecticut, and New York. The great markets draw their daily supplies from the neighbouring States, which in turn supply their wants from those markets. Hitherto the United States have wisely left all these things undisturbed in the hands of the States; but if ever a contest grows up concerning this power, the decision must be that it is concurrent, as the United States are utterly incompetent to supply the necessary legislation. This is sufficiently manifest, if we take this District of Columbia as an example of the capacity and ability of Congress to administer to local wants.

Such are the grounds upon which I have endeavoured to place the merits of the questions involved. We are opposed at every step, and whatever position we assume, it is alleged to be within the supposed mischief complained of. We are denied the right to board a vessel for the purpose of examining the passengers. We were always till now denied by the counsel the right to exact, in any case, a bond of indemnity for alien paupers; and as a bond is a contingent liability to pay money, it is difficult to see how it can be lawful, though it is now conceded to be so, while a claim for money is denounced as unlawful. The one right stands upon no better foundation than the other.

We are denied the right to demand money for any purpose. We can do none of these things without regulating unlaw-

fully foreign commerce. We cannot meet and correct the evil of pauperism. England, Ireland, and Germany may empty their poor-houses upon us, and compel us to assume their burdens and to perform their duties to humanity, because we are passive, powerless instruments in their hands.

We do not believe that the States are thus shorn of their authority, or that the Constitution of the United States was ever designed to cover such broad ground, and therefore we feel confident that the law of Massachusetts is constitutional.

SMITH *v.* TURNER.

Mr. Willis Hall, for the defendant in error.

On the former argument of this cause, the distinguished counsel who will conclude this discussion illustrated it by supposing a citizen of the United States coming from Charleston by water to arrive in the harbour of New York; it may be a member of Congress, on his way to discharge his legislative *functions in the Capitol, or it may be one of this [*338
honorable court, proceeding to his seat in this august tribunal. His progress is arrested, and he is not allowed to proceed until he has paid a dollar to an official of the State or city of New York. This is true. Nor is this citizen allowed to enter the city at all, if infected with the yellow-fever or any other infectious disease. And if he approaches the city by land, he will not be allowed to enter the ferry-boat at Jersey City until he has paid the toll.

It would be a truer illustration to suppose a citizen or an alien,—no matter whom, the President of the United States or the humblest individual that ever entered the harbour,—any person capable of being the vehicle of infectious disease,—to approach our city, bringing infection, bearing death to thousands,—an approach more dreadful than that of an invading army. He is repelled,—justly repelled,—by the express authority of the law of nations. (Vattel, Book 2, ch. 9, § 123.)

By whom is he repelled? By the Federal government? Under what clause of the Constitution? Under which of its powers? Under its commercial power?—A traffic in contagion! a tariff upon disease! Under its war power?—A war with the king of terrors! No. The State, and the State alone, has the power, and alone is charged with the duty, of repelling disease, and of guarding its confines from the entrance of whatever might injure its citizens.

To turn away the stranger to perish was uncivilized and unchristian; but long experience proved that it was also un-

safe. Men thus desperately situated would find means to communicate with their friends on shore, and thus the infection would be propagated in spite of all efforts at prevention.

The perception of this necessity, increasing wealth, a better civilization, and a larger infusion of the Christian maxim, "Do as you would be done by," at length erected a hospital on the coast, in connection with the quarantine, for the exclusive use of all persons entering our harbour from the sea, until they can safely be permitted to enter our thronged city.

How should the expenses of the quarantine and its appurtenances be defrayed? By the passenger, or by the State? The State did not invite the stranger to her shores. He did not come for her benefit. The misfortune which has fallen upon or threatens him is not of her procuring. Why should she divide the evil with him?

It is eminently proper that the passenger should pay all reasonable and proper expenses. He receives all the direct benefit, and the maxim applies, "*Qui sentit commodum debit et sentire onus.*" Here the State is indirectly benefited. So *339] it *is by a turnpike; but the traveller, who receives the direct benefit, pays the toll. So in Europe it is supposed that the safety of society requires the adoption of a law in every nation that no one shall travel through the territory without a passport, but the traveller, and not the State, pays for the passport. The State is under no obligation to permit the passenger to enter her territory at all. Nothing can be more reasonable, therefore, than that she should make it the condition of his admission, that he should pay all the expenses which his admission occasions.

The record in this case shows, that, some time in 1841, the plaintiff, as master of the ship Henry Bliss, brought into the port of New York, from Liverpool, a foreign port, and landed, two hundred and ninety-five steerage passengers.

1. Rev. Stat., p. 436, § 7, requires "the health-commissioner of the port of New York to demand, and, in case of refusal or neglect to pay, to sue for and recover, in his name of office, the following sums, from the master of every vessel that shall arrive in the port of New York, viz.:—For the master and each cabin passenger in a vessel arriving from a foreign port, one dollar and fifty cents. For each steerage passenger, mate, sailor, or mariner, one dollar."

The defendant, as health-commissioner, demanded of the plaintiff, as master, &c., the sum of two hundred and ninety-five dollars for the use of the quarantine, for that number of steerage passengers brought by him in his vessel as aforesaid.

The master refused to pay, and the health-commissioner sued, as required by the statute.

The action is debt on the statute. The master demurred, on the ground that the State law is contrary to the Constitution of the United States, and void.

The Supreme Court of New York overruled the demurrer, denying that the State law is contrary to the Constitution of the United States, and declaring that the principle involved is essentially the same as that involved in the case of *New York* v. *Miln*, 11 Pet., decided by this court in favor of the State law.

The master appealed from this decision to the Court of Errors, the highest court in our State, and that court unanimously affirmed the decision of the Supreme Court. From that court the master has appealed to this high tribunal, and the only specification which he makes of the unconstitutionality which he alleges against the State law is, that it is a regulation of commerce over which the State has no jurisdiction.

This cause has already been once elaborately argued before the court. Cases involving analogous principles have since *been fully discussed by very eminent counsel. This re-argument which has been ordered admonishes me [*340 that the case itself has been thoroughly investigated by the court, which, after viewing it in every aspect, by the light of all the arguments which have been suggested, still finds itself perplexed with doubt and surrounded with difficulties.

Under these circumstances, far abler counsel might well despair of being able to present a new view of the case, or a new argument; but if I cannot hope to enlighten, I will promise at least not to detain the court longer than is necessary to run rapidly over the brief which I have prepared.

I. Our quarantine, as now established, rests upon two laws, both passed on the same day, both having a common origin, both made with obvious reference to each other, although by different legislatures, and both forming in fact but one law.

The first was passed by the State on the 27th of February, 1799. The second was enacted by the Federal government on the same day. To be understood, they must be collated and traced historically.

Far removed from danger, we now coolly discuss the provisions of laws made in the very agony of fear. We must retrace our steps; we must catch the spirit of the times before we can understand or appreciate the various provisions of those laws.

The State law is the one establishing the quarantine and marine hospital at Staten Island, and which adopts the provision as to passengers substantially as it now exists.

The law which in these days of State rights is sought to be overthrown, as going too far in asserting the separate existence of the States, was passed in the heyday of Federalism and consolidation. It was passed by a Federal legislature, a Federal council of revision, and signed by John Jay, as Governor. If it is obnoxious to the objections now urged against it, the objectionable clauses have not crept in through any oversight or inadvertence on the part of its framers. No law was ever better considered, both as to its efficiency for the purpose intended, and as to its collision with any law of the United States.

This obnoxious law was reported by a joint special committee, of which Aaron Burr was a member and De Witt Clinton was chairman. For ten years prior, the yellow-fever had raged almost annually in the city, and annual laws were passed to resist it. The wit of man was exhausted, but in vain. Never did the pestilence rage more violently than in the summer of 1798. The State was in despair. The rising hopes of the metropolis began to fade. The opinion was *341] gaining ground, *that the cause of this annual disease was indigenous, and that all precautions against its importation were useless. But the leading spirits of that day were unwilling to give up the city without a final desperate effort. The havoc in the summer of 1798 is represented as terrific. The whole country was roused. A *cordon sanitaire* was thrown around the city. Governor Mifflin of Pennsylvania proclaimed a non-intercourse between New York and Philadelphia. This may be thought to conflict strangely with the doctrine, that the Federal government alone has jurisdiction of commerce between the States, but it may serve as an illustration that the police laws of the States are paramount; that when men are trembling for their lives, no commercial regulations can oppose a moment's obstacle. Fasts were proclaimed in Connecticut and in the neighboring cities, and when the pestilence had subsided, thanksgivings were proclaimed in this and the neighboring States. Governor Jay called the attention of the legislature to the subject in his message, and they responded by appointing a joint special committee of the Senate and Assembly, at the head of which they placed De Witt Clinton, then a senator from the city of New York, just commencing that glorious career which has since rendered his name immortal. This act of raising a special joint committee of the two houses is as rare, and

almost as significant of great danger impending over the republic, as that of appointing a dictator in ancient Rome. This joint committee reported the law of 1799 as a supplement to the law of 1798. This law contemplated, by an express provision, that the aid of the United States should be sought as far as deemed necessary, and another provision of the law imposed a light charge upon passengers, for the purpose of supporting the establishment.

The system then established has continued without material variation to this day. It seems to have had two objects in view:—

1st. To cut off completely all intercourse between persons under quarantine and the city.

To effect this, the law required that the quarantine should be removed from Governor's Island, which was within three quarters of a mile of the city, to Staten Island, which was more than nine miles distant. It also required a plot of forty acres of ground to be purchased, and a wall to be thrown around it as high and impassible as that of a state prison, that no one might enter or escape without the permission of the health-officer. It also directed that a marine hospital should be built within the wall, and adequate accommodations prepared for all who should be sent to quarantine.

*2d. The second object of the law was to cut off all communication between the vessel and goods, and the city. [*342

To do this, they must put an end to the practice of suspected vessels breaking bulk at the wharves. They doubted their constitutional rights thus to interfere with the landing of goods. They were puritanically scrupulous as to their federal duties. But neither Jay, nor Clinton, nor Burr, ever doubted their entire right over persons, either to prohibit their landing or to prescribe such conditions as they saw fit.

To obviate this constitutional difficulty as to their interfering with the landing of goods, they determined to apply to the Federal government. Accordingly, a clause was introduced into the law directing the Governor to make the application if he saw fit. This was the origin of the Federal law. The court will perceive that it is directly connected with the State law, and obviously made with reference to it. Governor Jay had already applied to the Federal government. He induced his friend, John Adams, to advert to the subject as follows, in his message of December 8th, 1798:—

"While, with reverence and resignation, we contemplate the dispensations of Divine Providence in the alarming and destructive pestilence with which several of our cities

and towns have been visited, there is cause for gratitude and mutual congratulations that the malady has disappeared, and that we are again permitted to assemble in safety at the seat of government for the discharge of our important duties. But when we reflect that this fatal disorder has, within a few years, made repeated ravages in some of our principal sea ports, and with increased malignancy, and when we consider the magnitude of the evils arising from the interruption of public and private business, whereby the national interests are deeply affected, I think it my duty to invite the legislature of the Union to examine the expediency of establishing suitable regulations in aid of the health laws of the respective States."

In the response, which was then customary, from the Senate, they reply to this recommendation as follows:—

"Sympathy for the sufferings of our fellow-creatures from disease, and the important interests of the Union, demand of the national legislation a ready coöperation with the State governments in the use of such means as seem best calculated to prevent the return of this fatal calamity." Senate Journal, p. 21.

Thus it appears that neither the President nor the Senate contemplated the establishment of a complete system, but merely a law auxiliary to the State systems. Of course it became necessary to examine the State systems to see what *343] aid *was required, and especially the New York system, with special reference to which this legislation was called for.

In compliance with this recommendation of the President, Congress passed the law of the 25th of February, 1799.

This law begins by requiring the collectors and revenue-officers to observe the restrictions imposed upon vessels by the State health laws, and to aid in their execution. It next provides for landing goods elsewhere than at the wharves of a city. It then requires the parties interested to pay for storage of goods "landed elsewhere," &c.

Of this law it is to be observed,—

1st. That it confines itself entirely to goods over which it was supposed, under its commercial powers and its exclusive right to collect duties, it must exercise an exclusive control.

2d. That it provides no means of supporting the quarantine. This is a universal charge throughout Europe wherever quarantines are established.

This was an oversight, for the law provides for the expenses of purifying and storing goods, but says nothing of the expenses of purifying, healing, and maintaining passen-

gers. This omission is fully accounted for by the fact that all the State laws, and especially the laws of New York, had already provided for the general expenses of the quarantine, and Congress had knowledge of those laws, and was satisfied with them. Another inference from the omission of this essential provision is, that Congress doubted its power to lay a tonnage or other duty for any such purpose. It certainly has no such power except under the general welfare clause, which was then stoutly denied by a party which, two years afterwards, gained the ascendency, which it has subsequently maintained.

3d. A third observation is, that it was passed on the same day with the State law which suggested to the governor the propriety of calling on the Federal government for aid, and the perfect understanding which existed at that time beween the two governments leaves no room to doubt that it was passed mainly at the instigation of Governor Jay,—that it was made especially with reference to the New York law,—that the two laws form, in fact, but one,—that to be understood they must be read together,—that the Federal law contains not only a general, but a particular sanction of every section in the State law.

In reliance upon these two laws thus established, New York has gone to great expense in forming an adequate establishment for our harbour,—one which has protected the city since its complete establishment in 1805. Of its efficiency, a distinguished physician of New Orleans thus speaks:—"If the *disease is not communicable by infection, how can we account for the fact that in a few years five physicians, health-officers for the quarantine of New York, have fallen victims to it, while there has not been a case known in that city for twenty-two years?" [*344

From the foregoing facts another conclusion arises worth noting. New York has acted in good faith. Under color of police regulations, she has not attempted to regulate commerce. In her legislation she has had no object in view but protection from disease.

II. The charge which the State, by her law, exacts from passengers arriving in the port of New York to support her quarantine, is merely a common-law toll, and may be defended on the same principles as the ferriage from Staten Island to the city. All the rules of a toll apply to it.

1st. It is established by the State for the support of work done for the public good, to be paid by those only who are especially benefited by it. 1 Mod., 474; Cro. Eliz., 711.

2d. It is supported by a good consideration, which is

necessary to a toll. 2 Wils., 296; 4 Taunt., 520; 10 Barn. & C., 508.

Those who do not go to the hospital receive a consideration, as well as those who do. The probability of advantage is as good a consideration as the actual enjoyment of the consideration.

Ramsgate harbor is supported by a toll upon all vessels, whether they enter or not, which come into a situation from which they would be compelled to seek refuge there in case of a storm. 3 Wm. Bl., 714.

If a port of refuge is a proper subject of toll at a point where it becomes essential in case of a storm, much more is a hospital of refuge, at a point where there is peculiar danger of disease, and when, without it, disease would be death.

This principle of charging those who receive no actual benefit is very common. It is sufficient to instance pilotage. It is part of every system of pilotage, that, if a pilot offers, the vessel must pay pilotage whether she receives or rejects him.

3d. There is an essential difference between a toll and a tax. *Tax* comes from a word that means the arrangement of the items of the public account. It has long since come to mean the charge which the government exacts of its citizens for its support. A tax is public, a toll private. A toll rests upon a good consideration. A tax is irrespective of consideration; it rests upon the authority of government alone; it is as imperative in a bad government as a good. That the distinction is a substantial one appears from the fact, that in England a toll *may be granted by the king, but a tax can be levied only by an act of Parliament. Cro. Eliz., 559; 3 Lev., 424; 2 Mod., 143; 4 Id., 323.

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In this respect, this case differs from the Massachusetts case, which was argued at the last term, and is about to be re-argued. There the two dollars exacted of the passenger for the benefit of the almshouse is applied to a purpose in which the passenger has no particular interest. It might as well have been applied to any other, or be paid at once into the treasury of the State, for its use for all purposes. It is, therefore, a tax, and rests upon the authority of government alone; but for the New York charge there is a fair equivalent,—it rests upon a private consideration.

III. In all ports, quarantine (including lazarettos) is now one of the established charges. It is of modern origin. None prior to the plague in Marseilles in 1720. McCulloch's Dict., Art. *Quarantine;* Howard on Lazarettos, *passim.*

The charge in England is much higher than it is here; indeed, the charge here is less than in any other commercial nation. The necessity of these establishments is now universally admitted by all disinterested persons.

The laws relating to quarantine in all nations are usually classed among municipal regulations. They are so in France. (See Dict. de Jurisprudence, Arts. *Autorité Municipale*, and *Salubrité Publique*.) They are so in England. Evans, in his collection of statutes, places them among police and criminal laws. (6 Evans, Stat., 142.)

For convenience, quarantine charges in England are collected at the custom-house; but they are carried to the consolidated fund. (45 Geo. III., c. 10, § 7.) This fund is devoted to the support of the king's household and the civil expenses of the internal government. 1 Bl. Com., 331.

They are so also in Denmark. A remarkable illustration of this fact appears in the recent discussion of the "Sound dues." In a communication on the subject from the Secretary of State, (the distinguished counsel who concludes this argument,) attached to President Tyler's inaugural message of June, 1841, the Sound dues were complained of as unreasonable. When the territory on both sides of the Sound (it is said) belonged to Denmark, there may have been some foundation for the charge; but the territory on the north of the Sound has, for several centuries, been an independent nation. There is, therefore, no longer a pretext for the exaction. The distinguished counsel admitted that the port charges which arose in consequence of being compelled to go into port to pay the dues were properly payable, for they rested upon an equivalent. By turning to *our own State papers (2 [*346
Com. and Nav., 144), it will be seen that one of these port charges is for quarantine.

Again, all the maritime States of the Union have considered quarantines as an internal municipal regulation, entirely within their jurisdiction, and no one has ever thought of applying to the Union on the subject, except where they have attempted to defray the expense by a tonnage duty, which can be laid by a State only by consent of Congress.

Virginia has never applied to Congress on the subject. She requires the master or owners of the vessel to defray the expense.

Pennsylvania and Delaware have never asked the assent of Congress to any law. They defray expenses precisely as is prescribed by the New York law.

Maryland, South Carolina, and Georgia have established their own systems, but they have preferred to defray the ex-

penses by a tonnage duty. To do this, they were of course compelled to get the permission of Congress.

New York has considered them as municipal regulations under every dynasty. The first law on the subject on her statute-book appears in 1758. (2 Liv. and Smith, Col. Laws, ch. 199.) She was then a Colony. All her commerce was then regulated in London, as now in Washington. Yet the execution of this law was in the hands of the Colonial authorities. They prohibited the vessel from landing, until examined and purified, and charged all expenses to the master. This interference was not considered a regulation of commerce by the mother country.

The same law was reënacted *verbatim* in 1784. (1 Greenl., 117.) New York was then a separate and independent sovereignty, and had her own custom-house and revenue officers. Yet the execution of this law was given, not to her revenue officers, but to the master and wardens of the port.

The third law was passed in 1794. (3 Grecnl., 146.) New York had then become a member of the Federal Union. This law assumed the whole subject of quarantine, and all its appendages, as being under the exclusive control of the State.

Thus quarantine laws passed in three widely different dynasties preserve to the quarantine of New York the same municipal character.

This slight review of the New York laws cannot fail to impress upon the court, not only that she has always considered them essentially police laws, but that the construction which New York has put upon her rights to impose quarantine charges upon master, owner, or passengers was contemporaneous with the Constitution, and has been continued without
*347] *objection more than half a century. We claim, therefore, the application of the rule in Stuart's case, that "a contemporaneous exposition of the Constitution of the United States, adopted in practice and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it." (1 Cranch, 299.)

IV. All the legislation of the United States on this subject has been in corroboration and recognition of the State quarantine and health laws, and whenever this court has adverted to them, it has been to approve of them, as within the State authority, notwithstanding their admitted interference with commerce. The United States have passed three laws on the subject.

The first was the law of May 27th, 1796. (1 Story, Laws. 432.) This law simply required the President to direct the

revenue-officers to aid in the execution of quarantine, and also the health laws of the States.

Hypercriticism may contend that the establishment of a marine hospital on the quarantine grounds, for the exclusive reception of infected persons thrown upon our coast from the sea, has nothing to do with quarantine. But it is absurd to say that it is not a pertinent and appropriate part of our health laws, and under the express sanction and protection of the United States law of 1796.

The second law was passed on the 25th of February, 1799. This law we have already examined, and found that the whole purport of the law, as well as the proposition in the President's message, was to come in aid of the State laws.

The third law was passed on the 13th of July, 1832. It simply authorizes the Secretary of the Treasury to employ additional boats, if necessary, to aid State quarantines.

These laws sanction the whole system of State quarantines, and every thing appurtenant to quarantines, such as hospitals, and the means of purification, and the preventing the spreading of contagion. Of these laws Chief Justice Marshall has said,—"The laws of the United States expressly sanction the health laws of a State." (12 Wheat., 444.)

Again, the decisions of this court, in harmony with the laws of the United States, have always spoken with approbation of the health laws of the States. In *Gibbons* v. *Ogden*, Chief Justice Marshall holds the following language:—"The inspection laws form a portion of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government: all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal [*348
commerce of a State, and those with respect to turnpike-roads, ferries, &c., are component parts of this mass." (9 Wheat., 203.)

In numerous subsequent decisions, this court have always adverted to this class of State laws in the same strain.

To this it will be said, in reply, This doctrine is readily admitted, but a marine hospital is no essential part of a system of health laws. We answer,—

First, a marine hospital or lazaretto is connected with the quarantine in every nation in Europe.

Secondly, nearly a century's experience in our own port, with and without a hospital, has demonstrated its necessity.

Thirdly, the State, which has the sole discretion in the matter, has deemed it a necessary part of her quarantine.

A quarantine regulation is not merely a detention of forty, or twenty, or any other number of days. Instead of a detention, it may be a deviation, a requiring of passengers to be landed at a particular point, or it may be an order that the sick shall be received into a hospital made for the purpose, and cared for.

V. It must be admitted that the States may pass quarantine and health regulations, that is, laws to prevent the introduction of infection into their harbours. Consequently, they may resort to such means for that purpose, and to defray the expense, as they judge expedient, and as are within their jurisdiction.

The possession of the power to establish embraces the power to support. For example, the Constitution gives the power to Congress to establish post-offices. Under that power they have always exercised the right, without dispute, to exact postages.

It is a maxim in this court, laid down in the case of Miln and in numerous other cases, that a State has jurisdiction of all means not prohibited to it by the Federal or State constitution. It is not pretended that the means resorted to in this case are prohibited by the State constitution; nor could such prohibition, if it existed, be the subject of inquiry in this court.

VI. The whole controversy, then, reduces itself to the single question, Is the means which has been resorted to by the State of New York to support its quarantine and health laws —that of exacting a toll or tax of passengers—prohibited to it by the Federal Constitution? We confidently aver that it is not.

1st. This power, which is included in the power to prohibit the entrance or exit to and from the territories of the States, is nowhere given to the Federal government. It is nowhere granted as a substantive power. The power to grant ingress and egress to and from its territory belongs to every sovereign *State. (Vattel, Lib. 2, ch. 7, § 98; 2 Ruth. Inst., 476.) They may, therefore, attach what conditions they please to this privilege.

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In the distribution of the substantive powers of government between the sovereignty of the United States and the State sovereignties, those only which were expressly granted fall to the share of the United States; all others remain with the States. In 4 Wheat., 195, this court say:—"It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the

States as existing over such cases as the laws of the Union may not reach."

By a substantive power is meant a power which may be exercised, not as a means, but an end. It must be expressly granted, either directly and distinctly by name, or indirectly, as included in and and adhering to some other granted power. This power is nowhere granted by name, nor is included in any other grant of power.

First, it is not included in the ninth section of the first article of the Constitution,—"The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

This is a case of migration, not of importation. This section gives Congress no power over migration. It recognizes a preëxisting right in the States to exclude it at all times, and says Congress shall not exclude it before 1808. Where does Congress get the power to exclude it after 1808? The prohibition of the exercise of a power for a limited time, which Congress did not possess before at all, cannot give it to them. Congress cannot take power, not as a means, but as an end, by implication. Such a conclusion is effectually excluded by the tenth amendment:—"The powers not delegated to the United States, nor prohibited to the States, are reserved to the States or the people."

Again, this section at the time was explained, and has ever since been construed, as having no other effect than giving Congress power, after 1808, to prohibit the slave-trade.

Judge Iredell, the leading member of the Convention from North Carolina, thus explains this section when submitted to the State convention:—"The Eastern States, who long ago have abolished slavery, did not approve of the expression *slaves*. They therefore used another, which answered the same purpose. . . . The word *migration* refers to free persons, but the word *importation* refers to slaves, because free [*350 persons cannot be said to be imported." (3 Ell. Deb., 1st ed., p. 98.)

Judge Wilson, who had the largest agency in forming the Constitution of any man except Madison, thus explains this section to the convention of Pennsylvania:—"Under the present confederation, the States may admit the importation of slaves as long as they please; but by this article, after the year 1808 the Congress will have power to prohibit such importation, notwithstanding the disposition of any State to the contrary. . . . The gentleman says that it means to pro-

hibit the introduction of white people from Europe, as this tax may deter them from coming amongst us. A little impartiality and attention will discover the care that the Convention took in selecting their language. The words are, 'The migration or importation of such persons, &c., shall not be prohibited by Congress prior to the year 1808, but a tax or duty may be imposed on such importation.' It is observable here that the term *migration* is dropped when a tax or duty is mentioned, so that Congress have power to impose the tax only on those imported."

Here we have the express authority of Judge Wilson, (and there is no higher on a question of constitutional interpretation,) that this ninth section does not give Congress the power to tax free emigrants or passengers. The advocates for this power in the Federal government must look for some other clause in which this power lies concealed.

Secondly, we are told it is part of the power contained in the grant to Congress "to regulate commerce."

The term "regulation of commerce" had a very definite and well-understood meaning at and before the Revolution. The phrase had become popularized by the disputes between the Colonies and the mother country. It was not understood to embrace any of the offices between ship and shore, such as pilotage, wharfage, quarantine, &c., all of which were regulated by colonial, and not by the laws of the mother country. (See Colonial Laws, *passim*.) It was not understood to embrace the right to levy duties for revenue, either upon persons or things. The assumption of the right to levy duties upon tea, under the pretence of regulating commerce, produced the Revolution. But the right to regulate commerce was conceded to England. In the address of the Continental Congress to the people of Great Britain, they say,—"The colonies are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their *351] sovereign: but from the necessity *of the case, and a regard for the mutual intercourse of both countries, we cheerfully consent to the operation of such acts of the British Parliament as are *bonâ fide* restricted to the regulation of our foreign commerce." (1 Journal, 28, 29.)

The regulation of commerce was considered as something great and international,—almost synonymous with the Navigation Acts,—acts intended by Great Britain to secure the benefits of the commerce of her Colonies to herself, and to regulate her commercial intercourse with foreign nations.

In this popular sense it was used by the framers of our Constitution. The grant of the power to regulate commerce to Congress was intended merely to substitute in this respect the new government for the old.—the United States for England.

Passengers are not the subjects of commerce. The power to tax them, if it existed in the Federal government, would not be by virtue of the power to regulate commerce. They never have been treated as such by the Federal government. Duties have been levied upon goods from the first, but never upon passengers. Passengers may be landed anywhere, but goods only in ports of entry. The payment of passage-money gives no more control over them than the payment of board gives the hotel-keeper control over his boarders. If the power to tax them is placed upon the general taxing power of the United States, that is universally admitted to be common to the States. This law of New York is, therefore, as constitutional as any other of her tax laws, even although Congress may tax the same things.

Again, the grant to Congress of the metaphysical power to regulate commerce did not carry with it any of the physical means of its exercise. The power to regulate, &c., is a mere capacity, a jurisdiction, an authority to make rules or laws. For example, the State has power to lay a poll tax of five dollars a head on every resident of this State. But does any one suppose that, by virtue of this power, the citizen may be called upon by a tax-collector to pay this sum? Must there not be a law to that effect? A mere power in the Federal or State government is latent and dormant; like the electricity of the air, it is unfelt and unseen until its energies are concentrated into the thunderbolt of a law.

It is palpable that the grant of power to regulate commerce will not authorize the collector to exclude passengers from our soil, or levy a tax upon them. There must be some law to that effect before he can move.

If there is any thing or any measure attached to the mere grant of the power to regulate commerce, and which passes with it, it is the right to lay a duty on tonnage. If the grant to Congress would of itself exclude the States from [*372] any act, it would from this. Yet Marshall tells us that [L. ed.] the States would have had this right, had they not been expressly excluded from it by another clause in the Constitution. (9 Wheat., 202.) If the right to lay a duty on tonnage is not taken from the States by the grant to Congress of the power to regulate commerce, with what propriety can it be said that this grant takes from them the right to tax passengers?

Again. Laying duties on imports belongs especially to com-

merce. Yet Hamilton says the States would have had this right had they not been expressly prohibited. (Federalist, No. 32, p. 169.) And in neither case does the collector derive his authority to collect duties from the grant in the Constitution, but from express laws.

A similar idea is conveyed by Marshall in the case of *Sturges* v. *Crowninshield*, 4 Wheat., 196:—"It is not the mere existence of the power, but its exercise," &c. Two conclusions follow:—

1. The mere grant of the metaphysical power by the Constitution does not carry with it any of the physical means necessary for its execution. It does not execute itself.

2. That although the power be exclusive, the means are not so.

This idea, that an exclusive power seizes upon the appropriate means of its execution and makes them exclusive also, has been a fruitful source of error. The argument is, A tax upon passengers is an appropriate means of regulating commerce; therefore the power to regulate commerce seizes upon it and converts it to its own nature,—that is, makes it exclusive, if it is itself exclusive.

This notion of a grant of exclusive power, carrying with it the means of its own execution, and assimilating them to its own exclusive nature, is not a mere abstract speculation, but has often been attempted to be enforced, as in this case, in practice. Thus in 1824 an attempt was made to compel the boatmen on the Erie Canal to take out coasting licenses, on the fallacious idea that the exclusive power of Congress over commerce gave an exclusive control over all the means of commerce. (De Witt Clinton's Message of 1824.)

The same assumption led to the case of *Wilson* v. *The Blackbird Creek Marsh Co.*, 2 Pet., 245. In that case the legislature of Delaware had incorporated a company, and authorized it to build a dam across a tide-water navigable creek, actually used for navigation. It was thought that this means of commerce pertained exclusively to the commercial power, and that any interference with it was of itself, without any act of
*353] *Congress, an infringement of the power to regulate commerce. But Chief Justice Marshall held that the power, without a law made in pursuance thereof, was nothing; that the repugnance of the State law must be to an act of the United States made in exercise of such power.

A similar case arose in the courts of the State of New York, *The People* v. *The Saratoga Railroad Co.*, 15 Wend. (N. Y.), 114. The railroad company built a bridge over the navigable waters of the Hudson, above any port of entry.

and interfering with no law of the United States. The court held, that though Congress had the power, yet that there was no repugnance to make the State law void till Congress had exercised the power by passing a repugnant act.

Still, it is objected that the law of the State of New York laying a tax or toll upon passengers is a regulation of commerce, and that Congress alone has power to make a regulation of commerce. Admitting that Congress has the exclusive right to make such regulations, this is not a regulation of commerce. Does it purport to be a regulation of commerce? Does the State undertake to regulate commerce? No. It purports and has been used for half a century as a regulation of health or quarantine. Is it an appropriate regulation of health? Yes, unquestionably. Why, then, is it called a regulation of commerce? Is it because it interferes with commerce? All quarantines must interfere with commerce more or less; yet this court has repeatedly declared that they are not on that account unconstitutional. Is it because it may be used as a regulation of commerce? So may a duty on tonnage. Yet Chief Justice Marshall says the States might use it for revenue purposes. It therefore became necessary to prohibit it by a distinct clause.

This court has repeatedly held that the States and the Federal government may do the selfsame thing in the exercise each of its respective and acknowledged powers. "Whilst a State is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by Congress, acting under a different power." (11 Pet., 137.)

To say that a tax upon passengers may be resorted to by the Federal government as a means is saying nothing. Every act which may be done by the States may be resorted to by the Federal government as a means, if "necessary and proper" to the exercise of a granted power.

It has been shown that this power to prohibit the entrance *of passengers, or place any conditions upon their entrance, has never been granted directly or indirectly, [*354 as a distinct substantive power or as adhering to any other power, to the Federal government.

2d. This power has nowhere been prohibited to the States. All the prohibitions upon the States are found in Art. 1, § 10. The only clause which is alleged to prohibit the States from the exercise of this power is,—"No State shall, without the consent of Congress, lay any imposts or duties on imports or

exports, except what may be absolutely necessary for the execution of its inspection laws."

1. This is not an impost or duty. The lighter takes the goods from the ship to the wharf for so much a ton. This is an impost in one sense, but not in the sense in which the word is used in this section. "Impost or duty," as used in the Constitution means such as is laid by virtue of sovereignty alone, irrespective of consideration. But we have seen that the tax laid upon passengers by the State is, in fact, a toll resting upon a private consideration, as much as pilotage or wharfage, both of which are regulated by statute.

2. Passengers are not imports. That term is applied properly to things or slaves brought into the country as property without their own volition.

"Immigration applies as properly to voluntary as importation to involuntary arrivals," (9 Wheat., 216,) is the declaration of Chief Justice Marshall.

Judges Iredell and Wilson, active members of the convention which formed the Constitution, also declare that *import* or *importation* was intentionally used to avoid the idea of its application to passengers or emigrants. (3 Ell. Deb., 1st ed., 98 and 251.)

Judge Barbour, in delivering the opinion of the court in the case of *The City of New York* v. *Miln*, says,—"Passengers are not the subjects of commerce, and are not imported goods," &c. (11 Pet., 136.)

3. But admitting, notwithstanding these authorities, that passengers are imports, this section does not prohibit the States from laying any duty or impost upon imports, but from laying more than is "absolutely necessary for the execution of its inspection laws."

If passengers are imports, the law in question is an inspection law. Infected or decayed goods are thrown into the sea. Infected passengers are sent to the hospital, and the necessary expenses are defrayed by a duty laid by the State, by express authority of the Constitution.

Inspection laws apply to imports as well as exports. The *nucleus of this provision as to State inspection laws was introduced into the convention by Colonel Mason, and applied only to exports. (3 Madison Papers, 1568, 1569.) It was afterwards modified, the word *imports* introduced, and it took its present form. (Id., 1584.)

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Inspection of imports must relate principally to health. If, then, this toll or tax upon passengers is a duty upon imports, it is exclusively for the execution of a State inspection law. But it is objected, that in this case more is taken than is

"absolutely necessary." This is denied. The State has advanced from its treasury, for the support and execution of this inspection law, more than it has received,—from the adoption of the Constitution to 1799, from $1,000 to $5,000 per annum; in 1799, $15,000; in 1809, $6,000.

During the war and the previous non-intercourse and embargo laws, from 1809 to 1815, the quarantine establishment, including the marine hospital, was sustained almost exclusively by the State. And the same must again occur whenever a foreign war arises.

If, then, in time of peace, there is a surplus, (which is not the case,) is it not proper that it should be applied to pay the debts of the establishment, and provide for its future wants?

Again, admitting that more is exacted than is "absolutely necessary," the abuse cannot be corrected in this way. The fact does not appear in the case. The State has had no opportunity of contesting this point. This case comes up on demurrer. But suppose the record presented the question of excess properly to the court. It could not pronounce it, on any principle, a defence to a party refusing to pay at all.

Besides, the Constitution itself prescribes the appropriate remedy for the evil:—"And the net produce of all duties and imposts laid by any State on imports and exports shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of Congress." Constitution, Art. 1, § 10. This clause in the Constitution supposes that the State law may collect more than is necessary for the purpose, and that it is not for that reason void. The action for excess must be brought by the United States, and Congress must correct the State law. This is the appropriate remedy, and this court has nothing to do with the matter.

The conclusion is irresistible. If this section includes a tax or impost upon passengers, it contains also an authorization of the State law.

3d. Not only does the Constitution not grant the power over passengers to the Federal government, and not prohibit it to the States, but, from the foundation of the government, this power *has been exercised almost exclusively by the States, without objection. [*356

First, that this power of admission to their territories was purely a State power was the doctrine of the founders of our republic.

Those who formed the articles of confederation inserted the following article:—"The people of each State shall have free ingress and egress to and from any other State." (Confedera-

tion, Art. 4.) From which it is to be inferred, that the power over ingress and egress was purely a State power, and that this article was necessary to restrict this power, so far as the citizens of other States of the Union were concerned; but it did not attempt to interfere with its exercise in relation to aliens.

When, a few years after the Federal Constitution was formed, (which was intended as a revision of the articles of confederation,) this article had been found defective in overriding the health laws of the States,—in absolutely requiring the admission of the citizens of other States, although they might bring yellow-fever with them,—the article was modified as follows:—"The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." (Constitution, Art. 4, § 2.)

This section was intended to authorize the exclusion of the citizens of other States, under the same circumstances under which they exclude their own. This section had no reference to aliens. The right of the State as to them remained as before. It is worthy of observation,—

1. That the New York law makes no distinction between its own citizens and all other persons.

2. That the case shows, and the fact is conceded, that all the persons on whom the tax was levied in this case were aliens.

Again, that the power over ingress and egress was not taken from the States by the new Constitution was the contemporaneous exposition.

In the first Congress after the adoption of the Constitution by the convention, in which were many members of that convention, the following resolution, of the date of the 16th of September, 1788, was passed:—

"*Resolved*, That it be, and it is hereby, recommended to the several States, to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." (Journal of Congress, Vol. 13.)

Laws were accordingly passed during that year and the next, and for five subsequent years after the Constitution went into operation, by most of the States; among which *357] were Virginia, *South Carolina, Georgia, New Hampshire, Massachusetts, and New York.

Secondly, not only were such the expressed opinions of the statesmen of that day, but ever since. It is believed that every State in the Union has practically guarded the gates of her own territory, and permitted the ingress and egress of such things and such persons only as she pleased.

1. As to the egress of persons. All the States of the Union constantly enforce the writ of *ne exeat*. Numerous States, since the adoption of the Constitution, have passed or enforced laws prohibiting the egress of debtors without the leave of their creditors.

2. As to the export of things. The statutes of New York declare, that "no flour shall be exported from the State until it has been submitted to an inspector." (1 Rev. Stat., 1st. ed., p. 536, § 1.) Similar laws have been made as to beef and pork, and most of the productions of the State. Similar laws have also been passed in other States.

The State may lay an embargo absolutely prohibiting the export of any or all articles. Mr. Madison moved in convention to prohibit the States laying an embargo, but it was not thought expedient, and the proposition was rejected. (3 Madison Papers, 1444.)

It is not intended to say that Congress may not resort to an embargo as a means. But it has no power to interdict the export of any article irrespective of the object. For example, it may perhaps resort to an embargo in the exercise of the war power, but it cannot do it to prevent a famine.

3. As to the ingress of persons. The State poor laws, settlement laws, laws prohibiting the entrance of paupers, convicts, infected persons, &c., are of this description.

The law of most, if not all, of the slaveholding States prohibiting the entrance of free blacks, is another instance of the exercise of this power. Does any one suppose the same power could legally have been exercised by Congress?

4. As to the importation of things. Mississippi, and, it is believed, some other of the Southern States, have assumed the right to prohibit the importation of slaves as merchandise, and this right has been sanctioned by this court in the case of *Groves* v. *Slaughter*, 15 Pet., 449. The same right has been claimed and exercised by all the Free States.

In New York, the introduction of bank-notes under one dollar, and of lottery-tickets, is prohibited. (1 Rev. Stat., 1st ed., p. 666, § 29; p. 713, § 8.)

So the introduction of noxious or immoral articles, injurious to the health or morals of the people, is universally prohibited *by the States, and not by the Federal [*358
government; such as licentious books, immoral paintings, articles of gaming, tainted food, dangerous preparations of gunpowder, and all nuisances.

The proposition, that the laying duties, or the right to regulate commerce, gives Congress the right to import what

it pleases, is not true. The case of *Brown* v. *Maryland*, 12 Wheat., 419, by no means supports it. The whole doctrine of that case is, that Congress has a monoply of duties on whatever articles the State permits to be landed.

Ellsworth held in the Convention, that taking from Congress the power to lay duties on exports did not take away from it the power to lay an embargo (3 Madison Papers, 1385) or prohibit exportation. On the same principle, giving the power to lay duties on imports does not give the power to import.

These examples show abundantly how extensively and constantly the States have exercised this power over ingress and egress,—over imports and exports. On the other hand, no instance is recollected of Congress exercising this power over persons, except in the case of what is known as the alien law of 1798. By this law power was given to the President, by his marshals, to remove certain aliens. (1 Story, 515, ch. 75.)

This law was bitterly censured at the time, and the right assumed by Congress denounced as unconstitutional. And it is now almost universally admitted that it was a violent and unconstitutional stretch of Federal power. Mr. Tazewell, a distinguished Senator from Virginia, said,—"But one power was given to Congress over aliens,—that of naturalizing them; and this did not authorize Congress to prohibit the migration of foreigners to a State, or to banish them when admitted. The States had not parted from their power of admitting foreigners to their society." (Ell. Deb., 1st ed., 251; 2 Virginia Stat. at L., New Series, 492.)

This assumption of power on the part of Congress greatly excited and aroused the country. The legislatures of Virginia and Kentucky denounced the law, and passed resolutions supposed to have been drawn by Jefferson and Madison, and which have ever since been considered as of incontrovertible authority in the construction of constitutional law.

The following is the fourth of the Kentucky resolutions:—"That alien friends are under the jurisdiction and protection of the laws of the State where they are; that no power over them has been delegated to the United States, nor prohibited to the individual States, distinct from their power over citizens, and it being true as a general principle, and one of the amendments to the Constitution having also declared, that the powers not delegated to the United States by the Constitution nor *prohibited by it to the States are reserved to the States respectively or the people, the

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act of Congress of the United States passed 22d of June, 1798, entitled 'An act concerning aliens,' which assumes power over alien friends not delegated by the Constitution, is not law, but is altogether void and of no force."

VII. The law of the State of New York does not violate or contravene the provisions of any law or treaty of the United States. "Laws made in pursuance of the Constitution, and all treaties made or to be made, or which shall be made under the authority of the United States, shall be the supreme law of the land." (Constitution, Art. 6, § 2.)

1st. As to treaties. The vessel was an English vessel, and it is conceded that all the emigrants on whose account the toll was collected were British subjects. If the toll violates in letter or spirit any treaty with England, it is illegal and void. The treaties by which our intercourse is regulated with England are the treaties of 1794 and 1815. These treaties profess to place the two nations on terms of equal and reciprocal advantages.

1. Does it violate reciprocity? The New York law lays a tax or toll upon passengers to defray the selfsame expenses which England defrays by a tonnage duty. England collects four times as much from our vessels for the support of her quarantine and hospital as we do from hers. The expenses in England amount to nearly a dollar per ton for an ordinary vessel of three hundred or four hundred tons. We collect that amount only upon here and there a passenger vessel. If, therefore, there is any violation of the reciprocity stipulations of the treaties in the execution of quarantine or health laws, it is on the part of England. (2 State Papers, Com. and Nav., Mitchell's App., No. 9.)

2. This is a law regulating the internal police of the country; and it is a rule of international law, independent of treaties, "that all foreigners are admitted into a country on condition of obeying its laws." (Vattel, Lib. 2, ch. 8, § 101.) One of the laws which they are bound to obey is the payment of all reasonable tolls. (Id., Lib. 1, ch. 9, § 103.)

This principle of international law is incorporated in these treaties, which are made expressly subject to the laws and statutes of the country. (Treaty of November, 1774, art. 14; of July, 1815, art. 1; Ell. Dip. Code, 253–275.) It is immaterial, so far as treaties are concerned, whether laws be made by the States or the United States. If it were within its constitutional powers, indisputably Congress might lay such a tax, as well as add a new item to the tariff. The State law is not obnoxious to the objection of infringing any treaty.

*360] *2d. As to a law. There is no law of the United States taxing passengers. Even if they have the power, they have not used it. Nor can it fairly be said that there is a law regulating passengers. The law of 1819 (3 Story, 1722) relates to "passenger ships and vessels." It regulates the number of passengers who may be taken on board by the tonnage. It was made in the exercise of the undisputed police power of Congress over vessels on the ocean. There is nothing in it with which the State law interferes in the remotest degree.

But, it is replied, we do not contend there is any conflict with any written law, any actual regulation, but with "a non-regulation."

Congress, it is assumed, has legislated on the subject of passengers, and it is as much its will that what is not prohibited should remain as it is, as what is prohibited. In other words, that, by making one regulation on a subject, Congress takes possession of the whole subject as effectually as by making every possible regulation. This ingenious theory has never been applied in practice, and never can be.

1. None but "laws made" are declared by the Constitution to be the supreme law of the land. Is this imaginary "non-regulation" a law made by Congress? What are its terms, its provisos, and its exceptions,—its extent, its length, and its breadth? And who is to construe and apply it?

2. This inferential legislation is uncontrollable by Congress. A vast mass of means hitherto left exclusively to the States, as more advantageous to the country, will be immediately seized upon and appropriated by the Federal government, not by virtue of any new legislation, but by this court sanctioning the theory of "non-regulation." No discretion is left to the legislature. The constitution becomes self-acting. It seizes, *proprio vigore*, when any power is put in action by the slightest act of legislation on the subject, upon all the means which might by any possibility be brought within its reach. The concurrence of State power becomes an empty sound.

The rule, in case of collision between Federal and State laws on a subject of concurrent jurisdiction, laid down by Marshall, is, that "the State law, so far, and so far only, as that incompatibility exists, must necessarily yield." (5 Wheat., 49, 50.) This is no longer the rule. The State laws must yield so far as the Federal power extends,—so far as the Federal government had power to pass incompatible laws.

Things which have hitherto been left to the States must be taken from them. Pilot laws, harbour regulations, laws re-

specting lighterage, wharfage, &c., must be abolished. Tide-mills, dams, bridges, &c., upon navigable tide-water, which *line our coast, must be swept away. Under the doc- [*361
trine of "non-regulation," Congress takes possession at once of all the remote as well as immediate means of executing its powers; e. g., the power to regulate commerce gives remote power over the ship-builder, the timber-merchant, the lumberman, &c. The names of some of the titles in the French Code of Commerce may convey some idea of the extent of power which may be included in the power to regulate commerce:—Partnerships, Banks, Brokers, Carriers, Bills of Exchange, Vessels, Insurances, Bankruptcies, &c. Thus far Congress has left these subjects to the States; but if this doctrine of "non-regulation" prevails, the matter is taken out of the hands of Congress, and all the regulations on these subjects which it was competent for Congress to make under its constitutional power are to be considered as made already. State power is in effect annihilated; if not at once, it is so crippled that it dies a lingering death.

This rule of construction will be found oppressive in the extreme, and impossible. Oppressive, because it requires men to obey laws which they cannot know; impossible, because the courts cannot apply it. The courts easily determine the limits of a written law, and their decisions are uniform; but it surpasses human knowledge to ascertain with precision the ramifications of a subject-matter.

Subjects intermingle. Commerce, manufactures, agriculture, are concerned in ship-building. Scarcely an act can be presented to the court which is not compound. How much of that subject, which carries with it the power of Congress, shall be necessary for that purpose?

It is to commerce particularly that this theory has been applied. "Commerce," it is said, "is a unit, and what is not regulated is as much a part of the unit as what is." We may admit that the power to regulate commerce is a unit, and is exclusive. We may admit that the regulations of commerce form one system, and are all exclusive. But the means employed or resorted to by these regulations are as diverse as nature, and as free to the States as to Congress. This case turns upon taking money as a tax or toll from passengers. This is not a regulation of any kind, but an act, a means.

These means are not permanently or necessarily attached to the regulation which adopts them. Granted that they may be resorted to to-day by a regulation of commerce, they are not inseparately attached to that regulation. They form no part of the unit. They may be resorted to to-morrow by a

totally different regulation,—one of health or finance on the
*362] part of *the States. The fallacy consists in confounding a regulation of commerce with the means which it adopts.

This idea of unity was first broached by Mr. Madison, who suggested that the right to regulate commerce was one and indivisible, and would exclude the States from the right to lay tonnage duty, and consequently that there was no necessity for any express prohibition in the Constitution upon the States. (3 Madison Papers, 1585.) The convention thought otherwise, and inserted the prohibitory clause, and Marshall intimates that it might have been resorted to by the States had it not been prohibited. (9 Wheat., 202.) The idea was again suggested by Mr. Webster in his argument in the case of *Gibbons* v. *Ogden*. (9 Wheat., 14.) "Henceforth," he says, "the commerce of the State was to be a unit." This view of the nature of the commercial power was afterwards referred to by Marshall as one having great weight. (Id., 209.)

The major proposition of these distinguished men, of the unity of the commercial power, is not contested, but merely its application to commercial means. The case of *Gibbons* v. *Ogden* was not decided against the State on the ground that the law of the State violated the commercial unity, or that the means employed by the State were not in themselves common to both governments, but because a law of the United States had already appropriated them to her use, and that the law of the State attempting to do the same was necessarily repugnant to the Federal law, and therefore void.

Marshall certainly did not intend, by the unity of commercial power, unity of commercial means, nor that the power of Congress to use the means of itself appropriated them, or that "non-regulation" was equivalent to regulation, in any case.

In *Sturges* v. *Crowninshield*, his language is,—"It may be thought more convenient that much of it [any subject committed to Congress] should be regulated by State legislation, and Congress may purposely omit to provide for many cases to which their power extends." (4 Wheat., 195.) It is obvious that he thought the States might use any means whatever not prohibited to them, and which Congress had not by an actual law appropriated to itself.

Again, he says in *Wilson* v. *The Blackbird Creek Marsh Co.*, —"If Congress had passed any act which bore upon the case, . . . we should feel not much difficulty in saying that a a State law coming in conflict with such act would be void. But Congress has passed no such act." True, says the objector, but Congress has power to pass such an act, and "non-

regulation" is equal to regulation. It is clear that Marshall gave no such efficacy to "non-regulation."

*The repugnance which makes a State law void must be to some actual existing law of the United States, and not to some non-existing inferential regulation. [*383

I have attempted to prove that the power over passengers either to exclude or tax them has not been given to Congress, either directly or indirectly; that it has nowhere directly or inferentially been prohibited to the States; that in practice it has been used by the States exclusively since the foundation of the government; and that the law of the State of New York now in question, made in exercise of that power, does not, in the remotest degree, infringe any treaty or any law of the United States.

I cannot conclude this argument without calling the particular attention of this court to the case of *The City of New York* v. *Miln*. The Supreme Court of the State of New York held this case to be identical with that. In that case the State law required the master to deliver a manifest of his passengers to the mayor within twenty-four hours of his arrival; to give bond and security for $300 to the city to indemnify against expenses of maintenance; that the master shall remove such passengers as the mayor, &c., shall direct; that the vessel shall be liable for any penalties incurred by the master. That law, like this, was alleged to be a regulation of commerce. That law prohibited passengers from landing altogether. This allows them to land on condition of paying expenses. That law required the master to give bond and security in $300 for each passenger. This law allows each one to come on shore on payment of the expenses. That law, after two elaborate arguments, was held not to be a regulation of commerce. In what particular does it differ in principle from this? Both are made in the execution of police laws of the State. Neither assumes to regulate commerce, and both are interferences with it.

The gist of the argument of Mr. Justice Story in his dissenting opinion in that case is, that "the States cannot resort to a regulation of commerce," &c., &c. Certainly not. The very question in dispute was, whether that was a regulation of commerce. He assumes, without proving it, the whole question.

He speaks of exclusive means. Powers may be exclusive, regulations may be exclusive, but means cannot be so, unless the States are excluded from them by name in the Constitution, or unless the Federal government have appropriated them, by an express law, to their own use. No doubt, as the

very learned judge says, if the same means had been resorted to by Congress, it would have been in the execution of a regulation of commerce, and when resorted to by the States, it is in the *bona fide* execution of a police law.

*364] *The rule is very clearly and concisely laid down by Judge Johnson:—"Whenever the powers of the respective governments are frankly exercised with a distinct view to the ends of such powers, they may act upon the same means, and yet the powers be kept perfectly distinct. A resort to the same means, therefore, is no argument to prove the identity of their respective powers." (9 Wheat., 239.)

This case cannot be decided for the plaintiff without overruling the case of Miln. This court, like all others, is presumed to be governed by the maxim, *Stare decisis*. For no court is it so important. Disrespect follows inconsistency, and woe to the Union when the decisions of this court shall cease to be respected. If the majority of to-day attempt to correct a supposed previous erroneous decision, the majority of to-morrow will certainly reinstate the old rule. This court remains, but its members change. Three of the five members who decided in favor of State rights in the case of Miln are gone. Where is Thompson? Where is Baldwin? Where is Barbour, who gave the opinion of the court in that case? Had these judges remained in the seats which they once adorned, this suit would never have been brought. Is it wise thus to invite speculation upon the sad changes which the inevitable doom that awaits us all must produce in this tribunal? If temporary majorities are to give the law of this court, its decisions, which should be as permanent as the republic, will become as fluctuating and mortal as its members.

The poor emigrants do not ask to be relieved of this tax. They do not bring this suit, nor is it brought for their benefit. The foreign agent, the rich shipper, is before this court striving, at the expense of these unfortunates, to swell their enormous gains. This toll is embraced in the price of passage. The emigrant knows nothing of it. If it is removed, he will know nothing of it, but that the home and the asylum that greeted him, and rescued him from disease and death on his arrival, are gone.

What cares the rich shipper of Liverpool, what cares his agent in New York, whether infection is brought to our shores,—whether disease ravage our city? No ties bind him to the soil. No family or kindred to weep over. Wealth is at his disposal. He keeps aloof or flies from the pestilence

which his accursed avarice has brought upon the devoted city.

But ask the emigrant, ask the destitute, ask the poor citizen, ask the thronging masses who make up the population of a great city, whom the strong bonds of poverty and affection chain to their homes, "Come weal, come woe." They will pray you to preserve unimpaired the health laws of the city, *the quarantine, and its hospital, which have so long proved an efficient protection to them and their families. They will conjure you, with the agonizing earnestness of men who feel that their lives are concerned in what they ask. [*365

Has this court listened to the suggestion, that, if this power is conceded to the States, it may be abused to the prejudice of commerce? Such a consideration is not for them. Let them close their ears, if they would not be betrayed into error.

Marshall has said,—"All power may be abused, and if the fear of abuse is to constitute an argument against its existence, it might be urged against the existence of that which is indispensable to the general safety." (12 Wheat., 440.)

But the suggestion is absurd. There is no such danger. If the child may be trusted to its mother, the city may be trusted to the State. It forms its greatest pride, and dearest interest. The commerce of New York is its glory, and the great source of its prosperity. Will it be guilty of the suicidal folly of destroying or injuring it? No. The accommodations for the sick passenger form one of the attractions of its port. The emigrants flock to it in preference to any other. The past year, more than one hundred thousand have arrived. All the hospitals at the quarantine have been crowded, and yet no extraordinary fatality has prevailed.

On the other hand, the mortality among the emigrants who have arrived at Quebec has been frightful,—not less than one tenth of the whole number. The pestilence has been scattered through the country, and the whole province has been sorely afflicted.

What has occasioned the difference but the very hospitals supported by this tax, and which must fall with it? They have been the refuge, and have yearly saved the lives, of thousands of the emigrants, and nothing, save their religion, is more gratefully cherished by them than the hospital at the quarantine ground in New York.

Conceding for a moment, that, if the State institution is destroyed, the Federal government have power to replace it,

will they do it? Will they continue to give it adequate support? Such is not the history of the past.

A few years before the close of the last century, Congress set on foot a marine hospital fund for the relief of sailors. In 1802, it had accumulated to more than ninety thousand dollars. At this time Massachusetts and Virginia governed the Union. They concluded to divide the fund between them. Fifteen thousand dollars were appropriated to build a sailor's hospital at Boston, and thirty-five thousand went to purchase an old hospital at Gosport, in Virginia.

*366] *Is it wise to leave an interest so local and so intensely interesting as that which concerns the lives of the citizens of New York to depend on the fluctuations of political influence? What do the Alleghanies or the Rocky Mountains know or care for the ravages of yellow-fever in the city of New York?

The island of New York will soon contain a million of people. When pestilence comes, it will sweep away thousands in a day. If she sees the necessary means of self-protection withheld or removed to more favored cities, what bonds will be strong enough to bind her to submission? When, the poisoned darts of death falling thick and fast around them, her citizens are called upon to wait the slow, reluctant movements of the Federal government,—when, driven to desperation by the imminent danger impending over them, they see themselves cut off from reasonable succour by the selfish, unsympathizing legislation of a remote people, who send their exports to Hudson's Bay or the mouth of the Columbia, will they not be impelled to take the law into their own hands?

Our country is extending itself farther and farther to the south and west. Wisdom cries aloud, with a warning voice, to leave local interests as much as possible to local legislation, and attend only to those common and external interests for which the Union was formed. Let the States repose in the undisturbed exercise of the sovereignty which is left to them, and we may, with safety, extend our system to the extreme limits of the continent.

The State of New York asks the humble boon of being allowed to protect herself against an exclusively internal evil. Two thirds of the common revenue are collected in her harbour. She divides the annual millions which, but for the Union, would be poured into her own coffers, freely and ungrudgingly among her sisters. She calculates not the value of the Union. She glories in the honor and welfare of our common country. But she has deemed it not unreasonable that she should be allowed to protect herself against dangers

to which this commerce, carried on for the common benefit, exposes her, and her alone.

SMITH *v.* TURNER.

Sketch of *Mr. Van Buren's* argument at the December term, 1845. The references to the excise cases decided since were made on the re-argument in 1847.

Mr. Van Buren referred to the printed points, and said the able argument submitted on them by his colleague would perhaps justify him in remaining entirely silent, but the *importance of the questions presented to the court [*367 seemed to him to authorize some additional suggestions. He read the sections under which the suit was brought. (1 Rev. Stat., 445, §§ 7-9.) By them the health commissioner was authorized to collect, from the master of every vessel that should arrive from a foreign port at the port of New York, one dollar for each steerage passenger on board. The sum so received was devoted to the use of the marine hospital, and the master was authorized to sue for and collect from each of such passengers the sum paid on his account. The declaration contained two counts, the first alleging that the passengers were brought into the port of New York; the second, that they were landed in New York. The demurrer is to the whole declaration, on the ground that the law is repugnant to the Constitution of the United States. Of course, the facts alleged in both counts are to be taken as true. The question is not whether the law is wise or politic, but whether it is repugnant to the United States Constitution. This is the extent of the jurisdiction of this court, (Judiciary Act, 1789, § 25,) and the question is to be determined on this record. The court cannot legally know how much money has been received under this law, nor the use it has been put to, nor the extent of disease, nor the expenses of the hospital, nor when the fund falls short, nor when it overruns. If these facts are important, they should be determined by proof in a competent proceeding. On this record, the court are asked by a plaintiff in error to say that the sections referred to necessarily conflict with the United States Constitution. The tax which they impose was first laid on the 30th of March, 1798, (3 Greenl., 388,) and it will be conceded that, if it was constitutional then, it is constitutional now. It does not grow unconstitutional by age. The power to declare a State law unconstitutional is one of great delicacy, as this court have frequently said, and should never be exercised in cases of doubt. (6 Cranch, 128; 4 Wheat., 621.) As Mr. Ogden

truly remarks, in *New York* v. *Miln*, 11 Pet., 122, "it should be so clear as to secure the acquiescence of the people and of the States, and thus to retain the affection of the different members of the Union for the Union itself." All the presumptions are in favor of the constitutionality of a law. Those who object to its unconstitutionality should be able to point to the provision of the United States Constitution with which it comes in collision, and the conflict should be so plain, that it could be immediately seen by comparing the two. The plaintiff in error says that this law conflicts with the eighth section of the first article of the Constitution; also with the tenth section of the first article; also with the ninth section of *the first article, subdivisions fourth and fifth; also with the sixth article, subdivision second; and also with the general spirit of the Constitution. The general spirit of the Constitution is to be found in its letter. The sections of the Constitution referred to should be examined separately; it is neither intelligible nor safe to contrast the law with what may be deemed the blended effect of all; and in examining them it should be remembered that the States, at the adoption of the Constitution, were free, independent, and sovereign communities; that as such they formed, as such adopted, the Constitution; that the Constitution is a grant by them of certain enumerated powers. The language of the tenth article of the Constitution only defines for greater caution what would have been the legal and constitutional effect of the grant in the manner and form in which it was made, to wit, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to people." (Baldwin's Views of the Constitution, 29–32.) The strict observance of these principles, in construing the Constitution, is believed by a large portion of the American people to be the surest bond of the Union itself.

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First, does the law in question conflict with the eighth section of the first article of the United States Constitution? This section provides, that "the Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." What is this power, and is it exclusive in Congress, or concurrent in Congress and in the States? The terms used are capable of indefinite extension in the hands of a skilful construer. Commerce, in an enlarged sense, covers nearly all the business relations of society. Every law that qualifies or affects its transactions or relations necessarily regulates it. Take the first clause,—"Congress shall have power to regulate com-

merce with foreign nations." Pilot laws affect this commerce; they touch it on the open sea, they restrain those engaged in it, they regulate it; yet the States on the seaboard all have pilot laws. So too, inspection laws. It is said these are authorized by the United States Constitution. Not so. Duties and imposts are permitted to execute them, but the laws are enacted under the inherent power of the State. It is true, most inspected articles are intended for exportation to foreign ports. But commerce consists as much of exports as imports; restraints and regulations of one are as much regulation of commerce as the other. The States also pass quarantine laws, wreck laws, harbour regulations, &c., &c.

These would seem to show a concurrent power in the States *over foreign commerce. Congress has power [*369
to regulate commerce among the States; yet the States establish ferries from one to the other. The court has held that the transportation of slaves from State to State is within the exclusive control of the States. (*Groves* v. *Slaughter*, 15 Pet., 449.) Congress has power to regulate commerce with the Indian tribes. Yet several States have habitually, since the adoption of the Constitution, passed laws regulating trade with the Indians. The New York constitution, article seventh, section twelfth, provides that no purchase of lands, or contract for purchase, made with Indians, within that State, subsequent to October, 1775, shall be valid, unless made by the authority and with the consent of the legislature. A comparison of this power in the Constitution with what it was in the Articles of Confederation, shows a much greater solicitude to make this exclusive than either of the others. The ninth article of the Confederation gave Congress power to regulate the trade and manage "all affairs with the Indians, not members of any of the States; provided that the legislative right of any State, within its own limits, be not infringed or violated." These restrictions were intentionally omitted in the Constitution. (See Federalist, No. 42, by Madison.) Yet the constitutionality of the laws and constitutions of the different States, regulating trade with the Indians, has never been questioned. The Constitution gives the same power to Congress over commerce among the States and with the Indian tribes that it gives over foreign commerce. If the latter is exclusive, the others are, and if the whole are exclusive, all the legislation thus briefly adverted to must be deemed void. It is submitted that the power is concurrent, subject to the positive inhibitions in the Constitution. It is the power to regulate

commerce with foreign nations which demands particular attention. This law encroaches on that power or on none.

We contend respectfully, that the power to regulate commerce is only exclusive in those cases where the regulation is effected by the exercise of an authority specially given to Congress in exclusive terms in the Constitution, or specially prohibited to the States; and that the only other authority over the subject remaining in Congress is derived from the sixth article of the Constitution, which authorizes them to prostrate State laws and constitutions by their own conflicting legislation.

Mr. Hamilton, in the thirty-second number of the Federalist, says that there is an exclusive delegation or alienation of State sovereignty in three cases: first, where exclusive power is in terms given to Congress; second, where an *370] authority is granted *to the Union, and the States are prohibited from exercising a like authority; third, where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant. As examples of the third class, he instances the power to establish uniform laws on the subjects of naturalization and bankruptcy.

This classification of the exclusive powers of Congress has been frequently referred to with approbation by this court. It is with extreme hesitation that a doubt is suggested as to its accuracy; but it is believed that a careful analysis of the Constitution authorizes the position, that the first two classes mentioned by Mr. Hamilton cover every case of exclusive delegation of power by the States, and that his third class of cases is covered by article sixth, subdivision second, which makes the laws of Congress, enacted in pursuance of the Constitution, the supreme law of the land.

This position is advanced with less hesitation, because, first, no case has ever been decided by the court which establishes such a classification; and secondly, the illustration given by Mr. Hamilton of the third class has been overruled. A single section gives the power to establish laws on the subject of naturalization and bankruptcy. They are to be alike uniform. Yet in *Sturges* v. *Crowninshield*, 4 Wheat., 122, it was expressly decided that the grant of power to Congress to establish uniform laws on the subject of bankruptcy did not alienate the power of the States. Why, then, should this effect follow the grant of power to establish uniform laws on the subject of naturalization? Each of the States, before the adoption of the Constitution, exercised this power of naturalization, and would now but for the action of Congress and the provisions

of article fourth, section second. (*Chirac* v. *Chirac*, 2 Wheat., 269; *Collett* v. *Collett*, 2 Dall., 294.)

Mr. Van Buren then examined the various powers given to Congress by the Constitution, and endeavoured to show that, whenever the power granted was, or was intended to be, exclusive, it was either,—

1st. Granted in exclusive terms, or (what is synonymous) necessarily exclusive, from operating in two or more States, or without the territory of all the States; or

2d. Granted to the general government, and prohibited to the States.

In the first class he placed the power to borrow money on the credit of the United States, to establish post-offices and post-roads, to establish tribunals inferior to the Supreme Court, to define and punish piracies and felonies on the high seas, to exercise exclusive legislation over the District of *Co- [*371
lumbia, forts, magazines, arsenals, &c., and to make all necessary and proper laws to carry the foregoing powers into execution. In the second class he placed the power to lay duties, imposts, and excises, except to execute inspection laws, to coin money, regulate the value thereof and of foreign coin, to declare war, grant letters of marque, &c., to raise and support armies, to provide and maintain a navy, and make rules for the government of the army and navy.

The States are prohibited from entering into any agreement or compact with another State, or with a foreign power. Power to make treaties is given to the President and Senate. This classification leaves, of the general powers of Congress which it is believed are not exclusive, the powers,—

1st. To lay and collect taxes. This is admitted to be concurrent.

2d. Over naturalization and bankruptcy, already adverted to.

3d. To fix the standard of weights and measures. This has always been exercised by the States, and never by the general government.

4th. To punish counterfeiting. This is concurrent. (1 N. Y. Rev. Laws, 466.)

5th. To promote science and the arts by copy and patent rights. This, to the extent of State limits, is believed to be concurrent. (1 Tuck. Bl. Com., App. D., 182, 265; *Livingston* v. *Van Ingen*, 9 Johns. (N. Y.), 567, 568; *Gibbons* v. *Ogden*, 9 Wheat., 221.)

6th. Over the militia, which is concurrent, except so far as expressly distributed by the Constitution to the States and Congress respectively.

7th. Over commerce. (*Houston* v. *Moore*, 5 Wheat., 1.) It is submitted that this is a concurrent power, unless the regulation is one authorized in express terms by the Constitution, and falling under the first or second class before mentioned. For instance, commerce is usually provided for by treaties, coining money, &c., &c.; it is usually protected by armies and navies, and the punishment of crimes on the high seas; it is usually interrupted by war. The authority over all these great subjects is exclusively in the general government. If commerce is incidentally regulated in other modes, the powers of the States and the general government are concurrent with the safeguard, in case of conflict, that the authority of Congress is paramount. This definition of the grant avoids three difficulties which must always be encountered by those who claim that the power over commerce, in its most enlarged signification, is exclusive:—

*372] *1. In *Sturges* v. *Crowninshield*, the court, in deciding a State insolvent or bankrupt law to be valid till Congress acts, says, "It is not the grant of a power to the Union, but its exercise, that ousts the State of jurisdiction." This, it is believed, cannot be true of an exclusive power. If such a power is granted to the Union, the State must necessarily be divested of it, whether Congress acts or not. The State is at the mercy of Congress, and helpless till it chooses to act.

2. In the argument of *Gibbons* v. *Ogden*, the distinguished counsel for the appellants contended (9 Wheat., 18), that regulation of any part made an entire system; that what was untouched was as much regulated as what was touched, and the court say there is great force in the argument, and that it has not been answered. (p. 209.) If this be so, a single commercial regulation by Congress would oust the States of authority, and leave their great interests to await the next movement of Congress.

3. In every argument and decision in favor of the exclusive power, counsel and court have been obliged to except from its operation pilot, health, inspection laws, &c. (9 Wheat., 18, 203-207; 12 Id., 444.) But these are nowhere excepted in the grant, and if it is exclusive it must cover them. Inspection laws are no exception. No authority is given to the States to pass them, but they are authorized to lay imposts to execute them.

This court has never held the power to be exclusive. In *Gibbons* v. *Ogden*, the regulations were held to be conflicting, and the case was decided on that ground. (9 Wheat., 200.) In *New York* v. *Miln*, 11 Pet., 146, the court declined

deciding the question. In *Groves* v. *Slaughter*, 15 Pet., 508, it is left an open question. But in the *License Cases*, 5 How., a majority of the judges expressly hold the power to be concurrent. The plaintiff in error, then, to show the act now before the court an unconstitutional regulation of commerce, if we are correct, must point, either,—

1st. To the clause in the United States Constitution which delegates exclusively to the general government the authority to make this law.

2d. To the express prohibition on the States to make it.

Neither can be shown. If not, it remains with that mass of inherent power appertaining to State sovereignty which has never been alienated. All the States have passed laws similar to this for the last half-century. He should refer to them particularly hereafter, and show that all these laws arrested vessels on the high seas, inspected them, discharged, and destroyed their cargoes, forbade them to anchor, &c., &c., and charged the *expense of executing the laws [*373
on the cargo, consignee, captain, or passenger, at discretion. The "regulations of commerce," if any, in the act before the court, were the control and direction exercised over the captain, passengers, ship, and cargo. The orders to them were where to stop, when to proceed, what should be destroyed, &c. Yet these acts were within the unquestionable power of the States, and were not even seriously disputed here. They were sanctioned in the case of *New York* v. *Miln*. They occurred always in the pilot, inspection, quarantine, and slave laws.

It seemed to him these considerations must dispose of the theory that commerce was a unit; that it included all intercourse; that the whole power over the subject of commerce, and its mode of prosecution, was surrendered to Congress; that what was untouched was as much regulated as what was touched, &c., &c.

But it was urged that, if this was a case of concurrent power, Congress had acted on the subject, and that there was a conflict of legislation; also, that the act before the court conflicted with treaties made by the United States. He examined these positions at length, and endeavoured to show that the legislation of Congress, so far from conflicting, was in aid and approbation of the law. He referred to the law of 1796, ch. 31, 1 Story, 432; Act of 1799, ch. 118, Id., 564; *New York* v. *Miln*, 11 Pet., 138, 139.

The treaties referred to were expressly subject to the laws of the two countries. If this law violated them, no tariff law, and certainly no law prohibiting the entry of colored

persons into States, could be upheld. But it was urged that the tax of one dollar on each steerage passenger was "a regulation of commerce." This he denied. The taxing power and the commercial power were totally distinct. Even laying imposts is not a regulation of commerce. (9 Wheat., 201.) Chief Justice Marshall says,—"There is no analogy between the power of taxation and the power of regulating commerce."

The tax in this case is laid on an inhabitant of New York, within her limits and jurisdiction. It is laid when the ship has arrived in the port of New York. As the record shows in this case, the passengers, as they are called, had landed. To deny the right of the State to do this is the most alarming proposition ever yet presented to this court. He contended,—

1st. That the State had the power altogether to forbid the landing on her shores of such persons as she chose to forbid, or to expel those who had entered, and, as a necessary consequence, she might dictate the terms on which they should be permitted to enter. This was vital to her self-preservation.

*374] *And having this right, the manner of its exercise must, of necessity, be left to her discretion. It was to be presumed self-interest, if no higher motive, would induce a discreet exercise of this power. But if the State was unreasonable,—*Stat pro ratione voluntas.* This court had no power to supervise her conduct. In support of this he cited *New York* v. *Miln*, 11 Pet., 132, 136; 7 Statutes of South Carolina, 459; Aikin's Alabama Dig., 352; 1 Lislet's Dig. Lou. Laws, 499. He also cited laws forbidding or regulating the admission of free persons of color in fifteen different States,—non-slaveholding as well as slaveholding States. In *Groves* v. *Slaughter*, 15 Pet., it was held that the right to admit slaves from other States into Mississippi, or to forbid them to enter, rested exclusively with that State, and was unaffected by the authority of Congress to regulate commerce among the States. The argument that the general government, being charged with the foreign relations of the country, acquired the right to regulate the terms upon which aliens should be admitted into the States, could not be maintained. The States retain the right to prescribe who shall hold property within their jurisdiction, who shall vote, &c. The sole power given to Congress is to prescribe the terms of citizenship by means of naturalization laws. In support of these positions he cited Senator Tazewell's speech against the Alien and Sedition Law. (4 Ell. Deb., 2d ed., 453; 3 Madison Papers, 1385.) Also, the Virginia and Kentucky reso-

lutions and reports on the same subject. (4 Ell. Deb., 566 to 608 inclusive.)

2d. That the right of a State to tax all persons and things within her jurisdiction was only limited by the express prohibitions of the United States Constitution, and that none of these prohibitions reached the tax in question. The power of taxation is vital to a State. The concurrent right of taxation given by the Constitution to the general government was one great objection to its adoption. It would never have received the sanction of the States, if they had not been satisfied that the right to raise money from persons and property within their limits was unrestricted except in specified particulars. (See Federalist, Nos. 32, 33, 34, 36.) The importance of this power to the State, and its unlimited character, have been frequently asserted by this court. (4 Wheat., 436; 6 Id., 429; 9 Id., 198; *Providence Bank* v. *Billings*, 4 Pet., 563.) The power not only extends to all the real and personal property of its citizens, but to that of non-residents, to the property of the general government (4 Wheat., 436), and to the United States stock (1 Nott & M. (S. C.), 527). Nor is there any such exemption as the plaintiff in error claims for the instruments of commerce. *Importing [*375
merchants, ship-owners, and others, are taxable like all other inhabitants, for all their property, whatever it may consist of. (5 How., 576, 592.)

There are but two restrictions on the State power of taxation:—

No State shall, without the consent of Congress, lay any imposts except what may be absolutely necessary to execute its inspection laws.

2. No State shall, without the consent of Congress, lay any duty of tonnage. The tax in question is not a duty of tonnage. If a passenger-ship of five hundred tons comes into New York without passengers, the law imposes no tax. This is not an impost or duty in imports; a human being is not an import. (*New York* v. *Miln*, 11 Pet., 132, 136; 12 Wheat., 437.)

The authority of Congress over imports was carried to its utmost verge in *Brown* v. *Maryland*, 12 Wheat., 442. It was there held, that the right to sell articles imported and having paid duties could not be taxed while the articles remained in the original package; that the importer by paying duties acquired a right to sell; that they could not be specifically taxed till bulk was broken and they were mingled with the mass of property subject to State taxation. (See opinion of Chief Justice Taney, 5 How., 574, and of Justice McLean,

Id., 587.) This reasoning is inapplicable to a free human being. If he is exempt from taxation when entering the State, he must remain so always. If he can once float on the waters of New York, or stand on her soil, exempt from taxation, no ingenuity can fix a time when he becomes subject to taxation. He is a perpetual exempt. Unless the plaintiff in error showed a prohibition on the State to lay this tax, it fell within the general taxing power of the State.

3d. The tax in question is an indispensable part of a health and quarantine system, which is the exclusive subject of State jurisdiction.

Under this head *Mr. Van Buren* traced minutely the history of the New York health and quarantine laws from their earliest institution. The tax in question was first laid in 1798, precisely as now. (3 Greenl. Laws of New York, 388.) The site of the marine hospital was purchased and the hospital built by the State; frequent appropriations had been made from the State treasury to meet deficiences in the fund. It was now inadequate to defray the charges upon it. (3 Greenl., 305; Id., 455; Laws of New York, 1804, ch. 469, 1805, ch. 31, 1809, ch. 66; 2 Rev. Laws, 534.) The rates had been fre-
*376] quently adjusted so as to meet the expenditures with the least burden *on the passengers. (Laws of New York, 1843, ch. 213; 1844, ch. 316.) The original and declared object of the tax was to pay the expense of guarding the city against infectious and pestilential diseases brought in from abroad. This object had been steadily adhered to. The occasional and temporary diversion of an accidental surplus furnished no exception. It was inevitable where claims were pressed on the legislature, and had been more than made good by advances from the State treasury. The fact that some might pay the tax who did not receive medical aid did not make the tax illegal. The same was true of all quarantine charges. A quarantine and health system could not be otherwise maintained. The pilot system was maintained in part by compulsory charges on those who refused to take a pilot. (Tate's Dig. Virginia Laws, p. 740, § 4; 1 Bullard and Curry's Dig. Louisiana Laws, 467–469.) Taxes on passengers for the support of hospitals were laid in Delaware, Pennsylvania, Maryland, and Louisiana. They had been levied ever since the adoption of the Constitution. (2 Laws of Delaware, 1357; 7 Smith's Laws of Pennsylvania, p. 20, § 21; Laws of Louisiana, 1842, No. 158, p. 458; Dorsey's Laws of Maryland, 1601.) It was not true that Congress exercised exclusive authority over the foreign transportation. Pennsylvania compelled German passenger-ships to keep a physician on board,

to attend to passengers *gratis*, and to pay an interpreter to prove to its authorities a compliance with the law. (7 Smith, p. 29, ch. 4488.)

Mr. Van Buren then examined the quarantine laws of the Atlantic States, and showed that all of them arrested ships, discharged cargo, if necessary, and destroyed it, charging expenses on cargo, master, owner, and consignee, at discretion. He referred to the following statutes:—Rev. Stat. of Maine, p. 186, § 27; Rev. Stat. of Massachusetts, 212; Laws of 1816, ch. 44, §§ 6, 7; Rev. Stat. of Rhode Island, p. 264, §§ 5, 6; Statutes of Connecticut, p. 621, § 12; Elmer's Digest of the Laws of New Jersey, p. 133, § 3; Purdon's Digest of Pennsylvania Laws, 632; 2 Laws of Delaware, 1357; Laws of Maryland, 1793, ch. 56; 2 Rev. Stat. of Virginia, p. 297, § 13; 1 Rev. Stat. of North Carolina, 496; 6 Statutes at Large of South Carolina, 472; Laws of Georgia of December 14, 1793; Aikin's Alabama Digest, 352; 1 Islet's Digest of the Laws of Louisiana, 525.

To the argument that section ninth, article first, of the Constitution, prohibiting Congress from forbidding, prior to 1808, the migration or importation of such persons as the States shall think proper to admit, gives Congress exclusive jurisdiction over the admission of persons into the States, he replied, that *this section applies exclusively to slaves. [*377
It was so understood by the framers of the Constitution. (Federalist, No. 42; 3 Mad. Papers, 1388, 1390, 1391, 1429.) It has been so held by this court. 9 Wheat., 206; 15 Pet., 513.) The section recognizes the right of the States to admit or forbid. If it gave Congress power to tax the admission of whites, it would not destroy the concurrent power of State taxation. The authority given to Congress to tax the importation of persons shows such a tax is not an impost. The power to lay imposts the general government has by another grant. To the argument that this tax violates subdivision sixth, section ninth, article first, of the Constitution, which forbids giving a preference through a regulation of commerce to the ports of one State over those of another, he replied, that the restrictions in section ninth were all imposed on Congress. He examined them to show that none referred to State legislation. State taxation was notoriously unequal. The Constitution of the United States in no degree forbids this. He instanced the rates of pilotage, wharf and harbour charges, personal taxes, &c. This tax was not "a regulation of commerce." It was a confusion of terms to complain of a tax as oppressive, and at the same time as giving a prefer-

ence to one port over another. The preference, if any, was caused by the legislation of other States.

It was urged that New York might defray the expense of the hospital and health establishment from other sources within her undisputed control. This was true. But ought she to do so? Was it not just that this burden should be borne by those who created it? Beyond this was it unconstitutional that the expense should be thus defrayed? The last was the only question which the court could pass upon. It was suggested that Congress should assume the charge of this subject. The powers of Congress are given to it as the legislature of the Union; in no other capacity can it act. (6 Wheat., 424.) The power of Congress to lay and collect taxes is limited to the objects of paying the debt and providing for the common defence and general welfare of the United States, and these objects are enumerated. (Federalist, No. 41.) Would this justify Congress in laying a tax to protect the health of New York and persons arriving there? The power over exports is confined to this State; jurisdiction over persons in our territory belong to New York. Under such circumstances, with what wisdom, skill, or advantage could Congress interfere? (Baldwin's Views, 194–197.) The State legislation heretofore referred to shows, that, since the adoption of the Constitution, this whole subject has been exclusively controlled by State legislation. This is a practical construction of the *Constitution of great weight. This court has said, a contemporary exposition of the Constitution of the United States, adopted in practice and acquiesced in for a number of years, fixes the meaning of it, and the court will not control it. *Stewart* v. *Laud*, 1 Cranch, 309.)

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Mr. Van Buren adverted to the printed points submitted to the court, and insisted, on the whole case,—

1. That, if the law in question be "a regulation of commerce," it is such a regulation as the State has a right to make. The right has never been granted exclusively to the Union or prohibited to the States. It rests with the State.

II. If Congress might legislate on the same subject, it has not done so in a manner conflicting with this law.

III. The tax laid is not an impost or duty of tonnage.

The court needed no assurance, he added, that the people of New York feel a deep interest in the decision of this question. The law has stood for half a century, has been adopted and approved by Congress; system has grown up under it;

with an exposed situation, the health and lives of her citizens and of the whole people have been protected by it. Our State had not been a large claimant on either the justice or bounty of the Union; yet she is believed to have contributed something to its aggrandizement. The strength, the intellect, and the lives of her citizens have been freely tendered to its support. She has cheerfully poured into its lap, as her *alma mater*, the immense resources collected at her port. Her insolvent laws have been prostrated by the judgment in *Sturges* v. *Crowninshield*. This very power "to regulate commerce," under which her splendid schemes of internal improvement have been projected and executed, has not been wielded to dig her canals, or, to any considerable extent, to deepen her rivers or to protect her harbours. Nay, the effort of the State to aid them, and to encourage the brilliant but unrequited genius of one of her sons, was deemed by this court to conflict with this over-reaching power of Congress, and fell a victim to judicial condemnation. She indulges the hope, at least, that it will not now be so construed as to prostrate her institutions of public health which have defied the constructions of half a century of time, and of transcendent ability. She saw with unaffected concern the prodigious strides made by this power to regulate commerce towards engrossing and consolidating the power of the Union. This may well be regarded as the mastodon of construction, starting from this bench, and in its giant strides trampling upon the rights of the States and their sovereignty. Fortunately, it is only known to the present day by its colossal bones, scattered through the reports of the early opinions of *members of this court. Its march was arrested, its life terminated, in [*379
New York v. *Miln*. The noble ground then assumed was maintained in the *License Cases*. He had no right to advise the court, but, as an humble citizen contributing a mite towards public opinion, there could be no impropriety in alluding to the jealousy felt towards this branch of the government. The life tenure of its judges removes them from the direct effect of public opinion. Selected by the general government, they are yet in some sort arbiters between it and the States. It is desirable they should secure the affections of the people. Their recent decisions have largely effected this, and the people regard these as indications that popular and liberal impulses have reached this bench. To confirm this, they have only to adhere to the just rules already laid down, to practise the great maxim which secures respect and renders certain the rights of property and life, *Stare decisis*.

In the case at bar, New York asks nothing but justice at their hands. Granting much, yielding much, to the wealth, glory, and power of the Union,—a Union in which she feels a just pride, and the value of which she never stopped to calculate,—she does not feel that it is immodest to ask, (if it be considered asking,) that she may avail herself of her local position to sustain in part the expense to her citizens, and the danger to their health and lives, which attend her exposure and the Union's commerce,—that she may arrest and purify the stream before it enters her veins, that the blood of life to the rest of the Union may not be infection and death to her.

Norris *v.* City of Boston.

Mr. J. Prescott Hall, for the plaintiff in error.

The object of the writ of error in this case is to test the constitutionality of an act of the legislature of the State of Massachusetts, passed in the year 1837, entitled, "An act relating to alien passengers."

With the general question involved in the cause, this court is entirely familiar. It is a branch of constitutional law which has occupied its attention at intervals during the last thirty years.

The controversy with regard to the powers of the several States over commerce and navigation, and their authority to control these and analogous subjects, supposed to be beyond their jurisdiction, began as far back as the year 1819, with the case of *McCulloch* v. *Maryland* (4 Wheat., 316), when it was here decided, that the act of Congress establishing a bank of the United States was not only constitutional, but that the States had no warrant for taxing its branches, or
*380] power, by *these or other means, to impede their action, or drive them beyond their territorial limits.

In strict analogy with this case was that of *Weston* v. *The City of Charleston* (2 Pet., 449), in the year 1829, when this court held that a tax imposed by a State on stock issued for loans to the United States was unconstitutional, and could not be collected.

The question as to the power of the States over commerce and navigation was directly presented by *Gibbons* v. *Ogden*, in the year 1824, when it was held that the State of New York could not grant to any of its citizens an exclusive right to traverse the great bays and navigable waters of that State with vessels propelled by steam, to the exclusion of those

from other States, licensed or enrolled under acts of Congress.

These discussions led to another, in the year 1827, when this court decided that the State of Maryland could not compel merchants, engaged in the business of importing and selling foreign goods by the bale or package, to take out licenses for the same, and to pay a sum of money, or tax, for the privilege. (*Brown* v. *State of Maryland*, 12 Wheat., 419.)

Then followed, after an interval of ten years, the case of *The City of New York* v. *Miln* (11 Pet., 102), which is supposed to control the present controversy and recognize the power of a State to regulate, in some degree, the commerce and navigation of the whole country, even on the tide-waters which wash our shores.

Nor will such controversies cease, perhaps, until other kindred subjects have been explored and examined; for New York claims now, and exercises, the power of imposing burdens upon the disposition of foreign merchandise in its original condition as imported, when sold in a particular manner, that is, by auction.

The recent decisions of this court upon the license laws of New Hampshire, Massachusetts, and Rhode Island may be, also, referred to, as bearing materially upon the reasoning we must employ, in expressing our views upon the subject now under consideration; but as they will undergo a critical examination in the progress of the argument, they are here merely glanced at, in passing.

This brief statement of the course of legislation and decision upon these subjects brings us back to the case now before the court. It arises under the act of Massachusetts before referred to, passed in the year 1837, shortly after the case of *The City of New York* v. *Miln* had opened the eyes of her legislators to this new source of revenue.

This law provides, that, upon the arrival of a vessel in the *waters of Massachusetts with alien passengers on [*381
board, an officer of the city or town where such passengers are to be landed shall stop the vessel, and examine into the condition of its passengers.

If any lunatics or infirm persons, incompetent to maintain themselves, are found, they cannot be permitted to land till security is given against their becoming chargeable within ten years; and no other alien passenger shall be permitted to land until two dollars are paid for each, to be appropriated for the support of foreign paupers.

By another provision of the same law, the State pilots are required to anchor vessels at particular places, suitable for

the examination of such passengers; and all this may be done while the ship is yet, comparatively, at sea,—more than a cannon-shot from the shore, and beyond the jurisdiction of Massachusetts. The examination may be made, and the tax is exacted, before the passage-money is earned; before the voyage is completed; while the insurance is running; before the passenger touches the soil of the State; while all is *in itinere*.

The validity of the act is defended upon the ground that it is a poor-law; that it is a police regulation; that the State has a system of pauper laws, of which this is a part; that the money, when collected, is expended in the support of foreign paupers; and that, as the means are appropriate to the end, the law itself may be upheld as valid.

The States have the power, beyond doubt, to pass poor-laws and make police regulations. But the question is, Can they provide for paupers, foreign or domestic, by a tax upon the commerce or navigation of the United States? Can they levy contributions upon aliens and citizens of other States, on ship-board, for the support of their police regulations and pauper systems? Are they not forbidden the exercise of this power by the Constitution of the United States, which is the paramount law of the land? The means may be appropriate to attain the end, if the State has the power to use them; but have they any such power? And that is the whole question before the court.

If the tax were imposed upon merchandise imported from foreign countries, the means to accomplish the object would be as appropriate as any other; and Massachusetts, were she an independent nation, might employ them at her discretion. But when she came into the Union, in 1789, she gave up, in express terms, all control over foreign commerce, although she was more interested in it at that time than any other State.

But she never did tax foreign commerce, be it observed, when she had the power to do so, for the support of paupers; *882] *on the contrary, for more than half a century, she maintained her own system by her other means. The tempting bait was first thrown out in the year 1837, by the case of *Miln* v. *New York*, and she seized it with avidity.

In our view of the law in question, it imposes a tax on the commerce of the country for the benefit of Massachusetts and its treasury. We consider it as a direct invasion of the power of Congress to regulate navigation and trade, and therefore as unconstitutional and void.

It is not an inspection law, nor a quarantine or police reg-

ulation; and if it were, the States cannot lay taxes on the commerce of the country, or any part of it, to build up and support police or quarantine establishments, although we admit the incidental expenses and ordinary fees of inspection belonging to sanatory regulations may be exacted by the State.

But the law in question imposes a duty on imports without the assent of Congress; for there may be importations of men as well as merchandise. The ninth section of the first article of the Constitution of the United States, when speaking of "the migration or importation" "of persons," is not restricted to any particular class of persons. The words are general. They are applicable to all persons, bond or free, and show that the whole power over such importations is confided to Congress.

Nor is the use of the word "importation," when connected with "persons," peculiar to the Constitution. An act passed by Congress in 1793 is entitled, "An act to prevent the importation of certain persons into certain States where, by the laws thereof, their admission is prohibited." And Judge Marshall held, in the case of the *Brig Wilson* (1 Brock., 437), that the prohibition of the law comprehended freemen as well as slaves. Various English statutes, applicable to the British Isles, where slavery does not exist, have been passed to regulate or impede or prohibit the importation of persons, free in their own countries, and who would be so in England. (Stat. 1 and 2 P. & M., c. 4; 5 Eliz., c. 20; Jacob's Law Dict., Art. *Egyptians.*)

And it may be remarked here, that the very act of Congress before referred to proves that the whole power of regulating or prohibiting the importation of persons is vested exclusively in the general government. It was passed upon a petition from North Carolina, setting forth that the French had set free their slaves in Guadaloupe, and the aid of Congress was invoked to protect the institutions of the South from the dangerous contact of free persons of color. The State felt its want of power over the subject. She knew it was vested in Congress alone, *and to Congress she turned for [*383
relief. That body immediately prohibited the "importation" of "negroes, mulattoes, and persons of color," free as well as slaves, into any State which by law had prohibited or should prohibit the importation of any such person or persons. And this act sanctioned to this day the legislation of the Southern States, to a great extent, upon this very subject.

The act of the State of Massachusetts now under examina-

tion might also be regarded, were it necessary, as imposing a duty on tonnage; being a tax on passengers by the poll. The number of passengers to be taken on board, or imported, in ships of the United States, is limited by law to a fixed relation, or ratio, with the tonnage of the vessel: and as only two passengers are allowed for every five tons, a tax of two dollars on each person is a tax on the vessel of eighty cents a ton.

The question before the court is a question as to power, and of power alone. It is a question as to the power on the part of a State to tax the commerce of the Union, to raise a revenue for her own uses. Give Massachusetts the authority to collect money from passengers for the support of paupers, and see how quickly she will extend the system. If it is advisable to support emigrants when in a state of destitution, it is also desirable to educate their children, so that they may not become a burden upon the Commonwealth at a future day. The expense of free schools is far beyond that of pauper asylums; and if Massachusetts has the power to raise revenue by these means for one purpose, so may she for the other.

It is true Chief Justice Shaw, in this very case of *Norris* v. *The City of Boston*, now before the court, restricts the power of the State to the object for which the tax is laid. He supposes that the States may impose small burdens of this kind, but are prohibited from their extension. He says (4 Mete. (Mass.), 297),—"If, under the form of pilotage, a large sum of money should be demanded of any inward-bound vessel, the effect of which would be to raise a revenue from foreign commerce, the pretence of its being pilotage would not make it legal. And this suggestion answers an argument much pressed, that if the State could demand two dollars in respect to each passenger, it could demand two hundred, or two thousand, and so raise a large revenue for any and all purposes. We think it is plain, that, if any such large sum were exacted of passengers, it would indicate the real purpose and design of the law to be to raise revenue, and not in good faith to carry into effect a useful and beneficent poor-law,—useful and beneficent to such aliens themselves; and therefore it would be in contravention of the Constitution and laws of the United States, and void."

*384] *With great respect, we submit that these reasons for the decision of the Supreme Court of Massachusetts are not strong enough to sustain it. No court can determine the constitutionality of a law by the extent to which its purposes are carried; for if a State has the power to pass a

law, she alone can limit its exercise. The courts cannot regulate or control the discretion of legislators; and if their power be once admitted, all control over them is surrendered up. The chief justice of this court has said, in express terms, that "upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power."

Can the Supreme Court of Massachusetts say that its legislature may impose a tax of two dollars upon each alien passenger, but cannot increase it to five? Can the court inquire into the condition of the treasury, count foreign paupers, ascertain the extent of their wants, and so determine whether the tax was designed for constitutional purposes or not? Is there any limit in the power of a State to tax the property of its own citizens in any way and to any extent it may see fit? Must not the same authority which selects the objects of taxation determine its extent also? Where is the limit? Who can define its bounds? Surely the courts cannot, and it has always been held that the power to tax is a power to destroy. (2 Pet., 467; 4 Wheat., 431.)

The money to be derived from the tax in the present case is not devoted to the use of those particular aliens who pay it, but to all aliens subsequently to arrive. The strong are to pay for the feeble, the rich for the poor. Passengers arrive at Boston, New York, and New Orleans, who have no purpose of remaining in those places. Their destination is westward towards the interior States, who have no soil touching upon that ocean which, by the Constitution, is as free to them as to the States which are washed by its waves.

Emigration is encouraged by the Constitution of the United States. Its prohibition and impediments in its way were subjects of complaint in the Declaration of Independence. The laws of Congress encourage and protect emigration. The condition of mankind solicits it; ships are given up entirely to the importation of passengers, their decks being loaded with responsible beings instead of merchandise. Steam has added its power to that of the winds, and vessels propelled by its energies will be hereafter exclusively devoted to this great branch of commerce.

New York and Boston and New Orleans have almost a monopoly of this business, and they seize the occasion to raise revenue from it. It may be well to regulate this matter; it *may be expedient to raise a fund for paupers; it is kind and benevolent to do so: but the question is, [*385
How can it be lawfully done? Who shall make this regulation of commerce,—Congress or the States? Congress has

the power to make the burden uniform; the States cannot. Massachusetts taxes the passenger two dollars; New York but one. Those who arrive in Boston, for the most part, pay through to other States. Those who come to New York, oftentimes without touching at the city, ascend the Hudson, and continue their progress without ceasing, until they reach the great prairies of the West. Yet each and all of these countless thousands leave a portion of their property, destined for their own use in other States, in the treasuries of these two ocean powers, and for the benefit of persons other than themselves. The Norwegian is taxed for the Frenchman, the Dane for the Irishman, the German for the Englishman, and all for the benefit of New York and Massachusetts. If these two States have the burdens of foreign pauperism, so have they also the benefits of foreign commerce. The sails of their ships whiten every sea, while the internal States, shut out from the ocean, have no such benefits in the same degree.

The tax of Massachusetts is not applicable to such paupers as arrive at the same time with the rich and the healthful. Her laws guard the Commonwealth sedulously against this burden, by requiring those who are in the condition of becoming a charge upon the State to give ample security for ten years against such charge before they are permitted to land. The pauper gives security; those who are above his condition pay a tax,—not for themselves, but for others.

The law of Massachusetts discriminates, taxing aliens alone. If it may do this, it may discriminate among nations. Treaties would have nothing to do with the subject, for the States cannot make them; nor could Congress restrain them, if the power in question is a mere police regulation or sanatory measure. Congress cannot regulate or restrain the States in matters of police and health, as each State has unlimited power over these subjects, to be exercised according to its own discretion.

If States may tax those who arrive by sea, they may tax those who travel by land. They may favor the North and burden the South; and New York, in her laws, does discriminate, in relation to this very subject, favorably to New Jersey, Connecticut, and Rhode Island, and adversely towards the other States. She takes upon herself to say, that coastwise passengers shall all be taxed; but that those from contiguous States, because of the frequency of intercourse, shall not be burdened to the same degree as those who are more remote.

*386] *With entire confidence, we submit that this cannot be done. New York cannot discriminate between the

Southern and the Eastern States in favor of the latter and against the former. She has no power over the subject. Citizens of one State have the privileges and immunities of citizens in all the other States, and they cannot be limited or curtailed in their rights by State authority. Even Congress could not do this, as its legislation must be uniform throughout the nation.

But the act of Massachusetts taxes aliens who come here for temporary purposes of business. Alien passengers in steamers and ships of war, whether foreign or domestic, are brought within its terms. The packets which ply constantly, in all seasons of the year, between Boston and Liverpool, are subject to its demands, and must obey them.

The comity of nations forbids the exercise of this power to this extent, for the very idea of taxation includes, or implies, that of reciprocal rights and duties; of allegiance on one side, and protection on the other.

"The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. This is an original principle, which has its foundation in society itself." "All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation." "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not." (2 Pet., 563, 564; 4 Wheat., 429.)

Aliens and merchandise are not "introduced" into Massachusetts by her "permission," nor do commerce and navigation exist by her "authority." The persons and property of aliens do not belong to the "body politic" of that State, and her "sovereignty" does not extend to commerce and navigation, nor to aliens before they come within her jurisdiction. Until landed, they are under the jurisdiction of the United States, covered and protected by their laws.

It will not be denied that Congress may impose taxes or duties at pleasure on men and merchandise, upon their importation, (within the limits of treaties,) without any objection as to its constitutional right to do so. But suppose the power were exercised by Congress; from whence would such authority be derived? Obviously, from the power "to lay and collect taxes, duties, imposts, and excises," and "to regulate commerce." The control of Congress over foreign com-

*387] merce is *unlimited, while that of the States has been given up to the general government.

Massachusetts cannot raise a fund for her pauper system by taxing the property of aliens on shipboard before it is landed or made subject to her jurisdiction. She could lay no duty, for instance, under the tariff of 1842, on "wearing apparel and other personal effects, not merchandise, professional books, instruments, implements and tools of trade, occupation or employment of persons arriving in the United States," because this law declared that those articles should be exempt from duty. And upon this subject Congress has legislated from the beginning to the same effect.

Has not the general government, then, interposed its authority and prescribed the terms under which aliens shall come into the ports of the United States,—not the ports of Boston and New York, but the ports of the nation at large, each and all of them, from the St. John's to the Rio Grande? Congress has said that the personal effects, not merchandise, of aliens shall be admitted exempt from duties. It has nowhere taxed their persons, but has permitted them, so far as their legislation is concerned, to come in free of charge. If the States cannot tax the personal effects, not merchandise, of aliens because Congress has permitted them to be free, how can they tax their persons, which, by clear implication, are to be free also?

Congress as often regulates commerce by permitting it to go untrammelled as it does by direct action. If that power were to impose taxes upon specific articles enumerated in a tariff, and omit all others, the latter would be free; for all articles not directly charged with duty by some act of Congress are undoubtedly exempt therefrom. (*The Liverpool Hero*, 2 Gall., 188.)

No State can, without the consent of Congress, lay any duty on imports except to carry out, as far as may be necessary, their inspection laws; and this by the express words of the tenth section of the first article of the Constitution. But suppose that section had been omitted; could the States then impose duties upon imports while the eighth section remains, which gives to Congress the entire control over the subject?

"From the vast inequality," says Chief Justice Marshall, "between the different States of the confederacy as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which

were deemed sufficient by the statesmen, of that day, the general power of taxation, indispensably necessary as it was, and jealous as the *States were of any encroachment [*388 on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed. Why are they restrained from imposing these duties? Plainly because, in the general opinion, the interests of all would be best promoted by placing the whole subject under the control of Congress."

It is obvious that the same power which imposes a light duty can impose a very heavy one; one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised at all; it must be exercised at the will of those in whose hands it is placed." (4 Wheat., 438, 439.)

It is not denied by the plaintiff in error, that States can establish systems of pauper laws, which may include aliens as well as natives; but they cannot tax commerce or navigation in order to procure the means for their support. For this purpose they must assess their own property and their own constituents, and not assume a power to tax, because of the benevolent objects for which the revenue is to be raised. If the end will sanction the means, then all power of restraining taxation is at an end.

We do not complain of any just exercise of a police power, nor of inspection laws, nor demands for lists of passengers, nor of acts to keep out pestilence or regulate the introduction of persons burdensome to the Commonwealth, nor of the stopping of ships for examination merely. All these things may be done, and yet no authority found in the States to tax passengers, brought into the country in the due course of commerce and navigation, for the purpose of supporting these measures.

If the States may impose these burdens, they may exclude passengers altogether. If they can tax aliens as such, they may expel them, when landed, by an oppressive exercise of the power. If they tax on arrival, they may tax on departure, and there is no limit to the power.

It is supposed that this case is governed by that of *The City of New York* v. *Miln*; but upon examination it will be found that the action in that case was not founded upon any section of the passenger law which imposed a tax upon them. It was an action of debt, for the recovery of a penalty for not reporting the names of the passengers. The declaration averred that a certain vessel arrived in the port of New York from Liverpool, with passengers on board, and that the

master did not make a report in writing to the mayor of the city of the name, place of birth and last legal settlement, age, and occupation of the several persons brought as passen-
*389] gers on the ship, contrary to *the provisions of the act of the State of New York, (partly recited in the declaration,) whereby an action accrued to the plaintiff to demand from the defendant, the consignee of the ship, the sum of seven thousand five hundred dollars. To this declaration there was a demurrer and joinder.

The decision of the court was therefore confined to that part of the act which requires the master, within twenty-four hours after the arrival of his vessel, to make report of his passengers, but the question as to the power of taxation did not arise. It is true there were many general remarks upon constitutional law, made by the judges who gave opinions; but the points before the court and the questions passed upon were those above referred to.

Chief Justice Taney, in remarking upon this case of *New York* v. *Miln*, observes, that "the question as to the power of the States upon this subject was very fully discussed at the bar. But no opinion was expressed upon it by the court, because the case did not necessarily involve it, and there was great diversity of opinion on the bench. Consequently the point was left open, and has never been decided in any subsequent case in this court." (5 How., 584.)

But can the maritime States, by their own acts, prohibit the importation of settlers for the public lands, or their migration to those unoccupied regions of the interior which are ready to welcome their approach? Congress has legislated upon the subject of emigration and naturalization, the exclusive power over which is given to that body by the Constitution. It has also legislated concerning the carrying of passengers, prescribing the space they shall be entitled to occupy on shipboard, the food and water with which they shall be supplied, and the privileges they shall enjoy.

The institutions and laws of the United States encourage the emigration of foreigners, and our untilled soil requires the stimulating power of their industry. Can the maritime States, then, by their own legislation, restrain or destroy that commerce which relates to the importation of passengers, and their migration to other States open for their reception? The law of Massachusetts prescribes some of the terms upon which aliens may land upon her shores. If it can prescribe some, it can prescribe others. It may establish burdensome or impossible conditions, and so shut out emigrants altogether. Let it not be forgotten that this is a question of power exclu-

sively. Emigrants arrive in Boston destined for Iowa. This convenient eastern port is selected as a place of disembarkation, the ultimate purpose being a permanent settlement elsewhere. The passengers are not, as a matter of course, either diseased, *decrepit, or infirm. They may be [*390 young, above want, adventurous, and determined. Upon approaching the shores of their first western port they are met by the tax-gatherer, who demands two dollars from each man, each woman, and each child. Having submitted to this exaction, the emigrants pass immediately on towards their long-sought home in the fertile regions of the West. When they arrive at the boundary of New York another tax-gatherer may meet them, and, under the pretence of pauperism and the burdens of poverty, he may demand two dollars also from each emigrant, for the privilege of crossing the borders of another State. For, if Massachusetts can tax them as they come in by sea, New York may tax them also as they journey through her territory by land; and this may be repeated in every State through which they may desire to pass.

It is submitted to the court, that the States have no such power. We repeat, that although the States may pass poor-laws, establish sanatory regulations, and provide for inspections, yet they cannot tax any branch of the foreign commerce of the country, to aid them in their projects, be they charitable or not. The power cannot be derived from the subject to which the money is to be applied, but must exist, if it exist at all, altogether independently of such objects.

The whole subject of emigration, so far as it is connected with commerce and navigation, is under the control of Congress, and there it should remain. That body can exercise the power wisely, discreetly, and disinterestedly, for the benefit of the whole country, without permitting any improper burden to be placed upon the maritime States. Their laws will be uniform; those of the States must necessarily be diverse,—the tax in Massachusetts being two dollars, while in New York it is but one. The sovereign power may annex what conditions it pleases to the admission of foreigners within its jurisdiction, or prohibit it altogether. But that sovereign power, in this country, is in the United States, and the whole subject is committed, with great propriety, by the Constitution, to the Congress of the whole people, and not to the States in their corporate capacities.

But the passengers referred to are not in all cases emigrants, coming here for permanent settlement. In many cases there are merchants, visiting our shores for purposes of commerce

merely, and we submit that to tax them is to tax the commerce of the country, which cannot be done by the States.

The act of Massachusetts is also open to another objection, which is obvious. The tax is not specifically on the alien passengers themselves, although it may be so indirectly. It *391] *forbids the landing of any such persons until the master, owner, consignee, or agent shall have paid two dollars for each passenger so landing.

We submit that this is a direct impost upon the masters or owners, in direct relation to their commercial avocations; it is a tax upon the master as master, upon the owner because he imports emigrants rather than merchandise. Massachusetts cannot compel a merchant to pay two dollars for each chest of tea he may import into Boston; and to impose upon him a duty of two dollars upon each person he may import is as direct an interference with the commerce of the country as a tax upon baggage or personal effects would be. Passengers are brought in as freight; they take the place of cargo, and occupy all the decks of the ship. To tax the passengers is to tax the freight; and if the latter cannot be done, the former cannot. The business of importing emigrants has become a matter of great importance to the merchants of New York and Boston, who derive large emoluments from this employment of their ships, the receipts for passage-money being counted by millions instead of thousands. Passage-money and freight are in law identical, and are governed by the same rules. (1 Pet. Adm., 123–125.)

The navigation of the country is under the exclusive control of Congress; and if it were under that of the States, what would be the consequence? Massachusetts, having power over the subject, might impose a tax of five dollars upon each emigrant imported in ships other than her own, and by this means secure a monopoly, as far as this could be done by legislation, for the vessels belonging to her own citizens. Uniformity in the laws of commerce and navigation would be destroyed, and we should go back in effect to the old Confederation. Jealousies would spring up, and retaliation begin, and this entire branch of the commerce of the country would fall into chaos. Thirty years ago, during the steamboat controversy, Connecticut passed retaliatory laws against New York; and if the States can regulate the conditions upon which passengers may land, these conditions may and would vary in all the maritime States.

They do so now. In this respect there is no uniformity in the State laws; and hence the whole subject should be and is referred to Congress. That body has the entire control over

our foreign relations, which are wisely placed by the Constitution beyond State interference.

If Massachusetts can tax passengers arriving within her jurisdiction before they came under the control of her laws, so may New Mexico and California, when States. These latter *would have a strong temptation to exercise the right at this time, and might make New York herself feel [*392 the weight of State power. For if States can lay an impost upon aliens, they may also upon natives, as New York herself now does.

She does not discriminate between citizens of the United States and foreigners, but imposes the same tax upon both. Neither is she particularly nice as to the objects to which the revenue thus raised is appropriated.

To support an establishment for the reform of young offenders she gives eight thousand dollars per annum; a large donation is bestowed upon her hospitals and dispensaries; and finally, should there be a surplus of revenue thus derived, the State treasury itself becomes the depository of all balances which remain. If she has the power to impose the tax, and raise the revenue, she doubtless has the power to dispose of it in any way she may see fit. She may defray out of it all the expenses of her civil list, maintain her schools, and support her paupers. The ease with which revenue may be raised by means of imposts upon commerce presents great temptations to State power. The convenience of the system is obvious. If it can be upheld under the Constitution of the United States, it will be resorted to by every State upon the Atlantic and the Pacific, and indirectly a large portion of the revenues of the States will be derived from commerce and navigation. The temptation would not be resisted, and hence those who framed the great charter under which the States are restrained wisely took the power to regulate commerce from these sovereignties, and bestowed it upon Congress.

We submit to the court, that the law of Massachusetts now under consideration is unconstitutional and void.

Mr. Justice McLEAN.

SMITH *v.* TURNER.

Under the general denomination of health laws in New York, and by the seventh section of an act relating to the marine hospital, it is provided, that "the health-commissioner shall demand and be entitled to receive, and in case of

neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.:—

"1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar.

"2. From the master of each coasting-vessel, for each per-
*393] son *on board, twenty-five cents; but no coasting-vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

The eighth section provides that the money so received shall be denominated "hospital moneys." And the ninth section gives "each master paying hospital moneys a right to demand and recover from each person the sum paid on his account." The tenth section declares any master, who shall fail to make the above payments within twenty-four hours after the arrival of his vessel in the port, shall forfeit the sum of one hundred dollars. By the eleventh section, the commissioners of health are required to account annually to the Comptroller of the State for all moneys received by them for the use of the marine hospital; "and if such moneys shall, in any one year, exceed the sum necessary to defray the expenses of their trust, including their own salaries, and exclusive of such expenses as are to be borne and paid as a part of the contingent charges of the city of New York, they shall pay over such surplus to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of the society."

The plaintiff in error was master of the British ship Henry Bliss, which vessel touched at the port of New York in the month of June, 1841, and landed two hundred and ninety steerage passengers. The defendant in error brought an action of debt on the statute against the plaintiff, to recover one dollar for each of the above passengers. A demurrer was filed, on the ground that the statute of New York was a regulation of commerce, and in conflict with the Constitution of the United States. The Supreme Court of the State overruled the demurrer, and the Court of Errors affirmed the judgment. This brings before this court, under the twenty-fifth section of the Judiciary Act, the constitutionality of the New York statute.

I will consider the case under two general heads:—

1. Is the power of Congress to regulate commerce an exclusive power?

2. Is the statute of New York a regulation of commerce?

In the eighth section of the first article of the Constitution it is declared that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Before the adoption of the Constitution, the States, respectively, exercised sovereign power, under no other limitations than those contained in the Articles of Confederation. By the third section of the sixth article of that instrument, it was declared that "no State shall lay any imposts or duties which may *interfere with any stipulations in [*394
treaties entered into by the United States in Congress assembled"; and this was the only commercial restriction on State power.

As might have been expected, this independent legislation, being influenced by local interests and policy, became conflicting and hostile, insomuch that a change of the system was necessary to preserve the fruits of the Revolution. This led to the adoption of the Federal Constitution.

It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal government and inhibited to the States, either expressly or by necessary implication. This implication may arise from the nature of the power.

In the same section which gives the commercial power to Congress, is given power "to borrow money on the credit of the United States," "to establish a uniform rule of naturalization," "to coin money," "to establish post-offices and post-roads," "to constitute tribunals inferior to the Supreme Court," "to define and punish piracies and felonies committed on the high seas," "to declare war," "to provide and maintain a navy," &c., and "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

Only one of these powers is, in the Constitution, expressly inhibited to the States; and yet, from the nature of the other powers, they are equally beyond State jurisdiction.

In the case of *Holmes* v. *Jennison*, 14 Pet., 570, the chief justice, in giving his own and the opinion of three of his brethren, says:—"All the powers which relate to our foreign intercourse are confided to the general government. Congress have the power to regulate commerce, to define and punish piracies," &c. "Where an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, there the authority

to the Federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the States." (p. 574.)

In *Houston* v. *Moore*, 5 Wheat., 23, the court say:—"We are altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time compatible with one another."

The court, again, in treating of the commercial power, say, in *Gibbons* v. *Ogden*, 9 Wheat., 196:—"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost *395] extent, and *acknowledges no limitations other than are prescribed in the Constitution." "The sovereignty of Congress, though limited to specified objects, is plenary as to those objects." "The power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions," &c. And in the same case, page 199:—"Where, then, each government exercises the power of taxation, neither is exercising the power of the other; but when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do."

And Mr. Justice Johnson, who gave a separate opinion in the same case, observes,—"The power to regulate commerce here meant to be granted was the power to regulate commerce which previously existed in the States." And again, —"The power to regulate commerce is necessarily exclusive."

In *Brown* v. *The State of Maryland*, 12 Pet., 446, the court say,—"It is not, therefore, matter of surprise that the grant of commercial power should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States." This question, they remark, "was considered in the case of *Gibbons* v. *Ogden*, in which it was declared to be complete in itself, and to acknowledge no limitations," &c. And Mr. Justice Baldwin, in the case of *Groves* v. *Slaughter*, 15 Pet., 511, says,—"That the power of Congress to regulate commerce among the several States is exclusive of any interference by the States has been, in my opinion, conclusively settled by the solemn opinions of this court," in the two cases above cited. And he observes,—"If these decisions are not to be taken as the established construction

of this clause of the Constitution, I know of none which are not yet open to doubt."

Mr. Justice Story, in the case of *New York* v. *Miln*, 11 Pet., 158, in speaking of the doctrine of concurrent power in the States to regulate commerce, says, that, in the case of *Gibbons* v. *Ogden*, "it was deliberately examined and deemed inadmissible by the court." "Mr. Chief Justice Marshall, with his accustomed accuracy and fulness of illustration, reviewed, at that time, the whole grounds of the controversy; and from that time to the present, the question has been considered, so far as I know, at rest. The power given to Congress to regulate commerce with foreign nations and among the States has been deemed exclusive, from the nature and objects of the power, and the necessary implications growing out of its exercise."

*When the commercial power was under discussion [*396
in the convention which formed the Constitution, Mr. Madison observed, that "he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority." Mr. Sherman said,—"The power of the United States to regulate trade, being supreme, can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction." Mr. Langdon "insisted that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it." And the motion was carried, "that no State shall lay any duty on tonnage without the consent of Congress." (3 Madison Papers, 1585, 1586.)

The adoption of the above provision in the Constitution, and also the one in the same section,—"that no State shall, without the assent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress,"—is a restriction, it is contended, upon the acknowledged power of the States.

The force of this argument was admitted by the court in the case of *Gibbons* v. *Ogden*, and it was answered by the allegation, that the restriction operated on the taxing power of the States. The same argument was used in the thirty-second number of the Federalist. I yield more to the authority of this position than to the stringency of the argument in support of it. To prohibit the exercise of a power by a

State, as a general rule, admits the existence of such power. But this may not be universally true. Had there been no inhibition on the States as to "coining money and fixing the value thereof," or as to tonnage duties, it could not have been successfully contended that the States might exercise those powers. All duties are required to be uniform, and this could not be the result of State action. And the power to coin money and regulate its value, for the Union, is equally beyond the power of a State.

Doubts may exist as to the true construction of an instrument in the minds of its framers, and to obviate those doubts, additional, if not unnecessary, provisions may be inserted. This remark applies to the Constitution in the instances named, and in others.

A concurrent power in the States to regulate commerce is an anomaly not found in the Constitution. If such power exist, it may be exercised independently of the federal authority.

*397] *It does not follow, as is often said, with little accuracy, that, when a State law shall conflict with an act of Congress, the former must yield. On the contrary, except in certain cases named in the Federal Constitution, this is never correct when the act of the State is strictly within its powers.

I am aware this court have held that a State may pass a bankrupt law, which is annulled when Congress shall act on the same subject. In *Sturges* v. *Crowninshield*, 4 Wheat., 122, the court say,—"Wherever the terms in which a power is granted by the Constitution to Congress, or wherever the nature of the power itself requires that it shall be exclusively exercised by Congress, the subject is as completely taken away from State legislatures as if they had been forbidden to act upon it." But they say,—"The power granted to Congress of establishing uniform laws on the subject of bankruptcy is not of this description."

The case of *Wilson* v. *The Blackbird Creek Marsh Company*, 2 Pet., 250, it is contended, recognizes the right of a State to exercise a commercial power, where no conflict is produced with an act of Congress.

It must be admitted that the language of the eminent chief justice who wrote the opinion is less guarded than his opinions generally were on constitutional questions.

A company was incorporated and authorized to construct a dam over Blackbird Creek, in the State of Delaware, below where the tide ebbed and flowed, in order to drain the marsh, and by that means improve the health of the neighbourhood.

The plaintiffs, being desirous of ascending the creek, with their vessel, above the dam, removed a part of it as an obstruction, for which the company recovered damages. The chief justice in speaking of the structure of the dam, the drainage of the marsh, and the improvement of the health of the neighbourhood, says:—"Means calculated to produce these objects, provided they do not come into collision with the powers of the general government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance." And he observes,—"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows," &c., "we should feel not *much difficulty in saying [*398
that a State law coming in conflict with such act would be void. But Congress had passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States,—a power which has not been so exercised as to affect the question."

The language of the chief justice must be construed in reference to the question before the court; to suppose that he intended to lay down the general proposition, that a State might pass any act to obstruct or regulate commerce which did not come in conflict with an act of Congress, would not only be unauthorized by the language used, and the facts of the case before the court, but it would contradict the language of the court in *Gibbons* v. *Ogden*, *Brown* v. *Maryland*, and every case in which the commercial power has been considered.

The chief justice was speaking of a creek which falls into the Delaware, and admitted in the pleadings to be navigable, but of so limited an extent that it might well be doubted whether the general regulation of commerce could apply to it. Hundreds of creeks within the flow of the tide were similarly situated. In such cases, involving doubt whether the jurisdiction may not be exclusively exercised by the State, it is politic and proper in the judicial power to follow the action of Congress. Over the navigable waters of a

State, Congress can exercise no commercial power, except as regards an intercourse with other States of the Union or foreign countries. And doubtless there are many creeks made navigable by the flowing of the tide, or by the backwater from large rivers, which the general phraseology of an act to regulate commerce may not embrace. In all such cases, and many others that may be found to exist, the court could not safely exercise a jurisdiction not expressly sanctioned by Congress.

When the language of the court is applied to the facts of the above case, no such general principle as contended for is sanctioned. The construction of the dam was complained of, not as a regulation of commerce, but an obstruction of it; and the court held, that, "as Congress had not assumed to control State legislation over those small navigable creeks into which the tide flows, the judicial power could not do so. The act of the State was an internal and a police power to guard the health of its citizens. By the erection of the dam, commerce could only be affected as charged consequentially and contingently. The State neither assumed nor exercised a commercial power. In this whole case, nothing more is found than a forbearance to exercise power over a doubtful object, which should ever characterize the judicial branch of the government.

*399] *A concurrent power excludes the idea of a dependent power. The general government and a State exercise concurrent powers in taxing the people of the State. The objects of taxation may be the same, but the motives and policy of the tax are different, and the powers are distinct and independent. A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. A joint action is not supposed, and two independent wills cannot do the same thing. The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must establish the rule. If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action.

But the argument is, that a State acting in a subordinate capacity, wholly inconsistent with its sovereignty, may regulate foreign commerce until Congress shall act on the same subject; and that the State must then yield to the paramount authority. A jealousy of the federal powers has often been expressed, and an apprehension entertained that they would

impair the sovereignty of the States. But this argument degrades the States by making their legislation, to the extent stated, subject to the will of Congress. State powers do not rest upon this basis. Congress can in no respect restrict or enlarge State powers, though they may adopt a State law. State powers are at all times and under all circumstances exercised independently of the general government, and are never declared void or inoperative except when they transcend State jurisdiction. And on the same principle, the Federal authority is void when exercised beyond its constitutional limits.

The organization of the militia by a State, and also a State bankrupt law, may be superseded by the action of Congress. But this is not within the above principle. The action of the State is local, and may be necessary on both subjects, and that of Congress is general. In neither case is the same power exercised. No one doubts the power of a State to regulate its internal commerce.

It has been well remarked, that the regulation of commerce consists as much in negative as in positive action. There is not a Federal power which has been exerted in all its diversified means of operation. And yet it may have been exercised by Congress, influenced by a judicious policy and the instruction of the people. Is a commercial regulation open to State action because the Federal power has not been exhausted? No ingenuity can provide for every contingency; and if it *could, it might not be wise to do so. Shall [*406
free goods be taxed by a State because Congress have not taxed them? Or shall a State increase the duty, on the ground that it is too low? Shall passengers, admitted by act of Congress without a tax, be taxed by a State? The supposition of such a power in a State is utterly inconsistent with a commercial power, either paramount or exclusive, in Congress.

That it is inconsistent with the exclusive power will be admitted; but the exercise of a subordinate commercial power by a State is contended for. When this power is exercised, how can it be known that the identical thing has not been duly considered by Congress? And how can Congress, by any legislation, prevent this interference? A practical enforcement of this system, if system it may be called, would overthrow the Federal commercial power.

Whether I consider the nature and object of the commercial power, the class of powers with which it is placed, the decision of this court in the case of *Gibbons* v. *Ogden*, reiterated in *Brown* v. *The State of Maryland*, and often re-

asserted by Mr. Justice Story, who participated in those decisions, I am brought to the conclusion, that the power "to regulate commerce with foreign nations, and among the several States," by the Constitution, is exclusively vested in Congress.

I come now to inquire, under the second general proposition, Is the statute of New York a regulation of foreign commerce?

All commercial action within the limits of a State, and which does not extend to any other State or foreign country, is exclusively under State regulation. Congress have no more power to control this than a State has to regulate commerce "with foreign nations and among the several States." And yet Congress may tax the property within a State, of every description, owned by its citizens, on the basis provided in the Constitution, the same as a State may tax it. But if Congress should impose a tonnage duty on vessels which ply between ports within the same State, or require such vessels to take out a license, or impose a tax on persons transported in them, the act would be unconstitutional and void. But foreign commerce and commerce among the several States, the regulation of which, with certain constitutional exceptions, is exclusively vested in Congress, no State can regulate.

In giving the commercial power to Congress the States did not part with that power of self-preservation which must be inherent in every organized community. They may guard against the introduction of any thing which may corrupt the morals, or endanger the health or lives of their citizens. Quarantine or health laws have been passed by the States, and regulations of police for their protection and welfare.

*401] *The inspection laws of a State apply chiefly to exports, and the State may lay duties and imposts on imports or exports to pay the expense of executing those laws. But a State is limited to what shall be "absolutely necessary" for that purpose. And still further to guard against the abuse of this power, it is declared that "the net produce of all duties and imposts laid by a State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of Congress."

The cautious manner in which the exercise of this commercial power by a State is guarded shows an extreme jealousy of it by the convention; and no doubt the hostile regulations of commerce by the States, under the Confederation, had induced this jealousy. No one can read this provision, and the one which follows it in relation to tonnage duties, without

being convinced that they cover, and were intended to cover, the entire subject of foreign commerce. A criticism on the term *import*, by which to limit the obvious meaning of this paragraph, is scarcely admissible in construing so grave an instrument.

Commerce is defined to be "an exchange of commodities." But this definition does not convey the full meaning of the term. It includes "navigation and intercourse." That the transportation of passengers is a part of commerce is not now an open question. In *Gibbons* v. *Ogden*, this court say,—"No clear distinction is perceived between the powers to regulate vessels in transporting men for hire and property for hire." The provision of the Constitution, that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808," is a restriction on the general power of Congress to regulate commerce. In reference to this clause, this court say, in the above case,—"This section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily."

To encourage foreign emigration was a cherished policy of this country at the time the Constitution was adopted. As a branch of commerce the transportation of passengers has always given a profitable employment to our ships, and within a few years past has required an amount of tonnage nearly equal to that of imported merchandise.

Is this great branch of our commerce left open to State regulation on the ground that the prohibition refers to an import, and a man is not an import?

Pilot laws, enacted by the different States, have been *referred to as commercial regulations. That these [*402
laws do regulate commerce, to a certain extent, is admitted; but from what authority do they derive their force? Certainly not from the States. By the fourth section of the act of the 7th of August, 1789, it is provided,—"That all pilots in the bays, inlets, rivers, harbours, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States, respectively, wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress."[1] These State laws, by adoption, are the laws of Congress, and as such effect

[1] CITED. *Webb* v. *Dunn*, 18 Fla., 728.

is given to them. So the laws of the States which regulate the practice of their courts are adopted by Congress to regulate the practice of the Federal courts. But these laws, so far as they are adopted, are as much the laws of the United States, and it has often been so held, as if they had been specially enacted by Congress. A repeal of them by the State, unless future changes in the acts be also adopted, does not affect their force in regard to Federal action.

In the above instances, it has been deemed proper for Congress to legislate by adopting the law of the States. And it is not doubted that this has been found convenient to the public service. Pilot laws were in force in every commercial State on the seaboard when the Constitution was adopted; and on the introduction of a new system, it was prudent to preserve, as far as practicable, the modes of proceeding with which the people of the different States were familiar. In regard to pilots, it was not essential that the laws should be uniform,—their duties could be best regulated by an authority acquainted with the local circumstances under which they were performed; and the fact that the same system is continued shows that the public interest has required no change.

No one has yet drawn the line clearly, because, perhaps, no one can draw it, between the commercial power of the Union and the municipal power of a State. Numerous cases have arisen, involving these powers, which have been decided, but a rule has necessarily been observed as applicable to the circumstances of each case. And so must every case be adjudged.

A State cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as other property owned by its citizens. A State may tax the stages in which the mail is transported, but this does not regulate the conveyance of the mail any more than taxing a ship regulates commerce. And yet, in both instances, the tax on the property in some degree affects its use.

*403] *An inquiry is made whether Congress, under "the power to regulate commerce among the several States," can impose a tax for the use of canals, railroads, turnpike roads, and bridges, constructed by a State or its citizens? I answer, that Congress has no such power. The United States cannot use any one of these works without paying the customary tolls. The tolls are imposed, not as a tax, in the ordinary sense of that term, but as compensation for the increased facility afforded by the improvement.

The act of New York now under consideration is called a health law. It imposes a tax on the master and every cabin passenger of a vessel from a foreign port, of one dollar and fifty cents; and of one dollar on the mate, each steerage passenger, sailor, or mariner. And the master is made responsible for the tax, he having a right to exact it of the others. The funds so collected are denominated hospital moneys, and are applied to the use of the marine hospital; the surplus to be paid to the treasurer of the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society.

To call this a health law would seem to be a misapplication of the term. It is difficult to perceive how a health law can be extended to the reformation of juvenile offenders. On the same principle, it may be made to embrace all offenders, so as to pay the expenses incident to an administration of the criminal law. And with the same propriety it may include the expenditures of any branch of the civil administration of the city of New York, or of the State. In fact, I can see no principle on which the fund can be limited, if it may be used as authorized by the act. The amount of the tax is as much within the discretion of the legislature of New York as the objects to which it may be applied.

It is insisted that if the act, as regards the hospital fund, be within the power of the State, the application of a part of the fund to other objects, as provided in the act, cannot make it unconstitutional. This argument is unsustainable. If the State has power to impose a tax to defray the necessary expenses of a health regulation, and this power being exerted, can the tax be increased so as to defray the expenses of the State government? This is within the principle asserted.

The case of *The City of New York* v. *Miln*, 11 Pet., 102, is relied on with great confidence as sustaining the act in question. As I assented to the points ruled in that case, consistency, unless convinced of having erred, will compel me to support the law now before us, if it be the same in principle. The law in Miln's case required that "the master or commander of any ship or other vessel arriving at the port of New York shall, *within twenty-four hours after his [*404 arrival, make a report, in writing, on oath or affirmation, to the mayor of the city of New York, of the name, place of birth and last legal settlement, age, and occupation of every person brought as a passenger; and of all persons permitted to land at any place during the voyage, or go on board of some other vessel, with the intention of proceeding to said city; under the penalty on such master or commander,

and the owner or owners, consignee or consignees, of such ship or vessel, severally and respectively, of seventy-five dollars for each individual not so reported." And the suit was brought against Miln as consignee of the ship Emily, for the failure of the master to make report of the passengers on board of his vessel.

In their opinion this court say,—"The law operated on the territory of New York, over which that State possesses an acknowledged and undisputed jurisdiction for every purpose of internal regulation"; and "on persons whose rights and duties are rightfully prescribed and controlled by the laws of the respective States, within whose territorial limits they are found." This law was considered as an internal police regulation, and as not interfering with commerce.

A duty was not laid upon the vessel or the passengers, but the report only was required from the master, as above stated. Now, every State has an unquestionable right to require a register of the names of the persons who come within it to reside temporarily or permanently. This was a precautionary measure to ascertain the rights of the individuals, and the obligations of the public, under any contingency which might occur. It opposed no obstruction to commerce, imposed no tax nor delay, but acted upon the master, owner, or consignee of the vessel, after the termination of the voyage, and when he was within the territory of the State, mingling with its citizens, and subject to its laws.

But the health law, as it is called, under consideration, is altogether different in its objects and means. It imposes a tax or duty on the passengers, officers, and sailors, holding the master responsible for the amount at the immediate termination of the voyage, and necessarily before the passengers have set their feet on land. The tax on each passenger, in the discretion of the legislature, might have been five or ten dollars, or any other sum, amounting even to a prohibition of the transportation of passengers; and the professed object of the tax is as well for the benefit of juvenile offenders as for the marine hospital. And it is not denied that a considerable sum thus received has been applied to the former object. The amount and application of this tax are only important to show the consequences of the exercise of this power by the States. The principle involved is vital to the commercial power of the Union.

*405] *The transportation of passengers is regulated by Congress. More than two passengers for every five tons of the ship or vessel are prohibited, under certain penalties; and the master is required to report to the collector

a list of the passengers from a foreign port, stating the age, sex, and occupation of each, and the place of their destination. In England, the same subject is regulated by act of Parliament, and the same thing is done, it is believed, in all commercial countries. If the transportation of passengers be a branch of commerce, of which there can be no doubt, it follows that the act of New York, in imposing this tax, is a regulation of commerce. It is a tax upon a commercial operation,—upon what may, in effect, be called an import. In a commercial sense, no just distinction can be made, as regards the law in question, between the transportation of merchandise and passengers. For the transportation of both the ship-owner realizes a profit, and each is the subject of a commercial regulation by Congress. When the merchandise is taken from the ship, and becomes mingled with the property of the people of the State, like other property, it is subject to the local law; but until this shall take place, the merchandise is an import, and is not subject to the taxing power of the State, and the same rule applies to passengers. When they leave the ship, and mingle with the citizens of the State, they become subject to its laws.

In *Gibbons* v. *Ogden*, the court held that the act of laying "duties or imposts on imports or exports" is derived from the taxing power; and they lay much stress on the fact, that this power is given in the same sentence as the power to "lay and collect taxes." "The power," they say, "to regulate commerce is given" in a separate clause, "as being entirely distinct from the right to levy taxes and imposts, and as being a new power, not before conferred"; and they remark, that, had not the States been prohibited, they might, under the power to tax, have levied "duties on imports or exports." (9 Wheat., 201.)

The constitution requires that all "duties and imposts shall be uniform," and declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another." Now, it is inexplicable to me how thirteen or more independent States could tax imports under these provisions of the Constitution. The tax must be uniform throughout the Union; consequently the exercise of the power by any one State would be unconstitutional, as it would destroy the uniformity of the tax. To secure this uniformity was one of the motives which led to the adoption of the Constitution. The want of it produced collisions in the commercial regulations of the States. But if, as is contended, these *provisions of the Constitution operate only on the Federal government, and the [*406

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States are free to regulate commerce by taxing its operations in all cases where they are not expressly prohibited, the Constitution has failed to accomplish the great object of those who adopted it.

These provisions impose restrictions on the exercise of the commercial power, which was exclusively vested in Congress; and it is as binding on the States as any other exclusive power with which it is classed in the Constitution.

It is immaterial under what power duties on imports are imposed. That they are the principal means by which commerce is regulated no one can question. Whether duties shall be imposed with the view to protect our manufactures, or for purposes of revenue only, has always been a leading subject of discussion in Congress; and also what foreign articles may be admitted free of duty. The force of the argument, that things untouched by the regulating power have been equally considered with those of the same class on which it has operated, is not admitted by the counsel for the defendant. But does not all experience sustain the argument? A large amount of foreign articles brought into this country for several years have been admitted free of duty. Have not these articles been considered by Congress? The discussion in both houses of Congress, the report by the committees of both, and the laws that have been enacted, show that they have been duly considered.

Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers. The Slave States have the power, as this court held in *Groves* v. *Slaughter*, to prohibit slaves from being brought into them as merchandise. But this was on the ground, that such a prohibition did not come within the power of Congress "to regulate commerce among the several States." It is suggested that, under this view of the commercial power, slaves may be introduced into the Free States. Does any one suppose that Congress can ever revive the slave trade? And if this were possible, slaves thus introduced would be free.

As early as May 27th, 1796, Congress enacted, that "the President be authorized to direct the revenue-officers commanding forts and revenue-cutters to aid in the execution of quarantine, and also in the execution of the health laws of the States respectively." And by the act of February 25th, 1799, which repealed the above act, more enlarged provisions

were enacted, requiring the revenue-officers of the United States to conform *to and aid in the execution of the quarantine and health laws of the States. In the first [*407 section of this law there is a proviso, that "nothing therein shall enable any State to collect a duty of tonnage or impost without the consent of Congress."

A proviso limits the provisions of the act into which it is introduced. But this proviso may be considered as not restricted to this purpose. It shows with what caution Congress guarded the commercial power, and it is an authoritative provision against its exercise by the States. An *impost*, in its enlarged sense, means any tax or tribute imposed by authority, and applies as well to a tax on persons as to a tax on merchandise. In this sense it was no doubt used in the above act. Any other construction would be an imputation on the intelligence of Congress.

If this power to tax passengers from a foreign country belongs to a State, a tax, on the same principle, may be imposed on all persons coming into or passing through it from any other State of the Union. And the New York statute does in fact lay a tax on passengers on board of any coasting-vessel which arrives at the port of New York, with an exception of passengers in vessels from New Jersey, Connecticut, and Rhode Island, who are required to pay for one trip in each month. All other passengers pay the tax every trip.

If this may be done in New York, every other State may do the same, on all the lines of our internal navigation. Passengers on a steamboat which plies on the Ohio, the Mississippi, or on any of our other rivers, or on the Lakes, may be required to pay a tax, imposed at the discretion of each State within which the boat shall touch. And the same principle will sustain a right in every State to tax all persons who shall pass through its territory on railroad-cars, canal-boats, stages, or in any other manner. This would enable a State to establish and enforce a non-intercourse with every other State.

The ninth section of the first article of the Constitution declares,—"Nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." But if the commercial power of the Union over foreign commerce does not exempt passengers brought into the country from State taxation, they can claim no exemption under the exercise of the same power among the States. In *McCulloch* v. *The State of Maryland*, 4 Wheat., 431, this court say,—"That there is a plain repugnance in conferring on one government a power

to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

*408] *The officers and crew of the vessel are as much the instruments of commerce as the ship, and yet they are taxed under this health law of New York as such instruments. The passengers are taxed as passengers, being the subjects of commerce from a foreign country. By the fourteenth article of the treaty of 1794, with England, it is stipulated that the people of each country may freely come, with their ships and cargoes, to the other, subject only to the laws and statutes of the two countries respectively. The statutes here referred to are those of the Federal government, and not of the States. The general government only is known in our foreign intercourse.

By the forty-sixth section of the act of March, 1799, the wearing apparel and other personal baggage, and the tools or implements of a mechanical trade, from a foreign port, are admitted free of duty. These provisions of the treaty and of the act are still in force, and they have a strong bearing on this subject. They are, in effect, repugnant to the act of New York.

It is not doubted that a large portion, perhaps nine tenths, of the foreign passengers landed at the port of New York pass through the State to other places of residence. At such places, therefore, pauperism must be increased much more by the influx of foreigners than in the city of New York. If, by reason of commerce, a burden is thrown upon our commercial cities, Congress should make suitable provisions for their relief. And I have no doubt this will be done.

The police power of the State cannot draw within its jurisdiction objects which lie beyond it. It meets the commercial power of the Union in dealing with subjects under the protection of that power, yet it can only be exerted under peculiar emergencies and to a limited extent. In guarding the safety, the health, and morals of its citizens, a State is restricted to appropriate and constitutional means. If extraordinary expense be incurred, an equitable claim to an indemnity can give no power to a State to tax objects not subject to its jurisdiction.

The Attorney-General of New York admitted, that, if the commercial power were exclusively vested in Congress, no part of it can be exercised by a State. The soundness of this conclusion is not only sustainable by the decisions of this court, but by every approved rule of construction.

That the power is exclusive seems to be as fully established as any other power under the Constitution which has been controverted.

A tax or duty upon tonnage, merchandise, or passengers is a regulation of commerce, and cannot be laid by a State, except under the sanction of Congress and for the purposes specified in the Constitution. On the subject of foreign commerce, including the transportation of passengers, Congress have adopted *such regulations as they deemed [*409
proper, taking into view our relations with other countries. And this covers the whole ground. The act of New York which imposes a tax on passengers of a ship from a foreign port, in the manner provided, is a regulation of foreign commerce, which is exclusively vested in Congress; and the act is therefore void.

Norris v. City of Boston.

This is a writ of error, which brings before the court the judgment of the Supreme Court of the State of Massachusetts.

"An act relating to alien passengers," passed the 20th of April, 1837, by the legislature of Massachusetts, contains the following provisions:—

"§ 1. When any vessel shall arrive at any port or harbour within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of said passengers.

"§ 2. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any other country, no such alien passenger shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient security, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"§ 3. No alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to

the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

The plaintiff being an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain, arriving in the port of Boston, from that place, in command of a schooner called the Union Jack, which had on board nineteen alien passengers, for each of which two dollars were demanded of the plaintiff, and paid by him, on protest that the exaction was illegal. An action being brought, to *410] recover back this *money, against the city of Boston, in the Court of Common Pleas, under the instructions of the court, the jury found a verdict for the defendant, on which judgment was entered; and which was affirmed on a writ of error to the Supreme Court.

Under the first and second sections of the above act, the persons appointed may go on board of a ship from a foreign port, which arrives at the port of Boston with alien passengers on board, and examine whether any of them are lunatics, idiots, maimed, aged, or infirm, incompetent to maintain themselves, or have been paupers in any other country, and not permit such persons to be put on shore, unless security shall be given that they shall not become a city, town, or State charge. This is the exercise of an unquestionable power in the State to protect itself from foreign paupers and other persons who would be a public charge; but the nineteen alien passengers for whom the tax was paid did not come, nor any one of them, within the second section. The tax of two dollars was paid by the master for each of these passengers before they were permitted to land. This, according to the view taken in the above case of *Smith* v. *Turner*, was a regulation of commerce, and not being within the power of the State, the act imposing the tax is void.

The fund thus raised was no doubt faithfully applied for the support of foreign paupers, but the question is one of power, and not of policy. The judgment of the Supreme Court, in my opinion, should be reversed, and this cause be remanded to that court, with instructions to carry out the judgment of this court.

Mr. Justice WAYNE.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

I agree with Mr. Justice McLean, Mr. Justice Catron, Mr. Justice McKinley, and Mr. Justice Grier, that the laws of Massachusetts and New York, so far as they are in question in these cases, are unconstitutional and void. I would not say so, if I had any, the least, doubt of it; for I think it obligatory upon this court, when there is a doubt of the unconstitutionality of a law, that its judgment should be in favor of its validity. I have formed my conclusions in these cases with this admission constantly in mind.

Before stating, however, what they are, it will be well for me to say, that the four judges and myself who concur in giving the judgment in these cases do not differ in the grounds upon which our judgment has been formed, except in one particular, in no way at variance with our united conclusion; *and that is, that a majority of us do not think it necessary in these cases to reaffirm, with our brother McLean, what this court has long since decided, that the constitutional power to regulate "commerce with foreign nations, and among the several States, and with the Indian tribes," is exclusively vested in Congress, and that no part of it can be exercised by a State. [*411

I believe it to be so, just as it is expressed in the preceding sentence. And in the sense in which those words were used by this court in the case of *Gibbons* v. *Ogden*, 9 Wheat., 198. All that was decided in that case remains unchanged by any subsequent opinion or judgment of this court. Some of the judges of it have, in several cases, expressed opinions that the power to regulate commerce is not exclusively vested in Congress. But they are individual opinions, without judicial authority to overrule the contrary conclusion, as it was given by this court in *Gibbons* v. *Ogden*.

Still, I do not think it necessary to reaffirm that position in these cases, as a part of our judgments upon them. Its exclusiveness in Congress will, it is true, be an unavoidable inference from some of the arguments which I shall use upon the power of Congress to regulate commerce; but it will be seen that the argument, as a whole, will be a proper and apt foundation for the conclusion to which five of us have come, —that the laws of Massachusetts and New York, so far as they are resisted by the plaintiffs in the cases before us, are tax acts, in the nature of regulations acting upon the com-

merce of the United States, such as no State can now constitutionally pass.

For the acts of Massachusetts and New York imposing taxes upon passengers, and for the pleadings upon which these cases have been brought to this court, I refer to the opinion of Mr. Justice Catron. They are fully and accurately stated. I take pleasure in saying that I concur with him in all the points made in his opinion, and in his reasoning in support of them. They are sustained by such minute references to the legislation of Congress and to treaty stipulations, that nothing of either is left to be added. As an argument, it closes this controversy against any other view of the subject-matter, in opposition to my learned brother's conclusions.

His leading positions are, that the acts of Massachusetts and New York are tax or revenue acts upon the commerce of the United States, as that commerce has been regulated by the legislation of Congress and by treaty stipulations; that the power to regulate commerce having been acted upon by Congress indicates how far the power is to be exercised for the United States as a nation, with which there can be no *412] *interference by any State legislation; that a treaty permitting the ingress of foreigners into the United States, with or without any other stipulation than a reciprocal right of ingress for our people into the territories of the nation with which the treaty may be made, prevents a State from imposing a poll-tax or personal impost upon foreigners, either directly or indirectly, for any purpose whatever, as a condition for being landed in any part of the United States, whether such foreigners shall come to it for commercial purposes, or as immigrants, or for temporary visitation.

Those of us who are united with Mr. Justice Catron in giving the judgments in these cases concur with him in those opinions. Mr. Justice McKinley and Mr. Justice Grier have just said so, my own concurrence has been already expressed, and the second division of Mr. Justice McLean's opinion contains conclusions identical with those of Mr. Justice Catron concerning the unconstitutionality of the laws of Massachusetts and New York, on account of the conflict between them with the legislation of Congress and with treaty stipulations. I also concur with Mr. Justice McKinley in his interpretation of the ninth section of the first article of the Constitution; also with Mr. Justice Grier, in his opinion in the case of *Norris* v. *The City of Boston*.

I have been more particular, in speaking of the opinions of Messrs. Justice McLean and Catron than I would otherwise have been, and of the points of agreement between them,

and of the concurrence of Messrs. Justices McKinley and Grier and myself in all in which both opinions agree, because a summary may be made from them of what the court means to decide in the cases before us. In my view, after a very careful perusal of those opinions, and of those also of Mr. Justice McKinley and Mr. Justice Grier, I think the court means now to decide,—

1. That the acts of New York and Massachusetts imposing a tax upon passengers, either foreigners or citizens, coming into the ports in those States, either in foreign vessels or vessels of the United States, from foreign nations or from ports in the United States, are unconstitutional and void, being in their nature regulations of commerce contrary to the grant in the Constitution to Congress of the power to regulate commerce with foreign nations and among the several States.

2. That the States of this Union cannot constitutionally tax the commerce of the United States for the purpose of paying any expense incident to the execution of their police laws; and that the commerce of the United States includes an intercourse of persons, as well as the importation of merchandise.

3. That the acts of Massachusetts and New York in question *in these cases conflict with treaty stipulations [*413
existing between the United States and Great Britain, permitting the inhabitants of the two countries "freely and securely to come, with their ships and cargoes, to all places, ports, and rivers in the territories of each country to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of said territories, respectively; also, to hire and occupy houses and warehouses for the purposes of their commerce, and generally the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject, always, to the laws and statutes of the two countries, respectively"; and that said laws are therefore unconstitutional and void.

4. That, the Congress of the United States having by sundry acts passed at different times admitted foreigners into the United States with their personal luggage and tools of trade free from all duty of imposts, the acts of Massachusetts and New York imposing any tax upon foreigners or immigrants for any purpose whatever, whilst the vessel is *in transitu* to her port of destination, though said vessel may have arrived within the jurisdictional limits of either of the States of Massachusetts or New York, and before the passengers

have been landed, are in violation of said acts of Congress, and therefore unconstitutional and void.

5. That the acts of Massachusetts and New York, so far as they impose any obligation upon the owners or consignees of vessels, or upon the captains of vessels or freighters of the same, arriving in the ports of the United States within the said States, to pay any tax or duty of any kind whatever, or to be in any way responsible for the same, for passengers arriving in the United States or coming from a port in the United States, are unconstitutional and void; being contrary to the constitutional grant to Congress of the power to regulate commerce with foreign nations and among the several States, and to the legislation of Congress under the said power, by which the United States have been laid off into collection districts, and ports of entry established within the same, and commercial regulations prescribed, under which vessels, their cargoes and passengers, are to be admitted into the ports of the United States, as well from abroad as from other ports of the United States. That the act of New York now in question, so far as it imposes a tax upon passengers arriving in vessels from other ports in the United States, is properly in this case before this court for construction, and that the said tax is unconstitutional and void. That the ninth section of the first article of the Constitution includes
*414] within it the migration of other persons, *as well as the importation of slaves, and in terms recognizes that other persons as well as slaves may be the subjects of importation and commerce.

6. That the fifth clause of the ninth section of the first article of the Constitution, which declares that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another State; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another," is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States, and also a prohibition upon the States to destroy such equality by any legislation prescribing a condition upon which vessels bound from one State shall enter the ports of another State.

7. That the acts of Massachusetts and New York, so far as they impose a tax upon passengers, are unconstitutional and void, because each of them so far conflicts with the first clause of the eighth section of the first article of the Constitution, which enjoins that all duties, imposts, and excises shall be uniform throughout the United States; because the constitutional uniformity enjoined in respect to duties and imposts

is as real and obligatory upon the States, in the absence of all legislation by Congress, as if the uniformity had been made by the legislation of Congress; and that such constitutional uniformity is interfered with and destroyed by any State imposing any tax upon the intercourse of persons from State to State, or from foreign countries to the United States.

8. That the power in Congress to regulate commerce with foreign nations and among the several States includes navigation upon high seas, and in the bays, harbours, lakes, and navigable waters within the United States, and that any tax by a State in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant.

9. That the States of this Union may, in the exercise of their police powers, pass quarantine and health laws, interdicting vessels coming from foreign ports, or ports within the United States, from landing passengers and goods, prescribe the places and time for vessels to quarantine, and impose penalties upon persons for violating the same; and that such laws, though affecting commerce in its transit, are not regulations of commerce prescribing terms upon which merchandise and persons shall be admitted into the ports of the United States, but precautionary regulations to prevent vessels engaged in commerce from introducing disease into the ports to which they are bound, and that the States may, in the exercise of such police power, without *any violation of the power in [*415
Congress to regulate commerce, exact from the owner or consignee of a quarantined vessel, and from the passengers on board of her, such fees as will pay to the State the cost of their detention and of the purification of the vessel, cargo, and apparel of the persons on board.

Having done what I thought it was right to do to prevent hereafter any misapprehension of what the court now means to decide, I will give some reasons, in addition to those which have been urged by my associates, in support of our common result. In the first place, let it be understood, that, in whatever I may say upon the power which Congress has "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," the internal trade of a State is not meant to be included; that not being in any way within the regulating power of Congress.

In the consideration, too, of the power in Congress to regulate commerce, I shall not rely, in the first instance, upon what may be constitutionally done in many commercial particulars, as well under the treaty-making power as by the legislation of Congress. My first object is to show the plenitude of the

power in Congress from the grant itself, without aid from any other clause in the Constitution. The treaty-making power for commercial purposes, however, and other clauses in the Constitution relating to commerce, may afterwards be used to enforce and illustrate the extent and character of the power which Congress has to regulate commerce. It is a grant of legislative power, susceptible, from its terms and the subject-matter, of definite and indisputable interpretation.

Any mere comment upon the etymology of the words "regulate" and "commerce" would be unsatisfactory in such a discussion. But if their meaning, as they were used by the framers of the Constitution, can be made precise by the subject-matter, then it cannot be doubted that it was intended by them that Congress should have the legislative power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes, to the exclusion of any regulation for such commerce by any one of the States.

All commerce between nations is permissive or conventional. The first includes every allowance of it, under what is termed by writers upon international law the liberty or freedom of commerce,—its allowance by statutes, or by the orders of any magistracy having the power to exercise the sovereignty of a nation in respect to commerce. Conventional commerce is, of course, that which nations carry on with each other under treaty stipulations. With colonial commerce—another distinct kind, between nations and their colonies, *416] which the laws *of nations permit the former to monopolize—we have nothing to do upon this occasion.

Now, what commerce was in fact, at least so far as European nations were concerned, had been settled beyond all dispute before our separation from the mother country. It was well known to the framers of the Constitution, in all its extent and variety. Hard denials of many of its privileges had taught them what it was. They were familiar with the many valuable works upon trade and international law which were written and published, and which had been circulated in England and in the Colonies from the early part of the last century up to the beginning of the Revolution. It is not too much to say, that our controversies with the mother country upon the subject had given to the statesmen in America in that day more accurate knowledge of all that concerned trade in all its branches and rights, and a more prompt use of it for any occasion, than is now known or could be used by the statesmen and jurists of our own time. Their knowledge, then, may well be invoked to measure the constitutional power of Congress to regulate commerce.

Commerce between nations or among states has several branches. Martens, in his Summary of the Laws of Nations, says,—"It consists in selling the superfluity; in purchasing articles of necessity, as well productions as manufactures; in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight."[1]

"Generally speaking, the commerce in Europe is so far free, that no nation refuses positively and entirely to permit the subjects of another nation, when even there is no treaty between them, to trade with its possessions in or out of Europe, or to establish themselves in its territory for that purpose. A state of war forms here a natural exception. However, as long as there is no treaty existing, every state retains its natural right to lay on such commerce whatever restriction it pleases. A nation is then fully authorized to prohibit the entry or exportation of certain merchandise, to institute customs and to augment them at pleasure, to prescribe the manner in which the commerce with its dominions shall be carried on, to point out the places where it shall be carried on, or to exempt from it certain parts of its dominions, to exercise freely its sovereign power over the foreigners living in its territories, to make whatever distinctions between the nations with whom it trades it may find conducive to its interests."

In all of the foregoing particulars Congress may act legislatively. It is conceded that the States may not do so in any one of them; and if, in virtue of the power to [*417 lay taxes, the United States and the States may act in that way concurrently upon foreigners when they reside in a State, it does not follow that the States may impose a personal impost upon them, as the condition of their being permitted to land in a port of the United States. "Duties on the entry of merchandise are to be paid indiscriminately by foreigners as well as subjects. Personal imposts it is customary not to exact from foreigners till they have for some time been inhabitants of the state." (Martens, p. 97.)

Keeping, then, in mind what commerce is, and how far a nation may legally limit her own commercial transactions with another state, we cannot be at a loss to determine, from the subject-matter of the clause in the Constitution, that the meaning of the terms used in it is to exclude the States from regulating commerce in any way, except their own internal trade, and to confide its legislative regulation completely and

[1] Cited. *Case of the State Freight Tax*, 15 Wall., 276.

entirely to Congress. When I say completely and entirely to Congress, I mean all that can be included in the term "commerce among the several States," subject, of course, to the right of the States to pass inspection laws in the mode prescribed by the Constitution, to the prohibition of any duty upon exports, either from one State to another State or to foreign countries, and to that commercial uniformity which the Constitution enjoins respecting all that relates to the introduction of merchandise into the United States, and those who may bring it for sale, whether they are citizens or foreigners, and all that concerns navigation, whether vessels are employed in the transportation of passengers or freight, or both, including, also, all the regulations which the necessities and safety of navigation may require. "Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike-roads, ferries, &c., are component parts of that immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government."

But the conclusion derived from the subject-matter of the clause, as I have just stated it, is strengthened particularly by what may be done in respect to commerce by treaty, and by other clauses in the Constitution relating to commerce. Martens (p. 151) says,—"The mere general liberty of trade, such as it is acknowledged at present in Europe, being too vague to secure to a nation all the advantages it is necessary it should derive from its commerce, commercial powers have been obliged to have recourse to treaties for their mutual benefit. The number of these treaties is considerably aug-
*418] mented since the *sixteenth century. However they may differ in their conditions, they turn generally on these three points:—1. On commerce in time of peace. 2. On the measures to be pursued with respect to commerce and commercial subjects in case of rupture between the parties. 3. On the commerce of the contracting party that may happen to remain neuter, while the other contracting party is at war with a third power. With respect to the first point the custom is,—1. To settle in general the privileges that the contracting powers grant reciprocally to their subjects. 2. To enter into the particulars of the rights to be enjoyed by their subjects, as well with respect to their property as to their personal rights. Particular care is usually taken to provide for the free enjoyment of their religion; for their right to the benefit of the laws of the country; for the security of the books of commerce, &c. 3. To mention specifically the kinds

of merchandise which are to be admitted, to be imported or exported, and the advantages to be granted relatively to customs, tonnage, &c.

"With respect to the rights and immunities in case of a rupture between the parties, the great objects to be obtained are,—1. An exemption from seizure of the person or effects of the subjects residing in the territory of the other contracting power. 2. To fix the time which they shall have to remove with their property out of the territory. 3. Or to point out the conditions on which they may be permitted to remain in the enemy's country during the war.

"In specifying the rights of commerce to be enjoyed by the neutral power, it is particularly necessary,—1. To exempt its vessels from embargo. 2. To specify the merchandise which is to be accounted contraband of war, and to settle the penalties in case of contravention. 3. To agree on the manner in which vessels shall be searched at sea. 4. To stipulate whether neutral bottoms are to make neutral goods or not."

It seems to me, when such regulations of commerce as may be made by treaty are considered in connection with that clause in the Constitution giving to Congress the power to regulate it by legislation, and also in connection with the restraints upon the States in the tenth section of the first article of the Constitution, in respect to treaties and commerce, that the States have parted with all power over commerce, except the regulation of their internal trade. The restraints in that section are, that no State shall enter into any treaty, alliance, or confederation; no State shall, without the consent of Congress, lay any duties on imports or exports, except what may be necessary for executing its inspection laws; no State shall, without the consent of Congress, lay any duty of tonnage, *or enter into any [*419
agreement or compact with another State or with a foreign power.

The States, then, cannot regulate commerce by a treaty or compact, and before it can be claimed that they may do so in any way by legislation, it must be shown that the surrender which they have made to a common government to regulate commerce for the benefit of all of them has been done in terms which necessarily imply that the same power may be used by them separately, or that the power in Congress to regulate commerce has been modified by some other clause in the Constitution. No such modifying clause exists. The terms used do not, in their ordinary import, admit of any exception from the entireness of the power in Con-

gress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes. The exercise of any such power of regulation by the States, or any one or more of them, would conflict with the constitutional authority of the United States to regulate commerce by legislation and by treaty, and would measurably replace the States in their commercial attitude to each other as they stood under the Articles of Confederation, and not as they meant to be when "we, the people of the United States," in their separate sovereignties, as they existed under the Articles of Confederation, superseded the latter by their ratification of "the Constitution for the United States of America."

In what I have said concerning commercial regulations under the treaty-making power, I do not mean to be understood as saying that by treaty all regulation of commerce can be made, independently of legislation by Congress. That question I do not enter into here, for in such cases as are now before the court I have no right to do so. It has only been alluded to by me to prevent any such inference from being made.

Apply the foregoing reasoning to the acts of Massachusetts and New York, and whatever may be the motive for such enactments or their legislative denomination, if they practically operate as regulations of commerce, or as restraints upon navigation, they are unconstitutional. When they are considered in connection with the existing legislation of Congress in respect to trade and navigation, and with treaty stipulations, they are certainly found to be in conflict with the supreme law of the land.

But those acts conflict also with other clauses in the Constitution relating to commerce and navigation; also, with that clause which declares that duties, imposts, and excises shall be uniform throughout the United States. Not in respect to excises, for those being taxes upon the consumption or retail sale *of commodities, the States *420] have a power to lay them, as well as Congress. Not so, however, as to duties and imposts; the first, in its ordinary taxing sense, being taxes or customs upon merchandise; and an impost being also, in its restrained sense, a duty upon imported goods, but also, in its more enlarged meaning, any tax or imposition upon persons. Notwithstanding what may have otherwise been said, I was brought to the conclusion, in my consideration of the taxing power of Congress before these cases were before us, that there

was no substantial reason for supposing it was used by the framers of the Constitution exclusively in its more confined sense.

But I return to those clauses with which I have said the acts in question conflict. It will be conceded by all, that the fifth clause of the ninth section of the first article of the Constitution, declaring that "no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another," was intended to establish among them a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States. When Congress enacts regulations of commerce or revenue, it does so for the United States, and the equality exists. When a State passes a law in any way acting upon commerce, or one of revenue, it can only do so for itself, and the equality is destroyed. In such a case the Constitution would be violated, both in spirit and in letter.

Again, it is declared in the first clause of the eighth section of the first article of the Constitution, that all duties, imposts, and excises shall be uniform throughout the United States; that is, first, that when Congress lays duties, imposts, or excises, they shall be uniform; and secondly, that if, in the exercise of the taxing power, Congress shall not lay duties or imposts upon persons and particular things imported, the States shall not destroy the uniformity, in the absence of regulation, by taxing either. Things imported, it is admitted, the States cannot tax, whether Congress has made them dutiable articles or free goods; but persons, it is said, they can, because a State's right to tax is only restrained in respect to imports and exports, and, as a person is not an import, a tax or duty may be laid upon him as the condition of his admission into the State.

But this is not a correct or full view of the point. A State's right to tax may only be limited to the extent mentioned; but that does not give the State the right to tax a foreigner or person for coming into one of the States of the United States. That would be a tax or revenue act, in the nature of a regulation of commerce, acting upon navigation. It is not a *disputable point, that, under the power given [*421
to Congress to lay and collect taxes, duties, imposts, and excises, it may, in the exercise of its power to regulate commerce, tax persons as well as things, as the condition of their admission into the United States. To lay and collect taxes, duties, and imposts gives to Congress a plenary power

over all persons and things for taxation, except exports. Such is the received meaning of the word *taxes* in its most extended sense, and always so when it is not used in contradistinction to terms of taxation, having a limited meaning as to the objects to which, by usage, the terms apply. It is in the Constitution used in both senses. In its extended sense, when it is said that Congress may lay and collect taxes; and in a more confined sense, in contradistinction to duties, imposts, and excises.

The power, then, to tax, and the power to regulate commerce, give to Congress the right to tax persons who may come into the United States, as a regulation of commerce and navigation. I have already mentioned, among the restraints which nations may impose upon the liberty or freedom of commerce, those which may be put upon foreigners coming into or residing within their territories. This right exists to its fullest extent, as a portion of the commercial rights of nations, when not limited by treaties.

The power to regulate commerce with foreign nations and among the several States having been given to Congress, Congress may, but the States cannot, tax persons for coming into the United States.

It is urged, however, in reply to what has just been said, that, as the power to regulate commerce and the right to levy taxes are distinct and substantive powers, the first cannot be used to limit the right of the States to tax, beyond the prohibition upon them not to tax exports or imports. The proposition is rightly stated, but what is gained in these cases from it? Nothing. The sums directed to be paid by or for passengers are said to be taxes which the States have a right to impose, in virtue of their police powers, either to prevent the evils of pauperism or to protect their inhabitants from apprehended disease. But the question in these cases is, not whether the States may or may not tax, but whether they can levy a tax upon passengers coming into the United States under the authority and sanction of the laws of Congress and treaty stipulations.

The right in a nation or state occurs—not in all cases, for there are international exceptions—upon all persons and things when they come or are brought within the territory of a state. Not, however, because the person or thing is within the territory, but because they are under the sovereignty or *422] political *jurisdiction of the state. If not within the latter, the right to tax does not arise until that event occurs. States may have territorial jurisdiction for most of

the purposes of sovereignty, without political jurisdiction for some of them.

The distinction is not mine. It has been long since made by jurists and writers upon national law, because the history of nations, from an early antiquity until now, shows such relations between them. The framers of the Constitution acted upon it throughout, in all the sovereign powers which they proposed that the States should yield to the United States. Martens properly says, that, to have a just idea of the states of which Europe is composed, we must distinguish those which are absolutely sovereign from those which are but demi-sovereign. The states of the German empire, for instance, and the Italian princes who acknowledge their submission to the empire, —and the German states, in their present Diet for great national purposes, with a vicar at its head, overtopping in might and majesty, but with regulated power, all before who have been emperors of Germany. I do not mean to say that the States of this Union are demi-sovereign to the general government in the sense in which some of the nations of Europe are to other nations; but that such connection between those nations furnishes the proof of the distinction between territorial sovereignty and political sovereignty. The sovereignty of these States and that of the United States, in all constitutional particulars, have a different origin. But I do mean to say, that the distinction between territorial and political jurisdiction arises, whether the association be voluntary between states, or otherwise. Whenever one power has an exterritorial right over the territory or sovereignty of another power, it is called by writers "a partial right of sovereignty." Is not that exactly the case between the United States, as a nation, and the States? Do not the constitutional powers of the United States act upon the territory, as well as upon the sovereignty, of the States, to the extent of what was their sovereignty before they yielded it to the United States? Can any one of the sovereign powers of the United States be carried out by legislation, without acting upon the territory and sovereignty of the States? This being so, Congress may say, and does say, whence a voyage may begin to the United States, and where it may end in a State of the United States. Though in its transit it enters the territory of a State, the political jurisdiction of the State cannot interfere with it by taxation in any way until the voyage has ended; not until the persons who may be brought as passengers have been landed, or the goods which may have been entered as merchandise have passed from the hands of the importer, or have been

*423] *made by himself a portion of the mass of the general property of the State. It is upon this distinction between territorial and political jurisdiction that the case of *Brown* v. *Maryland* rests. Without it, it has no other foundation, although it is not so expressed in the opinion of the court.

In these cases the laws complained of meet the vessels when they have arrived in the harbour, on the way to the port to which they are bound, before the passengers have been landed. And before they are landed they are met by superadded conditions in the shape of a tax, with which it is said they must comply, or which the captain must pay for them, before they are permitted to land. Certainly it is not within the political jurisdiction of a State, in such circumstances of a voyage, to tax passengers.

But it is said, notwithstanding, that the tax may be laid in virtue of police power in the States, never surrendered by them to the United States. A proper understanding of the police power of a nation will probably remove the objection from the minds of those who made it. What is the supreme police power of a state? It is one of the different means used by sovereignty to accomplish that great object, the good of the state. It is either national or *municipal*, in the confined application of that word to corporations and cities. It was used in the argument invariably in its national sense. In that sense it comprehends the restraint which nations may put upon the liberty of entry and passage of persons into different countries, for the purposes of visitation or commerce.

The first restraint that nations reserve to themselves is the right to be informed of the name and quality of every foreigner that arrives. That, and no more than that, was Miln's case. (11 Peters.) Nations have a right to keep at a distance all suspected persons; to forbid the entry of foreigners or foreign merchandise of a certain description, as circumstances may require. In a word, it extends to every person and every thing in the territory; and foreigners are subject to it, as well as subjects to the state, except only ministers and other diplomatic functionaries; and they are bound to observe municipal police, though not liable to its penalties.

"The care of hindering what might trouble the internal tranquillity and security of the state is the basis of the police, and authorizes the sovereign to make laws and establish institutions for that purpose, and as every foreigner living in the state ought to concur in promoting the object, even those who enjoy the right exterritorially (such as sovereigns and ministers cannot dispense with observing the laws of police, although

in case of transgression they cannot be punished like native or temporary subjects of the state."

*Police powers, then, and sovereign powers are the same, the former being considered so many particular rights under that name or word collectively placed in the hands of the sovereign. Certainly the States of this Union have not retained them to the extent of the preceding enumeration. How much of it have the States retained? I answer, unhesitatingly, all necessary to their internal government. Generally, all not delegated by them in the Articles of Confederation to the United States of America; all not yielded by them under the Constitution of the United States. Among them, qualified rights to protect their inhabitants by quarantine from disease; imperfect and qualified, because the commercial power which Congress has is necessarily connected with quarantine. And Congress may, by adoption, presently and for the future, provide for the observance of such State laws, making such alterations as the interests and conveniences of commerce and navigation may require, always keeping in mind that the great object of quarantine shall be secured. [*424

Such has been the interpretation of the rights of the States to quarantine, and of that of Congress over it, from the beginning of the Federal government. Under it the States and the United States, both having measurably concurrent rights of legislation in the matter, have reposed quietly and without any harm to either, until the acts now in question caused this controversy. The act of February 25th, 1799, (1 Stat. at L., 619,) will show this.

By that act, collectors, revenue-officers, masters and crews of revenue-cutters, and military officers in command of forts upon the coast, are required to aid in the execution of the State's quarantine laws. But then, and it may be observed particularly in reference to the acts of Massachusetts and New York now in question, the law provides that nothing in the act "shall enable a State to collect a duty of tonnage or impost without the consent of Congress"; that no part of the cargo of any vessel shall in any case be taken out, otherwise than as by law is allowed, or according to the regulations thereinafter established; thus showing that the State's quarantine power over the cargo for the purpose of purifying it or the vessel has been taken away. By the second section of the same act, the power of the States in respect to warehouses and other buildings for the purification of the cargo is also taken away, and exclusively assumed by the United States. And by the third section, in order that the States may be subjected to as little

expense as possible, and that the safety of the public revenue may not be lessened, it is provided that the United States, under the orders of the President of the United States, shall
*425] purchase or erect *suitable warehouses, with wharves and inclosures for goods and merchandise taken from vessels subject to quarantine, or other restraint, pursuant to the health laws of any State. And in regard to the word *imposts*, in the first section of the act, I may here remark, though I have heretofore given its meaning, that it means in the act, as well as it does in the Constitution, personal imposts upon a foreigner enjoying the protection of a State, or it may be a condition of his admission (Martens, p. 97), as well as any tax or duty upon goods; and Martens, as well as all other jurists and writers upon international law, uses the word in the sense I have said it has, also, as "imposts on real estates and duties on the entry and consumption of merchandises." (pp. 97, 98.)

But, further, by the police power in the States they have reserved the right to be informed of the name and quality of every foreigner that arrives in the State. This, and no more than this, was Miln's case, in 11 Peters. But after they have been landed, as is said in Miln's case. And it was surprising to me, in the argument of these cases, that that admission in Miln's case was overlooked by those who spoke in favor of the constitutionality of the laws of Massachusetts and New York; for the right of New York to a list of passengers, notwithstanding the passenger laws of the United States, is put upon the ground that those laws "affect passengers whilst on their voyage, and until they shall have landed." And "after that, and when they shall have ceased to have any connection with the ship, and when, therefore, they shall have ceased to be passengers, the acts of Congress applying to them as such, and only professing to legislate in relation to them as such, have then performed their office, and can with no propriety of language be said to come in conflict with the law of a State, whose operation only begins where that of the laws of Congress ends." That is, that the passenger acts, as my brother Catron has shown in his opinion, extend to his protection from all State interference, by taxation or otherwise, from the time of his embarcation abroad until he is landed in the port of the United States for which the vessel sailed.

The States have also reserved the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. But they have not reserved the use of taxation

universally as the means to accomplish that object, as they had it before they became the United States. Having surrendered to the United States the sovereign police power over commerce, to be exercised by Congress or the treaty-making power, it is necessarily a part of the power of the United States to determine who shall come to and reside in the United States for *the purposes of trade, independently of every other condition of admittance [*426 which the States may attempt to impose upon such persons. When it is done in either way, the United States, of course, subject the foreigner to the laws of the United States, and cannot exempt him from the internal power of police of the States in any particular in which it is not constitutionally in conflict with the laws of the United States. And in this sense it is that, in treaties providing for such mutual admission of foreigners between nations, it is universally said, "but subject always to the laws and statutes of the two countries respectively"; but certainly not to such of the laws of a State as would exclude the foreigner, or which add another condition to his admission into the United States.

And, further, I may here remark that this right of taxation claimed for the States upon foreign passengers is inconsistent with the naturalization clause in the Constitution, and the laws of Congress regulating it. If a State can, by taxation or otherwise, direct upon what terms foreigners may come into it, it may defeat the whole and long-cherished policy of this country and of the Constitution in respect to immigrants coming to the United States.

But I have said the States have the right to turn off paupers, vagabonds, and fugitives from justice, and the States where slaves are have a constitutional right to exclude all such as are, from a common ancestry and country, of the same class of men. And when Congress shall legislate,—if it be not disrespectful for one who is a member of the judiciary to suppose so absurd a thing of another department of the government,—to make paupers, vagabonds, suspected persons, and fugitives from justice subjects of admission into the United States, I do not doubt it will be found and declared, should it ever become a matter for judicial decision, that such persons are not within the regulating power which the United States have over commerce. Paupers, vagabonds, and fugitives never have been subjects of rightful national intercourse, or of commercial regulations, except in the transportation of them to distant colonies to get rid of them, or for punishment

as convicts. They have no rights of national intercourse; no one has a right to transport them, without authority of law, from where they are to any other place, and their only rights where they may be are such as the law gives to all men who have not altogether forfeited its protection.

The States may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off. But can such a police power be *427] *rightfully exercised over those who are not paupers, vagabonds, or fugitives from justice? The international right of visitation forbids it. The freedom or liberty of commerce allowed by all European nations to the inhabitants of other nations does not permit it; and the constitutional obligations of the States of this Union to the United States, in respect to commerce and navigation and naturalization, have qualified the original discretion of the States as to who shall come and live in the United States. Of the extent of those qualifications, or what may be the rights of the United States and the States individually in that regard, I shall not speak now.

But it was assumed that a State has unlimited discretion, in virtue of its unsurrendered police power, to determine what persons shall reside in it. Then it was said to follow, that the State remove all persons who are thought dangerous to its welfare; and to this right to remove, it was said, the right to determine who shall enter the State is an inseparable incident.

That erroneous proposition of the State's discretion in this matter has led to all the more mistaken inferences made from it. The error arose from its having been overlooked that a part of the supreme police power of a nation is identical, as I have shown it to be, with its sovereignty over commerce. Or, more properly speaking, the regulation of commerce is one of those particular rights collectively placed in the hands of the sovereign for the good of the State. Until it is shown that the police power in one of its particulars is not what it has just been said to be, the discretion of a State of this Union to determine what persons may come to and reside in it, and what persons may be removed from it, remains unproved. It cannot be proved, and the laws of Massachusetts and New York derive no support from police power in favor of their constitutionality.

Some reliance in the argument was put upon the cases of *Holmes* v. *Jennison*, 14 Pet., 540, *Groves* v. *Slaughter*, 15 Pet., 449, and *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet.,

539, to maintain the discretion of a State to say who shall come to and live in it. Why either case should have been cited for such a purpose I was at a loss to know, and have been more so from a subsequent examination of each of them.

All that is decided in the case of *Holmes* v. *Jennison* is, that the States of this Union have no constitutional power to give up fugitives from justice to the authorities of a nation from which they have fled. That it is not an international obligation to do so, and that all authority to make treaties for such a purpose is in the United States.

*The point ruled in the case of *Groves* v. *Slaughter* [*428 is, that the State of Mississippi could constitutionally prohibit negroes from being brought into that State for sale as merchandise, but that the provision in her constitution required legislation before it acted upon the subject-matter.

The case of *Prigg* v. *The Commonwealth of Pennsylvania* is inapplicable to the cases before us, except in the support which it gives to the construction of the police power, as stated in this opinion,—that it is applicable to idlers, vagabonds, paupers, and, I may add, fugitives from justice, and suspected persons.

Miln's case I will speak of hereafter, and now only say that no point was ruled in it, either in respect to commerce or the right of the State to a list of passengers who may come by sea into New York after they are landed, which gives any countenance or support to the laws now in question.

The fear expressed, that if the States have not the discretion to determine who may come and live in them, the United States may introduce into the Southern States emancipated negroes from the West Indies and elsewhere, has no foundation. It is not an allowable inference from the denial of that position, or the assertion of the reverse of it.

All the political sovereignty of the United States, within the States, must be exercised according to the subject-matter upon which it may be brought to bear, and according to what was the actual condition of the States in their domestic institutions when the Constitution was formed, until a State shall please to alter them. The Constitution was formed by States in which slavery existed, and was not likely to be relinquished, and States in which slavery had been, but was abolished, or for the prospective abolition of which provision had been made by law. The undisturbed continuance of that difference between the States at that time, unless as it might be changed by a State itself, was the recognized condition in the Constitution for the national Union. It has that, and can have no other, foundation.

Is it not acknowledged by all that the ninth section of the first article of the Constitution is a recognition of that fact? There are other clauses in the Constitution equally, and some of them more, expressive of it.

That is a very narrow view of the Constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve, or even disquiet, the fundamental organization of either of the States. The Constitution is to be interpreted by what was the condition of the parties to it *429] when it *was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of *ifs* and syllogisms.

It will be found, too, should this matter of introducing free negroes into the Southern States ever become the subject of judicial inquiry, that they have a guard against it in the Constitution, making it altogether unnecessary for them to resort to the *casus gentis extraordinarius*, the *casus extremæ necessitatis* of nations, for their protection and preservation. They may rely upon the Constitution, and the correct interpretation of it, without seeking to be relieved from any of their obligations under it, or having recourse to the *jus necessitatis* for self-preservation.

I have purposely refrained from repeating any thing that has been said in the opinions of my learned brothers, with whom I am united in pronouncing the laws of Massachusetts and New York in question unconstitutional. What they have said for themselves they have also said for me, and I do not believe that I have said any thing in this opinion which is not sanctioned by them.

Having said all that I mean to say directly concerning the cases before us, I will now do what I have long wished to do, but for which a proper opportunity has not been presented before. It is to make a narrative in respect to the case of *The City of New York* v. *Miln*, reported in 11 Pet., 102, that hereafter the profession may know definitely what was and what was not decided in that case by this court. It has been much relied upon in the cases before us for what was not decided by the court.

The opinion given by Mr. Justice Barbour in that case, though reported as the opinion of the court, had not at any time the concurrence of a majority of its members, except in this particular,—that so much of the act of New York as

required the captain of a vessel to report his passengers as the act directs it to be done was a police regulation, and therefore was not unconstitutional or a violation of the power of Congress to regulate commerce. In that particular, and in that only, and, as it is said in the conclusion of the opinion, "that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said act is constitutional." (11 Pet., 143.) But as to all besides in that opinion as to the constitutional power of Congress to regulate commerce,—except *the disclaimer in the 132d page, that it was not intended to [*430 enter into any examination of the question, whether the power to regulate commerce be or be not exclusive of the States,—and especially the declaration that persons were not the subjects of commerce, the opinion had not the assent of a majority of the members of this court, nor even that of a majority of the judges who concurred in the judgment. The report of the case in Peters, and the opinion of Mr. Justice Baldwin, accidentally excluded from the report, without the slightest fault in the then reporter of the court or in the clerk, but which we have in full in Baldwin's View of the Constitution, published in the same year, fully sustain what I have just said. I mention nothing from memory, and stand upon the record for all that I have said, or shall say, concerning the case.

The court then consisted of seven justices, including the chief justice; all of us were present at the argument; all of us were in consultation upon the case; all of us heard the opinions read, which were written by Messrs. Justices Thompson and Barbour, in the case; and all of us, except Mr. Justice Baldwin, were present in this room when Mr. Justice Barbour read the opinion which appears in Peters as the opinion of the court.

The case had been argued by counsel on both sides, as if the whole of the act of New York were involved in the certificate of the division of opinion by which it was brought before this court. The point certified was in these words:—"That the act of the legislature of New York, mentioned in the plaintiff's declaration, assumes to regulate trade and commerce between the ports of New York and foreign ports, and is unconstitutional and void."

In the consultation of the judges upon the case, as the report shows, the first point considered by us was one of jurisdiction. That is, that the point certified was a submis-

sion of the whole case, which is not permitted, and was not a specific point arising on the trial of the cause. The court thought it was the latter, principally for the reason given by Mr. Justice Thompson, as it appears in his opinion. That reason was, that the question arose upon a general demurrer to the declaration, and that the certificate under which the cause was sent to this court contains the pleadings upon which the question arose, which show that no part of the act was drawn in question, except that which relates to the neglect of the master to report to the mayor or recorder an account of his passengers, according to the requisitions of the act. In the discussion of the case, however, by the judges, the nature and exclusiveness of the power in Congress to regulate commerce was much considered. There was a divided mind among us about it. Four of the *court
*431] being of the opinion, that, according to the Constitution and the decisions of this court in *Gibbons* v. *Ogden* and in *Brown* v. *Maryland*, the power in Congress to regulate commerce was exclusive. Three of them thought otherwise. And to this state of the court is owing the disclaimer in the opinion, already mentioned by me, that the exclusiveness of the power to regulate commerce was not in the case a point for examination.

But there was another point of difference among the judges in respect to what was commerce under the constitutional grant to Congress, particularly whether it did not include an intercourse of persons and passengers in vessels. Two of the court—the report of the case shows it—thought, in the language of the opinion, that "persons are not subjects of commerce." Mr. Justice Thompson declined giving any opinion on that point, and repeated it in the opinion published by him. Four of the justices, including Mr. Justice Baldwin, thought that commerce did comprehend the intercourse of persons or passengers. For this statement I refer to the opinion of Mr. Justice Thompson, to the dissenting opinion of Mr. Justice Story, to the opinion of Mr. Justice Baldwin, to the constantly avowed opinion of Mr. Justice McLean, and to what has always been known by the justices of this court to be my own opinion upon this point.

In this state of the opinions of the court, Mr. Justice Thompson was designated to write an opinion,—that the law in question was a police regulation, and not unconstitutional. He did so, and read to the court the opinion, which he afterwards published. It was objected to by a majority of the court, on account of some expressions in it concerning the power of Congress to regulate commerce, and as our differ-

ences could not be reconciled, Mr. Justice Thompson said he would read it as his own.

Then Mr. Justice Barbour was asked to write an opinion for the majority of the court. He did so, and read that which is printed as such, in our last conference of that term, the night before the adjournment of the court. The next day it was read in court, all of the judges being present when it was read, except Mr. Justice Baldwin. In the course of that morning's sitting, or immediately after it, Mr. Justice Baldwin, having examined the opinion, objected to its being considered the opinion of the court, on account of what was said in it concerning the power of Congress to regulate commerce, and what was commerce. He sought Mr. Justice Barbour, with the view of having it erased from the opinion, declaring, as all the rest of us knew, that his objection to the opinion of *Mr. Justice Thompson [*432
was on account of what it contained upon the subject of commerce; that his objection to the reasoning upon the same matter in Mr. Justice Barbour's opinion was stronger, and that he had only assented that an opinion for the court should be written, on the understanding that so much of the act of New York as was in issue by the pleadings should be treated as a regulation, not of commerce, but police. Without his concurrence, no opinion could have been written. Unfortunately, Mr. Justice Barbour had left the court-room immediately after reading his opinion, already prepared to leave Washington in a steamer which was in waiting for him. Mr. Justice Baldwin did not see him. The court was adjourned. Then there was no authority to make any alteration in what had been read as the opinion of the court. Mr. Justice Baldwin wished it, but, under the circumstances of preparation which each judge was making for his departure from Washington, nothing was done, and Mr. Justice Baldwin determined to neutralize what he objected to in the opinion by publishing in the reports his own opinion of the case. That was not done, but he did so contemporarily with the publication of the reports, in his View of the Constitution. There it is, to speak for itself, and it shows, as I have said, that so much of the opinion in the case of *New York* v. *Miln* as related to commerce did not have the assent of Mr. Justice Baldwin, and therefore not the assent of a majority of the court.

How, then, did the case stand? Mr. Justice Thompson gave his own opinion, agreeing with that of Mr. Justice Barbour, that so much of the section of the act of the legislature of New York as applies to the breaches assigned in the

declaration does not assume to regulate commerce between the port of New York and foreign ports, and that so much of said section is constitutional, but giving his own views of the commercial question as it stood in relation to the case. The attitude of Mr. Justice Baldwin with respect to the opinion has just been told. Mr. Justice Story dissented from every part of the opinion, on the ground that the section of the act in controversy was a regulation of commerce, which a State could not constitutionally pass. Mr. Justice McLean is here to speak for himself, and he did then speak as he has done to-day in these cases concerning the power in Congress to regulate commerce being exclusive, and held that persons are the subjects of commerce as well as goods, contrary to what is said in the opinion (136th page), that persons are not. I certainly objected to the opinion then, for the same reasons as Mr. Justice McLean. Thus there were left of the seven judges but two, the Chief Justice and Mr. Justice Barbour, in favor of the opinion as a whole.

*433] *I have made this narrative and explanation, under a solemn conviction of judicial duty, to disabuse the public mind from wrong impressions of what this court did decide in that case; and particularly from the misapprehension that it was ever intended by this court, in the case of *New York* v. *Miln*, to reverse or modify, in any way or in the slightest particular, what had been the judgments and opinions expressed by this court in the cases of *Gibbons* v. *Ogden* and *Brown* v. *Maryland*. And I am happy in being able to think, notwithstanding the differing opinions which have been expressed concerning what was decided in those cases, that they are likely to stand without reversal.

The Chief Justice, the morning after I had read the foregoing statement in the case of *New York* v. *Miln*, made another to counteract it, in which he says his collections differ from mine in several particulars. I do not complain of it in any way. But it enables me to confirm my own in some degree from his, and in every other particular in which it does not give such assistance, the facts related by me are indisputable, being all in the report of the case in Peters, from which I took them. They are in exact coincidence, too, with my own recollections.

The only fact in my statement not altogether, but in part, taken from the record, is Mr. Justice Baldwin's discontent with the opinion written by Mr. Justice Barbour, and his wish that it might not as a whole be published in our volume of reports as the opinion of the court. The chief justice admits that Mr. Justice Baldwin did apply to him after the

adjournment of the court, and before they left Washington, for that purpose. Now if, by mistake or oversight, a judge shall fall into an admission, which more care afterwards enables him to recall and correct before the judgment has been published, but after it has been read, whatever may be the operation of the judgment, does it follow that the argument in the opinion in which the judgment is given continues to be the law of the court? And if the same judge, after more careful and matured thought, publishes contemporarily his opinion, differing from the dictum which had escaped his notice, will that make it law? Is it not plain that it is a case of mistake, which cannot make the law? And if his coöperation is essential to the validity of the original opinion, from those who may advocate it being thrown into the minority by his withdrawal, and his declaration that he never meant to coöperate in it in the particular objected to, can it be said that it ever was the law of the court? Is it at all an uncommon thing in the English and American law reports, that a case is published as law which is *deemed afterwards not to be so, on account of error in its publication, from its not having been really the opinion of the court when it was published? Mistake in all cases restores things to the correct condition in which they were before the mistake was made, except where the policy of the law has determined that it shall be otherwise. A single mistaken and misstated case is not within that policy. Long acquiescence, or repeated judicial decisions, may be, and then only because the interests of society have been accommodated to the error. [*434

But the chief justice says that he has the strongest reason to suppose that Mr. Justice Baldwin became satisfied, because, in his opinion in the case of *Groves* v. *Slaughter*, he quotes the case of *New York* v. *Miln* with approbation, when speaking in that case of the difference between commercial and police powers.

I certainly cannot object to the opinion of Mr. Justice Baldwin in *Groves* v. *Slaughter* being a test between the chief justice and myself in this matter; for Mr. Justice Baldwin's opinion in that case is the strongest proof that could have been given four years afterwards, by himself, that he never was reconciled to the opinion of Mr. Justice Barbour in Miln's case as a whole. For instance, in that opinion he does not leave the exclusive power of Congress to regulate commerce to the disclaimer in Miln's case, that it was not the intention of the judges to decide that point in that case. He says,—"That the power of Congress to regulate commerce among the States is exclusive of any inter-

ference by the States has been, in my opinion, conclusively settled by the solemn opinions of this court in *Gibbons* v. *Ogden*, 9 Wheat., 186–222; and in *Brown* v. *Maryland*, 12 Wheat., 438–446. If these decisions are not to be taken as the established construction of this clause of the Constitution, I know of none which are not yet open to doubt, nor can there be any adjudications of this court which must be considered as authoritative upon any question, if these are not to be so on this." And the learned judge goes on to say,—"Cases may indeed arise, wherein there may be found difficulty in discriminating between regulations of commerce among the several States and the regulation of the internal police of a State, but the subject-matter of such regulations of either description will lead to the true line which separates them, when they are examined with a disposition to avoid a collision between the powers granted to the Federal government by the people of the several States and those which they reserved exclusively to themselves. Commerce among the States, as defined by this court, is *trade, traffic, intercourse*, and dealing in articles of commerce between States by its *citizens or others, and carried on in more than one State. Police relates only to the internal concerns of one State; and commerce within it is purely a matter of internal regulation, when confined to those articles which have become so distributed as to form items in the common mass of property. It follows, that any regulation which affects the commercial intercourse between any two or more States, referring solely thereto, is within the powers granted exclusively to Congress, and that those regulations which affect only the commerce carried on within one State, or which refer only to subjects of internal police, are within the powers reserved." And then it is that the sentence follows cited by the chief justice to show that he had reason to suppose that Mr. Justice Baldwin had become satisfied. The citation made by me from his opinion shows what his opinion was in respect to the power of Congress to regulate commerce, confirming what I have said in my statement, that four of us were of the same opinion when that point was touched upon in the case of Miln, and that Mr. Justice Baldwin refused to sanction what was said by Mr. Justice Thompson in respect to it in the opinion written by him for the court in Miln's case. And that he was not satisfied as to that sentence of Mr. Justice Barbour's opinion in which it is said that persons are not the subjects of commerce, is manifest from that part of his opinion in *Groves* v. *Slaughter* in which he says that commerce is "trade, traffic, intercourse";—intercourse, in

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the sense of commerce, meaning, as it always does, "connection by reciprocal dealings between persons and nations." But, further, the chief justice says that Mr. Justice Baldwin called upon him and said there was a sentence or paragraph in the opinion with which he was dissatisfied, and wished altered, thus confirming all that I have said in respect to the case in what is in it concerning persons not being the subjects of commerce, that being the only declaration in the opinion relating to commerce, it having been previously declared that the exclusiveness of the regulation of commerce in Congress was not to be decided. All that was meant to be decided in Miln's case was, that the regulation stated in the certificate of division of opinion between the judges in the Circuit Court was not a regulation of commerce, but one of police. In respect to our lamented brother Barbour not knowing the dissatisfaction of our brother Baldwin and other members of the court with the opinion, I know that he did know it. In regard to the chief justice's declaration, that he had never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin, and never at any time, until this case came before us, heard any from any other member of the court *who had assented to or acquiesced in the opinion; while, of course, that must [*436
be taken to be so, as far as the chief justice is concerned, I must say that I have never, in any instance, heard the case of Miln cited for the purpose of showing that persons are not within the regulating power of Congress over commerce, without at once saying to the counsel that that point had not been decided in that case. I have repeatedly done so in open court, and, as I supposed, was heard by every member of it. I have only said, in reply to the chief justice's statement, what was necessary to show that it was not decided in Miln's case, by this court, that persons are not within the power of Congress to regulate commerce.

Indeed, it would be most extraordinary if the case of *Gibbons* v. *Ogden* could be considered as having been reversed by a single sentence in the opinion of *New York* v. *Miln*; upon a point, too, not in any way involved in the certificate of the division of opinion by which that case was brought to this court. The sentence is, that "they [persons] are not the subjects of commerce; and, not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to Congress to regulate commerce, and the prohibition to the States from imposing a duty on imported goods."

In the case of *Gibbons* v. *Ogden* the court said.—"Com-

merce is traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

Again:—"These words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend." "In regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines." "If Congress has the power to regulate it, that power must be exercised whenever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State." "The power of Congress comprehends navigation within the limits of every State in the Union, so far as that navigation may be connected with commerce with foreign nations, or among the several States." "It is the power to regulate; that is, to prescribe the rule by which commerce is governed." "Vessels have always been employed to a greater or less extent in the trans-
*437] portation of *passengers, and have never been supposed, on that account, withdrawn from the control or protection of Congress. Packets which ply along the coast, as well as those which make voyages between Europe and America, consider the transportation of passengers as an important part of their business. Yet it never has been suspected that the general laws of navigation did not apply to them. A coasting-vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of cargo."

In my opinion, the case of *Gibbons* v. *Ogden* rules the cases before us. If there were no other reasons, with such an authority to direct my course, I could not refrain from saying that the acts of Massachusetts and New York, so far as they are in question, are unconstitutional and void.

The case of *Gibbons* v. *Ogden*, in the extent and variety of learning, and in the acuteness of distinction with which it was argued by counsel, is not surpassed by any other case in the reports of courts. In the consideration given to it by the court, there are proofs of judicial ability, and of close and precise discrimination of most difficult points, equal to any other judgment on record. To my mind, every proposition in it has a definite and unmistakable meaning. Commentaries cannot cover them up or make them doubtful.

The case will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy.

There were giants in those days, and I hope I may be allowed to say, without more than judicial impressiveness of manner or of words, that I rejoice that the structure raised by them for the defence of the Constitution has not this day been weakened by their successors.

Mr. Justice CATRON.

SMITH *v.* TURNER.

The first question arising in this controversy is, whether the legislation of New York, giving rise to the suit, is a regulation of commerce; and this must be ascertained, in a great degree, from a due consideration of the State laws regulating the port of the city of New York in respect to navigation and intercourse. They are embodied in a system running through various titles in the Revised Statutes. The sections on which the action before us is founded will be found in Vol. I., pp. 445, 446. Title fourth purports to treat of the marine hospital and its funds, then, in 1829, erected on Staten Island, under the *superintendence of a [*438 health-officer, who is to be a physician, and certain commissioners of health. By section seventh, it is provided, that "the health-commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.:—1. From the master of every vessel from a foreign port, for himself and every cabin passenger, one dollar and fifty cents; and for each steerage passenger, mate, sailor, or marine, one dollar. 2. From the master of each coasting-vessel, for each person on board, twenty-five cents; but no coasting-vessel from the States of New Jersey, Connecticut, and Rhode Island shall pay for more than one voyage in each month, computing from the first voyage in each year."

"Sec. 8. The moneys so received shall be denominated 'hospital moneys,' and shall be appropriated to the use of the marine hospital, deducting a commission to the health-commissioner of two and one half per cent. for collection."

Turner, the health-commissioner, sued Smith, as master of the ship Henry Bliss, a British vessel, coming from Liverpool, in England, for the amount of money claimed as due

from the defendant under the above provisions, because he brought in two hundred and ninety-five steerage passengers, who were British subjects, immigrating into the United States, and intending to become inhabitants thereof.

By section ninth, the master paying the hospital money may recover from each person for whom it was paid the sum paid on his account, in case of a foreign vessel; and by section tenth, the master of a coasting-vessel shall pay the tax in twenty-four hours after the vessel arrives in port, under the penalty of one hundred dollars.

The eleventh section directs the health-commissioners annually to account to the Comptroller of the State for the moneys received by them by means of the tax for the use of the marine hospital, and if such moneys shall in any one year exceed the sum necessary to defray the expenses of their trust, including salaries, &c., they shall pay over such surplus to the Society for the Reformation of Juvenile Delinquents in the city of New York, for the use of that society.

By the act of April 25th, 1840, the Comptroller of the State was authorized to draw on the treasurer, annually, for twenty years, a sum not exceeding fifteen thousand dollars in each year, for the benefit of the State hospital in the city, and a sum of eight thousand dollars is there recognized as payable to the Society for the Reformation of Juvenile Delinquents; and the *city hospital is bound by the act to support at least twenty indigent persons from any part of the State. Thus a State hospital is also supported out of the fund, as well as an institution for young culprits, imposing an annual charge on the fund of twenty-three thousand dollars, having no necessary connection with commerce; and, by the act of 1841, three medical dispensaries are endowed out of the fund to an amount of four thousand five hundred dollars.

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The ship Henry Bliss was engaged in foreign commerce when she arrived in the port of New York, and when the tax was demanded of Smith, the master, by Turner, the health-commissioner. The baggage of passengers was on board, and also their tools of trade, if they had any, and of course the passengers were on board, for the master is sued, in one count, for landing them after the demand. The tax of two hundred and ninety-five dollars was therefore demanded before the voyage was ended, or the money earned for carrying passengers and their goods. The vessel itself was undoubtedly regulated by our acts of Congress, and also by our treaty with Great Britain of 1815,—the national character of

the vessel being British. She had full liberty to land, and so the goods on board belonging to trade and coming in for sale stood regulated, and could be landed and entered at the custom-house. And by the same treaty, passengers on board coming to the United States in pursuit of commerce in buying and selling were free to land. The master and crew were of the ship and navigation, and stood equally regulated with the ship. The property of passengers could not lie taxed or seized, being expressly and affirmatively protected by the act of 1799. It was an import, and whilst it continued in form of an import, could be landed and transferred by the owners inland. This is the effect of the decision in *Brown* v. *The State of Maryland*. As the State power had nothing left to act upon but the person simply, nor any means of collecting the tax from passengers, it was levied on the master, of necessity, in a round sum.

As the ship was regulated, and was free to land all the property on board, the question arises, whether these immigrant passengers were not also regulated, and entitled by law to accompany their goods and to land, exempt from State taxation.

The record states, that "the two hundred and ninety-five passengers imported in the ship Henry Bliss belonged to Great Britain, and intended to become inhabitants of the United States."

By the laws of nations, all commerce by personal intercourse is free until restricted; nor has our government at any time proposed to restrain by taxation such immigrants as the record describes.

"Our first step towards establishing an independent [*440
government was by the Declaration of Independence. By that act it was declared that the British king had endeavoured to prevent the population of the colonies by obstructing the laws for the naturalization of foreigners, and refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands. During the Confederation, the States passed naturalization laws for themselves, respectively, in which there was great want of uniformity, and therefore the Constitution provided that Congress should have power "to establish a uniform rule of naturalization." In execution of this power, Congress passed an act at its second session, (March 26th, 1790,) providing that any alien, being a free white person, who shall have resided in the United States two years, and in any one State one year, may become a citizen by taking an oath to support the Constitution in a court of record, and such step shall naturalize all the

children of such person under twenty-one years of age. In 1795, another act was passed (ch. 20), requiring five years' residence; and on the 26th of April, 1802, (ch. 28,) the naturalization laws were amended. This act is now in force, with slight alterations. Under these laws have been admitted such numbers, that they and their descendants constitute a great part of our population. Every department of science, of labor, occupation, and pursuit, is filled up, more or less, by naturalized citizens and their numerous offspring. From the first day of our separate existence to this time has the policy of drawing hither aliens, to the end of becoming citizens, been a favorite policy of the United States; it has been cherished by Congress with rare steadiness and vigor. By this policy our extensive and fertile country has been, to a considerable extent, filled up by a respectable population, both physically and mentally, one that is easily governed and usually of approved patriotism. We have invited to come to our country from other lands all free white persons, of every grade and of every religious belief, and when here to enjoy our protection, and at the end of five years to enjoy all our rights, except that of becoming President of the United States. Pursuant to this notorious and long established policy, the two hundred and ninety-five passengers in the Henry Bliss arrived at the port of New York.

Keeping in view the spirit of the Declaration of Independence with respect to the importance of augmenting the population of the United States, and the early laws of naturalization, Congress, at divers subsequent periods, passed laws to facilitate and encourage more and more the immigration of Europeans into the United States for the purpose of settlement and residence.

*441] *The twenty-third section of the general collection act of the 2d of March, 1799, requires that every master of a vessel arriving in the United States shall have on board a manifest, in writing, signed by such master, of the goods, wares, and merchandise on board such vessel, "together with the name or names of the several passengers on board the said ship or vessel, distinguishing whether cabin or steerage passengers, or both, with their baggage, specifying the number and description of packages belonging to each respectively."

The twenty-fifth section of the same act makes it the duty of the master to produce, on his arrival within four leagues of the coast, such manifest to such officer or officers of the customs as shall first come on board his said ship or vessel; and

by the twenty-sixth section, a fine of five hundred dollars is imposed on the master for not producing such manifest.

By the thirtieth section of the same act, the master is required, within twenty-four hours after his arrival from a foreign port, to repair to the office of the collector and make report of the arrival of his ship; "and within forty-eight hours after such arrival, shall make a further report in writing to the collector of the district, which report shall be in the form, and shall contain all the particulars, required to be inserted in a manifest"; and he is required to make oath or solemn affirmation to the truth of such report. But the material section of that act is the forty-sixth. That section declares, that "the wearing apparel, and other personal baggage, and the tools or implements of a mechanical trade only, of persons who arrive in the United States shall be free of duty." The same section prescribes a form of declaration, that the packages contain no goods or merchandise other than the wearing apparel, personal baggage, and tools of trade belonging to the person making the declaration, or his family. Before the property exempt from duty is allowed to be landed, a permit to do so must be obtained from the collector of the port, and each owner is bound to pay a fee for such privileges, for the support of the revenue-officers.

It is quite obvious, from these proceedings, that the passengers who were thus in the contemplation of Congress were, for the most part, immigrants, or persons coming to settle in the United States with their families. The act of the 27th of April, 1816, section second, re-enacts, in substance, that part of the forty-sixth section of the act of the 2d of March, 1799, above quoted. Exemptions and privileges in favor of passengers arriving in the United States are carried still further, by the provisions of the fourth subdivision of the ninth section of the duty act of the 30th of August, 1842. Among articles [*442 *declared by that act to be free of duty are "wearing apparel in actual use, and other personal effects, not merchandise, professional books, instruments, implements and tools of trade, occupation, or employment, of persons arriving in the United States." This provision is very broad. It not only exempts from duty tools of mechanical trades, but all instruments and implements of occupation and employment, and also all professional books, without limitation of value or numbers.

A still further enlargement of these privileges and exemptions is contained in the duty act of the 30th of July, 1846; for the eleventh section of that act (schedule 1), in addition to the passengers' articles made free by the act of 1842, declares

free from duty "household effects, old and in use, of persons or families from foreign countries, if used abroad by them, and not intended for any other person or persons."

Now, is it possible to reconcile State laws, laying direct and heavy taxes on every immigrant passenger and every member of his family, with this careful, studied, and ever-increasing security of immigrants against every legal burden or charge of any kind? Could Congress have done more than it has done, unless it had adopted what would have been justly regarded as a strange act of legislation, the insertion of passengers themselves in the list of free articles?

The first and one of the principal acts to be performed on bringing ships and goods from foreign countries into the United States is the production of a manifest; and in such manifest, along with the specifications of the cargo, the names and description of the passengers, with a specification of their packages of property, are to be inserted. Then comes a direct exemption of all such property from duties. All agree, that, if Congress had included the owners, and declared that immigrants might come into the country free of tax, these State laws would be void; and can any man say, in the face of the legislation of Congress from 1799 to 1846, that the will of Congress is not as clearly manifested as if it had made such a direct declaration? It is evident that, by these repeated and well-considered acts of legislation, Congress has covered, and has intended to cover, the whole field of legislation over this branch of commerce. Certain conditions and restraints it has imposed; and subject to these only, and acting in the spirit of all our history and all our policy, it has opened the door widely and invited the subjects of other countries to leave the crowded population of Europe and come to the United States, and seek here new homes for themselves and their families. We cannot take into consideration what may or may not be the policy adopted or cherished by particular States; some States may *443] *be more desirous than others that immigrants from Europe should come and settle themselves within their limits; and in this respect no one State can rightfully claim the power of thwarting by its own authority the established policy of all the States united.

The foregoing conclusions are fortified by the provisions of the act of March 2d, 1819. It provides that not more than two passengers shall be brought or carried to each five tons' measure of the vessel, under a severe penalty; and if the number exceeds the custom-house measure by twenty persons, the vessel itself shall be forfeited, according to the ninety-first section of the act of 1799. The kind and quantity of provisions

are prescribed, as well as the quantity of water, and if the passengers are put on short allowance, a right is given to them to recover at the rate of three dollars a day to each passenger, and they are allowed to recover the same in the manner seamen's wages are recovered, that is, in a summary manner, in a District Court of the United States. The master is also required, when the vessel arrives in the United States, at the same time that he delivers a manifest of his cargo, and if there be none, then when he makes entry of the vessel, to deliver and report to the collector, by manifest, all the passengers taken on board the ship at any foreign port or place, designating age, sex, and occupation, the country to which they severally belong, and that of which it is their intention to become inhabitants; which manifest shall be sworn to as manifests of cargo are, and subject to the same penalties. These regulations apply to foreign vessels as well as to our own, which bring passengers to the United States.

1. By the legislation of Congress, the passenger is allowed to sue in a court of the United States, and there to appear in person, as a seaman may, and have redress for injuries inflicted on him by the master during the voyage.

2. The passenger is allowed to appear at the custom-house with his goods, consisting often of all his personal property, and there, if required, take the oath prescribed by the acts of Congress, and get his property relieved from taxation. The clothes on his person, and the money in his purse, from which the tax is sought, may freely land as protected imports; and yet the State laws under consideration forbid the owner to land; they hold him out of the courts, and separate him from his property, until, by coercion, he pays to the master for the use of the State any amount of tax the State may at its discretion set upon him and upon his family; and this on the assumption that Congress had not regulated in respect to his free admission.

*And how does the assumption stand, that a poll-tax may be levied on all passengers, notwithstanding our commercial treaties? By the fourteenth article of the treaty of 1794 (known as Jay's treaty), and which article was renewed by our treaty with Great Britain of 1815, it was stipulated that reciprocal liberty of commerce should exist between the United States and all the British territories in Europe:—"That the inhabitants of Great Britain shall have liberty freely and securely to come with their ships and cargoes to our ports, to enter the same, and to remain and reside in any part of our territories; also, to hire and occupy houses and warehouses for the purposes of their [*444

commerce." And that no higher or other duties should be imposed on British vessels than were by our laws imposed on American vessels coming into our ports from Great Britain, and that our people should have reciprocal rights in the British ports and territories.

The taxes under consideration are imposed on all persons engaged in commerce who are aliens, no matter where they are from. We have commercial treaties of the same import with the one above recited with almost every nation whose inhabitants prosecute commerce to the United States; all these are free to come and enter our country, so far as a treaty can secure the right. Many thousands of men are annually engaged in this commerce. It is prosecuted, for a great portion of the territory of the United States, at and through the two great ports where these taxes have been imposed; and it is a matter of history, that the greater portion of our foreign commerce enters these ports. These aliens must come as passengers to prosecute commerce and to trade, and the question is, Can the States tax them out, or tax them at all, in the face of our treaties expressly providing for their free and secure admission?

It is thus seen to what dangerous extents these State laws have been pushed; and that they may be extended, if upheld by this court, to every ferry-boat that crosses a narrow water within the flow of tide which divides States, and to all boats crossing rivers that are State boundaries, is evident.

These laws now impose taxes on vessels through their masters, in respect to the masters and crews, and all passengers on board, when the vessel commences and ends its voyage within sight and hearing of the port where the tax is demandable, making no distinction between citizens and aliens. They tax, through the masters, all American vessels coming from other States (including steamboats) protected by coasting licenses, under United States authority, and also exempt by the Constitution from paying duties in another State. They tax, through the masters, foreign vessels pro-
*445] tected by the *Constitution from tonnage duties, save by the authority of Congress, and who are also protected by treaty stipulations. They tax passengers who are owners and agents of the vessel, and accompany the ship. They tax owners, agents, and servants who accompany goods brought in for sale, and who are by our treaties at full liberty freely to come and reside in any part of our territories in pursuit of foreign commerce.

The tax is demandable from the master on entering the port, and the law provides that, when he pays the money to

the State collector, the master may, by way of remedy over, recover by suit from each passenger the sum paid on his account. And it is insisted that the master had still a better remedy in the carrier's lien on goods of passengers, which he might detain, and by this means coerce payment at once before the vessel landed.

Plainly, this latter was the principal mode of distress contemplated by the State authorities, as wives and children could not be sued, nor have they any property, and therefore property of heads of families could only be reached on their account.

Now what do these laws require the master to do? As the agent of New York, and as her tax-collector, he is required to levy the tax on goods of passengers, and make it out of property which is beyond the reach of the State laws; and yet the thing is to be done by force of these same State laws. Suppose it to be true, that this forcing the master to levy a distress on protected goods is yet no tax on him or his vessel, and therefore, in that respect, the law laying the tax does not violate the Constitution; all this would only throw the tax from one protected subject to another,—it would shift the burden from the master and vessel on to the goods of the passenger, which are as much protected by the Constitution and acts of Congress as the master and vessel.

And how would this assumption, that a State law may escape constitutional invasion, by giving a remedy over, operate in practice?

Before the Constitution existed, the States taxed the commerce and intercourse of each other. This was the leading cause of abandoning the Confederation and forming the Constitution,—more than all other causes it led to the result; and the provision prohibiting the States from laying any duty on imports or exports, and the one which declares that vessels bound to or from one State shall not be obliged to enter, clear, or pay duties in another, were especially intended to prevent the evil. Around our extensive seaboard, on our great lakes, and through our great rivers, this protection is relied on against State assumption and State interference. Throughout the Union, our vessels of every [*446
description go free and unrestrained, regardless of L
State authority. They enter at pleasure, depart at pleasure, and pay no duties. Steamboats pass for thousands of miles on rivers that are State boundaries, not knowing nor regarding in whose jurisdiction they are, claiming protection under these provisions of the Constitution. If they did not exist, such vessels might be harassed by insupportable exactions.

If it be the true meaning of the Constitution, that a State can evade them by declaring that the master may be taxed in regard to passengers, on the mere assertion that he shall have a remedy over against the passengers, citizens and aliens, and that the State may assess the amount of tax at discretion, then the old evil will be revived, as the States may tax at every town and village where a vessel of any kind lands. They may tax on the assumption of self-defence, or on any other assumption, and raise a revenue from others, and thereby exempt their own inhabitants from taxation.

If the first part of the State law is void, because it lays a duty on the vessel, under the disguise of taxing its representative, the master, how can the after part, giving the master a remedy over against passengers, be more valid than its void antecedent? All property on board belonging to passengers is absolutely protected from State taxation. And how can a State be heard to say, that truly she cannot make distress on property for want of power, but still that she can create the power in the master to do that which her own officers cannot do?

In the next place, the Constitution, by article first, section eighth, provides, that "the Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States."

Such taxes may be laid on foreign commerce as regulations of revenue; these regulations are the ordinary ones to which the Constitution refers. Congress has no power to lay any but uniform taxes when regulating foreign commerce to the end of revenue,—taxes equal and alike at all the ports of entry, giving no one a preference over another. Nor has Congress power to lay taxes to pay the debts of a State, nor to provide by taxation for its general welfare. Congress may tax for the treasury of the Union, and here its power ends.

The question, whether the power to regulate commerce and navigation is exclusive in the government of the United States, or whether a State may regulate within its own waters and ports in particular cases, does not arise in this cause. The question here is, whether a State can regulate *447] foreign *commerce by "a revenue measure," for the purposes of its own treasury. If the State taxes, with the consent of Congress, the vessel directly, by a tonnage duty, or indirectly, by taxing the master and crew, or taxes the cargo by an impost, or assumes to tax passengers, or to regulate in any other mode, she assumes to exercise the

jurisdiction of Congress, and to regulate navigation engaged in foreign commerce; she does that which Congress has the power to do, and is restrained by the Constitution within the same limits to which Congress is restricted. And as Congress cannot raise money for the benefit of a State treasury, so neither can a State exercise the same power for the same purpose.

Again: give the argument all the benefit that it claims; concede the full municipal power in the State to tax all persons within her territory, as a general rule, whether they have been there a year or an hour; and still she could not impose a capitation tax on these passengers by the hand of her own tax-collector. The tax was demanded whilst they were on board. All the property they brought with them, the clothes and moneys on their persons, were imports; that is, "property imported or brought into this country from another country." No duty could be laid on it by the State; as, until it was separated from the ship, it belonged to foreign commerce, and was an import. Had the tax been imposed directly on the passengers, as a poll-tax is on land, and had the heads of families been bound to pay for their wives, children, and servants, and had the collector, with the tax-list in his hand (which was an execution in fact), gone on board, he would have found no property that was not protected, which he could touch by way of distress to make the money. The passengers could defy him, could turn about, go to another port in the next State, land, and go their way. Here, then, a demand was made for a most stringent tax, which could not be enforced at the time and place of demand from anybody, without violating the Constitution, various acts of Congress, and a most important commercial treaty.

It has also been urged on the court, with great earnestness, that, as this tax is levied for the support of alien paupers and purposes of city police, and as the police power has not been taken from the States, that the "object" for which it was imposed brings it within the State power. City police is part of the State police, and on this assumption a poll-tax on foreigners might be imposed to maintain almost the entire municipal power throughout the State, embracing the administration of justice in criminal cases, as well as numerous city expenses, together with the support of the poor. The objects *and assumptions might, indeed, be endless. Were this court once to hold that aliens belonging to foreign commerce, and passengers coming from other States, could have a poll-tax levied on them on entering any port of a State, on the assumption that the tax should be [*448

applied to maintain State police powers, and by this means the State treasury could be filled, the time is not distant when States holding the great inlets of commerce might raise all necessary revenues from foreign intercourse, and from intercourse among the States, and thereby exempt their own inhabitants from taxation altogether. The money once being in the treasury, the State legislature might apply it to any and every purpose, at discretion, as New York has done; and if more was needed, the capitation tax might be increased at discretion, the power to tax having no other limitation.

The passengers in this instance were not subjects of any police power or sanatory regulation, but healthy persons of good moral character, as we are bound to presume, nothing appearing to the contrary; nor had the State of New York manifested by her legislation any objection to such persons entering the State.

Again: it was urged that the States had the absolute power to exclude all aliens before the Constitution was formed, and that this power remained unsurrendered and unimpaired; that it might be exercised in any form that the States saw proper to adopt; and having the power to admit or reject at pleasure, the States might, as a condition to admission, demand from all aliens a sum of money, and if they refused to pay, the States might keep them out, nor could Congress or a treaty interfere. If such power existed in the State of New York, it has not been exerted in this instance. That it was intended to impose a condition hostile to the admission of the passengers, in respect to whom the master was sued, is without the slightest foundation. They were not hindered or interfered with in any degree by the State law. It is a general revenue measure, and declares that the health-commissioner shall demand, and be entitled to receive, and in case of neglect or refusal shall sue for and recover, from the master of every vessel from a foreign port that shall arrive in the port of New York, for himself and each cabin passenger, one dollar and fifty cents; and for each steerage passenger, mate, sailor, or marine, one dollar; and from the master of each coasting-vessel, for each person on board, twenty-five cents. No restraint is imposed on passengers, either of foreign vessels or of coasting-vessels. In the one case, as in the other, the merchants, traders, and visitors in the cabin, and the immigrants in the steerage, were equally

*449] free to *come into the harbour, and equally welcome to enter the State. She does not address herself to them at all, but demands a revenue duty from the master, making the presence of passengers the pretext. We have to deal

with the law as we find it, and not with an imaginary case that it might involve, but undoubtedly does not.

For the reason just stated, I had not intended to examine the question presenting the State right claimed, but it has become so involved in the discussions at the bar and among the judges, that silence cannot be consistently observed. The assumption is, that a State may enforce a non-intercourse law excluding all aliens, and having power to do this, she may do any act tending to that end, but short of positive prohibition. If the premises be true, the conclusion cannot be questioned.

The Constitution was a compromise between all the States of conflicting rights among them. They conferred on one government all national power, which it would be impossible to make uniform in a process of legislation by several distinct and independent State governments; and in order that the equality should be preserved as far as practicable and consistent with justice, two branches of the national legislature were created. In one, the States are represented equally, and in the other, according to their respective populations. As part of the treaty-making power, the States are equal. The action of the general government by legislation or by treaty is the action of the States and of their inhabitants; these the Senate, the House of Representatives, and the President represent. This is the federal power. In the exercise of its authority over foreign commerce it is supreme. It may admit or it may refuse foreign intercourse, partially or entirely.

The Constitution is a practical instrument, made by practical men, and suited to the territory and circumstances on which it was intended to operate. To comprehend its whole scope, the mind must take in the entire country and its local governments. There were at the time of its adoption thirteen States. There existed a large territory beyond them already ceded by Virginia, and other territory was soon expected to be ceded by North Carolina and Georgia. New States were in contemplation, far off from ports on the ocean, through which ports aliens must come to our vacant territories and new States, and through these ports foreign commerce must of necessity be carried on by our inland population. We had several thousand miles of sea-coast; we adjoined the British possessions on the east and north for several thousand miles, and were divided from them by lines on land to a great extent; and on the west and south we were bounded for three thousand miles and more *by the possessions of Spain. With neither of these gov- [*450

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ernments was our intercourse by any means harmonious at that time.

Provision had to be made for foreign commerce coming from Europe and other quarters, by navigation in pursuit of profitable merchandise and trade, and also to regulate personal intercourse among aliens coming to our shores by navigation in pursuit of trade and merchandise, as well as for the comfort and protection of visitors and travellers coming in by the ocean.

Then, again, on our inland borders, along our extensive lines of separation from foreign nations, trade was to be regulated; but more especially was personal intercourse to be governed by standing and general rules, binding the people of each nation on either side of the line. This could only be done by treaty of nation with nation. If the individual States had retained national power, and each might have treated for itself, any one might have broken its treaty and given cause of war, and involved other States in the war; therefore all power to treat, or have foreign intercourse, was surrendered by the States; and so were the powers to make war and to naturalize aliens given up. These were vested in the general government for the benefit of the whole. This became "the nation" known to foreign governments, and was solely responsible to them for the acts of all the States and their inhabitants.

The general government has the sole power by treaty to regulate that foreign commerce which consists in navigation, and in buying and selling. To carry on this commerce, men must enter the United States (whose territory is a unit to this end) by the authority of the nation; and what may be done in this respect will abundantly appear by what has been done from our first administration under the Constitution to the present time, without opposition from State authority, and without being questioned, except by a barren and inconsistent theory, that admits exclusive power in the general government to let in ships and goods, but denies its authority to let in the men who navigate the vessels, and those who come to sell the goods and purchase our productions in return.

Our first commercial treaty with Great Britain was that of 1794, made under the sanction of President Washington's administration. By the fourteenth article, already referred to, the inhabitants of the king of Great Britain, coming from his Majesty's territories in Europe, had granted to them liberty, freely and securely, and without hindrance or molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within our territories, to enter

the same, to resort there, to remain and reside there, without *limitation of time; and reciprocal liberty was granted to the people and inhabitants of the United States in [*451 his Majesty's European territories; but subject always, as to what respects this article, to the laws and statutes of the two countries respectively. This stipulation was substantially renewed by the treaty of 1815, article first. In the British dominions our inhabitants were to abide by the general laws of Great Britain, and in our territories the subjects and inhabitants of that country were to abide by the laws of the United States, and also by the laws of any State where they might be. But the treaty does not refer to laws of exclusion. The State laws could not drive out those admitted by treaty without violating it, and furnishing cause of war; nor could State laws interpose any hindrance or molestation to the free liberty of coming. We have similar treaties with many other nations of the earth, extending over much of its surface, and covering populations more than equal to one half of its inhabitants. Millions of people may thus freely come and reside in our territories without limitation of time, and after a residence of five years, by taking the proper steps, may be admitted to citizenship under our naturalization laws. Thousands of such persons have been admitted, and we are constantly admitting them now; and when they become citizens they may go into every State without restraint, being entitled "to all the privileges and immunities of citizens of the several States."

And as respects intercourse across our line of separation from the British possessions in America, it is agreed, by the third article of the treaty of 1794, "that it shall at all times be free to his Majesty's subjects and to the citizens of the United States, and also to the Indians dwelling on either side of said boundary-line, freely to pass and repass, by land or inland navigation, into the respective territories and countries of the two parties on the continent of America, (the country within the limits of the Hudson's Bay Company only excepted,) and to navigate all the lakes, rivers, and waters thereof; and freely to carry on trade and commerce with each other." Tolls and rates of ferriage are to be the same, on either side of the line, that natives pay on that side.

Although this treaty was abrogated by the war of 1812, still I understand that it was intended to be renewed, so far as it regulated intercourse at our inland borders, by the second article of the treaty of 1815.

Thus have stood fact and practice for half a century, in the face of the theory, that individual States have the discretion-

ary power to exclude aliens, because the power was reserved to the States, is exclusively in them, and remains unimpaired by the Constitution.

*152] *It is also insisted that the States may tax all persons and property within their respective jurisdictions, except in cases where they are affirmatively prohibited. This is a truism not open to denial. Certainly the States may tax their own inhabitants at discretion, unless they have surrendered the power. But constitutional exceptions to the State power are so broad as to render the claim valueless in the present instance. The States cannot lay export duties, nor duties on imports, nor tonnage duties on vessels. If they tax the master and crew, they indirectly lay a duty on the vessel. If the passengers on board are taxed, the protected goods—the imports—are reached.

In short, when the tax in question was demandable by the State law, and demanded, the ship rode in the harbour of New York, with all persons and property on board, as a unit belonging to foreign commerce. She stood as single as when on the open ocean, and was as exempt from the State taxing power.

For the reasons here given, I think the judgment of the State court should be reversed, because that part of the State law on which it is founded was void.

GRIER, J. I concur with this opinion of my brother Catron.

NOTE.—I here take occasion to say, that the State police power was more relied on and debated in the cause of *Norris* v. *The City of Boston* than in this cause. In that case I had prepared an opinion, and was ready to deliver it when I delivered this opinion in open court. But being dissatisfied with its composition, and agreeing entirely with my brother Grier on all the principles involved in both causes, and especially on the State power of exclusion in particular instances, I asked him to write out our joint views in the cause coming up from Massachusetts. This he has done to my entire satisfaction, and therefore I have said nothing here on the reserved powers of the States to protect themselves, but refer to that opinion as containing my views on the subject, and with which I fully concur throughout.

Mr. Justice McKINLEY.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

I have examined the opinions of Mr. Justice McLean and Mr. Justice Catron, and concur in the whole reasoning

upon the main question, but wish to add, succinctly, my own views upon a single provision of the Constitution.

The first clause of the ninth section and first article of the *Constitution provides, that "the migration or [*453 importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person."

On the last argument of this cause, no reference was made to this clause of the Constitution; nor have I ever heard a full and satisfactory argument on the subject. Yet on a full examination of this clause, connected with other provisions of the Constitution, it has had a controlling influence on my mind in the determination of the case before us. Some of my brethren have insisted that the clause here quoted applies exclusively to the importation of slaves. If the phrase, "the migration or importation of such persons," was intended by the Convention to mean slaves only, why, in the assertion of the taxing power, did they, in the same clause, separate migration from importation, and use the following language:—"But a tax or duty may be imposed on such importation, not exceeding ten dollars for each person"? All will admit, that, if the word *migration* were excluded from the clause, it would apply to slaves only. An unsuccessful attempt was made in the Convention to amend this clause by striking out the word *migration*, and thereby to make it apply to slaves exclusively. In the face of this fact, the debates in the Convention, certain numbers of the Federalist, together with Mr. Madison's report to the legislature of Virginia in 1799,—eleven years after the adoption of the Constitution,—are relied on to prove that the words *migration* and *importation* are synonymes, within the true intent and meaning of this clause. The acknowledged accuracy of language and clearness of diction in the Constitution would seem to forbid the imputation of so gross an error to the distinguished authors of that instrument.

I have been unable to find any thing in the debates of the Convention, in the Federalist, or the report of Mr. Madison, inconsistent with the construction here given. Were they, however, directly opposed to it, they could not, by any known rule of construction, control or modify the plain and unambiguous language of the clause in question. The conclusion, to my mind, is therefore irresistible, that there are two separate and distinct classes of persons intended to be provided for by this clause.

Although they are both subjects of commerce, the latter

class only is the subject of trade and importation. The slaves are not immigrants, and had no exercise of volition in their transportation from Africa to the United States.

The owner was bound to enter them at the custom-house as *any other article of commerce or importation, and [*454] to pay the duty imposed by law, whilst the persons of the first class, although subjects of commerce, had the free exercise of volition, and could remove at pleasure from one place to another; and when they determined to migrate or remove from any European government to the United States, they voluntarily dissolved the bond of allegiance to their sovereign, with the intention to contract a temporary or permanent allegiance to the government of the United States, and if transported in an American ship, that allegiance commenced the moment they got on board. They were subject to, and protected by, the laws of the United States, to the end of their voyage.

Having thus shown that there are two separate and distinct classes included in, and provided for by, the clause of the Constitution referred to, the question arises, how far the persons of the first class are protected, by the Constitution and laws of the United States, from the operation of the statute of New York now under consideration. The power was conferred on Congress to prohibit migration and importation of such persons into all the new States, from and after the time of their admission into the Union, because the exemption from the prohibition of Congress was confined exclusively to the States then existing, and left the power to operate upon all the new States admitted into the Union prior to 1808. Four new States having been thus admitted within that time, it follows, beyond controversy, that the power of Congress over the whole subject of migration and importation was complete throughout the United States after 1808.

The power to prohibit the admission of "all such persons" includes, necessarily, the power to admit them on such conditions as Congress may think proper to impose; and therefore, as a condition, Congress has the unlimited power of taxing them. If this reasoning be correct, the whole power over the subjects belongs exclusively to Congress, and connects itself indissolubly with the power to regulate commerce with foreign nations. How far, then, are these immigrants protected, upon their arrival in the United States, against the power of State statutes? The ship, the cargo, the master, the crew, and the passengers are all under the protection of the laws of the United States, to the final termination of the voyage; and the passengers have a right to be landed and go on shore, under

the protection and subject to these laws only, except so far as they may be subject to the quarantine laws of the place where they are landed; which laws are not drawn in question in this controversy. The great question here is, Where does the power of the United States over this subject end, and where does the *State power begin? This is, perhaps, [*455] one of the most perplexing questions ever submitted to the consideration of this court.

A similar question arose in the case of *Brown* v. *The State of Maryland*, 12 Wheat., 419, in which the court carried out the power of Congress to regulate commerce with foreign nations, upon the subject then under consideration, to the line which separates it from the reserved powers of the States, and plainly established the power of the States over the same subject-matter beyond that line.

The clause of the Constitution already referred to in this case, taken in connection with the provision which confers on Congress the power to pass all laws necessary and proper for carrying into effect the enumerated and all other powers granted by the Constitution, seems necessarily to include the whole power over this subject; and the Constitution and laws of the United States being the supreme law of the land, State power cannot be extended over the same subject. It therefore follows, that passengers can never be subject to State laws until they become a portion of the population of the State, temporarily or permanently; and this view of the subject seems to be fully sustained by the case above referred to. Were it even admitted that the State of New York had power to pass the statute under consideration, in the absence of legislation by Congress on this subject, it would avail nothing in this case, because the whole ground had been occupied by Congress before that act was passed, as has been fully shown by the preceding opinion of my brother Catron. The laws referred to in that opinion show conclusively that the passengers, their moneys, their clothing, their baggage, their tools, their implements, &c., are permitted to land in the United States without tax, duty, or impost.

I therefore concur in the opinion, that the judgment of the court below should be reversed.

Mr. Justice Catron concurs in the foregoing opinion, and adopts it as forming part of his own, so far as Mr. Justice McKinley's individual views are expressed, when taken in connection with Mr. Justice Catron's opinion.

Mr. Justice GRIER.

NORRIS *v.* CITY OF BOSTON.

As the law of Massachusetts which is the subject of consideration in this case differs in some respects from that of New York, on which the court have just passed in the case of *Smith* v. *Turner*, I propose briefly to notice it. In so doing, it is not *my purpose to repeat the arguments urged in vindication of the judgment of the court in that case, and which equally apply to this, but rather to state distinctly what I consider the point really presented by this case, and to examine some of the propositions assumed, and arguments urged with so much ability by the learned counsel of the defendants.

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The plaintiff in this case is an inhabitant of St. John's, in the Province of New Brunswick and kingdom of Great Britain. He arrived at the port of Boston in June, 1837, in command of a schooner belonging to the port of St. John's, having on board nineteen alien passengers. Prior to landing, he was compelled to pay to the city of Boston the sum of two dollars each for permission to land said passengers. This sum of thirty-eight dollars was paid under protest, and this suit instituted to recover it back.

The demand was made, and the money received from the plaintiff, in pursuance of the following act of the legislature of Massachusetts, passed on the 20th of April, 1837, and entitled, "An act relating to alien passengers."

"§ 1. When any vessel shall arrive at any port or harbour within this State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessels and examine into the condition of such passengers.

"§ 2. If, on such examination, there shall be found among said passengers any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the officer so examining, to maintain themselves, or who have been paupers in any country, no such alien passenger shall be permitted to land until the master, owner, consignee, or agent of such vessel shall have given to such city or town a bond in the sum of one thousand dollars, with good and sufficient surety, that no such lunatic or indigent passenger shall become a city, town, or State charge within ten years from the date of said bond.

"§ 3. No alien passengers, other than those spoken of in the preceding section, shall be permitted to land until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct, for the support of foreign paupers.

"§ 4. The officer or officers required in the first section of this act to be appointed by the mayor and aldermen, or the *selectmen, respectively, shall, from time to time, notify the pilots of the port of said city or town of the [*457 place or places where the said examination is to be made, and the said pilots shall be required to anchor all such vessels at the place so appointed, and require said vessels there to remain till such examination shall be made; and any pilot who shall refuse or neglect to perform the duty imposed upon him by this section, or who shall, through negligence or design, permit any alien passenger to land before such examination shall be had, shall forfeit to the city or town a sum not less than fifty nor more than two thousand dollars.

"§ 5. The provisions of this act shall not apply to any vessel coming on shore in distress, or to any alien passengers taken from any wreck where life is in danger."

It must be borne in mind (what has been sometimes forgotten), that the controversy in this case is not with regard to the right claimed by the State of Massachusetts, in the second section of this act, to repel from her shores lunatics, idiots, criminals, or paupers, which any foreign country, or even one of her sister States, might endeavour to thrust upon her; nor the right of any State, whose domestic security might be endangered by the admission of free negroes, to exclude them from her borders. This right of the States has its foundation in the sacred law of self-defence, which no power granted to Congress can restrain or annul. It is admitted by all, that those powers which relate to merely municipal legislation, or what may be more properly called *internal police*, are not surrendered or restrained; and that it is as competent and necessary for a State to provide precautionary measures against the moral pestilence of paupers, vagabonds, and convicts, as it is to guard against the physical pestilence which may arise from unsound and infectious articles imported. The case *New York* v. *Miln* asserts this doctrine, and no more. The law under consideration in that case did not interfere with passengers as such, either directly or indirectly, who were not paupers. It put

forth no claim to tax all persons for leave to land and pass through the State to other States, or a right to regulate the intercourse of foreign nations with the United States, or to control the policy of the general government with regard to immigrants.

But what is the claim set up in the third section of the act under consideration, with which alone we have now to deal?

It is not the exaction of a fee or toll from passengers for some personal service rendered to them, nor from the master of the vessel for some inspection or other service rendered either to the vessel or its cargo. It is not a fee or tax for a *license to foreigners to become denizens or citizens of the Commonwealth of Massachusetts; for they have sought no such privilege, and, so far as is yet known, may have been on their way to some other place.

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It is not an exercise of the police power with regard to paupers, idiots, or convicts. The second section effectually guards against injury from them. It is only after the passenger has been found, on inspection, not to be within the description whose crimes or poverty require exclusion, that the master of the vessel is taxed for leave to land him. Had this act commenced with the third section, might it not have been truly entitled, "An act to raise revenue off vessels engaged in the transportation of passengers"? Its true character cannot be changed by its collocation, nor can it be termed a police regulation because it is in the same act which contains police regulations.

In its letter and its spirit it is an exaction from the master, owner, or consignee of a vessel engaged in the transportation of passengers, graduated on the freight or passage-money earned by the vessel. It is, in fact, a duty on the vessel, not measured by her tonnage, it is true, but producing a like result, by merely changing the ratio. It is a taxation of the master, as representative of the vessel and her cargo.

It has been argued that this is not a tax on the master or the vessel, because in effect it is paid by the passenger having enhanced the price of his passage. Let us test the value of this argument by its application to other cases that naturally suggest themselves. If this act had, in direct terms, compelled the master to pay a tax or duty levied or graduated on the ratio of the tonnage of his vessel, whose freight was earned by the transportation of passengers, it might have been said, with equal truth, that the duty was paid by the passenger, and not by the vessel. And so, if it had laid an impost on the goods of the passenger imported

by the vessel, it might have been said, with equal reason, it was only a tax on the passenger at last, as it comes out of his pocket, and, graduating it by the amount of his goods, affects only the modus or ratio by which its amount is calculated. In this way, the most stringent enactments may be easily evaded.

It is a just and well-settled doctrine established by this court, that a State cannot do that indirectly which she is forbidden by the Constitution to do directly. If she cannot levy a duty or tax from the master or owner of a vessel engaged in commerce graduated on the tonnage or admeasurement of the vessel, she cannot effect the same purpose by merely changing the ratio, and graduating it on the number of masts, or of mariners, *the size and power of the steam-engine, or the number of passengers which she [*459 carries. We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce, and not owned by her own citizens, by changing its name from a "duty on tonnage" to a tax on the master, or an impost upon imports, by calling it a charge on the owner or supercargo, and justify this evasion of a great principle by producing a dictionary or a dictum to prove that a ship-captain is not a vessel, nor a supercargo an import?

The Constitution of the United States, and the powers confided by it to the general government, to be exercised for the benefit of all the States, ought not to be nullified or evaded by astute verbal criticism, without regard to the grand aim and object of the instrument, and the principles on which it is based. A constitution must necessarily be an instrument which enumerates, rather than defines, the powers granted by it. While we are not advocates for a latitudinous construction, yet "we know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purpose for which they are conferred."

Before proceeding to examine the more prominent and plausible arguments which have been urged in support of the power now claimed by the State of Massachusetts, it may be proper to notice some assumptions of fact which have been used for the purpose of showing the necessity of such a power, from the hardships which it is supposed would otherwise be inflicted on those States which claim the right to exercise it.

It was assumed as a fact, that all the foreigners who arrived at the ports of Boston and New York, and afterwards became paupers, remained in those cities, and there became a public

charge; and that, therefore, this tax was for their own benefit, or that of their class. But is this the fact? Of the many ten thousands who yearly arrive at those ports, how small a proportion select their residence there! Hundreds are almost daily transferred from the vessels in which they arrive to the railroad-car and steamboat, and proceed immediately on their journey to the Western States. Are Boston, New York, and New Orleans, through which they are compelled to pass, the only cities of the Union which have to bear the burden of supporting such immigrants as afterwards become chargeable as paupers? It may well be questioned whether their proportion of this burden exceeds the ratio of their great wealth and population. But it appears by the second section of the act now before us, that all persons whose poverty, age, or
*460] infirmities render them *incompetent to maintain themselves are not permitted to land until a bond has been given, in the sum of one thousand dollars, with sufficient security, that they will not become a city, town, or State charge within ten years. By the stringency of these bonds, the poor, the aged, and the infirm are compelled to continue their journey and migrate to other States; and yet, after having thus driven off all persons of this class, and obtained an indemnity against loss by them if they remain, it is complained of as a hardship, that the State should not be allowed to tax those who, on examination, are found *not* to be within this description,—who are *not* paupers, nor likely to become such; and that this exaction should be demanded, not for a license to remain and become domiciled in the State, but for leave to pass through it. But admitting the hardship of not permitting these States to raise revenue by taxing the citizens of other States, or immigrants seeking to become such, the answer still remains, that the question before the court is not one of feeling or discretion, but of power.

The arguments in support of this power in a State to tax vessels employed in the transportation of passengers assume,—1st. That it is a tax upon passengers or persons, and not upon vessels. 2d. That the States are sovereign, and that "the sovereign may forbid the entry of his territory either to foreigners in general or in particular cases, or for certain purposes, according as he may think it advantageous to the State; and since the lord of the territory may, whenever he thinks proper, forbid its being entered, he has power to annex what conditions he pleases to the permission to enter"; that the State of Massachusetts, having this power to exclude altogether, may therefore impose as a condition for a license to pass through her territory any amount of tax she may see fit;

and this is but the exercise of the police power reserved to the States, and which cannot be controlled by the government of the Union. 3d. That it is but an exercise of the municipal power which every State has, to tax persons and things within her jurisdiction, and with which other States have no concern.

Let us assume, for the sake of argument, that this is not a duty on the vessel, nor an interference with commercial regulations made by Congress, but a tax on persons transported in the vessel, and carry out the propositions based on this hypothesis to their legitimate results.

It must be admitted that it is not an exercise of the usual power to tax persons resident within a State, and their property; but is a tax on passengers *qua* passengers. It is a condition annexed to a license to them to pass through the State, on their journey to other States. It is founded on a claim by a *State of the power to exclude *all persons* from entering her ports or passing through her territory. [*461

It is true, that, if a State has such an absolute and uncontrolled right to exclude, the inference that she may prescribe the conditions of entrance, in the shape of a license or a tax, must necessarily follow. The conclusion cannot be evaded if the premises be proved. A right to exclude is a power to tax; and the converse of the proposition is also true, that a power to tax is a power to exclude; and it follows, as a necessary result, from this doctrine, that those States in which are situated the great ports or gates of commerce have a right to exclude, if they see fit, all immigrants from access to the interior States, and to prescribe the conditions on which they shall be allowed to proceed on their journey, whether it be the payment of two or of two hundred dollars. Twelve States of this Union are without a seaport. The United States have, within and beyond the limits of these States, many millions of acres of vacant lands. It is the cherished policy of the general government to encourage and invite Christian foreigners of our own race to seek an asylum within our borders, and to convert these waste lands into productive farms, and thus add to the wealth, population, and power of the nation. Is it possible that the framers of our Constitution have committed such an oversight, as to leave it to the discretion of some two or three States to thwart the policy of the Union, and dictate the terms upon which foreigners shall be permitted to gain access to the other States? Moreover, if persons migrating to the Western States may be compelled to contribute to the revenue of Massachusetts, or New York, or Louisiana, whether for the support of paupers or penitentiaries, they may with equal

justice be subjected to the same exactions in every other city or State through which they are compelled to pass; and thus the unfortunate immigrant, before he arrives at his destined home, be made a pauper by oppressive duties on his transit. Besides, if a State may exercise this right of taxation or exclusion on a foreigner, on the pretext that he may become a pauper, the same doctrine will apply to citizens of other States of this Union; and thus the citizens of the interior States, who have no ports on the ocean, may be made tributary to those who hold the gates of exit and entrance to commerce. If the bays and harbours in the United States are so exclusively the property of the States within whose boundaries they lie, that, the moment a ship comes within them, she and all her passengers become the subjects of unlimited taxation before they can be permitted to touch the shore, the assertion, that this is a question with which the citizens of other States have no *concern, may well be doubted. *462]
If these States still retain all the rights of sovereignty, as this argument assumes, one of the chief objects for which this Union was formed has totally failed, and "we may again witness the scene of conflicting commercial regulations and exactions which were once so destructive to the harmony of the States, and fatal to their commercial interests abroad."

To guard against the recurrence of these evils, the Constitution has conferred on Congress the power to regulate commerce with foreign nations, and among the States. That, as regards our intercourse with other nations and with one another, we might be one people,—not a mere confederacy of sovereign States for the purpose of defence or aggression.

Commerce, as defined by this court, means something more than traffic,—*it is intercourse;* and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse. "But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means for exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Con-

gress may be exercised within a State." (*Gibbons* v. *Ogden*, 9 Wheat., 195.)

The question, whether this power is exclusive, is one on which the majority of this court have intimated different opinions at different times; but it is one of little practical importance in the present case, for this power has not lain dormant, like those for enacting a uniform bankrupt law, and for organizing the militia. The United States have made treaties, and have regulated our intercourse with foreign nations by prescribing its conditions. No single State has, therefore, a right to change them. To what purpose commit to Congress the power of regulating our intercourse with foreign nations and among the States, if these regulations may be changed at the discretion of each State? And to what weight is that argument entitled which assumes, that, because it is the policy of Congress to leave this intercourse free, therefore it has not been regulated, and each State may put as many restrictions upon it as she pleases?

*The argument of those who challenge the right to [*463
exercise this power for the States of Massachusetts and New York, on the ground that it is a necessary appurtenant to the police power, seems fallacious, also, in this respect. It assumes, that, because a State, in the exercise of her acknowledged right, may exclude paupers, lunatics, &c., therefore she may exclude all persons, whether they come within this category or not. But she may exclude putrid and pestilential goods from being landed on her shores; yet it does not follow that she may prescribe what sound goods may be landed, or prohibit their importation altogether. The powers used for self-defence and protection against harm cannot be perverted into weapons of offence and aggression upon the rights of others. A State is left free to impose such taxes as she pleases upon those who have elected to become residents or citizens; but it is not necessary to her safety or welfare that she should exact a transit duty on persons or property for permission to pass to other States.

It has been argued, also, that, as the jurisdiction of the State extends over bays and harbours within her boundaries for the purpose of punishing crimes committed thereon, therefore her jurisdiction is absolute for every purpose to the same extent; and that, as she may tax persons resident on land and their ships engaged in commerce, she has an equal right to tax the persons or property of foreigners or citizens of other States, the moment their vessels arrive within her jurisdictional limits. But this argument is obnoxious to the imputation of proving too much, and therefore not to be

relied on as proving any thing. For if a State has an absolute right to tax vessels and persons coming from foreign ports, or those of other States, before they reach the shore, and as a condition for license to land in her ports, she may tax to any amount, and neither Congress nor this court can restrain her in the exercise of that right; it follows, also, as a necessary consequence, that she may exclude all vessels but her own from entering her ports, and may grant monopolies of the navigation of her bays and rivers. This the State of New York at one time attempted, but was restrained by the decision of this court in the case of *Gibbons* v. *Ogden*.

In conclusion, we are of opinion,—

1st. That the object of the Constitutional prohibition to the States to lay duties on tonnage and imposts on imports was to protect both vessel and cargo from State taxation while *in transitu*; and this prohibition cannot be evaded, and the same result effected, by calling it a tax on the master or passengers.

2d. That the power exercised in these cases to prohibit the *immigration of foreigners to other States, except on prescribed conditions, and to tax the commerce or intercourse between the citizens of these States, is not a police power, nor necessary for the preservation of the health, the morals, or the domestic peace of the States who claim to exercise it.

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3d. That the power to tax this intercourse necessarily challenges the right to exclude it altogether, and thus to thwart the policy of the other States and the Union.

4th. That Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free, and it is therefore not left to the discretion of each State in the Union either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it.

CATRON, J. I concur with the foregoing opinion of Mr. Justice Grier.

Mr. Chief Justice TANEY, dissenting.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

I do not concur in the judgment of the court in these two cases, and proceed to state the grounds on which I dissent.

The constitutionality of the laws of Massachusetts and New York in some respects depends upon the same principles. There are, however, different questions in the two

cases, and I shall make myself better understood by examining separately one of the cases, and then pointing out how far the same reasoning applies to the other, and in what respect there is a difference between them; and, first, as to the case from Massachusetts.

This law meets the vessel after she has arrived in the harbour, and within the territorial limits of the State, but before the passengers have landed, and while they are still afloat on navigable water. It requires the State officer to go on board and examine into the condition of the passengers, and provides that, if any lunatic, idiot, maimed, aged, or infirm person, incompetent, in the opinion of the examining officer, to maintain themselves, or who have been paupers in any other country, shall be found on board, such alien passenger shall not be permitted to land until the master, owner, consignee, or agent of the vessel shall give bond, with sufficient security, that no such lunatic or indigent person shall become a city, town, or State charge within ten years from the date of the bond. These provisions are contained in the first two sections. It is the third section that has given rise to this controversy, and which *enacts that no alien passengers other than those before spoken of shall be permitted to land until the master, owner, consignee, or agent of the vessel shall pay to the boarding officer the sum of two dollars for each passenger so landing; the money thus collected to be appropriated to the support of foreign paupers. [*465

This law is a part of the pauper laws of the State, and the provision in question is intended to create a fund for the support of alien paupers, and to prevent its own citizens from being burdened with their support.

I do not deem it material at this time to inquire whether the sum demanded is a tax or not. Of that question I shall speak hereafter. The character of the transaction and the meaning of the law cannot be misunderstood. If the alien chooses to remain on board, and to depart with the ship, or in any other vessel, the captain is not required to pay the money. Its payment is the condition upon which the State permits the alien passenger to come on shore and mingle with its citizens, and to reside among them. He obtains this privilege from the State by the payment of the money. It is demanded of the captain, and not from every separate passenger, for the convenience of collection. But the burden evidently falls on the passenger; and he in fact pays it, either in the enhanced price of his passage, or directly to the captain, before he is allowed to embark for the voyage. The nature of the transaction and the ordinary course of

business show that this must be the case; and the present claim, therefore, comes before the court without any equitable considerations to recommend it, and does not call upon us to restore money to a party from whom it has been wrongfully exacted. If the plaintiff recovers, he will most probably obtain from the State the money which he has doubtless already received from the passenger, for the purpose of being paid to the State; and which, if the State is not entitled to it, ought to be refunded to the passenger. The writ of error, however, brings up nothing for revision here but the constitutionality of the law under which this money was demanded and paid, and that question I proceed to examine.

And the first inquiry is, whether, under the Constitution of the United States, the federal government has the power to compel the several States to receive, and suffer to remain in association with its citizens, every person or class of persons whom it may be the policy or pleasure of the United States to admit. In my judgment, this question lies at the foundation of the controversy in this case. I do not mean to say that the general government have, by treaty or act of Congress, required the State of Massachusetts to permit the aliens in question to land. *I think there is no treaty or act of Congress which can justly be so construed. But it is not necessary to examine that question until we have first inquired whether Congress can lawfully exercise such a power, and whether the States are bound to submit to it. For if the people of the several States of this Union reserved to themselves the power of expelling from their borders any person, or class of persons, whom it might deem dangerous to its peace, or likely to produce a physical or moral evil among its citizens, then any treaty or law of Congress invading this right, and authorizing the introduction of any person or description of persons against the consent of the State, would be an usurpation of power which this court could neither recognize nor enforce.

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I had supposed this question not now open to dispute. It was distinctly decided in *Holmes* v. *Jennison*, 14 Pet., 540; in *Groves* v. *Slaughter*, 15 Pet., 449; and in *Prigg* v. *The Commonwealth of Pennsylvania*, 16 Pet., 539.

If these cases are to stand, the right of the State is undoubted. And it is equally clear, that, if it may remove from among its citizens any person or description of persons whom it regards as injurious to their welfare, it follows that it may meet them at the threshold and prevent them from entering. For it will hardly be said that the United States

may permit them to enter, and compel the State to receive them, and that the State may immediately afterwards expel them. There could be no reason of policy or humanity for compelling the States, by the power of Congress, to imbibe the poison, and then leaving them to find a remedy for it by their own exertions and at their own expense. Certainly no such distinction can be found in the Constitution, and such a division of power would be an inconsistency, not to say an absurdity, for which I presume no one will contend. If the State has the power to determine whether the persons objected to shall remain in the State in association with its citizens, it must, as an incident inseparably connected with it, have the right also to determine who shall enter. Indeed, in the case of *Groves* v. *Slaughter*, the Mississippi constitution prohibited the entry of the objectionable persons, and the opinions of the court throughout treat the exercise of this power as being the same with that of expelling them after they have entered.

Neither can this be a concurrent power, and whether it belongs to the general or to the State government, the sovereignty which possesses the right must in its exercise be altogether independent of the other. If the United States have the power, then any legislation by the State in conflict with a treaty or act of Congress would be void. And if the States possess it, *then any act on the subject by [*467
the general government, in conflict with the State law, would also be void, and this court bound to disregard it. It must be paramount and absolute in the sovereignty which possesses it. A concurrent and equal power in the United States and the States as to who should and who should not be permitted to reside in a State, would be a direct conflict of powers repugnant to each other, continually thwarting and defeating its exercise by either, and could result in nothing but disorder and confusion.

Again: if the State has the right to exclude from its borders any person or persons whom it may regard as dangerous to the safety of its citizens, it must necessarily have the right to decide when and towards whom this power is to be exercised. It is in its nature a discretionary power, to be exercised according to the judgment of the party which possesses it. And it must, therefore, rest with the State to determine whether any particular class or description of persons are likely to produce discontents or insurrection it its territory, or to taint the morals of its citizens, or to bring among them contagious diseases, or the evils and burdens of a numerous pauper population. For if the general government can in

any respect, or by any form of legislation, control or restrain a State in the exercise of this power, or decide whether it has been exercised with proper discretion, and towards proper persons, and on proper occasions, then the real and substantial power would be in Congress, and not in the States. In the cases decided in this court, and herein before referred to, the power of determining who is or is not dangerous to the interests and well-being of the people of the State has been uniformly admitted to reside in the State.

I think it, therefore, to be very clear, both upon principle and the authority of adjudged cases, that the several States have a right to remove from among their people, and to prevent from entering the State, any person, or class or description of persons, whom it may deem dangerous or injurious to the interests and welfare of its citizens; and that the State has the exclusive right to determine, in its sound discretion, whether the danger does or does not exist, free from the control of the general government.

This brings me to speak more particularly of the Massachusetts law, now under consideration. It seems that Massachusetts deems the introduction of aliens into the State from foreign countries likely to produce in the State a numerous pauper population, heavily and injuriously burdensome to its citizens. It would be easy to show, from the public history of the times, that the apprehensions of the State are well founded; that a fearful amount of disease and pauperism is daily brought *to our shores in emi-
*468] grant ships, and that measures of precaution and self-defence have become absolutely necessary on the Atlantic border. But whether this law was necessary or not is not a question for this court; and I forbear, therefore, to discuss its justice and necessity. This court has no power to inquire whether a State has acted wisely or justly in the exercise of its reserved powers. Massachusetts had the sole and exclusive right to judge for herself whether any evil was to be apprehended from the introduction of alien passengers from foreign countries. And in the exercise of her discretion, she had a right to exclude them if she thought proper to do so. Of course I do not speak of public functionaries or agents, or officers of foreign governments. Undoubtedly no State has a right to interfere with the free ingress of persons of that description. But there does not appear to have been any such among the aliens who are the subjects of this suit, and no question, therefore, can arise on that score.

Massachusetts, then, having the right to refuse permission to alien passengers from foreign countries to land upon her

territory, and the right to reject them as a class or description of persons who may prove injurious to her interests, was she bound to admit or reject them without reserve? Was she bound either to repel them altogether, or to admit them absolutely and unconditionally? And might she not admit them upon such securities and conditions as she supposed would protect the interest of her own citizens, while it enabled the State to extend the offices of humanity and kindness to the sick and helpless stranger? There is certainly no provision in the Constitution which restrains the power of the State in this respect. And if she may reject altogether, it follows that she may admit upon such terms and conditions as she thinks proper, and it cannot be material whether the security required be a bond to indemnify or the payment of a certain sum of money.

In a case where a party has a discretionary power to forbid or permit an act to be done, as he shall think best for his own interests, he is never bound absolutely and unconditionally to forbid or permit it. He may always permit it upon such terms and conditions as he supposes will make the act compatible with his own interests. I know no exception to the rule. An individual may forbid another from digging a ditch through his land to draw off water from the property of the party who desires the permission. Yet he may allow him to do it upon such conditions and terms as, in his judgment, are sufficient to protect his own property from overflow; and for this purpose he may either take a bond and security, or he may accept a sum of money in lieu of it, and take upon himself the *obligation of guarding against the danger. [*469
The same rule must apply to governments who are charged with the duty of protecting their citizens. Massachusetts has legislated upon this principle. She requires bond and security from one class of aliens, and from another, whom she deems less likely to become chargeable, she accepts a sum of money, and takes upon herself the obligation of providing a remedy for the apprehended evil.

I do not understand that the lawfulness of the provision for taking bond, where the emigrants are actual paupers and unable to gain a livelihood, has been controverted. That question, it is true, is not before us in this case; but the right of the State to protect itself against the burden of supporting those who come to us from European almshouses seems to be conceded in the argument. Yet there is no provision in the Constitution of the United States which makes any distinction between different descriptions of aliens, or which reserves the power to the State as to one class and denies it over the other.

And if no such distinction is to be found in the Constitution, this court cannot engraft one upon it. The power of the State as to these two classes of aliens must be regarded here as standing upon the same principles. It is in its nature and essence a discretionary power, and if it resides in the State as to the poor and the diseased, it must also reside in it as to all.

In both cases the power depends upon the same principles, and the same construction of the Constitution of the United States; it results from the discretionary power which resides in a State to determine from what person or description of persons the danger of pauperism is to be apprehended, and to provide the necessary safeguards against it. Most evidently this court cannot supervise the exercise of such a power by the State, nor control or regulate it, nor determine whether the occasion called for it, nor whether the funds raised have been properly administered. This would be substituting the discretion of the court for the discretionary power reserved to the State.

Moreover, if this court should undertake to exercise this supervisory power, it would take upon itself a duty which it is utterly incapable of discharging. For how could this court ascertain whether the persons classed by the boarding officer of the State as paupers belonged to that denomination or not? How could it ascertain what had been the pursuits, habits, and mode of life of every emigrant, and how far he was liable to lose his health, and become, with a helpless family, a charge upon the citizens of the State? How could it determine who was sick and who was well? who was rich and who was poor? who was likely to become chargeable and who not? *470] Yet all *this must be done, and must be decided too upon legal evidence, admissible in a court of justice, if it is determined that the State may provide against the admission of one description of aliens, but not against another: that it may take securities against paupers and persons diseased, but not against those who are in health or have the means of support; and that this court have the power to supervise the conduct of the State authorities, and to regulate it and determine whether it has been properly exercised or not.

I can, therefore, see no ground for the exercise of this power by the government of the United States or any of its tribunals. In my opinion, the clear, established, and safe rule is, that it is reserved to the several States, to be exercised by them according to their own sound discretion, and according to their own views of what their interest and safety

require. It is a power of self-preservation, and was never intended to be surrendered.

But it is argued in support of the claim of the plaintiff, that the conveyance of passengers from foreign countries is a branch of commerce, and that the provisions of the Massachusetts law, which meet the ship on navigable water and detain her until the bond is given and the money paid, are a regulation of commerce; and that the grant to Congress of the power to regulate commerce is of itself a prohibition to the States to make any regulation upon the subject. The construction of this article of the Constitution was fully discussed in the opinions delivered in the License Cases, reported in 5 Howard. I do not propose to repeat here what I then said, or what was said by other members of the court with whom I agreed. It will appear by the report of the case, that five of the justices of this court, being a majority of the whole bench, held that the grant of the power to Congress was not a prohibition to the States to make such regulations as they deemed necessary, in their own ports and harbours, for the convenience of trade or the security of health; and that such regulations were valid, unless they came in conflict with an act of Congress. After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported. Referring to my opinion on that occasion, and the reasoning by which it is maintained, as showing what I *still think upon the subject, I desire now [*471
to add to it a reference to the thirty-second number of the Federalist, which shows that the construction given to this clause of the Constitution by a majority of the justices of this court is the same that was given to it at the time of its adoption by the eminent men of the day who were concerned in framing it, and active in supporting it. For in that number it is explicitly affirmed, that, "notwithstanding the affirmative grants of general authorities, there has been the most pointed care in those cases where it was deemed improper that the like authorities should reside in the States, to insert negative clauses prohibiting the exercise of them by the States." The grant of a general authority to regulate

commerce is not, therefore, a prohibition to the States to make any regulations concerning it within their own territorial limits, not in conflict with the regulations of Congress.

But I pass from this objection, which was sufficiently discussed in the License Cases, and come to the next objection founded on the same clause. It is this: that the law in question is a regulation of commerce, and is in conflict with the regulations of Congress and with treaties, and must yield to the paramount authority over this subject granted to the United States.

It is a sufficient answer to this argument to say, that no treaty or act of Congress has been produced which gives, or attempts to give, to all aliens the right to land in a State. The act of March 2, 1799, ch. 23, § 46, has been referred to, and much pressed in the argument. But this law obviously does nothing more than exempt certain articles belonging to a passenger from the duties which the United States had a right to exact, if they thought proper. Undoubtedly the law presupposes that the passenger will be permitted to land. But it does not attempt to confer on him the right. Indeed, the construction contended for would by a startling one to the States, if Congress has the power now claimed for it. For neither this nor any other law of Congress prescribes the character or condition of the persons who may be taken on board in a foreign port to be brought to the United States. It makes no regulations upon the subject, and leaves the selection altogether to the discretion and pleasure of the ship-owner or ship-master. The ship-owner, as well as the ship-master, is in many cases a foreigner, acting sometimes, perhaps, under the influence of foreign governments or foreign cities, and having no common interest or sympathy with the people of the United States; and he may be far more disposed to bring away the worst and most dangerous portion of the population rather than the moral and industrious citi-
*472] zen. And as the act of 1799 speaks of *passengers generally, and makes no distinction as to their character or health, if the argument of the counsel for the plaintiff can be maintained, and this law gives every passenger which the ship-owner has selected and brought with him the right to land, then this act of Congress has not only taken away from the States the right to determine who is and who is not fit to be received among them, but has delegated this high and delicate power to foreign ship-masters and foreign ship-owners. And if they have taken on board tenants of their almshouses or workhouses, or felons from their jails, if Congress has the power contended for, and this act of Con-

gress will bear the construction given to it, and gives to every passenger the right to land, then this mass of pauperism and vice may be poured out upon the shores of a State in opposition to its laws, and the State authorities are not permitted to resist or prevent it.

It is impossible, upon any sound principle of construction, so to interpret this law of Congress. Its language will not justify it, nor can such be supposed to have been the policy of the United States, or such its disposition towards the States. The general government merely intended to exercise its powers in exempting the articles mentioned from duties, leaving it to the States to determine whether it was compatible with their interest and safety to permit the person to land. And this power the States have always exercised before and since the passage of this act of Congress.

The same answer may be given to the argument on treaty stipulations. The treaty of 1794, article 4, referred to and relied on is no longer in force. But the same provision is, however, substantially contained in the first article of the convention with Great Britain of July 3, 1815, with this exception, that it puts British subjects in this respect on the same footing with other foreigners. But the permission there mutually given, to reside and hire houses and warehouses, and to trade and traffic, is in express terms made subject to the laws of the two countries respectively. Now, the privileges here given within the several States are all regulated by State laws, and the reference to the laws of this country necessarily applies to them, and subjects the foreigner to their decision and control. Indeed, the treaty may be said to disavow the construction now attempted to be given to it. Nor do I see how any argument against the validity of the State law can be drawn from the act of Congress of 1819. On the contrary, this act seems accurately to mark the line of division between the powers of the general and State governments over this subject; and the powers of the former have been exercised in the passage of this law without encroaching on the rights of the latter. It regulates [*473
*the number of passengers which may be taken on board, and brought to this country from foreign ports, in proportion to the tonnage of the vessel, and directs that, at the time of making his entry at the custom house, the captain shall deliver to the collector a list of the passengers taken on board at any foreign port or place, stating their age, sex, and occupation, and whether they intend to become inhabitants of this country, and how many have died on the voyage; and this list is to be returned quarterly to the State Depart-

ment, to be laid before Congress. But the law makes no provision for their landing, nor does it require any inspection as to their health or condition. These matters are evidently intended to be left to the State government, when the voyage has ended, by the proper custom-house entry. For it cannot be supposed that, if the legislature of the United States intended by this law to give the passengers a right to land, it would have been so regardless of the lives, and health, and interests of our own citizens as to make no inquiry and no examination upon a subject which so nearly concerned them. But it directs no inquiries, evidently because the power was believed to belong to the States. And as the landing of the passengers depended on the State laws, the inquiries as to their health and condition properly belonged to the State authorities. The act of 1819 may fairly be taken as denoting the true line of division between the two sovereignties, as established by the Constitution of the United States and recognized by Congress.

I forbear to speak of other laws and treaties referred to. They are of the same import, and are susceptible of the same answer. There is no conflict, therefore, between the law of Massachusetts and any treaty or law of the United States.

Undoubtedly, vessels engaged in the transportation of passengers from foreign countries may be regulated by Congress, and are a part of the commerce of the country. Congress may prescribe how the vessel shall be manned and navigated and equipped, and how many passengers she may bring, and what provision shall be made for them, and what tonnage she shall pay. But the law of Massachusetts now in question does not in any respect attempt to regulate this trade or impose burdens upon it. I do not speak of the duty enjoined upon the pilot, because that provision is not now before us, although I see no objection to it. But this law imposes no tonnage duty on the ship, or any tax upon the captain or passengers for entering its waters. It merely refuses permission to the passengers to land until the security demanded by the State for the protection of its own people from the evils of pauperism has been given. If, however, *474] the treaty or act of Congress above referred to had *attempted to compel the State to receive them without any security, the question would not be on any conflicting regulations of commerce, but upon one far more important to the States, that is, the power of deciding who should or should not be permitted to reside among its citizens. Upon that subject I have already stated my opinion. I cannot believe that it was ever intended to vest in Congress,

by the general words in relation to the regulation of commerce, this overwhelming power over the States. For if the treaty stipulation before referred to can receive the construction given to it in the argument, and has that commanding power claimed for it over the States, then the emancipated slaves of the West Indies have at this hour the absolute right to reside, hire houses, and traffic and trade throughout the Southern States, in spite of any State law to the contrary; inevitably producing the most serious discontent, and ultimately leading to the most painful consequences. It will hardly be said, that such a power was granted to the general government in the confidence that it would not be abused. The statesmen of that day were too wise and too well read in the lessons of history and of their own times to confer unnecessary authority under any such delusion. And I cannot imagine any power more unnecessary to the general government, and at the same time more dangerous and full of peril to the States.

But there is another clause in the Constitution which it is said confers the exclusive power over this subject upon the general government. The ninth section of the first article declares that the migration or importation of such persons as any of the States then existing should think proper to admit should not be prohibited by the Congress prior to the year 1808, but that a tax or duty might be imposed on such importation, not exceeding ten dollars for each importation. The word *migration* is supposed to apply to alien freemen voluntarily migrating to this country, and this clause to place their admission or migration entirely in the power of Congress.

At the time of the adoption of the Constitution, this clause was understood by its friends to apply altogether to slaves. The Madison Papers will show that it was introduced and adopted solely to prevent Congress, before the time specified, from prohibiting the introduction of slaves from Africa into such States as should think proper to admit them. It was discussed on that ground in the debates upon it in the Convention; and the same construction is given to it in the forty-second number of the Federalist, which was written by Mr. Madison, and certainly nobody could have understood the object and intention of this clause better than he did.

*It appears from this number of the Federalist, that those who in that day were opposed to the Constitution, and endeavouring to prevent its adoption, represented the word "migration" as embracing freemen who might desire to migrate from Europe to this country, and objected [*475

to the clause because it put it in the power of Congress to prevent it. But the objection made on that ground is dismissed in a few words, as being so evidently founded on misconstruction as to be unworthy of serious reply; and it is proper to remark that the objection then made was, that it was calculated to prevent voluntary and beneficial migration from Europe, which all the States desired to encourage. Now the argument is, that it was inserted to secure it, and to prevent it from being interrupted by the States. If the word can be applied to voluntary immigrants, the construction put upon it by those who opposed the Constitution is certainly the just one; for it is difficult to imagine why a power should be so explicitly and carefully conferred on Congress to prohibit immigration, unless the majority of the States desired to put an end to it, and to prevent any particular State from contravening this policy. But it is admitted on all hands, that it was then the policy of all the States to encourage immigration, as it was also the policy of the far greater number of them to discourage the African slave-trade. And with these opposite views upon these two subjects, the framers of the Constitution would never have bound them both together in the same clause, nor spoken of them as kindred subjects which ought to be treated alike, and which it would be the probable policy of Congress to prohibit at the same time. No State could fear any evil from the discouragement of immigration by other States, because it would have the power of opening its own doors to the immigrant, and of securing to itself the advantages it desired. The refusal of other States could in no degree affect its interests or counteract its policy. It is only upon the ground that they considered it an evil, and desired to prevent it, that this word can be construed to mean freemen, and to class them in the same provision, and in the same words, with the importation of slaves. The limitation of the prohibition also shows that it does not apply to voluntary immigrants. Congress could not prohibit the migration and importation of such persons during the time specified "in such States as might think proper to admit them." This provision clearly implies that there was a well-known difference of policy among the States upon the subject to which this article relates. Now, in regard to voluntary immigrants, all the States, without exception, not only admitted them, but encouraged them to come; and the *476] words "in such States as may think proper to admit *them" would have been useless and out of place if applied to voluntary immigrants. But in relation to slaves it was known to be otherwise; for while the African slave-

trade was still permitted in some of the more southern States, it had been prohibited many years before, not only in what are now called Free States, but also in States where slavery still exists. In Maryland, for example, it was prohibited as early as 1783. The qualification of the power of prohibition, therefore, by the words above mentioned, was entirely appropriate to the importation of slaves, but inappropriate and useless in relation to freemen. They could not and would not have been inserted if the clause in question embraced them.

I admit that the word *migration* in this clause of the Constitution has occasioned some difficulty in its construction; yet it was, in my judgment, inserted to prevent doubts or cavils upon its meaning; for as the words *imports* and *importation* in the English laws had always been applied to *property and things*, as contradistinguished from *persons*, it seems to have been apprehended that disputes might arise whether these words covered the introduction of men into the country, although these men were the property of the persons who brought them in. The framers of the Constitution were unwilling to use the word *slaves* in the instrument, and described them as persons; and so describing them, they employed a word that would describe them as persons, and which had uniformly been used when persons were spoken of, and also the word which was always applied to matters of property. The whole context of the sentence, and its provisions and limitations, and the construction given to it by those who assisted in framing the clause in question, show that it was intended to embrace those persons only who were brought in as property.

But apart from these considerations, and assuming that the word *migration* was intended to describe those who voluntarily came into the country, the power granted is merely a power to prohibit, not a power to compel the States to admit.

And it is carrying the powers of the general government by construction, and without express grant or necessary implication, much farther than has ever heretofore been done, if the former is to be construed to carry with it the latter. The powers are totally different in their nature, and totally different in their action on the States. The prohibition could merely retard the growth of population in the States. It could bring upon them no danger, nor any new evil, moral or physical.

But the power of compelling them to receive and to retain among them persons whom the State may deem dangerous to its peace, or who may be tainted with crimes or infectious

*477] *diseases, or who may be a burden upon its industrious citizens, would subject its domestic concerns and social relations to the power of the Federal government.

It would require very plain and unambiguous words to convince me that the States had consented thus to place themselves at the feet of the general government; and if this power is granted in regard to voluntary immigrants, it is equally granted in the case of slaves. The grant of power is the same, and in the same words, with respect to migration and to importation, with the exception of the right to impose a tax upon the latter; and if the States have granted this great power in one case, they have granted it in the other; and every State may be compelled to receive a cargo of slaves from Africa, whatever danger it may bring upon the State, and however earnestly it may desire to prevent it. If the word *migration* is supposed to include voluntary immigrants, it ought at least to be confined to the power granted, and not extended by construction to another power altogether unlike in its character and consequences, and far more formidable to the States.

But another clause is relied on by the plaintiff to show that this law is unconstitutional. It is said that passengers are imports, and that this charge is therefore an impost or duty on imports, and prohibited to the States by the second clause of the tenth section of the first article. This objection, as well as others which I have previously noticed, is in direct conflict with decisions heretofore made by this court. The point was directly presented in the case of *Miln* v. *The City of New York*, 11 Pet., 102, and was there deliberately considered, and the court decided that passengers clearly were not imports. This decision is perfectly in accordance with the definition of the word previously given in the case of *Brown* v. *Maryland*, 12 Wheat., 419. Indeed, it not only accords with this definition, but with the long established and well settled meaning of the word. For I think it may be safely affirmed, that, both in England and this country, the words *imports* and *importation*, in statutes, in statistical tables, in official reports, and in public debates, have uniformly been applied to articles of property, and never to passengers voluntarily coming to the country in ships; and in the debates of the Convention itself, the words are constantly so used.

The members of the Convention unquestionably used the words they inserted in the Constitution in the same sense in which they used them in their debates. It was their object to be understood, and not to mislead, and they ought not to be supposed to have used familiar words in a new or unusual

sense. And there is no reason to suppose that they did not *use the word *imports*, when they inserted it in the Constitution, in the sense in which it had been familiarly used for ages, and in which it was daily used by themselves. If in this court we are at liberty to give old words new meanings when we find them in the Constitution, there is no power which may not, by this mode of construction, be conferred on the general government and denied to the States. [*478

But if the plaintiff could succeed in maintaining that passengers were imports, and that the money demanded was a duty on imports, he would at the same time prove that it belongs to the United States, and not to him, and, consequently, that he is not entitled to recover it. The tenth section of the first article prohibits a State from laying any duty on imports or exports except what may be absolutely necessary for the execution of its inspection laws. Whatever is necessary for that purpose may therefore be laid by the State without the previous consent of Congress.

If passengers are imports, then their condition may be examined and inspected by an officer of the State like any other import, for the purpose of ascertaining whether they may not when landed bring disease or pauperism into the State; for if the State is bound to permit them to land, its citizens have yet the right to know if there is danger, that they may endeavour to avert it, or to escape from it. They have, therefore, under the clause of the Constitution above mentioned, the power to lay a duty on this import, as it is called, to pay the necessary expenses of the inspection. It is, however, said, that more than sufficient to pay the necessary expenses of the inspection was collected, and that the duty was laid also for other purposes. This is true. But it does not follow that the party who paid the money is entitled to recover it back from the State. On the contrary, it is expressly provided in the clause above mentioned, that the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the treasury of the United States. If, therefore, these passengers were imports, within the meaning of this clause of the Constitution, and the money in question a duty on imports, then the net produce or surplus, after paying the necessary expenses of inspection, belongs to the treasury of the United States. The plaintiff has no right to it, and cannot maintain a suit for it. It is appropriated by the express words of the Constitution to the United States, and they, and they alone, would have a right to claim it from the State. The argument, however, that passengers are imports,

is, in my judgment, most evidently without any reasonable foundation.

*479] The only remaining topic which seems to require *examination is the objection, that the money demanded is a tax on the captain of the vessel, and therefore a regulation of commerce.

This argument, I think, is sufficiently answered by what I have already said as to the real and true character of the transaction, and the relative powers of the Union and the States. But I proceed to inquire whether, if the law of Massachusetts be a tax, it is not a legitimate exercise of its taxing power, putting aside for the present the other considerations herein before mentioned, and which I think amply sufficient to maintain its validity.

Undoubtedly the ship, although engaged in the transportation of passengers, is a vehicle of commerce, and within the power of regulation granted to the general government; and I assent fully to the doctrine upon that subject laid down in the case of *Gibbons* v. *Ogden*. But it has always been held that the power to regulate commerce does not give to Congress the power to tax it, nor prohibit the States from taxing it in their own ports, and within their own jurisdiction. The authority of Congress to lay taxes upon it is derived from the express grant of power, in the eighth section of the first article, to lay and collect taxes, duties, imposts, and excises, and the inability of the States to tax it arises from the express prohibition contained in the tenth section of the same article.[1]

This was the construction of the Constitution at the time of its adoption, the construction under which the people of the States adopted it, and which has been affirmed in the clearest terms by the decisions of this court.

In the thirty-second number of the Federalist, before referred to, and several of the preceding numbers, the construction of the Constitution as to the taxing power of the general government and of the States is very fully examined, and with all that clearness and ability which everywhere mark the labors of its distinguished authors; and in these numbers, and more especially in the one above mentioned, the construction above stated is given to the Constitution, and supported by the most conclusive arguments. It maintains that no right of taxation which the States had previously enjoyed was surrendered unless expressly prohibited; that it was not impaired by any affirmative grant of power to the general government; that duties on imports were a part of the taxing

[1] QUOTED. *Transportation Co.* v. *Wheeling*, 9 Otto, 280; and see Id., 282.

power, and that the States would have had a right, after the adoption of the Constitution, to lay duties on imports and exports, if they had not been expressly prohibited.

The grant of the power to regulate commerce, therefore, did not, in the opinion of Mr. Hamilton, Mr. Madison, and Mr. Jay, prohibit the States from laying imposts and duties upon *imports brought into their own territories. It [*480 did not apply to the right of taxation in either sovereignty, the taxing power being a distinct and separate power from the regulation of commerce; and the right of taxation in the States remaining over every subject where it before existed, with the exception only of those expressly prohibited.

This construction, as given by the Federalist, was recognized as the true one, and affirmed by this court, in the case of *Gibbons* v. *Ogden*, 9 Wheat., 201. The passage upon this subject is so clear and forcible, that I quote the words used in the opinion of the court, which was delivered by Chief Justice Marshall.

"In a separate clause," he says, "of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution then considers those powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition upon the subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce."

With such authorities to support me, so clearly and explicitly stating the doctrine, it cannot be necessary to pursue the argument further.

I may therefore safely assume, that, according to the true construction of the Constitution, the power granted to Congress to regulate commerce did not in any degree abridge the power of taxation in the States; and that they would at this day have the right to tax the merchandise brought into their ports and harbours by the authority and under the regulations of Congress, had they not been expressly prohibited.

They are expressly prohibited from laying any duty on

imports or exports, except what may be absolutely necessary for executing their inspection laws, and also from laying any tonnage duty. So far, their taxing power over commerce is restrained, but no farther. They retain all the rest; and if the money demanded is a tax upon commerce, or the instrument or vehicle of commerce, it furnishes no objection to it unless it is a duty on imports or a tonnage duty, for these alone are forbidden.

*481] *And this brings me back to the question whether alien passengers from a foreign country are imports. I have already discussed that question, and need not repeat what I have said. Most clearly, in my opinion, they are not imports; and if they are not, then, according to the authorities referred to, the State has a right to tax them,—their authority to tax not being abridged in any respect by the power in the general government to regulate commerce. I say nothing as to its being a tonnage duty, for, although mentioned in the argument, I do not suppose any reliance could be placed upon it.

It is said that this is a tax upon the captain, and therefore a tax upon an instrument of commerce. According to the authorities before referred to, if it were a tax on the captain it would be no objection to it, unless it were indirectly a duty on imports or tonnage.

Unquestionably a tax on the captain of a ship, bringing in merchandise, would be indirectly a tax on imports, and consequently unlawful; but his being an instrument of commerce and navigation does not make it so; for a tax upon the instrument of commerce is not forbidden. Indeed, taxes upon property in ships are continually laid, and their validity never yet doubted. And to maintain that a tax upon him is invalid, it must first be shown that passengers are imports or merchandise, and that the tax was therefore indirectly a tax upon imports.

But although this money is demanded of the captain, and required to be paid by him or his owner before the passenger is landed, it is in no proper and legitimate sense of the word a tax on him. Goods and merchandise cannot be landed by the captain until the duties upon them are paid or secured. He may, if he pleases, pay the duty without waiting for his owner or consignee. So here the captain, if he chose, might pay the money and obtain the privilege of landing his passengers without waiting for his owner or consignee. But he was under no obligation to do it. Like the case of a cargo, he could not land his passengers until it was done. Yet the duties demanded in the former case have never been supposed

to be a tax on the captain, but upon the goods imported. And it would be against all analogy, and against the ordinary construction of all statutes, to call this demand a tax on the captain. The amount demanded depends upon the number of passengers who desire to land. It is not a fixed amount on every captain or every ship engaged in the passenger trade; nor upon her amount of tonnage. It is no objection, then, to the Massachusetts law to say, that the ship is a vehicle or the captain an instrument of commerce.

The taxing power of the State is restrained only where the *tax is directly or indirectly a duty on imports or tonnage. And the case before us is the first in which [*482] this power has been held to be still further abridged by mere affirmative grants of power to the general government. In my judgment, this restriction on the power of the States is a new doctrine, in opposition to the contemporaneous construction and the authority of adjudged cases. And if it is hereafter to be the law of this court, that the power to regulate commerce has abridged the taxing power of the States upon the vehicles or instruments of commerce, I cannot foresee to what it may lead; whether the same prohibition, upon the same principle, may not be carried out in respect to shipowners and merchandise in a way seriously to impair the powers of taxation which have heretofore been exercised by the States.

I conclude the subject by quoting the language of Chief Justice Marshall in the case of *Billings* v. *The Providence Bank*, in 4 Pet., 561, where, speaking upon this subject, he says:—"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to reaffirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it,—that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear."

Such has heretofore been the language of this court, and I can see nothing in the power granted to Congress to regulate commerce that shows a deliberate purpose on the part of the States who adopted the Constitution to abandon any right of taxation except what is directly prohibited. The contrary appears in the authentic publications of the time.

It cannot be necessary to say any thing upon the article of the Constitution which gives to Congress the power to establish a uniform rule of naturalization. The motive and object of this provision are too plain to be misunderstood. Under the Constitution of the United States, citizens of each State are entitled to the privileges and immunities of citizens in the several States; and no State would be willing that another State should determine for it what foreigner should become one of its citizens, and be entitled to hold lands and to vote at its elections. For, without this provision, any one State could have given the right of citizenship in every other State; and, as every citizen of a State is also a citizen of the United States, *a single State, without this provision, might have given to any number of foreigners it pleased the right to all the privileges of citizenship in commerce, trade, and navigation, although they did not even reside amongst us.

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The nature of our institutions under the Federal government made it a matter of absolute necessity that this power should be confided to the government of the Union, where all the States were represented, and where all had a voice; a necessity so obvious that no statesman could have overlooked it. The article has nothing to do with the admission or rejection of aliens, nor with immigration, but with the rights of citizenship. Its sole object was to prevent one State from forcing upon all the others, and upon the general government, persons as citizens whom they were unwilling to admit as such.

It is proper to add, that the State laws which were under examination in the License Cases applied altogether to merchandise of the description mentioned in those laws, which was imported into a State from foreign countries or from another State; and as the States have no power to lay a tax or duty on imports, the laws in question were subject to the control of Congress until the articles had ceased to be imports, according to the legal meaning of the word. And it is with reference to such importations and regulations of Congress and the States concerning them, that the paramount power of Congress is spoken of in some of the opinions then delivered.

The questions as to the power of a State to exclude from its territories such aliens as it may deem unfit to reside among its citizens, and to prescribe the conditions on which they may enter it, and as to the power of a State to levy a tax for revenue upon alien passengers arriving from foreign ports, were

neither of them involved in those cases, and were not considered or discussed in the opinions.

I come now to the case from New York.

The object of this law is to guard its citizens, not only from the burdens and evils of foreign paupers, but also against the introduction of contagious diseases. It is not, therefore, like the law of Massachusetts, confined to aliens, but the money is required to be paid for every passenger arriving from a foreign port. The tax is imposed on the passenger in this case clearly and distinctly; for although the captain who lands them is made liable for the collection, yet a right is expressly secured to him to recover it from the passenger. There can be no objection to this law upon the ground that the burden is imposed upon citizens of other States, because citizens of New York are equally liable; but embracing, as it does, its own citizens and citizens of other States, when they arrive from a *foreign port, [*484
the right of a State to determine what person or class of persons shall reside among them does not arise, and what I have said upon that subject in the Boston case is inapplicable to this. In every other respect, however, it stands upon the same principles, involving also other and further considerations, which I proceed to notice, and which place it upon grounds equally firm with the case from Massachusetts.

It will be admitted, I understand, that New York has the right to protect herself from contagious diseases, and possesses the right to inspect ships with cargoes, and to determine when it is safe to permit the vessel to come to the wharf, or the cargo to be discharged. In other words, it may establish quarantine laws. Consequently the State may tax the ship and cargo with the expenses of inspection, and with the costs and expenses of all measures deemed necessary by the State authorities. This is uniformly the case in quarantine regulations; and although there is not the least appearance of disease in the crew, and the cargo is free from taint, yet if the ship comes from a port where a contagious disease is supposed to exist, she is always placed under quarantine, and subjected to the delay and expenses incident to that condition, and neither the crew nor cargo suffered to land until the State authorities are satisfied that it may be done without danger. The power of deciding from what port or ports there is danger of disease, and what ship or crew shall be made subject to quarantine, on account of the port from which she sailed, and what precautions and securities are required to guard against it, must of necessity belong to the State authorities; for otherwise the power to

direct the quarantine could not be executed. And this power of a State has been constantly maintained and affirmed in this court whenever the subject has been under consideration. And when the State authorities have directed the quarantine, if proof should be offered showing that the foreign ports to which it applied were free from disease, and that there was no just ground for apprehension, this court would hardly, upon that ground, feel itself authorized to pronounce the expenses charged upon the vessel to be unconstitutional, and the law imposing them to be void.

Upon every principle of reason and justice, the same rule must be applied to passengers that is applied to ships and cargoes. If, for example, while rumors were recently prevailing that the cholera had shown itself in the principal seaport towns of Europe, New York had been injudicious enough to embarrass her own trade by placing at quarantine all vessels and persons coming from those ports, and burdened them with the heavy expenses and ruinous delays incident to that measure,—*or if she were to do so now, when apprehensions are felt that it may again suddenly make its appearance in the great marts of European trade,—this court certainly would not undertake to determine that these fears are groundless, and precautionary measures unnecessary, and the law therefore unconstitutional, and that every passenger might land at his own pleasure. Nobody, I am sure, will contend for such a power. And however groundless the apprehension, and however injurious and uncalled for such regulations may be, still, if adopted by the State, they must be obeyed, and the courts of the United States cannot treat them as nullities.

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If the State has the same right to guard itself from persons from whom infection is feared that it has to protect itself against the danger arising from ships with cargoes, it follows that it may exercise the same power in regard to the former that it exercises in relation to the latter, and may tax them with the expense of the sanatory measures which their arrival from a foreign port is supposed to render necessary or prudent.

For the expenses imposed on ships with cargoes, or on the captain or owner, are as much a tax as the demand of a particular sum to be paid to the officer of the State, to be expended for the same purpose. It is in truth always the demand of a sum of money to indemnify the State for the expense it incurs. And, as I have already said, these charges are not always made and enforced against ships actually infected with disease, but frequently upon a particular class

of vessels; that is to say, upon all ships coming from ports from which danger is apprehended,—upon the sound and healthy as well as the infected. The charge is not made upon those ships alone which bring disease with them, but upon all that come from a port or ports from which it is feared disease may be brought. It is true the expenses may and do differ in amount, according to the condition of the ship and cargo. Yet all are subjected to the tax, to the amount of the charges incurred by the State.

Now, in the great commercial emporium of New York, hundreds are almost daily arriving from different parts of the world, and that multitude of strangers (among whom are always many of the indigent and infirm) inevitably produces a mass of pauperism which, if not otherwise provided for, must press heavily on the industry of its citizens; and which, moreover, constantly subjects them to the danger of infectious diseases. It is to guard them against these dangers that the law in question was passed. The apprehensions which appear to have given rise to it may be without foundation as to some of the foreign ports from which passengers have arrived, but that *is not a subject of inquiry here; and it will hardly be denied that there are sufficient grounds for apprehension and for measures of precaution as to many of the places from which passenger ships are frequently arriving. Indeed, it can hardly be said that there is any European port from which emigrants usually come which can be regarded as an exception. [*486

The danger arising from passenger ships cannot be provided against, with a due regard to the interests and convenience of trade and to the calls of humanity, by precisely the same means that are usually employed in cases of ships with cargoes. In the latter case, you may act without difficulty upon the particular ship, and charge it with the expenses which are incident to the quarantine regulations. But how are you to provide for hundreds of sick and suffering passengers? for infancy and age? for those who have no means,—who are not objects of taxation, but of charity? You must have an extensive hospital, suitable grounds about it, nurses and physicians, and provide food and medicine for them. And it is but just that these expenses should be borne by the class of persons who make them necessary; that is to say, the passengers from foreign ports. It is from them, as a class, that the danger is feared, and they occasion the expenditure. They are all entitled to share in the relief which is provided, and the State cannot foresee which of them will require it and which will not. It is provided for

all that need it, and all should therefore contribute. You must deal with them as you do with ships with merchandise and crews arriving from ports where infectious diseases are supposed to exist; when, although the crew are in perfect health, and the ship and cargo free from infection, yet the ship-owner must bear the expense of the sanatory precautions which are supposed to be necessary on account of the place from which the vessel comes.

The State might, it is true, have adopted towards the passenger ships the quarantine regulations usually applied to ships with merchandise. It might have directed that the passenger ships from any foreign port should be anchored in the stream, and the passengers not permitted to land for the period of time deemed prudent. And if this had been done, the ship-owner would have been burdened with the support of his numerous passengers, and his ship detained for days, or even weeks, after the voyage was ended. And if a contagious disease had broken out on the passage, or appeared after the vessel arrived in port, the delay and expense to him would have been still more serious.

The sanatory measures prescribed by this law are far more favorable to the passengers than the ancient regulations, and *incomparably more so to the feeble, the sick, and the poor. They are far more favorable, also, and less burdensome, to the ship-owner; and no one, I think, can fail to see that the ancient quarantine regulations, when applied to passenger ships, are altogether unsuited to the present condition of things, to the convenience of trade, and to the enlightened policy which governs our intercourse with foreign nations. The ancient quarantine regulations were introduced when the passenger trade, as a regular occupation, was unknown, and when the intercourse between nations was totally unlike what it is at the present day. And after all, these quarantine regulations are nothing more than the mode in which a nation exercises its power of guarding its citizens from the danger of disease. It was, no doubt, well suited to the state of the world at the time when it was generally adopted; but can there be any reason why a State may not adopt other sanatory regulations in the place of them, more suitable to the free, speedy, and extended intercourse of modern times? Can there be any reason why they should not be made less oppressive to the passenger, and to the ship-owner and mariner, and less embarrassing and injurious to commerce? This is evidently what the New York law intended to accomplish, and has accomplished, while the law has been permitted to stand. It is no more a regulation

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of commerce, and, indeed, is far less burdensome and occasions less interruption to commerce, than the ancient quarantine regulations. And I cannot see upon what ground it can be supposed that the Constitution of the United States permits a State to use the ancient means of guarding the health of its citizens, and at the same time denies to it the power of mitigating its hardships and of adapting its sanatory regulation to the extended and incessant intercourse with foreign nations, and the more enlightened philanthropy of modern times; nor why the State should be denied the privilege of providing for the sick and suffering on shore, instead of leaving them to perish on shipboard. Quarantine regulations are not specific and unalterable powers in a State; they are but the means of executing a power. And certainly other and better means may be adopted in place of them, if they are not prohibited by the Constitution of the United States. And if the old mode is constitutional, the one adopted by the law of New York must be equally free from objection. Indeed, the case of *The City of New York* v. *Miln*, so often referred to in the argument, ought, in my judgment, to decide this. It seems to me that the present case is entirely within the principles there ruled by the court.

I had not intended to say any thing further in relation to the case of *New York* v. *Miln*, but the remarks of one of my *brethren have rendered it necessary for me to speak [*488 of it more particularly, since I have referred to it as the deliberate judgment of the court. It is eleven years since that decision was pronounced. After that lapse of time, I am sensible that I ought not to undertake to state every thing that passed in conference or in private conversations; because I may be mistaken in some particulars, although my impressions are strong that all the circumstances are yet in my memory. And I am the less disposed to enter upon such a statement, because, in my judgment, its judicial authority ought not to rest on any such circumstances depending on individual memory. The court at that time consisted of seven members; four of them are dead, and among them the eminent jurist who delivered the opinion of the court. All of the seven judges were present, and partook in the deliberations which preceded the decision. The opinion must have been read in conference, and assented to or acquiesced in by a majority of the court, precisely as it stood, otherwise it could not have been delivered as the court's opinion. It was delivered from the bench in open court, as usual, and only one of the seven judges, Mr. Justice Story, dissented. Mr. Justice Thompson delivered his own opinion, which con-

curred in the opinion of the court, but which, at the same time, added another ground, which the court declined taking and determined to leave open. This will be seen by referring to the opinions. And if an opinion thus prepared and delivered and promulgated in the official report may now be put aside, on the ground that it did not express what at that time was the opinion of the majority of the court, I do not see how the decisions, when announced by a single judge, (as is usual when the majority concur,) can hereafter command the public confidence. What is said to have happened in this case may, for aught we know, have happened in others. In *Gibbons* v. *Ogden*, for example, or *Brown* v. *The State of Maryland*, which have been so often referred to.

The question which the court determined to leave open was, whether regulations of commerce, as such, by a State within its own territories, are prohibited by the grant of the power to Congress. This appears in the opinion itself, and the law of New York was maintained on what was called the police power of the State. I ought to add, as Mr. Justice Baldwin has been particularly referred to, that the court adjourned on the day the opinion was delivered, and on the next day he called on me and said there was a sentence, or a paragraph, I do not remember which, that had escaped his attention, and which he was dissatisfied with, and wished altered. Of course nothing could be done, as the court had separated, and Mr.

*489] *Justice Barbour, as well as others, had left town. Mr. Justice Barbour and Mr. Justice Baldwin were both present at the next term, and for several terms after; but I never heard any further dissatisfaction expressed with the opinion by Mr. Justice Baldwin, and never at any time, until this case came before us, heard any from any other member of the court who had assented to or acquiesced in the opinion, nor any proposition to correct it. I have no reason to suppose that Mr. Justice Barbour ever heard in his lifetime that the accuracy of his opinion had been questioned, or that any alteration had been desired in it. And I have the strongest reason to suppose that Mr. Justice Baldwin had become satisfied, because, in his opinion in *Groves* v. *Slaughter*, he quotes the case of *New York* v. *Miln* with approbation, when speaking in that case of the difference between commercial and police power. The passage is in 15 Pet., 511, where he uses the following language:—"The opinion of this court in the case of *Miln* v. *New York*, 11 Pet., 130, &c., draws the true line between the two classes of regulations, and gives an easy solution to any doubt which may arise on the clause of the constitution of Mississippi which has been under considera-

tion." I quote his words as judicially spoken, and forming a part of the official report.

I have deemed it my duty to say this much, as I am one of the three surviving judges who sat in that case. My silence would justly have created the belief that I concurred in the statement which has been made in relation to the case of which I am speaking. But I do not concur. My recollections, on the contrary, differ from it in several particulars. But it would be out of place to enter on such a discussion here. All I desire to say is, that I know nothing that, in my judgment, ought to deprive the case of *New York* v. *Miln* of its full judicial weight as it stands in the official report. Mr. Justice Barbour delivered the opinion. Mr. Justice Thompson's opinion maintains, in the main, the same principles; Mr. Justice Baldwin, four years afterwards, quoted it with approbation; and I certainly assented to it,—making a majority of the whole court. I speak of the opinion of my deceased brethren from their public acts. Of the opinions of those who sit beside me I have no right to speak, because they are yet here and have spoken for themselves. But it is due to myself to say, that certainly, at the time the opinion was delivered, I had no reason to suppose that they did not both fully concur in the reasoning and principles, as well as in the judgment. And if the decision now made is to come in conflict with the principles maintained in that case, those who follow us in these seats must hereafter decide between the two cases, and determine which of them best *accords with the true [*490
construction of the Constitution, and ought, therefore, to stand. The law now in question, like the law under consideration in the case of *New York* v. *Miln*, is, in all of its substantial objects and provisions, in strict analogy to the ordinary quarantine regulations in relation to ships with cargoes from places supposed to be dangerous; at least as much so as the nature of the danger brought by a passenger ship, and the means necessary to guard against it, will permit.

But if this law is held to be invalid, either because it is a regulation of commerce, or because it comes in conflict with a law of Congress, in what mode can the State protect itself? How can it provide against the danger of pestilence and pauperism from passenger ships? It is admitted that it has a right to do so; that want and disease are not the subjects of commerce, and not within the power granted to Congress. They do not obey its laws. Yet, if the State has the right, there must be a remedy, in some form or other, in its own hands, as there is in the case of ships with cargoes. The State can scarcely be required to take upon itself, and impose upon the

industry of its citizens, the duty of supporting the immense mass of poverty and helplessness which is now pressing so heavily upon property in Europe, and which it is endeavouring to throw off. It cannot be expected that it should take upon itself the burden of providing buildings, grounds, food, and all the necessary comforts for the multitude of helpless and poor passengers who are daily arriving from foreign ports. Neither, I presume, will it be expected that the citizens of New York should disregard the calls of sympathy and charity, and repulse from their shores the needy and wretched who are seeking an asylum amongst them. Those who deny the legality of the mode adopted would seem to be called upon to point out another consistent with the rights and safety of the State, and with the interests of commerce in the present condition of the commercial world, and not inconsistent with the obligations of humanity. I have heard none suggested, and I think it would be difficult to devise one on the principles on which this case is decided, unless the health and the lives of the citizens of every State are made altogether dependent upon the protection of the Federal government, and the reserved powers of the States over this subject, which were affirmed by this court in *Gibbons* v. *Ogden* and *Brown* v. *The State of Maryland*, are now to be denied.

With regard to the taxing power in the State, the case of *Brown* v. *The State of Maryland*, referred to in the argument, does not apply to it. The rights of the ship-owner or the captain were in no degree involved in that suit. Nor *491] was there *any question as to when the voyage terminated; as to the ship, or when passengers were entitled to land. The case turned altogether upon the rights of the importer, the owner of imported goods; and the inquiry was, how long and under what circumstances they continued, after they had been actually landed, to be imports or parts of foreign commerce, subject to the control of Congress and exempt therefore from taxation by the State. And even with regard to the importer, that case did not decide that he was not liable to be taxed for the amount of his capital employed in trade, although these imports were a part of that capital.

But here there is no owner. It is the case of passengers,—freemen. It is admitted that they are not exempt from taxation after they are on shore. And the question is, When was the voyage or passage ended, and when did the captain and passengers pass from the jurisdiction and protection of the general government and enter into that of the State. The act of 1819 regulated and prescribed the duties of the ship-owner and captain during the voyage, and until the entry

was made at the custom-house and the proper list delivered. It makes no further provision in relation to any of the parties. The voyage was evidently regarded as then completed, and the captain and passengers as passing from the protection and regulations of Congress, into the protection and exclusive jurisdiction of the State. The passengers were no longer under the control of the captain. They might have landed where and when they pleased, if the State law permitted it, and the captain had no right to prevent them. If he attempted to do so, there was no law of Congress to afford redress or to grant relief. They must have looked for protection to the State law and the State authorities. If a murder had been committed, there was no law of Congress to punish it. The personal safety of the passengers and the captain, and their rights of property, were exclusively under the jurisdiction and protection of the State. If the right of taxation did not exist in this case in return for the protection afforded, it is, I think, a new exception to the general rule upon that subject. For all the parties, the captain as well as the passengers, were as entirely dependent for the protection of their rights upon the State authorities, as if they were dwelling in a house in one of its cities; and I cannot see why they should not be equally liable to be taxed, when no clause can be found in the Constitution of the United States which prohibits it.

The different provisions of the two laws, and the different circumstances of the two cases, made it necessary to say this much concerning the case from New York. In all other *respects, except those to which I have adverted, they [*492
stand upon the same principles, and what I have said of the Boston case is equally applicable to this.

In speaking of the taxing power in this case, I must, however, be understood as speaking of it as it is presented in the record,—that is to say, as the case of passengers from a foreign port. The provisions contained in that law relating to American citizens who are passengers from the ports of other States is a different question, and involves very different considerations. It is not now before us; yet, in order to avoid misunderstanding, it is proper to say, that, in my opinion, it cannot be maintained. Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the United States, from the most remote States or Territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State and Territory of the Union. And the various

provisions in the Constitution of the United States—such, for example, as the right to sue in a federal court sitting in another State, the right to pursue and reclaim one who has escaped from service, the equal privileges and immunities secured to citizens of other States, and the provision that vessels bound to or from one State to another shall not be obliged to enter and clear or pay duties—all prove that it intended to secure the freest intercourse between the citizens of the different States. For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State for entering its territories or harbours is inconsistent with the rights which belong to the citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.

But upon the question which the record brings up, the judgment in the New York case, as well as that from Massachusetts, ought, in my opinion, to be affirmed.

NOTE.—It has been said in the discussion of these cases, by those who maintain that the State laws are unconstitutional, that *commerce* means *intercourse;* and that the power granted to regulate it ought to be construed to include intercourse. I have never been able to see that any *493] argument which *needed examination could be justly founded on this suggestion, and therefore omitted to notice it in the aforegoing opinion. But some stress was, perhaps, intended to be laid on the word *intercourse* thus introduced, and I therefore subjoin this brief note, in order to show that it has not been overlooked.

It has always been admitted, in the discussions, upon this clause of the Constitution, that the power to regulate commerce includes navigation, and ships, and crews, because they are the ordinary means of commercial intercourse; and if it is intended by the introduction of the word *intercourse* merely to say that the power to regulate commerce includes in it navigation, and the vehicles and instruments of commerce, it leaves the question in dispute precisely where it stood before, and requires no further answer.

But if *intercourse* means something more than *commerce*, and would give to the general government a wider range of

power over the States, no one, I am sure, will claim for this court the power to interpolate it, or to construe the Constitution as if it was found there. And if, under the authority to regulate commerce, Congress cannot compel the States to admit or reject aliens or other persons coming from foreign ports, but would possess the power if the word *intercourse* is, by construction, substituted in its place, every one will admit that a construction which substitutes a word of larger meaning than the word used in the Constitution could not be justified or defended upon any principle of judicial authority.

The introduction of the word *intercourse*, therefore, comes to this: if it means nothing more than the word *commerce*, it is merely the addition of a word without changing the argument; but if it is a word of larger meaning, it is sufficient to say that then this court cannot substitute it for the word of more limited meaning contained in the Constitution. In either view, therefore, of the meaning to be attached to this word *intercourse*, it can form no foundation for an argument to support the power now claimed for the general government.

And if commerce with foreign nations could be construed to include the intercourse of persons, and to embrace travellers and passengers, as well as merchandise and trade, Congress would also have the power to regulate this intercourse between the several States, and to exercise this power of regulation over citizens passing from one State to another. It, of course, needs no argument to prove that such a power over the intercourse of persons passing from one State to another is not granted to the Federal government by the power to regulate commerce among the several States. Yet, if commerce does not mean the intercourse of persons between the several States, *and does not embrace passengers or travellers from one State to another, it [*494 necessarily follows that the same word does not include passengers or travellers from foreign countries. And if Congress, under its power to regulate commerce with foreign nations, possesses the power claimed for it in the decision of this case, the same course of reasoning and the same rule of construction (by substituting *intercourse* for *commerce*) would give the general government the same power over the intercourse of persons between different States.

Allusion has been made in the course of these discussions to the exclusive power of the Federal government in relation to intercourse with foreign nations, potentates, and public authorities. This exclusive power is derived from its power

of peace and war, its treaty-making power, its exclusive right to send and receive ambassadors and other public functionaries; and its intercourse in exercising this power is exclusively with governments and public authorities, and has no connection whatever with private persons, whether they be emigrants or passengers, or travellers by land or water from a foreign country. This power over intercourse with foreign governments and authorities has frequently been spoken of, in opinions delivered in this court, as an exclusive power. And I do not suppose that any of these opinions have been alluded to in this case, as furnishing any argument upon the question now before us. For an argument drawn from a mere similitude of words, which are used in relation to a subject entirely different, would be a sophism too palpable to need serious reply.

Mr. Justice DANIEL, dissenting.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

Of the decision of the court just given, a solemn sense of duty compels me to declare my disapproval. Impressed as I am with the mischiefs with which that decision is believed to be fraught, trampling down, as to me it seems to do, some of the strongest defences of the safety and independence of the States of this confederacy, it would be worse than a fault in me could I contemplate the invasion in silence. I am unable to suppress my alarm at the approach of power claimed to be uncontrollable and unlimited. My objections to the decision of the court, and the grounds on which it is rested, both at the bar and by the court, will be exemplified in detail in considering the case of *Smith* v. *Turner*, arising under the statute of New York. The provision of the statute in question is in the following words:—

*495] "The health-commissioner shall demand and be entitled to receive, and in case of neglect or refusal to pay shall sue for and recover, in his name of office, the following sums from the master of every vessel that shall arrive in the port of New York, viz.:—1. From the master of every vessel from a foreign port, for himself and each cabin passenger, one dollar and fifty cents; for each steerage passenger, mate, sailor, or mariner, one dollar." (Rev. Stat. of New York, 445.)

It is wholly irrelevant to the case before us to introduce any other provisions of this statute; such provisions have no connection with this cause, which originated in the single

provision just cited; the intrusion of other provisions of the law of New York can tend only to confusion, and to the effect of diverting the mind from the only proper question for our decision.

Under this provision of the statute, an action was brought by the defendant in error, as health-officer of New York, against the plaintiff in error, to recover the amount authorized by the statute to be demanded of him for bringing within the port of the city of New York, from a foreign country, two hundred and ninety-five alien passengers. It is deemed necessary particularly to state the character of the persons with respect to whose entrance the demand originated and was made, with the view to anticipate objections which might be founded on a supposed invasion of the right of transit in American citizens from one portion of the nation to another. To raise such an objection would be the creation of a mere man of straw, for the quixotic parade of being tilted at and demolished. This case involves no right of transit in American citizens or their property; it is a question raised simply and entirely upon the right of the State to impose conditions on which aliens, or persons from foreign countries, may be introduced within her territory. When a case of a different character, touching the right of transit in citizens, shall arise, it will then, and not till then, be proper to consider it. We cannot properly take cognizance of matters existing only in imagination. Whether this statute of New York and those which have preceded it *in pari materiâ*, be wise, or beneficent, or equitable, or otherwise, in their provisions,—whether, under color of these statutes, more may have been collected than either justice or prudence, or the objects professed in those laws, would require,—whether the amounts collected have been diverted to purposes different from those alleged in excuse for such collection,—are not questions adjourned hither for adjudication upon this record. The legitimate and only regular inquiry before the court is this,—whether the authority claimed and exerted by New York, and *the mode she has chosen for its exertion, be in conformity [*496 with the provisions of the Constitution? I shall dismiss from my view of this cause every other question, as irrelevant and out of place.

The legislation of New York, and the proceedings adopted to enforce it, are assailed as violations of the Constitution, first, as being repugnant to, and an interference with, the power delegated to Congress to regulate foreign commerce. And this general proposition has been divided into two more specific grounds of objection:—

1st. The prohibition to the States to levy taxes or imposts on imports.

2d. The alleged right of Congress to regulate exclusively the admission of aliens,—a right insisted on as falling by construction within the commercial power, or within some other implication in the Constitution.

As guides in the examination of these objections, I will take leave to propound certain rules or principles regarded by myself, at least, as postulates, and conceded to be such, perhaps, by every expositor of the Constitution and of the powers of the State governments.

1st. Then, Congress have no powers save those which are expressly delegated by the Constitution, and such as are necessary to the exercise of powers expressly delegated. (Constitution, art. 1, sec. 8, clause 18, and Amendments, art. 10.)

2d. The necessary auxiliary powers vested by art. 1, sec. 8, of the Constitution cannot be correctly interpreted as conferring powers which, in their own nature, are original, independent substantive powers; they must be incident to original substantive grants, ancillary in their nature and objects, and controlled by and limited to the original grants themselves.

3d. The question, whether a law be void for its repugnancy to the Constitution, ought seldom, if ever, to be decided in the affirmative in a doubtful case. It is not on slight implication and vague conjecture, that a legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other. (6 Cranch, 128.) Various other cases might be adduced to the same effect. Governed by the above principles, whose soundness will scarcely be doubted, I proceed to inquire wherein the existing legislation of New York is in conflict with the Constitution, or with any regulation of Congress established under the authority of that instrument. Whilst, with respect to the paramount authority in Congress to regulate commerce with *foreign nations and amongst the several States (with the exceptions and qualifications of internal commerce and of regulations necessary for the health and security of society), there appears to have been great unanimity everywhere amongst all persons, much diversity of opinion has existed amongst members of this tribunal as to another characteristic of this grant to Congress; namely, as to whether it implies an exclusiveness which necessarily denies and forbids, apart from actual or practical

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collision or interference, every thing like the power of commercial regulation on the part of the States.

To collate or comment upon these various opinions would here be a work of detail and curiosity rather than of utility. A reference to them is no further necessary than to remark, that their preponderance is against the position of exclusiveness in the sense above mentioned, or in any acceptation beyond an actual interference or an unavoidable and essential repugnance in the nature of the separate State and Federal action.

And still more would an examination of these opinions be useless, if, indeed, it would not be irregular, since the decision at the last term but one of this court, upon the license laws of Massachusetts, Rhode Island, and New Hampshire, reported in 5 How., 504, in which decision the preceding cases upon this subject were reviewed, and the character of exclusiveness in the power delegated to Congress repelled and denied. It was my purpose, with this general reference to the decisions of this court, to pass from the point of exclusiveness in the power of Congress over commercial regulations to other questions involved in the present cause; but certain positions just confidently stated from the bench seem to require a pause in my progress, long enough to show the inconsistency of these positions with the Constitution,—their direct conflict, indeed, with themselves. Thus, in the argument to sustain the exclusiveness of the commercial power in Congress, it has been affirmed that, the powers of the Federal government being complete, and within the scope of their design and objects admitting of no partition, the State governments can exercise no powers affecting subjects falling within the range of Federal authority, actual or potential, or in subordination to the Federal government; yet it is remarkable that this assertion has been followed in the same breath by the concession, that the pilot laws are, to some extent, regulations of commerce, and that pilot laws, though enacted by the States, are constitutional, and are valid and operative until they shall be controlled by Federal legislation.

Again: the very language of the Constitution may be appealed to for the recognition of powers to be exercised by the *States, until they shall be superseded by a paramount authority vested in the Federal government. [*498
Instances of these are the powers to train the militia, to lay duties or imposts on imports or exports, so far as this shall be necessary to execute the inspection laws; and the provision in the fourth section of the first article of the Constitu-

tion, declaring that the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof, subject to the power of Congress at any time to alter such regulation. Here, then, are examples put by the Constitution itself, which wholly overthrow this idea of necessity for universal exclusiveness in the investiture of Federal power; examples surely not of minor importance to any which can be derived from the ordinary exigencies of trade. I must stop here, too, long enough to advert to a citation which has been made, in support of the idea of exclusive commercial power, from the opinion of the late Mr. Justice Baldwin, in the case of *Groves* v. *Slaughter*, 15 Pet., 511. With regard to this opinion, it would seem to be enough to deprive it of binding influence as authority, to remark that it was a dissent by a single judge; and this opinion should have still less weight here or elsewhere, when it shall be understood to have asserted the extraordinary doctrine that the States of this Union can have no power to prohibit the introduction of slaves within their territory when carried thither for sale or traffic, because the power to regulate commerce is there asserted to reside in Congress alone. It may safely be concluded, I think, that the justice who cites, with seeming approbation, the opinion of Mr. Justice Baldwin, will hesitate to follow it to the eccentric and startling conclusion to which that opinion has attained.

In opposition to the opinion of Mr. Justice Baldwin, I will place the sounder and more orthodox views of Mr. Justice Story upon this claim to exclusive power in Congress, as expressed in the case of *Houston* v. *Moore*, 5 Wheat., 48, with so much clearness and force as to warrant their insertion here, and which must strongly commend them to every constitutional lawyer. The remarks of Justice Story are these:—"Questions of this nature are always of great importance and delicacy. They involve interests of so much magnitude, and of such deep and permanent public concern, that they cannot but be approached with uncommon anxiety. The sovereignty of a State in the exercise of its legislation is not to be impaired, unless it be clear that it has transcended its legitimate authority; nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, *499] we are *not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution; and, on the other hand, we are bound to support the Constitution as it stands, and to give a fair and rational scope to all the powers which it clearly con-

tains. The Constitution containing a grant of powers in many instances similar to those already existing in the State governments, and some of these being of vital importance to State authority and State legislation, it is not to be admitted that a mere grant of such powers in affirmative terms to Congress does *per se* transfer an exclusive sovereignty on such subjects to the latter. On the contrary, a reasonable interpretation of that instrument necessarily leads to the conclusion, that the powers so granted are never exclusive of similar powers existing in the States, unless where the Constitution has expressly in terms given an exclusive power to Congress, or the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. In all other cases not falling within the classes already mentioned, it seems unquestionable that the States retain concurrent authority with Congress, not only upon the letter and spirit of the eleventh amendment of the Constitution, but upon the soundest principles of general reasoning. There is this reserve, however, that, in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union, being the supreme law of the land, are of paramount authority, and State laws so far, and so far only, as such incompatibility exists must necessarily yield. Such are the general principles by which my judgment is guided in every investigation on constitutional points. I do not know that they have ever been seriously doubted. They commend themselves by their intrinsic equity, and have been amply justified by the opinions of the great men under whose guidance the Constitution was framed, as well as by the practice of the government of the Union. To desert them would be to deliver ourselves over to endless doubts and difficulties, and probably to hazard the existence of the Constitution itself." Here, indeed, is a commentary on the Constitution worthy of universal acceptation.

As the case of *Gibbons* v. *Ogden* has been much relied on in the argument of these cases, and is constantly appealed to as the authoritative assertion of the principle of exclusiveness in the power in Congress to regulate commerce, it is proper here to inquire how far the decision of *Gibbons* v. *Ogden* affirms this principle, so often and so confidently ascribed to it; and after all that has been said on this subject, it may be *matter of surprise to learn, that the court, in the decision above mentioned, so far from affirming that principle, emphatically disclaims all intention to pass upon it. It is true that the court, in speaking of the power to regulate [*500

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commerce vested in Congress by the Constitution, says, that, like all other powers vested in Congress, "it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are comprised by the Constitution." How far exclusiveness in its nature or in the modes of its exercise is indispensable to this completeness of the power itself, the court does not say; but, as has been already remarked, declares its intention not to speak on these topics. These are the words of the court:—"In discussing the question whether this power is still in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We dismiss that inquiry, because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations and among the States, while Congress is regulating it?" And, in fine, upon this question of exclusiveness, the case of *Wilson* v. *The Blackbird Creek Marsh Company* affirms, in language too explicit for misapprehension, that the States may, by their legislation, create what may be obstructions of the means of commercial intercourse, subject to the controlling and paramount authority of Congress. The words of the court in the case last mentioned are these:—"If Congress had passed any act which bore upon the case, any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such an act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. The act is not in violation of this power in its dormant state." (2 Pet., 252.)

I now proceed to inquire whether the exaction of one dollar by New York from aliens arriving within her limits from abroad by sea, can be denominated a regulation of commerce, either according to the etymological meaning of the word *commerce*, or according to its application in common parlance.

*501] *Commerce*, from *con* and *mercis*, critically signifies a mutual selling or traffic, and in ordinary and practical acceptation it means trade, bargain, sale, exchange, barter;

embracing these both as its means and its objects. Different and metaphorical significations of the term can doubtless be suggested by ingenious imaginations. Thus we read in a great poet of "looks commercing with the skies"; but this sublimated application of the term would badly accord with the *views* of commerce in a mercantile sense, or with the utilitarian spirit of this calculating and prosaic age.*

Does the law of New York operate either directly or necessarily upon any one of these ingredients of commerce? Does it look to them at all? With regard to the emigrant, this law institutes no inquiry either as to his pursuits, or his intentions, or his property. He may be a philosopher, an agriculturist, a mechanic, a merchant, a traveller, or a man of pleasure; he may be opulent, or he may be poor;—none of these circumstances affect his admission. It is required, upon his entering the State, that there be paid by or for him a given sum, graduated upon a calculation of benefit to himself and to others similarly situated with himself,—or, if you choose, upon a calculation of advantage to the State; but, under whatever aspect it is viewed, wholly irrespective of property or occupation. So far, then, as the emigrant himself is considered, this imposition steers entirely clear of regulating commerce, in any conceivable sense; it is literally a tax upon a person placing himself within the sphere of the taxing power, and the nature and character of the proceeding are in no wise changed where payment shall be made by the master of the vessel acting as the agent and on behalf of the emigrant. It would still be purely an exercise of the great, indefeasible right of taxation, which, it has been explicitly said by this court, would extend to every subject but for the restriction as to imports and exports imposed by the Constitution; a right, too, expressly declared to belong to a branch of power wholly different from the power to regulate commerce, and forming no part of that power. Thus, in the case of *Gibbons* v. *Ogden*, 9 Wheat., 201, this court, speaking of the power of laying duties or imposts on imports or exports, make use of the following language:—"We think it very clear, that it is considered as a branch of the taxing power. It is so treated in the first clause *of the eighth section. 'Congress shall have power to lay and collect [*502

* *Commerce*, from *con* and *merx*, which Vossius derives from the Hebrew, to divide a part of his own for a part of another's, to exchange, to bargain and sell, to trade or traffic, to have intercourse for purposes of traffic. *Merchand*, or *merchant*, from *merx* or *merces*, contracted from *mercis*, is by some derived from *mereri*, by others from the Greek μέρος, *pars, quia res per partes vendiur*. To *merchand*, to buy, to trade, to traffic.—Richardson's Dictionary.

taxes, duties, imposts, and excises"; and before commerce is mentioned, the rule by which the exertion of this power must be governed is declared. It is that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration, the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution, then, considers these two powers as substantive and distinct from each other, and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject, and they might consequently have exercised it by levying duties on imports or exports had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception to the acknowledged power of the States to levy taxes; not from the questionable power to regulate commerce." Again, in the same case, p. 200, it is declared that "there is no analogy between the power of taxation and the power to regulate commerce"; that the powers are not the same; that there is neither affinity nor resemblance between them (p. 198). It follows *ex necessitate* from this language, that the right to regulate commerce must mean something essentially distinct and separate from the power to impose duties or taxes upon imports; and that the latter might exist independently of and without the former. The assertion of the court here is too clear and emphatic to be misapprehended; and it would seem to follow by regular induction therefrom, that a tax directly upon the master himself, in consideration of the emigrants brought by him within the limits of the State, could not be within the prohibition of the Constitution, unless those emigrants could in legal or in ordinary acceptation be made to fall within the meaning of the term *imports*. This would be absolutely necessary, and by a different construction the authority of *Gibbons* v. *Ogden* would be wholly overthrown. It is said, upon the authority of *Gibbons* v. *Ogden*, that *commerce* includes *navigation*, as a necessary means or instrument. Let this, as a general proposition, be conceded, still it by no means follows that *navigation* always implies *commerce*, and much less does it follow that the instruments of commerce, simply because they may be instruments, either as agents or as property, are to be wholly exempted from burdens incident to all other subjects of social polity. I will not contend that the master, his vessel, and his mariners and passengers are not *all subject to

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proper regulations of commerce enacted by Congress; the proposition I maintain is this: that regulations of commerce do not embrace taxes on any or on all the subjects above named, exacted within the just sphere of the power imposing them. Thus, then, the assessment made by New York is purely a tax, not a regulation of commerce; but it is not a tax on imports, unless passengers can be brought within this denomination; if they cannot, it is a tax simply on persons coming within the jurisdiction of the taxing power. And who shall deny or control this sovereign attribute, when operating within its legitimate sphere? When and by whom shall any restriction be put upon it beyond the point to which it has been voluntarily and expressly conceded by the Constitution? And this point, it is said, by the decision of *Gibbons* v. *Ogden*, is established singly and determinately in the prohibition to impose taxes on imports. With regard to this essential and sovereign power of taxation, it may be proper here to advert to the caution with which it was granted, and the extreme jealousy which was manifested towards any and every apprehended encroachment upon it by the Constitution when it was offered for adoption. Against such dreaded encroachment were pointed some of the most strenuous objections of the opponents of the new government. They insisted that revenue was as requisite to the purposes of the local administrations as to those of the Union, and that the former were at least of equal importance with the latter to the happiness of the people; that it was therefore as necessary that the State governments should be able to command the means of supplying their wants, as that the national government should possess the like means in respect to the wants of the Union; and they said that, as the laws of the Union were to become the supreme law of the land, and as the national government was to have power to pass all laws necessary for carrying into execution the authorities with which it was proposed to vest it, the national government might at any time abolish the taxes imposed for State objects, upon the pretence of an interference with its own. The objections just stated, and the feeling of mistrust in which they had their origin, the advocates of the Constitution found it indispensable to remove; hence it is that in the Federalist we find several numbers of that able work devoted particularly to the purpose of reconciling the existence of the power of taxation in the Federal government with its possession and exercise on the part of the States, and nothing can be more explicit than is the admission contained in these papers of the independent and unqualified power in

the States in reference to this subject. In the thirty-second *504] number *of the Federalist, the writer thus expresses himself:—"I am willing here to allow, in its full extent, the justness of the reasoning which requires that the individual States should possess an independent and uncontrollable authority to raise their own revenues for the supply of their own wants. And making this concession, I affirm (with the exception of duties on imports and exports) they would, under the plan of the Convention, retain that authority in the most absolute and unqualified sense; and that an attempt on the part of the national government to abridge them in the exercise of it would be a violent assumption of power, unwarranted by any article or clause of its Constitution." Again, in the same number, speaking with respect to the prohibition on the States from imposing duties on imports, it is said:—"This restriction implies an admission, that, if it were not inserted, the States would possess the power it excludes; and it implies a further admission, that as to all other taxes the authority of the States remains undiminished." Such were the principles and doctrines of the Constitution as admitted, nay, urged, by the advocates of its adoption; and it is thought that there is no candid inquirer into the history of the times who will profess to believe that, had their admission not been thus made and earnestly pressed, the Constitution could have been accepted by the States. The contemporaneous interpretation thus given by the very fabricators of the instrument itself, confirmed, as has been shown, by the decision of *Gibbons* v. *Ogden*, is perhaps more emphatically declared in the later decision of this court in the case of the *Providence Bank* v. *Billings*, 4 Pet., 561, where the court expresses itself in the following language:—"That the taxing power is of vital importance, that it is essential to the existence of government, are truths which it cannot be necessary to affirm. They are acknowledged and assented to by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community are interested in maintaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." Can it be admitted, then,—can it be established by any correct reasoning,—that this high sovereign attribute, pronounced by this court to be of vital importance, and essential to the existence of a government,

must be yielded, upon mere implication, to a theory based on no express authority, but on construction alone,—not recommended by superior utility, but *greatly embarrassing in practice the theory of exclusive power in Congress to regulate commerce? [*505

The inquiry next in order, and growing out of the aforegoing views, is this:—Can the emigrant, or passenger on whom the tax is assessed, on his arrival within the State be properly denominated an import? It has been contended that he may, because, according to the classical derivation of the term from *importare*, or *in* and *porta*, he has, like every thing else in the ship, been *brought in*. The advocates of this etymological interpretation should be cautious of adopting it, since it might imply too much, may lead to strange confusion, and ultimately to conclusions directly adverse to those they would deduce from it. Thus, if the alien passenger is an import, simply from the fact of being brought into the State, will not the master and mariners also be imports, precisely for the same reason, although they may be natives and inhabitants of, and merely returning to, the country and port at which the vessel arrives, and thus, if imported, must be imported home, having equally sustained, a short time previously, when temporarily leaving that home, the character also of exports? Again: under this interpretation a dilemma might arise as to whether the ship, as she had been brought in, would not likewise be an import, or whether the ship had imported the crew, or the crew the ship; for although the latter would have been conducted into port by the former, it would be literally true that they would have been brought in by her. These departures from the common and received acceptation of language may give rise to distinctions as astute as those in Scriblerius upon the famous bequest of Sir John Swale of all his black and white horses, and equally useful with those either in the development of truth or the establishment of justice. But the strict etymologists have this further difficulty to encounter. It is said by Livy, and by Varro, in his book De Linguâ Latinâ, that the Romans when they laid out a town, as a religious ceremony observed on such occasions, delineated its boundaries with a plough; and that wherever they designed there should be a gate, they took up the plough and left a space. Hence the word *porta*, a gate, *a portando aratrum*. Those, then, who will insist upon etymological acceptation, necessarily place themselves, as imported, *within the gate;* in other words, within the municipal authority of the State, and by consequence within the acknowledged operation of its laws. But

such critical derivation cannot be admitted as accordant either with common acceptation or general experience; by these the term *imports* is justly applicable to articles of trade proper,—goods, chattels, property, subjects in their nature passive and having no volition,—not to *men whose emigration is the result of will, and could not be accomplished without their coöperation, and is as much their own act as it is the act of others; nay, much more so. The conclusion, then, is undeniable, that alien passengers, rational beings, freemen carrying into execution their deliberate intentions, never can, without a singular perversion, be classed with the subjects of sale, barter, or traffic; or, in other words, with imports.

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The law of New York has been further assailed in argument, as being an infraction of the fourteenth article of the treaty of amity and commerce negotiated between Great Britain and the United States in the year 1794, by which article it is provided that "there shall be between all the dominions of his Majesty in Europe, and the territories of the United States, a reciprocal and perfect liberty of commerce and navigation. The people and the inhabitants of the two countries shall have liberty freely and securely, and without hindrance and molestation, to come with their ships and cargoes to the lands, countries, cities, ports, places, and rivers within the dominions and territories aforesaid, and to enter into the same; to resort there, and to remain and reside there without any limitation of time; also to hire and possess houses and warehouses for the purposes of their commerce; and generally the merchants and traders on each side shall enjoy the most complete protection and security for their commerce, but subject always, as to what respects this article, to the laws and statutes of the two countries respectively."

It has been insisted that the article of the treaty just cited, having stipulated that British subjects shall have liberty freely and securely, and without hindrance, to come with their ships and cargoes to the lands, countries, cities, ports, &c., and to remain and reside for the purposes of their commerce; and the second clause of the sixth article of the Constitution having declared the Constitution and the laws of the United States, made in pursuance thereof, and treaties made under the authority of the United States, to be the supreme law of the land, the laws of New York, being in derogation of the fourteenth article of the treaty of 1794, are unconstitutional and void. The fourteenth article of the treaty of 1794, having expired by limitation of time anterior

to the enactment of the statutes complained of, it cannot in terms, as a part of that compact, be brought to bear upon this case. The same provision, however, with the single variation that British subjects are placed on the same footing with other foreigners who shall be admitted to enter American ports, was renewed by the first article of the treaty of 1815, and by the third article of the same treaty was *continued for four years. Subsequently, by the fourth article of the Convention with Great Britain of 1818, it was extended for ten years, and finally, by the first article of the Convention with the same power of the 6th of August, 1827, for an indefinite period, but liable to be terminated upon notice, from either of the contracting parties, of twelve months from and after the 20th day of October, 1828. The fourteenth article of the treaty of 1794, or rather its effect and meaning, with the variation above, engrafted on the treaty of 1815, may be considered as subsisting at the present time. Before examining particularly the force of the objection founded upon this stipulation, and of the effect sought to be imparted to it from the clause of the Constitution adduced in its support, I cannot forbear to recur to my opinion expressed on a former occasion, it being the view I still entertain as to what should be the interpretation of the second clause of the sixth article of the Constitution. The opinion referred to is as follows:— [*507]

"This provision of the Constitution, it is to be feared, is sometimes expounded without those qualifications which the character of the parties to that instrument, and its adaptation to the purposes for which it was created, necessarily imply. Every power delegated to the Federal government must be expounded in coincidence with a perfect right in the States to all that they have not delegated; in coincidence, too, with the possession of every power and right necessary for their existence and preservation; for it is impossible to believe that these ever were, either in intention or in fact, ceded to the general government. Laws of the United States, in order to be binding, must be within the legitimate powers vested by the Constitution. Treaties, in order to be valid, must be made within the scope of the same powers; for there can be no authority of the United States, save what is derived mediately or immediately, and regularly and legitimately, from the Constitution. A treaty no more than an ordinary statute can arbitrarily cede away any one right of a State, or of any citizen of a State." (5 How., 613.)

Admitting this fourteenth article of the treaty to be in full force, and that it purported to take from the State of New York

the right to tax aliens coming and commorant within her territory, it would be certainly incompetent for such a purpose, because there is not, and never could have been, any right in any other agent than her own government to bind her by such a stipulation. In the next place, the right of taxation claimed by New York can by no rational construction of it be made to conflict with a correct comprehension of the treaty stipulations in question. These neither express nor imply any thing more
*508] *than security for free, but regular, legitimate commercial intercourse, between the people of the contracting nations, and exemption from burdens or restrictions inconsistent with such intercourse; for this was the sole purpose either contemplated or professed. If these stipulations can be extended beyond this meaning, and, under the terms "shall have liberty freely and securely to come and enter the ports of the country, and to remain and reside and to hire and occupy houses for the purposes of their commerce," there can be claimed the right to withdraw, for an indefinite period, either the persons or the property of aliens from the power of taxation in the States, then there is asserted for Congress or the executive the power of exerting, through foreign governments and foreign subjects, a control over the internal rights and polity of the States, which the framers of the Constitution and the decisions of this court, already quoted, have denied to the government in the exercise of its regular domestic functions. It would be difficult to limit, or even to imagine, the mischiefs comprised in such an interpretation of the treaty stipulations above mentioned. As one example of these, if it should suit the commercial speculations of British subjects to land within the territory of any of the States cargoes of negroes from Jamaica, Hayti, or Africa, it would be difficult, according to the broad interpretation of the commercial privileges conferred by those stipulations, to designate any legitimate power in the States to prevent this invasion of their domestic security. According to the doctrines advanced, they could neither repulse nor tax the nuisance.

The argument constructed by counsel and by some of the judges upon the provisions of the act of Congress authorizing the importation of the tools of mechanics, their clothing, &c., free from duties, presents itself to my mind as wanting in logical integrity, and as utterly destructive of positions which those who urge this argument elsewhere maintain. The exemption allowed by Congress can correctly be made to signify nothing more than this: that the general government will not levy duties on the private effects of certain classes of persons who may be admitted into the country. But, by any rule of

common sense, can this exemption be made to signify permission to those persons to land at all events in the States? It asserts or implies no such thing; much less does it convey a command, or the power to issue a command, to the States to admit them. Must not this benefit of exemption from duties be always in enjoyment subordinate to and dependent upon the right of the owner of the property exempted to enter the country? This is inevitable, unless it be contended that a mere forbearance to exact duties on the property is identical with *ordering the admission of its owner; thus making the man the incident of the property, and not the the property that of the man,—a *reductio in absurdum*, which cannot be escaped from by those who deduce the right of admission from the act of Congress. But are those who assume this ground aware that it is destructive of other positions which they themselves have not only conceded, but even insist upon? They have admitted the power or right of self-preservation in the States, and, as a means of securing this right, the power of excluding felons, convicts, paupers, and persons infected; but according to this argument, based upon the acts of Congress and on the treaty stipulations for free access and commorancy, all must be permitted to land and to remain; for these acts of Congress and treaty stipulations contain no exceptions in favor of the safety of the States; they are general, and in their terms ride over all such considerations as health, morals, or security amongst the people of the States. This argument cannot be maintained. The true interpretation of the act of Congress referred to is this: tools, clothing, and personal property of mechanics, are goods, chattels, imports, in the known and proper sense of the term *imports;* Congress, having under the Constitution the power to impose duties on these, possess the correlative right of exempting them from duties; this they have done, and nothing beyond this. Congress have not pretended to declare permission to the mechanic, or to any other description of person, directly, to come into the States, because they have no such direct power under the Constitution, and cannot assume or exercise it indirectly. [*509]

I will now consider the second head of objection to the legislation of New York, as propounded in the division stated in the commencement of this opinion, namely, the alleged right of Congress to regulate exclusively the admission of aliens, as a right comprehended within the commercial power, or within some other implication in the Constitution.

Over aliens, *qua* aliens, no direct authority has been delegated to Congress by the Constitution. Congress have the

right to declare war, and they are bound to the duty of repelling invasions. They have the power, too, to establish a uniform rule of naturalization. By an exercise of the former power, Congress can place in the condition of alien enemies all who are under allegiance to a nation in open war with the United States; by an exercise of the second, they can extend to alien friends the common privileges of citizens. Beyond these predicaments put by the Constitution, and arising out of the law of nations, where is the power in Congress to deal with aliens, as a class, at all? and much more the power, when *510] falling *within neither of the aforegoing predicaments, to invite them to or to repel them from our shores, or to prescribe the terms on which, in the first instance, they shall have access to, and, if they choose, residence within, the several States,—and this, too, regardless of the considerations either of interest or safety deemed important by the States themselves? The Constitution, confessedly, has delegated no such direct power to Congress, and it never can be claimed as auxiliary to that which, in a definite and tangible form, can nowhere be found within that instrument.

The power to regulate the admission, as implied in the right of banishment or deportation, of aliens, not the citizens or subjects of nations in actual war with the United States, was at one period of our history assumed by the Federal government; and a succinct review of the arguments by which this pretension was sought to be sustained must expose its absolute fallacy.

Congress, it was insisted, could exert this power under the law of nations, to which aliens are properly amenable. To this it was answered, that, under the law of nations, aliens are responsible only for national offences,—offences in which their nation bears a part; they are then alien enemies. That alien friends, on the other hand, owe a temporary allegiance to the government under which they reside, and for their individual offences committed against the laws of that government they are responsible, as other members of the community, to the municipal laws.

Again, it was asserted that the right was vested in Congress under the power to make war, and under the power and the duty to prevent invasion. The obvious refutation of this argument was furnished in the reply, that alien friends could not be the subjects of war (public national conflict), nor in any sense the instruments of hostile invasion, such invasion being an operation of war. Neither could they fall within the power vested by the Constitution to grant letters of marque and reprisal, as an equivocal authority partaking of

the characters of war and peace; "reprisal being a seizure of foreign persons and property, with a view to obtain that justice for injuries done by one state or its members, for which a refusal of the aggressors requires such a resort to force under the law of nations. It must be considered as an abuse of words to call the removal of persons from a country a seizure or a reprisal on them; nor is the distinction to be overlooked between reprisal on persons within the country, and under the faith of its laws, and on persons out of the country." (Madison's Report.) It may, then, be correctly affirmed, that by no direct delegation of *power to the Constitution, [*511
—not by the power to declare war, not by the power to make reprisals, not by the more general power to punish offences against the laws of nations, nor by the power and duty of repelling invasion,—has the right been given to Congress to regulate either the admission or the expulsion of alien friends. Does such a right result from any rational or necessary implication contained in the Constitution? We find that, even anterior to the adoption of this instrument, attempts were made to ascribe to it the delegation of such a power by the ninth section of the first article, and this ascription was strenuously urged as a reason against its adoption. The objection, whether fairly or uncandidly urged, was founded, no doubt, upon some ambiguity of language of the ninth section; an ambiguity perfectly explained by contemporaneous exposition, and by the written history of its progress and ultimate adoption. Let us see how this section has been interpreted at its date by those who bore the chief part in the formation of the Constitution; and who, to commend it when completed to their countrymen, undertook and accomplished an able and critical exposition of its every term. We shall see, by the almost unanimous declaration of these sages, that the clause and article in question was intended to apply to the African slave-trade, and to no other matter whatever. Thus, in the forty-second number of the Federalist, it is said by Mr. Madison, speaking of the section and article in question:—"It were doubtless to be wished that the power of prohibiting the importation of slaves had not been postponed until the year 1808, or rather that it had been suffered to have immediate operation. But it is not difficult to account, either for this restriction on the general government, or for the manner in which the whole clause is expressed. It ought to be considered as a great point gained in favor of humanity, that a period of twenty years may terminate for ever within these States a traffic which has so long and so loudly upbraided the barbarism of modern policy." Again

he says,—"Attempts have been made to pervert this clause into an objection against the Constitution, by representing it on one side as a criminal toleration of an illicit practice, and on another, as calculated to prevent voluntary and beneficial emigrations from Europe to America. I mention these misconstructions, not with a view to give them an answer,—for they deserve none,—but as specimens of the manner and spirit in which some have thought fit to conduct their opposition to the proposed government."

Before proceeding farther with the history of this article, it will be well to contrast the view of its scope and objects, as given in the quotation just made from the Federalist, with the *arguments of the counsel who press this article as evidence of an intention to vest in Congress the sole power of controlling the admission of aliens; subsequently, at least, to the year 1808. It is strenuously urged by them, that the introduction of aliens has always been accordant with the policy of the government, and so highly promotive of advantage to the country in clearing and cultivating its forests, and increasing its physical strength, that the power of interfering with these important objects should not be subjected to the hazard of State abuses, but that they should be intrusted to the Federal government alone. Yet the learned counsel will be somewhat surprised to hear that the migration or importation he so zealously advocates is proved (by contemporaneous authority, on which he rests his argument) to be "an unnatural traffic, which has so long and so loudly upbraided the barbarism of modern policy"; and that "it ought to be regarded as a great point gained in favor of humanity, that a period of twenty years might terminate it for ever in these States." For such, and such only, is the migration limited to the States for twenty years, by the ninth section of the fourth article, on which counsel found themselves; such only the migration over which the Constitution has given power to Congress, as the natural meaning of the section signifies, and which alone it was intended to convey, as we are told by those who framed it.*

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* 3 Madison Papers, August 21st, 1787. 1. Proposition by Mr. Martin against article 7. Motion to exclude slave-trade (Vol. III., p. 1388). Mr. Rutledge, Mr. Ellsworth, and Mr. Pinckney, all opposed to Mr. Martin's motion (pp. 1388 and 1389). August 22.—Mr. Sherman, though against slave-trade, was opposed to taking it from the States (p. 1390). Colonel Mason thought it immoral and dangerous, and was for its immediate abolition (pp. 1390, 1391). Mr. Ellsworth opposed to interference; if it was so immoral as to require interference, they ought to abolish it, and free all slaves (p. 1391); that slaves were necessary, and must be imported for use in the sickly rice-swamps of South Carolina and Georgia (p. 1392). Mr.

If the history of the ninth section of article fourth be traced, in the proceedings of the Convention, from its introduction into that body until finally moulded and engrafted upon the Constitution (3 Madison Papers, from p. 1388 to p. 1675), it will be found that not one member of the Convention ever treated this section in other terms, or as designed for any other purpose, than as a power specially given to Congress by that section alone to abolish the foreign slave-trade from the period limited by that section, with the exception of a single observation of Colonel Mason of Virginia, that the provision as it stood might be necessary in order to prevent the introduction of convicts; but not pretending to extend the power of Congress beyond these and the foreign slave-trade.

*The migration or importation embraced in it is in the debates uniformly and plainly called the slave-trade [*513] by certain Southern States, which the Convention would have abolished by the Constitution itself, but for the avowed necessity of propitiating those States by its toleration for twenty years. There, too, it will be seen that Mr. Gouverneur Morris, with a frankness and sagacity highly creditable, objected to the ambiguous language in which the section was proposed and adopted. He said "he was for making the clause read at once, 'the importation of slaves' into North Carolina, South Carolina, and Georgia shall not be prohibited, &c. This, he said, was most fair, and would avoid the ambiguity by which, under the power with regard to naturalization, the liberty reserved to the States might be defeated. He wished it to be known, also, that this part of the Constitution was a compliance with those States." (3 Madison Papers, 1427 and 1478.) A portion of the Convention objected to an open sanction of the slave-trade upon the very face of the Constitution, whilst the Southern States would not yield their views of their own interests or necessities; hence, in the spirit of compromise, the section was unfortunately permitted to retain the ambiguity objected to by Mr. Morris; and hence, too, the color given for those misconstructions of the restriction on the general government, and the manner in which it is expressed, so decidedly reprehended in the number of the Federalist already quoted. This ninth section of the fourth article of the Constitution has, on a former occasion, been invoked in support of the power claimed for the Federal government

Pinckney, General Pinckney, Mr. Baldwin, Mr. Wilson, Mr. Gerry, Mr. Dickinson, Mr. Williamson, Mr. Rutledge, Mr. Sherman, (Vol. III., pp. 1396–1397,) all treat of this article as applicable only to the slave-trade.

over alien friends. The supporters in Congress of the alien law, passed in 1798, endeavoured to draw from this very section a justification of that extraordinary enactment; and as their argument deduced from it is, perhaps, as cogent as any likely to be propounded at this day, it may be properly adverted to as a fair sample of the pretension advanced in this case, and of the foundation on which it seeks to plant itself. The argument alluded to was by a committee of the House of Representatives, and is in these words:—"That as the Constitution has given to the States no power to remove aliens during the period of the limitation under consideration, in the mean time, on the construction assumed, there would be no authority in the country to send away dangerous aliens, which cannot be admitted." Let the comment of a truly great man on these startling heresies expose their true character. "It is not," says Mr. Madison, "the inconclusiveness of the general reasoning on this passage which chiefly calls the attention to it. It is the principle assumed by it, that *514] the powers held by the States *are given to them by the Constitution of the United States, and the inference from this principle, that the powers supposed to be necessary, which are not so given to the State governments, must reside in the government of the United States. The respect which is felt for every portion of the constituted authorities forbids some reflections which this singular paragraph might excite; and they are the more readily suppressed, as it may be presumed with justice, perhaps, as well as candor, that inadvertence may have had its share in the error. It would be unjustifiable delicacy, nevertheless, to pass by so portentous a claim without a monitory notice of the fatal tendency with which it would be pregnant." (Madison's Report.) The assertion of a general necessity for permission to the States from the general government, either to expel from their confines those who are mischievous or dangerous, or to admit to hospitality and settlement whomsoever they may deem it advantageous to receive, carries with it either a denial to the former, as perfect original sovereignties, of the right of self-preservation, or presumes a concession to the latter, the creature of the States, wholly incompatible with its exercise.

This authority over alien friends belongs not, then, to the general government, by any express delegation of power, nor by necessary or proper implication from express grants. The claim to it is essentially a revival of what public sentiment so generally and decisively condemned as a usurpation in the alien law of 1798; and however this revival may at this time be freed from former imputations of foreign antipathies or

partialities, it must, nevertheless, be inseparable from—nay, it must be the inevitable cause of far greater evils—jealousy, ill-feeling, and dangerous conflict between the members of this confederacy and their common agent.

Thus far I have preferred to consider this case as depending rather upon great fundamental principles, inseparable from the systems of government under which this country is placed, than as dependent upon forms of pleading, and conclusions deducible from those forms. But judging of the case in the latter aspect as moulded by those forms, it seems to fall directly within the operation of a precedent settled by this court, which must, if regarded, decide the law to be with the defendant in error. By the second count in the declaration, it is averred that the defendant below (the plaintiff in error), being the master of the ship Henry Bliss, in violation of the laws of New York, brought into the port of New York, and there actually landed the same, two hundred and ninety-five passengers; the demurrer to the declaration, admitting the truth of these averments, places the *locale* of the origin, as well as the infraction *of the obligation declared on, within the municipal authority of the State, and without the pale of the authority of Congress to regulate commerce with foreign nations. In this view, this case is brought, not only within the reasoning, but within the literal terms, of the decision of *The City of New York* v. *Miln*, and must be sustained upon the authority of that decision, were there no other grounds on which it could be supported. But as it is manifest that this case involves the high, and what this court has asserted (with the single exception of taxes on imports) to be the perfect and undiminished and indispensable, power of taxation in a sovereign State, it would have seemed to me a species of delinquency not to make that right the prominent and controlling subject of investigation and decision, or to have forborne to vindicate it in its full integrity. [*515

Between this case and that of *Norris* v. *The City of Boston*, there are some shades of difference; they are such, however, as by me are not regarded as essential; both the cases rest in reality upon the right of taxation in the States; and as the latter case has been examined with so much more of learning and ability than I could have brought to its investigation, by his Honor the Chief Justice, I shall content myself with declaring my entire concurrence in his reasonings and conclusions upon it.

It is my opinion that the judgment of the Court for the Trial of Impeachments and Correction of Errors in New

York, and the judgment of the Supreme Judicial Court of Massachusetts, should be affirmed.

NOTE.—In the opinions placed on file by some of the justices constituting the majority in the decision of this case, there appearing to be positions and arguments which are not recollected as having been propounded from the bench, and which are regarded as scarcely reconcilable with the former then examined and replied to by the minority, it becomes an act of justice to the minority that those positions and arguments, now for the first time encountered, should not pass without comment. Such comment is called for, in order to vindicate the dissenting justices, first, from the folly of combating reasonings and positions which do not appear upon the record; and, secondly, from the delinquency of seeming to recoil from exigencies, with which, however they may be supposed to have existed, the dissenting justices never were in fact confronted. It is called for by this further and obvious consideration, that, should the modification or retraction of opinions delivered in court obtain in practice, it would result in this palpable irregularity; namely, that opinions, *516] which, as those of the *court, should have been premeditated and solemnly pronounced from the bench antecedently to the opinions of the minority, may in reality be nothing more than criticisms on opinions delivered subsequently in the order of business to those of the majority, or they may be mere afterthoughts, changing entirely the true aspect of causes as they stood in the court, and presenting through the published reports what would not be a true history of the causes decided.

Examples of diversity between the opinions in this cause, comprehended as they were delivered in court, and as subsequently modified, will now be adverted to. The first is found in the solecism, never propounded, perhaps, from any tribunal,—one, indeed, which it might have been supposed no human imagination, not the most fruitful in anomalies, could ever conceive,—"that the action of the Federal government by legislation and treaties is the action of the States and their inhabitants." If this extraordinary proposition can be taken as universally or as generally true, then State sovereignty, State rights, or State existence even, must be less than empty names, and the Constitution of the United States, with all its limitations on Federal power, and as it has been heretofore generally understood to be a special delegation of power, is a falsehood or an absurdity. It must be viewed as the creation of a power transcending that which

called it into existence; a power single, universal, engrossing, absolute. Every thing in the nature of civil or political right is thus ingulfed in Federal legislation, and in the power of negotiating treaties. History tells us of an absolute monarch who characterized himself and his authority by the declaration, "I am the State." This revolting assertion of despotism was, even in the seventeenth century, deemed worthy of being handed down for the reprobation of the friends of civil and political liberty. What, then, must be thought in our day, and in future time, of a doctrine which, under a government professedly one of charter exclusively, claims beyond the terms of that charter, not merely the absolute control of civil and political rights, but the power to descend to and regulate *ad libitum* the private and personal concerns of life. Thus the ground now assumed in terms for the Federal government is, that the power to regulate commerce means still "more especially" the power to regulate "personal intercourse." Again, it is asserted that the Federal government, in the regulation of commerce, "may admit or may refuse foreign intercourse partially or entirely." If those who resort to this term *intercourse* mean merely commercial transactions as generally understood, their argument is an unmeaning variation of words, and is worth nothing. They obtain by the *attempted substitution no new power. They have the power to regulate [*517 commerce, and nothing beyond this. Commercial intercourse is simply commerce. But if they adopt the word *intercourse* singly, in its extended and general acceptation, and without the proper qualifying adjunct, they violate the text and the meaning of the Constitution, and grasp at powers greatly beyond the scope of any authority legitimately connected with commerce as well understood. The term *commerce*, found in the text of the Constitution, has a received, established, and adjudged acceptation. The wise men who framed the Constitution designed it for practical application. They preferred, therefore, to convey its meaning in language which was plain and familiar, and avoided words and phrases which were equivocal, unusual, or recondite, as apt sources of future perplexity. They well understood the signification of the word *intercourse*, and knew it was by no means synonymous with the word *commerce*; they shunned, therefore, the ambiguity and seeming affectation of adopting it, in order to express their meaning when speaking of commerce. This word *intercourse*, nowhere found in the Constitution, implies infinitely more than the word *commerce*. *Intercourse* "with foreign nations, amongst the States, and with the Indian

tribes." Under this language, not only might national, commercial, or political intercourse be comprehended, but every conceivable intercourse between the individuals of our own country and foreigners, and amongst the citizens of the different States, might be transferred to the Federal government. And thus we see that, with respect to intercourse with aliens, in time of peace, too, it is now broadly asserted that all power has been vested exclusively in the Federal government. The investiture of power in Congress under this term would not be limited by this construction to this point. It would extend, not only to the right of going abroad to foreign countries, and of requiring licenses and passports for that purpose; it would embrace also the right of transit for persons and property between the different States of the Union, and the power of regulating highways and vehicles of transportation. We have here a few examples of the mischiefs incident to the doctrine which first interpolates into the Constitution the term *intercourse* in lieu of the word *commerce* contained in that instrument, and which then, by an arbitrary acceptation given to this term, claims for Congress whatsoever it may be thought desirable to comprise within it meaning. By permitting such an abuse, every limit may be removed from the power of the Federal government, and no engine of usurpation could be more conveniently devised than the introduction of a favorite word which the *518] *interpolator would surely have as much right to interpret as to introduce. This would be fulfilling almost to the letter the account in the Tale of a Tub, of Jack, Peter, and Martin engaged in the interpretation of their father's will. Once let the barriers of the Constitution be removed, and the march of abuse will be onward and without bounds.

Mr. Justice NELSON, dissenting.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

I have examined particularly the opinion of the Chief Justice delivered in these cases of *Smith* v. *Turner*, and *Norris* v. *The City of Boston*, and have concurred, not only in its conclusions, but in the grounds and principles upon which it is arrived at; and am in favor of affirming the judgments in both cases.

Mr. Justice WOODBURY, dissenting.

NORRIS *v.* CITY OF BOSTON, AND SMITH *v.* TURNER.

In relation to the case of *Turner* v. *Smith*, from New York, I wish merely to express my non-concurrence with the opinions pronounced by the majority of this court. But standing more intimately connected with the case of *Norris* v. *Boston*, by my official duties in the First Circuit, I feel more obliged to state, in some detail, the reasons for my opinion, though otherwise content to acquiesce silently in the views expressed by the Chief Justice; and though not flattering myself with being able, after the elaborate discussions we have just heard, to present much that is either novel or interesting.

The portion of the statute of Massachusetts which in this case is assailed, as most questionable in respect to its conformity with the Constitution, is the third section. The object of that is to forbid alien passengers to land in any port in the State, until the master or owner of the vessel pays "two dollars for each passenger so landing." The provisions in the other sections, and especially the second one, requiring indemnity for the support of lunatics, idiots, and infirm persons on board of vessels before they are landed, if they have been or are paupers, seem admitted by most persons to be a fair exercise of the police powers of a State.

This claim of indemnity is likewise excused or conceded as a power which has long been exercised by several of the Atlantic States in self-defence against the ruinous burdens which would otherwise be flung upon them by the incursions of paupers from abroad, and their laws are often as stringent against the introduction of that class of persons from adjoining *States as from foreign countries. (Revised Statutes of New Hampshire, ch. 67, § 5; 5 How., 629.) [*519

Such legislation commenced in Massachusetts early after our ancestors arrived at Plymouth. It first empowered the removal of foreign paupers. (See Colonial Charters and Laws, 1639, p. 173, and 1692, p. 252.) It extended next to the requisition of indemnity from the master, as early as the year 1701. See Statute of 13 Wm. III., Ibid., 363.) But while it embraced removals of paupers not settled in the Colony, and indemnity required from the master for the support of foreigners introduced by sea, I do not think it assumed the special form used in the third section of this statute, until the year 1837, after the decision in the case of *The City of New York* v. *Miln*, 11 Pet., 107. I shall not, therefore, discuss further the provisions in the second section of the statute; for,

at all events, the requisitions of that section, if not by all admitted to be constitutional, are less objectionable than those of the third; and if the last can be vindicated, the first must be, and hence the last has constituted the burden of the arguments on both sides.

It will be remembered that this third section imposes a condition on landing alien passengers, or, in other words, levies a toll or fee on the master for landing them, whether then paupers or not, and that the present action is to recover back the money which has been collected from the master for landing such passengers.

After providing, in the following words, that, "when any vessel shall arrive at any port or harbour within the State, from any port or place without the same, with alien passengers on board, the officer or officers whom the mayor and aldermen of the city, or the selectmen of the town, where it is proposed to land such passengers, are hereby authorized and required to appoint, shall go on board such vessel and examine into the condition of said passengers." The third section of the statute declares that "no alien passenger, other than those spoken of in the preceding section, shall be permitted to land, until the master, owner, consignee, or agent of such vessel shall pay to the regularly appointed boarding officer the sum of two dollars for each passenger so landing; and the money so collected shall be paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

It is conceded that the sum paid here on account of "alien passengers" was demanded of them, when coming in some "vessel," and was collected after she arrived at a "port or harbour within the State." Then, and not till then, the master was required to pay two dollars for each before landing, "to be *paid into the treasury of the city or town, to be appropriated as the city or town may direct for the support of foreign paupers."

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By a subsequent law, as the foreign paupers had been made chargeable to the State treasury, the balances of this fund in the different towns were required to be transferred to that treasury.

After careful examination, I am not satisfied that this exercise of power by a State is incapable of being sustained as a matter of right, under one or all of three positions.

1st. That it is a lawful exercise of the police power of the State to help to maintain its foreign paupers.

2d. If not, that it may be regarded as justified by the sovereign power which every State possesses to prescribe the

conditions on which aliens may enjoy a residence within, and the protection of, the State.

3d. Or it may be justified under the municipal power of the State to impose taxes within its limits for State purposes. I think, too, that this power has never been ceded to the general government, either expressly or by implication, in any of the grants relied on for that purpose, such as to lay duties on imports, or to prohibit the importation of certain persons after the year 1808, or to regulate commerce.

Under the first ground of vindication for the State, the whole statute was most probably enacted with the laudable design to obtain some assistance in maintaining humanely the large number of paupers, and persons likely soon to become paupers, coming to our shores by means furnished by the municipal authorities in various parts of Europe. (See 3 Ex. Doc. of 29th Congress, 2d Session, No. 54.) Convicts were likewise sent, or preparing to be sent, hither from some cities on the Continent. (Ib.)

A natural desire, then, would exist, and would appear by some law, to obtain, first, indemnity against the support of emigrants actually paupers, and likely at once to become chargeable; and, secondly, funds to maintain such as, though not actually paupers, would probably become so, from this class of aliens.

It is due to the cause of humanity, as well as the public economy of the State, that the maintenance of paupers, whether of foreign or domestic origin, should be well provided for. Instead of being whipped or carted back to their places of abode or settlement, as was once the practice in England and this country in respect to them; or, if aliens, instead of being reshipped over a desolate waste of ocean, they are to be treated with kindness and relieved or maintained. But still, if feasible, it should, in justice, be at the *expense of those introducing them, and introducing [*521
the evils which may attend on them. This seems to have been the attempt in this statute, and as such was a matter of legitimate police in relation to paupers.

But those persons affected by the third section not being at the time actual paupers, but merely alien passengers, the expediency or right to tax the master for landing them does not seem so clear, in a police view, as it is to exact indemnity against the support of those already paupers. Yet it is not wholly without good reasons, so far as regards the master or owner who makes a profit by bringing into a State persons having no prior rights there, and likely in time to add something to its fiscal burdens and the number of its unproduc-

tive inhabitants. He who causes this danger, and is the willing instrument in it, and profits by it, cannot, in these views, object to the condition or tax imposed by the State, who may not consider the benefits likely to arise from such a population a full counterbalance to all the anticipated disadvantages and contingencies. But the aspect of the case is somewhat different, looking at the tax as falling wholly on the passenger. It may not be untrue, generally, that some portion of a burden like this rests eventually on the passenger, rather than the master or owner. (*Neil* v. *State of Ohio*, 3 How., 741–743.) Yet it does not always; and it is the master, and the owners through him, who complain in the present action, and not the passengers; if it fell on the latter alone, they would be likely, not only to complain, but to go in vessels to other States where onerous conditions had not been imposed. Supposing, however, the burden in fact to light on them, it is in some, though a less degree, and in a different view, as a matter of right, to be vindicated.

Were its expediency alone the question before us, some, and among them myself, would be inclined to doubt as to the expediency of such a tax on alien passengers in general, not paupers or convicts. Whatever may be their religion, whether Catholic or Protestant, or their occupation, whether laborers, mechanics, or farmers, the majority of them are believed to be useful additions to the population of the New World, and since, as well as before our Revolution, have deserved encouragement in their immigration by easy terms of naturalization, of voting, of holding office, and all the political and civil privileges which their industry and patriotism have in so many instances shown to be usefully bestowed. (See Declaration of Independence; Naturalization Law; 1 Lloyd's Debates, Gales and Seaton's ed., p. 1147; *Taylor* v. *Carpenter*, 2 Woodb. & M.) If a design existed in any *[502] statute to thwart this policy, or if *such were its necessary consequence, the measure would be of very questionable expediency. But the makers of this law may have had no such design, and such does not seem to be the necessary consequence of it, as large numbers of emigrants still continue to arrive in Massachusetts when they would be likely to ship for ports in other States where no such law exists, if this operated on them as a discouragement, and like other taxes when felt, or when high, had become in some degree prohibitory.

The conduct of the State, too, in this measure, as a matter of right, is the only question to be decided by us, and may be a very different one from its expediency. Every sovereign

State possesses the right to decide this matter of expediency for itself, provided it has the power to control or govern the subject. Our inquiry, therefore, relates merely to that power or right in a State; and the ground now under consideration to support the exercise of it is her authority to prescribe terms, in a police view, to the entry into her boundaries of persons who are likely to become chargeable as paupers, and who are aliens.

In this view, as connected with her police over pauperism, and as a question of mere right, it may be fairly done by imposing terms which, though incidentally making it more expensive for aliens to come here, are designed to maintain such of them and of their class as are likely, in many instances, ere long to become paupers in a strange country, and usually without sufficient means for support in case either of sickness, or accident, or reverses in business. So it is not without justification that a class of passengers from whom much expense arises in supporting paupers should, though not at that moment chargeable, advance something for this purpose at a time when they are able to contribute, and when alone it can with certainty be collected. (See *New York* v. *Miln*, 11 Pet., 156.) When this is done in a law providing against the increase of pauperism, and seems legitimately to be connected with the subject, and when the sum required of the master or passenger is not disproportionate to the ordinary charge, there appears no reason to regard it as any measure except what it professes to be,—one connected with the State police as to alien passengers, one connected with the support of paupers, and one designed neither to regulate commerce nor be a source of revenue for general purposes. (5 How., 626.)

The tax is now transferred to the State treasury, when collected, for the reason that the support of foreign paupers is transferred there; and this accords with an honest design to collect the money only for that object.

"The last year, so fruitful in emigration and its contagious diseases of ship-fever and the terrific cholera, [*523 and the death of so many from the former, as well as the extraordinary expense consequent from these causes, furnish a strong illustration that the terms required are neither excessive nor inappropriate.

There are many other reasons showing that this is legitimately a police measure, and, as such, competent for the State to adopt. It respects the character of those persons to come within the limits of the State,—it looks to the benefits and burdens deemed likely to be connected with their presence,—it regards the privileges they may rightfully claim of relief,

whenever sick or infirm, though on shipboard, if within the boundaries of the State,—it has an eye to the protection they will humanely receive if merely *in transitu* through the State to other governments, and the burdens which, in case of disease or accidents, without much means, they may thus throw upon the State. And the fund collected is expressly and wholly applied, after deducting the expenses of its collection, to "the support of foreign paupers."

A police measure, in common parlance, often relates to something connected with public morals; and in that limited view would still embrace the subject of pauperism, as this court held in 16 Pet., 625. But in law, the word *police* is much broader, and includes all legislation for the internal policy of a State. (4 Bl. Com., ch. 13.)

The police of the ocean belongs to Congress and the admiralty powers of the general government; but not the police of the land or of harbours. (*Waring* v. *Clarke*, 5 How., 471.)

Nor is it any less a police measure because money, rather than a bond of indemnity, is required as a condition of admission to protection and privileges. The payment of money is sometimes imposed in the nature of a toll or license fee, but it is still a matter of police. It is sometimes demanded in the nature of charges to cover actual or anticipated expenses. Such is the case with all quarantine charges. Substantially, too, it is demanded under the indemnity given by the second section, if the person becomes chargeable; and if that be justifiable, so must be this; the fact that one is contingent and the other absolute cannot affect their constitutionality. Neither is it of consequence that the charge might be defrayed otherwise, if the State pleased, as from other taxes or other sources. This is a matter entirely discretionary with the State. This might be done with respect to quarantine expenses or pilotage of vessels; yet the State, being the sole judge of what is most expedient in respect to this, can legally
*524] impose it on the vessel, or *master, or passengers, rather than on others, unless clearly forbidden by the Federal Constitution. And it can be none the less a police measure than is a quarantine charge, because the master or owner is required to pay it, or even the passengers, rather than the other people of the State by a general tax.

Even to exclude paupers entirely has been held to be a police measure, justifiable in a State. (*Prigg* v. *Pennsylvania*, 16 Pet., 625; 5 How., 629.) Why, then, is not the milder measure of a fee or tax justifiable in respect to those alien passengers considered likely to become paupers, and to be applied solely to the support of those who do become charge-

able from that class? And why is not this as much a police measure as the other? If such measures must be admitted to be local, are of State cognizance, belong to State interests, they clearly are among State rights.

Viewed as a mere police regulation, then, this statute does not conflict with any constitutional provision. Measures which are legitimately of a police character are not pretended to be ceded anywhere in the Constitution to the general government in express terms; and as little can it be argued that they are impliedly to be considered as ceded, if they be honestly and truly police measures. Hence, in all the decisions of this tribunal on the powers granted to the general government, either expressly or by implication, measures of that character have been regarded as not properly to be included. (*License Cases*, 5 How., 624; Baldwin's Views, 184, 188; cases cited in *The United States* v. *New Bedford Bridge*, 1 Woodb. & M., 423.)

Thus viewed, the case also comes clearly within the principles settled in *New York* v. *Miln*, 11 Pet., 102, and is fortified by the views in the *License Cases*, 5 How., 504. The fact that the police regulation in the case of Miln was enforced by a penalty instead of a toll, and in the License Cases by a prohibition at times, as well as a fee, does not alter the principle, unless the mode of doing it in the present case should be found, on further examination, before closing, to be forbidden to the States.

But if this justification should fail, there is another favorable view of legislation such as that of the third section of the statute of Massachusetts, which has already been suggested, and which is so important as to deserve a separate consideration. It presents a vindication for it different from that of a mere police regulation, connected with the introduction or support of aliens, who are or may afterwards become paupers, and results from the power of every sovereign State to impose such terms as she pleases on the admission or continuance of foreigners within her borders. If this power can be [*525 shown to exist, and it is in its nature and character a police power also, then we have already demonstrated that the States can rightfully continue to exercise it. But if it be not such a power, and hence cannot be ranked under that title and enjoy the benefit of the decisions exempting police powers from control by the general government, yet if it exists as a municipal rather than a police power, and has been constantly exercised by the States, they cannot be considered as not entitled to it, unless they have clearly ceded it to Congress in some form or other.

First, then, as to its existence. The best writers on national law, as well as our own decisions, show that this power of excluding emigrants exists in all states which are sovereign. (Vattel, B. 1, ch. 19, § 231; 5 How., 525, 629; *New York* v. *Miln*, 11 Pet., 142; *Prigg* v. *Pennsylvania*, 16 Pet., 625; and *Holmes* v. *Jennison*, 14 Pet., 565.)

Those coming may be voluntary emigrants from other nations, or travelling absentees, or refugees in revolutions, party exiles, compulsory victims of power, or they may consist of cargoes of shackled slaves, or large bands of convicts, or brigands, or persons with incendiary purposes, or imbecile paupers, or those suffering from infectious diseases, or fanatics with principles and designs more dangerous than either, or under circumstances of great ignorance, as liberated serfs, likely at once, or soon, to make them a serious burden in their support as paupers, and a contamination of public morals. There can be no doubt, on principles of national law, of the right to prevent the entry of these, either absolutely or on such conditions as the State may deem it prudent to impose. In this view, a condition of the kind here imposed, on admission to land and enjoy various privileges, is not so unreasonable, and finds vindication in the principles of public law the world over. (Vattel, B. 1, ch. 19, §§ 219, 231, and B. 2, ch. 7, §§ 93, 94.)

In this aspect it may be justified as to the passengers, on the ground of protection and privileges sought by them in the State, either permanently or transiently, and the power of the State to impose conditions before and while yielding it. When we speak here or elsewhere of the right of a State to decide and regulate who shall be its citizens, and on what terms, we mean, of course, subject to any restraint on her power which she herself has granted to the general government, and which, instead of overlooking, we intend to examine with care before closing.

It having been, then, both in Europe and America, a matter of municipal regulation whether aliens shall or shall not reside in any particular states, or even cross its borders, it fol-
*526] lows *that, if a sovereign state pleases, it may, as a matter of clear right, exclude them entirely, or only when paupers or convicts, (Baldwin's Views, 193, 194,) or only when slaves, or, what is still more common in America, in Free States as well as Slave States, exclude colored emigrants, though free. As further proof and illustration that this power exists in the States, and has never been parted with, it was early exercised by Virginia as to others than paupers, (1 Bl. Com., by Tucker, pt. 2, App., p. 33,) and it

is now exercised, in one form or another, as to various persons, by more than half the States of the Union. (11 Pet., 142; 15 Id., 516; 16 Id., 625; 1 Brock., 434; 14 Pet., 568; 5 How., 629.)

Even the old Congress, September 16th, 1788, recommended to the States to pass laws excluding convicts; and they did this, though after the new constitution was adopted, and that fact announced to the country. "Resolved, That it be, and it is hereby, recommended to the several States to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States." (Journal of Congress for 1788, p. 867.)

But the principle goes further, and extends to the right to exclude paupers, as well as convicts, by the States (Baldwin's Views, 188, 193, 194); and Mr. Justice Story, in the case of *New York* v. *Miln*, 11 Pet., 56, says as to the States,—"I admit that they have a right to pass poor-laws, and laws to prevent the introduction of paupers into the States, under like qualifications."

Many of the States also exercised this power, not only during the Revolution, but after peace; and Massachusetts especially did, forbidding the return of refugees, by a law in 1783, ch. 69. Several of the States had done the same as to refugees. (See Federalist, No. 42.)

The first naturalization laws by Congress recognized this old right in the States, and expressly provided that such persons could not become naturalized without the special consent of those States which had prohibited their return. Thus in the first act:—"Provided, also, that no person heretofore proscribed by any State shall be admitted a citizen as aforesaid, except by an act of the legislature of the State in which such person was proscribed." (March 26, 1790, 1 Stat. at L., 104. See a similar proviso to the third section of the act of 29th January, 1795, 1 Stat. at L., 415.)

The power given to Congress, as to naturalization generally, does not conflict with this question of taxing or excluding alien passengers, as acts of naturalization apply to those aliens only who have already resided here from two to five years, and not *to aliens not resident here at all, or not so long. (See acts of 1790, 1795, and 1800.) [*527

And it is not a little remarkable, in proof that this power of exclusion still remains in the States rightfully, that while, as before stated, it has been exercised by various States in the Union,—some as to paupers, some as to convicts, some as to refugees, some as to slaves, and some as to free blacks,—it never has been exercised by the general government as to

mere aliens, not enemies, except so far as included in what are called the Alien and Sedition Laws of 1798. By the former, being "An act concerning aliens," passed June 15th, 1798, (1 Stat. at L., 571,) power was assumed by the general government, in time of peace, to remove or expel them from the country; and that act, no less than the latter, passed about a month after, (Id., 596,) was generally denounced as unconstitutional, and suffered to expire without renewal; on the ground, among others assigned for it, that, if such a power existed at all, it was in the States, and not in the general government, unless under the war power, and then against alien enemies alone. (4 Elliot's Deb., 581, 582, 586; Virginia Resolutions of 1798.)

It deserves special notice, too, that, when it was exercised on another occasion by the general government, not against aliens as such, but slaves imported from abroad, it was in aid of State laws passed before 1808, and in subordination to them. The only act of Congress on this subject before 1808 expressly recognized the power of the State alone then to prohibit the introduction or importation "of any negro, mulatto, or other person of color," and punished it only where the States had. (See act of Feb. 28, 1803, 2 Stat. at Large, 205.) In further illustration of this recognition and coöperation with the States, it provided, in the third section, that all officers of the United States should "notice and be governed by the provisions of the laws now existing in the several States, prohibiting the admission or importation of any negro, mulatto, or other person of color as aforesaid; and they are hereby enjoined vigilantly to carry into effect said laws," i. e. the laws of the States. (See 1 Brock., 432.)

The act of March 2d, 1807, forbidding the bringing in of slaves, (2 Stat. at L., 426,) was to take effect on the 1st of January, 1808, and was thus manifestly intended to carry into operation the admitted power of prohibition by Congress, after that date, of certain persons contemplated in the ninth section of the first article, and as a branch of trade or commerce which Congress, in other parts of the Constitution, was empowered to regulate. That act was aimed solely at
*528] the foreign *slave-trade, and not at the bringing in of any other persons than slaves, and not as if Congress supposed that, under the ninth section, it was contemplated to give it power, or recognize its power, over any thing but the foreign slave-trade. But of this more hereafter.

It will be seen also in this, that the power of each State to forbid the foreign slave-trade was expressly recognized as existing since, no less than before, 1808, being regarded as a

concurrent power, and that by this section no authority was conferred on Congress over the domestic slave-trade, either before or since 1808.

If the old Congress did not suppose it was right and proper for the States to act in this way on the introduction of aliens, after the new Constitution went into operation, why did they, by their resolution of 1787, recommend to the States to forbid the introduction of convicts from abroad, rather than recommend it to be done by Congress under the new Constitution?

It is on this principle that a State has a right, if it pleases, to remove foreign criminals from within its limits, or allow them to be removed by others. (*Holmes* v. *Jennison*, 14 Pet., 568.) Though the obligation to do so is, to be sure, an imperfect one, of the performance of which she is judge, and sole judge, till Congress makes some stipulation with foreign powers as to their surrender (11 Pet., 391); and if States do not surrender this right of affixing conditions to their ingress, the police authorities of Europe will proceed still further to inundate them with actual convicts and paupers, however mitigated the evil may be at times by the voluntary immigration with the rest of many of the enterprising, industrious, and talented. But if the right be carried beyond this, and be exercised with a view to exclude rival artisans, or laborers, or to shut out all foreigners, though persecuted and unfortunate, from mere naked prejudice, or with a view to thwart any conjectural policy of the general government, this course, as before suggested, would be open to much just criticism.

Again: considering the power to forbid as existing absolutely in a State, it is for the State where the power resides to decide on what is sufficient cause for it,—whether municipal or economical, sickness or crime; as, for example, danger of pauperism, danger to health, danger to morals, danger to property, danger to public principles by revolutions and change of government, or danger to religion. This power over the person is much less than that exercised over ships and merchandise under State quarantine laws, though the general government regulates, for duties and commerce, the ships and their *cargoes. If the power be clear, how- [*529
ever others may differ as to the expediency of the exercise of it as to particular classes or in a particular form, this cannot impair the power.

It is well considered, also, that if the power to forbid or expel exists, the power to impose conditions of admission is included as an incident or subordinate. Vattel (B. 2, ch. 8, § 99) observes, that, "since the lord of the territory may,

whenever he thinks proper, forbid its being entered, he has, no doubt, a power to annex what conditions he pleases to the permission to enter." (*Holmes* v. *Jennison*, 14 Pet., 569, 615, Appendix.)

The usage in several States supports this view. Thus the State of Maryland now, of Delaware since 1787, of Pennsylvania since 1818, if not before, and of Louisiana since 1842, besides New York and Massachusetts, pursue this policy in this form. (7 Smith's Laws of Pennsylvania, 21; 2 Laws of Delaware, 167, 995; 1 Dorsey's Laws of Maryland, 6, 10.) And though it is conceded that laws like this in Massachusetts are likely, in excited times, to become of a dangerous character, if perverted to illegitimate purposes, and though it is manifestly injudicious to push all the powers possessed by the States to a harsh extent against foreigners any more than citizens, yet, in my view, it is essential to sovereignty to be able to prescribe the conditions or terms on which aliens or their property shall be allowed to remain under its protection, and enjoy its municipal privileges. (Vattel, B. 1, ch. 19, §§ 219, 231.)

As a question of international law, also, they could do the same as to the citizens of other States, if not prevented by other clauses in the Constitution reserving to them certain rights over the whole Union, and which probably protect them from any legislation which does not at least press as hard on their own citizens as on those of other States. Thus, in article fourth, section second:—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And the old Confederation (article fourth) protected the ingress and egress of the citizens of each State with others, and made the duties imposed on them the same.

Such is the case of *Turner* v. *Smith*, considered in connection with this, collecting the same of its own citizens as of others; and to argue that States may abuse the power, by taxing citizens of other States different from their own, is a fallacy, because Congress would also be quite as likely to abuse the power, because an abuse would react on the State itself, and lessen or destroy this business through it, and because the abuse, instead of being successful, would probably *530] *be pronounced unconstitutional by this court, whenever appealed to.

With such exceptions, I am aware of no limitations on the powers of the States, as a matter of right, to go to the extent indicated in imposing terms of admission within their own limits, unless they be so conducted as to interfere with

some other power, express or implied, which has been clearly granted to Congress, and which will be considered hereafter.

The last ground of vindication of this power, as exercised by Massachusetts in the third section, is under its aspect as imposing a tax.

Considering this, the inquiry may be broad enough to ascertain whether the measure is not constitutional, under the taxing power of the State generally, independent of its authority, already examined, as to a police, over the support of paupers, and, as to municipal regulations, over the admission of travellers and non-residents.

It deserves remark, in the outset, that such a tax, under the name of a toll or passport fee, is not uncommon in foreign countries on alien travellers when passing their frontiers. In that view it would be vindicated under long usage and numerous precedents abroad, and several in this country, already referred to.

It requires notice, also, that this provision, considered as a license fee, is not open to the objection of not being assessed beforehand at stated periods, and collected at the time of other taxes. When fees of a specific sum are exacted for licenses to sell certain goods, or exercise certain trades, or exhibit something rare, or for admissions to certain privileges, they are not regarded so much in the light of common taxes as of fees or tolls. They resemble this payment required here more than a tax on property, as they are not always annual, or collected at stated seasons; they are not imposed on citizens only, or permanent residents, but frequently are demanded as often as an event happens, or a certain act is done, and at any period, and from any visitor or transient resident. But fees or tolls thus collected are still legitimate taxes.

Another view of it as a tax is its imposition on the master of the vessel himself, on account of his capital or business in trade, carrying passengers, and not a tax on the passengers themselves. The master is often a citizen of the State where he arrives with a cargo and passengers. In such a case, he might be taxed on account of his business, like other citizens; and so, on other general principles, might masters of vessels who are not citizens, but who come within the limits and jurisdiction and protection of the State, and are hence, on that account, *rightfully subjected to its taxation, and made to bear a share of its burdens. It is customary [*581 in most countries, as before named, to impose taxes on particular professions and trades or businesses, as well as on property; and whether in the shape of a license or fee, or an

excise or poll-tax, or any other form, it is of little consequence when the object of the tax is legitimate, as here, and its amount reasonable.

States, generally, have the right also to impose poll-taxes, as well as those on property, though they should be proportionate and moderate in amount. This one is not much above the usual amount of poll-taxes in New England. Nor need they require any length of residence before a person is subject to such a tax; and sometimes none is required, though it is usual to have it imposed only on a fixed day.

The power of taxation, generally, in all independent states, is unlimited as to persons and things, except as they may have been pleased, by contract or otherwise, to restrict themselves. Such a power, likewise, is one of the most indispensable to their welfare, and even their existence.

On the extent of the cession of taxation to the general government, and its restriction on the States, more will be presented hereafter; but in all cases of doubt, the leaning may well be towards the States, as the general government has ample means ordinarily by taxing imports, and the States limited means, after parting with that great and vastly increased source of revenue connected with imposts. The States may, therefore, and do frequently, tax every thing but exports, imports, and tonnage, as such. They daily tax things connected with foreign commerce as well as domestic trade. They can tax the timber, cordage, and iron of which the vessels for foreign trade are made; tax their cargoes to the owners as stock in trade; tax the vessels as property, and tax the owners and crew per head for their polls. Their power in this respect travels over water as well as land, if only within their territorial limits.

It seems conceded, that, if this tax, as a tax, had not been imposed till the passenger had reached the shore, the present objection must fail. But the power of the State is manifestly as great in a harbour within her limits to tax men and property as it is on shore, and can no more be abused there than on shore, and can no more conflict there than on shore with any authority of Congress as a taxing power not on imports as imports. Thus, after emigrants have landed, and are on the wharves, or on public roads, or in the public hotels, or in private dwelling-houses, they could all be taxed, though with less ease; and they could all, if the State felt so disposed to abuse the power, be taxed out of their limits as quickly and

*532] *effectually as have been the Jews in former times in several of the most enlightened nations of modern Europe.

To argue, likewise, that the State thus undertakes to assess taxes on persons not liable, and to control what it has not got, is begging the question, either that these passengers were not within its limits, or that all persons actually within its limits are not liable to its laws and not within its control. To contend, also, that this payment cannot be exacted, on the ground that the great correction of excessive taxation is its oppression on the constituent, which causes a reaction to reduce it (4 Wheat., 316, 428), and in this case the tax does not operate on a constituent, is another fallacy, to some extent. For most taxes operate on some classes of people who are not voters, as, for example, women, and especially resident aliens; and if this reasoning would exempt these passengers, when within the limits of the State, it would also exempt all aliens, and others not voters, however long resident there, or however much property they possess.

It seems likewise well settled, that, by the laws of national intercourse and as a consequence of the protection and hospitality yielded to aliens, they are subject to ordinary reasonable taxation in their persons and property by the government where they reside, as fully as citizens. (Vattel, B. 2, ch. 10, § 132, p. 235; *Taylor* v. *Carpenter*, 2 Woodb. & M.) But I am not aware of the imposition of such a tax in this form, except as a toll or a passport; it being, when a poll-tax, placed on those who have before acquired a domicile in the State, or have come to obtain one *animo manendi*. Yet, whatever its form, it would not answer hastily to denounce it as without competent authority, when imposed within the usual territorial limits of the State.

In short, the States evidently meant still to retain all power of this kind, except where, for special reasons at home, neither government was to tax exports, and, for strong reasons both at home and abroad, only the general government was to tax imports and tonnage.

Having explained what seem to me the principal reasons in favor of a power so vital to the States as that exercised by Massachusetts in this statute, whether it be police or municipal, regulating its residents or taxing them, I shall proceed to the last general consideration, which is whether this power has in any way been parted with to Congress entirely, or as to certain objects, including aliens.

It is not pretended that there is *eo nomine* any express delegation of this power to Congress, or any express prohibition of it to the States. And yet, by the tenth amendment of the *Constitution, it is provided, in so many words, that [*583
"the powers not delegated to the United States by the

Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." If, in the face of this, Congress is to be regarded as having obtained a power of restriction over the States on this subject, it must be by mere implication, and this either from the grant to impose taxes and duties, or that which is usually considered a clause only to prohibit and tax the slave-trade, or that to regulate commerce. And this statute of Massachusetts, in order to be unconstitutional, must be equivalent to one of these, or conflicting with one of them.

In relation, first, to the most important of these objections, regarding the statute in the light of a tax, and as such supposed to conflict with the general power of taxation conferred on Congress, as well as the exclusive power to tax imports, I would remark, that the very prohibition to the States, in express terms, to tax imports, furnishes additional proof that other taxation by the States was not meant to be forbidden in other cases and as to other matters. *Expressio unius, exclusio est alterius.* It would be very extraordinary, also, that, when expressly ceding powers of taxation to the general government, the States should refrain from making them exclusive in terms, except as to imports and tonnage, and yet should be considered as having intended, by mere implication, there or elsewhere in the instrument, to grant away all their great birthright over all other taxation, or at least some most important branches of it. Such has not been the construction or practical action of the two governments for the last half-century, but the States have continued to tax all the sources of revenue ceded to Congress, when not in terms forbidden. This was the only safe course. (Federalist, No. 32.)

One of the best tests that this kind of tax or fee for admission to the privileges of a State is permissible, if not expressly forbidden, is the construction in two great cases of direct taxes on land imposed by Congress, in 1798 and 1813. The States, on both of those occasions, still continued to impose and collect their taxes on lands, because not forbidden expressly by the Constitution to do it. And can any one doubt, that, so far as regards taxation even of ordinary imports, the States could still exercise it if they had not been expressly forbidden by this clause? (*Collet* v. *Collet*, 2 Dall., 296; *Gibbons* v. *Ogden*, 9 Wheat., 201.) If they could not, why was the express prohibition made? Why was it deemed necessary? (Federalist, No. 32.)

This furnishes a striking illustration of the true general rule of construction, that, notwithstanding a grant to Congress is

*express, if the States are not directly forbidden to act, it does not give to Congress exclusive authority over [*534 the matter, but the States may exercise a power in several respects relating to it, unless, from the nature of the subject and their relations to the general government, a prohibition is fairly or necessarily implied. This power in some instances seems to be concurrent or coördinate, and in others subordinate. On this rule of construction there has been much less doubt in this particular case as to taxation, than as a general principle on some other matters, which will hereafter be noticed under another head. The argument for it is unanswerable, that, though the States have, as to ordinary taxation of common subjects, granted a power to Congress, it is merely an additional power to their own, and not inconsistent with it.

It has been conceded by most American jurists, and, indeed, may be regarded as settled by this court, that this concurrent power of taxation, except on imports and exports and tonnage, (the last two specially and exclusively resigned to the general government,) is vital to the States, and still clearly exists in them. In support of this may be seen the following authorities:—*McCulloch* v. *State of Maryland*, 4 Wheat., 316, 425; *Gibbons* v. *Ogden*, 9 Wheat., 1, by Chief Justice Marshall; *Providence Bank* v. *Billings*, 4 Pet., 561; *Brown* v. *State of Maryland*, 13 Wheat., 441; 4 Gill & J. (Md.), 132; 2 Story's Com. on Const., § 437; 5 How., 588; *Weston* v. *City of Charleston*, 2 Pet., 449; Federalist, No. 42.

Nor is the case of *Brown* v. *Maryland*, so often referred to, opposed to this view. It seems to have been a question of taxation, but the decision was not that, by the grant to the general government of the power to lay taxes and imposts, it must be considered, from "the nature of the power," "that it [taxation generally] should be exercised exclusively by Congress." On the contrary, all the cases before and hereafter cited, bearing on this question, concede that the general power of taxation still remains in the States; but in that instance it was considered to be used so as to amount to a tax on imports, and, such a tax being expressly prohibited to the States, it was adjudged there that for this reason it was unconstitutional. Under this head, then, as to taxation, it only remains to ascertain whether the toll or tax here imposed on alien passengers can be justly considered a tax on imports, as it was in the case of *Brown* v. *Maryland*, when laid on foreign goods. If so considered, it is conceded that this tax has been expressly forbidden to be imposed by a State, unless with the consent of Congress, or to aid in enforcing the inspection laws of the State.

Clearly it does not come within either of those last exceptions,
*535] *and therefore the right to impose it must depend upon the question, whether it is an "impost," and whether passengers are "imports," within the meaning of the Constitution. An *impost* is usually an *ad valorem* or specific duty, and not a fee like this for allowing a particular act, or a poll-tax like this,—a fixed sum per head. An *import* is also an article of merchandise, goods of some kind,—property, "commodities." (*Brown* v. *Maryland*, 12 Wheat., 437. See McCulloch's Dict., *Imports;* 5 How., 594, 614.) It does not include persons unless they are brought in as property,—as slaves, unwilling or passive emigrants, like the importation referred to in the ninth section of the first article of the Constitution. (*New York* v. *Miln*, 11 Pet., 136; *Case of the Brig Wilson*, 1 Brock., 423.)

Now there is no pretence that mere passengers in vessels are of this character, or are property; otherwise they must be valued, and pay the general *ad valorem* duty now imposed on non-enumerated articles. They are brought in by no owner, like property generally, or like slaves. They are not the subject of entry or sale. The great objection to the tax in *Brown* v. *Maryland* was, that it clogged the sale of the goods. They are not like merchandise, too, because that may be warehoused, and reëxported or branded, or valued by an invoice. They may go on shore anywhere, but goods cannot. A tax on them is not, then, in any sense, a tax on imports, even in the purview of *Brown* v. *Maryland*. There it was held not to be permitted until the import in the original package or cask is broken up, which it is difficult to predicate of a man or passenger. The definition there, also, is "imports are *things* imported," not persons, not passengers; or they are "*articles* brought in," and not freemen coming of their own accord. (12 Wheat., 437.) And when "imports" or "importation" is applied to men, as is the case in some acts of Congress, and in the ninth section of the first article of the Constitution, it is to men or "persons" who are property and passive, and brought in against their will or for sale as slaves,—brought as an article of commerce, like other merchandise. (*New York* v. *Miln*, 11 Pet., 136; 15 Pet., 505; 1 Bl. Com., by Tucker, pt. 2, App. 50.)

But, so far from this being the view as to free passengers taxed in this statute,—that they are merchandise or articles of commerce, and so considered in any act since 1808, or before,—it happens that, while the foreign import or trade as to slaves is abolished, and is made a capital offence, free passengers are not prohibited, nor their introduction punished as a

crime. (4 Elliot's Deb., 119.) If "importation" in the ninth section applied to one class of persons, and "migration" to another, as has been argued, then allowing a tax by Congress on the *"importation" of any person was meant to be confined to slaves, and is not allowed on "migration," either in words or spirit, and hence it confers no power on Congress to tax other persons (see Iredell's remarks, 4 Elliot's Deb., 119); and a special clause was thought necessary to give the power to tax even the "importation" of slaves, because "a duty or impost" was usually a tax on things, and not persons. (1 Bl. Com., by Tucker, App. 231.) [*536

Indeed, if passengers were "imports" for the purpose of revenue by the general government, then, as was never pretended, they should and can now be taxed by our collectors, because they are not enumerated in the tariff acts to be admitted "free" of duty, and all *non-enumerated* imports have a general duty imposed on them at the end of the tariff; as, for instance, in the act of July 30, 1846, section third, "a duty of twenty per cent. *ad valorem*" is laid "on all goods, wares, and merchandise imported from foreign countries, and not specially provided for in this act."

To come within the scope of a tariff, and within the principle of retaliation by or towards foreign powers, which was the cause of the policy of making imposts on imports exclusive in Congress, the import must still be merchandise or produce, some rival fruit of industry, an article of trade, a subject, or at least an instrument, of commerce. Passengers, being neither, come not within the letter or spirit or object of this provision in the Constitution.

It is, however, argued, that, though passengers may not be imports, yet the carrying of them is a branch of commercial business, and a legitimate and usual employment of navigation.

Grant this, and still a tax on the passenger would not be laying a duty on "imports" or on "tonnage"; but it might be supposed to affect foreign commerce at times, and in some forms and places, and thus interfere with the power to regulate that, though not with the prohibition to tax imports and tonnage. Consequently, when hereafter considering the meaning of the grant "to regulate commerce," this view of the objection will be examined.

But there seems to be another exception to this measure, as conflicting with the powers of the general government, which partly affects the question as a tax, and partly as a regulation of commerce. It is, that the tax was imposed on a vessel before the passengers were landed, and while under

the control of the general government. So far as it relates to the measure as a tax, the exception must be regarded as applying to the particular place where it is collected, in a vessel on the water, *though after her arrival within a port or harbour. It would seem to be argued, that, by some constitutional provision, a State possesses no power in such a place. But there is nothing in the taxing part of the Constitution which forbids her action in such places on matters like this. If forbidden at all, it must be by general principles of the common and of national law, that no State can assess or levy a tax on what is without the limits of its jurisdiction, or that, if within its territorial limits, the subject-matter is vested exclusively by the Constitution in the general government.

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It will be seen, that, if the first exception be valid, it is not one connected with the Constitution of the United States, and hence not revisable here. It was not, and could not properly be, set up as a defence in the court of a State, except under its own constitution, and hence not revisable in this court by this writ of error. But as it may be supposed to have some influences on the other and commercial aspect of the objection, it may be well to ascertain whether, as a general principle, a vessel in a port, or its occupants, crew, or passengers, are in fact without the limits or jurisdiction of a State, and thus beyond its taxing power, and are exclusively for all purposes under the government of the United States. One of the errors in the argument of this part of the cause has been an apparent assumption that this tax—considered as a tax—was collected at sea, before the voyage ended, and was not collected within the limits and jurisdiction of the State. But, *ex concesso*, this vessel then was in the harbour of Boston, some miles within the limits of the State, and where this court itself has repeatedly decided that Massachusetts, and not the general government, has jurisdiction. First, jurisdiction to punish crimes. (See in *Waring* v. *Clarke*, 5 How., 441; Id., 628; *Coolidge's case*, 1 Wheat., 415; *Bevans's case*, 3 Wheat., 336; 1 Woodb. & M., 401, 455, 481, 483.) Next, the State would have jurisdiction there to enforce contracts. So must she have to collect taxes, for the like reason (5 How., 441); because it was a place within the territorial limits and jurisdiction of the State. Chief Justice Marshall, in 12 Wheat., 441, speaks of "their [the States'] acknowledged power to tax persons and property within their territory." (Id., 444.)

The tax in this case does not touch the passenger *in transitu* on the ocean, or abroad,—never till the actual arrival of

the vessel with him in port. An arrival in port, in other acts of Congress using the term, is coming in, or anchoring within, its limits, with a view to discharge the cargo. (2 Sumner, 419; 5 Mason, 445; 4 Taunt., 662, 722; *Tyler* v. *White*, Ware, 277.)

*For aught that appears, this vessel, before visited, had come in and was at anchor in the port. The person so going into port abroad is considered to have "arrived," so as to be amenable to his consul, and must deposit his papers. He has come under or into the control of shore power, and shore authority, and shore laws, and shore writs, and shore juries; at least concurrently with other authorities, if not exclusively. In common parlance, the voyage for this purpose at least is not interrupted; for then it has ended, and the State liabilities and powers begin, or the State becomes utterly imbecile. Hence, speaking of a country as distinguished from the sea, and of a nation as a state, Vattel (B. 1, ch. 23, § 290) says:—"Ports and harbours are manifestly an appendage to, and even a part of, the country, and consequently are the property of the nation. Whatever is said of the land itself will equally apply to them, so far as respects the consequences of the domain and of the empire." If the ports and harbours of a State are *intra fauces terræ*, within the body of a country, the power of taxation is as complete in them as it is on land, a hundred miles in the interior. Though on tide waters, the vessels are there subject for many purposes to State authority rather than Federal, are taxed as stock in trade, or ships owned, if by residents; the cargo may be there taxed; the officers and crew may be there taxed for their polls, as well as estate; and, on the same principle, may be the master for the passengers, or the passengers themselves. Persons there, poor and sick, are also entitled to public relief from the city or State. (4 Metc. (Mass.), 290, 291.) No matter where may be the place, if only within the territorial boundaries of the State, or, in other words, within its geographical limits. The last is the test, and not whether it be a merchant-vessel or a dwelling-house, or something in either, as property or persons. Unless beyond the borders of the State, or granted, as a fort or navy-yard within them, to a separate and exclusive jurisdiction, or used as an authorized instrument of the general government, the State laws control and can tax it. (*United States* v. *Ames*, 1 Woodb. & M., 76, and cases there cited.) [*568

It is true there are exceptions as to taxation which do not affect this question; as where something is taxed which is held under the grants to the United States, and the grants

might be defeated if taxed by the State. That was the point in *McCulloch* v. *Maryland*, 4 Wheat., 316; *Weston* v. *City of Charleston*, 2 Pet., 449; *Dobbins* v. *Commissioners of Erie County*, 16 Pet., 435; *Osborn* v. *Bank of the United States*, 9 Wheat., 738. But that is not the question here, as neither passengers nor the master of the vessel can be considered as official instruments of the government.

*539] *In point of fact, too, in an instance like this, it is well known that the general jurisdiction of the States for most municipal purposes within their territory, including taxation, has never been ceded to the United States nor claimed by them; but they may anchor their navies there, prevent smuggling, and collect duties there, as they may do the last on land. But this is not inconsistent with the other, and this brings us to the second consideration under this head,—how far such a concurrent power in that government, for a particular object, can, with any propriety whatever, impair the general rights of the States there on other matters.

These powers exist in the two governments for different purposes, and are not at all inconsistent or conflicting. The general government may collect its duties, either on the water or the land, and still the State enforce its own laws without any collision, whether they are made for local taxation, or military duty, or the collection of debts, or the punishment of crimes. There being no inconsistency or collision, no reason exists to hold either, by mere construction, void. This is the cardinal test.

So the master may not always deliver merchandise rightfully, except on a wharf; nor be always entitled to freight till the goods are on shore; yet this depends on the usage, or contract, or nature of the port, and does not affect the question of jurisdiction. (Abbott on Shipping, 249; 4 Bos. & P., 16.) On the contrary, some offences may be completed entirely on the water, and yet the State jurisdiction on land is conceded. (*United States* v. *Coombs*, 12 Pet., 72.)

So a contract with a passenger may or may not be completed on arriving in port, without landing, according as the parties may have been pleased to stipulate. (*Brig Lavinia*, 1 Pet., Adm., 125.)

So the insurance on a cargo of a ship may not in some cases terminate till it is landed, though in others it may, depending on the language used. (*Reyner* v. *Pearson*, 4 Taunt., 662, and *Levin* v. *Newnham*, Id., 722.) But none of these show that the passengers may not quit the vessel outside the harbour in boats or other vessels, and thus go to the land, or go to other ports. Or that, if not doing this, and coming in

the same vessel within the State limits, they may not be subject to arrests, punishments, and taxation or police fees, or other regulations of the State, though still on board the vessel. Nor do any of them show that the vessel and cargo, after within the State limits, though not on the shore, are not within the jurisdiction of the State, and liable, as property of the owner, to be taxed in common with other stock in trade.

*I will not waste a moment in combating the novel idea, that taxes by the States must be uniform, or they are void by the Constitution on that account; because clearly that provision relates only to taxes imposed by the general government. It is a fallacy, also, to argue that the vessels, crews, and passengers, when within the territory of a State, are not amenable to the State laws in these respects, because they are enrolled as belonging to the United States, and their flag is the flag of the United States. For though they do belong to the United States in respect to foreign nations and our statistical returns and tables, this does not prevent the vessels at the same time from being owned by citizens of the State of Massachusetts, and the crew belonging there, and all, with the passengers, after within her limits, from being amenable generally to her laws. [*540

If taking another objection to it as a tax, and arguing against the tax imposed on the vessel, because it may be abused to injure emigration and thwart the general government, it would still conflict with no particular clause in the Constitution or acts of Congress. It should also be remembered that this was one objection to the license laws in 5 How., and that the court held unanimously they were constitutional, though they evidently tended to diminish importations of spirituous liquor and lessen the revenue of the general government from that source. But that being only an incident to them, and not their chief design, and the chief design being within the jurisdiction of the States, the laws were upheld.

It is the purpose which Mr. Justice Johnson thinks may show that no collision was intended or effected. "Their different purposes mark the distinction between the powers brought into action, and while frankly exercised they can produce no serious collision." (*Gibbons* v. *Ogden*, 9 Wheat., 235.) "Collision must be sought to be produced." "Wherever the powers of the respective governments are frankly exercised, with a distinct view to the end of such powers, they may act on the same subject, or use the same means,

and yet the powers be kept perfectly distinct." (p. 239.) See 1 Woodb. & M., 423, 433.

The next delegation of power to Congress, supposed by some to be inconsistent with this statute, is argued to be involved in the ninth section of the first article of the Constitution. This they consider as a grant of power to Congress to prohibit the migration from abroad of all persons, bond or free, after the year 1808, and to tax their importation at once and for ever, not exceeding ten dollars per head. (See 9 Wheat., 230, by Mr. Justice Johnson; 15 Pet., 514.) The *541] words are:—"'The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." But it deserves special notice, that this section is one entirely of limitation on power, rather than a grant of it; and the power of prohibition being nowhere else in the Constitution expressly granted to Congress, the section seems introduced rather to prevent it from being implied except as to slaves, after 1808, than to confer it in all cases. (1 Brock., 432.)

If to be implied elsewhere, it is from the grant to regulate commerce, and by the idea that slaves are subjects of commerce, as they often are. Hence, it can go no further than to imply it as to them, and not as to free passengers.

Or if to "regulate commerce" extends also to the regulation of mere navigation, and hence to the business of carrying passengers, in which it may be employed, it is confined to a forfeiture of the vessel, and does not legitimately involve a prohibition of persons, except when articles of commerce, like slaves. (1 Brock., 432.) Or finally, however far the power may extend under either view, it is still a power concurrent in the States, like most taxation and much local legislation as to matters connected somewhat with commerce, and is well exercised by them when Congress does not, as here, legislate upon the matter either of prohibition or of taxation of passengers. It is hence that, if this ninth section is a grant of the power to prevent the migration or importation of other persons than slaves, it is not an exclusive one, any more than that to regulate commerce, to which it refers; nor has it ever been exercised so as to conflict with State laws, or with the statute of Massachusetts now under consideration. This clause itself recognizes an exclusive power of prohibition in the States until the year 1808. And a concurrent and subordinate power on this by the States, after that, is nowhere expressly forbidden in the Con-

stitution, nor is it denied by any reason or necessity for such exclusiveness. The States can often use it more wisely than Congress in respect to their own interests and policy. They cannot protect their police, or health, or public morals without the exercise of such a power at times and under certain exigencies, as forbidding the admission of slaves and certain other persons within their borders. One State, also, may require its exercise, from its exposures and dangers, when another may not. So it may be said, as to the power to tax *importation*, if limited to slaves, the States could continue to do the same when they pleased if men are not deemed "imports."

*But to see for a moment how dangerous it would be to consider a prohibitory power over all aliens as vested exclusively in Congress, look to some of the consequences. The States must be mute and powerless. [*542

If Congress, without a coördinate or concurrent power in the States, can prohibit other persons as well as slaves from coming into States, they can of course allow it, and hence can permit and demand the admission of slaves, as well as any kind of free person, convicts or paupers, into any State, and enforce the demand by all the overwhelming powers of the Union, however obnoxious to the habits and wishes of the people of a particular State. In view of an inference like this, it has therefore been said that, under this section, Congress cannot admit persons whom a State pleases to exclude. (9 Wheat., 230; Justice Johnson.) This rather strengthens the propriety of the independent action of the State, here excluding conditionally, than the idea that it is under the control of Congress.

Besides this, the ten dollars per head allowed here specially to be collected by Congress on imported slaves is not an exclusive power to tax, and would not have been necessary or inserted, if Congress could clearly already impose such a tax on them as "imports," and by a "duty" on imports. It would be not a little extraordinary to imply by construction a power in Congress to prohibit the coming into the States of others than slaves, or of mere aliens, on the principle of the alien part of the Alien and Sedition Laws, though it never has been exercised as to others permanently; but the States recommended to exercise it, and seventeen of them now actually doing it. And equally extraordinary to imply, at this late day, not only that Congress possesses the power, but that, though not exercising it, the States are incapable of exercising it concurrently, or even in subordination to Congress. But beyond this, the States have exercised it

concurrently as to slaves, no less than exclusively in respect to certain free persons, since as well as before 1808, and this as to their admission from neighbouring States no less than from abroad. (See cases before cited, and *Butler* v. *Hopper*, 1 Wash. C. C., 500.)

The word "migration" was probably added to "importation" to cover slaves when regarded as persons rather than property, as they are for some purposes. Or if to cover others, such as convicts and redemptioners, it was those only who came against their will, or in a *quasi* servitude. And though the expression may be broad enough to cover emigrants generally, (3 Madison State Papers, 1429; 9 Wheat., 216, 230; 1 Brock., 431,) and some thought it might cover *convicts, (5 Elliot's Deb., 477; 3 Madison State Papers, 1430,) yet it was not so considered by the mass of the Convention, but as intended for "slaves," and calling them "persons" out of delicacy. (5 Elliot's Deb., 457, 477; 3 Id., 251, 541; 4 Id., 119; 15 Peters, 113, 506; 11 Id., 136; 1 Bl. Com., by Tucker, App., 290.) It was so considered in the Federalist soon after, and that view regarded as a "misconstruction" which extended it to "emigration" generally. (Federalist, No. 42.) So afterwards thought Mr. Madison himself, the great expounder and framer of most of the Constitution. (3 Elliot's Deb., 422.) So it has been held by several members of this court (15 Peters, 508): and so it has been considered by Congress, judging from its uniform acts, except the unfortunate Alien Law of 1798, before cited, and which, on account of its unconstitutional features, had so brief and troubled an existence. (4 Elliot's Deb., 451.)

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In the Constitution, in other parts as in this, the word "persons" is used, not to embrace others as well as slaves, but slaves alone. Thus, in the second section of the first article, "three fifths of all other *persons*" manifestly mean slaves; and in the third section of the fourth article, "no *person* held to service or labor in one State," &c., refers to slaves. The word *slave* was avoided, from a sensitive feeling; but clearly no others were intended in the ninth section. Congress so considered it, also, when it took up the subject of this section in 1807, just before the limitation expired, or it would then probably have acted as to others, and regulated the migration and importation of others as well as of slaves. By forbidding merely "to import or bring into the United States, or territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of color, with intent to hold, sell, or dispose of such negro, mulatto, or person of

color as a slave, or to be held to service or labor," it is manifest that Congress then considered this clause in the Constitution as referring to slaves alone, and then as a matter of commerce; and it strengthens this idea, that Congress has never since attempted to extend this clause to any other persons, while the States have been in the constant habit of prohibiting the introduction of paupers, convicts, free blacks, and persons sick with contagious diseases, no less than slaves; and this from neighbouring States as well as from abroad.

There was no occasion for that express grant, or rather recognition, of the power to forbid the entry of slaves by the general government, if Congress could, by other clauses of the Constitution, for what seemed to it good cause, forbid the entry of every body, as of aliens generally; and if Congress could *not do this generally, it is a decisive argument [*544
that the State might do it, as the power must exist somewhere in every independent country.

Again, if the States had not such power under the Constitution, at least concurrently, by what authority did most of them forbid the importation of slaves from abroad into their limits between 1789 and 1808? Congress has no power to transfer such rights to States. And how came Congress to recognize their right to do it virtually by the first article and ninth section, and also by the act of 1803? It was because the States originally had it as sovereign States, and had never parted with it exclusively to Congress. This court, in *Groves* v. *Slaughter*, 15 Pet., 511, is generally understood as sustaining the right of States since 1808, no less than before, to prohibit the bringing into their limits of slaves for sale, even from other States, no less than from foreign countries.

From the very nature of State sovereignty over what is not granted to Congress, and the power of prohibition, either as to persons or things, except slaves after the year 1808, not being anywhere conferred on, or recognized as in, the general government, no good reason seems to exist against the present exercise of it by the States, unless where it may clearly conflict with other clauses in the Constitution. In fact, every Slave State in the Union, long before 1808, is believed to have prohibited the further importation of slaves into her territories from abroad (*Libby's Case*, 1 Woodb. & M., 235; *Butler* v. *Hopper*, 1 Wash. C. C., 499); and several, as before stated, have since prohibited virtually the import of them from contiguous States. Among them may be named Kentucky, Missouri, and Alabama, as well as Mississippi, using, for instance, as in the constitution of the last, such language as the following: —"The introduction of slaves into this State

as merchandise, or for sale, shall be prohibited from and after the first day of May, 1833." (See Constitutions of the States, and 15 Pet., 500.)

Coming by land or sea to be sold, slaves are equally articles of commerce, and thus bringing them in is an "importation or migration of persons"; and if the power over that is now exclusive in Congress, more than half the States in the Union have violated it. If a State can do this as to slaves from abroad or a contiguous State, why not, as has often been the case, do it in respect to any other person deemed dangerous or hostile to the stability and prosperity of her institutions? They can, because they act on these persons when within their limits, and for objects not commercial, and doing this is not disturbing the voyage, which brings them in as passen-
*545] gers, nor *taxing the instrument used in it, as the vessel, nor even the master and crew, for acts done abroad, or any thing without her own limits. The power of the State in prohibiting rests on a sovereign right to regulate who shall be her inhabitants,—a right more vital than that to regulate commerce by the general government, and which, as independent or concurrent, the latter has not disturbed, and should not disturb. (15 Pet., 507, 508.)

But the final objection made to the collection of this money by a State is a leading and difficult one. It consists in this view, that, though called either a police regulation, or a municipal condition to admission into a State, or a tax on an alien visitor, it is in substance and in truth a regulation of foreign commerce, and, the power to make that being exclusively vested in Congress, no State can properly exercise it.

If both the points involved in this position could be sustained, this proceeding of the State might be obliged to yield. But there are two answers to it. One of them is, that this statute is not a regulation of commerce; and the other is, that the power to regulate foreign commerce is not made exclusive in Congress.

As to the first, this statute does not *eo nomine* undertake "to regulate commerce," and its design, motive, and object were entirely different.

At the formation of the Constitution, the power to regulate commerce attracted but little attention, compared with that to impose duties on imports and tonnage; and this last had caused so much difficulty, both at home and abroad, that it was expressly and entirely taken away from the States, but the former was not attempted to be. The former, too, occupies scarce a page in the Federalist, while the latter engrosses several numbers. A like disparity existed in the

debates in the Convention, and in the early legislation of Congress. Nor did the former receive much notice of the profession in construing the Constitution till after a quarter of a century; and then, though considered in the case of *Gibbons* v. *Ogden* (9 Wheat., 1) as a power clearly conferred on Congress, and to be sustained on all appropriate matters, yet it does not appear to have been held that nothing connected in any degree with commerce, or resembling it, could be regulated by State legislation; but only that this last must not be so exercised as to conflict directly with an existing act of Congress. (See the text, and especially the mandate in 9 Wheat., 239, 240.) On the contrary, many subjects of legislation are of such a doubtful class, and even of such an amphibious character, that one person would arrange and define them as matters of police, *another as matters [*546
of taxation, and another as matters of commerce. But all familiar with these topics must know, that laws on these by States for local purposes, and to operate only within State limits, are not usually intended, and should not be considered, as laws "to regulate commerce." They are made entirely *diverso intuitu*. Hence, much connected with the local power of taxation, and with the police of the States as to paupers, quarantine laws, the introduction of criminals or dangerous persons, or of obscene and immoral prints and books, or of destructive poisons and liquors, belongs to the States at home. It varies with their different home policies and habits, and is not either in its locality or operation a matter of exterior policy, though at times connected with, or resulting from, foreign commerce, and over which, within their own borders, the States have never acted as if they had parted with the power, and never could with so much advantage to their people as to retain it among themselves. (9 Wheat., 203.) Its interests and influences are nearer to each State, are often peculiar to each, better understood by and for each, and, if prudently watched over, will never involve them in conflicts with the general government or with foreign nations.

The regulation and support of paupers and convicts, as well as their introduction into a State through foreign intercourse, by vessels, are matters of this character. (*New York* v. *Miln*, 11 Pet., 141; *License Cases*, 5 How.; Baldwin's Views, 184.) Some States are much exposed to large burdens and fatal diseases and moral pollution from this source, while others are almost entirely exempt. Some, therefore, need no legislation, State or national, while others do and must protect themselves when Congress cannot or will not.

This matter, for instance, may be vital to Massachusetts, New York, Louisiana, or Maryland; but it is a subject of indifference to a large portion of the rest of the Union, not much resorted to from abroad; and this circumstance indicates, not only why those first-named States, as States, should, by local legislation, protect themselves from supposed evils from it where deemed necessary or expedient, but that it is not one of those incidents to our foreign commerce in most of the Union which, like duties, or imposts, or taxes on tonnage, require a uniform and universal rule to be applied by the general government.

A uniform rule by Congress not being needed on this particular point, nor being just, is a strong proof that it was not intended Congress should exercise power over it; especially when paupers, or aliens likely to become paupers, enter a State that has not room or business for them, but they merely pass through to other places, the tax would not be *547] needed to *support them or help to exclude them; and hence such a State would not be likely to impose one for those purposes. But considering the power to be in Congress, and some States needing legislation, and that being required to be uniform, if Congress were to impose a tax for such purposes, and pay a ratable proportion of it over to such a State, it would be unjust. If, to avoid this, Congress were to collect such a tax, and itself undertake to support foreign paupers out of it, Congress would transcend the powers granted to her, as none extend to the maintenance of paupers, and it might as well repair roads for local use and make laws to settle intestate estates, or, at least, estates of foreigners. And if it can do this because passengers are aliens and connected with foreign commerce, and, this power being exclusive in it, State taxes on them are therefore void, it must follow that State laws are void also in respect to foreign bills of exchange, a great instrument of foreign commerce, and in respect to bankrupt laws, another topic connected with foreign commerce,—neither of which, but directly the reverse, is the law.

"To regulate" is to prescribe rules, to control. But the State by this statute prescribes no rules for the "commerce with foreign nations." It does not regulate the vessel or the voyage while in progress. On the contrary, it prescribes rules for a local matter, one in which she, as a State, has the deepest interest, and one arising after the voyage has ended, and not a matter of commerce or navigation, but rather of police, or municipal, or taxing supervision.

Again, it is believed that in Europe, in several instances of

border states, so far from the introduction of foreigners who are paupers, or likely soon to be so, being regarded as a question of commerce, it is deemed one of police merely; and the expenses of alien paupers are made a subject of reclamation from the contiguous government to which they belong.

This view, showing that the regulation of this matter is not in substance more than in words to regulate foreign commerce, is strengthened by various other matters, which have never been regarded as regulating commerce, though nearer connected in some respects with that commerce than this is. But like this, they are all, when provided for by the States, regulated only within their own limits, and for themselves, and not without their limits, as of a foreign matter, nor for other States. Such are the laws of the States which have ever continued to regulate several matters in harbours and ports where foreign vessels enter and unload. (*Vanderbilt* v. *Adams*, 7 Wend. (N. Y.), 349.) The whole jurisdiction over them when within the headlands on the ocean, though filled with salt water and *strong tides, is in the States. We [*548 have under another head already shown that it exists there exclusively for most criminal prosecutions, and also for all civil proceedings to prosecute trespasses and recover debts of the owners of the ship or cargo, or of the crew or passengers, and whether aliens or citizens. And though the general government is allowed to collect its duties and enforce its specific requirements about them there, as it is authorized to do, and does, under acts of Congress, even on land, (*Gibbons* v. *Ogden*, 9 Wheat.; *United States* v. *Coombs*, 12 Pet., 72,) yet it can exercise no power there, criminal or civil, under implication, or under a construction that its authority to regulate commerce there is exclusive as to matters like these. No exclusive jurisdiction has been expressly ceded to it there, as in some forts, navy-yards, and arsenals. Nor is any necessary. Not one of its officers, fiscal or judicial, can exert the smallest authority there in opposition to the State jurisdiction, and State laws, and State officers, but only in public vessels of war, or over forts and navy-yards ceded, or as to duties on imports, and other cases, to the extent specifically bestowed on them by constitutional acts of Congress. And to regulate these local concerns in this way by the States is not to regulate foreign commerce, but home concerns. The design is local; the object a State object, and not a foreign or commercial one; and the exercise of the power is not conflicting with any existing actual enactment by Congress.

The States also have and can exercise there, not only their just territorial jurisdiction over persons and things, but make

special officers and special laws for regulating there in their limits various matters of a local interest and bearing, in connection with all the commerce, foreign as well as domestic, which is there gathered. They appoint and pay harbour-masters, and officers to regulate the deposit of ballast, and anchorage of vessels, (7 Wend. (N. Y.), 349,) and the building of wharves; and are often at great expense in removing obstructions. (1 Bl. Com., by Tucker, 249.)

These State officers have the power to direct where vessels shall anchor, and the precautions to be used against fires on board; and all State laws in regard to such matters must doubtless continue in force till conflicting with some express legislation by Congress. (1 Bl. Com., by Tucker, 252.) I allude to these with the greater particularity, because they are so directly connected with foreign commerce, and are not justified more, perhaps, under police, or sanatory, or moral considerations, than under the general principle of concurrent authority in the States on many matters granted to Congress,—"taking care not to attempt to regulate *549] the foreign commerce, and not to conflict directly and materially with any provision actually made by Congress,—nor to do it in a case where the grant is accompanied by an express prohibition to the States, or is in its nature and character such as to imply clearly a total prohibition to the States of every exercise of power connected with it. To remove doubts as to the design to have the power of the States remain to legislate on such matters within their own limits, the old Confederation, in article ninth, where granting the power of regulating "the trade and managing all affairs with the Indians, not members of any of the States," provided that "the legislative right of any State, within its own limits, be not infringed or violated." The same end was meant to be effected in the new Constitution, though in a different way; and this was, by not granting any power to Congress over the internal commerce, or police, or municipal affairs of the States, and declaring expressly, in the tenth amendment, that all powers not so granted were reserved to the people of the States.

It follows from what has been said, that this statute of Massachusetts, if regarded as a police measure, or a municipal regulation as to residents or visitors within its borders, or as a tax or any local provision for her own affairs, ought not to be considered as a regulation of commerce; but it is one of those other measures still authorized in the States, and still useful and appropriate to them. Such measures, too, are usually

not conflicting with that commerce, but adopted entirely *diverso intuitu*, and so operating.

Conceding, then, that the power to regulate foreign commerce may include the regulation of the vessel as well as the cargo, and the manner of using the vessel in that commerce, yet the statute of Massachusetts does neither. It merely affects the master or passengers after their arrival, and for some further act than proposed to be done. And though vessels are instruments of commerce, passengers are not. And though regulating the mode of carrying them on the ocean may be to regulate commerce and navigation, yet to tax them after their arrival here is not. Indeed, the regulation of any thing is not naturally or generally to tax it, as that usually depends on another power. It has been well held in this court, that under the Constitution the taxing of imports is not a regulation of commerce, nor to be sustained under that grant, but under the grant as to taxation. (*Gibbons* v. *Ogden*, 9 Wheat., 201.) Duties may, to be sure, be imposed at times to regulate commerce, but oftener are imposed with a view to revenue; and therefore, under that head, duties as taxes were prohibited to the States. (9 Wheat., 202, 203.)

*It is a mistaken view to say, that the power of a State to exclude slaves, or free blacks, or convicts, or paupers, or to make pecuniary terms for their admission, may be one not conflicting with commerce, while the same power, if applied to alien passengers coming in vessels, does conflict. Slaves now excepted, though once not entirely, they are all equally and frequently passengers, and all oftener come in by water in the business and channels of ocean commerce than by land. But if the transit of persons coming into the States as passengers, by water, is a branch of commerce, so is their coming in by land; and this, whether from other nations on our land frontier, or from other States. And if Mississippi and Ohio can rightfully impose prohibitions, taxes, or any terms to such coming by land or water from other States, so may Massachusetts and New York, if thus coming from foreign nations by water. Congress, also, has like power to regulate commerce between the States, as between this country and other nations, and if persons coming in by water as passengers belong to the subject of commerce and navigation on the Atlantic, so do they on the Lakes and large rivers; and if excluding or requiring terms of them in one place interferes with commerce, so it does in the other. [*550

Again, if any decisive indication, independent of general

principles, exists as to which government shall exercise the taxing power in respect to the support of paupers, it is that the States, rather than the general government, shall exercise it (9 Wheat., 206, 216); and exercise it as such a power, and not, by a forced construction, as a power "to regulate commerce." The States have always continued to exercise the various powers of local taxation and police, and not Congress; and have maintained all paupers. And this, though the general authority to regulate commerce, no less than to lay taxes, was granted to Congress. But police powers and powers over the internal commerce and municipal affairs of States were not granted away; and under them, and the general power of taxation, States continued to control this subject, and not under the power to regulate commerce. Nor did Congress, though possessing this last power, ever attempt to interfere, as if to do so was a branch of that power or justifiable under it, because in terms using language connected with commerce. Thus, in the Kentucky constitution, and substantially in several others, it is provided that the legislature "shall have full power to prevent slaves from being brought into this State as merchandise," and Congress sanctioned that Constitution, and the rest, with such provisions in them.

These affairs are a part of the domestic economy of States,
*551] *belong to their interior policy, and operate on matters affecting the fireside, the hearth, and the altar. The States have no foreign relations, and need none, as to this. (1 Bl. Com., by Tucker, App., 249.)

The fair exercise of such powers rightfully belonging to a State, though connected often with foreign commerce and indirectly or slightly affecting it, cannot therefore be considered, in any point of view, hostile, by their intent or origin, as regulations of such commerce. See in point, *Gibbons* v. *Ogden*, 9 Wheat., 203; 11 Pet., 102.

In this view, it is immaterial whether this tax is imposed on the passenger while in the ship, in port, or when he touches the wharf, or reaches his hotel. All these places, being within the territory, are equally within the jurisdiction of the State for municipal purposes such as these, and not with a view to regulate foreign commerce; it being conceded that a tax may be imposed on a passenger after quitting the vessel and on the land, why may it not before, when he is then within the limits of the State? In either instance, the tax has no concern with the foreign voyage, and does not regulate the foreign commerce; whereas, if otherwise, it might be as invalid when imposed on land as on water.

Much of the difficulty in this case arises, I apprehend, from

a misconception, as if this tax was imposed on the passenger at sea and before within the territorial limits of the State. But this, as before suggested, is an entire misapprehension of the extent of those limits, or of the words and meaning of the law.

If, then, as is argued, intercourse by merchants in person, and by officers in their vessels, boats, and wagons, is a part of commerce, and the carrying of passengers is also a branch of navigation or commerce, still the taxing of these after the arrival in port, though Congress there has power to collect its duties as it has on land, is not vested at all in Congress; or, if at all, not exclusively.

Who can point to the cession to the United States of the jurisdiction, by Massachusetts or New York, of their own ports and harbours for purposes of taxation, or any other local and municipal purpose?

So far from interfering at all here with the foreign voyage, the State power begins when that ends and the vessel has entered the jurisdictional limits of the State. Her laws reach the consequences and results of foreign commerce, rather than the commerce itself. They touch not the tonnage of the vessel, nor her merchandise, nor the baggage or tools of the aliens; nor do they forbid the vessels carrying passengers. *But as a condition to their landing and remaining [*552
within the jurisdiction of the State, enough is required by way of condition or terms for that privilege, and the risk of their becoming chargeable, when aliens, (though not chargeable at the time,) to cover in some degree the expenses happening under such contingency. This has nothing to do with the regulation of commerce itself,—the right to carry passengers to and fro over the Atlantic Ocean,—but merely with their inhabitancy or residence within a State so as to be entitled to its charity, its privileges, and protection. Such laws do not conflict directly with any provision by the general government as to foreign commerce, because none has been made on this point, and they are not in clear collision with any made by that government on any other point. When, as here, they purport to be for a different purpose from touching the concerns of the general government,—when they are, as here, adapted to another local and legitimate object,—it is unjust to a sovereign State, and derogatory to the character of her people and legislature, to impute a sinister and illegitimate design to them concerning foreign commerce, different from that avowed, and from that which the amount of the tax and the evil to be guarded against clearly indicate as the true design. Hence, as before remarked, Mr. Justice Johnson, in

the same opinion which was cited by the original defendants, says the *purpose* is the test; and if that be different, and does not clash, the law is not unconstitutional.

So Chief Justice Marshall, in 9 Wheat., 204, says, that Congress for one purpose and a State for another may use like means and both be vindicated. And though Congress obtains its power from a special grant, like that of the power "to regulate commerce," the State may obtain it from a reserved power over internal commerce or over its police. Hence, while Congress regulates the number of passengers to the size of the vessel, as a matter of foreign commerce, and may exempt their baggage and tools from duties as a matter of imposts on imports, yet this is not inconsistent with the power of a State, after passengers arrive within her limits, to impose terms on their landing, with a view to benefit her pauper police, or her fiscal resources, or her municipal safety and welfare. And the two powers, thus exercised separately by the two governments, may, as Mr. Justice Johnson says, "be perfectly distinct." So, in the language of Chief Justice Marshall, "if executed by the same means," "this does not prove that the powers themselves are identical."

The measures of the general government amount to a reg-
*553] ulation of the traffic, or trade, or business, of carrying *passengers, and of the imposts on imports; but those of the States amount to neither, and merely affect the passengers or master of the vessel after their arrival within the limits of a State, and for State purposes, State security, and State policy.

As we have before explained, then, if granting that the bringing of passengers is a great branch of the business of navigation, and that to regulate commerce is to regulate navigation, yet this statute of Massachusetts neither regulates that navigation employed in carrying passengers, nor the passengers themselves, either while abroad in foreign ports, or while on the Atlantic Ocean, but merely taxes them, or imposes conditions on them, after within the State. These things are done, as Mr. Justice Johnson said in another case, "with a distinct view." And it is no objection that they "act on the same subject" (9 Wheat., 235); or, in the words of Chief Justice Marshall, "although the means used in their execution may sometimes approach each other so nearly as to be confounded" (p. 204). But where any doubt arises, it should operate against the uncertain and loose, or what the late chief justice called "questionable power to regulate commerce," (9 Wheat., 202,) rather than the more fixed and distinct police or taxing power.

In cases like this, if, amidst the great complexity of human affairs, and in the shadowy line between the two governments over the same people, it is impossible for their mutual rights and powers not to infringe occasionally upon each other, or cross a little the dividing line, it constitutes no cause for denouncing the acts on either side as being exercised under the same power or for the same purpose, and therefore unconstitutional and void. When, as is seldom likely, their laws come in direct and material collision, both being in the exercise of distinct powers, which belong to them, it is wisely provided, by the Constitution itself, and consequently by the States and the people themselves, as they framed it, that the States, being the granting power, must recede. (9 Wheat., 203; *License Cases*, 5 How., 504; *United States* v. *New Bedford Bridge*, 1 Woodb. & M., 423.) Here we see no such collision.

There are other cases of seeming opposition which are reconcilable, and not conflicting, as to the powers exercised both by the States and the general government, but for different purposes. Thus hides may be imported under the acts of Congress taxing imports and regulating commerce; but this does not deprive a State of the right, in guarding the public health, to have them destroyed if putrefied, whether before they reach the land or after. So as to the import of gunpowder by the authority of one government, and the prohibition *by the other, for the public safety, to keep [*554
it in large quantities. (4 Metcalf, 294.) Neither of these acts by the State attempts to interfere with the commerce abroad, but after its arrival here, and for other purposes, local and sanatory, or municipal.

In short, it has been deliberately held by this court, that the laying a duty on imports, if this was of that character, is an exercise of the taxing power, and not of that to regulate commerce. (*Gibbons* v. *Ogden*, 9 Wheat., 201, by Chief Justice Marshall.) And if, in *Brown* v. *Maryland*, 12 Wheat., 447, the tax or duty imposed there can be considered as held to violate both, it was because it was not only a tax on imports, but provided for the treatment of goods themselves, or regulated them as imported in foreign commerce, and while in bulk.

But if the power exercised in this law by Massachusetts could, by a forced construction, be tortured into a regulation of foreign commerce, the next requisite to make the law void is not believed to exist in the fact that the States do not retain some concurrent or subordinate powers, such as were here exercised, though connected in certain respects with

foreign commerce. Beside the reasons already assigned for this opinion, it is not opposed to either the language or the spirit of the Constitution in connection with this particular grant. Accompanying it are no exclusive words, nor is the further action of the States, or any thing concerning commerce, expressly forbidden in any other way in the Constitution. But both of these are done in several other cases, such as "no State shall coin money," or no State "engage in war," and these are ordinary modes adopted in the Constitution to indicate that a power granted is exclusive, when it was meant to be so.

If this reasoning be not correct, why was express prohibition to the States used on any subject where authority was granted to Congress? The only other mode to ascertain whether a power thus granted is exclusive "is to look at the nature of each grant, and if that does not clearly show the power to be exclusive, not to hold it to be so." We have seen that was the rule laid down by one of the makers and great expounders of the instrument. (Federalist, No. 82. See also 14 Pet., 575.)

It held out this as an inducement to the States to adopt the Constitution, and was urged by all the logic and eloquence of Hamilton. It was, that a grant of power to Congress, so far from being *ipso facto* exclusive, never ousted the power of the States previously existing, unless "where an exclusive authority is in express terms granted to the Union, or where a particular authority is granted to the Union and the exercise *of a like authority is prohibited to the States; or
*555] where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible."

This rule has been recognized in various decisions on constitutional questions by many of the judges of this court. 2 Cranch, 397; 3 Wheat., 386; 5 Wheat., 49; *Wilson* v. *Blackbird Creek Marsh Company*, 2 Pet., 245; *Prigg* v. *Pennsylvania*, 16 Pet., 627, 655, 664; *New York* v. *Miln*, 11 Pet., 103, 132; *Groves* v. *Slaughter*, 15 Pet., 509; *Holmes* v. *Jennison*, 14 Pet., 579. So by this court itself, in *Sturges* v. *Crowninshield*, 4 Wheat., 193. And also by other authorities entitled to much respect. 4 Elliot's Deb., 567; 3 Jefferson's Life, 425–429; 3 Serg. & R., 79; Peck's Trial, 86, 87, 291–293, 329, 404, 434, 435; *Calder* v. *Bull*, 3 Dall., 386; 1 Kent, Com., 364; 9 Johns. (N. Y.), 568.

In other cases it is apparently contravened. 9 Wheat., 209; 15 Pet., 504, by Mr. Justice McLean, and 511, by Mr. Justice Baldwin; *Prigg* v. *Pennsylvania*, 16 Pet., 543; *New*

York v. *Miln*, 11 Pet., 158, by Mr. Justice Story; *The Chusan*, 2 Story, 465; *Golden* v. *Prince*, 3 Wash. C. C., 325.

But this is often in appearance only, and not in reality. It is not a difference as to what should be the true rule, but in deciding what cases fall within it, and especially the branch of it as to what is exclusive by implication and reasoning from the nature of the particular grant or case; or in the words of Hamilton, "where an authority is granted to the Union, with which a similar authority in the States would be utterly incompatible."

Thus, in the celebrated case of *Sturges* v. *Crowninshield*, the rule itself is laid down in the same way substantially as in the Federalist; namely, that the power is to be taken from the State only when expressly forbidden, or where "the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress." (4 Wheat., 122, 193, by Chief Justice Marshall; *Prigg* v. *Commonwealth of Pennsylvania*, 16 Pet., 626, by Chief Justice Taney, and 650, by Mr. Justice Daniel.)

And Chief Justice Marshall on another occasion considered this to be the true rule. That was in the case of *Wilson* v. *Blackbird Creek Marsh Company*, 2 Pet., 245, though a commercial question. And Judge Story did the same in *Houston* v. *Moore*, 5 Wheat., 49,—a militia question. So, many of the other grants in this same section of the Constitution, under like forms of expression, have been virtually held not to be exclusive; such as that over weights and measures; that over bankruptcy (*Sturges* v. *Crowninshield*, 4 Wheat., 122); *that over taxation (see cases already cited); that to regulate the value of foreign coins; that to discipline the militia (*Houston* v. *Moore*, 5 Wheat., 1; 3 Story, Com. on Constitution, § 1202; 15 Pet., 499; Rawle on the Constitution, ch. 9, p. 111); that "to provide for the punishment of counterfeiting coin" (*Fox* v. *State of Ohio*, 5 How., 410); and robbing the mail when punished as highway robbery (5 Wheat., 34). Why, then, hold this to be otherwise than concurrent? [*556

There are still other grants, in language like this, which never have been considered exclusive. Even the power to pass uniform naturalization laws was once considered by this court as not exclusive (*Collett* v. *Collett*, 2 Dall., 296); and though doubt has been flung on this since by the *United States* v. *Villato*, 2 Dall., 372, *Chirac* v. *Chirac*, 2 Wheat., 269, and by some of the court in 5 How., 585, and *Golden* v. *Prince*, 3 Wash. C. C., 314; and though these doubts may

be well founded unless the State naturalization be for local purposes only in the State, as intimated in *Collett* v. *Collett*, and more favorable than the law of the United States, and not to give rights of citizenship out of the State, (1 Bl. Com., by Tucker, App., 3, 4, 255, 296,) which were the chief objections in 3 Wash. C. C., 314; yet this change of opinion does not impugn in principle the ground for considering the local measure in their case as not conflicting with foreign commerce. The reasoning for a change there does not apply here.

So, it is well settled that no grant of power to Congress is exclusive, unless expressly so, merely because it may be broad enough in terms to cover a power which clearly belongs to the State; e. g. police, quarantine, and license laws. They may relate to a like place and subject, and by means somewhat alike, yet, if the purposes of the State and of Congress are different and legitimate for each, they are both permissible and neither exclusive. (See cases before cited, 4 Wheat., 196; 3 Ell. Deb., 259; Baldwin's Views, 193, 194.)

This very grant of the power "to regulate commerce" has also been held by this court not to prevent bridges or ferries by the States where waters are navigable. (*Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245.) So elsewhere. (*Corfield* v. *Coryell*, 4 Wash. C. C., 371; 1 Woodb. & M., 417, 424, 425; 9 Wheat., 203. See also *Warren Bridge Case*, 11 Pet., 420; 17 Conn., 64; 8 Cow. (N. Y.), 146; 1 Pick. (Mass.), 180; 7 N. H., 35.) And it has been considered elsewhere not to confer, though in navigable waters, any right or control over the fisheries therein, within the limits of a State. (4 Wash. C. C., 383. See also *Martin* v. *Waddell*, 16 Pet., 367, 3 Wheat., 383; Angell on Tide Waters, 105.) So the

*557] *States have been accustomed to legislate as to pilots, and Congress has concurred in it. But if the acts of the States alone as to pilots are not valid, on the ground of a concurrent power in them, it is difficult to see how Congress can transfer or cede to the States an authority on this which the Constitution has not given to them. (Chief Justice Taney, in 5 How., 580.) The real truth is, that, each possessing the power in some views and places, though not exclusively, Congress may declare it will not exercise the power on its part, either by an express law or by actual omission, and thus leave the field open to the States, on their reserved or concurrent rights, and not on any rights ceded to them by Congress. This reconciles the whole matter, and

tends strongly to sustain the same view in the case now under consideration.

Nor has it ever been seriously contended, that, where Congress has chosen to legislate about commerce and navigation on our navigable waters as well as the sea-coast, and to introduce guards against steam explosions and dangers in steam vessels, the law is not to be enforced as proper under the power to regulate commerce, and when not in conflict with any State legislation. This power in Congress is at least concurrent, and extends to commerce on rivers, and even on land, as well as at sea, when between our own States or with foreign countries. Whether this could be done as to vessels on waters entirely within any one State is a different question, which need not be here considered. (See *Waring* v. *Clark*, 5 How., 441.)

As a general rule of construction, then, the grants to Congress should never be considered as exclusive, unless so indicated expressly in the Constitution by the nature or place of the thing granted, or by the positive prohibition usually resorted to when that end is contemplated, as that "no State shall enter into any treaty," or "coin money," &c.; "no State shall, without the consent of Congress, lay any imposts or duties on imports," &c. (Art. 1, § 9. *United States* v. *New Bedford Bridge*, 1 Woodb. & M., 432.)

It is also a strong argument, after using this express prohibition in some cases, that, when not used in others, as it is not here, it is not intended. Looking at the nature of this grant, likewise, in order to see if it can or should be entirely exclusive, we are forced to the same conclusions.

There is nothing in the nature of much which is here connected with foreign commerce that is in its character foreign, or appropriate for the action of a central and single government; on the contrary, there is matter which is entirely local,—something which is seldom universal, or required to be *either general or uniform. For though Congress [*558
is empowered to regulate commerce, and ought to legislate for foreign commerce as for all its leading incidents and uniform and universal wants, yet "to regulate commerce" could never have been supposed by the framers of the Constitution to devolve on the general government the care of any thing except exterior intercourse with foreign nations, with other States, and the Indian tribes. Every thing else within State limits was, of course, to be left to each State, as too different in so large a country to be subjected to uniform rules, too multifarious for the attention of

the central government, and too local for its cognizance over only general matters.

It was a difference between the States as to imposts or duties on imports and tonnage which embarrassed their intercourse with each other and with foreign nations, and which mainly led to the new Constitution, and not the mere regulation of commerce. (9 Wheat., 225.) It was hence that the States in respect to duties and imposts were not left to exercise concurrent powers, and this was prevented, not by merely empowering Congress to tax imports, but by expressly forbidding the States to do the same; and this express prohibition would not have been resorted to, or been necessary, if a mere grant to Congress of the power to impose duties or to "regulate commerce" was alone deemed exclusive, and was to prevent taxation of imports by the States, or assessing money by them on any kind of business or traffic by navigation, such as carrying passengers.

Congress, in this way, resorted to a special prohibition where they meant one (as to tax on imports); but where they did not, as, for example, in other taxation or regulating commerce, they introduced no such special prohibition, and left the States to act also on local and appropriate matters, though connected in some degree with commerce. Where, at any time, Congress had not legislated or preoccupied that particular field, the States acted freely and beneficially, yielding, however, to Congress when it does act on the same particular matter, unless both act for different and consistent objects. (*Gibbons* v. *Ogden*, 9 Wheat., 204, 239.) In this way much was meant to be left in the States, and much ever has been left, which partially related to commerce, and an expansive, and roving, and absorbing construction has since been attempted to be given to the grant of the power to regulate commerce, apparently never thought of at the time it was introduced into the Constitution. When I say much was left, and meant to be left, to the States in connection with commerce, I mean, concerning details and local mat-
*559] ters, inseparable in *some respects from foreign commerce, but not belonging to its exterior or general character, and not conflicting with any thing Congress has already done. *Vanderbilt* v. *Adams*, 7 Wend. (N. Y.), 349; *New Bedford Bridge Case*, 1 Woodb. & M., 429.) Such is this very matter as to taxation to support foreign paupers, with many other police matters, quarantine, inspections, &c. See them enumerated in the *License Cases*, 5 Howard.

The provisions in the State laws in 1789, on these and kindred matters, did not therefore drop dead on the adoption

of the Constitution, but only those relating to duties expressly prohibited to the States, and to foreign and general matters which were then acted on by Congress. Chief Justice Marshall, in *Sturges* v. *Crowninshield*, (4 Wheat., 195,) considered "the power of the States as existing over such cases as the laws of the Union may not reach."

So far as reasons exist to make the exercise of the commercial power exclusive, as on matters of exterior, general, and uniform cognizance, the construction may be proper to render it exclusive, but no further, as the exclusiveness depends in this case wholly on the reasons, and not on any express prohibition, and hence cannot extend beyond the reasons themselves. Where they disappear, the exclusiveness should halt. In such case, emphatically, *cessante ratione, cessat et ipse lex.*

It nowhere seems to have been settled that this power is exclusive in Congress, so that the States can enact no laws on any branch of the subject, whether conflicting or not with any acts of Congress. But, on the contrary, the majority of the court in the License Cases (5 How., 504) appear to have held that it is not exclusive as to several matters connected in some degree with commerce. The case of *New York* v. *Miln* (11 Pet., 141) seems chiefly to rest on a like principle, and likewise to hold that measures of the character now under consideration are not regulations of commerce.

Indeed, besides these cases, and on this very subject of commerce, a construction has at times been placed, that it is not exclusive in all respects, as will soon be shown, and if truly placed, it is not competent to hold that the State legislation on such incidental, subordinate, and local matters is utterly void when it does not conflict with some actual legislation by Congress. For the silence of Congress, which some seem to regard as more formidable than its action, is, whether in full or in part, to be respected and obeyed only where its power is exclusive, and the States are deprived of all authority over the matter. The power must first be shown to be exclusive before any inference can be drawn that the silence of Congress *speaks, and a different course of reasoning begs the question attempted to be proved. In other cases, [*560 when the power of Congress is not exclusive and that of the States is concurrent, the silence of Congress to legislate on any mere local or subordinate matter within the limits of a State, though connected in some respects with foreign commerce, is rather an invitation for the States to legislate upon it,—is rather leaving it to them for the present, and assenting to their action in the matter,—than a circumstance nullifying

and destroying every useful and ameliorating provision made by them.

Such, in my view, is the true rule in respect to the commercial grant of power over matters not yet regulated by Congress, and which are obviously local. In the case of *Wilson* v. *The Blackbird Creek Marsh Co.*, Chief Justice Marshall not only treated this as the true rule generally, but held it applicable to the grant to Congress of the power "to regulate commerce," and that this grant was not exclusive nor prohibitory on the action of the States, except so far as it was actually exercised by Congress, and thus came in conflict with the laws of the States. These are some of his words:—"The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations, and among the several States, a power which has not been so exercised as to affect the question." (2 Pet., 252.)

The Chief Justice in another case held that a power being vested in Congress was not enough to bar State action entirely, and that it did not forbid by silence as much as by action. He says,—"It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States." (*Sturges* v. *Crowninshield*, 4 Wheat., 195, 196.) And in 16 Pet., 610, Justice Story admits "that no uniform rule of interpretation can be applied to it [the Constitution], which may not allow, even if it does not positively demand, many modifications in its actual application to particular clauses."

Hence, if the power "to regulate commerce" be regarded by us as exclusive, so far as respects its operations abroad, or without the limits of the country, because the nature of the grant requires it to be exclusive there, and not exclusive so far as regards matters consequent on it which are within the limits of a State, and not expressly prohibited to it nor conflicting with any thing done by Congress, because the nature of the grant does not require it to be so there, we exercise *561] *then what appears to be the spirit of a wise conciliation, and are able to reconcile several opinions elsewhere expressed, some as to the concurrent and some as to the exclusive character of the power "to regulate commerce." It may thus be exclusive as to some matters and not as to others, and every thing can in that aspect be reconciled and harmonious, and accord, as I have before explained, with the nature and reason of each case, the only constitutional limits

where no express restrictions are imposed. I am unable to see any other practical mode of administering the complicated, and sometimes conflicting, relations of the Federal and State governments, but on a rule like this. And thus deciding the cases as they arise under it, according to the nature and character of each case and each grant, some indicating one to be exclusive, and some indicating another not to be exclusive; and this, also, at times, as to different kinds of exercise of power under one and the same grant. (See Justice Johnson, 9 Wheat., 235–239.) There is another view of this question which leads to like results. If the opposite opinions mean only that the States cannot, after express grants to the general government, legislate on them for and in behalf of the general government, and not simply for themselves in local matters,—cannot legislate for other States without their own limits, *extra territorium*, or as to general uniformity, general conduct, or the subject-matter over the whole country, like naturalization and bankruptcy,—then there is no difference between the spirit of those opinions and my own. But if they are construed to mean, that after such a grant, with no express prohibition on a State to act for itself alone on the matter, and none implied from their relations to the general government and the nature of the subject, a State cannot make such regulations and laws for itself, and its own people, and local necessities, as do not violate any act of Congress in relation to the matter, I do not think they are supported either by sound principle or precedents.

Necessities for a different course have existed, and ever must exist, in the complex movements of a double set of legislators for one and the same people.

They may crowd against each other in their measures slightly and doubtingly, but that, as before shown, is not sufficient to annul and override those of the States, as there must be for that disagreeable consequence a direct conflict, a plain incompatibility. (3 Story, Com. on Const., 434; *New Bedford Bridge Case*, 1 Woodb. & M., 417, 418; 9 Wheat., 238.)

This circumstance shows, also, that the argument to avoid State legislation is not sufficient when it discovers some *different spirit or policy in the general measures of the States from that in the general government. The States have a right to differ in opinion,—some are very likely often to differ. But what clause in the Constitution makes such an instance of independence a nullity, or makes a different object an illegitimate one? To be a nullity, it must oppose what has been actually done or prescribed by Congress, and in [*562

a case where it has no reserved power to act differently from Congress. We have already seen that an indirect reduction of the revenue of the general government by the license laws, when passed under a legitimate power, and with a different legitimate view, did not render them unconstitutional, nor does this, under like circumstances, though it may indirectly operate in some measure against emigration.

If it did, a law by a State to favor the consumption of its own products would be pronounced void, and so would be a high tax by a State on wharves or stores, as all these would somewhat embarrass and render more expensive the business connected with foreign commerce. So this condition imposed on passengers after their arrival might in some degree affect the business and commerce of carrying them to that State, when the alien passengers are taxed before they are permitted to land.

There are two classes of grants to which this rule now under consideration is applicable, and the force of it will be more striking when they are examined separately. One includes grants where Congress has acted, and continues to act, in relation to them; and the other, where it has never acted, or, if it has once acted, has ceased to do so.

Now, the vindication for the States to act in the last class is, that, unless each State is considered authorized still to legislate for itself, the subject-matter will be without any regulation whatever, and a lawless condition of things will exist within the heart of the community, and on a matter vital to its interests. Such is now the case as to weights and measures, Congress never having legislated to produce uniformity concerning them, though the power is expressly granted to it in the Constitution.

Now, on the construction that such a grant of power is exclusive, and, whether exercised or not, it is unconstitutional for any State to legislate on the subject for itself; and, moreover, that Congress does in truth regulate by its silence as much as by its action, and when doing nothing about it virtually enacts that nothing shall be done about it by any one of the States, it will follow that not only all the legislation by the States on weights and measures since 1789 is illegal and void, but all *their legislation now existing on matters *563] of bankruptcy, and in respect to the disciplining of the militia, and imposing taxes on land, is also void. For the powers over all these are expressly ceded to Congress, and are not now regulated by any existing acts of Congress, though all except weights and measures once have been. The argument alluded to, if sound, would thus be strong, that

Congress, having once acted on these and ceased to, means that nothing more shall be done.

On this exclusive principle, though the action of the States on them is not forbidden expressly in the Constitution, nor impliedly beyond what grows out of any express grant, all the States in the Union are disarmed from any action whatever on such matters, and all their laws on these topics, so essential to their domestic industry and trade, their public security and political existence by means of revenue, are to be considered null and void.

The catastrophe which would follow on such a construction has led this court, as heretofore explained, to hold that the States still possess a concurrent power to act on matters of bankruptcy, the discipline of the militia, taxation of land, and some subjects of commerce; and like considerations would undoubtedly lead them, when the cases arise, to hold, that, notwithstanding such grants, the laws of the States, not conflicting with any passed by the general government on many other such topics, must be considered valid. Indeed, it seems conceded by some of the members of the court in this case, that the States are, by some power coördinate or subordinate, rightfully legislating on weights and measures, pilots, bankruptcy, the militia, &c. But if they have not this power without any grant or license by Congress, they cannot have it by any such grant, because Congress is not empowered by the Constitution to grant away powers vested in it by the people and the States; and how can it hereafter, by legislation, give any power to them over this subject if not having it now?

Again, in the other class of cases, where Congress has already legislated, and still legislates, some time elapsed before it passed laws on any subject, and years before it acted at all on some of them; and in almost the whole, its first legislation was only a beginning and in part, doing more and more from time to time, as experience and the exigencies of the country seemed to require. It is not necessary to repeat here several detailed illustrations and cases on this collected in the case of the *United States* v. *New Bedford Bridge*, 1 Woodb. & M., 430. In the mean time, the States continued to exercise their accustomed powers, and have ever since done it on all matters not forbidden expressly in the Constitution, not exclusive in *their nature, and not conflicting with actual provisions in relation to them already made under the general government. (14 Pet., 594.) [*564

To show, further, that these grants of power are not always and necessarily exclusive, and that legislation on them by

Congress to any extent is not as prohibitory on the States where it is silent as where it enacts, the States have not only continued to punish crimes which Congress could punish, but they have, in numerous instances, regulated matters connected, locally at least, with commerce abroad, and between the States, and with the Indians.

In so large a territory as the jurisdiction of the general government embraces, in so many and so diversified topics as come before it, and in the nature of its supervisory powers on certain subjects, requiring action only on what is general and foreign, and to produce uniformity merely as to that, it becomes almost inevitable that many local matters and details must be left to be regulated by some local authorities. Yet, as explained in the License Cases, like the by-laws of corporations, made by them and not the legislature, they must not conflict with the general regulations or laws prescribed by the paramount power. But, so far from being exclusive, even while it is exercised, and much less while it is dormant or unexercised, the paramount power summons to its aid, in order to be effective, the contemporaneous and continued action of others. Thus not only moneyed corporations, but towns and cities, must make numerous by-laws in order to enforce the general provisions laid down by the legislation of the State. Thus, too, this court must make numerous rules to carry into effect the legislation of Congress in respect to it; and the War and the Navy Departments must compile and enforce volumes of regulations of a like kind and for a like purpose, taking care, as all subordinate power in such cases must, not to violate any general law prescribed on the subject. (See 1 Woodb. & M., 423.)

The condition of this whole country when colonies of England furnishes another illustration of the relation and character of such powers. The parent government at home was sovereign, and provided general regulations, either in acts of Parliament or charters, but still left the several colonies (and surely our States have as much power as they) to legislate as to details, and introduce any regulations suited to their own condition and interests, not conflicting with the general provisions made by the paramount power at home. (1 Bl. Com., by Tucker, App., 109, 110.

Indeed, what becomes of the whole doctrine of concurrent powers on this hypothesis of exclusiveness in all mere grants,

*565] *and of the usage that the States may act in such concurrent cases or local matters till their measures conflict directly with those of Congress? (Id., 179.) Where is the line of distinction between a measure by the State which

is void, whether it conflict or not, and one which is not void till it comes into actual collision with some law passed by the general government? What becomes of the idea, that the power to regulate foreign commerce is exclusive, and Congress may prohibit the introduction of obscene prints under it, and yet the States may do the latter also, but touch nothing connected with commerce? Is not the introduction of these connected with it? Cannot the States, too, patronize science and the arts in various ways, though a like power is conferred on Congress by means of patents and copyrights. (*Livingston* v. *Van Ingen*, 9 Johns. (N. Y.), 572.)

Nor do I understand the words of Mr. Justice Johnson, in the case of *Gibbons* v. *Ogden*, in the sense attributed to them by some. "The practice of our government," says he, "has been, on many subjects, to occupy so much only of the field open to them as they think the public interests require." (9 Wheat., 234.) It is argued that this means to exclude State action, where Congress has not occupied the field, as well as where it has. Yet it seems plainly to be inferred, from other words connected, that he considers "the power of the States must be at an end so far as the United States have by their legislative act taken the subject under their immediate superintendence." This means the subject then under consideration. But where have they so taken the subject of the admission of alien passengers into States, and the terms of it, "under their immediate superintendence"? They may have regulated the manner of their coming here, but where their maintenance here when sick or poor, or likely to be poor? where their taxation here?

They have regulated also their naturalization in this country, but not under the grant of the power "to regulate commerce," or impose imposts on imports; but, knowing it was not involved in either, a separate and express grant was wisely inserted in the Constitution to empower Congress to make uniform rules on this subject.

It will be seen, that, where Congress legislates about foreign commerce or passengers as connected with it, that legislation need not, and does not, forbid the States to legislate on other matters not conflicting. Thus all will harmonize, unless we interpolate, by mere construction, a prohibitory clause either in the law or in the Constitution. You may, if you please, call the power so exercised by Congress exclusive in one sense or *to one extent, but it is not in others. It [*566
may be considered as exclusive so far as it goes, and still leave the rest of the field concerning them open to the States. Thus the right to regulate the number of passengers

in vessels from abroad in proportion to the tonnage has been exercised by Congress, and may be deemed the use of a legitimate authority. (3 Stat. at L., 448; 9 Wheat., 216.) So has it been exercised to exempt their personal "baggage" and "tools" from *imposts*, not, as some seem to suppose, their *goods* or *merchandise*. (1 Stat. at L., 661.) But this statute of Massachusetts conflicts with neither. So Congress provides for uniform naturalization of aliens, but this statute does not interfere with that. So Congress does not forbid passengers to come from abroad; neither does this statute.

Again, Congress nowhere stipulates or enacts, or by the Constitution can do it, probably, as before suggested, that passengers shall not in their persons be taxed on their arrival within a State, nor terms be made as to their residence within them. Again, the objection to this view involves another apparent absurdity,—that, though the regulation of commerce extends to passengers, it is not entirely exclusive in the general government if they come with yellow-fever and the cholera, and that they are then subject to State control and its quarantine expenses and fees; but are not, if they come with what the State deems equally perilous. That is, if they endanger the health of the body, the power over them is not exclusive in Congress, but if they endanger only the police of the State, its pauper securities, and its economy, morals, and public peace, the power is exclusive in Congress, and goes to strip the State of all authority to resist the introduction of either convicts, slaves, paupers, or refugees. If these last only come in the tracks of commerce in vessels from abroad, and are enrolled as passengers, the States cannot touch them, but may seize on them at once if their bodies are diseased. It would be useful to have that clause in the Constitution pointed out which draws such a novel line of discrimination.

In holding this measure to be a regulation of commerce, and exclusive, and hence void, wherever the power of Congress over commerce extends, a most perilous principle is adopted in some other respects; for that power extends over the land as well as water, and to commerce among the States and with the Indian tribes, no less than to foreign commerce. (See art. 1, § 8.) And if it can abrogate a tax or terms imposed by States in harbours over persons there, it may do so whenever the power over commerce goes into the interior, and as to matters connected with it, and also between States.

*567] *On this reasoning, passengers there in vessels, boats, wagons, stages, or on horseback, are as much connected with commerce as if they come in by sea; and

they may consist of paupers, slaves, or convicts, as well as of merchants or travellers for pleasure and personal improvement; and thus all the laws of Ohio, Mississippi, and many other States, either forbidding or taxing the entrance of slaves or liberated blacks, will be nullified, as well as those of almost every Atlantic State, excluding paupers coming in from without their limits.

Congress has sanctioned at least five constitutions of States exercising a power to exclude slaves, and the introduction of them as merchandise and for commerce. And how can this be reconciled by those who would reverse the judgments below, on the ground that the commercial power is exclusive in Congress, and not either concurrent in one view or independent in another, in some particulars, in the States.

Another consequence from the opposite doctrine is, that, if Congress by regulating commerce acts exclusively upon it, and can admit whom it pleases as passengers, independent of State wishes, it can force upon the States slaves or criminals, or political incendiaries of the most dangerous character. And furthermore, that it can do this only by admitting their personal baggage free, as doing that, it is argued here by some, shows the owner must come in free, and neither be excluded nor taxed by the State after within her limits.

This makes the owner of the personal baggage a mere incident or appurtenant to the baggage itself, and renders, by analogy, any legislation as to taxing property more important than taxing the person, and, indeed, overruling and governing the person as subordinate and inferior. So, if Congress by making baggage free exonerates passengers from a State tax, it exonerates all the officers and crews of vessels from State taxes; for their personal baggage is as free as that of passengers. They, too, are as directly connected with commerce as the passengers; and by a parity of reasoning, the absurdity follows, that, by admitting American vessels free of tonnage duties, the owners of them are also made free from State taxes.

Every person acquainted with the tariff of the general government knows that specially declaring a box or chest of apparel "free" does not exonerate anything else or any other article, much less can it any person, if taxed by a State law. On the contrary, all things not specially taxed, nor specially declared "free," have a duty imposed on them by Congress as non-enumerated articles, and so would passengers, if imports, and if Congress had a right to tax them. And if saying nothing about passengers would imply that they were

*568] free from *taxes of the United States, much more of the States, why is it necessary to declare in terms any article "free," when silence would make it so? The real truth rather is, that Congress has no right to tax alien friends, or exclude them, and hence the silence. This statute, then, contravenes no act of Congress on this matter of passengers.

And while all the legislation of Congress as to passengers operates on them at sea during the voyage, except imposts being forbidden on their baggage, which is solely within the jurisdiction of Congress, all the legislation of Massachusetts operates on them after their arrival in port, and without any attempt then to impose any duty on their baggage. The former legislation by Congress, regulating their number in proportion to the tonnage, is, as it should be, *extra territorium;* the latter, as it should be, *infra territorium;* and thus both are proper, and the jurisdiction over either is not exclusive of that exercised by the other, or conflicting materially with it.

Having considered the different general grounds which can be urged in support of this statute, and the objections made in opposition to them, I shall proceed, before closing, to submit a few remarks on some miscellaneous topics relied on to impeach its provisions. One is a supposed conflict between this statute and some treaties of the general government.

I am aware that a tax or fee on alien passengers, if large, might possibly lead to collision with those foreign governments, such as Great Britain and Prussia, with whom we have treaties allowing free ingress and egress to our ports. (See 8 Stat. at L., 116, 228, 378.) But neither of them complains in this instance, and I do not consider this law as conflicting with any such provisions in treaties, since none of them profess to exempt their people or their property from State taxation after they arrive here.

If such a stipulation were made by the general government it would be difficult to maintain the doctrine, that, by an ordinary treaty, it has power to restrict the rights and powers of the several States any further than the States have by the Constitution authorized, and that this has ever been authorized. But it has not here been attempted; and these particular treaties are subject to the ordinary laws of the States, as well as of the general government, and enable the citizens of those countries merely to have free ingress and egress here for trade, (See Treaty of 1794, art. 3; 8 Stat. at L., 117,) having no relation to their coming here as passengers to reside here or for pleasure. Nor can they apply in the present case at all, as the record now stands, finding only that

the master was a British subject or his vessel British, but not that his passengers belonged to Great Britain.

*The Prussian treaty does not appear to contemplate [*569
any thing beyond the establishment of reciprocal duties, and a treatment in other respects like "the most favored nations." (8 Stat. at L., 164.)

And who ever thought that these treaties were meant to empower, or could in any moral or political view empower, Great Britain to ship her paupers to Massachusetts, or send her free blacks from the West Indies into the Southern States or into Ohio, in contravention of their local laws, or force on the States, so as to enjoy their protection and privileges, any persons from abroad deemed dangerous, such as her felon convicts and the refuse of her jails? Again, so far as regards the liberty of commerce secured to British subjects in Europe by the fourteenth article of the treaty of 1794, it does not apply to those coming from the British Provinces in America, as did this vessel (8 Stat. at L., 124), and by the eighteenth article of that treaty was to last only ten years (p. 125). And while it did last, it was expressly made "subject always, as to what respects this article, to the laws and statutes of the two countries respectively" (p. 124).

Besides this, the whole of the treaty of 1794, including the third article, probably was suspended by the war of 1812, and exists now only as modified in that of 1815, which gives to British subjects no higher rights than "other foreigners." (Art. 1; 8 Stat. at L., 228.) The old Articles of Confederation contained a clause which indicated in a different form like views as to what was proper in treaties, and indicates a wise jealousy of power exercised in hostility to the policy of a State. That policy is never intended to be thwarted by any arrangements with foreign nations by reciprocal treaties, as they relate merely to the imposts on tonnage and cargoes by the national governments, requiring them to be equal, and do not concern the port and harbour fees or expenses imposed by the local authorities for local purposes. The best security that these fees and taxes will never be unreasonably high and injurious to foreigners is the tendency they would then have to drive trade to other ports or countries contiguous, where they might be lower.

The same right exists also in states to impose conditions on the selling of certain articles by foreigners and others within their limits, as a state may prefer to encourage its own products, or may deem the use of some foreign articles of bad influence in other respects. (Grotius on the Rights

of Peace and War, B. 2, ch. 2, § 20; *License Cases*, 5 How., 504.)

Nor can I see, as has been urged, any collision between this statute and the act of Congress to carry into effect our *commercial arrangement of 1830 with Great Britain. (4 Stat. at L., 419.) The intention of that act does not in any respect seem to go beyond that of the treaties just referred to, and in some respects is to have matters stand as they did before. Each side imposed charges and duties. They existed in England and her colonies, as well as with us; but this arrangement sought only to have them not unequal nor prohibitory of trade, and not to discriminate against each other by general legislation. (See 1 Commerce and Navigation, State Papers, 158; 4 Stat. at L., 419.)

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A few remarks as to some objection, urged against the large amount and the motive of this tax, and I have done.

If the payment was to be vindicated under the general taxing power alone, it is clear that the amount could not affect the question of the constitutionality of the tax. And if it was very high, considering its professed object "for the support of foreign paupers," and was applied in part to other objects, that is a matter within the discretion of the State, and if it proved oppressive, and thus diverted this kind of business to the ports of other States, it would, like all high taxes, react, and be likely in time to remedy in a great degree the evil. But viewed as a police measure, the amount of the payment and the application of it may, in my view, have an important bearing.

Thus a State is authorized to impose duties on imports sufficient to defray the expenses of her inspection laws, but not an amount disproportionate to them, nor to apply the money thus collected to other purposes.

It would seem that the same rule would govern her assessments to enforce her quarantine laws, and it could hardly be tolerated, under the right to enforce them and demand sufficient to defray their charges, that they should be justified to collect enough more for other purposes, and thus apply the quarantine funds to make roads or maintain schools.

In such events in these cases, either this court would be obliged to declare void assessments which were clearly perverted and improperly collected and applied, or Congress could direct the excess to be paid into the treasury of the general government. (3 Elliot's Deb., 291.) Congress is in the Constitution expressly empowered to revise and control the sums collected by the States to defray the expenses of their inspection laws. (Art. 1, § 10.)

A mere pretext in a law colorably for one object, but really for another, as in condemning lands for public purposes when the true object was different, though not to be presumed to be done by any sovereign state, must, if clearly proved, be difficult *to uphold. (*West River Bridge* v. *Dix*, 6 How., 548.) But here the amount of the tax, compared with the burden flung on the State by foreign paupers, does not look so much like a wish to prohibit entirely the entrance of alien passengers, and thus disclose a covert design, hostile to the policy of the general government, as like a wish to obtain enough to cover the expenses and trouble of maintaining such of them as, though not paupers, are likely to become so in the ordinary cause of human events. This is a highly important consideration in judging whether the law throughout looked really to the subject of pauperism, and not to hostility towards emigration, nor, under the third section, to revenue from foreign commerce, independent of the pauper system. It is unjust to regard such provisions as intended to conflict with foreign commerce, when there is another and local matter which they profess to reach, and can and do honestly reach. [*571

It is, therefore, too broad in some cases to say that the object and motive of the State in requiring the payment, or the amount demanded, is of no importance; because, though the great question is a question of power, yet the object and motive may bring it within some existing power, when a different object or motive would not. The different purpose in a State often shows that there is no collision or wrong, and justifies the measure. (4 Wheat., 196; 9 Wheat., 335; Baldwin's Views, 193.)

So, as to the amount demanded, it might be sufficient only for a legitimate State object, and hence might be constitutional, as, for instance, to pay the expenses of inspection laws, when a much larger amount would not be permissible, if too much for the particular object deemed constitutional. But in this case, as no excess is shown on the record, a conclusive opinion on this point is unnecessary.

This construction of the Constitution, upholding concurrent laws by a State where doubts exist and it is fairly open for adoption, has much to commend it in this instance, as the States, which singly become feebler and weaker daily as their number and the whole Union increases, being now thirty to one, instead of thirteen to one, will not thus be rendered still feebler, and the central government, daily becoming more powerful and strong, will not thus be rendered still stronger. So the authority of the latter will not thus, by mere con-

struction, be made to absorb and overwhelm the natural and appropriate rights of sovereign States, nor mislead them by silence. Leaving this matter also to each will not conflict with any existing action of the general government, but promote and sustain the peaceful operations of both in their appropriate spheres.

*572] *It will operate justly among the States, no less than between them and the general government, as it will leave each to adopt the course best suited to its peculiar condition, and not leave one helplessly borne down with expenses from foreign sources while others are entirely free, nor draw the general government, in order to remedy such inequalities, into a system of police and local legislation, over which their authority is doubtful, as well as their ability to provide so well for local wants as the local governments, and those immediately interested in beneficial results.

A course of harshness towards the States by the general government, or by any of its great departments,—a course of prohibitions and nullifications as to their domestic policies in doubtful cases, and this by mere implied power,—is a violation of sound principle, will alienate and justly offend, and tend ultimately, no less than disastrously, to dissolve the bands of that Union so useful and glorious to all concerned.

"Libertas ultima mundi,
Quo steterit, ferienda loco."

In conclusion, therefore, I think that, in point of law, the conduct of the State in imposing this condition or payment on alien passengers can be vindicated under its police rights to provide for the maintenance of paupers, and under its authority as a sovereign State to decide on what conditions or terms foreigners, not citizens of any of the United States, shall be allowed to enjoy its protection and privileges, and under its concurrent powers of taxation over every thing but imports and tonnage. I think, too, that this power in the State is not taken away by the authority ceded to Congress, either to tax imports and tonnage, or to prohibit the importation of persons (usually limited to slaves), or to regulate commerce.

ORDERS.

Smith v. *Turner.*

This cause came on to be heard on the transcript of the record of the Court for the Trial of Impeachments and the Correction of Errors of the State of New York, and was argued by counsel. On consideration whereof, it is the

opinion of this court, that the statute law of New York, by which the health-commissioner of the city of New York is declared entitled to demand and receive, from the master of every vessel from a foreign port that should arrive in the port of said city, the sum of one dollar for each steerage passenger brought in such vessel, is repugnant to the Constitution and laws of the United States, and therefore void. Whereupon, it is now here ordered *and adjudged by this court, that the judgment of the said Court for the Trial of Impeachments and the Correction of Errors be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Court for the Trial of Impeachments and the Correction of Errors, in order that further proceedings may be had therein, in conformity to the aforesaid opinion and judgment of this court. [*573

Norris v. *The City of Boston.*

This cause came on to be heard on the transcript of the record of the Supreme Judicial Court of Massachusetts, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the third section of the act of the legislature of the Commonwealth of Massachusetts of the 20th of April, 1837, entitled, "An act relating to alien passengers," under which the money mentioned in the record and pleadings was demanded of the plaintiff in error, and paid by him, is repugnant to the Constitution and laws of the United States, and therefore void. Whereupon, it is now here ordered and adjudged by this court, that the judgment of the said Supreme Judicial Court of Massachusetts be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Supreme Judicial Court, in order that further proceedings may be had therein in conformity to the aforesaid opinion and judgment of this court.

JOHN TYLER, WHO IS A CITIZEN OF VIRGINIA, PRESIDENT OF THE UNITED STATES, AND SUCCESSOR IN OFFICE OF MARTIN VAN BUREN, AND TRUSTEE FOR THE USE OF THE ORPHAN CHILDREN PROVIDED FOR IN THE NINETEENTH ARTICLE OF THE TREATY WITH THE CHOCTAWS, OF SEPTEMBER, 1830, PLAINTIFF IN ERROR, *v.* JOHN H. HAND, JOHN HUDDLESTON, AND THOMAS G. BLEWETT, DEFENDANTS IN ERROR.

A general demurrer by the defendant, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer, which is an objection for defects in form.

In this case, none of the reasons are valid as objections to a matter of form, but the court, nevertheless, will examine them as if brought forward to sustain a general demurrer.

Where bonds were given to the President of the United States, and his successors in office, for the use of the orphan children of certain Indians, and the declaration so averred, it was not a good cause of demurrer to allege that they were taken without authority of law. They were valid instruments, though voluntarily given and not prescribed by law; and as the demurrer admitted the facts stated in the declaration, the defendant was estopped from contesting the right of the obligee to sue.

*574] *So, also, it was not a valid reason to say, in support of the demurrer, that the bonds were given without consideration; and if there was any illegality in the transaction, it should have been pleaded in bar.

Where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff.

So, also, it is not good ground for the defendant to say that the plaintiff has shown no title to the bonds. It is not a good objection to a matter of form or substance.

Nor was it a good ground of demurrer to say that the *cestui que* use was not named in the declaration. The demurrer admits that the recital of the use in the declaration was correct, and it was not necessary for the plaintiff to set out the individual uses, when the uses were general in the bonds.

THIS cause was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

The circumstances were these.

By the treaty of Dancing Rabbit Creek, of the 27th September, 1830, the Choctaw nation ceded to the United States the entire country they owned and possessed east of the Mississippi River. The nineteenth article (7 Stat. at L., 336, 337), allowing certain reservations to be made, by its sixth section provides as follows:—

"Sixthly. Likewise, children of the Choctaw nation, residing in the nation, who have neither father nor mother, a list of which, with satisfactory proof of parentage and orphanage, being filed with the agent in six months, to be forwarded to the War Department, shall be entitled to a quarter-section of land, to be located under the direction of the President; and with his consent the same may be sold, and the proceeds applied to some beneficial purpose for the benefit of said orphans."

The number of orphans entitled to the provision above recited was one hundred and thirty-four; and the lands having been selected, the same were sold in quarter-sections at public sale in 1838, by Mr. Aaron V. Brown, under the direction of President Van Buren, for a sum amounting to

upwards of one hundred and thirty-five thousand dollars. The purchasers were entitled to a credit of two, four, and six years, were to give security for the payment of the purchase-money, with interest, and no title was to be given until the whole amount of principal and interest was paid. Thomas G. Blewett became a purchaser of several pieces of the land, and, together with John H. Hand and John Huddleston, executed joint and several bonds to "Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaws of September, 1830." The bonds bore the *following dates, and were for the following sums of money, viz.:— [*575

1838, May 28,	$300	1838, May 28,	$250
" " "	300	" June 6,	300
" " "	300	" " "	300
" " "	300	" " "	350
" " "	600	" " "	450

The bonds were given as security for the payment of the interest upon certain notes for the principal, which last-mentioned notes were recited in the above ten bonds.

In May, 1843, John Tyler, as President of the United States, brought an action of debt upon these bonds in the District Court for the Northern District of Mississippi, which exercised the jurisdiction of a Circuit Court.

The declaration contained a count for each separate bond, the first of which was as follows, viz:—

"John Tyler, who is a citizen of Virginia, President of the United States, and successor in office of Martin Van Buren, and trustee for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaws of September, 1830, by attorney, complains of Thomas G. Blewett, John Huddleston, and John H. Hand, citizens of the State of Mississippi, being in the custody of the marshal, &c., of a plea that they render unto him the sum of thirty-four hundred and fifty dollars, which to him they owe, and from him unjustly detain; for that whereas the said defendants, by the way and style of Thomas G. Blewett, John Huddleston, and J. H. Hand, heretofore, to wit, on the 28th day of May, A. D., 1838, at, to wit, in the district aforesaid, by their certain writing obligatory, sealed with their seals, and now here to the court shown, the date whereof is a certain day and year therein mentioned, to wit, the day and year aforesaid, jointly and severally acknowledged themselves to be held and firmly bound to Martin Van Buren, President of the United States,

and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaws of September, 1830, in the sum of three hundred dollars, to be paid to the said Martin Van Buren, President as aforesaid, and his successors in office, in good and lawful money of the United States; and the said plaintiff avers that he is President of the United States, and a successor in office of Martin Van Buren, which said writing obligatory was and is subject to a condition thereunder written, to wit, that whereas the said Thomas G. Blewett, on the 28th day of May, 1838, at a public sale of the Choctaw orphan lands, had

*576] and held in the town of Columbus, *became and was the purchaser of northwest quarter of section thirty-two, township twenty-three, range eight east, for which the said Thomas G. Blewett has executed his three several notes with Thomas McGee, John Huddleston, and John H. Hand, his security, to Martin Van Buren, President of the United States, for the use of the Choctaw orphan children provided for in the nineteenth article of the treaty with the Choctaws of September, 1830, to wit, one note dated the 28th day of May, 1838, and due the 28th day of May, 1840, for two hundred and fourteen dollars and twenty-six cents; one other note of same date and amount, due the 28th day of May, 1842; and one other note of the same date and amount, due the 28th day of May, 1844. All of said several bonds or notes, by the terms of said purchase, are to bear interest from their date at the rate of six per cent. per annum. Now, if said Thomas G. Blewett shall pay or cause to be paid interest at the rate of six per centum per annum on said several notes at the expiration of each and every year from the date of the same, in good and lawful money of the United States, at the office of the Commissioner of Indian Affairs, in Washington city, then this obligation to be void, otherwise to be good and binding as by the said writing obligatory, and the condition thereof will more fully and at large appear.

"Nevertheless," &c. (setting out the breach).

To this declaration, the defendants filed the following demurrer, viz.:—

"And said defendants, by attorney, come and defend the wrong and injury, when, &c., and say that the plaintiff ought not to have or maintain his aforesaid action thereof against them, because they say that the declaration and matter therein contained are insufficient in law for the plaintiff to maintain his aforesaid action thereof against them, and that they are not bound by law to answer the same, and this they are ready to verify; wherefore, they pray judgment, and that

the plaintiff be barred from having or maintaining his aforesaid action thereof against them, and according to the statute they state and show the following causes of demurrer, viz.:—

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit.

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same.

"3d. That the parties for whose use the suit is brought (who, *by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the [*577 record.

"4th. That said bonds sued on were taken without authority of law, the said Martin Van Buren, President of the United States, having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office and not given by law.

"5th. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The plaintiffs joined in demurrer, and in December, 1844, the case was argued upon the demurrer, which was sustained by the court.

To review this judgment, a writ of error brought the case up to this court.

It was argued at the preceding term, and held under a *curia advisare vult.*

It was argued, on the part of the plaintiff in error, by *Mr. Clifford*, then Attorney-General, and on the part of the defendants in error, by *Mr. Eaton* and *Mr. Foote*, with whom were *Mr. S. Adams* and *Mr. Bibb.*

The *Attorney-General*, for the plaintiff in error, stated the facts in the case, and proceeded as follows.

For error it is assigned,—

1st. That the suit was well brought in the name of John Tyler, a citizen of the State of Virginia.

2d. That the plaintiff, as the successor of President Van Buren, had title to the bonds sued on.

3d. That there was no necessity that the parties for whose use the suit was brought should be named in the record.

4th. That the bonds sued on were lawfully taken to Mr. Van Buren, as President, and his successors in office.

5th. That Mr. Van Buren had authority to dispose of the lands, and that there was no failure of consideration.

I. The declaration avers, that John Tyler, the plaintiff, is a citizen of the State of Virginia, President of the United States, and successor in office of Martin Van Buren. This is the usual mode of averring citizenship, and meets the requirements of the Constitution and the Judiciary Act on the subject.

*578] *II. The declaration avers, that the bonds were taken payable to Martin Van Buren, President of the United States, and his successors in office. If Mr. Van Buren had any title to the bonds in question while President, and as President, then Mr. Tyler, as his successor, had the same title. The title was not in Mr. Van Buren individually, but in him as President. The bonds were executed to him as President of the United States, and his successors; and the suit is well brought in the name of Mr. Tyler, who was in office at the time it was commenced. No principle is better settled than the one which asserts that no suit could be commenced in the name of Mr. Van Buren after he had retired from the office of President, and of course it must be brought in the name of his successor, according to the terms of the bond. This is the law and the contract. The point is destitute of all merit, as it seems to me, and need not be further examined.

III. There is no law requiring a plaintiff who sues as trustee to name in the record the parties for whose use the suit is brought; and if there were, it could not apply to a case like the present. It is presumed the demurrer is based upon the thirtieth section of the process act of Mississippi, which falls far short of sustaining the position assumed by the defendants. It provides that, "if any suit or action shall be commenced in any court of record in this State, in the name of any person for the use and benefit of another, the same shall not abate by the death of the nominal plaintiff, but shall progress to final judgment, and execution may be awarded thereon in like manner as if brought in the name of the person for whose use or benefit such suit or

action was instituted, who shall be liable for the costs of suit as in other cases." (H. & H. Miss. Laws, 584.)

The act nowhere makes any such requirement as is supposed by the demurrer. It authorizes the suit to progress, notwithstanding the death of the nominal plaintiff; and in such cases costs are allowed.

This action is therefore well brought in the name of the trustee, who must hold whatever may be recovered, subject to the disposition which the law authorizes and directs, for the benefit of the *cestui que trust*. This point, being unaffected by the Mississippi act, stands upon general principles, which are clearly against the defendants.

The description given of the *cestui que trusts* in the declaration follows the language of the bond, and is therefore sufficient. It might, however, have been wholly omitted, and, being entirely immaterial, may be rejected as surplusage, and cannot embarrass the suit.

*IV. That these bonds were lawfully taken, and made payable to the President for the time being, and to his successors in office, there can be no doubt. To take securities for the lands sold, if it should be deemed most advantageous for the interests of the Indian orphans that they should be sold on credit, was not only an incident to the power to make the sale, but an obvious duty incumbent on the President. It was no more than an act of common prudence to see that the securities were executed in such form that payment could be enforced, if delayed beyond the period when he might expect to retire from office, and to leave the trust reposed in him in the hands of a successor. *United States* v. *Tingey*, 5 Pet., 115; *Lord* v. *Dall*, 12 Mass., 115; *Dugan* v. *United States*, 3 Wheat., 172; *Commonwealth* v. *Wolbert*, 6 Binn. (Pa.), 292. [*579

V. The fifth ground of demurrer raises the main question involved in the case. The defendants contend that the bonds were given without any actual consideration; the President having, as they allege, no authority to dispose of the lands.

The first question is, Can this point be raised on the record as it stands? The declaration does not state of whom the purchase was made, or by what authority the sale took place. Until it otherwise appears, it must be presumed that it was made by virtue of a lawful authority. A bond under seal imports a consideration without its being expressed: and a want or failure of consideration is not sufficient at law to avoid a specialty. (*Vrooman* v. *Phelps*, 2 Johns. (N. Y.), 177; *Dorlan* v. *Sammis*, Id., 179; *Dorr* v. *Munsell*, 13 Id., 430.) A note in Petersdorff's Abridgment, Vol. IV., p. 613,

cites a number of cases to the same effect, and defines the true rule on the subject.

It is a very great error, as it seems to me, to suppose that there is any want of consideration in these bonds appearing on the face of the record and pleadings. It is a familiar principle that the demurrer admits every thing that is well pleaded; and under this rule the point is not open to the defendants even by the Mississippi statute, which requires a special plea to authorize a party "to impeach any writing under seal, or to go into the consideration of the same." (H. & H. Miss. Laws, 589.)

But was it competent for the President to direct the sale of these lands? It is contended, on the part of the defendants, that he had no such authority, but that the Indian orphans took a fee-simple estate under the treaty, as tenants in common, and that they were in all respects competent to dispose of the lands thus vested in them, subject only to the *580] consent of *the President for the time being. It is, however, insisted for the plaintiff, that the terms of the provision do not in the least degree countenance any such construction of the treaty. It might, perhaps, be considered a sufficient answer to this proposition of the defendants, to ask the attention of the court to the fact, that no particular Indian, for whose benefit the lands were to be reserved and selected, is named in this provision. Even the number entitled was unknown, and had to be subsequently ascertained in virtue of the stipulation under which this pretension is set up.

The true intent and purpose of the provision seems to me to be apparent. It was to create a trust for the benefit of the orphans, of which the President of the United States was declared to be the trustee, and which he was to execute. The object of the trust was to create a fund for the benefit of the orphans, in which all were to participate equally. This is the leading idea in the provision. The construction contended for on the other side would defeat the end intended to be accomplished. The language of the provision is not, it is admitted, precise, but its true meaning and intention cannot well be mistaken. When the number of orphans entitled had been ascertained in the manner prescribed, and the list of them forwarded to the War Department, the lands were to be located under the direction of the President, and with his consent sold, and, with the like consent, the proceeds were to be applied for some beneficial purpose for the benefit of the orphans. The legal title to the lands in question was vested in the United States, and

was held by them in subordination to this provision, giving authority to the President to sell and invest the proceeds for some beneficial object in accordance with the trust. That the legal title to the whole lands of the Choctaw nation east of the Mississippi became vested in the United States is clear, not only from the third article by which the cession is made, but from the fourteenth, which provides for reservations to such Choctaws as were desirous to become citizens of the United States, and especially from the provision which stipulates that grants in fee simple should issue from the United States to this class of Indians. The other reservations in the nineteenth article are to certain parties by name, and to certain classes of the Indians who had made improvements, and furnish no argument to illustrate this case. These reservations stand on a very different footing from those of the orphans. They were ascertained and certain, and constituted the homes in which the Indians lived. But in the case of the orphans, the lands had no identity, and, when selected, were to be sold to raise a fund for their benefit.

*Mr. *Eaton* and *Mr. Foote*, for the defendants in error, rested their argument upon the point that the [*581 President had no power to order the sale; that the treaty secured to him no such authority, and that if he could be considered in the character of trustee, even then he was incapable by law to delegate the trust to another, and being so delegated, the act and every thing under it were void. This point was illustrated with great particularity.

Mr. Adams contended that the court below did not err in sustaining the demurrer, and that the judgment should be affirmed:—1st. For the reasons that the President had no authority to sell, had no title in himself, nor obligation upon others to make title; that he was not a trustee with power to sell for the benefit of the Indians, or otherwise; and that the contract is void for the want of proper parties and consideration. 2d. That the fee is still in the reservees, who cannot be deprived of it but by their own act, with the consent of the President, or the law. 3d. For the reasons assigned in the first, second, third, and fourth special causes of demurrer.

Mr. Justice WAYNE delivered the opinion of the court.

This suit is brought upon ten bonds payable to Martin Van Buren, President of the United States, and his successors in office, for the use of the orphan children provided

for in the nineteenth article of the treaty with the Choctaw Indians of September, 1830.

The principal and interest due upon the bonds are demanded, and the plaintiff in the action, John Tyler, sues as successor of Martin Van Buren and trustee for the orphan children.

The defendants have demurred to the plaintiff's declaration, pursuing the usual form of a general demurrer, and have added thereto several special causes of demurrer. There is a joinder in demurrer. Upon these pleadings, the court below sustained the demurrer of the defendants. It is that judgment which is now before this court by writ of error.

In our opinion, there is error in the judgment. We shall reverse it, with an order to the court below to enter up a final judgment for the plaintiff.

The cause is not before us on the grounds upon which it was placed in argument by the counsel of the defendants, except as to the insufficiency of the facts averred in the plaintiff's declaration to entitle him to recover, or to enable the defendants to sustain their demurrer.

A demurrer is an objection made by one party to his opponent's pleading, alleging that he ought not to answer it, for *582] *some defect in law in the pleading. It admits the facts, and refers the law arising thereon to the court. (Co. Lit., 71 *b*; 5 Mod., 132.) The opposite party may demur when his opponent's pleading is defective in substance or form, but there can be no demurrer for a defect not apparent in the pleadings. This being so, the question now is, whether or not, notwithstanding the objections in substance and form which the defendants have made to the plaintiff's declaration, sufficient matter appear in the pleadings, upon which the court may give judgment according to the very right of the case. Five special causes of demurrer are assigned; they were of course meant to be objections for defects in form, as none other can be assigned in a special demurrer. A general demurrer lies only for defects in substance, and excepts to the sufficiency of the pleading in general terms, without showing specially the nature of the objection. A special demurrer is only for defects in form, and adds to the terms of a general demurrer a specification of the particular ground of exception.

Our first remark, then, is, that neither of the special causes of demurrer alleged in this case is for a matter of form. They are as follows:—

"1st. That there is no sufficient averment in the proceedings or record showing the citizenship or place of abode of

the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain said suit.

"2d. That the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain the same.

"3d. That the parties for whose use the suit is brought (who, by the laws of Mississippi, are the real plaintiffs, and responsible for costs) are not named in the record.

"4th. That said bonds sued on were taken without authority of law, the said Martin Van Buren, President of the United States, having no such delegated power, and having no right to make the same payable to himself and his successors in office, or to assume to himself or his successors in office a legal perpetuity and succession unknown to the said office, and not given by law.

"5th. That said bonds in the declaration mentioned appear, from the face of the pleadings, to have been given without any actual consideration, and by virtue of an assumption of authority on the part of said Martin Van Buren to dispose of said orphan Indian lands at public sale, without any legal right to sell the same. And because the said declaration is in other respects informal and insufficient."

The case, then, is before the court upon a general demurrer, in which must be considered the whole record, and judgment should be given for the party who on the whole appears to be entitled to it. (*Le Bret* v. *Papillon*, 4 East, 502.) It cannot be better shown in this case for whom the judgment should be, than by showing that the special causes of objection assigned, supposing them to have been made as matters of substance, are not sufficient in law to prevent a recovery by the plaintiff. We will first speak of the fourth and fifth, because they are the chief reliance of the defendants to show that no judgment can be rendered against them. [*583

The fourth is, that the bonds given by the defendants were taken without authority of law. The fifth is, that it appears from the face of the pleadings they were given without any actual consideration. Neither of these points can be raised in this case by a demurrer. As to the first of the two, it was not necessary to aver in the declaration that the bonds were taken with the authority of law,—nor is it so averred. The bonds are made to the President of the United States and his successors in office, for the use of the orphan children provided for in the nineteenth article of the treaty with the Choctaw Indians of September, 1830. They are so recited in the

declaration, and are admitted by the defendants to have been given by them. In point of law, then, they are valid instruments, though voluntarily given, and not prescribed by law. (*United States* v. *Tingey*, 5 Pet., 115.) It is not the case of a bond given contrary to law, or in violation of law, but that of bonds given voluntarily for a consideration expressed in them to a public officer, but not happening to be prescribed by law. Nor does it matter that they are made to the President of the United States and his successors in office, if the political official character of the President is recognized in them, and is so averred in the declaration. This cause of demurrer, whether well taken or not, admits the fact that the bonds were given, and estops the defendants from denying it as a matter of form, or from contesting by a demurrer the right of the obligee and his successors in office to sue the obligors at law. As to the alleged want of consideration for these bonds, as stated in the fifth special cause of demurrer, that affords no ground for a demurrer, as a bond cannot be avoided at law either for a want or failure of consideration, and any thing illegal in the consideration can only be pleaded in bar to the action. (*Fallowes* v. *Taylor*, 7 T. R., 475.)

But it is said that these bonds were given without any actual consideration, the President, as it is alleged, having no authority to dispose of the land. What of that? The declaration does not state of whom the purchase was made, or by *584] *what authority the sale took place. The defendants admit that a sale did take place, that they were purchasers of the lands, and that they gave the bonds voluntarily, according to the terms of sale. Neither of these questions, then, can be raised under the demurrer of the defendants, and could not have been the foundation of the judgment given in their favor.

Having disposed of the fourth and fifth special causes of demurrer, we will now inquire, in their order, whether or not the judgment which was given can be sustained upon either of the other alleged grounds.

The first is, "That there is no sufficient averment in the proceedings showing the citizenship or place of abode of the plaintiff, or that he is, by reason of the nature of his place of abode and citizenship, entitled by law to maintain this suit." This cannot justify the judgment, because it is demurring in abatement. In such a case the plaintiff is entitled to final judgment. If the matter of abatement be extrinsic, the defendant must plead it. If intrinsic, the court will act upon it upon motion, or notice it of themselves. (*Dockminique* v. *Davenant*, Salk., 220.) But it does not follow, because a de-

murrer in abatement cannot be available for the defendant, that it is to be rejected altogether from the pleading, if tendered in proper time. It will be received, but being erroneously put in, it entitles the plaintiff to final judgment, so that for this reason the judgment of the court below would have to be reversed.

Perhaps the best exposition of this point of pleading anywhere to be found is that given in *Furniss et al.* v. *Ellis and Allen*, in 2 Brock., 17, by Chief Justice Marshall. He says, "The cases quoted to show that the demurrer is not good, do not show that even in England it ought not to be received, if tendered in proper time. In 5 Bac. Abr., 459, it is said, if a defendant demur in abatement, the court will, notwithstanding, give a final judgment, because there cannot be a demurrer in abatement. This does not prove that the demurrer shall be rejected, but that it shall be received, and that the judgment upon it shall be final. A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Salk., 220, is quoted by Bacon, and is to the same purport, indeed in the same words. These cases show that a demurrer, being in its own nature a plea to the action and being even in form a plea to the action, shall not be considered as a plea in abatement, though the *special cause alleged for demurring be matter of abatement. This court will disregard these special causes, and, considering the demurrer independently of them, will decide upon it as if they had not been inserted in it." And then the Chief Justice adds, in respect to the particular case then in hand, that "these cases go far to show that the court would overrule the demurrer, and decide the cause against the party demurring, not that it should be expunged from the pleadings." [*585

The second ground of special demurrer is, that the plaintiff shows no title to the bonds or obligations sued on, nor such an interest in the suit as will authorize him to maintain an action on the same. Neither fact stated is a matter of form, and cannot therefore be a cause for a special demurrer. But taking them as matters of substance, the insertion of them in the plaintiff's declaration is not necessary to show his right to sue and recover upon these bonds, or material for the defendants in their plea. This objection will not avail to sustain the judgment.

The remaining objection to be considered is the third in order stated, and may be as briefly and as satisfactorily dis-

posed of as some of the rest have been. It is, that the parties for whose use the suit is brought are not named, who by the laws of Mississippi are the real plaintiffs, and responsible for costs. We remark, that for whose use the bonds were taken is not recited as personal to any of the Choctaw orphans, but as an aggregate for all such as were entitled to lands under the nineteenth article of the treaty. The demurrer admits that the bonds were so made by the defendants, and that the recital in the declaration is as the fact is expressed in the bonds. The inquiries, then, into who are individually the orphan children residing in the Choctaw nation, or who by name are entitled to a quarter-section of land, or any such averments in the plaintiff's declaration, were not necessary to entitle him to recover, and could not be shown either as a cause of special demurrer or be urged under a general demurrer, to prevent a recovery in this case.

All of us are of the opinion, that there is nothing in the causes of demurrer which were shown in argument, or in the special causes assigned, to sustain the demurrer, and thinking, as we all do, that nothing has been shown to lessen the obligation of the defendants to pay these bonds, or their liability to be sued for them at law, we shall direct the judgment of the court below to be reversed, with costs, and shall order the cause to be remanded to the District Court, with directions to that court to enter judgment in this case (principal and interest) for the plaintiff in that court.

*586] *ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said District Court, with directions to that court to enter judgment in this case for both principal and interest for the plaintiff in that court.

JOSHUA KENNEDY'S EXECUTORS ET AL., PLAINTIFFS IN ERROR, *v.* LESSEE OF JONATHAN HUNT, JOHN HAGAN ET AL., DEFENDANTS IN ERROR.

Forbes and Company obtained a grant of land in 1807 from Morales, Intendant-General under the Spanish government, which land was adjacent to Mobile, in West Florida. This grant purported to be, in part, the confirmation of a concession granted in 1796 and surveyed in 1802. The survey terminated at high-water-mark upon the river.

The grant of 1807 included the land between the then bank of the river and the high-water-mark of 1802.

This grant of 1807 was excepted from the operation of the act of Congress passed on the 26th of March, 1804, which annulled all Spanish grants made after the 1st of October, 1800, and was recognized as a valid grant by the act of 3d March, 1819.

An act of March 2d, 1829, confirmed an incomplete Spanish concession which was alleged to draw after it, as a consequence, certain riparian rights conflicting with those claimed under the grant of 1807.

A decision of a State court, giving the land covered by these riparian rights to the claimants under the grant of 1807, was only a construction of a perfected Spanish title, and cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. It did not draw in question an act of Congress or any authority exercised under the Constitution or laws of the United States.[1]

THIS case was brought up from the Supreme Court of the State of Alabama, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. John O. Sargent* and *Mr. Johnson*, for the plaintiffs in error, and by *Mr. Underwood* and *Mr. Sargeant*, for the defendants in error.

The points made by the counsel for the plaintiffs in error were the following.

"The action was ejectment brought by plaintiffs below in the Circuit Court for Mobile county, to recover [*587 a piece of ground and ground covered with water, on Mobile River.

Plaintiffs gave in evidence the Spanish Orange Grove grant of 1807 to Forbes & Co., and the act of Congress entitled, "An act adjusting the claims to land, and establishing land-offices in the districts east of the island of New Orleans," passed 3d March, 1819. (3 Stat. at L., 528.)

Defendants gave in evidence a Spanish concession of 1798 to Thomas Price, and an act of Congress of 2d March, 1829,

[1] CITED. *Moreland v. Page*, 20 How., 523.

entitled, "An act confirming the reports of the register and receiver of the land-offices for the district of St. Stephens, in the State of Alabama, and for other purposes," confirming said title by United States with surveys, location, certificate, report, and patent by United States to Joshua Kennedy, and the mesne conveyances from Price to defendants. (4 Stat. at L., 358.)

I. The right of the defendants to the land in controversy was asserted under the act of 1829, and the decision of the court below was against that right. This brings the case clearly within the twenty-fifth section of the Judiciary Act.

In 1798, Price prayed Governor Gayoso to grant him a tract of twenty arpens by thirty, bounded on the east by the lots in the town of Mobile, and the river of said town. The donation was ordered accordingly, November 10, 1796.

In 1806, it was confirmed by the commandant, according to a plan accompanying his petition, and the deputy surveyor was ordered to survey the tract and make the boundaries, according to a "copy from the surrounding survey."

This tract, thus bounded, was confirmed by the act of 1829.

The patent, plan, survey, &c., all show that the confirmation contemplated the original boundaries; one of which, on the east, was the River Mobile.

Defendants insist that they are still entitled to go to the river, as one of their eastern boundaries; that the act of 1829 operated to confirm the title of Price to the tract described in the concession of 1798.

The decision of the court below was against the title or right set up under this act.

II. The court below charged the jury that the construction of the plaintiffs' (Forbes & Co.) grant as confirmed would authorize them to go to the channel of the river; and that the boundaries of the plaintiffs' grant must be run and continued eastwardly till they reach the channel of the river.

Defendants excepted.

The grounds of exception are not specifically stated. It is *588] *supposed that the exception lets in all legal objections of which the defendants could have availed themselves below. They appear in the record certified from the Supreme Court, and are alluded to in the opinion of the court. They set up the act of March 2, 1819, entitled, "An act to enable the people of the Alabama Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States," as a bar to the plaintiffs' claim, by establishing

an outstanding title to the land in controversy in the State of Alabama. This is supposed to be a perfect defence. If the United States, on the 2d of March, 1819, dedicated the shore of Mobile River to Alabama, they could not grant it subsequently to an individual, or confirm an invalid Spanish grant to make it so operate. The court below decided, in effect, that the act in question did not vest the shore in Alabama, and that Congress could grant it to an individual. It is apparent on the record, that the construction of this statute was called in question, and that the judgment of the State court would not have been what it is, if there had not been a misconstruction of this statute to the injury of the defendants below, or a decision against the validity of the right, title, privilege, or exception set up under it; or, in other words, the question is necessarily involved in the decision, and the State court could not have given the judgment or decree which they passed without deciding it. (3 Pet., 398; 16 Pet., 285.)

III. The court below refused to charge, that, if the jury believed the line of division between the Forbes and Price grants was drawn by authority of the United States, and surveyed and patented to Price's assigns, and being a United States survey and location of both tracts, such survey was binding on the plaintiffs, and the said two titles would cease where such survey ceased to the east, and the riparious rights would commence where such survey ceased, according to the front of each.

Defendants excepted.

The court below charged that the grant of the plaintiffs, being confirmed by the act of 1819 as a complete title, it could not be affected or limited by any survey made by the authority of the United States, and that the jury should find without any regard to any such survey.

Defendants excepted.

Defendants insist that the surveys in evidence were made by authority of the United States, under the acts of 1819 and 1829, and of other acts providing for the survey and location of claims to land in the township of Mobile.

*They further insist, that, by their charge, and their refusal to charge as requested, and their rejection of the United States surveys, the court ruled against the validity of an authority exercised under the United States. [*589

IV. Both parties claim under acts of Congress; the defendants below under that of 1829, confirming the concession to Price; the plaintiffs under that of 1819, confirming the invalid Spanish grant to Forbes & Co. The decision could not but

be against the right set up by the defendants under the one statute, if it was in favor of the right set up by the plaintiffs under the other.

The record sets out the title on each side, together with the facts and the charge of the court; from which it appears, that the decision of the State court of Alabama was opposed to the right of the plaintiffs in error, the judgment of the Circuit Court having been affirmed. The construction and application are called for of the acts of Congress on which the controversy depends.

In the *City of Mobile* v. *Eslava*, 16 Pet., 249, Mr. Justice Catron cites *Matthews* v. *Zane*, 4 Cranch, 382; *Ross* v. *Barland*, 1 Pet., 664; *Wilcox* v. *Jackson*, 13 Pet., 509; *Pollard's Lessee* v. *Kibbe*, 14 Pet., 353, as establishing the doctrine, that where both sides claim under acts of Congress, and come to this court under the twenty-fifth section for their construction, the court proceed upon the whole case, and for either side.

On the whole, it is manifest from the record that the judgment of the court below could not have been what it is, if there had not been a decision against the right and title set up by the defendants below under the act of 1829; or against the defence they set up under the act of the 2d of March, 1819; or against the validity of an authority exercised under the laws providing for the survey and location of claims in the township where the land in controversy lies.

The counsel cited the following authorities in support of the jurisdiction of the court.

Pollard's Lessee v. *Kibbe*, 14 Pet., 360; *Wallace* v. *Parker*, 6 Pet., 687; *Owings* v. *Norwood's Lessee*, 5 Cranch, 344; *Harris* v. *Dennie*, 3 Pet., 298; *Davis* v. *Packard*, 6 Pet., 48; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 250; *Martin* v. *Hunter's Lessee*, 1 Wheat., 355; *Miller* v. *Nicholls*, 4 Wheat., 311; *Williams* v. *Norris*, 12 Wheat., 117; *Mobile* v. *Eslava*, 16 Pet., 249; *Craig* v. *State of Missouri*, 4 Pet., 427; *Chouteau* v. *Eckhart*, 2 How., 372; *Matthews* v. *Zane*, 4 Cranch, 382; *Ross* v. *Barland*, 1 Pet., 664; *Wilcox* v. *Jackson*, 13 Pet., 509.

590*] *Mr. Justice CATRON delivered the opinion of the court.

This case comes here by writ of error to the Supreme Court of Alabama, under the twenty-fifth section of the Judiciary Act of 1789, and the first question made by the defendants in error is, whether any matter presented by the record will authorize this court to exercise jurisdiction under the

twenty-fifth section. And to ascertain how far, if at all, the powers of this court can be called into exercise, the facts and the laws bearing on them must be stated in something of detail; as in this case, in common with many others, it is found much more difficult to settle the question of jurisdiction, and how far it extends, than it would have been to decide the merits of the controversy had the cause been brought here by writ of error to a court of the United States.

Hunt, Hagan, and others, sued in ejectment Kennedy's executors and other tenants in possession, for about ten acres of land lying in the city of Mobile, in the State Circuit Court. The plaintiffs claimed title to the premises sued for under a grant made to John Forbes & Co. in 1807, by Morales, Intendant-General under the Spanish government in the province of West Florida, Spain being then in possession of the province and exercising jurisdiction. The grant, by its recitals, purports to be, in part, the confirmation of a concession, and survey founded on it, of earlier dates; say 1796 and 1802, in favor of Panton, Leslie, & Co., to which firm Forbes & Co. were successors. The concession was surveyed in 1802 by Collins, an authorized surveyor under the Spanish government, and its eastern boundary terminated on the bank of the Mobile River, at high-water-mark; the survey contained two hundred and sixty-three acres, equal to about three hundred arpens. To the extent of Collins's survey there is no controversy, but Forbes & Co. solicited the Intendant-General in 1807 to grant them the flowed land lying east of the eastern boundary of the survey, and between the same and the channel of the river, and which the Intendant proceeded to do, in the following terms: —"And as the distance that is observed in the map from the river to the boundary-lines of the land, which was left vacant at that time in consequence of its having been impassable, has since become of great use to the claimants, having constructed levels and the necessary drains, in consideration of which it has been granted to them as a compensation for their labor thereon invested, with the reserve such as necessary to allow a free passage along the bank of the river, without altering the figure of the tract on either of the other sides. Wherefore, using and exercising the powers which the king our lord—God preserve him!—has conferred on me, I do *in his royal name confirm [*591
and ratify to the aforesaid John Forbes & Co. the possession of the three hundred and ten arpens, seventy-seven perches and one eighth, already mentioned, and which are contained in the map (No. 1809), with the corrections made by the surveyor-general, in order that they may own and pos-

sess the same, sell and alienate the land at their own and entire pleasure, without prejudice to any third person who may have a better right, on condition that they should observe and fulfil the requisitions of the land regulations formed and published by the intendancy on the seventeenth of July, 1799, as far as the local situation and quality of the land will permit."

According to Spanish usages and regulations, the grant to Forbes & Co. was a perfect title, and as such binding on the government of Spain, although made in 1807, after that government had parted with its power to grant, according to our construction of the treaty of 1803, the limits of which were claimed by this government to extend east to the River Perdido, and which claim has been upheld and established by the political and judicial departments of the United States. The first conclusive step was taken by Congress as early as 1804, when, by the act of March 26th of that year, it was declared that all grants made by the Spanish authorities after the 1st day of October, 1800, (the date of the treaty of St. Ildefonso,) should be held and deemed to be void. But the act excepted from its operation "any *bonâ fide* grant made agreeably to the laws, usages, and customs of the Spanish government, to an actual settler on the lands so granted for himself and for his wife and family"; and also excepted "any *bonâ fide* act or proceeding done by an actual settler agreeably to the laws, usages, and customs of the Spanish government, to obtain a grant for lands actually settled on by the person or persons claiming title thereto, if such settlement, in either case, was actually made prior to the 20th day of December, 1803." Some restrictions were imposed on actual settlers in regard to quantity, that have no application to the grant of Forbes & Co.

The Spanish grant recites that Forbes & Co. had been settled on the land granted, and that it had been occupied and cultivated by them since the year 1796, and up to the date of the grant, and such was the proof made before our commissioner, and therefore the "proceeding" by which the imperfect title of Forbes & Co. was completed was within the second exception of the act of 1804. That the grant made by the Intendant-General Morales, in 1807, was in itself, unaided by the sanction of Congress, a valid title, we *592] do not *assert; but being reported on by the commissioner as a title complete in form, according to the usages and laws of Spain, and recognized and sanctioned by Congress as a perfect title by the act of 1819, the courts of justice are concluded by the action of the political department, and bound to pronounce the grant to Forbes & Co. a

perfect title in substance as well as form, because the claim was within the exclusive jurisdiction of the political department in 1819, when Congress acted on it. Such is the well-established doctrine of this court, as will be seen by the cases of *Chouteau* v. *Eckhart*, 2 How., 344; *Mackay* v. *Dillon*, 4 Id., 421; and especially that of *Les Bois* v. *Bramell*, 4 Id., 461.

Nor did the grant of Forbes & Co. require any further step to perfect its boundary. This being the *primâ facie* condition of Forbes & Co.'s grant, the next inquiry is whether those claiming under Kennedy's title were in a condition, on the trial in the State court, to call the plaintiffs' title in question.

The defendants below claimed by virtue of an act of Congress, passed March 2, 1829, confirming an incomplete Spanish concession made to Thomas Price. By the fourth section of the confirming act of 1829, it is provided, "that the confirmations of all the claims provided for by this act shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tracts of land and town lots so confirmed, and that nothing herein contained shall be construed to affect the claim or claims of any individual or body politic or corporate, if any such there be."

And by the fifth section of said act, the register and receiver of the land-office at St. Stephens were invested with power, within their district, to direct the manner in which all claims to lands and town lots which had been confirmed by that act should be located and surveyed; having reference to the laws, usages, and customs of the Spanish government on the subject, and also to the mode adopted by the government of the United States, pursuant to the act of March 3, 1803. And by section sixth, certificates of confirmation and patents were ordered to be granted for all lands and town lots confirmed by the act.

According to the act, the claim of Joshua Kennedy (representative of Thomas Price) was duly surveyed on the 2d of February, 1836, and in May, 1837, a patent was taken out by Kennedy for the land described in the survey. The calls in the patent, having any connection with the present controversy, are as follows:—"Thence north, 69° 5′ east, 15 chains 44 links, to the ancient margin of the River Mobile, being *34½ links west of the south angle of St. Louis and Water Streets; thence north, 66° west, nine chains [*593 and seventy-six links, to the southeast corner of the Orange Grove tract granted to John Forbes & Co." The next line runs north, 82° west, with the southern boundary of Forbes & Co.'s tract.

The southeast corner of the Orange Grove tract is an iron-

bound stake, well known, and from which the Spanish survey made by Collins runs due north, and from that line east to the channel of the river the land was added by the grant of the Intendant-General Morales, in 1807.

The line of Kennedy's grant fronting towards the river runs 66° west of north, and it is contended that Kennedy, as a front proprietor, is entitled to claim a riparian right to the channel of the river, according to lines drawn at right angles to the front line and from each terminus thereof, unless some other claim shall interfere; and it is insisted that the addition made to Forbes & Co.'s grant in 1807 cannot hinder the assertion of Kennedy's riparian right, because the addition was made after Spanish authority ceased, and for so much the grant of 1807 is void, and being out of the way, Forbes & Co. can only claim as front proprietors, riparian rights in like manner that Kennedy himself claims; and to extend Forbes's southern line east, and Kennedy's lines at right angles, as above stated, would produce a conflict of riparian rights incident to the respective grants, the lines crossing each other at the iron-bound stake, forming an acute angle at the stake, and widening towards the channel of the river; and this angle, it is assumed by those claiming under Kennedy's grant, should be divided between the two grants, but in what proportions we are not informed. This assumption the State court rejected, and held that Forbes & Co.'s grant took all the land to the channel of the river north of a direct extension of its southern boundary, and thereby cut off the pretension of Kennedy to the incident of alluvion.

Suppose it to be true that the addition made to Forbes & Co.'s grant in 1807 was void, for want of authority in the Spanish government, or for any other reason, and that Kennedy's grant was entitled to divide the alluvion as an incident to it, and that the State court improperly rejected his claim, and wrongfully adjudged the land to Forbes & Co.;—conceding all these assumptions, can this court revise and reverse the decision of the State court? The controversy respecting the alluvion drew in question no act of Congress, nor any authority exercised under the Constitution or laws of the United States, and therefore the decision of the State court could not be opposed either to the laws, or to any *594] authority exercised under the laws, *of the United States. For the established construction and application of the twenty-fifth section of the Judiciary Act, we refer to the cases of *Crowell* v. *Randell*, 10 Pet., 391, 398; *McKinney* v. *Carroll*, 12 Pet., 68; and *Armstrong* v. *Treasurer of Athens County*, 16 Pet., 284. In this case, as in that

of *McDonogh* v. *Millaudon*, 3 How., 693, the State courts were called on to construe a perfected Spanish title, and to settle its limits by applying the local law, and having done so, this court has no authority to revise the judgment; nor can we see how the case would have been different had Forbes & Co.'s grant been an elder patent emanating from the United States directly; as in such a case a controversy concerning the incidents of alluvion would not have drawn in question an act of Congress, or a survey made according to an act of Congress.

We deem it useless to examine in detail the instructions proposed by the defendants below, and rejected by the court. The only one worthy of notice was that which rejected Weakly's survey of Forbes & Co.'s grant, made and approved in 1835. It could not change the grant, nor affect its validity in any degree, and could only be read to establish boundary as a matter of fact; and neither its admission nor rejection, when offered for such purpose, could give this court jurisdiction, no matter which side should be injured; and so this court, in effect, held in the case of *Mackay* v. *Dillon*, 4 How., 447. The survey was an *ex parte* proceeding for the purposes of the land-office, and immaterial to Forbes & Co.'s title.

On careful examination, we are of opinion that no one question was raised and decided in the State courts that gives this court jurisdiction to revise such decision; and that, therefore, the case must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this cause be and the same is hereby dismissed, for want of jurisdiction.

JACOB HUGG AND JOHN M. BANDEL, PLAINTIFFS, [*595
v. THE AUGUSTA INSURANCE AND BANKING COMPANY OF THE CITY OF AUGUSTA.

In an insurance upon freight, there is no total loss of a memorandum article as long as the goods have not lost their original character, but remain in

specie, and in that condition are capable of being shipped to their destined port, no matter what may be the extent of the damage.[1]

If, however, the articles are not capable of being carried, in specie, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel; or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss.[2]

In construing the contract of insurance upon freight, the interest of the insured, or of the underwriters of the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and insurers of the cargo to sell it at the port of distress.

If so sold, the insured cannot recover for a total loss of freight.

But although it is the duty of the owner of the vessel, either to repair his own or to procure another at the port of distress to carry on the cargo, yet, if it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged condition, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then became the duty of the master to sell the goods for the benefit of whom it might concern.

A policy of insurance upon "freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, to the amount of $5,000, upon all lawful goods, &c., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid," upon which a greater premium was paid than was usual for the outward voyage alone, must not be construed as a policy upon the round voyage.[3]

The insurers were, therefore, not entitled to a deduction for the outward freight.

THIS case came up, on a certificate of division, from the Circuit Court of the United States for the District of Maryland.

[1] EXPLAINED. *Insurance Co.* v. *Fogarty*, 10 Wall., 643, 4. S. P. *Mercardier* v. *Chesapeake Ins. Co.*, 8 Cranch, 39; *Morean* v. *United States*, 1 Wheat., 219; s. c., 3 Wash. C. C., 256; *Humphreys* v. *Union Ins. Co.*, 3 Mason, 429; *Robinson* v. *Commonwealth Ins. Co.*, 3 Sumn., 220.

An actual total loss of freight arises only where the circumstances are such as to render the ultimate earning of freight absolutely impossible or practically hopeless. The mere loss of the vessel does not produce this result, as the master may still earn the freight by forwarding the cargo by other means of conveyance; and it is his duty to the insurer on freight so to do, if in his power. If the owner neglect to do this, the insurer on freight is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to the amount so adjusted. The question, therefore, whether the loss of freight is total, does not depend upon whether the ship is totally lost, but upon whether there is a chance of being able to earn the freight by forwarding the cargo. *Hubbell* v. *Great Western Ins. Co.*, 74 N. Y., 246; reversing s. c., 10 Hun, 167.

[2] CITED. *Williams* v. *Hartford Ins. Co.*, 54 Cal., 451.

[3] FOLLOWED. *Insurance Co.* v. *Mordecai*, 22 How., 118.

The Reporter finds the following statement prefixed to the opinion of the court, as delivered by Mr. Justice Nelson.

This is an action upon a policy of insurance on the freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro, and back to Havana or Matanzas, with liberty to touch and stay at any intermediate port in case of stress of weather, or for the purpose of transacting business. The amount $5,000; premium, $158.25.

The policy contained the usual memorandum, enumerating various articles warranted free from average, and all others that were perishable in their own nature.

About four hundred tons of jerked beef were shipped on board the vessel at Montevideo, which were to be delivered in good order at the port of Matanzas or Havana to the *consignees, they paying freight. The bill of lading [*596 was signed the 25th of April, 1842.

The vessel sailed from Montevideo on the 29th of April, and, after being out some forty-seven days, encountered a storm, and was driven on Gingerbread Ground, where she received considerable damage; the rudder was broken and unshipped, and as the extent of the damage could not be ascertained, it was deemed prudent, on consultation with the captain of a wrecking vessel and Bahama pilot, to go into Nassau for the purpose of a survey and repairs. The wind was fair for that port, but strong ahead in the direction of Matanzas. The vessel was taken in charge of one of the wreckers, and arrived at Nassau on the second day, about the 20th of June, and grounded on the bar while entering the harbour, and under the charge of the king's pilot, and sustained a good deal additional damage.

A part of the beef had been thrown overboard to lighten the vessel while on the Gingerbread Ground; and a much larger quantity while on the bar at Nassau. She had leaked while on the ground in the former place, so that it was necessary to work the pumps every half hour; and at the latter, there was seven or eight feet of water in the hold, with some fourteen men at the pumps.

The beef was so much damaged by the sea-water that the board of health at Nassau refused to allow but about one hundred and fifty tons to be landed. The rest was ordered to be carried outside the bar, and thrown into the sea, for fear of disease; it was wet and very much heated, some of it so changed as to become green, and all emitting an offensive stench. The portion allowed to be landed was wet and heated, and not in a fit condition to be shipped; and the

board of health recommended to the authorities, that it should be removed as soon as conveniently could be.

The vessel was surveyed after the cargo was discharged, and it was found that the rudder was entirely broken off, the forefoot gone, and the keel greatly shattered and damaged; and it appears to be conceded that she could not have been repaired at that port so as to have carried on the cargo, and that, if she could, it would have cost more than half her value. She was repaired sufficiently to bring her home in ballast. It also appears that there was no vessel in port that could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped.

The salvors libelled the vessel and cargo for salvage services in the Vice-Admiralty Court of the Bahamas on the 30th of June, 1842, to which the master put in an answer on the 7th *of July, insisting that the libellants were entitled to compensation for pilotage only, and not for salvage. *597]

The court, on the 18th of July, decreed $2,100 salvage to the libellants, for services rendered to the vessel and cargo. Appraisers of the vessel and cargo taken on shore had been previously appointed; and, on an examination of the cargo, it was found to be so much damaged, and in such a condition, that they advised an immediate sale, as it was deteriorating in value daily.

The master assented to a sale, accordingly, which was ordered by the court on his application on the 1st of July. The nett proceeds amounted to $2,664.92. The time occupied in an ordinary voyage from Nassau to Matanzas is three days, and to Baltimore, ten.

It was proved by several masters of vessels, that the navigation at the place where the Margaret Hugg first grounded, and was visited by the pilots, was very hazardous, and that, under similar circumstances, they would have considered it their duty to have carried their vessel into the harbour at Nassau.

The regular premium for insurance of freight of the cargo covered by the policy for the outward voyage was about one and one eighth per cent.

Upon this state of facts appearing at the trial, the following questions were raised, and presented to the court, viz.:—

1. It being admitted that the loss is to be adjusted according to the terms of the Baltimore Insurance Company, if the jury find that jerked beef was a perishable article within the meaning of the policy, are the defendants liable as for a total loss of freight, unless the entire cargo was so totally de-

stroyed that no part of it could have been carried to the port of destination even in a deteriorated and valueless condition?

2. If the jury find that, from the condition of that portion of the cargo sold at Nassau (occasioned by the disasters stated in the testimony), it was for the interest of the insured and insurers upon the cargo that it should be so sold, and not transported to Matanzas, is the plaintiff entitled to recover for a total loss of freight, provided his own vessel could have been repaired in a reasonable time, so as to perform the voyage in safety, or he could have procured another vessel, and have transmitted to the port of destination, in its deteriorated state, the portion sold at Nassau? And

3. Assuming that the plaintiff is entitled to recover, is the policy on the amount mentioned for one entire voyage round, from Baltimore out and home again? and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo?

*The cause was argued by *Mr. Mayer* and *Mr. Nelson*, for the plaintiffs, and *Mr. David Stewart* and *Mr. Johnson*, for the defendants. The following is a very brief sketch of the respective arguments. [*598

Mr. Mayer, for the plaintiffs.

The premium was double what would have been demanded for half the voyage. Some of the beef was thrown out as spoiled, the rest landed, somewhat injured. Then came a libel for salvage, and a decree for it. No funds existing to pay it or make the necessary repairs with, a sale was ordered. We abandoned, and now claim for a total loss. The policy is a blank cargo policy, filled up with an insurance on freight. Does the claim arise where the articles are not entirely lost? In England the courts of Common Pleas and King's Bench have decided differently. 3 Bos. & P., 474; Marshall on Ins., 227, 565; 2 Man. & Sel., 247;—that the articles, though not lost, might be deemed extinct. 32 Com. Law Rep., 115; 1 Wheat., 219, 225,—case of memorandum articles; 2 Philips on Insurance, 485,—all the decisions cited; 6 Cow. (N. Y.), 270.

The law was settled in England by the case of *Roux* v. *Salvador*, 3 Bing. (N. C.), 266; s. c., 1 Bing., 526; and there is nothing contradictory in the decisions of this court. The case in 1 Wheaton depended on particular circumstances. If the beef had to be thrown overboard for the sake of health, it could not be considered any longer as beef for all commercial purposes. If the voyage is broken up, there is an end to

freight; and it was broken up here by the perils insured against. There is no difference between memorandum and other articles, when a total loss ensues. Marshall on Ins., 585; 12 East, 304; 15 East, 565; 6 Mass., 119, 318, where the cases are cited; 1 Wheat., 219.

The *vis major* of the claim for salvage broke up the voyage and destroyed the property. The beef was in a fermenting state. The condition of the vessel was hopeless. As to the effect of *vis major*, 7 Com. Law Rep., 202.

Second question certified.

This involves the discretion of the captain. The owner of the vessel is bound by his contract to carry the goods. If the perils of the sea require a transshipment, it is his privilege and duty to make it. But if there be a difficulty in obtaining a vessel, the master is not bound to pay an excessive freight. 7 East, 44; 7 Com. Law Rep., 364, same as 3 Brod. & B., 97; 36 Com. Law Rep., 156, same as 9 Ad. & El., 314; 4 Johns. (N. Y.) Ch., 225; 7 Cow. (N. Y.), 584; 4 Wend. (N. Y.), 54; 12 Johns. (N. Y.), 107; Abbott on Shipp., 369, 461.

*599] *But if the court should think that it was the duty of the master to transship, then I say that, if there was ground of abandonment from *vis major*, the captain became the agent of the insurers, and they must be responsible for his errors. 9 Johns. (N. Y.), 28. If half the property is lost, it is not the duty of the master to transship.

The captain is the agent of the adventure, and if the jury justify him as to the vessel or cargo, his acts bind all parties. 5 Pet., 604; 1 Johns. (N. Y.), 406. The exigency would have justified a prudent man in acting as he did, if there had been no insurance. He is to act for the general good, mindful of the owners and insurers. 3 Moo., 133, quoted in 2 Phill., 268. Was not this a judicial sale? The judge ordered it, not upon the petition of the master, but as an order of the court. The opposite party appeared, and did not object to it. 1 Wash. C. C., 530.

The third question relates to the *quantum* of recovery. The outward cargo belonged to the owners of the vessel, and thus, in fact, no freight was earned. But we are charged with a constructive freight. Suppose the owner could earn freight from himself, this is an open policy, and value must be proved. There is no evidence to show that the value of the outward freight was just half of the whole sum insured. It could not be a round voyage, because the owners sent out an adventure, and only intended to earn freight on the return. In an open policy, we have only to show that we had that amount of interest when the loss occurred. We paid a pre-

mium, double of what we would have been charged for the outward voyage alone. It could not, therefore, have been intended as a round voyage. 3 Cai. (N. Y.), 16; 7 Gill & J. (Md.), 293; 12 Wheat., 383; 3 Wend. (N. Y.), 283; 2 Wash. C. C., 89; 1 Rawle (Pa.), 97; 33 Com. Law Rep., 124, or 3 Barn. & Ad., 198; 4 Peck, 429; 3 Com. Law Rep., 480; 2 Stark., 573.

Mr. Stewart, for the defendants.

It is proper that some omissions of the opposite counsel should be supplied. In the first place, the captain knew that he was insured; the answer to the libel says so. In the next place, he could have prosecuted his voyage. The answer to the libel says, that "without any assistance from Demeritt and his party, he could have got the bark clear of the Gingerbread Ground, and could, without any other than the ordinary dangers of the sea, have proceeded in the prosecution of their voyage." In the third place, the condition of the cargo was not so bad. The report of the board of health, made on the 29th of June, 1842, says, that "the quantity of beef *which is housed in the store appears to the board [*600 to be in a sound condition, and fit for the purpose for which it was cured." This was made on the 29th. On the 30th, the captain petitioned for a sale, which took place on the 1st of July. In the affidavit to support the motion for a sale, the captain says "he had intended, previous to the commencement of the action, that the sale of such beef should take place in the early part of the present week." What became of the cargo? In fact, it went to the very port of destination. The captain says, in his deposition, that Adderly "bought the beef with the intention of shipping it to Matanzas." Strobel, the supercargo, says, "The vessel had no means of her own to make the repairs with, but Mr. Starr, the agent of the underwriters, offered to advance money for repairs upon bottomry." The libel for salvage was contested, and limited to pilotage, and yet a sale took place.

As to the first question certified. The object of the policy is to protect underwriters by excluding small losses. Partial losses, therefore, are not recoverable, as long as part of the cargo remains not liable at all. 3 Bos. & P., 478, does not impugn this doctrine, because the articles were thrown overboard from necessity.

In *Roux* v. *Salvador* there was a special verdict, in which the jury found that the hides would have lost their character from putrefaction. The court relied upon this. Of course

there was a total loss. The counsel then referred to the following cases. Park, 191, 185; 2 Man. & Sel., 371; 2 Com. Law Rep., 55, or 7 Taunt., 154; 4 Mart. (La.), N. S., 640; 16 East, 214; 1 Cain. (N. Y.), 196; 3 Id., 108; 4 Johns. (N. Y.), 139; 4 Wend. (N. Y.), 33; 7 Cranch, 415; 8 Cranch, 39; 3 Wash. C. C., 356; 1 Wheat., 59; 3 Mason, 429. From the time of 1 Wheaton to 3 Mason, the question was not mooted, and when it was, it was only upon the authority of 15 East. 5 Mees. & W. explains 15 East to have been an insurance upon each parcel. But here a part of the beef was good, and sold for fifty per cent. of its cost. From this loss our contract exempts us. The assured warrant that they will not charge, except for general average. The vessel was within three days' sail of Matanzas, and if the jury find that beef was a perishable article, we cannot be liable.

The second question assumes that the vessel could have been repaired, or that another vessel might have been obtained. Could the act of the captain give the plaintiffs a right to recover in this action? The opposite counsel wish to make the cargo a test of the rule respecting freight; but the cargo is nothing to us. The agency of the captain binds all parties *who are within the contract of indemnity, but not those who are beyond it. There was no necessity for a sale, if another vessel could have been had. 1 Johns. (N. Y.), 205; 3 Id., 321; 9 Id., 21; 2 Pick. (Mass.), 104; 23 Id., 405; 10 Com. Law Rep., 366. These cases show that, if the captain could transship, it was his duty to carry on the cargo. The expense is nothing to us. It might have cost half the freight. 4 Wend. (N. Y.), 54.

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On the third question, *Mr. Stewart* cited and commented upon 20 Com. Law Rep., 342; 36 Com. Law Rep., 216.

Mr. Johnson, on the same side.

As to the first question. Certain articles are inserted in the memorandum, to guard against frauds upon the underwriters, because no one could tell whether or not the losses arose from the perils insured against. For example, it is impossible to say how far the injury to the beef proceeded from the perils of the sea, or whether or not it would have been putrid, if there had been no storms. Therefore we only insured against a total loss. The question assumes that the master could have carried on the beef in his own or some other vessel,—in a valueless condition, it is true. But does this make us liable? We may lay down these two propositions:—

1st. The case cited from Wheaton establishes, that, if a

vessel arrives at her port, the underwriters are not responsible, unless in case of general average.

2d. Where the vessel could go on, the same rule must be applied as if she had actually gone on. Otherwise, it is in the power of the captain to convert no loss into a total loss. The underwriters are placed completely in his power. In this case, if the vessel had pursued her voyage, the underwriters would not have been responsible. Originally, the doctrine was more extensive upon our side than now, because it was held that, if any article existed at all, the insurers were discharged. The case in 3 Bingham only corrects this in its vicious extent; it only makes the underwriters free, if the cargo arrives consisting of the same articles which composed it before,—that is, if flour is still flour, hides are still hides, &c. The question of value is left out of view altogether. The question before us is, not whether the jury must find that the beef had ceased to be beef or not, but only speaks of its value. 1 Wheat., 219, decides this. It says that the consideration of quantity or value is of no consequence. If, therefore, ever so small a quantity of the article arrives, or ever so much injured, the underwriters are not responsible. The master's duty was to go on. The case of *Roux* v. *Salvador* does not *justify [*602 the sale at Nassau. The hides in that case would have lost their character as hides.

And as to the second question. This assumes that the master could have repaired his vessel. The question of cost is not involved. Was it not his duty to send on the cargo? If the other side are right, it is always in the power of the assured to bind us by stopping short, when we would not have been responsible if the cargo had been carried on. The agency of the master only begins when the liability of the underwriters is absolutely fixed. The law is settled in England, New York, Louisiana, and in this court. If the cargo remains, specifically, the underwriters cannot be held responsible for a total loss upon memorandum articles. 3 Cai. (N. Y.), 108; 1 Johns. (N. Y.), 305; 3 Id., 328; 14 Id., 139, 143, 144, 145; 23 Pick. (Mass.), 405–409, 412, 414–416; 4 Barn. & C., 366; 3 Kent's Com., 210, 212, 213; 36 Com. Law Rep., 157, or 9 Ad. & El., 314, cites the above from Kent, with approbation; 3 Mason, 429, 440; 16 East, 214, overrules 5 East.

The owner of the cargo is bound to pay freight if the cargo arrives, no matter how much injured it may be. On memorandum articles, the underwriters are not responsible for any thing but a total loss. The policy contains such a

clause, and no one has a right to strike it out. But the question supposes a discretion to exist in the master, to act for the benefit of all parties. But how can he do so when their interests are contradictory? If he could have gone on, then a loss of freight has occurred, not from the perils of the sea, but from the conduct of the master. If he has acted for the benefit of the owners of the cargo, that is nothing to us. We only insured that freight should be earned, not that it should be actually received. It might have been for the interest of the owner of the ship and the owner of the cargo to terminate the voyage at Nassau. But it was not for our interest, and we cannot be bound by the act.

Third question. Was it a round voyage? We rely on 2 Stark., 573; 3 Com. Law Rep., 408.

Mr. Nelson, for the plaintiffs, in reply and conclusion.

I admit that, if the loss was not total, we cannot recover. But the proposition is a surprising one, which asserts that an article can be totally valueless in point of fact, and yet not be a total loss in point of law. The object of all contracts of insurance is to preserve property, and here its value is admitted to be entirely destroyed. There is no adjudged case which sanctions such a doctrine. I speak not of the language used by courts, but of points decided. It has *603] never been before *this court. We do not assert that a loss of a part can be considered a total loss. In 7 Johns. (N. Y.) Ch., 415, the loss of a part of the hides was held to be a partial loss. This is settled law in the United States. Massachusetts has followed it. But it is not our question. In 8 Cranch, 47, it is said that nothing short of physical extinction or extinction in value will justify an abandonment of memorandum articles; but it is not settled whether extinction in value will be sufficient. 1 Wheat., 219, is not like our case. The vessel there did not put into any port of distress, but arrived at her destination.

In the New York cases, the language of the judges is strong, but the cases themselves are distinguishable from ours. (*Mr. Nelson* here remarked upon the case of *Griswold* v. *New York Ins. Co.*, in 1 Johnson, and again reported in 3 Johnson, and also upon the case in 14 Johnson.)

These New York cases rest upon a dictum of Lord Mansfield, which has been overruled again and again. (*Mr. Nelson* then examined all the cases in chronological order, viz.:—Park on Ins., 253; same book, 247; *Cocking* v. *Fraser*, 4 Doug., 295; 7 T. R., 218,—where the first doubt of *Cocking*

v. *Fraser* was expressed by Lord Kenyon, Park on Ins., 252; *Dyson* v. *Rowcroft*, 3 Bos. & P., 474,—where it is said that *Cocking* v. *Fraser* is much shaken; 15 East; 16 East, 214; 17 Com. Law Rep., 408, 409, or 9 Barn. & C., 411; and the case of *Roux* v. *Salvador*, which came up twice, 27 Com. Law Rep., 481, or 1 Bing. (N. C.), 526, and 32 Com. Law Rep., 115; 5 Man. & Sel., 447.)

The English authorities appear to settle the point, that, if the value of an article is destroyed, it is a total loss. This opinion is fortified by Stevens and Benecke on Average, p. 435.

The New York cases rely upon *Cocking* v. *Fraser*. There is a learned argument on the subject in 14 Conn., 47.

As to the second question. It is, that, assuming a power to transship when the articles were damaged, whether an insurance upon freight can be recovered, it being granted that the cargo was insured and that it was for the interest of all parties to sell. The opposite counsel says that 23 Pickering closes this case. But I think not. (*Mr. Nelson* commented on the authority.) The question to be settled is, What ought the master to do? The authorities read by *Mr. Mayer* have not been answered. They show that where the master is in the double situation of protector of the ship and cargo, he must act with a sound discretion. Another point open upon the record is, that the vessel was in the hands of the law. The vessel entered the port on the 22d of June, and was sold on the 1st of July. The goods were taken from the control of the master and placed in *custody of the law. The [*604
sale was a judicial one, and the captain only did what his duty required.

As to the third question. This very point is decided in 12 Wheat., 383.

Mr. Justice NELSON delivered the opinion of the court, after reading the statement prefixed to this report.

The first point certified, upon the assumptions stated, involves the question, whether the underwriter of a policy upon freight of goods warranted free from average is liable, as for a total loss, unless the goods be actually destroyed by one of the perils insured against, so as to be incapable of shipment to the port of destination; or whether a total loss may result at the port of distress from the goods having been so much damaged, that, if sent on, they would become of no value at the time they reached the port of destination; and hence, instead of being sent on, may be sold for the benefit of whom it may concern.

The contract of insurance upon freight is, that the goods shall arrive at the port of delivery notwithstanding the perils insured against; and that, if they fail thus to arrive, and the owner is thereby unable to earn his freight, the underwriter will make it good.

It does not undertake that the goods shall be delivered in a sound or merchantable state, or that the vessel in which they are shipped shall be safe against the dangers of the sea, but that it shall be in the power of the insured to earn his freight; that is, that the perils insured against shall not prevent the ship from earning full freight for the assured in that voyage. If the ship and cargo remain, notwithstanding the disasters, in a condition to continue the voyage, it is in his power to earn freight, and he is bound to proceed; but if damage happens to either, and the voyage is broken up, so that no freight can be earned, the owner is entitled to recover, as for a total or partial loss, according as he may or may not have earned freight *pro ratâ itineris*.

If the damage happens to the vessel, and that can be repaired at the port of distress in a reasonable time, and at a reasonable expense, it is the duty of the owner to make the repairs, and to continue the voyage and earn his freight; and, on the other hand, if the damage happens to the goods, and the ship be in a capacity to proceed, or, if disabled, another can be procured upon reasonable terms, the owner of the ship will still be entitled to perform the voyage and recover his freight, unless the goods have been totally destroyed. In every case, before he can recover of the underwriter, he must
*605] show that he *was prevented by one of the perils insured against from completing the voyage, and, for that reason, had failed to entitle himself to freight from the shippers.

The first point certified to us assumes that the ship was capable of carrying on the cargo to the port of delivery notwithstanding the injuries received; and the only question is, whether the cargo was so much damaged, and in such a condition, as to have dispensed with that duty.

In the case of memorandum articles, the exception of particular average excludes a constructive total loss; and, of course, the principle which allows an abandonment where the loss exceeds half the value does not apply. There must be an actual total loss of the goods. The object of the clause is to protect the underwriter from any partial loss on articles of a perishable nature, which are liable to inherent decay and damage, independently of the damage occasioned by the perils insured against, and where it would be difficult, if not

impossible, to distinguish between them. In case of a total loss, consequent upon the happening of one of the perils, the whole damage is presumed to have arisen from that cause, and thus all dispute is avoided as to the origin or nature of the loss.

What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in most of the cases, the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. The cases are numerous on the subject, and will be found collected in Park on Marine Ins., ch. 6, subd. 13, p. 247; 2 Phillips on Ins., ch. 18, p. 483; and 3 Kent, Com., 295, 296. It would be useless to refer more particularly to them.

The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. But although this has been suggested in several cases in England as a proper qualification, and as coming within the obligation of the underwriter, there is no case to be found in which the suggestion has received the sanction of judicial authority.

In this country the rule has been uniform, that there must *be a destruction of the article in specie, as will be [*606
seen by a reference to the following authorities. *Maggrath* v. *Church*, 1 Cai. (N. Y.), 196; *Neilson* v. *Col. Ins. Co.*, 3 Id., 108; *Le Roy* v. *Gouverneur*, 1 Johns. (N. Y.) Cas., 226; *Griswold* v. *New York Ins. Co.*, 1 Johns. (N. Y.), 205, Livingston, J.; s. c., 3 Id., 321; *Saltus* v. *Ocean Ins. Co.*, 14 Id., 138; *Whitney* v. *N. Y. Firemen Ins. Co.*, 18 Id., 208; *Brooke* v. *Louis. State Ins. Co.*, 4 Mart. (La.), N. S., 640; s. c., 5 Id., 530; *Moreau* v. *U. S. Ins. Co.*, 1 Wheat., 219; *McGaw* v. *Ocean Ins. Co.*, 23 Pick. (Mass.), 405; 3 Sumn., 544; 1 Story, 342.

Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are

capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial into a total loss.

Mr. Park, in speaking of the case of *Cocking* v. *Fraser* (4 Doug., 295), a leading one in the establishment of the rule, observes that the wisdom of the decision is apparent; for, otherwise, it would be a constant temptation to the assured, whenever a cargo of this description was likely to reach the port of destination in an unsound state, to throw the loss upon the underwriters, by voluntarily giving up the further prosecution of the voyage, to which they were not liable by the terms of the memorandum. (1 Park, 249.)

The rule, it will be observed, as we have stated it, contemplates the arrival of the goods, or some part of them, in specie, at the port of delivery; or that they were capable of being shipped to that port in specie. And hence, if the commodity be damaged so that it would not be allowed to remain on board consistently with the health of the crew or safety of the vessel, or if permission be refused to land the same by the public authorities at the port of distress for fear of disease, and, for these and like causes, should, from necessity, be destroyed by being thrown overboard, notwithstanding the
*607] article existed *in specie, and might have been carried on in that condition, there would still be a total loss within the meaning of the policy. In the cases supposed, it is as effectually destroyed by a peril insured against, as if it had gone to the bottom of the sea from the wreck of the ship. The same result follows, also, if the goods be so much damaged as to be incapable of reaching the port of destination in their original character.

These principles are either stated in, or are fairly deducible from, several cases, but especially from the cases of *Dyson* v. *Rowcroft*, 3 Bos. & P., 474, and *Roux* v. *Salvador*, 3 Bing. (N. C.), and s. c., 1 Bing. (N. C.), 526.

In *Roux* v. *Salvador*, in the Exchequer, it was observed that the argument rested upon the position, that, if, at the

termination of the risk, the goods remained in specie, however damaged, there was not a total loss; and it was admitted that the position might be just, if, by the termination of the risk, was meant the arrival of the goods at their place of destination; but that there was a fallacy in applying those words to the termination of the adventure before that period by a peril of the sea, as the object of the policy is to obtain an indemnity for any loss that the assured might sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of destination.

It was also remarked, that, if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, were, by reason of that damage, in such a state, though the species be not utterly destroyed, that they could not with safety be reshipped into the same or any other vessel,—or if it was certain that before the termination of the original voyage the species itself would disappear,—in any of these cases, the circumstance of their existence in specie at the forced termination of the risk was of no importance.

The jury had found in that case, that the hides were so far damaged by a peril of the sea, that they never could have arrived at the port of destination in the form of hides; and as the destruction was not complete when they were taken out of the vessel at the port of distress, they became, in their then condition, a salvage for the benefit of the party who was to sustain the loss.

In respect to the first point, therefore, the court direct that it be certified to the Circuit Court, that, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, or that a total destruction would *have been inevitable from the damage [*608
received, if it had been reshipped before it could have arrived at Matanzas, the port of destination.[1]

The second point certified assumes that the vessel, notwithstanding the disaster, was in a condition to carry on the cargo, or that another could be procured, and the question is, whether the plaintiff is entitled to recover, as for a total loss of freight, if it appeared that it was for the interest of the insured and insurer of the cargo, on account of the damaged condition of the portion sold, that it should have been sold, and not carried on to Matanzas, the port of delivery.

[1] Approved. *Insurance Co. v. Fogarty*, 10 Wall., 643.

Many of the considerations stated in our examination of the first point certified have a direct application to this one; as it there appears that the interest of the insured, or of the underwriter of the cargo, is not taken into the account, nor in any way regarded in determining whether or not a total loss of the freight has happened from any of the perils insured against, but whether there has been a destruction of the entire cargo in specie, or such damage received as would inevitably prevent the arrival of any portion of it in specie at the destined port.

The interest of the owner of the cargo may frequently be adverse to that of the owner of the ship; for although the goods remain in specie, and in that condition capable of being carried on, it may be for the interest of the owner, or of the insurer of the cargo, to have it sold in its then damaged state at the intermediate port, instead of taking the risk of further deterioration. But, in that case, the owner, or those representing him, must act upon their own responsibility; for, if he elects to receive the goods voluntarily at a place short of the port of destination, he is responsible for the freight. The loss cannot be total or partial at his will, or as his interest may dictate.

It was said in *Griswold* v. *New York Ins. Co.* (which was an action on a policy on freight), that whether it would have been wise or foolish in the shipper to have sent on the flour in the condition it was in was a question not to be put to the plaintiffs. It was none of their concern. The risk of the value of the cargo at the port of delivery lay with the owners of the cargo. All that the plaintiffs had to do by their contract was to provide the means to take on the cargo, by repairing their ship or procuring another.

Other considerations may arise as between the owner and insurer of the cargo, but it is not important now to go into them.

On looking into the facts in this case, it will be seen that the portion of the beef landed at Nassau, and sold, was wet and heated; and that the board of health had recommended *609] to the *authorities, that it should be removed as soon as it conveniently could be without too great a sacrifice of the property. It is obvious, therefore, that the perishable condition of the article must be taken into consideration in deciding upon the obligation of the master, in the emergency, to repair his vessel, or to procure another, for the purpose of sending it on to the port of delivery. If it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the

voyage as would, in all probability, occasion a destruction of the article in specie before it could arrive at the port of destination, or from its damaged condition could not be reshipped in time consistently with the health of the crew or safety of the vessel, or would not be in a fit condition from pestilential effluvia, or otherwise, to be carried on, it then was the duty of the master to sell the goods for the benefit of whom it might concern.

The cargo being in a perishable condition, the extent of the repairs, or difficulty of procuring another vessel, and consequent delay attending the same, are material considerations influencing his judgment in deciding upon the necessity of a sale; for it would be unreasonable to require him to subject his owner to this expense, when, at the same time, a strong probability existed that the cargo would not be in a condition to be reshipped. 18 Johns. (N. Y.), 208; 6 Cow. (N. Y.), 270; 1 Bing. (N. C.), 526; 3 Id., 266; 3 Brod. & B., 97; s. c., 6 Moo., 288; 6 Taunt., 383; 1 Holt, 48; 3 Kent, Com., 212, 213; 2 Phillips, 331 *et seq.*

The quantity and value of the portion saved are also material circumstances to be considered in exercising a sound discretion in respect to the extent of the repairs required to be made, or of expense in the procurement of another vessel, with a view to the earning of salvage for the benefit of the underwriter on freight. The owner of the cargo is liable for any increased freight arising from the hire of another vessel; and unless it can be procured at an expense not exceeding the amount of the freight to be earned by completing the voyage, the underwriter on freight has no right to insist upon this duty of the master. Beyond this, it becomes a question between him and the owner or underwriter of the cargo. 3 Kent, Com., 212; *Shipton* v. *Thornton*, 9 Ad. & El., 314; *Searle* v. *Scovel*, 4 Johns. (N. Y.) Ch., 218; *American Ins. Co.* v. *Center*, 4 Wend. (N. Y.), 45; 2 Phillips, 216.

In respect to the second question, therefore, we direct it to be certified to the Circuit Court, if the jury find that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo that it *should have been so sold, and not transported [*610
to Matanzas, still, the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination.

The third question is, assuming that the plaintiffs are entitled to recover, is the policy on the amount mentioned for one entire voyage round from Baltimore out, and home again; and are the defendants entitled to deduct from the amount insured the freight earned in the voyage from Baltimore to Rio upon the outward cargo.

The policy provides, that the defendants, in consideration of $156.25, agree to insure the plaintiffs, &c., on freight of the bark Margaret Hugg, at and from Baltimore to Rio Janeiro and back to Havana or Matanzas, or a port in the United States, &c., to the amount of $5,000 upon all kinds of lawful goods, &c., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid.

It is insisted, on the part of the defendants, that the voyage insured is one entire voyage from Baltimore out to Rio Janeiro, and then to Matanzas, or home; and that they are entitled to a deduction of the freight earned on the outward cargo from Baltimore to Rio.

The court are of the opinion, that, upon a true construction of the policy, the insurance was upon every successive cargo that was taken on board in the course of the voyage out and home, and is to be applied to the freight at risk at any time, whether on the outward or homeward passage. This was the construction given to these terms in a freight policy in *Davy* v. *Hallett*, 3 Cai. (N. Y.), 16, and *The Columbian Ins. Co.* v. *Catlet*, 12 Wheat., 383. The insurance was regarded as, in effect, covering freight upon separate voyages out and home, to the amount of the valuation; and in the former case the payment of double premium was deemed a pretty sure index to the intent of the parties that the policy should attach on the outward or homeward freight according to events, and was to be valid and operative as long as there was aliment to keep it alive. All the considerations urged in favor of this construction in the cases referred to apply with equal force to the policy in question.

The court direct, therefore, that it be certified to the Circuit *Court, that, assuming the plaintiffs are entitled [*611] to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home.

ORDER.

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 Maryland, and on the points and questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court,—1st. That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its orignal character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination. 2d. If the jury find, that, from the condition of that portion of the cargo sold at Nassau, it was for the interest of the insured and insurers of the cargo, that it should have been so sold, and not transported to Matanzas, still, that the plaintiffs are not entitled to recover as for a total loss of freight, provided their own vessel could have been repaired in a reasonable time, and at a reasonable expense, so as to perform the voyage, or they could have procured another at Nassau, the port of distress, and have transshipped the portion sold in specie to the port of destination. And 3d. That, assuming the plaintiffs are entitled to recover, the defendants are not entitled to deduct from the insured the freight earned on the voyage from Baltimore to Rio upon the outward cargo, as the policy is not for one entire voyage round from Baltimore out, and home. Whereupon, it is now here ordered and adjudged, that it be so certified to the said Circuit Court.

*612] *PHILIP PECK AND WILLIAM BELLOWS, COPARTNERS, TRADING UNDER THE FIRM OF PHILIP PECK AND COMPANY, PLAINTIFFS IN ERROR, *v.* JOHN S. JENNESS, JOHN GAGE, AND JOHN E. LYON, TRADING UNDER THE NAME AND FIRM OF JENNESS, GAGE, AND COMPANY, DEFENDANTS IN ERROR.

The proviso of the second section of the bankrupt act passed on the 19th of August, 1841, preserves all liens which may be valid by the laws of the States respectively.[1]

In some of the States, attachments are issued on mesne process, by which the property seized is held to await the result of the suit. This constitutes a lien, which is saved by the proviso in the bankrupt act.

The various kinds of liens explained.

Therefore, where an attachment was issued and the defendants afterwards applied for the benefit of the bankrupt act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment.[2]

The fourth section of the statute, if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts; but if the whole statute be construed together, this is not the result.

A rejoinder, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder.

The District Court could not oust the State court of its jurisdiction, which had already attached.[3]

THIS case was brought up from the Superior Court of Judicature for the State of New Hampshire, by a writ of error, issued under the twenty-fifth section of the Judiciary Act.

Peck and Bellows were residents of the town of Walpole, in the county of Cheshire and State of New Hampshire. Jenness, Gage, and Company resided in Boston.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Goodrich*, on behalf of the defendants in error.

C. B. Goodrich, for defendants in error

In October, 1842, the plaintiffs below sued out a process of attachment, upon which estate of the defendants below, real and personal, was attached. This process issues without the

[1] CITED. *Matter of Straus & Co.*, 61 How. (N. Y.) Pr., 248; *Matter of Allen*, 24 Hun (N. Y.), 412.

[2] APPLIED. *Goodsell* v. *Benson*, 13 R. I., 254. CITED. *Gibson* v. *Worden*, 14 Wall., 248; *Gilbert* v. *Lynch*, 17 Blatchf., 405.

[3] CITED. *Riggs* v. *Johnson County*, 6 Wall., 195; *Evans* v. *Peck*, 2 Flipp., 274; *Hay* v. *Railroad Co.*, 4 Hughes, 352; *Brown* v. *Newman*, 66 Ala., 277; *Anderson* v. *Anderson*, 65 Ga., 523. See also *Carroll* v. *Carroll*, 16 How., 287.

sanction of any judicial officer. It issues at the will of any one who assumes to be a creditor of the party against whom it issues. It is a proceeding *in personam* and *in rem*,—is available as the one or the other, as the party may elect.

The question for adjudication is whether the original plaintiffs can avail themselves of this process as a proceeding *in rem*. Howland, who is the several assignee of each of the original defendants, is in no proper sense a party to the record. He appears in the names of Peck and Bellows, and relies upon their rights. 5 Stat. at L., 443, ch. 9, § 3.

*Statutes operate upon property, contracts, or persons. The statutes of the United States and those of a State may operate upon the same property, the same contracts, the same persons. Their action is distinct in time, or in purpose, or both. The operation of the two jurisdictions, each within prescribed limits, is independent. [*613

Courts of equity cannot, in this country, in all things, exercise the same power, to the same extent, as do courts of equity in England. Courts of the United States and those of the States have a different origin; their jurisdictions are for different purposes. The one court will exercise its control over the citizen, so as not to impair his ability to yield obedience to the other, when and where such obedience is due. The jurisdiction of the courts of the United States and of the several States can never rightfully come in collision; where the jurisdiction is concurrent, the one which first attaches will retain it. There are only two modes in which a suit rightfully instituted in a State court can be proceeded in, or controlled by, the courts of the United States; the one is by transfer, the other under the twenty-fifth section of the Judiciary Act. The courts of the United States are invested with the exclusive power of construction of the laws and treaties of the United States; courts of the several States construe the laws thereof; the construction of each, within its appropriate sphere, is obligatory upon the other.

When a statute of the United States adopts or engrafts upon itself a statute or law of one of the States, *quoad* the law adopted, the construction of such law, at the time of its adoption, by the highest judicial tribunal of the State whose law is adopted is also adopted. If this be not so, the same law, acting within the same territory and upon the same person, may mean one thing in one court-room, something else in another. A State law adopted by the laws of the United States does not cease to be a State law. The jurisdiction of the District Court of the United States, sitting in bankruptcy, over property, is coextensive with the effect produced by the

decree of bankruptcy; which is to pass the property of the bankrupt, *cum onere*.

The judgment of the court below should be affirmed, and I submit,—

I. That the District Court of the United States for the District of New Hampshire acquired no jurisdiction of the several original petitions of Philip Peck and of William Bellows to be declared bankrupt, and its proceedings upon said several petitions are void. This is so, because the pleas do not aver or show that the petitions were verified by oath, *614] *without which oath and verification the petitions were nullities; because the pleas do not aver that the petitioners represented to said District Court that they owed debts not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or while acting in any other judiciary character; because the pleas do not aver or exhibit the notice which was ordered, or which was published, of the time when the said several original applications to be declared bankrupt would be considered. 5 Laws U. S., 440, ch. 7, § 1; *United States* v. *Marvin*, 3 How., 620; *Elliott* v. *Piersol*, 1 Pet., 338; *Ex parte Bollman*, 4 Cranch, 93; *Sharp* v. *Spier*, 4 Hill (N. Y.), 76; *Sharp* v. *Johnson*, Id., 92; *Bank of Utica* v. *Rood*, Id., 535; 2 Christian's Bank. Law, 20, 21, 22; Cooper on Bank. Sta., 165; *Buckland* v. *Newsome*, 1 Taunt., 477; *Sackett* v. *Andros*, 5 Hill (N. Y.), 330; *Stephens* v. *Ely*, 6 Id., 608; *Brereton* v. *Hull*, 1 Denio (N. Y.), 75; *Varnum* v. *Wheeler*, Id., 331; *Maples* v. *Burnside*, Id., 332; *Thatcher* v. *Powell*, 6 Wheat., 119; *Wilcox* v. *Jackson*, 13 Pet., 511, 516, 517; *Walden* v. *Craigg's Heirs*, 14 Pet., 147; *Hickey* v. *Stewart*, 3 How., 762; *Wheeler* v. *Townsend*, 3 Wend. (N. Y.), 247; *Gordon* v. *Wilkinson*, 8 T. R., 507; 1 Chitty on Plead., 223; Owen on Bank. App., 25; Archbold on Bank. App., 9, and 97; *Wyman* v. *Mitchell*, 1 Cow. (N. Y.), 316; *Frary* v. *Dakin*, 7 Johns. (N. Y.), 75; *Ex parte Balch*, 3 McLean, 221; *United States* v. *Clark*, 8 Pet., 444, 445; *Garland* v. *Davis*, 4 How., 131.

II. The several rejoinders of the original defendants, and the matters therein set up, amount in law to a departure from their several pleas. 1 Chitty on Plead., 648.

III. The statute of the United States, in relation to bankruptcies, passed Aug. 19, 1841, as to all matters of liens and securities adopts the laws of the States respectively, and exempts from the operation of the decree of bankruptcy all property which, at the time of the decree, might be charged with any duty, lien, or security valid by the law of the State in which the duty, lien, or security might arise.

This position is sustained by the language of the act, and is in consonance with the uniform policy of the United States, which has been to adopt the laws, usages, and modes of proceeding of the several States so far as practicable. 1 Laws, 92, 1789, ch. 20, § 34; 1 Laws, 93, 1789, ch. 21, § 2; 1 Laws, 276, 1792, ch. 36, § 2; 4 Laws, 278, 1828, ch. 68, § 1; 4 Laws, 281, ch. 68, § 2; 1 Laws, 79, ch. 20, § 12; 2 Laws, 123, ch. 32, § 3; 1 Laws, 106, ch. 5; 5 Laws, 393, ch. 43, § 4; 5 Laws, 394, ch. 47, § 1; 5 Laws, 321, ch. 35; 5 Laws, 410, ch. 2, § 1.

An attachment on mesne process was known to the laws of the United States, as a lien and security, and recognized by its judiciary, prior to the bankrupt statute. 1 Laws, 602, ch. 75, § 16; 3 Laws, 33, ch. 16, § 28; 3 Laws, 83, ch. 56, § 6; 1 Laws, 594, ch. 71, § 15; *United States* v. *Graves*, 2 Brock., 381; *Tyrell's Heirs* v. *Bountree*, 1 McLean, 95; s. c., 7 Pet., 464; *Beaston* v. *Farmers' Bank of Delaware*, 12 Pet., 102; *Wallace* v. *McConnell*, 13 Pet., 151. [*615

I now recur to the position, that the bankrupt statute adopts liens which are so by the laws of the several States. Its correctness is evident from the proviso in the second section of the act, and from the fact that the act professes to pass only such property as the bankrupt might convey; the act gives him no new right of property, or power over it. *Ex parte Christy*, 3 How., 316, fully sustains the principle, in which the court say, "There is no doubt that the liens, mortgages, and other securities within the purview of this proviso, so far as they are valid by the State laws, are not to be annulled, destroyed, or impaired under the proceedings in bankruptcy, but they are to be held of equal obligation and validity in the courts of the United States as they would be in the State court." It is not necessary to ascertain what constitutes a lien at common law, in equity or admiralty, or in the civil law. The lien protected is such a one as is known to the law of the State in which the question arises. *Savage* v. *Best*, 3 How., 119; *Norton* v. *Boyd*, 3 How., 436. How will this court ascertain what constitutes a lien by the laws of New Hampshire? By a resort to the adjudications of its highest judicial tribunal; this course is in conformity with general principles and with the course of this court. *Green* v. *Neal*, 6 Pet., 295; *Livingston* v. *Moore*, 7 Pet., 542; *Jackson* v. *Chew*, 12 Wheat., 153; *Shelby* v. *Guy*, 11 Wheat., 361.

IV. An attachment on mesne process, on the 19th of August, 1841, and on the 10th of October, 1842, was a

lien or security valid by the laws of the State of New Hampshire.

In support of this, I refer to the laws of New Hampshire, edition of 1830, pp. 58, 59, 101, 105, 106; to *Kittridge* v. *Warren* and *Kittridge* v. *Emerson*, in manuscript, not yet reported. These cases, and the authorities cited in them, exhibit the law of New Hampshire as it has been recognized from its early history. The principle is sustained by the courts of other States. *Kilbourn* v. *Lyman*, 6 Metc. (Mass.), 304; *Hubbard* v. *Hamilton Bank*, 7 Id., 342; *Am. Ex. Bank* v. *Morris Canal Co.*, 6 Hill (N. Y.), 367; *Storm* v. *Waddell*, 2 Sandf. (N. Y.) Ch., 494; *Davidson* v. *Clayland*, 1 Harr. & J. (Md.), 546. I refer, also, to an opinion of a distinguished jurist, Hon. Jeremiah Mason, which sustains the views submitted.

*616] *In opposition to the two last positions, *Ex parte Foster*, 2 Story, 131, is relied upon. I submit that the authorities relied upon in this case do not support the judgment pronounced. The cases mainly relied upon in *Ex parte Foster* are *Atlas Bank* v. *Nahant Bank*, 23 Pick., (Mass.), 488; *Conard* v. *Atlantic Ins. Co.*, 1 Pet., 386, 441, 443; *Giles* v. *Grover*, 6 Bligh, 279. An examination of them will show that they sustain, so far as applicable, the views which I have presented; the case of *Giles* v. *Grover* proceeded entirely upon the ground of prerogative, and it was so regarded in a subsequent case. *Godson* v. *Sanctuary*, 1 Nev. & M., 52.

The case *Ex parte Foster* is not sustained by the reasons; our answer to them is complete. A statute lien is exactly what the statute makes it, and it derives no aid from the analogies of other liens. Several of the adjudications of this court, to which I have referred, are in opposition to the doctrines of *Ex parte Foster*.

V. Assuming that the bankrupt statute adopts the laws of the States respectively as to liens and securities, and that an attachment of mesne process, as recognized by the laws of New Hampshire, is regarded by such law as a valid lien or security, it results, *ex necessitate*, that a discharge of the bankrupt does not and cannot defeat a lien or security rightfully created and existing prior to any act of bankruptcy.

Assuming the third and fourth propositions as sound, the one now taken is a necessary deduction from them. It is sustained by the express terms of the proviso. It is so independent of the proviso. The decree of bankruptcy passes the property, and its effect cannot be enlarged or diminished by the discharge, or by a denial of the discharge, to the bankrupt.

An attachment is of double aspect; it is a proceeding *in personam* and *in rem*; so far as it is *in personam*, the discharge is a protection; so far as it is *in rem*, the discharge cannot avail to destroy a right which the act protects. It is clearly competent for the court to render a judgment *in rem*, and thus uphold every part of the act. *Wallace* v. *Blanchard*, 3 N. H., 395; *Chickering* v. *Greenleaf*, 6 N. H., 51; *Buxton* v. *Marden*, 1 T. R., 80; *Steward* v. *Dunn*, 11 Mees. & W., 63; *Newton* v. *Scott*, 4 Id., 434; s. c., 10 Id., 471. Whether the court of New Hampshire has power to render a conditional judgment where the law and justice require such judgment is a matter exclusively cognizable by that court.

VI. The order of the District Court exhibited in the rejoinders is not an authority, within the meaning of the twenty-fifth section of the Judiciary Act of 1789; and if it be such *authority, neither Peck nor Bellows claims title under it; for which reasons, the decision of the State court upon the effect of such order cannot be reëxamined in this court. [*617

A judgment of a court of the United States must be enforced by itself. If the party relies upon it in a State court, he must be content with such effect as the State court gives to it; otherwise, causes will come here indirectly, which cannot, under the laws of the United States, come here directly. *Osborn* v. *United States*, 6 Wheat., 738; *Montgomery* v. *Hernandez*, 12 Wheat., 129; *Williams* v. *Norris*, 12 Wheat., 117; *Crowell* v. *Randall*, 10 Pet., 368; *Mackay* v. *Dillon*, 4 How., 447; *Owings* v. *Norwood*, 5 Cranch, 334; *Hickie* v. *Starke*, 1 Pet., 98.

VII. The District Court had no jurisdiction to make the order which it set up in the several rejoinders of the defendants below. It is an attempt by the District Court, contrary to the provisions of the twenty-fifth section of the Judiciary Act, to exercise appellate jurisdiction over the State court. The property at the time the order was made was *in custodia legis*. *Ashton* v. *Heron*, 2 Myl. & K., 390; 2 Story Eq., § 891. *Ex parte Christy* admits that the District Court cannot reach the State courts; if it can reach their offices, the protection is of no value. *Ship Robert Fulton*, 1 Paine, 620; *Hogan* v. *Lucas*, 10 Pet., 403; *Brown* v. *Clark*, 4 How., 4; *Knox* v. *Smith*, 4 How., 316; *Harris* v. *Dennie*, 4 Pet., 294; *Ex parte Dorr*, 3 How., 103; *Ex parte Bellows and Peck*, 2 Story, 443; *Slocum* v. *Mayberry*, 2 Wheat., 1.

I have assumed, so far, that all the doctrines of *Ex parte Christy* are to be sustained by this court. I submit, however, "that a suit rightfully instituted in a State court, before the

institution of proceedings in a court of the United States, cannot be arrested by injunction from any court of the United States." If this be not so, our complex system of government cannot be upheld. 1 Laws, 334, 335, ch. 22, § 5; *Annis* v. *Smith*, 16 Pet., 313. This proposition is in harmony with the analogy which may be drawn from the English law of bankruptcy. *Ex parte Pease*, 19 Ves. 46; *Ex parte Heath*, Mon. & Bligh, 171; *Ex parte Bocherley*, 2 Glyn & J., 369; *Ex parte Tindal*, Buck, 305.

VIII. The order of the District Court can have no effect upon the rights of the parties before this court. The defendants in error were not parties to the proceeding before the District Court. The order is, *in personam*, against the sheriff and his deputy, and does not reach, or in any manner fasten upon, the property. *Ramsey* v. *Eaton*, 10 Mees. & W., 22; *Bellows and Peck*, 3 Story, 428; *Marshall* v. *Beverley*, 5 Wheat., *313; *Conn* v. *Penn*, 5 Wheat., 424; *Russell* v. *Clark*, 7 Cranch, 69; *Aspden* v. *Nixon*, 4 How., 497, 498; *Hollingsworth* v. *Barber*, 4 Pet., 475.

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IX. The several petitions of Peck and of Bellows to be declared bankrupt do not aver the insolvency or inability of Philip Peck & Co., as a firm, to pay its debts; and the several decrees of bankruptcy do not subject the joint or partnership property to the action of the bankrupteies. The fourteenth section of the bankrupt statutes especially provides for the case of partnerships. *Taylor* v. *Feilds*, 4 Ves., 396; *Ex parte Ruffin*, 6 Ves., 126; *Young* v. *Keighly*, 15 Ves., 557; *Dutton* v. *Morrison*, 1 Rose, 213; *Ex parte Farlow*, 1 Rose, 421; *Shriver* v. *Lynn*, 2 How., 43.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error, Jenness, Gage, & Co., instituted this suit against Philip Peck and William Bellows, in the Court of Common Pleas of Cheshire county, New Hampshire, demanding the sum of $2,000, for goods sold and delivered. The action was served according to the practice of that State, on the 10th of October, 1842, by the attachment of the goods, chattels, and lands of the defendants. The cause was continued till April term, 1844, when Aaron P. Howland, assignee in bankruptcy of each of the defendants, was, on motion, admitted by the court to come in and defend in their names. He pleaded severally their application to the District Court of the United States, at Portsmouth, on the 26th of November, 1842, for the benefit of the bankrupt law; on which they were decreed bankrupts, on the 28th day of December, 1842. That Howland was appointed assignee, and that defendants

severally received a certificate of discharge on the 21st of June, 1843.

To these pleas the plaintiffs below replied, that, before the filing of said petitions by the defendants, to wit, on the 8th of October, 1842, the plaintiffs in good faith sued and prosecuted out of the Court of Common Pleas their writ of attachment against the defendants for a just debt; by virtue of which the sheriff attached and took into his custody and possession, as security for such judgment as the plaintiffs in their said suit might obtain, certain goods and chattels on a schedule annexed, and now retains the custody thereof; and therefore pray judgment to be levied of the same.

To this replication the defendants rejoined, that Howland, the assignee, on the 25th of July, 1843, presented to the District Court of the United States a petition, setting forth the plaintiffs' attachment of the goods, and averring that such *attachment was not a valid lien on the said goods, and that therefore the sheriff had no right to detain [*619 them; and prayed the court to order and decree that the sheriff should deliver the goods to the assignee, or account for their value: and that the court, after notice to the parties and hearing, had decreed accordingly.

To these rejoinders the plaintiffs demurred; and the Court of Common Pleas entered their judgment, as follows:— "That the plaintiffs recover against the said Philip Peck and William Bellows $1818.87, damages and costs of suit; which sums are to be levied only of the goods and chattels and estate of the defendants attached upon the plaintiffs' writ aforesaid, and described in the plaintiffs' said replications, and not otherwise."

This judgment of the Court of Common Pleas was removed by writ of error to the Superior Court of Judicature of the State of New Hampshire, at the instance of the defendants; and, on hearing the judgment of the court below, was affirmed.

The defendants, now plaintiffs in error, then prosecuted their writ of error to this court, under the twenty-fifth section of the Judiciary Act of 1789. As the record shows that the highest court of judicature of the State of New Hampshire has decided against a title claimed under a statute of the United States, it is clearly a proper case for the revision of this court. Various questions have been made on the argument of this case, as to the regularity of the bankrupt proceedings, and the validity of the certificates of discharge set forth in the pleas of the defendants below. But we do not think it necessary to notice them; and shall

therefore assume that the bankrupt proceedings are regular, and properly set forth in the pleas.

I. The first question that will present itself for our consideration will be, whether the replication of the plaintiffs below sets forth matter in avoidance of the plea which will entitle them to the judgment prayed for, and afterwards rendered by the court. In order to test its sufficiency, we must first inquire, whether an attachment of property under the process peculiar to New Hampshire and some other States creates a lien or security on the property attached, within the true meaning and intention of the proviso of the second section of the bankrupt act.

The words of this proviso are as follows:—"And provided, also, that nothing in this act contained shall be construed to annul, destroy, or impair any lawful rights of married women, or any liens, mortgages, or other securities on *620] property, real or *personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act."

As it is not alleged that the attachment in this case is subject to any imputation of inconsistency with the provisions of the second and fifth sections of the act, it will not be necessary to give them further attention. Taking the words of the proviso, disconnected with this exception, they are of the most general and expansive character; they are equivalent to a saving of all liens or securities, &c., from any construction of the act that shall in any wise annul, destroy, or impair them; and, furthermore, to test their validity, we are referred to the laws of the States respectively.

At common law there can be no lien without possession. It is there defined, a right in one man to retain that which is in his possession belonging to another, till certain demands of him, the person in possession, are satisfied. (*Hammond* v. *Barclay*, 2 East, 235.) In maritime law, liens exist independently of possession, either actual or constructive. In courts of equity, the term *lien* is used as synonymous with a charge or encumbrance upon a thing, where there is neither *jus in re*, nor *ad rem*, nor possession of the thing. Hence a judgment which, by virtue of the statute of Westminster 2d, (commonly called the Statute of Elegit,) is a charge upon the lands of the debtor, is called in courts of equity in England, and in the courts of law of many of these States, a *lien*, and executions which bind the personal property of the debtor, after their delivery to the sheriff, are termed *liens*, both before and after the property is seized and taken into the custody of

the law by its officer. In the case of *Walter* v. *Best*, 3 How., 111, this court decided that in Kentucky the creditor obtains a lien upon the property of his debtor by the delivery of a *fi. fa.* to the sheriff, and this lien is as absolute before the levy as after; and that a creditor is not deprived of this lien by an act of bankruptcy on the part of the debtor, committed before the levy is made, but after the execution is in the hands of the sheriff; and "it is unnecessary," say the court, "to remark upon the cases which have been decided in other States, or in England, because the question depends altogether upon the law of Kentucky."

It would be an arbitrary and fanciful exposition of the terms of this proviso to say that it saved common-law liens, and not statute liens; liens after judgment, and not liens before judgment; or to assert that it is the policy of the bankrupt act to save the lien of a factor or bailee, while it annuls that of the judgment or execution creditor.

*It is clear, therefore, that whatever is a valid lien or security upon property, real or personal, by the laws of any State, is exempted by the express language of the act. [*621

Let us inquire, then, whether an attachment on mesne process is a valid lien or security on the property attached by the laws of New Hampshire, as expounded by her courts.

This species of process is peculiar to the New England States. As early as the year 1650, while New Hampshire was united to the Massachusetts colony, it was enacted, that "henceforth goods attached upon any action shall not be released upon the appearance of the party or judgment, but shall stand engaged until the judgment or the execution granted on the same be discharged." (Charters and Colony Laws, 50.) And a proviso was added in 1659, that, when execution was not taken out within one month after judgment, the attachment shall be released and void in law, &c.

The earliest provincial legislation of New Hampshire adopted the same system, which has been continued with some variations to the present day. In 1718, they describe the goods attached as "security to satisfy the judgment" which the plaintiff might recover on the trial. (Provincial Laws N. H., 113.) In the statute of July, 1822, and of November sessions, 1842, ch. 2, the charge or incumbrance created by an attachment is denominated a *lien*.

The mode of proceeding and practice, as at present established, under writs of attachment in the State of New Hampshire, is thus described by the Superior Court of that State, in the case of *Kittridge* v. *Warren*.

"In an attachment of personal estate, the sheriff, upon the

service of the writ, takes the possession of the goods, and acquires thereby a special property in them, for the purpose of enforcing and protecting the attachment, and the rights of all concerned in the attachment and in the goods. He is then accountable, both to the plaintiff and to the defendant, for the disposition of them. If the plaintiff obtains a judgment, they are seized and sold upon the execution. If he fails, they are returned to the debtor. Some person may become accountable for them, and they may thus go back into the hands of the debtor, and the attachment be dissolved; the sheriff having, by means of a receipt for them, the security of some third person, which is in that case to be made available to the creditor. But if the attachment is not dissolved, it fastens itself upon the goods, as a charge or incumbrance, like the attachment upon real estate, and the avails of them are first to be applied to the satisfaction of the judgment, when recovered. Subsequent attachments may be made upon them by the same sheriff, and *where there are several attachments, the *622] attaching creditors have a right to priority of satisfaction, so far as those goods are concerned, not by priority of judgment, but by that of the attachment. *Poole* v. *Symonds*, 1 N. H., 292, 294; *Bissell* v. *Huntington*, 2 Id., 142; *Hackett* v. *Pickering*, 5 Id., 24; *Kittridge* v. *Bellows*, 7 Id., 428; *Clarke* v. *Morse*, 10 Id., 238."

The statute of elegit has never been adopted in this State, and hence a judgment is not treated as a charge or lien on the lands of the defendant, and the reason would seem to be, because the plaintiff could select his security upon specific property by his attachment at the commencement of his suit, and hold it for thirty days after judgment for the purpose of satisfaction. Hence their courts have denominated the charge or security thus obtained a lien. (See *Dunken* v. *Fales*, 5 N. H., 538; *Kittredge* v. *Bellows*, 7 Id., 427; *Clarke* v. *Morse*, 10 Id., 238; *Burnam* v. *Folsom*, 5 Id., 568; *Kittridge* v. *Warren*; *Kittridge* v. *Emerson*, &c.)

In Massachusetts, also, the charge or incumbrance created by an attachment is denominated a *lien*. See 9 Mass., 210; *Fettyplace* v. *Dutch*, 13 Pick. (Mass.), 392; *Arnold* v. *Brown*, 24 Id., 95; *Kilborn* v. *Lyman*, 6 Metc. (Mass.), 299, &c. In Connecticut, also, see *Carter* v. *Champion*, 8 Conn., 550.

Having thus shown that an attachment on mesne process creates a charge on the property attached in favor of the plaintiff, which is, in the language of the statutes and courts of New Hampshire, called a *security* and a *lien*, it will be unnecessary to notice arguments which have been urged against them on the ground of their peculiarities or distinctive feat-

ures. The mere accidents of the subject cannot alter its essence. It is a statute lien, and therefore as much protected by the general language of the proviso as a common law lien.

II. Could this lien be defeated by the interposition of the plea of bankruptcy as a bar to a judgment in favor of the plaintiff?

By the fourth section of the act, it is declared, that "the certificate or discharge, when duly granted, shall, in all courts of justice, be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act, and shall or may be pleaded as a full and complete bar to all suits brought in any court of judicature whatever." And it is contended, as the lien of the attachment was defeasible, and could only be rendered absolute and of practical benefit to the plaintiff by the recovery of a judgment for his demand, which is effectually barred by the plea, that therefore the action and the lien must fall together.

This conclusion would be undoubtedly correct, if we *construe this section of the act by itself, and without regard to other provisions of the same act. [*623

But it is among the elementary principles with regard to the construction of statutes, that every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another, so that all may stand together.

The proviso to the second section of this act declares, "that nothing in this act contained shall be construed to annul, destroy, or impair," any liens, &c. Here, then, is an absolute prohibition to the court to construe the general terms of the fourth section so as to defeat the lien saved by the second. It is clear, therefore, that the court, while it grants the defendant the benefit of his discharge, must do it in such a manner as not to impair the rights saved to the plaintiff. All liens, whether by mortgage or judgment, by common law or by statute, are for the purpose of obtaining satisfaction of some debt or claim; and the construction of the fourth section which would treat the bankrupt's certificate as an absolute discharge from all his debts, for every purpose, would be alike destructive of them all. The mortgagee, the factor, or the bottomry lender, is in no better condition than the judgment or attachment creditor. And an attempt to make a distinction between

them, which would save the rights of one, and impair or destroy those of the other, would be judicial legislation,—*jus dare*, not *jus dicere*. In order, therefore, to give full effect to all the provisions of the act, the bankrupt's certificate must be made to operate as a discharge of his person and future acquisitions, while, at the same time, the mortgagees or other lien creditors shall be permitted to have their satisfaction out of the property mortgaged or subject to lien. A legal right without a remedy would be an anomaly in the law.

The judgment rendered in this case has fully attained both these objects. While it discharges the defendant from personal liability, it saves to the plaintiffs below their remedy, and awards their satisfaction out of the property attached, "and not otherwise." The books are full of precedents for such a judgment. When an administrator pleads *plene administravit*, the plaintiff may admit the plea, and take judgment of assets, *quando acciderint*. When the defendant pleads a discharge of his person under an insolvent law, the plaintiff may confess the *plea, and have judgment to be levied only of defendant's future effects. 1 Chitty, Pl., 548. [*624

III. The only question that remains to be considered is, whether the rejoinder of the defendants below is a sufficient answer to the replication.

It sets up, by way of avoidance of the attachment pleaded in the replication, that the District Court of the United States, on the petition of the assignee, and on notice to the plaintiff in this suit, had decreed that this attachment was not a lien on the property in custody of the sheriff, and ordered him to deliver it up to the assignee, or account to him for its value. It does not pretend to show how the proceedings in the Court of Common Pleas had been removed to the District Court, or how its judgment on the cause pending before it could be thus anticipated; nor that the District Court had found any means of enforcing its decree by compelling the sheriff to deliver the property attached to the assignee, and thus, in effect, destroy the lien: but it seems to rely on the decree as a judgment on the question, which should operate by way of estoppel. This necessarily involves the inquiry, whether the District Court was vested with any power or authority to oust the Court of Common Pleas of its jurisdiction over the cause, and supersede its judgment, by this summary proceeding.

The district Court has exclusive jurisdiction "of all suits and proceedings in bankruptcy." But the suit pending before the Court of Common Pleas was not a suit or proceeding in bankruptcy; and although the plea of bankruptcy was interposed by the defendants, the court was as competent to enter-

tain and judge of that plea as of any other. It had full and complete jurisdiction over the parties and the subject-matter of the suit; and its jurisdiction had attached more than a month before any act of bankruptcy was committed. It was an independent tribunal, not deriving its authority from the same sovereign, and, as regards the District Court, a foreign forum, in every way its equal. The District Court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of State Courts can be revised or annulled, and that is by this court, under the twenty-fifth section of the Judiciary Act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects, they are to be regarded as equal and independent tribunals.

It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and *whether its decision be correct or otherwise, its [*625
judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other.[1] Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.[2] In the case of *Kennedy* v. *The Earl of Cassilis*, Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the Court of Sessions of Scotland, which, on more mature reflection, he dissolved; because it was admitted, if the Court of Chancery could in that way restrain proceedings in an independent foreign tribunal, the Court of Sessions might equally enjoin the parties from proceeding in chancery, and thus they would be unable to proceed in either court. The fact, therefore, that an injunction issues only to the

[1] APPLIED. *Andrews* v. *Smith*, 19 Blatchf., 104. FOLLOWED. *Stout* v. *Lye*, 13 Otto, 68. LIMITED. *Watson* v. *Jones*, 13 Wall., 716. QUOTED. *Orton* v. *Smith*, 18 How., 206; *Randell* v. *Howard*, 2 Black, 589; *Amador Canal &c. Co.* v. *Mitchell*, 50 Cal., 178. CITED. *Hammock* v. *Loan and Trust Co.*, 15 Otto, 82.

[2] APPROVED. *Freeman* v. *Howe*, 24 How., 457. QUOTED. *Taylor* v. *Carryl*, 20 How., 596.

parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum.

The act of Congress of the 2d of March, 1793, ch. 66, § 5, declares that a writ of injunction shall not be granted "to stay proceedings in any court of a State." In the case of *Diggs* v. *Wolcott*, 4 Cranch, 119, the decree of the Circuit Court had enjoined the defendant from proceeding in a suit pending in a State court, and this court reversed the decree, because it had no jurisdiction to enjoin proceedings in a State court.[3]

It follows, therefore, that the District Court had no supervisory power over the State court, either by injunction or the more summary method pursued in this case, unless it has been conferred by the bankrupt act. But we cannot discover any provision in that act which limits the jurisdiction of the State courts, or confers any power on the bankrupt court to supersede their jurisdiction, to annul or anticipate their judgments, or wrest property from the custody of their officers. On the contrary, it provides that "all suits in law and equity then pending, in which such bankrupt is a party, may be prosecuted and defended by such assignee to its final conclusion, in the same way and with the same effect as they might have been by such bankrupt."

Instead of drawing the decision of the case into the Dis-
*626] trict *Court, the act sends the assignee in bankruptcy to the State court where the suit is pending, and admits its power to decide the cause. It confers no authority on the District court to restrain proceedings therein by injunction on any other process, much less to take property out of its custody or possession with a strong hand. An attempt to enforce the decree set forth in the rejoinder would probably have been met with resistance, and resulted in a collision of jurisdictions much to be deprecated.

In fine, we can find no precedent for the proceeding set forth in this plea, and no grant of power to make such decree or to execute it, either in direct terms or by necessary implication, from any provisions of the bankrupt act; and we are not at liberty to interpolate it on any supposed grounds of policy or expediency.

The plea cannot, therefore, be sustained, and the judgment of the Superior Court of New Hampshire must be affirmed.

[3] Followed. *Watson* v. *Jones*, 31 Wall., 719. Cited. *Dial* v. *Reynold*, 6 Otto, 341.

ORDER.

This cause came on to be heard on the transcript of the record of the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

ABRAHAM COLBY, PLAINTIFF IN ERROR, *v.* JAMES LEDDEN.

The decision of this court in the preceding case of *Peck* v. *Jenness* affirmed.

THIS, like the preceding case of *Peck* v. *Jenness*, was brought up from the Superior Court of Judicature of the State of New Hampshire, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

Ledden was an inhabitant of the Province of New Brunswick, and Colby of the State of New Hampshire. The attachment was issued in 1837.

The case was similar, in its principal circumstances, to that of *Peck* v. *Jenness*, and was argued together with it.

C. B. Goodrich, for the defendant in error.

As to the principal question, I rely upon the argument [*627 submitted in the case of *Peck* v. *Jenness*. The attachment in this case was made before the passage of the bankrupt statute. It cannot with much reason be said, that the right which the defendant below acquired by his attachment, legal when made, can be taken from him by subsequent legislation. Every objection, however, can be made in this case, which can be taken in relation to any attachment. The debt is discharged here, to the same extent as any other debt.

As to the objections, that the statute requisites have not been complied with which are essential to constitute an attachment, I submit that the State court is the exclusive judge in this particular, and that its judgment is not open to review is this court.

Mr. Justice GRIER delivered the opinion of the court.

This case was argued with the case of *Philip Peck et al* v.

John S. Jenness et al., and the record presents the same questions which have just been decided in that case. For the reasons there assigned, the judgment of the Superior Court of New Hampshire is affirmed.

ORDER.

This cause came on to be heard on the transcript of the record to the Superior Court of Judicature of the State of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Superior Court of Judicature in this cause be and the same is hereby affirmed, with costs and damages at the rate of six per centum per annum.

JOHN L. SHAWHAN, DANIEL SHAWHAN, GEORGE H. PERRIN, BENJAMIN BERRY, CATHARINE SNODGRASS, AND ISAAC MILLER, APPELLANTS, *v.* PERRY WHERRITT, ASSIGNEE OF THE BANKRUPT ESTATE OF BENJAMIN BRANDON.

A decree of the District Court of the United States, sitting in bankruptcy, whereby a person proceeded against, *in invitum*, was declared to be a bankrupt, is sufficient evidence, as against those who were not parties to the proceeding, to show that there was a debt due to the petitioning creditor; that the bankrupt was a merchant or trader within the meaning of the act; and that he had committed an act of bankruptcy.[1]

The first section of the bankrupt act declares that the making of any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods, or chattels, is the commission of an act of bankruptcy.

No creditor can, by instituting proceedings in a State court, after the commis-
*628] sion of *an act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by such fraudulent deed, if he has notice of the commission of an act of bankruptcy by the debtor. It passes to the assignee of the bankrupt for the benefit of all the creditors.[2]

A lien thus acquired is not saved by the proviso of the second section of the bankrupt law. That proviso does not protect liens which are inconsistent with the second and fifth sections of the act, and these sections declare such a lien to be void.

THIS was an appeal from the Circuit Court of the United States for the District of Kentucky.

On the 6th of April, 1842, Benjamin Brandon executed the following deed:—

[1] APPLIED. *Boyd* v. *Olney*, 82 Ind., 306. DISTINGUISHED. *In re Thomas*, 11 Bank. Reg., 333.

[2] CITED. *Buchanan* v. *Smith*, 16 Wall., 307; *Michaels* v. *Post*, 21 Id., 428.

"This indenture, made and entered into this 6th day of April, 1842, between Benjamin Brandon, of Harrison county and State of Kentucky, of the one part, and William A. Withers, of the county and State aforesaid, of the other part, witnesseth: That the said Benjamin Brandon, for and in consideration of one dollar, to him in hand paid, and for the further consideration hereinafter mentioned, hath given, granted, bargained, sold, released, conveyed, and confirmed, and by these presents do give, grant, bargain, sell, release, convey, and confirm unto the said William A Withers, his successor or successors, for ever, all the estate, real, personal, and mixed, of whatever nature or kind it may consist, (except such property only as by law not subject to execution,) said estate hereby conveyed consisting of a tract of about 336 acres of land, situated in the State and county aforesaid, and the same tract on which said Brandon now resides, and on which is a steam-mill and distillery, the boundary of which land is more particularly designated in the several deeds which said Brandon holds for said land; also, five negroes, two wagons and teams, about 400 head of hogs, about 15,000 pieces of cooper's stuff, all his stock of horses, cattle, and sheep, his household and kitchen furniture and farming utensils, his debts and choses in action, of every kind and description; it being the intention of said Brandon, by this deed, to convey to the said Withers and his successors, for ever, all his estate, real, personal, and mixed, and choses in action, with the exceptions hereinbefore expressed, whether the same be particularly mentioned and set forth in this instrument or not. To have and to hold all the estate, real, personal, and mixed, and choses in action, hereby conveyed to the said William A. Withers and his successor or successors, for ever, in trust, for the following purposes, namely:—To collect the debts and choses in action due, payable, or owing to said Brandon, and to sell the real estate hereby conveyed, either all together or in lots, as said trustee may think most advisable, at public auction, to the highest bidder, on the *following pay- [*629
ments: namely, one third of the purchase-money to be paid in hand, and the residue in one and two years; and the slaves and personal estate to be sold at public auction to the highest bidder, on a credit of twelve months; and after making to said trustee a just and reasonable compensation for his trouble and expenses in executing this trust, to pay all the money which he may receive as trustee aforesaid, either by the collection of debts or choses in action, from the proceeds of the sale of the trust estate, to all the creditors of said Brandon, ratably, proportionably to the amount of their respective

debts or demands; but should any one or more of the creditors of said Brandon become the purchaser or purchasers of any portion of the real or personal estate, or slaves, hereby conveyed, said trustee is authorized and empowered to accept the debt or debts due or owing by said Brandon to such purchaser or purchasers, in payment for their respective purchases, so far as said debts may go; and in such cases, if any such should occur, only the residue of the price to be distributed *pro rata* as aforesaid; and after the payment of all said Brandon's debts, to pay the residue, if any, to said Brandon, his heirs and assigns; and the title to the estate hereby conveyed he doth hereby warrant and defend to said Withers, and his successor or successors, for ever, in trust for the purposes aforesaid, against the claim or claims of him, the said Benjamin Brandon, and against all other claims. In testimony of which, the said Benjamin Brandon hath hereunto subscribed his name and affixed his seal, this day and year first above written. BENJAMIN BRANDON."

On the 3d of May, 1842, John L. Shawhan and others filed a bill in the Harrison Circuit Court of Kentucky, sitting as a court of equity. The bill recited, that the complainants were creditors of Brandon; that he had executed the deed above set forth, "for the purpose of hindering, delaying, and defrauding the creditors of the said Brandon in the collection of their debts"; that the trustee was about to sell and dispose of the property mentioned in the deed; and prayed for an injunction to stop him.

On the same day an injunction was issued, and served upon Brandon and Withers, the trustee.

On the 21st of May, 1842, Brandon and Withers filed separate answers to the bill. Brandon admitted his indebtedness, and the execution of the deed of trust; averred that Shawhan was present while the deed was preparing, and expressed himself satisfied with its provisions; denied most positively that he executed said deed either to hinder, delay, *630] or defraud *his creditors, but, on the contrary, in good faith, believing that general satisfaction would be given to them. The answer of Withers was to the same effect as that of Brandon.

On the 25th of June, 1842, Withers and Brandon applied for an order to change the venue. It was granted, and the record sent to the county of Bourbon.

On the 24th of September, 1842, John Lail presented a petition to the United States Kentucky District Court, sitting in bankruptcy. It alleged that, on the 6th of April

preceding, Brandon had made a fraudulent conveyance with intent to defraud his creditors; and that he had concealed himself to avoid being arrested. It then prayed that the court might declare the said Benjamin Brandon a bankrupt. With the petition were filed several exhibits, which it is not necessary to state particularly.

On the same day an order was passed, setting down the hearing for the 4th of the ensuing November, and, in the mean time, enjoining the defendant and all others from removing or otherwise disposing of the property of the defendant, or which, on the decree, the assignee might be entitled to reclaim and recover.

On the 22d of October, 1842, the Bourbon County Court, before which the suit of Shawhan and others against Brandon and Withers was pending, passed a decree annulling and setting aside the deed of trust, as being, in point of law, fraudulent and void. The court enumerated many of the creditors, whose claims had been exhibited, and then ordered, that "so much of the personal property, slaves, and real estate mentioned in said deed of trust as may be necessary for the purpose be sold to satisfy the aforesaid debts." Thomas B. Woodyard was appointed to make the sale, according to certain given directions.

On the 22d of November, 1842, the District Court of the United States passed the following order:—

"JOHN LAIL *v.* BENJAMIN BRANDON.

"The prayer of the petitioner, that the defendant be declared a bankrupt, having been heard upon the allegations of the petition, and the proofs taken and filed, (the defendant having failed to answer,) and now having been fully considered:

"It is found and adjudged by the court, that the said Benjamin Brandon, of Harrison county, being a retailer of merchandise, and indebted as in the petition mentioned, did, by making the deed of conveyance and assignment to William A. Withers, of all his property, real, personal, and mixed, and rights of property, subject to the payment of his debts by the laws of the State, bearing date the 6th day of April, [*631] 1842, and on the 7th day of that month and year admitted to record in the clerk's office of the Harrison County Court, and in the petition mentioned, whereof a copy is filed here, now adjudged a fraudulent conveyance and assignment; and by concealing himself to avoid being served with process, whereby a suit had been commenced against him, thereupon became and is a bankrupt.

"Perry Wherritt is appointed the assignee, and required to execute bond in the penalty of $5,000, with two sufficient sureties."

On the 24th of November, 1842, Woodyard, the commissioner appointed by Bourbon County Court, proceeded to sell the personal property of Brandon.

In May, 1843, the commissioner made his report to Bourbon County Court, whereupon another decree was passed, reciting that the former sale was insufficient to pay the debts, and directing that so much of the land comprised in the deed of trust as might be necessary for the purpose should be sold for the payment of the balance of the debts.

On the 14th of July, 1843, the commissioner sold the land, in conformity with the above order, and John L. Shawhan became the purchaser. A writ of possession was issued in his favor, in April, 1844, which will be mentioned again in its proper place.

On the 10th of August, 1843, Wherritt, as assignee of the estate of Benjamin Brandon, filed a bill in chancery, in the District Court of the United States for the District of Kentucky, against John L. Shawhan and the other parties named in the caption of this statement. The bill referred to the former proceedings of the court, declaring Brandon to be a bankrupt, and all the other facts in the case. It stated that the assignee had taken possession of the property of the bankrupt, including the land; that Shawhan and others knew of the commission of the act of bankruptcy, but had nevertheless obtained a decree of Bourbon County Court, under the authority of which they had sold the land to Shawhan, who was threatening to disturb the possession of the complainant, and by his threats and forced claims of title was preventing the complainant from disposing of the land. It then prayed that Shawhan might be ordered to surrender up, to be cancelled, any pretended claim, and that all the parties might answer, &c.

On the 18th of December, 1843, John L. Shawhan, Daniel Shawhan, and Benjamin Berry answered separately. Shawhan admitted the execution, by Brandon, of the deed of April *6th, 1842, but denied that he had committed any acts of bankruptcy. It admitted also the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated above; but insisted that by said proceedings he had acquired a lien on the property, which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been

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commenced before those in bankruptcy, could not be affected by those of the District Court of the United States.

It is not material to state the answers of the other defendants. To these answers there was a general replication.

At the April term, 1844, the Bourbon County Court passed a decree reciting the sale to Shawhan by the commissioner, Woodyard, and proceeding as follows, viz.:—

"It is therefore decreed and ordered, that the said purchases made by the said Shawhans be and the same are hereby confirmed; that the amounts so decreed to said Shawhans be and the same are hereby extinguished and satisfied, by the aforesaid purchases made by them, except as to said balance of $149.34, which was decreed to the Shawhans above the amount of their purchases. That a writ of possession issue in favor of said John L. Shawhan, to put him into the possession of said tract of land mentioned in the complainant's bill; that Thomas B. Woodyard, the commissioner herein, convey all the right and title of the defendants, Brandon and William A. Withers, in and to said tract of land, to said John L. Shawhan, by deed of special warranty, warranting the title of the same against the claims of the said Benjamin Brandon and William A. Withers, and all persons claiming by, through, or under them, but not against the claim or claims of any other person or persons whatever."

The decree then proceeded to regulate certain details.

In June, 1844, the bill filed by Wherritt in the District Court of the United States came on for hearing, when the complainant prayed that the defendants might be ordered to pay over the amount of sales of the personal property which had been sold under the authority of Bourbon County Court. A reference took place to a master in chancery, upon the coming in of whose reports the court passed the following final decree, on the 10th of June, 1844.

"This cause having been heard at this term, and argued by counsel, thereupon, on consideration thereof:

"It is adjudged by the court, that the complainant was invested with all the estate which was of said Brandon at the time he became a bankrupt, and that the defendants did not, by their after-commenced suit, and proceedings therein had, (with notice of his act of bankruptcy,) obtain a right [*623 to have it thereby subjected exclusively, or first, to the satisfaction of their demands; and that the defendants, John L. Shawhan, Daniel Shawhan, George H. Perrin, Benjamin Berry, Catharine Snodgrass, and Isaac Miller, by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and

are each of them, liable for his, their, and her proper portion of the proceeds thereof, whereof they thus wrongfully obtained the benefit, and must pay the same, together with the interest thereon, to the complainant, for the purpose of equal distribution required by the statute; and it is adjudged, that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared, and was vested in the complainant as assignee so appointed; but the said Shawhan, by the assertion of his pretended claims so founded, has and does injuriously embarrass the title of the complainant.

"It is therefore ordered, adjudged, and decreed, that the defendant, John L. Shawhan, do, on or before the first day of July next, execute to the complainant, as assignee of the bankrupt estate of Benjamin Brandon, a deed of release of all right, title, and interest claimed by him, Shawhan, in and to the tract of land whereon the said Brandon resided, containing 350 acres, more or less, in the county of Harrison, in the bill and answers mentioned, with covenant of warranty against all persons claiming by, through, or under him.

"And it is adjudged and ordered, that said Shawhan do, on or before the said first day of July next, deliver to the complainant the possession of the said land."

The decree then went on to specify the amounts to be paid, &c.

From this decree there was an appeal to the Circuit Court of the United States of the District of Kentucky.

On the 22d of November, 1844, the Circuit Court affirmed the decree of the District Court.

The defendant appealed to this court, and the cause came up on this appeal.

It was argued by *Mr. Trimble*, for the appellants, and *Mr. Bibb*, for the appellee.

The appellants assigned the following causes of error.

1. The Circuit Court erred in affirming the decree of the District Court, and in decreeing costs against the appellants.

*634] *II. The Circuit Court ought to have reversed the decree of the District Court, and dismissed the bill, on the following grounds, to wit:—

1. The bill filed by the appellee in the District Court is predicated entirely on the provisions of the English statutes, or the former bankrupt law of the United States, passed in 1800.

2. There is no equity in the bill filed in the court below, when tested by the late bankrupt law of 1841.

3. The bill alleges that the appellee is in possession of the tract of land in contest, and prays the Court to quit him and the possession, and protect him against the process of the State court; and the decree directs John L. Shawhan to restore the possession.

4. The decree assumes a fact which is contradicted by the record. John L. Shawhan, &c., commenced their suit in the State court several months before Brandon became a bankrupt, and not afterwards, as is stated in the decree.

5. The principles assumed by the decree are expressly negatived by the bankrupt law of 1841, and can only be sustained by adopting the provisions of the English statutes, or the bankrupt law of 1800.

6. The decree directs the appellants to pay over to the appellee the amount of the sales of the slaves and personal estate of Brandon, when it appears from the record that the commissioner took notes for the purchase-money, and the appellants have not received either the notes or the money.

7. The petitioner was not a creditor of Brandon when the petition was filed.

That portion of the argument of the counsel for the appellants, which related to the principal point decided by the court, was as follows, viz.:—

By the decree of the District Court, it is said that the complainant in that court was invested with all the estate of Brandon at the time he became a bankrupt, and that the defendants did not, by a suit commenced afterwards, obtain a right to have it subjected to their demand, &c. If, by that expression, it was intended to say, that, by the decree in bankruptcy, the assignee was invested with all the estate of Brandon at the time he made the fraudulent deed of trust, the opinion of the court is in direct opposition to the plain and unequivocal words of the third section of the act. That section expressly declares that the estate of the bankrupt shall, from the time of the decree, be deemed to be divested out of the bankrupt, and by force of the decree be vested in the assignee. That provision of the section must be abrogated, and other words *interpolated before the opinion [*685
of the District Court can be sustained. It would be a strange perversion of that section, to say that the decree should have relation to an act of bankruptcy, contrary to the express words of the section. If that section had barely said that, by the decree, the estate should be divested out of the bankrupt, and vested in the assignee, without reference to

the time when the estate should be so divested, there might have been some room left for construction. But such language has not been used. On the contrary, the words employed have left no room for construction as to the time when the property shall be divested out of the bankrupt, and vested in the assignee. The same section is equally explicit as to the power of the assignee to sell and dispose of the property of the bankrupt. It provides that the assignee shall have the same power to sell and dispose of the property which might be exercised by such bankrupt before or at the time of the bankruptcy declared. If, by the decree in bankruptcy, the property was divested out of the bankrupt from the time of making a fraudulent conveyance, he certainly could have no power to sell or dispose of his property at the time of the bankruptcy declared. If Congress had intended that the decree in bankruptcy should have relation to an act of bankruptcy, they would have employed language indicating such an intention. They have not done so, nor even left room for construction on that subject; but the most explicit language has been employed to prevent any such relation by construction. Neither the English statutes, nor the former bankrupt law of the United States, contain any provision similar to that in the third section of the late bankrupt law. The decisions in the English books, and the decisions of the American courts, founded on statutory provisions totally dissimilar, cannot, therefore, have any influence on the question. The statute 13th Eliz. empowers the commissioners in bankruptcy to sell and convey all the lands and tenements which the bankrupt had at the time he became a bankrupt; and further provides, that such conveyance shall be good against the bankrupt, and all other persons claiming by, from, or under him by any act after committing the act of bankruptcy. 2 Bl. Com., 285; 2 Phil. Ev., 289.

The statutes of James I. direct the commissioners to assign over to the assignees the whole of the bankrupt's estate, and makes void all acquisitions of property by, from, or under the bankrupt, at any time after committing the act of bankruptcy. A few cases, only, are excepted out of the general prohibition by the same statutes, and by the statute of 19th George II. 2 Bl. Com., 485, 486; 1 W. Bl., 68; 2 W. Bl., 829. The tenth section of the bankrupt law of the United States, passed *in 1800, contains similar provisions. *636] By the express provisions, therefore, of the English statutes, and of the bankrupt law of 1800, the assignment of the commissioners vested in the assignees the whole of the estate of the bankrupt which he had at the time when

be committed the act of bankruptcy. It has already been shown, that the late bankrupt law contains no such provision, but that its provisions expressly negative any relation to an act of bankruptcy.

Mr. Bibb's argument upon the same point was as follows:—

III. The rights, titles, and authorities of the assignee, when appointed by the court, had relation to the act of bankruptcy committed on the 6th of April, 1842, specified in the decree declaring the bankruptcy, and overreached and avoided the lien claimed by the appellants as the result of their proceedings in the State court, so originated after and with full knowledge of the prior act of bankruptcy.

Such relation is expressly enacted by the second and third sections of the act of 1841. That the effect of such relation, so enacted by the statute, is to annul all subsequent acts by which the assets of the bankruptcy are attempted to be diverted from the general fund for distribution among the several creditors of the bankrupt, is a doctrine well settled by very many adjudged cases. These precedents may be arranged under four classes.

1st Class. Transactions by and with a bankrupt preceding an act of bankruptcy, but in contemplation of bankruptcy, and for the purpose of preferring a creditor contrary to the spirit of the bankrupt law, and therefore void. Of this class these examples will suffice:—*Locke* v. *Winning*, 3 Mass., 325, 326, 329; *Harman* v. *Fishar*, 1 Cowp., 117, 123; *Rust* v. *Cooper*, 2 Cowp., 629, 632, 633; *Alderson* v. *Temple*, 4 Burr., 2238, 2239, 2241; *Compton* v. *Bedford*, 1 W. Bl., 362.

2d Class. Transactions by a bankrupt in themselves acts of bankruptcy, and therefore void. Of this class these examples, out of many others, will suffice:—*Worsely* v. *De Mattos*, 1 Burr., 468, 476, 484; *Wilson* v. *Day*, 2 Burr., 827; *Alderson* v. *Temple*, 4 Burr., 2239, 2240; *Devon* v. *Watts*, and *Hassells* v. *Simpson*, 1 Doug., 86, 89, 92; *Linton* v. *Bartlett*, 3 Wils., 47.

3d Class. Transactions by and with a bankrupt after an act of bankruptcy committed, and before commission sued out, void because after an act of bankruptcy. Of this class these examples will suffice:—*Hussey* v. *Fidell*, 3 Salk., 59; *Dyson* v. *Glover*, 3 Salk., 60; *King* v. *Leith*, 2 T. R., 141; *Vernon* v. *Hall*, 2 T. R., 648; *Dias* v. *Freeman*, 5 T. R., 197.

*4th Class. Efforts by process of law, after an act [*637 of bankruptcy, to abduct the property of the bankrupt from the assets for distribution among the general creditors,

avoided by the commission after taken out upon the previous act of bankruptcy. Of this class these examples will suffice: —*Sill* v. *Worswick*, 1 H. Bl., 665; *Cooper* v. *Chitty*, 1 Burr., 20; *Coppendall* v. *Bridgen*, 2 Burr., 817, 820; *Smallcomb* v. *Cross*, 1 Ld. Raym., 252; *Rust* v. *Baker*, 2 Str., 996; *Payne* v. *Teap*, 1 Salk., 108; *Smith* v. *Milles*, 1 T. R., 475; *Ward* v. *Macauley*, 4 T. R., 489; Bull. N. P., 41, 42.

Such must be the relation to the time of the act of bankruptcy, and such the effect thereof, according to the enactments of the third, second, and fifth sections of the bankrupt law of 1841.

I put the third section foremost, because that section declares that the rights, titles, powers, and authorities of the assignee shall relate, not only to the time of the act of bankruptcy committed, but even to a time before the bankruptcy. I refer to the second section for the purposes, first, to show that the time of the decree passed is not the border and foremost faculty given to rights of the assignee, (as has been argued for the appellants,) when appointed by the court in consequence of the decree, but that the relation thereof to the act of bankruptcy, upon which the decree is founded, is clearly avouched by the second section; secondly, as explanatory of the sense and propriety of the expression in the third section, "before or at the time of his bankruptcy."

The celebrated maxim of the Rabbins is, "In the law there is no such thing as first or last." For in the law many things are set down, all taking effect, as the one law, at one and the same time. The sages of the law have been used to collect the sense and meaning of the law by comparing one part with another, and by viewing all the parts together as one whole, and not of one part only by itself,—"Nemo enim aliquam partem recte intelligere possit, antequam totum iterum atque iterum per legerit." *Lincoln College's Case*, 3 Co., 59 *b*; *Stradling* v. *Morgan*, Plowd., 205; Co. Litt., 381., *a*.

I do not cite the second section as that which directly invalidates the lien set up by the appellants, but only as explanatory of the third section. The nullity of the lien claimed by the appellants by process of law in the State court, commenced and carried on after the act of bankruptcy, results from the relation of the rights, titles, powers, and authorities of the assignee to the time of Brandon's bankruptcy, committed on the 6th day of April, enacted by the third section, and the system of equality among all the creditors of the
*638] bankrupt established *by the fifth section. This equality among creditors, without preference or priority, is

the soul and spirit of the bankrupt law, to which the second and third sections are but handmaids and auxiliaries.

The English system of bankruptcy having been in use long before the system of bankruptcy was enacted in the United States, our statutes have borrowed the general outlines and phrases from the English statutes and the adjudications thereon. In particular instances expressions are altered to make the principle less dubious, and to enlarge the reach and extent of the statute. It will therefore not be without utility, in conducing to a clear understanding of our statute of 1841, to run a parallel between that and the English statutes.

By the English statute, the process against a bankrupt commenced by a petition of a creditor to the court, alleging the particular act of bankruptcy which the debtor had committed. So by ours. By the English statute and ours of 1800, the proper court, upon the presentation of a petition, appointed, as a matter of course, commissioners to hear and determine the matters of the petition against the debtor, and, if found true, "to declare him or her a bankrupt." By our statute of 1841, the petition is heard by the court, and, if true, the bankruptcy is declared by decree of the court. By the English system, and by our statute of 1800, the debtor had notice of the time and place appointed by the commissioners to hear and determine the matters of the petition, but no notice was given generally to persons interested to show cause against the petition. By our statute of 1841, notice of the time assigned by the proper court for the hearing of the petition is given by a publication in one or more newspapers, at least twenty days before the hearing, "and all persons interested may appear and show cause, if any they have, why the prayer of the petitioner should not be granted."

By the English system, the commission of bankruptcy was liable to be superseded (if improvidently issued) by application to the Court of Chancery. *Ex parte Gayther*, 1 Atk., 144; *Ex parte Sydebotham*, 1 Atk., 146; *Ex parte Hylliard*, 1 Atk., 147. By our statute of 1841, section first, the decrees declaring the bankruptcy, when passed by the proper court, and not reëxamined upon the petition of the bankrupt within ten days for a trial by jury, "shall de deemed final and conclusive."

By the English system, the creditors appointed the assignees to manage the estate and affairs of the bankrupt. By our statute of 1841, the assignee is appointed by the court, with power of removal and new appointment, *toties quoties*.

By the English statute and ours of 1800, the commissioners

*639] *made a formal deed of conveyance and assignment of the property and effects of the bankrupt to the assignee. By our statute of 1841, no deed of conveyance or assignment is made to the assignee appointed by the court, but by the third section the decree of the court is made to stand in the place, and to have the effect, of a formal deed of conveyance and assignment to the assignee, when thereafter appointed by the court.

By the former statutes, the estate and title of the bankrupt were not divested out of him, nor vested in the assignees chosen by the creditors, until the formal deed of conveyance and assignment was executed by the commissioners to the assignees; although the power and authority of the bankrupt over his property was suspended by his act of bankruptcy. So is the law stated to be, in the cases of *Cary* v. *Crisp*, 1 Salk., 108; *Brassey* v. *Dawson*, 2 Str., 981, 982; Bull. N. P., 41.

By the first part of the third section of the act of 1841, "all the property and rights of property of every name and nature, and whether real, personal, or mixed, of every bankrupt," "who shall by the decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of the bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested, by force of the same decree, in such assignee as from time to time shall be appointed by the proper court for this purpose, which power of appointment and removal such court may exercise at its discretion," &c. In this the allusion to the former mode of assignment by a formal decree of conveyance is clear, and the decree itself is made to have like effect.

By the former statutes, when the deed of conveyance and assignment was executed, the rights and titles to the property of the bankrupt were in the assignees chosen by the creditors, from the time of the act of bankruptcy committed, by relation or retrospect, according to the numerous cases before cited.

By the after part of the third section of the act of 1841, the like relation, or retrospect, to the time of the act of bankruptcy committed, is enacted as to the rights, title, and authorities of the assignee when appointed by the court.

The words are,—"And the assignee so appointed shall be vested with all the rights, titles, powers, and authorities, to sell, manage, and dispose of the same, and to sue for and defend the same, subject to the orders and directions of such

court, as fully, to all intents and purposes, as if the same were vested in or might be exercised by such bankrupt *before* or at the time of his bankruptcy declared as aforesaid."

The word "before" so used has reference to the provisions of the second section, whereby acts done "in contemplation of bankruptcy, and for the purpose of giving any [*640 creditor, indorser, surety, or other person, any preference or priority over the general creditors of such bankrupt," &c., "shall be deemed utterly void, and a fraud upon this act." Such acts so done before the act of bankruptcy, but being in contemplation of an act of bankruptcy afterwards committed, and contrary to the spirit of the bankrupt law, are declared void. Therefore, in the third section, the word "before" is introduced, in connection with the words "or at the time of his bankruptcy," so as to make the relation of the title, powers, and authorities of the assignee embrace fraudulent transactions by and with a bankrupt before the act of bankruptcy committed, as well as after the bankruptcy and before the appointment of the assignee.

The decree declaring the bankruptcy divests the title, rights, and authorities of the bankrupt out of him; the appointment and qualification of the assignee vests all the rights, titles, authorities, and powers in the assignee by relation, as fully as they were vested in the bankrupt himself "before or at the time of his bankruptcy." Moreover, this relation, so established by the word "before," extends to frauds and other injuries committed upon the property of the bankrupt, *in invitum*, before his act of bankruptcy (and before he contemplated bankruptcy), and to all other rights which the bankrupt himself might have asserted, if the misfortune of bankruptcy had not happened to him. So that fraudulent contrivances before or after the act of bankruptcy are within the rights, titles, powers, and authorities of the assignee.

If all the time between an act of bankruptcy committed and the decree pronounced upon the petition, after a notice (by publication of not less than twenty days) of the time assigned for the hearing, had been left as an hiatus, a chasm, not filled by the relation and retrospect of the title, rights, authorities, and powers of the assignee in bankruptcy, when appointed by the court, and thereby omitting all mesne acts contrary to the spirit of the bankrupt law, then, indeed, the statute would have been impotent to protect and secure the funds and assets of the bankruptcy for that just equality and distribution among all the creditors,—to every of the creditors *bonâ fide* a portion, rate and rate like, according to the

quantity of his debt,—which are the soul, essence, and spirit of a bankrupt law, and the end designed and enacted by the fifth section.

Without such relation, the filing of the petition against a bankrupt, and the publication of the notice for the hearing, would have been a signal for acquiring priorities and preferences, by levy of executions, attachments, and every species *641] *of depredation upon the estate, property, and effects of the bankruptcy; the statute would have been but a dead letter. For example, the appellants claim the whole property of the bankrupt by process and decrees in chancery begun after the act of bankruptcy committed, having knowledge thereof, and using the very fact and deed of trust, in itself a definite act of bankruptcy, as the foundation of their attachment.

But the statute is not so lifeless, so powerless. The legislators who enacted the statute of 1841, using the lessons of former legislation, the wisdom of experience, and profiting by the examples of former times and the adjudications upon former statutes of bankruptcy in England and the United States, comprehended the truth, that the relation of the rights, titles, powers, and authorities of the assignee in bankruptcy to the previous time of the act of bankruptcy committed, (and even "before,") was necessary and proper to the end proposed, and so enacted.

(*Mr. Bibb* then commented at length upon the case of *Sill* v. *Worswick*, 1 H. Bl., 665, 694, which he considered very strongly in point.)

Mr. Justice GRIER delivered the opinion of the court.

Perry Wherritt, as assignee of Benjamin Brandon, a bankrupt, filed his bill in equity in the District Court of the United States for Kentucky, setting forth that, on regular proceedings in said court, Brandon was deemed and held to be a merchant and trader, within the bankrupt act, and found to have committed acts of bankruptcy by making a fraudulent transfer of his property, and by secreting himself to avoid the service of legal process, and was, therefore, decreed a bankrupt, on the 22d of November, 1842; that the complainant was duly appointed his assignee; that, on the 6th of April, 1842, Brandon had made a fraudulent deed of trust of all his property to William A. Withers; that John L. Shawhan and others, the defendants and appellants, with a full knowledge of the acts of bankruptcy, filed their bill in chancery in the Harrison Circuit Court of Kentucky, against Brandon, Withers, and others, charging that the said deed of

trust was fraudulent and void; that the court decreed that the deed was void, and ordered the property to be sold for the benefit of Shawhan and the other creditors who had joined in the bill; that, since the decree in bankruptcy, the State court had proceeded to sell the real and personal estate of said Brandon; that Shawhan had purchased a tract of land belonging to Brandon, of 350 acres, of which the complainant had possession, whereby he was prevented from disposing of said land for a fair price; and praying that *Shawhan might be compelled to surrender and cancel his claim, [*642 and for all such equitable relief, general and special, as the merits of the case may require, &c.

The answer of Shawhan admits the execution by Brandon of the deed of the 6th of April, 1842, but denies that he had committed any acts of bankruptcy. It admits, also, the proceedings by himself in the State court to set aside the deed as fraudulent, and the decree and sale as stated in the bill. He insists that by said proceedings he had acquired a lien on the property, which could not be impaired by the proceedings in bankruptcy, and that the proceedings in the State court, having been commenced before those in bankruptcy, could not be affected by them, &c.

On the hearing of this cause at June term, 1844, before the District Court, "the complainant prayed as specific relief as to the movable property which was of said Brandon at the time he became bankrupt, and which the defendants afterwards caused to be sold under the decree of the Bourbon Circuit Court, that the defendants be adjudged to pay the amount of said sales"; and the court referred it to a master to report the amount of the sales of personal property, and afterwards decreed, "that the complainant was invested with all the estate which was of said Brandon at the time he became bankrupt, and that defendants did not, by their after-commenced suit and proceedings therein had, (with notice of his act of bankruptcy,) obtain a right to have it thereby subjected exclusively or first to the satisfaction of their demands; and that the defendants, John L. Shawhan, &c., by the subsequent sales of the movable property by them so caused, did become, on the demand of the complainant here made, and are, each of them, liable for their proper portion of the proceeds thereof, whereof they thus wrongfully obtained the benefit, and must pay the same, together with interest, to the complainant, for the purpose of equal distribution as required by the statute; and that the sale of the land so afterwards caused by the defendants was wrongful, and assailed here by the complainant, was and is ineffectual, and did not invest the

defendant, John L. Shawhan, the purchaser, with the right thereto, in opposition to the title which had previously passed by decree of bankruptcy of its holder so declared, and was vested in the assignee so appointed," &c., &c. It was adjudged and decreed, also, that Shawhan should release all his title in the land to the complainant, and the defendants severally pay over to the plaintiff the money received by each of them from the proceeds of the personal property.

From this decree the defendants appealed to the Circuit *643] *Court of the United States for the District of Kentucky, where the decree of the District Court was affirmed, and the defendants then prosecuted their appeal to this court.

Of the numerous objections to the decree taken on the argument, it will be necessary to notice but two, being those chiefly relied on by the counsel for the appellants.

1. That the decree in bankruptcy was not evidence, as against the defendants, who were no parties to it, either that there was a debt due to the petitioning creditor, or that Brandon was a merchant or trader within the meaning of the bankrupt act, or that he had committed an act of bankruptcy. It is a sufficient answer to this objection,—1st. That the thirteenth section of the bankrupt act declares, that "the proceedings in all cases of bankruptcy shall be deemed matters of record." 2d. Both parties admit the deed made by Brandon, on the 6th of April, was fraudulent, and the first section of the bankrupt act declares the execution of such a deed an act of bankruptcy. 3d. The record before us shows sufficiently that he was a merchant or trader, and therefore liable to be declared a bankrupt. The District Court had, therefore, plenary and exclusive jurisdiction of the subject-matter.[1] 4th. The public notice required by the act having been given, the creditors must be treated as having notice of the proceedings, and an opportunity to make their objections to them, and having neglected or refused so to do, they ought not to be allowed to impeach them collaterally, as they are in the nature of a proceeding *in rem*, before a court of record having jurisdiction. 5th. Even if the record in the bankrupt court be not conclusive as against the defendants, it is at least *prima facie* evidence that all facts necessary to sustain the decree were proved before the court; and lastly, the record of this case shows sufficient evidence to sustain the decree on all points. Besides, the third section of the act declares, that "all the property, &c., of every bankrupt, (except as herein-

[1] Followed. *Commercial Bank of Manchester* v. *Buckner*, 20 How., 120.

after provided,) who shall by a decree of the proper court be declared to be a bankrupt within this act, shall, by mere operation of law, *ipso facto*, from the time of such decree, be deemed to be divested out of such bankrupt, without any other act, assignment, or other conveyance whatsoever; and the same shall be vested by force of the same decree in such assignee," &c. As the court had jurisdiction of the subject-matter and person of the bankrupt, the decree is thus made conclusive evidence of the title of the assignee.[1]

The English cases can have no application to this question, as there all proceedings in bankruptcy are before commissioners, under a commission issued out of chancery, and the commissioners are not a court of record.

*2d. The chief and important question involved in this case is whether the appellants, after an act of bankruptcy of which they had full knowledge, could, by proceeding in a State court, obtain a valid lien, and seize the property of the bankrupt to the exclusion of his other creditors, or whether such proceeding be not a fraud on the bankrupt law, and therefore void. [*644

The appellants in their answer deny their knowledge of the act of bankruptcy, and that the defendant was a bankrupt before the decree. But this seems rather a denial of the law than of the fact; for the bill filed by them in the State court alleged that the deed made by Brandon of all his property to a trustee, on the 6th of April, 1842, was fraudulent and void. The first section of the bankrupt act, in enumerating the acts for which a merchant or trader shall be liable to be declared a bankrupt, by proceedings *in invitum*, mentions the making of "any fraudulent conveyance, assignment, sale, gift, or other transfer of his lands, tenements, goods, or chattels," &c. By their own showing, therefore, they had knowledge of the fact of bankruptcy. The acts thus enumerated are usually termed acts of bankruptcy, and may be considered as tests of insolvency, showing conclusively the inability of the trader to pay his debts, or carry on his trade. The policy and aim of bankrupt laws are to compel an equal distribution of the assets of the bankrupt among all his creditors. Hence, when a merchant or trader, by any of these tests of insolvency, has shown his inability to meet his engagements, one creditor cannot, by collusion with him, or by a race of diligence, obtain a preference to the injury of others. Such conduct is considered a fraud on the act, whose aim is to divide the assets equally, and therefore equitably. To pre-

[1] CITED. *Lamp Chimney Co. v. Brass and Copper Co.*, 1 Otto, 661.

vent these frauds, the English bankrupt laws give the title of the assignee a relation back to the act of bankruptcy, so as to avoid all payments, sales, or contracts made after it. The second section of our bankrupt act effects the same object, not by establishing the doctrine of relation in direct terms, but by declaring all such payments, transfers, &c., void, and a fraud on the act, and enabling the assignee to recover the money paid, or property transferred, for the use of the creditors. This section declares fraudulent and void, not only "future payments, securities, conveyances or transfers of property, or agreements made or given by any bankrupt in contemplation of bankruptcy, and for the purpose of giving a preference or priority to one creditor over another," but that "all other payments, securities," &c., "to any person whatever, not being a *bonâ fide* creditor or purchaser for *645] a valuable consideration without notice, shall *be deemed utterly void and a fraud on this act"; and the assignee is authorized to sue for, and recover and receive the same, as part of the assets of the bankruptcy.

It avoids, not only payments, securities, &c., made in collusion with a bankrupt in contemplation of bankruptcy, but those obtained by a creditor with notice; and it afterwards defines this notice which is the test of fraud or want of *bona fides* in the creditor to be "notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." A creditor may always recover payment of his debt, or security for it, from his debtor, unless he has notice or knowledge that his debtor has committed an act of bankruptcy; and then he is forbidden to receive payment of his debt, or to obtain any other priority or advantage over the other creditors of the bankrupt. And if notice of this fact to the creditor makes a payment by the debtor void, it is obvious that a security or priority gained by suit in a State court after such notice could have no better claim to protection; for notice of the act of bankruptcy to the creditor is the test of the *mala fides* which vitiates the transaction.

The last proviso of the second section, which saves all "liens, mortgages, or other securities on property, which may be valid by the laws of the States respectively," subjects them, nevertheless, to this condition; that they shall not "be inconsistent with the second and fifth sections of the act." Liens or securities which would be otherwise valid by the State laws, being made void by the second section when obtained after notice of an act of bankruptcy, are, consequently, not saved by this proviso; but the property subject to them vests in the assignee discharged from such lien, and if the property

has been sold under process from a State court, the creditor is liable to refund the money thus received to the assignee of the bankrupt. Having obtained this preference *malâ fide*, in fraud of the bankrupt law, he cannot be suffered to retain the fruits of it to the injury of other creditors; otherwise, the whole policy and aim of the law would be frustrated.

We are of opinion, therefore, that the lien obtained by Shawhan upon the property of Brandon by his proceedings in the State Court, after notice of the act of bankruptcy, was not saved or protected by the proviso to the second section of the act, and that he and the other appellants, who had appropriated the assets of the bankrupt to their own use, are liable to refund the same to the assignee in this suit; and that the decree of the Circuit Court of the United States for the District of Kentucky should be affirmed.

ORDER.

*This cause came on to be heard on the transcript of the record of the Circuit Court of the United States for the District of Kentucky, and was argued by counsel. On consideration whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby affirmed with costs. [*646

WILLIAM AND FRANCIS SADLER, COMPLAINANTS, *v.* THOMAS B. HOOVER, SYLVANUS CHAMBERS, AND SAMUEL H. DINKINS, PARTNERS BY THE STYLE OF THOMAS B. HOOVER AND COMPANY.

Where an appeal, from a Circuit Court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as would give this court jurisdiction.[1]

The appeal must, therefore, be dismissed, for want of jurisdiction.

THIS case came up, on a certificate of division, from the Circuit Court of the United States for the Southern District of Mississippi.

[1] See *Perkins* v. *Hart*, 11 Wheat., 237; *Wolf* v. *Usher*, 3 Pet., 269; *United States* v. *Briggs*, 5 How., 208; *Dennistoun* v. *Stewart*, 18 Id., 565; *Ogilvie* v. *Knox Ins. Co.*, Id., 577; *Hare meyer* v. *Iowa County*, 3 Wall., 294.

The following is the statement of facts agreed upon in the court below, by the counsel for the respective parties, and sent up with the record.

"WM. SADLER and FRANCIS SADLER, } In Chancery.
v. }
THOMAS B. HOOVER and others. }

"In the Circuit Court of the United States for the Southern District of Mississippi.

"The bill states that at May term, 1839, of the Circuit Court, the defendants, Thomas B. Hoover & Co., recovered judgment against them, and one Francis Ross, their surety, for $3,501.84 debt, and $383.65 damages, with interest thereon from the 17th of May, 1839, and costs of suit; and at the same term, another judgment against them, and one W. D. Henry, as their surety, for $7,881.66, with interest from the 17th of May, 1839, and costs of suit. That executions issued on said judgments, and forthcoming bonds have been given with one Robert Ridley, as security in each case, and that said bonds were returned forfeited to the November term, 1839, and executions about to issue thereon; that the instruments *647] of writing on which these *judgments are founded were given by complainants, in consideration of certain slaves sold by the firm of Thomas B. Hoover & Co. to them, on the 28th of October, 1836, and for which bills of sale were given; that complainants feel themselves greatly aggrieved by the conduct of Thomas B. Hoover & Co.; that they had an understanding with Hoover, by which they might have been relieved from the contract, but which was not reduced to writing with other parts of the contract, and complainants have thus been deprived of its benefit, and will be greatly injured if relief is not afforded to them on the grounds hereafter stated.

"The complainants allege that the said slaves were introduced into this State by the said Thomas B. Hoover, for himself and partners, but a few weeks previous to such sale, as merchandise, and for sale, without any certificate of character, and were sold without any record of certificate, contrary to the constitution and laws of the State of Mississippi; and that the causes of action, on which the said judgments are rendered, were given in direct exchange for said slaves. That complainants have been advised that this court will interfere to prevent the collection of these judgments if they will submit to act rightfully, and not use the occasion to act fraudulently and unjustly. On this principle of equity, complainants submit to a rescission of the contract,—offer to

deliver up to defendants all the said negroes now alive, and to account for the hire of them, including, also, their increase, and to perform whatever they may be required by the court.

"Complainants aver that they were prevented from making this defence at law, by advice of counsel, on account of decisions adverse to it previously made by this court and the Circuit Courts of the State of Mississippi; and the current of decisions to this effect was not broken into until the decision of this court, at the late November term, (1839,) and until then complainants supposed they were not entitled to relief on this ground, and under this belief they entered into forthcoming bonds. That defendants, Hoover & Co., are unwilling to rescind said contract, and are about to enforce the collection of said judgments. The bill prays process, and a perpetual injunction against the judgments.

"On application to the district judge, he granted a fiat for an injunction on the 4th of January, 1840, and injunction was issued accordingly.

"Previous to the May term, 1840, the defendants, Thomas B. Hoover, Samuel H. Dinkins, and Sylvanus Chambers, members of the firm of Thomas B. Hoover & Co., answered.

"Thomas B. Hoover, in his answer, admits that, as a member *of said firm, and on its behalf, a few weeks [*648 previous to the sale, he introduced into the State of Mississippi, as merchandise, and for sale, a number of slaves, without any certificate of character, or record of the same, and that he sold the slaves named in the bill to the complainants, and took their bill of exchange and note therefor, on which the said judgments were rendered. He denies, positively, any arrangement or understanding between him and complainants, by which they were to be relieved from their contract; that although these slaves were introduced for sale, the defendant insists on the validity of the contract; that even regarding the contract as illegal, the complainants having failed to make this defence on the trials at law, they are now precluded from availing themselves of this ground of relief in chancery; especially that complainants have given forthcoming bonds on which judgments have been rendered.

"As to complainants' offer to rescind the contract and to restore the slaves, this defendant states, that, on a dissolution of the partnership, he transferred the liabilities of complainants to his copartners; he has, therefore, no control of the judgments; that having made the contract of sale, he can state positively that no fraud or imposition of any kind was practised on complainants; that the contract was fair and

honest on his part; that the negroes were, as he believes, sound and healthy, and were sold at the customary prices.

"Samuel H. Dinkins, in his answer, admits that he was a member of the firm of Thomas B. Hoover & Co. He knows nothing personally of the sale of the slaves, and on this point refers to the answer of Thomas B. Hoover, the trading partner. He admits, however, that the slaves were sold to complainants; that, after litigation on the instruments given for them, judgments were rendered against complainants for the sums agreed to be given. He insists on the legality and validity of the contract, and that the complainants, having failed to make this defence at law, cannot now avail themselves of it as a ground of relief. He rejects the offer of the bill to rescind the contract, as being manifestly unjust, since the great change in the value of this property, and because the complainants do not offer to account for the value of three slaves since dead.

"Sylvanus Chambers states in his answer, that, as to the introduction of the negroes into Mississippi, and their sale, he knows nothing personally. He insists on the validity of the contract, and that, whether originally legal or not, complainants cannot now avail themselves of this ground for relief, having failed to set it up as a defence at law. He rejects, also, the proposition to rescind the contract, for the reasons *649] stated in the *preceding answer, and insists that, as the contract was fairly entered into, without any wilful intent to violate the laws of Mississippi, should the court decree it to be void, he and his partners should be compensated also for the value of the three dead slaves, as there is no allegation of their unsoundness; and especially, as he charges, that they died from the cruel treatment of the complainants.

"At May term, 1840, a motion was made, on the part of defendants, to dissolve the injunction, which motion was afterwards overruled.

"At the May term, 1844, the cause came to a hearing on bill, answers, and replication, before their Honors, Peter V. Daniel, and Samuel J. Gholson, judges. And the court not being able to agree in opinion, one of the said judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, it was ordered, at the request of counsel on both sides, that this difference of opinion be certified to the Supreme Court of the United States for their decision.

"The foregoing is a correct abstract of the material facts in the above-stated cause.

"LEA & LEA, *Complainants' Sol.*
W. R. HILL, *Defendants' Sol.*

"*January* 8, 1845."

The case was argued (in print) by *Mr. Hill*, for the defendants, but the question of the jurisdiction of this court was not raised, and it is deemed necessary to insert the argument of the main point in the case.

Mr. Chief Justice TANEY delivered the opinion of the court.

This cause comes before us on a certificate of division. But, upon inspecting the record, it appears that the particular point or points upon which the justices of the Circuit Court differed in opinion are not distinctly stated; and the case must therefore be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion agreeably to the act of Congress in such case made and provided, and was argued by counsel. And it appearing to this court, upon an inspection of the said transcript, that no *point in the case, within the meaning of the act of [*650
Congress, has been certified to this court, it is thereupon now here ordered and decreed by this court, that this cause be and the same is hereby dismissed, and that this cause be and the same is hereby remanded to the said Circuit Court, to be proceeded in according to law.

FREDERICK J. AND SAMUEL W. BARNARD AND HENRY Q. HAWLEY, APPELLANTS, *v.* JOHN GIBSON.*

Where a decree in chancery refers the matters to a master to ascertain the amount of damages, and in the mean time the bill is not dismissed, nor is

*Mr. Chief Justice Taney did not sit in this cause, being indisposed at the time it was argued.

there a decree for costs, the decree is not a final one, from which an appeal will lie to this court, although there is a perpetual injunction granted.[1]
The amount of damage which will follow from restraining a party from using a machine held under a patent right is a proper consideration to be addressed to the Circuit Court, but does not constitute a ground of appeal.

THIS was an appeal from the Circuit Court of the United States for the Northern District of New York.

The question being, whether or not the decree of the Circuit Court was final, the Reporter thinks it proper to insert the whole of that decree, together with the statement of facts, as he finds it prepared by Mr. Justice Nelson.

Circuit Court, United States.

JOHN GIBSON
v. } In Equity.
FREDERICK J. BARNARD and others.

I. W. W. Woodworth conveyed to John Gibson the exclusive right to the Woodworth planing-machine in and for the city and county of Albany, with the single exception of two rights in the town of Watervliet, in said county. With this exception, the whole right of the county was in Gibson.

II. The two machines, the right to use which was thus excepted, consisted, first, of a machine in use at the time in said town by Rousseau and Easton, which had been erected under the first term of the patent, and the right to continue which they claimed during any extension of the grant, and, second, of a machine which Gibson had conveyed to Woodworth, and by him to Rousseau and Easton.

III. Woodworth, on the 19th of May, 1842, agreed with *651] *Rousseau and Easton to make an assignment to them by which they would become vested more fully with the right of running the machine in the town of Watervliet, which they claimed under the first term of the patent; and also to assign to them the right to use the other machine which had been conveyed to him by Gibson, of even date with this agreement. In consideration of which, Rousseau and Easton paid at the time $200; and, in case the extension should be obtained, and assignment of the two machines, as above stipulated for, made, they would pay, in addition, $2,000, in four equal annual instalments.

[1] APPLIED. *Reeves* v. *Keystone Bridge Co.*, 2 Bann. & A., 257; s. c., 11 Phil. (Pa.), 498. FOLLOWED. *Grant* v. *Phœnix Ins. Co.*, 16 Otto, 431. CITED. *Humeston* v. *Stainthorp*, 2 Wall., 110; *Rumford Chemical Works* v. *Hecker*, 2 Bann. & A., 359; *Brown* v. *Deere et al.*, 6 Fed. Rep., 490; s. c., 2 McCrary, 428. S. P. *Beebe* v. *Russell*, 19 How., 283. And see note to *McCollum* v. *Eager*, 2 How., 61.

IV. This agreement of the 19th of May, 1842, was modified by an indorsement on the same, signed by all parties, 26th April, 1843, in which it was recited that Rousseau and Easton had, on that day, executed and delivered to Woodworth eight promissory notes, of $250 each, payable at different periods, the last one 1st July, 1846; in consideration thereof, the said Woodworth agreed that, upon payment of said notes as they became due, he would make the assignments stipulated for in the said agreement referred to.

V. On the 12th of August, 1844, Woodworth assigned all his interest in this contract with Rousseau and Easton in respect to the two machines, and all right and title to the use of the same, to J. G. Wilson, by which he took the place of Woodworth.

VI. On the 13th of November, 1844, Gibson renounced and released all right or claim, if any, to these two machines, to J. G. Wilson, this having been supposed necessary to enable Wilson to sue Rousseau and Easton for breach of their contract, or for an infringement of the Woodworth patent and extension by the use of the machines in the town of Watervliet, after refusing to fulfil their contract; Gibson claimed no right to the use of the two machines in said town, as he had already passed to Woodworth all the right which he ever had in the same. The release was given for abundant caution, the better to secure to Wilson the right which he had acquired by the assignment from Woodworth.

VII. On the 5th of December, 1845, J. G. Wilson granted to F. J. Barnard & Son a license to construct and use two machines in the town of Watervliet, for which he was to receive $4,000; but it was then and there agreed, that, if the decision of the Supreme Court of the United States, in a case then pending between Wilson and Rousseau and Easton, should be against Wilson, so as to exclude him from the use of the said two machines in the said town, then he was to repay to Barnard & Son $2,000, paid to him on that day in part *satisfaction of the purchase-money; but if the [*652
decision should be in favor of Wilson, and Barnard & Son should be put in possession of the right to erect and use the two machines in said town, then they were to pay to Wilson a further sum of $2,000.

VIII. Upon the foregoing state of facts, and upon the pleadings and proofs in the case, it is quite clear, that, down to the time of the grant of Wilson to Barnard & Son, the 5th of December, 1845, Gibson, the complainant, possessed the exclusive right and title to the planing-machine in and for the county of Albany, with the exception of the two rights

in the town of Watervliet, namely, the right to use one claimed by Rousseau and Easton, under the first grant, and more effectually secured to them by Woodworth, and the one sold and assigned by Gibson to Woodworth, and by him to Rousseau and Easton.

And, further, that Wilson possessed no interest in any right to the use of the planing-machine in the town of Watervliet, except in the two so derived from Woodworth by assignment on the 12th of August, 1844, and which had before been sold to Rousseau and Easton, and of which they were in the actual use and enjoyment. Wilson therefore could grant his interest, whatever it might be, in these two rights, and nothing more; and this was all that could pass to Barnard & Son under the grant of the 5th of December, 1845. The terms of that agreement also establish, that it was the interest of Wilson in these two rights which he intended to sell, and Barnard & Son to purchase.

IX. The failure of Rousseau and Easton to fulfil their agreement of purchase with Woodworth, the interest in which belonged to Wilson, did not, of itself, operate to annul and cancel the contract. It was a contract partly executed; $200 of the purchase-money had been paid, and promissory notes given for the residue. The machines had been erected, and were in operation; and although a court of equity might have decreed the contract to be delivered up and cancelled upon terms, until then Rousseau and Easton must be deemed in the lawful use and enjoyment of the two rights under the patent. And even assuming the contract to be annulled, and the parties remitted to their original rights, it is clear that Wilson had power to grant but one of the rights in said town of Watervliet, as the other was secured to Rousseau and Easton, under the decision of the court in *Wilson* v. *them*.

An injunction was accordingly issued.

On the 11th of April, 1848, the Circuit Court of the United States for the Northern District of New York was in session at Utica, when the following decree was passed:—

*653] "This cause having been brought on to be heard upon pleadings and proofs, and Mr. Wm. H. Seward having been heard on the part of the plaintiff, and Mr. Marcus T. Reynolds on the part of the defendants, and due deliberation having been had, it is ordered, adjudged, and decreed, that the defendants in this cause be, and they are hereby, perpetually enjoined from any further constructing or using in any manner, and from selling or disposing in any manner, of the two planing-machines mentioned in said bill as erected

by them in the town of Watervliet, in the county of Albany, or either of said machines, which machines are machines for dressing boards and plank, by planing, tonguing, or grooving, or either, or in some separate combination, constructed upon the principle and plan specified and described in the schedule annexed to letters patent issued to Wm. W. Woodworth, administrator of William Woodworth, on the 8th day of July, 1845; which letters were a renewal upon a formal surrender for an imperfect specification of letters patent issued to Wm. Woodworth on the 27th day of December, 1828, and extended on the 16th day of November, 1842, to take effect on the 27th day of December, 1842, and again extended by act of Congress on the 26th day of February, 1845, and from infringeing upon or violating the said patent in any way whatsoever.

"And it is further ordered, adjudged, and decreed, that it be referred to Julius Rhodes, Esq., of Albany, counsellor at law, as a master *pro hac vice* in this cause, with the usual powers of a master of this court, to ascertain and report the damages which the plaintiff has sustained, arising from the infringement of his rights by the defendants, by the use of the said two machines by them.

"And it is further ordered, that the report of the said master herein may be made, either to this court in term time, or to one of the judges thereof at chambers in vacation; and that either party may, on ten days' notice to the other of time and place, apply, either to this court in term time, or to one of the judges thereof at chambers in vacation, for confirmation of such report.

"And it is further ordered, that either party may at any time, on ten days' notice of time and place to the other, apply to this court in term time, or to one of the judges thereof in vacation, for further directions in the premises.

"And the question of costs, and all other questions in this cause, are hereby reserved until the coming in of the said report.

"And the complainant shall either pay to the defendants, or set off against the damages to be awarded, the sum of two *thousand dollars, which he offered in his bill to pay them, with interest from the 5th of December, 1845." [*654

An appeal from this decree brought the case up to this court.

Mr. Seward moved to dismiss the appeal, upon the ground that the decree was not a final one, which motion was opposed by *Mr. Taber*.

Mr. Seward stated the case, and then said that it was admitted that an appeal would not lie except from a final decree. The only question is, what is the distinction between final and interlocutory decrees. The same principle may be applied which governs the construction of judgments at law; those are final which grant a remedy upon the whole matter, and dismiss a party from the court. But in equity there is some difficulty, owing to the different nature of the relief which is granted. A final decree in equity may be defined to be one which definitely adjudges the whole subject-matter; an interlocutory decree, one which disposes of some parts and reserves others for future decision. (2 Dan., Ch. Pr., Part 2, pp. 631, 632, 635, 638, 641, London ed. of 1840.) The present decree is not final, when tested by the principles laid down by Daniel.

1. It expressly reserves the question of costs. They do not depend upon any statute, but upon judicial discretion.

2. It does not determine the amount of damages, but refers the subject to a master to ascertain and report.

3. Even if the master decides, still the decree does not adjudge them to be according to the report.

4. It does not settle any principles upon which damages can be computed; whether they are for one machine or two, &c.

5. It reserves a decision upon the rights of the respective parties. The complainant offered, in his bill, to pay $2,000; the decree says he shall do so, but does not say whether it is an extinguishment of the claim, or only a set-off.

6. The bill prays that the machines and their produce may be delivered to the plaintiff; but the decree is silent upon this point. The question is reserved. It may be said that a perpetual injunction is decisive of the rights of the parties. But it is only an order, which the court may revoke at any time. It cannot be pleaded in bar. We think the parties are still in court.

7. The decree does not give all the relief which is prayed for in the bill. Whatever is asked and not granted is left undecided, because the bill is not dismissed as to that.

(*Mr. Seward* then commented on 10 Wheat., 502; 11 Wheat., 429; 8 Pet., 318; 9 Pet., 1; 6 Cranch, 51; *655] 15 *Pet., 287; 2 How., 62; 5 How., 51; 6 How., 203; Id., 208, 209.)

Mr. A. Taber, against the motion.

1. The decree in question is a "final decree," upon a sound construction of the Judiciary Act of 1803, chap. 93, § 2. The

fundamental purpose of this act was to give an appeal, if required, where the amount in controversy was sufficient, to the end that the substantial rights of parties should not be finally disposed of by Circuit Courts. Not so of the English statutes of limitations, authorities construing which have been cited on the other side. Their leading object was, not to give or take away an appeal, but to restrict by a short limitation appeals taken *pendente lite*, allowing a longer one to those taken after the cause was ended. Wherefore, the words "final decree," in these English acts, are justly interpreted to mean one which is a *finis* of the cause, and in our act, one which is a *finis* of substantial rights of the parties, which, unless immediately appealed from, would take away property from one and give it to another, or work irreparable mischief. (6 How., 202, 203, 206; 13 Pet., 15; 3 Cranch, 179; 2 Smith, Ch. Pr., 187, 188.)

The decree in question would do both. It was intended by the Circuit Court finally to adjudge and determine the patent rights in controversy. It takes them away from the defendants, and vests them in the complainant; and, by the perpetual injunction it directs, immediately renders worse than valueless,—an encumbrance upon the ground,—the expensive erections of the defendants for their enjoyment.

For the costs of the cause, no appeal would hereafter lie. (4 Russ. Ch., 180; 3 Pet., 307, 319; 2 How., 210, 237.) The other matters reserved are merely in execution of the decree already passed. Before these matters could have been adjusted, and an appeal prosecuted to effect, our patent rights would have expired by their own limitation, and nothing remain for the appellate offices of this court but a *post mortem* examination of our rights for the vindication of abstract law.

The perpetual injunction, the main relief prayed, is a final execution; not the mere extension of a preliminary injunction, which latter has been repeatedly denied in this cause, and is wholly inapplicable to a contest between assignees under the same patent, which is, therefore, no more *primâ facie* evidence for one party than the other. (4 Burr., 2303, 2400; 1 Vern., 120; Id., 275; 7 Ves., 1; 3 Meriv., 622; 14 Ves., 130–132; Drewry on Injunctions, 223, § 5, 221, § 3, 223, § 4; Eden on Injunctions, 207.)

*2. But if this is not a case for an appeal under the act above cited, it assuredly must be one of "all other cases," provided for by the seventeenth section of the patent act of 1836, chap. 747. In patent causes, evidently for the reasons above alluded to, there is no limitation of an appeal except the safe one, that "the court shall deem it [*656

reasonable to allow the same." If the act means this honorable court, this appeal has been allowed by it, by one of its justices at chambers. If, as is more probable, the Circuit Court was intended (6 How., 458, and note, and 477), then Justice Nelson, being a quorum of that court (Laws of 1837, ch. 801, § 3), acted as such, judicially, in allowing it at chambers. (1 Brock., 380.) Or if error has occurred in the manner of taking this appeal, no statute restriction being in the way, it should be allowed, in furtherance of justice, to be amended now. (Laws of 1789, ch. 20, § 32; 16 Pet., 319; 7 Wend. (N. Y.), 508.) And this, according to the last-cited case, would be properly done by simply denying this motion.

3. If it be replied to the last point, that this is not a case arising under the patent law, but under the common law of contracts and assignments, then the Circuit Court never had jurisdiction, the cause being between residents of the same State, and an appeal lies at any time, to reverse its decision already made, and dismiss the cause. (2 How., 244; 3 Id., 693; 8 Pet., 148; 16 Id., 97; 3 Dall., 19.)

Mr. Justice M'LEAN delivered the opinion of the court.

This is an appeal from the decree of the Circuit Court for the Northern District of New York.

The parties claim conflicting interests as assignees of Woodworth's patented planing-machine. The cause was submitted to the circuit judge, who decreed, that the defendants below be perpetually enjoined from any further constructing or using in any manner the two planing-machines, &c., and the case was referred to a master to ascertain and report the damages which the plaintiff has sustained, arising from the infringement of his rights by the defendants by the use of the said two machines. The report of the master to be made in term time, or to one of the judges at chambers in vacation, and on ten days' notice either party to move for confirmation of the report, &c. The question of costs was reserved until the coming in of the report, &c.

A motion is made to dismiss this appeal, on the ground that the decree is not final.

No point is better settled in this court, than that an appeal may be prosecuted only from a final decree. The cases are *numerous where appeals have been dismissed, because the decree of the Circuit Court was not final. It is supposed there was a departure from this uniform course of decision, at the last term, in the case of *Forgay et al.* v. *Conrad*, 6 How., 201.[1]

*657]

[1] See note to case cited in the text.

In that case the court says,—"The decree not only decides the title to the property in dispute, and annuls the deeds under which the defendants claim, but also directs the property in dispute to be delivered to the complainant, and awards execution. And according to the last paragraph in the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the master. In all other respects, the whole of the matters brought into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court." "If these appellants, therefore, must wait until the accounts are reported by the master and confirmed by the court, they will be subjected to irreparable injury."

The decree in that case would have been executed by a sale of the property, and the proceeds distributed among the creditors of the bankrupt, and lost to the appellants, before the minor matters of account referred to the master could be adjusted and acted on by the court. The course of procedure in the Circuit Court was irregular, and the consequent injury to the defendants would have been irreparable. Effect should not be given to its final orders by the Circuit Court, until the matters in controversy shall be so adjusted as to make the decree final. Any other course of proceeding will, in many cases, make the remedy by an appeal of no value.

The decree in the case under consideration is not final, within the decisions of this court. The injunction prayed for was made perpetual, but there was a reference to a master to ascertain the damages by reason of the infringement; the bill was not dismissed, nor was there a decree for costs. In several important particulars, this decree falls below the rule of decision in *Forgay* v. *Conrad*. The execution of the decree in that case would have inflicted on the defendant below an irreparable injury. The bill was dismissed as to the principal matters in controversy, and there was a decree for costs.

It is said that the decree in this case, by enjoining the defendants below from the use of their machines, destroys their value and places the defendants in a remediless condition. That in the course of a few months their right to run the machines will expire, and that no reparation can be obtained for the suspension of a right by the act of the court. It is alleged, too, that many thousands of dollars have been invested in the machinery, which by such a procedure becomes useless.

*The hardship stated is an unanswerable objection to the operation of the injunction, until all the mat- [*658

ters shall be finally adjusted. If the injunction has been inadvertently granted, the Circuit Court has power to suspend it or set it aside, until the report of the master shall be sanctioned. And unless the defendants below are in doubtful circumstances, and cannot give bond to respond in damages for the use of the machines, should the right of the plaintiff be finally established, we suppose that the injunction will be suspended. Such is a correct course of practice, as indicated by the decisions of this court, and that is a rule of decision for the Circuit Court.

The appeal is dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel. On consideration whereof, and it appearing to the court here that the decree of the court below complained of is not a final decree within the meaning of the act of Congress, it is thereupon now here ordered and decreed by this court, that this cause be and the same is hereby dismissed for the want of jurisdiction.

The United States, Appellants, *v.* The Heirs of Louis Boisdoré.*

The meaning of the forty-third rule of this court is, that, if a judgment or decree in the court below be rendered more than thirty days before the commencement of the term of this court, and the record be not filed within the first six days of the term, the appellee or defendant in error may docket the case, and move for its dismissal as the rule prescribes.

But if the judgment or decree of the court below be rendered less than thirty days before the commencement of the term of this court, the rule does not apply.[1]

This was an appeal from the District Court of the United States for the Southern District of Mississippi.

Mr. Fendall moved to dismiss the appeal, upon the grounds stated in the opinion of the court, which motion was opposed by *Mr. Toucey* (Attorney-General).

Mr. Justice McLEAN delivered the opinion of the court.

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*Mr. Chief Justice Taney did not sit in this cause.

[1] Further decision, 8 How., 113.

This is an appeal from the decree of the District Court for the Southern District of Mississippi.

*The bill was filed against the United States, under the acts of June 17, 1844, and May 26, 1824, to try [*659 the validity of the complainants' claims to certain lands in Mississippi. At the November term of the District Court, 1847, a decree was entered in favor of the petitioners, and at the same term an appeal to the Supreme Court of the United States was granted by the District Court, on the application of the defendants. An appeal thus allowed requires no notice to the appellee. A motion is now made to dismiss this appeal, on the following grounds:—

1. Because the appeal is not made to any specified term of the Supreme Court.

2. Because it is not made returnable to the term of the Supreme Court next following the decree.

3. Because the record is not filed at the term of the Supreme Court next following the decree.

Under the act of 1824, the party against whom the decree is entered may appeal within one year. On the 14th of March, 1848, a transcript of the record was made out, and it was filed in this court at the present term. From the time this decree was entered, to the commencement of the ensuing session of the Supreme Court, there were less than thirty days. And under such circumstances it appears, by the forty-third rule, that the appellant was not required to file the transcript of the record in this court at the first term.

The rule provides, that, "in all cases where a writ of error, or an appeal, shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause and file the record with the clerk of this court within the first six days of the term." If this be not done, the other party, on producing the proper certificate, may have the cause docketed and the appeal or writ of error dismissed.

The rule does not operate where a decree is entered less than thirty days before the term of this court, and consequently the cause is not liable to be docketed and dismissed. The appellants, under the circumstances of this case, are chargeable with no neglect for failing to file the record with the clerk at the first term of the Supreme Court after the decree was entered. The motion to dismiss is overruled.

ORDER.

On consideration of the motion to dismiss this cause, made by *Mr. Fendall*, on a prior day of the present term of this
*660] court, to wit, on Friday, the 2d instant, and of the *arguments of counsel thereupon had, as well in support of as against the motion, it is now here ordered by this court, that the said motion be and the same is hereby overruled.

The State of Missouri, Complainant, v. The State of Iowa, Respondent.

The State of Iowa, Complainant, v. The State of Missouri, Respondent.—*Cross-Bill.*

The western and northern boundary-lines of the State of Missouri, as described in the first article of the constitution of that State, were as follows:—from a point in the middle of the Kansas River, where the same empties into the Missouri River, running due north along a meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel, to the middle of the channel of the main fork of the said River Des Moines; thence, etc., etc.

The constitution of the State of Missouri was adopted in 1820. But in 1816, an Indian boundary-line had been run by the authority of the United States, which in its north course did not terminate at its intersection with the parallel of latitude which passed through the rapids of the River Des Moines, and in its east course did not coincide with that parallel, or any parallel of latitude at all.

Missouri claimed that this north line should be continued until it intersected a parallel of latitude which passed through certain rapids in the River Des Moines, and from the point of intersection be run eastwardly along the parallel to these rapids.

Iowa claimed that this Indian boundary-line was protracted too far to the north; that by the term "rapids of the River Des Moines" were meant certain rapids in the Mississippi River, known by that name, and that the parallel of latitude must pass through these rapids; the effect of which would be to stop the Indian boundary-line in its progress north, before it arrived at the spot which had been marked by the United States surveyor.

There being a bill and a cross-bill, each State is a defendant, and this court can pass such a decree as the case requires.[1]

The southern boundary-line of Iowa is coincident with, and dependent upon, the northern boundary-line of Missouri.

Iowa is bound by the acts of its predecessor, the government of the United States, which had plenary jurisdiction over the subject as long as Iowa remained a Territory; and the United States recognized the Indian boundary-line,—1st. By treaties made with the Indians; 2d. By the acts of the general land-office; 3d. By Congressional legislation.

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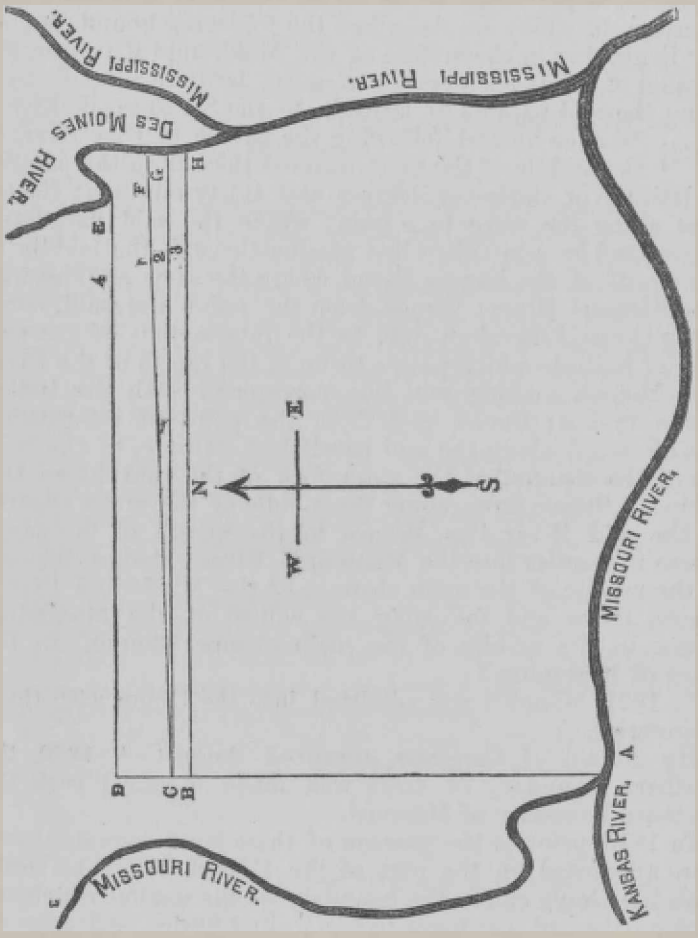
[1] Cited. *Virginia v. West Virginia*, 11 Wall., 54.

On the other hand, there are no rapids in the River Des Moines so conspicuous as to justify the claim of Missouri.

This court therefore adopts the old Indian boundary-line as the dividing line between the two States, and decrees that it shall be run and marked by commissioners.[1]

THE State of Missouri filed a bill against the State of Iowa, in the Supreme Court of the United States, with the consent of the State of Iowa, in order to settle a controversy which



had arisen respecting the true location of the boundary-line which divided the two States.

[1] See *Freeholders of Union v. Freeholders of Essex*, 14 Vr. (N. J.), 399.

The origin of the controversy is so fully stated by Mr. *Justice Catron, in delivering the opinion of the court, that it is only necessary for the Reporter to explain the pretensions of the respective parties according to the map, without which they cannot be understood. This map or diagram is only intended to be illustrative of these claims, without pretending to be geographically accurate.

*661]

In July, 1820, the people living in the then Territory of Missouri, in pursuance of an act of Congress, adopted a constitution, in which are described the following boundaries:—

"Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude to the St. François River; *thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude of thirty-six degrees and thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Mississippi River, in the middle of the main channel thereof, to the place of beginning."

*662]

In 1821, Missouri was admitted into the Union with these boundaries.

By an act of Congress, approved August 4, 1820, the southern boundary of Iowa was made identical with the northern boundary of Missouri.

In 1816, prior to the passage of these laws, commissioners were appointed on the part of the United States to settle with the Osage chiefs the boundary of the session which the Osage tribe had just made to the United States, and John C. Sullivan was appointed surveyor to run the line which should be thus agreed upon.

Beginning on the bank of the Missouri, opposite the mouth of the Kansas, at *A* in the diagram, he ran north just 100

miles to the point *C;* and thence pursued what he thought was a due east course, (but which was in fact to the north of east,) until he struck the River Des Moines at the point *F.* This line is marked No. 1, and runs from *C* to *F;* the true parallel of latitude being afterwards ascertained to be from *C* to *G.*

The State of Missouri alleged, that, at the point *E* in the River Des Moines, there existed rapids which answered the call in the constitution, and that the parallel of latitude spoken of in that instrument must consequently be a line running from *E* to *D*, and the north line, which commenced at *A*, must therefore be protracted to *D*, where it intersected the parallel of latitude called for; that the phraseology used required the "rapids of the River Des Moines" to be in that river, and not in the Mississippi.

*On the other hand, it was alleged by the State of Iowa, that in the Mississippi River, at the place marked *H*, there were rapids which were commonly called and known by the name of "the rapids of the River Des Moines," long anterior to the formation of the constitution of the Missouri; that the parallel of latitude must run through the head or centre of these rapids, and that the line *H B* would therefore be the true boundary, the point *B* being the spot where this parallel of latitude would intersect the line running north from *A.* [*663

These were the claims of the respective parties. To sustain them, a great mass of evidence was taken on both sides.

The cause was argued by *Mr. Gamble* and *Mr. Green*, for the State of Missouri, and *Mr. Ewing* and *Mr. Mason*, for the State of Iowa.

The Reporter regrets that he cannot give an extended notice of the arguments of the respective counsel. But he is admonished, by the size which this volume has already attained, that he must reduce the cases which are yet to be reported to as small a compass as possible.

The positions assumed by the counsel respectively are thus stated in the briefs of *Mr. Green*, for Missouri, and *Mr. Ewing*, for Iowa.

Mr. Green.

On the part of the State of Missouri it is insisted,—

1st. That the words "rapids of the River Des Moines" constitute the controlling call to determine the northern boundary, and that the natural and obvious import of these words is "rapids *of* and *in* the River Des Moines itself."

2d. That the evidence establishes the fact, that there are rapids in the River Des Moines.

3d. That there is no ambiguity in reference to the river of which the rapids are spoken, and none as to the rapids, unless more rapids than one are found in the River Des Moines.

4th. That having established the fact that there are rapids in the River Des Moines, thus satisfying the call of the constitution, no evidence can be introduced to contradict or vary the meaning of the constitution, or to prove that rapids of some other river were intended, different from that which the language indicates and describes.

5th. That the evidence offered does not prove the rapids in the Mississippi River to have been commonly known and called by the name "rapids of the River Des Moines," as alleged by Iowa.

6th. That if it were true that the rapids of the Mississippi were commonly known and called "rapids of the River Des *Moines," still these rapids could not be taken as the rapids called for, as they do not answer to the description, while those in the Des Moines fulfil exactly the description, and none others will.

*664]

7th. But if the constitution be considered ambiguous, as between the rapids of the River Des Moines and rapids of the Mississippi, it serves only to let in proof of intention beyond what the language indicates. And on this point the evidence is clear in favor of Missouri.

From a full examination of all the facts and circumstances, as established by the evidence in connection with the language of the constitution, and by giving to each the weight to which it is entitled, we contend, in behalf of Missouri,—

1st. That the old Indian boundary-line (marked as line No. 1 on the diagram) cannot be the true northern boundary of Missouri, and the terms of the descriptive call do not allow the adoption of that line.

2d. That the parallel of latitude passing through the old northwest corner of the Indian boundary (marked on the diagram as line No. 2) is neither legally nor equitably the northern boundary of Missouri.

3d. That the parallel of latitude passing through the rapids of the Mississippi River (marked on diagram as line No. 3) will not fulfil the descriptive call of the constitution, and cannot be the northern line of the State.

4th. That the parallel of latitude passing through the rapids of the River Des Moines, at the Big Bend, in latitude 40 degrees 44 minutes 6 seconds north, (marked on the diagram

as line No. 4,) will precisely and accurately satisfy the descriptive call of the constitution, and is the true northern boundary of the State of Missouri, as established by her constitution.

Mr. Ewing, for Iowa.

We will endeavour to show by the evidence, that, at the time of the adoption of the constitution, there was one object, and one only, namely, the rapids of the Mississippi, a few miles above the mouth of the Des Moines River, which was called in English "the rapids of the River Des Moines," and in French "les rapides de la Rivière Des Moines," which object had notoriety by that name; and that its position is every way adopted to satisfy the locatave call.

We shall also expect to show by the evidence, that there were no rapids in the River Des Moines, then called, or entitled to be called, on account of position or magnitude, "the rapids of the River Des Moines."

These facts being established, we will insist that the *notorious object bearing the name used in the locative call, and every way satisfying the call, must be taken [*665 in law to be the object called for; and that the centre of "the rapids of the River Des Moines" in the Mississippi is the point over which the line of latitude marking the boundary of the State of Missouri must run.

1st. We will show by public acts, and by numerous witnesses, the position of "the rapids of the River Des Moines"; that they are the same with the lower or Des Moines rapids of the Mississippi, and that those rapids were in 1820, and prior thereto, well known by the name of "the rapids of the River Des Moines" in English, and "les rapides de la Rivière Des Moines" in French.

2d. We will infer from the language of the constitution itself, and the then existing knowledge of the country, that "the rapids of the River Des Moines" were called for in the constitution merely to fix the parallel of latitude on which the boundary-line was to run, and were not supposed to be touched by that line.

3d. We will show by actual survey, as well as by general evidence, that there are no rapids in the Des Moines entitled to the general descriptive appellation of "the rapids of the River Des Moines."

4th. And we will insist that in 1820 there were no rapids in the Des Moines River known as "the rapids of the River Des Moines."

5th. We will contend, that the State of Missouri has failed to prove a general understanding or opinion in Congress and

in the convention counter to what we have shown to be the obvious construction of the act of Congress and of the constitution of Missouri, when taken in connection with the well-established facts.

6th. We will contend, that the evidence on the part of Missouri shows that all, or nearly all, of the members of the convention, and other witnesses who supposed, or now think they supposed, the rapids named in the constitution were in the Des Moines River, knew nothing of any particular rapids to which the constitution referred; but that their impression was vague and general, fixing on no actual known or existing object.

7th. We will show that the evidence which tends to give to rapids in the Des Moines River a distant locality and name is insufficient and unsatisfactory, and that in the aggregate it applies as well to the Sweet Home or the Farmington rapids, as to the rapids of the Big Bend.

8th. We will insist that the rapids at St. Francisville and the rapids at Farmington are each and either of them better
*666] *entitled to the appellation of "the rapids of the River Des Moines," than the rapids at the Great Bend,—the first because of its position, the second because it is the greater rapid. And that the rapids at Sweet Home conform better than those at the Great Bend to the locative calls in the constitution, and to contemporaneous opinion and usage. Fall at Great Bend, in 87 rods, 1.80 feet. Fall at Farmington, in 87 rods, 2.05 feet.

9th. If we succeed in maintaining these propositions, we establish as matters of fact, that the lower rapids of the Mississippi were the object, and the only object, which, in 1820, bore in English the name used in the constitution, "the rapids of the River Des Moines," and in French the name used in the translation, "les rapides de la Rivière Des Moines." And that, at that time, they had notoriety in both languages by those names, and that they every way satisfy the locative call.

10th. And these facts being established, we will contend that those rapids are, and must be held in law to be, the object called for; and that the centre of that object, namely, the centre of "the rapids of the River Des Moines" in the Mississippi, is the point over which the line of latitude must be drawn which shall mark the northern boundary of the State of Missouri.

Mr. Justice CATRON delivered the opinion of the court.

On the tenth day of December, A. D., 1847, the State of

Missouri filed her original bill in this court, according to the third article and second section of the Constitution, against the State of Iowa, alleging that the northern part of said State of Missouri was obtruded on and claimed by the defendant, for a space of more than ten miles wide and about two hundred miles long; and that the State of Missouri is wrongfully ousted of her jurisdiction over said territory, and obstructed from governing therein; that the State of Iowa has actual possession of the same, claims it to be within her limits, and exercises jurisdiction over it, contrary to the rights of the State of Missouri, and in defiance of her authority.

And the complainant prays, that, on a final hearing, the northern boundary-line of said State of Missouri (being the common boundary between the complainant and defendant) be, by the order of this court, ascertained and established; and that the rights of possession, jurisdiction, and sovereignty to all the territory in controversy be restored to the State of Missouri; that she be quieted in her title thereto; and that the defendant, the State of Iowa, be for ever enjoined and restrained from disturbing the State of Missouri, her officers and people, *in the full possession and enjoyment of said territory, thus wrongfully held by the State of Iowa. [*667

To this bill the State of Iowa answers. She denies the right claimed by Missouri; alleges that Iowa has the sovereign authority to govern and hold the territory in dispute as part of her territory, the common line dividing the States being the southern part thereof; and also prays, that the rights of the parties may be speedily adjudicated by this court, that the relief prayed by complainant may be denied, and that her bill be dismissed.

To the bill of Missouri Iowa files her cross-bill, charging Missouri with seeking to encroach on the territorial limits of Iowa to the extent aforesaid, and more; prays, that, on a final hearing, a decree be made by this court, settling for ever the true and rightful dividing line between the two States; that Iowa may be quieted in her possession, jurisdiction, and sovereignty up to the line she claims; and that the State of Missouri be perpetually enjoined from exercising jurisdiction and authority, and from disturbing the State of Iowa, her officers and people, in the enjoyment of their rights on the north side of the true line.

To this bill the State of Missouri answers, and sets up in defence the same matters set forth by her original bill.

Replications were filed to both answers. On these issues

depositions were taken, on which, together with much of historical and documentary evidence, the cause was brought on to a hearing, and was heard with a most commendable spirit of liberality on both sides. And we take occasion here to say, on a matter of practice, that bill and cross-bill is deemed the most appropriate mode of proceeding applicable to cases like the present, as it always offers an opportunity to the court of making an affirmative decree for the one side or the other, and of establishing by its authority the disputed line, and of having it permanently marked by commissioners of its own appointment, if that be necessary, as in this cause it is.

The present controversy originated in 1837, between the United States and the State of Missouri, and was carried on for ten years before Iowa was admitted as a State. Previous to the controversy, and after Missouri came into the Union, in 1821, many acts had been done by both parties most materially affecting the controversy, and tending to compromit the claims now set up, on the one side as well as the other. The new State of Iowa came into the Union, December 27, 1847, and up to this date she was bound by the acts of her predecessor, the United States, forasmuch as the latter might have directly conceded to Missouri a new boundary on the north, as was done on the west; and so, likewise, Iowa is
*668] bound by the *acts and admissions of the United States, tending indirectly to confirm and establish a particular line as the northern boundary of Missouri. And to ascertain how far the United States government was committed by acts to a particular line, a brief historical notice is necessary, showing how jurisdiction has been exercised in the country west of the Mississippi River. It was acquired in 1803, and in 1804 the Territory of Orleans and the District of Louisiana were divided, the latter then embracing what is now the State of Missouri, and much more. In 1805, the District of Louisiana was erected into a separate territorial government, the name of which was changed to Missouri, on the State of Louisiana being created, in 1812, that State having adopted the name of Louisiana. In 1819, the Territory of Arkansas was formed from the southern part of the Missouri Territory; the lines of division being the same that now divide the States of Missouri and Arkansas.

In 1818, the inhabitants of Missouri Territory petitioned Congress that it might be admitted into the Union as an independent State. They set forth the boundaries which they desired that the new State should have, with the rea-

sons favorable to the boundaries desired. They alleged that the petitioners resided in that part of the territory which lies between thirty-six degrees and thirty minutes and forty degrees north, and between the Mississippi River east, and the Osage boundary-line west; and they prayed to be admitted into the Union of the States within these limits. The petitioners further declared, that "the boundaries which they solicit for the future State they believe to be the most reasonable and proper that can be devised. The southern limit will be an extension of the line that divides Virginia and North Carolina, Tennessee and Kentucky. The northern will correspond nearly with the north limit of the territory of Illinois, and *with the Indian boundary-line, near the mouth of the River Des Moines.* A front of three and a half degrees upon the Mississippi will be left to the South, to form the Territory of Arkansas, with the River Arkansas traversing its centre. A front of three and a half degrees more, upon a medium depth of two hundred miles, with the Missouri River in the centre, will form the State of Missouri. Another front of equal extent, embracing the great River St. Pierre, will remain above, to form another State at some future day. The boundaries, as solicited, will include all the country to the north and west to which the Indian title has been extinguished. They will include the body of the population."

The two Indian boundary-lines referred to (as "the Osage or Indian boundary") were run in pursuance of a treaty made in 1808, between the United States and the [*669 Great and Little Osage nations, by which it was stipulated that the Osage boundary should begin at Fort Clark, standing on the south bank of Missouri River, about twenty-three miles below the mouth of the Kansas, thence running due south to the Arkansas River, and with it to its mouth; thereby ceding to the United States all lands lying east of said line, and north of the southwardly bank of the Arkansas. The treaty also ceded "all lands belonging to the Osages situated northwardly of the River Missouri." The boundary-lines were to be run and marked as soon as the circumstances and convenience of the parties would permit. And the Great and Little Osages promised to depute two chiefs from their respective nations to accompany the commissioner or commissioners who might be appointed by the United States to settle and adjust the said boundary. The war of 1812 seems to have hindered a survey of the lines, as, in 1815, by another treaty, peace was reëstablished between the contracting parties, and former treaties were renewed,

and in 1816 John C. Sullivan was sent by the United States to run the lines north of the Missouri River. The Osages, by the treaty of 1808, having surrendered all claim to territory north of the Missouri River, it became necessary that they should show to the United States what part of that country they owned, so that it might be separated, by a defined boundary, from other Indian territories. Sullivan, the surveyor, commenced his first line on the north bank of the Missouri, opposite to the middle of the mouth of the Kansas, and ran north one hundred miles, made a corner, and then ran east to the River Des Moines, about one hundred and fifty miles more, west of the first line, and north of the second. The entire country was then claimed, and partly occupied, by different nations of Indians. In 1816, also, Joseph C. Brown ran the line from Fort Clark south to the Arkansas River, in execution of the treaty of 1808. And the lines run by Brown and Sullivan are "the Indian boundary" referred to in the foregoing petition of the inhabitants of Missouri Territory.

In March, 1818, the petition was referred to a select committee; and on March 6th, 1820, an act of Congress was passed, pursuant to the petition, authorizing the people of Missouri Territory to form a constitution and State government within the limits designated by the act; that is to say, — "Beginning in the middle of the Mississippi River, on the parallel of thirty-six degrees of north latitude; thence west along the said parallel of latitude to the St. François River; thence up and following the course of that river, in the middle of the main channel thereof, to the parallel of latitude *670] of thirty-six degrees and *thirty minutes; thence west along the same to a point where the said parallel is intersected by a meridian line passing through the middle of the mouth of the Kansas River, where the same empties into the Missouri River; thence, from the point aforesaid, north along the said meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel of latitude, to the middle of the channel of the main fork of the said River Des Moines; thence down along the middle of the main channel of the said River Des Moines to the mouth of the same, where it empties into the Mississippi River; thence due east to the middle of the main channel of the Mississippi River; thence down and following the course of the Missis-

sippi River, in the middle of the main channel thereof, to the place of beginning."

According to this law, the people of the Territory, in 1820, proceeded to form a constitution, by which the boundary prescribed by the act of Congress was adopted; and by resolution of March 2, 1831, the State was admitted to enter the Union on certain conditions, to which she assented in June, 1821. On the north and west, as already stated, the new State bordered on Indian territory, over which the general government exercised that modified jurisdiction which existing Indian rights would allow, and had the exclusive power to extinguish the Indian title. The boundaries were therefore common to the two governments, and the acts of either, when exercising jurisdiction with respect to the common boundary, become proper subjects of consideration in the present controversy, as either government might bind itself to a practical line, although not a precisely true one, within the foregoing description. And in pursuing this branch of the subject, our first inquiry will be, how far the general government has committed itself to the old Indian boundary. Its action has been, first, through the Indian department; secondly, through the surveyor's department; and thirdly, by the exercise of civil jurisdiction in the territorial form of government on the north of Sullivan's line, embracing the territory now in controversy.

And, first, as to Indian treaties. The earliest one materially bearing on the question was that of August 4, 1824, with the Sac and Fox tribes. They ceded to the United States all the title and claim that they had to any lands within the limits of the State of Missouri, "which are situated, lying, and being between the Mississippi and Missouri Rivers, and a line *running from the Missouri, at the [*671
entrance of the Kansas River, north one hundred miles to the northwest corner of the State of Missouri, and from thence east to the Mississippi; reserving to the half-breeds of said tribes the small tract in the fork between the Mississippi and Des Moines Rivers, and south of the said line." The Indian tribes admitted that the land east and south of the given lines belonged to the United States, and that none of their people should be permitted to settle or hunt on it. Although the Osages had, in part, ceded the same country in 1808, still the Sacs and Foxes set up a claim to part of it, and the treaty of 1824 was made to quiet their claim.

June 3, 1825, the Kansas tribe also ceded to the United States all claim they had to any lands in the State of Mis-

souri, and further ceded and relinquished all other lands which they then occupied, or to which they had title or claim, "lying west of the said State of Missouri, and within the following boundaries: beginning at the entrance of the Kansas into the Missouri River; from thence north to the northwest corner of the State of Missouri," thence north and west. Of course, the northwest corner here referred to was the one made by Sullivan in 1816, as none other was then claimed by Missouri herself, nor known to the United States or the Indians.

In February, 1831, the State of Missouri, by a memorial from the legislature to Congress, petitioned the United States for an addition of the country west of the line running from the mouth of the Kansas north, and between said line and the Missouri River, alleging that it was a small slip of land that had been acquired, by the treaty of June 3d, 1825, from the Kansas Indians. The petition declared, that the line from the mouth of the Kansas north was about one hundred miles long; that the country was settled, and rapidly settling, to its utmost verge; and that, as the Missouri River was the only great highway of this region, and could not be reached through a country inhabited by Indians, and being without roads, a cession of it to that State was necessary and proper.

June 7, 1836, Congress acceded to the request of Missouri, and granted to that State all jurisdiction over the lands lying between its then western line and the Missouri River, making the river the western boundary. But the accession was not to take effect until the Indian title to the country was extinguished.

By the treaty of July 15, 1830, ten confederated tribes conjointly ceded a large tract of country to the United States, the boundary of which began near the head of the Des Moines River, and passed westwardly to the north of the principal rivers falling into the Missouri, and down Calumet River to the Missouri, and down the same to the Missouri
*672] State line at the *mouth of the Kansas; thence along said State line to the northwest corner of the State; and then northwardly and eastwardly various courses to the place of beginning. And within this boundary the tribes were to be located and superintended by the United States, pursuant to a policy now generally prevailing, and by which the Indians east of the Mississippi River had been removed west of it. By this treaty, the neck of land between the Missouri River and the then western line of Missouri was appropriated for the benefit of these tribes. To remove this impediment, and gratify the request of the State to have her

limits enlarged, a treaty was made on the 17th of September, 1836, with the Iowas, Sacs, and Foxes, reciting the facts, so far as the Indians were interested, and also that it was desirable and necessary that the country should be attached to the State of Missouri; and thereupon these Indian tribes (being part of the ten) did cede and relinquish to the United States all their right and interest to the lands lying between the State of Missouri and the Missouri River; and the United States were exonerated from the guaranty imposed on them by the treaty of 1830, known as the Treaty of Prairie du Chien. And on the 27th of September, 1836, another band of the Sac and Fox tribes made a similar cession. And on the 15th of October, 1836, various bands of the Sioux, by another treaty, also assented to the cession, but in more definite terms: they gave a quitclaim to the United States of their interest in the lands "lying between the State of Missouri and the Missouri River, and south of a line running due west from the northwest corner of the State to the Missouri River." The country having been disencumbered of the Indian title, the President, by proclamation of March 28, 1837, declared that the act of Congress of June 7, 1836, should take effect; and thereby the ceded territory became a part of the State of Missouri.

There are, in all, fifteen Indian treaties referring to the Osage boundary of 1816, as run by Sullivan, each of which recognizes that boundary as the Missouri State line; and all of which treaties were made after Missouri was admitted into the Union, and before Iowa became a State. And as the treaties were drawn by authority of the United States, they must be taken as recognitions, on the part of the general government, that the Missouri boundary and the old Indian boundary are identical.

In the second place, it is proper to inquire how far the general government has recognized the Indian boundary-line of 1816 in its land department. By the act of February 17, 1818, the Howard District was established. This extended west to the old Indian boundary, and ran with it from the mouth of the Kansas north, through its whole length, [*673 and thence east with Sullivan's line to where it intersected the range line ten west from the principal meridian; extending on the east line about four fifths of its length.

In 1823 this district was divided, and a western one established fronting on the two lines.

To the eastern part of Sullivan's line, next to the Des Moines River, the St. Louis District extended until 1824, when the Salt River District was established, running west

to the range line between ranges 13 and 14; thence north to the northern boundary-line of the State of Missouri; thence east with the State line to the River Des Moines, and down the same with the State line.

By the act of August 29, 1842, the western land district was divided, and that part of it lying north of the Missouri River had attached to it the Platte country; that is to say, the country annexed to Missouri by the act of Congress of 1836, lying west of the old Indian boundary, and next to the Missouri River.

When acting through the surveyor's department of public lands, on the Missouri side, the general government has never recognized on the north, nor, until the Platte country was attatched, on the west, any boundary as belonging to that State other than the two Indian lines run by Sullivan in 1816, so far as they extended.

The country north of the State of Missouri was for a time attatched to the Territory of Michigan, and then to the Territory of Wisconsin. By the act of June 12, 1838 (ch. 96), it was formed into a separate territorial government, by the name of Iowa. And by another act of the same date (ch. 100), the territory was formed into two land districts, the southern one embracing the country in dispute.

And on the Iowa side, the public surveys were executed, and lands were sold, up to Sullivan's northern line. Nor had the Surveyor-General of Illinois and Missouri any jurisdiction to go beyond it north; nor the surveyor's department of Iowa, to cross it by surveys to the south. From the time that Missouri became a State to this day, Sullivan's line has been recognized by the United States as the true northern boundary of Missouri, so far as it could be done through the department of public lands.

And thirdly, Congress, as early as 1834, organized a territorial government bounded by said line; laid off counties bounded by it on the south, as early as 1836; and governed the territory for ten years up to that line,—all the time recognizing it as the proper northern boundary of Missouri.

*674] *From these facts it is too manifest for argument to make it more so, that the United States were committed to this line when Iowa came into the Union. And, as already stated, Iowa must abide by the condition of her predecessor, and cannot now be heard to disavow the old Indian line as her true southern boundary.

The State of Iowa, by her cross-bill, alleges that Missouri also treated the old Indian boundary as her true northern line, until about the year 1836; and that said line, at its

western extremity, is about six miles north of the parallel of latitude which is the proper dividing line between the two States, and that, at its eastern extremity, it is about ten miles north of the same; that the parallel of latitude on which the line should run is found at a point opposite the *middle* of the rapids in the Mississippi River known as "the Des Moines Rapids." This rapid begins about three miles above the mouth of the Des Moines River, and extends up the Mississippi about fourteen miles. It is a highly notorious geographical object, and a very proper one to govern a national boundary; but the name called for in the act of Congress of 1820, and in the constitution of Missouri, is "the rapids of the River Des Moines." Then, and ever since, the great rapid in the Mississippi River has been known by a different name. It is therefore left uncertain whether the rapid in the Mississippi was the one referred to; and the obscurity is greatly increased by a most embarassing disagreement among the witnesses testifying on this head.

The name given in the act of Congress, taken in connection with its context, would assuredly apply to a rapid in the Des Moines River, if a notorious one existed, as the Mississippi River is not mentioned in the call, and the Des Moines is; nor was the Mississippi River to be reached by that line. Then, again, the rapid is fourteen miles long, and no part of it is called for as an opposite point to found the line upon.

It therefore follows, that the claim of Iowa to come south to the middle of the rapid throws us on a doubtful and forced construction of the instrument under consideration; and such a construction we are not willing to adopt, even if Iowa could at this day set up a claim to its adoption, which, for the reasons above stated, we think she cannot be allowed to do.

The State of Missouri, by her bill, disavows the old Indian boundary, and utterly denies that the great Des Moines rapid in the River Mississippi is the object called for in her constitution. She insists that the true rapids are found in the Des Moines, and that her northern line has been run and marked from the true rapids, west to the Missouri River. [*675
The history of this line is as follows:—In December, 1836, the legislature of Missouri passed an act requiring the northern boundary of that State to be surveyed and marked under the direction of the executive; and in June, 1837, the governor appointed three commissioners to execute the law, who acted under special instructions from the executive. The commissioners appointed Joseph C. Brown their engineer and surveyor, and commenced the work in

July following; and after having examined the Des Moines, from a point nearly one hundred miles up the river, downwards to its mouth, to ascertain the true rapids called for in the State constitution, determined on the proper place where, in their judgment, the line should begin; and from that place the line was run and marked due west to the Missouri River; and this is known as Brown's line. It lies about ten miles north of the old Indian boundary. And, by an act of the legislature of Missouri, passed 11th February, 1839, the line so run and marked by Brown was declared to be the northern boundary-line of said State, and has been claimed by her as such since that time.

On the rapids selected by the commissioners, and on Brown's line, the bill of complaint of the State of Missouri is altogether founded; and if she fails in establishing the proper place of beginning, she has no case, and must go out of court as a complainant, and can have no relief further than an injunction to restrain Iowa from obtruding on her jurisdiction south of the true line, wherever it may be found, should Iowa attempt to go south of such line.

The main question arising on the original bill of the State of Missouri therefore is, whether any rapid exists in the Des Moines River of such a prominent character as to correspond to the call in her constitution of "THE RAPIDS OF THE RIVER DES MOINES." On this branch of our inquiries we are furnished with highly satisfactory evidence. By the act of August 8, 1846, the Iowa Territory had granted to it, by Congress, every alternate section of land not then disposed of lying in a strip of five miles wide on each side of the Des Moines River, for the improvement of the same from its mouth to a long distance up, and which grant was to accrue to the benefit of the State when she should come into the Union. To carry into effect the act of Congress, a board of public works was organized for the improvement of the river. They employed an engineer to survey and level it with a view to slack-water improvements, and it was surveyed from its mouth for ninety-three miles upwards. The engineer had every advantage of suitable instruments, low water, and ice in the winter, and no doubt exists of his accuracy when performing the field operations and in making the levels.

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The first ripple he came to, worthy of notice here, was twenty-four miles from the mouth of the river; and, on eighty rods of its greatest descent, he found .73 foot fall.

On the 26th mile is "Sweet-home Ripple." There was found a fall of .85 foot in eighty rods.

On the 34th mile, at Farmington, he found a fall of 2.27 feet in ninety-six rods, and in eighty rods 1.89 feet.

On the 42d mile, he found a ripple (near Benton's Port) of 1.26 feet fall in sixty rods, and 1.68 in eighty rods.

On the 51st mile, being at the great bend, where Brown's line commences, the engineer found a fall of 1.75 feet in eighty rods,—that is to say, twenty-one inches. Brown had also taken a level there of a space of some sixty rods, in August, 1837, and found a fall in that distance of 1 foot 9⅜ inches; but his instruments were not so reliable. The bottom of the river is rock at that place, and there is a thin stratum at one point, over which the water breaks when the river is low.

On the 53d mile, a fall was found in eighty rods of 1.75 feet by the engineer of Iowa.

On the 55th mile, a fall of 1.81 feet was found in eighty rods.

On the 93d mile, a fall was found in eighty rods of 2.10 feet.

A line extended due west from this greatest fall would lie about twenty miles north of Brown's line, the river being very crooked. From this point downwards, it was examined by the commissioners of Missouri in 1837.

The shoals on the 34th mile, at Farmington, on the 42d, at Benton's Port, and at the great bend at Van Buren, on the 51st mile, where Brown's line begins, and the descents on the 53d and 55th miles, are of about equal magnitude; neither reach to so much as two feet ascent in eighty rods, and are not perceptible at all when the water is three feet higher than when at its lowest stage in dry weather. In 1820 these shoals were nameless, and are so slight that some of them are now nearly obliterated by the accidents of dams thrown across the river for milling purposes. Either one of the five might have been selected by the commissioners of Missouri for the proper place of beginning with almost equal propriety. They searched the river from the Appannoose Fall, at the 93d mile, to its mouth, in a pirogue, before they selected their starting-point, obviously depending on such examination for a selection of the particular place of beginning, and not on any notorious rapid pointed out by public reputation. There is none such in the Des Moines River, and therefore Brown's line cannot be upheld, nor the claim of Missouri be supported.

*This court is, then, driven to that call in the constitution of Missouri which declares that her western boundary shall correspond with the Indian boundary-line; and, treating the western line of a hundred miles long as a unit, and then running east from its northern terminus, it [*677

will supply the deficiency of a call for an object that never existed. Nor has Missouri any right to complain. She herself, for ten years and more after coming into the Union, recognized the Indian lines west and north as her proper boundary; her counties were extended up to these lines before the present controversy arose; and so counties in the territory north were established up to this recognized line without objection on the part of Missouri. And when Congress ceded to Missouri the country west of Sullivan's line, both parties to that cession acted on the assumption, that the ceded territory next the Missouri River was bounded on the north by a line that should be run due west from the northwest corner of the old Osage boundary. To this extent the Indian title was extinguished, and to no other extent did the United States cede that country. Nor could this court act otherwise than to reject the claim of Missouri, without doing palpable injustice to the United States on the western part of the line.

We are, therefore, of opinion, that the northern boundary of Missouri is the Osage line, as run by Sullivan in 1816, from the northwest corner made by him to the Des Moines River; and that a line extended due west from said northwest corner to the Missouri River is the proper northern boundary on that end of the line. And this is the unanimous opinion of all the judges.

Decree.

On this 13th day of February, A. D., 1849, the cause of the State of Missouri against the State of Iowa, on an original bill, and also on a cross-bill of the State of Iowa against the State of Missouri, constituting part of said cause, came on to be heard before the honorable the judges of the Supreme Court of the United States in open court, all the judges of said court being present. And said cause was heard on the original bill, and the answer thereto, and the replication to said answer; and also on said cross-bill, and the answer thereto, and the replication to said answer; and on the proofs in said cause, consisting of depositions, documents, and historical evidences; when it appeared to the court, that, in the year 1816, the United States caused to be run and marked two lines, as part of a boundary between the United States and the Great and Little Osage nations of Indians, in execu-
*678] tion of a treaty made *with said Osages in 1808, the first line of the two beginning on the eastern bank of the Missouri River, opposite the middle of the mouth of the

Kansas River, and extending north one hundred miles, where a corner was made by John C. Sullivan, the surveyor and commissioner, acting on behalf of the United States and the Osage nations; and that from said corner a second line was then run and marked by said surveyor, under said authority, which was intended to be run due east, on a parallel of latitude, but which line, by mistake, varied about two and one-half degrees towards the north of a due east and west line. And it further appeared, that the first-named line is the one to which the descriptive call in the constitution of the State of Missouri refers as the Indian boundary-line, and to which the western boundary of said State was to correspond. And it also appeared, that said two lines had, at all times since Missouri came into the Union as a State, been recognized by the United States as the true western and northern boundaries of the State of Missouri, as called for in her constitution; and that the State of Missouri had also recognized these lines as a part of her boundary for the first ten years of her existence, if not more; but that, in the year 1837, she caused another line to be run, and marked as her northern boundary, from the River Des Moines due west to the Missouri River, lying about ten miles north of said line run by Sullivan in 1816, which line of 1837 embraced part of a territory then governed by the United States, and which was inhabited by citizens of the United States, and which territory continued to be so governed by the United States until the 29th day of December, 1846, when the jurisdiction over the same was conferred upon the State of Iowa. It further appeared, that the State of Missouri claims to exercise jurisdiction up to said line, as run and marked in the year 1837, on an assumption that the descriptive call in her constitution for a parallel of latitude "passing through the rapids of the River Des Moines" was gratified by a rapid found in said river, at a place known as the Great Bend, and from which said line was begun and extended west. And this court finds that there is no such rapid in the River Des Moines as that called for in the constitution of the State of Missouri; and that she was not justified in causing the line run and marked in 1837 to be extended as her northern boundary.

And the court further finds, that the State of Iowa is estopped from setting up claim to a line south of the old Indian boundary, known as Sullivan's line, as said State, by her cross-bill, assumes to do; because her predecessor, the United States, by many acts, and by uniform assumptions, up to the time when *Iowa was created, in December, [*679
1846, recognized and adopted Sullivan's line as the

proper northern boundary of the State of Missouri; and that the State of Iowa is bound by such recognition and adoption.

And it further appeared, that that portion of territory lying west of Sullivan's first line, and between the same and the Missouri River, was added to the State of Missouri by force of an act of Congress of June 7th, 1836, which took effect by the President's proclamation of March 28th, 1837; and that a line prolonged due west from Sullivan's northwest corner, on a parallel of latitude, to the middle of the Missouri River, is the true northern boundary of the State of Missouri, on this part of the controverted boundary.

And this court doth therefore see proper to decree, and doth accordingly order, adjudge, and decree, that the true and proper northern boundary-line of the State of Missouri, and the true southern boundary of the State of Iowa, is the line run and marked in 1816, by John C. Sullivan, as the Indian boundary, from the northwest corner made by said Sullivan, extending eastwardly, as he run and marked the said line, to the middle of the Des Moines River; and that a line due west from said northwest corner to the middle of the Missouri River is the proper dividing-line between said States west of the aforesaid corner; and that the States of Missouri and Iowa are bound to conform their jurisdictions up to said line on their respective sides thereof, from the River Des Moines to the River Missouri.

And it is further adjudged and decreed, that the State of Missouri be, and she is hereby, perpetually enjoined and restrained from exercising jurisdiction north of the boundary aforesaid dividing the States; and that the State of Iowa be, and she hereby is, also perpetually enjoined and restrained from exercising jurisdiction south of the dividing boundary established by this decree.

And it is further ordered, that Joseph C. Brown, of the State of Missouri, and Henry B. Hendershot, of the State of Iowa, be, and they are hereby, appointed commissioners to find and re-mark the line run by said Sullivan in 1816, extending eastwardly from said northwest corner to the Des Moines River; and especially to find and establish said northwest corner, and to mark the same as hereinafter directed; and also to run a line due west, on a parallel of latitude, from said corner, when found, to the Missouri River, and to mark the same as hereinafter directed.

And said commissioners are hereby commanded to plant at said northwest corner a cast-iron pillar, four feet six inches
*680] *long, and squaring twelve inches at its base, and eight inches at its top; such a pillar to be marked with the

word "Missouri" on its south side, and "Iowa" on the north, and "State Line" on the east side; which marks shall be strongly cast into the iron. And a similar pillar shall be by them planted in the line near the bank of the Des Moines River, with the mark of "State Line" facing the west. And also a similar one, near the east bank of the Missouri River, shall be planted by the said commissioners in the said line, the mark of "State Line" facing the east.

And it is further ordered, that pillars or posts, of stone or of east-iron, shall be planted at every ten miles in the line extending east, from the northwest corner aforesaid to the Des Moines River; and also at the end of every ten miles on the due west line, extending to the Missouri River from said corner. These latter line-posts to be of such description as the commissioners may adopt, or as the parties to this suit, acting jointly, may direct the commissioners to use, except that said line-posts shall be of stone or iron.

And it is further ordered, that a duly certified copy of this decree shall be forwarded to the chief magistrate of the State of Missouri, forthwith, by the clerk of this court; and that a similar copy shall, in like manner, be forwarded to the chief magistrate of the State of Iowa. And the commissioners of this court hereby appointed are directed to correspond with said chief magistrates respectively, through their secretaries of state, requesting the coöperation and assistance of the State authorities in the performance of the duties imposed on said commissioners by this decree.

And it is further ordered, that the clerk of this court forward to each of the said commissioners a copy hereof, duly authenticated, without delay.

And it is further ordered, that said commissioners make report to this court, on or before the first day of January next, of their proceedings in the premises, with a bill of costs and charges annexed.

And it is further ordered, that, should either of said commissioners die, or refuse to act, or be unable to perform the duties required by this decree, the chief justice of this court is hereby authorized and empowered to appoint other commissioners to supply vacancies; and, if it be deemed advisable by the chief justice, he may increase the commissioners, by appointment, to more than two; and he is authorized to act on such information in the premises as may be satisfactory to himself.

And should any other contingencies arise in executing this *decree, the chief justice, in vacation, is further and generally authorized to make such orders and give [*681

such instructions, as this court could do when in session. Copies of all orders and instructions and acts done in the premises by the chief justice shall be filed by the clerk of this court, together with the petitions, papers, and documents on which they are founded. And reports of the commissioners, if made in vacation, shall be filed with the clerk also, for safe-keeping thereof, until presented in open court for its action thereon.

And it is further ordered and adjudged, that the costs of this suit, including the original bill, cross-bill, and the proceedings thereon, and all costs incident to establishing and marking the dividing line, and all other costs and charges of every description, shall be paid by the States of Iowa and Missouri equally.

In the case of *Missouri* v. *Iowa*, and of *Iowa* v. *Missouri*, in the Supreme Court of the United States:

Having received information of the death of Joseph C. Brown, one of the commissioners appointed by the decree of the Supreme Court in the above-mentioned cases to run and mark the boundary-line between the States of Missouri and Iowa, I hereby, pursuant to the duty enjoined upon me by the said decree, appoint Robert W. Wells, of the State of Missouri, a commissioner for the purposes aforesaid, in the place of the said Joseph C. Brown, deceased.

R. B. TANEY,
Chief Justice of Supreme Court of U. S.

Baltimore, April 6, 1849.

THOMAS AP CATESBY JONES, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

Where a running account is kept at the Post-Office Department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances.[1]

This the creditor has a right to do in the absence of instructions from the debtor.

The English decisions and those of this court examined.

The act of Congress of 1825 (Stat. at L., 102), which exonerates the sureties if balances are not sued for within two years after they occur, does not apply to this case, because, by this mode of keeping the account, the balance due from the postmaster is thrown upon the last quarter.[2]

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[1] CITED. *Schuelenburg et al.* v. *Martin*, 1 McCrary, 361.

[2] CITED. *State of Texas* v. *Middleton's Sureties*, 57 Tex., 190.

Jones v. The United States.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Eastern District of Virginia.

It was a suit brought by the United States upon a postmaster's bond against Walter F. Jones (the postmaster at Norfolk, in Virginia), and Thomas Ap Catesby Jones and Duncan *Robertson, his sureties. Judgment went by default against the postmaster and Robertson. [*682

The act of Congress upon which the defence rested was the following, viz.:—

The act of the 3d March, 1825, (4 Stat. at L., 102,) is entitled "An act to reduce into one the several acts for establishing and regulating the Post-Office Department," and in its *third* section enacts,—

"That it shall be the duty of the Postmaster-General, upon the appointment of any postmaster, to require and take of such postmaster bond, with good and approved security, in such penalty as he may judge sufficient, conditioned for the faithful discharge of all the duties of such postmaster required by law, or which may be required by any instruction or general rule for the government of the Department: *Provided, however*, That if default shall be made by the postmaster aforesaid, at any time, and the Postmaster-General shall fail to institute suit against such postmaster and said sureties for two years from and after such default shall be made, then and in that case the said sureties shall not be liable to the United States, nor shall suit be instituted against them."

Jones was postmaster from 1830 to August, 1839, during which time a running account was kept up with him at the Post-Office Department, with only one rest, namely, in August, 1836, when the account was added up and a balance transferred to a new account. The following is the debit side of the account.

To balance transferred from old account . .									$345	50
To balances due the United States on his quarterly returns as postmaster, viz.:—										
From July 1	to	Sept.	30,	1836,	.	.	.		2,073	77
" Oct. 1	"	Dec.	31,	"	.	.	.		2,488	16
" Jan. 1	"	March	31,	1837,	.	.	.		2,746	04
" April 1	"	June	30,	"	.	.	.		2,634	93
" July 1	"	Sept.	30,	"	.	.	.	.	2,187	79
" Oct. 1	"	Dec.	31,	"	.	.	.		2,298	13
" Jan. 1	"	March	31,	1838,	.	.	.		2,450	65
" April 1	"	June	30,	"	.	.	.		2,422	47

From July 1 to Sept. 30, "												2,233	48
" Oct. 1 " Dec. 31, "												2,618	26
" Jan. 1 " March 31, 1839,												2,829	60
" April 1 " April 3, "												53	11
												$ 27,381	89
To balance,												5,515	89

To interest from August, 1839, to

*683] *The credit side of the account ran on continuously as in the following, which is the conclusion of the account:—

1838.													
		By amount brought over,										$18,198	64
Dec.	4,	By draft	No.	8448,								62	54
"	4,	"	"	"	8452,							42	94
"	4,	"	"	"	8455,							77	19
"	4,	"	"	"	8465,							98	57
"	15,	"	"	"	8745,							50	26
"	15,	"	"	"	8746,							43	64
"	17,	"	"	"	8768,							132	79
"	31,	"	"	"	8967,							88	52
"	31,	"	"	"	8968,							206	48
1839.													
Jan.	19,	"	"	"	9100,							45	00
Feb.	19,	"	"	"	9792,							750	00
"	20,	"	"	"	9801,							863	29
March	13,	"	"	"	271,							46	04
"	13,	"	"	"	274,							38	56
Aug.	31,	" cash,										1,121	54
		Balance,										5,515	89
												$27,381	89

The substance of the pleadings in the court below, and the prayers of the respective counsel, are given in the opinion of this court, and need not be here repeated.

It was argued by *Mr. Walter Jones*, for the plaintiff in error, and by *Mr. Toucey*, (Attorney-General), for the United States.

Mr. Jones contended, that although no quarterly balances were struck, yet an analysis of the account would show that the postmaster was in default continually.

Thus, on the 30th of September, 1836, (the end of the first

quarter after the date of the bond,) the balance against him was $1,894 27
On the 31st December, 1836, it was . . 1,793 43
On the 31st March, 1837, it was . . . 3,027 47
On the 30th June, 1837, it was . . . 3,866 40
On the 30 September, 1837, it was . . . 6,020 84
On the 31st December, 1837, it was . . 5,446 18
On the 31st March, 1838, it was . . . 3,509 70
On the 30th June, 1838, it was . . . 3,937 98
On the 30th September, 1838, it was . . 4,530 05
On the 31st December, 1838, it was . . 5,297 61
And on the 31st March, 1839, it was . . 6,384 32

The sureties were therefore discharged under the operation of the act of Congress above recited.

*Mr. Justice DANIEL delivered the opinion of the court. [*684

The case in the Circuit Court was an action of debt, instituted to recover the amount of a default claimed by the United States of Walter F. Jones, as postmaster of the Borough of Norfolk, in the State of Virginia. The said Walter F. Jones, having been appointed postmaster of Norfolk, executed, on the 8th day of August, in the year 1836, his bond, with the plaintiff in error and one Duncan Robertson as his sureties, in the penalty of ten thousand dollars, conditioned for the faithful performance of the duties of his office. In the year 1839, Walter F. Jones was removed from office, the United States claiming against him a balance of $5,515.89 as due from him on the 31st of August in the year last mentioned; and to recover this balance, the action on his official bond was instituted in the Circuit Court against him and his sureties. After the institution of the suit, it was abated as to Walter F. Jones by his death; Robertson made default in the case, and as to him a writ of inquiry of damages was executed; the plaintiff in error alone appeared and made defence, upon four several pleas, as to each of which replication and issue were taken. The first plea interposed was that of condition performed generally. The second and third pleas, presenting substantially the same defence, rely upon the act of Congress of the 3d of March, 1825, entitled "An act to reduce into one the several acts establishing and regulating the Post-Office Department," and particularly upon that portion of the act which prescribes that the Postmaster-General shall obtain from the postmasters their accounts and vouchers for their receipts and expenditures once in three months, or

oftener, with the balances therein arising in favor of the General Post-Office; and that, if any postmaster, or other person authorized to receive the postage of letters, &c., shall neglect or refuse to render his accounts, and pay over to the Postmaster-General the balance due by him at the end of every three months, it shall be the duty of the Postmaster-General to cause a suit to be commenced against the person so neglecting or refusing; and if default be made by the postmaster at any time, and the Postmaster-General shall fail to institute suit against such postmaster and sureties within two years after such default shall be made, then and in that case the said sureties shall not be held liable to the United States, nor shall suit be instituted against them. These pleas further aver, that, subsequently to the execution of the bond of Walter F. Jones on the 8th of August, 1836, and during the year 1837, sundry defaults were made by him in failing to pay over money received by him as postmaster, and that these defaults were permitted to remain unclaimed by suit
*685] up to the 12th of March, *1840, the period at which this suit was instituted; a length of time from the occurrence of those defaults comprising an interval of more than two years.

The fourth plea of the defendant below is simply a general averment, that the causes of action in the declaration mentioned did not occur within two years next before the institution of the suit.

The only evidence adduced in this case, on behalf of the plaintiffs below, was the account certified under the act of Congress from the Treasury Department against the postmaster, brought down to the 31st of August, 1839, exhibiting a balance in favor of the United States, at that date, of $5,515.89; and all the evidence on behalf of the defendant was a letter to him from the Postmaster-General, dated on the 19th of December, 1837, announcing the fact, that a draft had been drawn on the defendant in favor of the Treasury Department, for the sum of $5,000 in specie, and requesting the deposit of that sum with the Bank of Virginia, at Richmond, as the agent for the treasury. Upon the aforegoing pleadings and evidence, the following prayers were made, and instructions given at the trial.

The attorney for the United States moved the court to instruct the jury, "that all payments made by the postmaster, Walter F. Jones, to the General Post-Office, after the execution of his official bond, on the 8th of August, 1836, and subsequently to any default at the end of a quarter, without any direction by him or by the Postmaster-General as to the ap-

plication of said payments, should be applied in the first instance to extinguish each successive default in the order in which it fell due; and if, by such application of said payments, the jury shall believe from the evidence that all of the defaults which occurred two years before the institution of this suit were extinguished within two years after the same were respectively committed, that the act of Congress, which limits the institution of suits against the sureties of a postmaster to two years after the default of the principal, has no application to this case, and cannot affect in any degree the plaintiffs' right to recover in this action."

And the counsel for the defendant moved this court to instruct the jury,—"1st. That if the jury shall find that the said deputy postmaster, Walter F. Jones, committed any default or defaults in office at any time or times more than two years before the commencement of this suit, and that such default or defaults were then known to the Postmaster-General; and, further, than the said deputy postmaster continued in default to an equal or greater amount thenceforth, until he was *discharged from office; that the Post- [*686
master-General failed to institute, or cause to be instituted, a suit against the said deputy postmaster and his sureties for two years from and after such default or defaults were made,—then the defendant, Thomas Ap Catesby Jones, one of the sureties of the said deputy postmaster, is not liable to the United States, nor can any suit be maintained against him on the official bond of the said deputy postmaster, wherein the defendant was bound as one of the sureties for any default or defaults committed by the said deputy postmaster.

"2d. That as this suit was commenced on the 12th of March, 1840, the jury should inquire whether any default was committed by the said deputy postmaster, Walter F. Jones, in not duly paying over any balance or balances of money which became due from him on account of collections by him officially made before the end of the quarter next preceding the 12th of March, 1838, namely, the quarter ending on the 31st of December, 1837. And if the jury shall find that the said deputy postmaster was so in default in not duly paying over such balances or balance due from him on account of collections by him officially made before the end of the quarter ending the 31st of December, 1837, and that such default was then known to the Postmaster-General, then they should apply, towards the discharge of such balances or balance, all such payments made by the said deputy postmaster during his continuance in office subsequently to the 31st of December, 1837, as they shall find to have been

made out of moneys officially collected by him before that date, or out of his private funds; and they should apply all other payments made by him after that date, and during his continuance in office, towards the discharge of the balances or balance which became due from him on account of moneys by him officially collected after the 31st of December, 1837, during his continuance in office.

"3d. And that, as to the payment of $1,121.54, which was made by the said deputy postmaster after he was discharged from his office, the jury should inquire whether that payment was made by him out of moneys remaining in his hands on account of collections officially made by him before the 31st of December, 1837, or out of his own private funds; or whether that payment was made out of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837; and if the jury shall find that that payment was made, and of moneys remaining in his hands of collections by him officially made prior to the 31st of December, 1837, or out of his own private funds, then the jury should apply that payment towards the discharge of the *balance which was due from him on the 31st of December, 1837; but if the jury shall find that that payment of $1,121.54 was made by the said deputy postmaster out of money officially collected by him during his continuance in office subsequently to the 31st of December, 1837, then they should apply the said payment towards the balance that accrued and became due from him on account of moneys officially collected by him during his continuance in office subsequently to the 31st of December, 1837."

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"Whereupon, the court gave the said instruction prayed by the attorney for the United States, and refused to give the said instructions prayed by the counsel for the defendant: to which opinion of the court the defendant by his counsel excepted, and prayed the court to sign and seal this bill of exceptions, which is done accordingly."

The jury found a verdict for the United States, assessing their damages to the sum of $4,387.09, with interest thereon from the 31st day of August, 1839, till payment; and upon this verdict a judgment was entered for the sum of $10,000, the penalty of the bond, to be discharged by the damages and interest by the jury assessed, and the costs of suit.

It is apparent that the only question of law raised in this cause is the question of an appropriation of payments by debtor and creditor, it being insisted, in behalf of the United States, and being so ruled by the court below, that when, at

the end of a quarter, there might be a default on the part of a postmaster, it was competent for him to supply such default, or to extinguish the debt then due from him, by payments made posterior to the end of the quarter; and that, in the event of an omission by the postmaster to appropriate the payments so made by him, it was the right of the government to apply them at its discretion to the extinguishment of previous balances; and that if, by such application, all defaults occurring within two years previously to the institution of the suit had been extinguished, the act of Congress did not affect the plaintiff's right of recovery.

On behalf of the defendants below, it is insisted that the receipts by the postmaster, within a given quarter, should be applied, exclusively or primarily, to the debt due from the postmaster for that quarter; and that, if there should have existed any balances for previous quarters, these should not be extinguished by subsequent receipts; and that, if permitted to remain for the space of two years without being claimed (as such balances) *by suit* on the part of the government, the omission should operate a complete exoneration of the sureties. With respect to the position contended for as above, it may be *remarked, that a construction of the act of Congress which, in numerous instances, would [*688 interpose in the way of a debtor obstructions to the voluntary payment of his own debt, and compel the creditor to resort to a reluctant, dilatory, and expensive litigation for its recovery, would never be adopted except under the influence of some controlling principle or necessity, rendering such a proceeding unavoidable; and no such principle or necessity can be perceived where a creditor is willing to receive his money, the debtor is willing to pay it, and the surety assents to, or acquiesces in, the payment. We cannot therefore approve an interpretation of the act of Congress like that assumed in the defence, which would require that quarterly balances should at all events, and in opposition to the will of the parties, justly inferred from their conduct, remain open and unsatisfied, to become the subjects of future contest.

Upon the question of the appropriation of payments, some diversity, and even contrariety, may be found in the doctrines of the courts; yet nothing of the kind, it is thought, can be deduced from them which should embarrass the adjudication in this case. In the general proposition upon this subject, all the courts agree. It is this:—"That the party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of appropriation. If both are silent, the law must decide." With

the third branch of this proposition, the most fruitful of uncertainty and embarrassment, namely, the decision which the law would make in the silence or entire forbearance of the parties, we are here not particularly called on to deal, the subject here being more immediately the right of the creditor to make an appropriation of payments, and the limitations upon that power resulting from the delay or lapse of time, from the character of the transactions between the debtor and creditor, and the rights of third persons which may be affected by those transactions. In instances of official bonds executed by the principal at different times, with separate and distinct sets of sureties, this court has settled the law to be, that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake by their contract, and that neither the misfeasance nor nonfeasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable. Such is the rule established in the cases of *The United States* v. *January and Patterson*, 7 Cranch, 572, and *689] of *The United States* v. *Eckford's Executors*, *1 How., 250. The case before us is free from any embarrassment of conflicting interests between separate sets of sureties. In this case there is but one bond; it presents the instance of an appropriation of payments between a single debtor and creditor. Upon the question, as understood in this form and with this limitation, there is not a perfect uniformity in the decisions either in England or in this country. The opinion of Sir William Grant in Clayton's case, 1 Meriv., pp. 604 *et seq.*, has often been referred to as a high authority in favor of the restriction of the right of the creditor to make the application to the exact period of time at which the payment was made. A close examination of the opinion of this able judge, however it may show the inclination of his mind on this subject, can hardly be received as an express adjudication upon the point in support of which it is adduced. In Clayton's case, page 605, speaking of the right of appropriation in the creditor in the absence of express direction, Sir Wm. Grant says:—"There is certainly a great deal of authority for this doctrine; with some shades of distinction it is sanctioned by the cases of *Goddard* v. *Cox*, 2 Str., 1194; of *Wilkinson* v. *Sterne*, 9 Mod., 427; of *Newmarch* v. *Clay*, 14 East, 239; and of *Peters* v. *Anderson*, 5 Taunt., 596." He proceeds:—"There are, however, other cases, which are irreconcilable with this indefinite right of election in the creditor,

and which seem, on the contrary, to imply a recognition of the civil law principle of decision. Such are, in particular, the cases of *Meggot* v. *Mills*, 1 Ld. Raym., 287, and *Dowe* v. *Holdworth*, Peake, N. P., 64. The cases then set up two conflicting rules,—the presumed intention of the debtor, which, in some instances at least, is to govern, and the *ex post facto* election of the creditor, which, in other instances, is to prevail. I should therefore feel myself a good deal embarrassed, if the general question of the creditor's right to make the application of indefinite payments were now necessarily to be determined. But I think the present case is distinguishable from any of those in which that point has been decided in the creditor's favor." Again, on page 609, we find the following statement from this same judge, namely, that the creditor received his account drawn out by his debtor, the banker *who kept the account*, and made no objection to it whatever, and the master stated in his report that the silence of the customer (the creditor), after the receipt of his banking account, is regarded as an admission of its being correct. "Both creditor and debtor must therefore," says the judge, "be considered as having concurred in the appropriation." This case has been adverted to somewhat at length, although it is often referred to as high and express authority, with the view of showing that it does *not adjudge directly the point of the creditor's discretion in the appropriation [*690 of payments, however strongly it may intimate the inclination of the Master of the Rolls as to that question. Later decisions in the English courts would seem to be wholly irreconcilable with the remarks of Sir William Grant in Clayton's case. Thus, in *Simpson* v. *Ingham*, decided in 1823, and reported in 2 Barn. & C., 65, Bayley, Justice, speaking of the right of creditors to appropriate payments, uses this language:—"It has been insisted, that, at that period of time, they had no right so to do, because they were precluded by the entries which they had already made in their own books in the intermediate space of time. If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering the account; but entries made by a man for his own private purposes are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time, he has the right to apply the payments as he thinks fit." Holroyd, Justice, in the same case, says:—"The persons paying the money not having made any direct application of it, the right of making

such application devolved on the receivers; and if they have done no act which can be considered as such an application, it is equally clear, that, although they did not apply it at the moment of payment, they would have the right to make the application at a subsequent period. The question therefore is, whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now, these entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payment had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect." Still later (in 1834), in the case of *Philpot* v. *Jones*, 2 Ad. & El., 41, Denman, Chief Justice, says:—"The defendant made no application of that payment; the plaintiff therefore may elect *at any time* to appropriate it to this part of his demand." And so Taunton, Justice, in the same case:—"Here the £17 were paid without any application to the particular items of the account. The plaintiff then might apply that payment to the items in question; and he was not
*691] bound to tell the defendant at the time that he *made such application; he might make it at *any time before the case came under the consideration of the jury.*" In *Smith* v. *Wigler and Turnicliffe*, 3 Moo. & S., 175, Tindall, Chief Justice, said that the creditor must make the appropriation at the time the money comes to his hands. Yet, in *Mills* v. *Fowkes*, 5 Bing. N. C., 455, the same Chief Justice said, that, in conformity with the rule in *Simpson* v. *Ingham*, the creditor may make the application *at any time before action brought.* Bosanquet, Justice, said, in the same case, that the receiver might appropriate the payment, if the debtor had not, at any time before action commenced; and Coltman, Justice, that, notwithstanding the doubt expressed by the Master of the Rolls in Clayton's case, the more correct view seemed to be, "that the creditor *is not limited in point of time.*"

In the case of *The Mayor of Alexandria* v. *Patton*, reported in 4 Cranch, 320, Chief Justice Marshall said, in pronouncing the decision:—"It is a clear principle of law, that a person owing money on two several accounts, as upon a bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. *No principle* is recol-

lected which obliges the creditor to make the election immediately. After having made it, he is bound by it; but until he makes it, he is free to credit either the bond or the simple contract." So, too, Justice Story, in delivering the decision in the case of *Kirkpatrick* v. *The United States*, 9 Wheat., 724, says,—"The general doctrine is, that the debtor has a right, if he pleases, to make the appropriation of payments; if he omits it, the creditor may make it; if both omit it, the law will apply the payments according to his own notions of justice. It is certainly too late for either party to claim a right to make an application after the controversy has arisen, and *a fortiori* at the time of the trial." The two cases last cited, with those of *The United States* v. *January*, and of *The United States* v. *Eckford's Executors*, comprise the substance, it is believed, of all that has been ruled by this court upon the subject of the appropriation of payments. There are several State decisions upon this subject, which are not adverted to; but amongst these, if examined, there will be found some contrariety. An attempt to reconcile any discrepancies, either real or apparent, amongst either the English or American cases, would seem to be at least useless here, inasmuch as, with regard to the only principle connected with the appropriation of payments which we deem to be involved in this case, all the decisions concur. There is not even a decision to be found which denies to the creditor, where the debtor has been quiescent, the right to appropriate payments at *the periods at which they shall be made; and the concession of this restricted right we hold to be decisive [*692 of the character and fate of the transaction under review. That transaction exhibits one general account of debit and credit continued from its commencement to its close, when, and at no prior time, the balance is struck. On the due side of the account are presented the amounts received by the postmaster for postages within the periods there stated, and on the other side are entered to his credit the sums paid by him, either in cash or in drafts from the Postmaster-General, in an exact conformity with the dates at which the transactions occurred. By this application any balance which may have existed at the end of a previous quarter was extinguished, and sometimes overpaid, and the account thus brought down to the final balance. To this mode of application no just objection can be perceived; the parties interested in the payments were the same throughout, and equally liable for all; the payments being made generally, and without any appropriation by the debtors who were thus liable, it was the undoubted right of the creditor to apply them to any sums

antecedently due. Indeed, in the case of *The United States* v. *Kirkpatrick*, this court say, that "in long running accounts, where debits and credits are perpetually occurring, and no balances otherwise adjusted than for the purpose of making rests, we are of opinion that payments ought to be applied to extinguish the debts according to the priority of time." In this case they have been so applied, and in strict conformity with the times at which such payments were made.

We conclude our view of this question in the language of Judge Hopkinson, in the case of *The Postmaster-General* v. *Norvell*, Gilp., 134:—"The application of the moneys received in a subsequent quarter to the payment of the debt or balance antecedently due being perfectly correct and lawful, it follows that no part of the default for which suit is brought accrued two years before; on the contrary, all the balances antecedent to the last quarter were extinguished by the successive payments, and the final balance falls on the last quarter." A contrary result could be attained only by changing the manner in which the accounts have been kept, and by arranging the actual transactions as they have occurred between the parties, —a proceeding which we think is required neither by the letter nor the objects of the act of Congress. The judgment of the Circuit Court should therefore be, and is hereby, affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the *693] Eastern *District of Virginia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

BENJAMIN D. HARRIS, PLAINTIFF IN ERROR, *v.* JAMES D. WALL.

The conditions under which a party is permitted and a magistrate authorized to take a deposition *de bene esse* by the thirtieth section of the Judiciary Act are,—

1st. That the witness lives at a greater distance from the place of trial than one hundred miles.

2d. Or is bound on a voyage to sea.

3d. Or is about to go out of the United States.

4th. Or out of such district to a greater distance from the place of trial than one hundred miles before the time of trial.

5th. Or is ancient or very infirm.

And to entitle himself to read the deposition upon the trial, the party must show, —

1st. That the witness is dead.

2d. Or gone out the United States.

3d. Or to a greater distance than one hundred miles from the place where the court is sitting.

4th. Or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.[1]

The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof.

Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States.

The service of the notice upon the opposite party should be certified by the magistrate as well as the marshal.

When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

In February, 1839, the following sealed note was executed :—

$10,391.06. *Clinton, Miss., February*, 1839.

On or before the first day of January, eighteen hundred and forty, we or either of us promise and bind ourselves, our heirs, &c., to pay to Benjamin D. Harris, his heirs or assigns, the sum of ten thousand three hundred and ninety-one dollars and six cents, with eight per cent. interest thereon from the date hereof.

Given under our hands and seals, the day and date above written. T. W. WINTER. [SEAL.]
JAS. M. WALL. [SEAL.]

*Suit was brought upon this note at May term, 1840. Judgment went against Winter by default, [*694 and it is not necessary to notice him further.

Wall put in three pleas. The first two were substantially the same, and were, that the introduction of slaves into Mississippi, as merchandise, after the first day of May, 1833, was prohibited by the constitution of that State, and the contract for their purchase and sale, therefore, void. These pleas

[1] See Rev. Stat., § 863, and *Egbert* v. *Citizens Ins. Co.*, 2 McCrary, 386.

averred that the note was given for the purchase of slaves so introduced. To these pleas the plaintiff took issue.

The third plea was, that the slaves were above the age of fifteen years, and were introduced into the State of Mississippi from one of the United States as merchandise, and sold to Winter by the plaintiff, without having complied with the fourth and fifth sections of an act entitled "An act to reduce into one the several acts concerning slaves, free negroes, and mulattoes," passed June 15th, 1822. To this plea the plaintiff demurred.

In November, 1844, the cause came on for trial, issue having been joined upon the first two pleas, and a joinder in demurrer having been filed as to the third. The jury found a verdict for the defendant upon the issue upon the first two pleas, and the record did not show any judgment of the court upon the demurrer.

In the course of the trial, the plaintiff, Harris, took four exceptions to opinions of the court.

1st. As to the admissibility in evidence of the deposition of William S. Rayner.

2d. As to the admissibility in evidence of parts of the deposition of Benjamin G. Sims.

The 3d and 4th were, that Wall had filed a bill in chancery against Harris, which Harris had answered; and that Wall could not, in a trial at law, introduce evidence to contradict Harris's answer.

1st exception,—as to Rayner's deposition.

The following is the notice and certificate attached to the deposition.

"*Jackson, May* 1, 1843.

"Mr. B. D. HARRIS, or Messrs. RIVES & SHELTON, his Attorneys at Law:—

"Take notice, that on Wednesday next, the third day of May, A. D., 1843, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi, between the hours of eight o'clock, A. M., and three o'clock, P. M., at the town of Jackson, I shall take the deposition of William S. Rayner, (about to depart the State,) to be read
*695] on the part of the *defendant *de bene esse* in a certain action at law, depending in said court, wherein said Harris is plaintiff, and Winter and Wall defendants; where you can attend. Yours, &c.

"GEO. W. MILLER, *U. S. Commissioner.*

Marshal's return:—"Executed by handing Wm. M. Rives a copy between the hours of eleven, A. M., and twelve, M., May 1, 1843. "ANDERSON MILLER, *Marshal*,
By Z. P. WARDELL, *D. M.*"

"The deposition of William S. Rayner, taken before the undersigned commissioner of affidavits in and for the Southern District of Mississippi, at the clerk's office of the Circuit Court of the United States for the Southern District of Mississippi in the town of Jackson, between the hours of eight o'clock, A. M., and three, P. M., on the 3d day of May, A. D., 1843, according to a notice by me issued and hereunto annexed; said deposition to be read as evidence on the part of the defendant *de bene esse* in the trial of a certain action at law, depending and mentioned in the Circuit Court of the United States for the Southern District of Mississippi, wherein Benjamin D. Harris is plaintiff, and Winter and Wall defendants."

(Then follows the deposition, to which is attached the following certificate:—)

"*United States of America, Southern District of Mississippi, act.*

"I, George W. Miller, commissioner of affidavits, &c., in and for the Southern District of Mississippi, do hereby certify that the foregoing deposition of William S. Rayner was taken, subscribed, and sworn to before me, and by me reduced to writing in the presence of said witness, at the time and place mentioned in the caption thereof, at the time of which I was attended by James M. Wall, one of the defendants, and William M. Rives, Esq., attorney for plaintiff, who declined putting any interrogatories to said witness. I further certify that I am not a counsel for either party, or interested in the event of said cause.

"Given under my hand and seal at Jackson, this 3d day of May, A. D., 1843.

"GEO. W. MILLER, *U. S. Commissioner.*"

The court allowed the deposition to be read in evidence, to which the plaintiff excepted.

2d exception,—respecting the deposition of Sims.

This deposition had upon it the following indorsement, viz.:—

*696] *"When sworn to, it is agreed this deposition of B. G. Sims may be used in the cause stated in the caption as evidence.

"RIVES & SHELTON & THOMPSON, *for Plaintiff.*
MAYES & CLIFTON, *for Defendant Wall.*"

After the defendant had read to the jury the deposition of Benjamin G. Sims, which was done subject to exceptions, the plaintiff moved the court to exclude from the jury that part of said deposition which proved or tended to prove said plaintiff to be a negro-trader; but the court overruled said motion, on the ground that the counsel of the plaintiff had agreed in writing on said deposition, that the same might be read in evidence.

This opinion of the court constituted the second exception.

The third and fourth exceptions were abandoned by the counsel for the plaintiff in error, and need not be further noticed.

The cause was argued by *Mr. Nelson*, for the plaintiff in error, and *Mr Clifton*, for the defendant in error.

Mr. Nelson.

The first exception relates to the admissibility in evidence of the deposition of William S. Rayner, and is grounded on the insufficiency of the notice, under the act of September 24th, 1789, § 30.

That act authorizes the taking of the deposition of a witness *de bene esse* "who shall live at a greater distance from the place of trial than one hundred miles," or "is bound on a voyage to sea," or "is about to go out of the United States," or "out of such district (in which a cause may be depending) and to a greater distance from the place of trial than one hundred miles," upon proper notice to the adverse party.

Now the notice given in regard to this deposition does not bring the case within the act of Congress, because, whilst it states that the witness was about to depart the State, it does not allege that it was about to go to a greater distance than one hundred miles from the place of trial, and it might well have been that the witness would leave the State, and yet be within reach of the process of the court.

To show the strictness with which the act of Congress in question has been construed, reference is made to the cases following. *Bell* v. *Morrison et al.*, 1 Pet., 355; *The Samuel*, 1 Wheat., 9; *The Patapsco Ins. Co.* v. *Southgate*, 5 Pet., 604; *The Thomas and Henry*, 1 Brock., 373.

The second exception regards the admissibility in evidence of part of the deposition of Benjamin G. Sims, which the court below suffered to go to the jury, because of the agreement of counsel appended to it.

*It is submitted that the court erred in this, since the true construction of that agreement is, that the deposition was to be received in evidence only in so far as the matters contained in it were legally admissible in support of the issues joined in the causes; and it being conceded, as indeed it cannot be denied, that the portion of the deposition excepted to was not in itself evidence, the agreement could not make it admissible. It is like the case of a witness examined on the stand, whose statements improperly made in the hearing of the jury will be excluded by the court at any time during the trial. [*697

The third and fourth exceptions, which relate to the admissibility of the answer in chancery, are believed to be untenable.

But, independently of these exceptions, the plaintiff in error insists that the judgment of the court below must be reversed, because the record shows that nothing has been found to justify that judgment.

The issues passed upon the jury, as the court will perceive, are wholly immaterial, the existence or non-existence of the facts involved in them in no wise affecting the rights of the parties to the controversy.

They put the defence in the action exclusively on the ground of the consideration of the bill sued upon, which was, that it had been given for slaves introduced by the plaintiff into the State of Mississippi after the 3d day of May, 1833.

Now that this consideration was a good one, has been over and over again settled by this court. *Groves* v. *Slaughter*, 15 Pet., 449; *Harris* v. *Runnels*, 5 How., 135; *Truly* v. *Wanzer et al.*, 5 How., 141; *Sims* v. *Hundley*, 6 How., 1.

In the last of these cases, on page 6, Chief Justice Taney says,—"It is the settled law in this court, that contracts of this description, made at the time when these notes bear date, were valid, and not prohibited by the constitution of Mississippi."

This being the law of the case, it is clear that the plaintiff below might have treated these pleas as nullities, and, as far as they were concerned, have signed judgment for the want of a plea.

But he inadvertently took issue upon them, and the jury decided the facts against him; and in that state of the case it is

equally clear that he might have moved the court for judgment *non obstante veredicto*.

This he omitted to do, and now the inquiry is whether that omission precludes him from availing himself of the insufficiency of the judgment in this court.

That it does not, the plaintiff in error thinks is clear upon principle as well as upon authority.

*698] *That the issue was not material, see 2 Saund., 319 (No. 6).

That the defect is error, for which the judgment will be reversed, it is respectfully submitted, will be conclusively shown by the following cases. 6 Cranch, 221, 223, 225; Kirby, 139; 2 Root (Conn.), 4,204; 2 T. R., 759; 2 Archb. Pr., 758; 1 Mason, 62; 4 How., 131.

In the case last cited, the question was elaborately examined, and the principle and practice settled, under circumstances much less strong than those which are disclosed in the record in this case.

But it is supposed by the counsel for the defendants in error, that the judgment rendered in the court below must be sustained because it is said to be a general judgment, and that the third of the pleas of the defendant below set up a sufficient defence to the action.

To this it is answered, in the first place, that there was no judgment rendered in the court below upon that plea, and this is manifest from the whole record.

The plea was in bar, and, if good, furnished a full defence to the plaintiff's action. Yet a jury was called to decide the issues of fact, wholly unnecessary to be passed upon if the plea in question had been adjudged good.

Nor does the judgment profess to be rendered on the demurrer,—it is on the verdict.

As to the form of a judgment on demurrer, see 2 Saund., 300 (No. 3); 2 Archb. Pr., 11; Archb. Forms, 306; Tidd's P. Forms, 200.

Even, however, if it were otherwise, and judgment had been rendered on the demurrer, it could not have been supported.

This plea was framed on the act of Mississippi of the 18th of June, 1822, 4th and 5th sections (How. & H. Dig., 156).

The first-mentioned of these sections (the fourth) prescribes the mode and manner in which slaves may be imported as merchandise into Mississippi; the fifth, what shall be done when such slaves are sold.

The sixth section of the same act imposes a penalty of $100

for every slave sold without a compliance with the provisions of the fourth and fifth sections.

Now it is apprehended, that, upon the true construction of this act, the non-compliance by the seller with the provisions of the sections mentioned does not invalidate a sale made by him. On the contrary, the sixth section of the act, by its terms, recognizes the validity of such sales.

*The plea does not allege any combination or collusion between the plaintiff and defendant in regard to the introduction of the slaves sold into Mississippi. Can it, then, be doubted, that, under the provisions recited, the defendant acquired a title to the slaves in question under his purchase? And if so, is it not equally clear, that, though liable to the penalty denounced by the sixth section of the act in question, the plaintiff is competent to enforce his contract against the defendant? It can hardly be that the defendant has acquired a title to the property purchased, and yet is not answerable for its price. [*699

Questions of this character have been frequently considered and decided. See 11 Wheat., 258; 4 Burr., 2069; 6 T. R., 410; 3 T. R., 418; 1 Bos. & P., 295; 7 Taunt., 246; 4 N. H., 290; 8 Wheat., 357; 12 Pet., 70; Walker, 293; 1 Litt., 16, 19.

In any view, therefore, which may be taken of this act of Mississippi, (assuming it to be in force, though some intimation is given in the notes of the defendant's counsel, that it has been repealed,) it is submitted, that it cannot avail to defeat the recovery by the plaintiff of his demand. But it is insisted that the question does not arise in this case, the record showing that the demurrer, at the time of the trial of the issues before the jury, was undisposed of, and that the judgment was rendered on the verdict alone.

Mr. C. R. Clifton, for defendant in error, in reply.

1. The act of 1789, which authorizes the taking of the deposition of a witness *de bene esse*, nowhere requires that the *notice* should show that the case was within the provisions of the act. The decisions cited by the counsel for the plaintiff only establish what has never been controverted, that the party who offers a deposition taken *de bene esse* must show that the case provided for by the act existed, and that there had been a full compliance with its requisitions.

In this case the counsel of the opposite party attended the examination.

When the deposition was offered, in open court, the party offering it proved, that, at the time it was taken, the witness

was on his way to the republic of Texas,—that is, he was "about to go out of the United States,"—and that he then, at the time of offering it, resided in that republic. These facts having been proved by evidence *aliunde*, the certificate of the commissioner showed every other fact required by the act of Congress to render the deposition competent, and we insist there was a compliance with all its provisions.

The only object of the notice was to secure the attendance *700] *of the counsel at the examination. He attended, and pleads in abatement to the notice, that it was insufficient,—his presence refuting his plea.

2. The deposition of Sims ought not to have been excluded. The issue was as to what was the consideration of the bond sued on: it being averred on the one side that it was for slaves introduced into the State of Mississippi and sold in the year 1836, and denied on the other. The deposition contains several circumstances conducing to show the truth of this averment; and among these is the one objected to,—that is, that the plaintiff had carried slaves to Mississippi for sale, and was, in fact, engaged in the avocation of a "negro-trader." How far the defendant would have been permitted to go in making this proof, in opposition to the will of the plaintiff, it is not now needful to inquire, since no such opposition was made. This fact was proved in a deposition, which the plaintiff agreed should be read as evidence to the jury; and he cannot now ask the appellate court to reverse the judgment, because the court below held him to his own agreement.

(The counsel then proceeded to the discussion of the point involving the construction of the constitution of Mississippi, and arising on the issues found by the jury for the defendant; but was arrested for the moment by the chief justice, who, after conference with the other members of the court, said, that this question had been repeatedly settled by this court, and the court could not consent to consider it an open question, and hear it again argued. The counsel acquiesced with manifest reluctance, and, being asked by a member of the court if there was any other point in the case, said:—)

There is a special plea founded upon the fourth and fifth sections of the act of the 18th of June, 1822, which, if not repealed by the provision of the constitution of Mississippi as to the introduction of slaves, presents a valid defence to the action. It is demurred to.

In Mississippi, these sections have been considered as repealed, upon the ground that the constitution, which is the supreme law, prohibits the introduction of slaves absolutely,

and therefore repeals all laws permitting them to be imported upon condition.

This court, adhering to its former decisions, cannot regard these sections as repealed, because, if the constitution did not prohibit their introduction from the 1st day of May, 1833, the law which specified the conditions upon which they might be imported and sold remained in full force.

The language of these sections is:—"It shall not be lawful for any person or persons to import in to this State, from any of *the United States, or the Territories thereof, as merchandise, any slave or slaves, either negro or mulatto, or of any other description whatever, above the age of fifteen years, without having previously obtained a certificate, signed by two respectable freeholders in the county of the State or Territory from whence such slave or slaves is or are brought; which certificate shall contain a particular description of the stature and complexion of such slave or slaves, together with the name, age, and sex of the same; and, furthermore, that the slave or slaves therein mentioned and described have not been guilty of murder, burglary, arson, or other felony, within their knowledge or belief, in such State or Territory; which certificate shall be signed or acknowledged before the clerk of the county of the State or Territory where the same is given and certified by said clerk, specifying therein that the persons whose signatures are affixed thereto are respectable freeholders of the county and neighbourhood in which they reside. [*701

"Any person, who shall sell any slave or slaves brought into this State as merchandise, shall cause to be registered with the register of the Orphan's Court of the county where such slave or slaves are, or are first sold, every certificate as aforesaid, the seller previously swearing that he believes the contents of such certificate or certificates to be just and true; which oath said register is hereby authorized and required to administer; for which service he shall receive the sum of one dollar for each certificate so registered." (See How. and Hutch. Digest, 156, and Hutchinson's Mississippi Code, 513.) The sixth section of the act imposes a penalty of $100 for every slave sold without a compliance with the said fourth and fifth sections, recoverable in any court of competent jurisdiction.

The facts stated in this plea are confessed on the record. The judgment of the court for the defendant is general.

This court will inspect the entire record, and give judgment for that party who may appear to be entitled to it; and if the plea interpose a good defence to the action, the judgment of

the court below, according to familiar principles, will not be disturbed.

The counsel on the other side assumes, that, even if this were so, the defence disclosed by that plea is not a valid one; and he refers to a variety of cases for the purpose of sustaining that position.

The first of these is that of *Armstrong* v. *Toler*, from 11 Wheaton, which, as it is understood by me, cannot be tortured into an authority for the plaintiff. On the contrary, it decides, that, where a contract grows out of an illegal act, a court of justice will not lend its aid to enforce it. The selling
*702] of a *slave, without a previous compliance with the requisitions of the law, which could alone make such sale legal, was an illegal act; and this, therefore, is an authority for the defendant.

The case from 4 Burrow was an action on a bond given by the defendant to the plaintiff, to repay to the plaintiff the one half of a sum of money which the plaintiff had previously paid, for himself and the defendant, to a third party, in relation to a transaction forbidden by act of Parliament; and it was said by the court to be a fair and honest transaction between these two, and not in violation of the act.

That from 6 T. R., 410, *Booth* v. *Hodgson*, is an authority for the defendant.

In delivering the opinion in 3 T. R., 418, Lord Kenyon expressly declares that none of the provisions of the act were infringed.

1 Bos. & Pull. decides, that, if the contract be stained by any thing illegal, the plaintiff shall not be heard in a court of law. *Simpson* v. *Bloss*, 7 Taunt., 246, holds that no action can be founded on an illegal contract, and furnishes a test for determining what is an illegal contract, which is decisive against this.

The case from 4 N. H., 290, is an express authority for the defendant. It decides, that, when a statute inflicts a penalty for the doing of a particular act, that act is, by implication, prohibited and illegal. "Where an illegal contract is made between parties who are *in pari delicto*, the contract is void, and neither party can maintain any action which requires for its support the aid of such illegal contract."

The other cases seem to me to have no very direct application to the question, and certainly furnish no support to the idea, that a party can successfully assert a right in a court of justice, to which he has entitled himself by a violation of law.

Indeed, I had supposed, if there was a universal and uncontroverted proposition in the common law, as it is known and

understood in England and in this country, it was, that no act done in violation of the laws of the land, or in disregard or contravention of its principles, can be the foundation of a claim which can be enforced at law or in equity. And this has been the rule from Lord Holt to the present time, as can be shown by an unbroken series of decisions. In truth, this principle is much older than the common law, and was incorporated into that system from the civil law, whence it comes to us, clothed with the sanction of many centuries.

Where the law, as in this case, declares it shall not be lawful to do a particular thing, unless under certain conditions and limitations, no action can be maintained upon a contract *growing out of the doing of that thing, unless those [*703
conditions and limitations have been complied with. To declare an act unlawful, and at the same time to give a remedy to the person guilty of doing it, founded on his illegal act, would be to make the law as a house divided against itself. The law was never guilty of the absurdity of giving a legal action for an illegal act.

In *Bartlett* v. *Vinor*, Carth., 251, Chief Justice Holt says, —"Any contract made for or about any matter or thing which is prohibited and made unlawful by any statute is a void contract, though the statute itself doth not mention that it shall be so, but only inflict a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute." The same is held in *Bensley* v. *Bignold*, 5 Barn. & Ald., 335; *Drury* v. *Defontaine*, 1 Taunt., 136; 14 Mass., 322; Holt. N. P., 425. This rule is now applied as well to cases *mala prohibita* as *mala in se*. 2 Bos. & P., 374, 375; 5 Barn & Ald., 341; 2 Wils., 351; 17 Mass., 281.

"The policy of a penal statute may be enlarged, not for the purpose of inflicting the penalty, but to avoid the contract." Dwarris on Statutes, 752; *Mitchell* v. *Smith*, 1 Binn. (Pa.), 110–118; 4 Yeates (Pa.), 34–54; 4 Serg. & R. (Pa.), 151.

No recovery can be had for printing a newspaper, whose publisher does not first make the affidavit directed by the act, though the act does not, in terms, avoid the contract. *Marchant* v. *Evans*, 8 Taunt., 142; *Roby* v. *West*, 4 N. H., 285.

The 17 Geo. 3, ch. 42, sec. 1, declares, all bricks made for sale shall be 2½ inches thick and 4 wide, and the second section imposes twenty shillings for every thousand bricks so made of less dimensions, as a penalty. Held, that bricks of less dimensions could not be recovered for, though there was

nothing in the act declaring the sale void. *Law* v. *Hodgson*, 2 Camph., 147.

And in the case of *Sprergean* v. *McElwain*, 6 Ohio, 442, it is decided, that where the statute forbids the keeping of a ninepin alley, under a penalty, a carpenter who builds one, knowing the object, cannot recover the price of building.

It would be useless to multiply authorities on this point. The courts of England and this country, with a rare uniformity, have held that every contract made in violation of the laws of the land, or without complying with its provisions, or which is made in disregard or contravention of the statute or common law, is void, and cannot be enforced in law or in equity. 1 Leigh, N. P., 6–13; 2 Pet., 539; 2 Carr. & P., 472; 4 T. R., 466; 3 Id., 454; Cowp., 191; 2 Doug., 698; 1 Man. & Sel., 593; 5 Barn. & Ad., 887; 4 Pet., 410; 5 Johns. (N. Y.), 320; 1 Rand. (Va.), 76; 3 Id., 214; 1 Barn. & C., 192; 5 Id., 887.

*704] *Mr. Justice GRIER delivered the opinion of the court.

On the trial of the issues of the fact in this case before the Circuit Court, the defendant offered to read the deposition of William S. Rayner, which had been taken *de bene esse*, under the thirtieth section of the Judiciary Act. It was objected to by the plaintiff's counsel, as not coming within the conditions prescribed by that act. The court admitted the deposition, and sealed a bill of exceptions, which is the foundation of the first assignment of error.

A notice was served on the plaintiff's counsel, signed by the commissioner or magistrate, and stating the time and place at which it was intended to be taken, and that "I shall take the deposition of William S. Rayner, (*about to depart the State,*) to be read on the part of the defendant, *de bene esse*," &c.

When the deposition was offered, the defendant proved to the court, that "when said deposition was taken, said Rayner was on his way to the republic of Texas, to reside there, and that he was a citizen of, and resided in, said republic."

It has been decided by this court, in the case of *Bell* v. *Morrison*, 1 Pet., 351, that "the authority to take depositions in this manner, being in derogation of the rules of common law, has always been construed strictly, and therefore it is necessary to establish that all the requisitions of the law have been complied with before such testimony is admissible."

The conditions under which a party is permitted, and a magistrate authorized, to take depositions *de bene esse*, under

this act, are,—1st, that the witness lives at a greater distance from the place of trial than one hundred miles; 2d, or is bound on a voyage to sea; 3d, or is about to go out of the United States; 4th, or out of such district to a greater distance from the place of trial than one hundred miles, before the time of trial; 5th, or is ancient or very infirm.

The magistrate is required also to deliver to the court, together with the depositions so taken, a *certificate of the reasons of their being taken*, and of the notice, if any, given to the opposite party. In order to entitle the party to read such depositions when taken and certified in due form of law, he must show, that, at the time of the trial,—1st, either the witness is dead; 2d, or gone out of the United States; 3d, or to a greater distance than one hundred miles from the place where the court is sitting; 4th, or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court.

Now, assuming that the defendant has brought himself within the conditions which would enable him to read a deposition regularly taken and certified according to the requisitions of this act, the question is, whether this deposition was so taken and certified.

*The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. The act of Congress requires them to be certified by the magistrate. It would be reasonable, also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is "about to depart the State," not that he is bound on a voyage to sea, or about to go out of the United States, or a hundred miles from the place of trial. [*705

This notice is appended or annexed to the deposition, with a return of service by the marshal; but the service is not certified by the magistrate, nor does he certify, as required by the act, "the reasons" for taking the deposition. The presence of the plaintiff's attorney, who declined to take any part in the proceedings, cannot affect the case, or amount to a waiver of any objection to the want of authority apparent on the face of this certificate.

We are of opinion, therefore, that the court erred in admitting this deposition to be read to the jury.

The third and fourth exceptions have been abandoned on the argument, and the second does not appear to be well taken. When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for *not* excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them.

The record in this case does not show that any judgment was given by the court below on the demurrer. If a defendant plead several pleas in bar, either of which is a defence to the whole action, and one be found in his favor, he is entitled to judgment. For this reason the parties may have considered it unnecessary to pray the judgment of the court on the plea demurred to, as the issues on the other pleas had been found in favor of the defendant, and judgment rendered thereon for him. And the plaintiff here, who was also plaintiff below, cannot assign error on an issue in which there was no judgment of the court below. The validity of the defence set up in that plea is consequently not before this court, and cannot be noticed. But as the trial of these issues below took place before the decision in this court of the cases of *Rowan* v. *Runnels*, 5 How., *135, and *Sims* v. *Hundley*, 6 How., 1, and as these cases show that the issues of fact are immaterial, though found for the defendant, the defence will probably turn wholly on the decision of the point raised by the demurrer.

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The judgment of the Circuit Court is reversed.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

THOMAS TOWNSEND, PLAINTIFF IN ERROR, *v.* ROBERT JEMISON.

Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of this case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled.

The thirty-second section of the Judiciary Act (1 Stat. at L., 91) forbids a reversal of the judgment on account of the omission of the clerk to record such waiver of overruling.

The statutes of jeofails examined.

Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of. A statute of Mississippi, where the cause was tried, allows one good count to sustain a judgment.

Where the plea was bad, and the demurrer was to a replication to this bad plea, the first fault in pleading was committed by the defendant, and judgment against him was properly given.[1]

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

It was a suit brought by Jemison against Townsend, to recover a sum of money which Jemison had paid for him to the Mississippi Union Bank, at Macon. The consideration appears to have been, that Townsend should take up a note at the Commercial Bank of Columbus, for which he, Townsend, was bound for one John B. Jones; but in what manner Townsend's taking up the latter note would benefit Jemison did not appear from any part of the record.

*On the 21st of May, 1842, the suit was commenced by issuing a summons, which was indorsed as follows: [*707

"This action of assumpsit is brought to recover the sum of $4,000, with interest at 10 per cent., (paid for defendant,) from 27th January, 1840, to Mississippi Union Bank, defendant agreed to pay for plaintiff same amount in the Commercial Bank of Columbus, Mississippi, in consideration that plaintiff would pay same amount for him to the Mississippi Union Bank at Macon; this action is brought to recover said sum of money, defendant having failed to comply with his promise.

"HARRIS & HARRISON, *Plaintiff's Attorneys.*"

[1] See note to *United States* v. *Linn*, 1 How., 104.

The declaration originally filed was amended, and on the 6th of December, 1842, the amended declaration was filed, which contained three special counts and the general money counts. The first of the three special counts was as follows, the other two being similar in substance.

"Robert Jemison, who is a citizen of the State of Alabama, by leave of the court for that purpose first had and obtained, by attorney, complains of Thomas Townsend, who is a citizen of the Northern District of the State of Mississippi, and who was summoned to answer the said plaintiff of a plea of trespass on the case in assumpsit. For that whereas, heretofore, to wit, on the 20th day of March, A. D., 1840, at, to wit, in said district, in consideration that the said defendant was then and there bound, and liable by note in writing, to the Commercial Bank of Columbus, Mississippi, for one John B. Jones, as his security for about the sum of nine thousand eight hundred and six $\frac{50}{100}$ dollars, besides interest thereon; and was also indebted to the Mississippi Union Bank, at its branch in Macon, in the county of Noxubee, about the sum of three thousand dollars, on a note of four thousand dollars, executed by the said defendant and others, payable at Jackson, at the banking-house of the said Mississippi Union Bank, at Jackson; and in consideration that the said plaintiff would take up the said last-mentioned note to the Mississippi Union Bank, and would also take up the note of the said Jones in the Commercial Bank of Columbus, Mississippi, on which the said Townsend was liable as security as aforesaid, except an amount equal to the amount of said Townsend's liability to the said Mississippi Union Bank, and release the said Townsend from the balance of his said liability to the said Commercial Bank, he, the said defendant, then and there agreed with the said plaintiff, to pay on his said liability, in the said Commercial Bank of Columbus, Mississippi, the same amount which the said plaintiff might take up for him, the said Townsend, in the said Mississippi Union Bank. *And the said plaintiff avers, that afterwards, to wit, on the 10th day of May, in the year 1840, he did take up the said Townsend's note, in the said Mississippi Union Bank above stated, according to the said agreement, amounting to the sum of three thousand and ninety $\frac{11}{100}$ dollars. And the said plaintiff further avers, that he did then and there, to wit, on the same day and year last named, at, to wit, in said district, take up the notes of the said John B. Jones, in the said Commercial Bank of Columbus, Mississippi, on which the said Townsend was security as

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aforesaid, according to his said agreement. And the said plaintiff in fact says," &c., &c.

The subsequent pleadings were as follows:—

"And the said defendant, by attorney, comes and defends the wrong and injury, when, &c., and says he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and of this he puts himself upon the country, &c.

"COCKE, SMITH, & GHOLSON, *for Defendant.*

"And the plaintiff doth the like.

"HARRIS & HARRISON, *Plaintiff's Attorneys.*"

"And for further plea in this behalf, the said defendant, as to the first, second, and third counts of the said declaration, says, that the said plaintiff ought not to have or maintain his action, because he says that, by an act to prevent frauds and perjuries, it is enacted, that no action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of any other person, unless such promise or agreement, or some note or memorandum thereof, shall be in writing, and signed by the party to be charged therewith, or some other person by him thereunto lawfully authorized. And the said defendant avers, that the said plaintiff hath brought his action to charge the defendant for the debt of John B. Jones, and for no other purpose whatever; and that there is no agreement in writing touching the promise of the said defendant, as alleged in said counts of said declaration, to answer for the debt of the said John B. Jones, or any memorandum or note thereof signed by the said defendant, or any other person by him thereunto lawfully authorized. And this he is ready to verify, wherefore he prays judgment, &c.

COCKE, SMITH & GHOLSON, *for Defendant.*"

Plaintiff's replication to defendant's above-stated pleas, filed at December term, 1842, in the words and figures following, to wit:—

"'The United States of America, District Court for Northern District of Mississippi, December term, 1842. [*709

"ROBERT JEMISON
v. } No. 108.
THOMAS TOWNSEND.

"And the said plaintiff, as to the said plea of the said de-

fendant by him secondly above pleaded, saith, that he, the said plaintiff, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having or maintaining his aforesaid action thereof against him, the said defendant, because he says that he, the said plaintiff, hath not brought his action to charge the said defendant for the debt of John B. Jones, and for no other purpose whatever; but that the said action is brought to charge the said defendant upon his said several original promises and undertakings, founded upon the said several new and sufficient considerations in the said count of said declaration stated and set forth; and this he prays may be inquired of by the country.

"HARRIS & HARRISON, *Plaintiff's Attorneys.*"

Defendant's demurrer to plaintiff's replication, filed at December term, 1842, in the words and figures following, to wit:—

"And the said defendant saith, that the said replication of the said plaintiff to the said second plea of the said defendant is not sufficient in law for the said plaintiff to have or maintain his action aforesaid; and this he is ready to verify; wherefore he prays judgment, &c.

GHOLSON & SMITH, *for Defendant.*"

In this condition of the pleadings, it appeared by the record that the parties went to trial, when the jury found a verdict for the plaintiff, assessing his damages at $3,451.88.

The trial took place on the 12th of December, 1842.

An execution was issued upon the judgment, then an *alias*, a *pluries*, and an *alias pluries*.

On the 5th of June, 1845, a writ of error was sued out, which brought the case up to this court.

It was argued by *Mr. Cocke*, for the plaintiff in error. His argument was as follows.

This is a writ of error to the Circuit Court of the United States for the Northern District of Mississippi. The facts may be briefly stated to be these. Jemison, the defendant in error, instituted an action of assumpsit in the court below against Townsend, to recover the sum of three thousand and ninety dollars and forty-one cents, which Jemison paid for Townsend to the Mississippi Union Bank, upon the agreement of Townsend *to pay the same amount for Jemison to the Commercial Bank of Columbus, Mississippi, upon a note of one John B. Jones, upon which Townsend was indorser for Jones. In the declaration filed at the June

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term of said court, 1842, there is a special count, to which is added the usual money counts. There is a demurrer to the special count,—1st, because there is no legal cause of action set out; 2d, because no legal breach is designated; and to the money counts *non assumpsit* was pleaded. The court below made no disposition of the demurrer, but gave leave to the parties to amend their pleadings at the next term. Jemison filed an amended declaration, containing three special counts on the above facts, placing them under different phases, and also adding the usual money counts; *non assumpsit* was pleaded to the money counts, and to the special counts was pleaded the statute of frauds and perjuries. There was a special replication to the last plea pleaded, to which the defendant demurred, and the court below tried the cause without making any disposition of the demurrer, and permitted the plaintiff below to proceed to final judgment over the demurrer. The case being tried in Mississippi, it is believed the rule governing such cases in that State should prevail. The regularity of these proceedings being the subject of inquiry on behalf of the plaintiff in error, we maintain,—1st. That the statute of frauds and perjuries pleaded is a full and conclusive defence to the matters alleged in the declaration. 2. That the demurrer to the replication raised the question of the sufficiency of the matters contained in the whole declaration in law to charge the defendant upon the agreement set out; and it was error in the court below to have permitted the plaintiff to proceed to final judgment while the demurrer was pending and undetermined. 3. That the defendant was entitled to his judgment in the court below upon his demurrer. Let us examine, first, the three several counts contained in the declaration. The first count is as follows, in substance:—In consideration that defendant was liable, by note, as security for one John B. Jones to the Commercial Bank of Columbus for about $9,806.50, and was indebted to the Mississippi Union Bank about $3,000 on a note of $4,000, and in consideration that plaintiff would take up said last note to the Union Bank, and would also take up said Jones's in the Commercial Bank, except an amount equal to the amount of defendant's liability to the Union Bank, and relieve defendant from the balance of said debt to the Commercial Bank, defendant agreed with and promised plaintiff to pay, on his, defendant's, liability to the Commercial Bank, the amount which plaintiff might take up for him, defendant, in the Union Bank; and that plaintiff did *take up [*711
defendant's note in the Union Bank to the amount of three thousand and ninety $\frac{4}{100}$ dollars, and did take up said

note to the Commercial Bank, and defendant has never paid plaintiff nor the Commercial Bank. To this count the defendant pleaded that the plaintiff's action was brought to charge him upon a promise to pay him the debt of John B. Jones, and that the statute of frauds and perjuries—How. and Hutch. Miss. Dig., 370, 371—barred any such action on such promise. To this plea the plaintiff replead, and, by his replication, denies that the count is on a promise to pay Jones's debt. To which the defendant demurs, and for good cause; for the defendant's promise to pay so much of Jones's debt, contained in the declaration, is clearly a promise to pay the debt of another person, within the statute of frauds and perjuries aforesaid. The replication denies that the count is brought on any such promise, and thus the replication denies the count itself, and is as good a defence as the defendant could have desired. What better defence could he ask than that the plaintiff should, by his own pleadings, deny the cause of action set out in the count? For this reason, the demurrer was well taken, and should have been sustained. But again, in support of the demurrer, the plaintiff shows that he himself took up the whole debt to the Commercial Bank, when the contract set out was that he was to take up a part thereof only, and was to leave such part as was equal to the amount paid to the Union Bank by plaintiff, to be paid by defendant to the Commercial Bank. Townsend's promise was to pay that amount to the Commercial Bank upon Jones's debt, and not to pay the plaintiff by taking up the whole of Jones's debt to the Commercial Bank. Plaintiff put it out of defendant's power to pay the Commercial Bank. He relates the contract set out, and then seeks to recover damages of defendant for a breach which was brought about by his own breach of the contract first committed. Again, it was Jones's debt that plaintiff took up. Thus, in direct violation of the agreement, Jones was the principal in the note at the Commercial Bank, and, as such, was, under the statute of this State, first liable directly for the payment of the note, either to the bank or the plaintiff. Townsend being a mere accommodation security for Jones, the bank could not hold Townsend responsible for the money until Jones had been pursued to insolvency; and if the bank cannot, how can Jemison hold Townsend responsible, until he first fail to collect it from Jones? The count shows that Townsend was a mere indorser for Jones, and Jones being first directly liable to pay the Commercial Bank debt, for aught that appears to the contrary he may have paid the plaintiff the whole amount of

said note. *As the plaintiff voluntarily took that amount of the Commercial Bank debt which, by his [*712
contract, he was bound to have left to be paid by the defendant, he has placed it out of the power of the defendant to comply; let him seek his remedy on the note, and not bring his action to recover damages for a breach which he himself was the cause of. The demurrer was good as to the replication and first count, and yet the plaintiff passed the demurrer in the court below unnoticed, and the court permitted him to proceed to judgment without joinder in the demurrer, and without making any disposition of it. If the demurrer was well taken, judgment should have been for the defendant; if not, a judgment of *respondeat ouster* ought to have been entered by the action of the court; the defendant below could not take issue on the replication. See How. & H. Dig., 616; Revised Code of Mississippi, 120; *Walker* v. *Walker*, 6 How. (Miss.), 500; *Bright* v. *Rowland*, 3 Id., 415; *Davis* v. *Singleton*, 2 Id., 681; *Brown* v. *Smith*, 5 Id., 387. The second count states, that, in consideration that the defendant was bound to the Commercial Bank, by note, as security for Jones, and was also indebted to the Mississippi Union Bank in the sum of three thousand dollars on a note for four thousand dollars, and in consideration that plaintiff would take up the note in the Union Bank, defendant promised plaintiff to pay same amount on said note in said Commercial Bank, and plaintiff did take up said note of defendant in said Union Bank, and paid the sum of three thousand and ninety $\frac{40}{100}$ dollars; yet defendant has not yet paid the Commercial Bank on said note of John B. Jones, on which defendant is liable as aforesaid. To this the above plea was pleaded, also, that the promise declared on was to pay the debt of another, and that the statute of frauds and perjuries aforesaid was a bar. And to said plea plaintiff also replead, and by the replication denied that the promise declared on was a promise to pay the debt of Jones; and thus the plaintiff denies his own second count. And thereupon the defendant demurs, as well he might. The defendant could have no better defence than the denial of the plaintiff of his own cause of action; and, upon such denial, the defendant rightfully demurred to any further answer. See the same authorities. Again, has plaintiff ever sustained any injury by reason of defendant's failure to pay Jones's debt? It is a matter of no moment to plaintiff whether defendant paid or whether Jones paid, or whether Jones's debt was paid at all; he shows no affinity between himself and Jones, or Jones's debt, whereby the payment would have been an advantage, or the non-payment a disadvantage, to

plaintiff. How could the failure of defendant to pay a debt *718] to Commercial Bank for which he, as *the security of Jones, owed said bank, affect the plaintiff, who was a stranger to said debt? The Commercial Bank is competent to take care of its own matters; and the declaration does not show that plaintiff was guardian or trustee for said bank, or that he was in any wise interested in the payment of a debt due to it. If the plaintiff has taken up defendant's note to the Union Bank, let him sue on the note, and not seek to recover damages when he could not possibly sustain any, by reason of the non-payment by defendant to Commercial Bank of said note to Jones. The third count states that defendant, in consideration that he was indebted to the Union Bank by several notes, and in consideration that he was liable for John B. Jones to Commercial Bank for about $9,806.50, and in consideration that plaintiff would take up any or all of said notes in the Union Bank, agreed with plaintiff to pay to the credit of defendant's note in the Commercial Bank, on which he was security for Jones, whatever sum plaintiff should pay to the Union Bank in taking up the liabilities of said defendant in the Union Bank; and the plaintiff has taken up defendant's liabilities to the Union Bank to the amount of $8,000, and yet the defendant has not paid the Commercial Bank same amount of money, but refuses to pay same. If defendant has refused to pay the Commercial Bank, is plaintiff injured thereby? If he has not paid, he is still bound to pay; and whatever he has paid or has not paid, or is bound or is not bound, does not in any wise affect the plaintiff. The Commercial Bank may have forgiven the debt, or cancelled the notes, or Jones may have paid it; and whether the bank forgave the debt or not, or whether it be cancelled or not, in no wise affects the plaintiff. If defendant had paid the Commercial Bank, as he was already bound to do as the security of Jones, Jemison would not have been any better off; and if defendant has not paid the Commercial Bank, it is the bank's own affair whether it is ever paid, and to Jemison it matters not whether it is ever paid. The three counts are wholly void of any cause of action; if the plaintiff has paid money for defendant, let him sue for it, but not seek to recover damages for the breach of a promise to pay the Commercial Bank a debt which the defendant was already bound to pay by his promissory note, and to pay which a promise to Jemison, who was a perfect stranger as to the debt due to the Commercial Bank, creates no new obligation. As to the other counts for money had and advanced, money paid, laid out, and expended, and for money had and received, they do

not sustain any action, because plaintiff hath appended thereto no bill of particulars, except a promissory note made by defendant and others to the Union Bank. Plaintiff can give nothing in *evidence, under the common counts, except what is contained in his bill of particulars. See Statutes of Mississippi, How. & H. Dig., 590. And he cannot give his note in evidence under said count, because it is a note given to the Union Bank by defendant and others, and, by the act of the Mississippi legislature, the bank could not assign this note. See Laws of 1840, p. 16; 3 Sm. & M., 661. Here, by virtue of this law, Jemison could get no such interest in the note as to authorize him to sue him in his own name; for, in fact, no title passed to him in the note; the note is not negotiable nor assignable or transferable hereby. Then the court could not permit him to practise a fraud upon the law by waiving his action on the note, and use it in evidence to sustain a right of action against the defendant, where he holds the note itself in direct and known violation of the statute; this note is still the property of the Union Bank. There being no bill of particulars filed by plaintiff, except this note, and not being lawfully possessed of it, it was not properly introduced into the bill of particulars, and for the want of such a bill of particulars as the law requires, the common counts in the declaration are wholly void of any right of action; and it was error to admit the note under the money counts; the bank could not assign the note, because it is against the law of the State. The Supreme Court will reverse a judgment obtained upon a contract entered into in violation of the statutes of the State. See 2 Pet., 539. Suppose Townsend had paid the note, he is bound to know the law, that the bank could not assign his note, and could recover the amount of the debt again of him, if he pays it to plaintiff. See also 4 Pet., 410. We therefore contend that the judgment should be reversed, and judgment rendered for Townsend on his demurrer. [*714

Mr. Justice WOODBURY delivered the opinion of the court.

The original action in this case was assumpsit. Though the declaration contained several counts, some on a special promise and some for money paid and received, it was indorsed on the original summons, that the action was "brought to recover the sum of $4,000 and interest at 10 per cent., paid for defendant, from 27th of January, 1840, to Mississippi Union Bank," &c., &c.

There was a demurrer and other pleadings as to this decla-

ration, which it is not necessary to repeat, as leave was given to amend throughout; and on the 6th of December, 1842, a new declaration was filed, consisting of three special counts and the usual money counts, all of which must of course be for the original cause of action.

On the 9th of December, 1842, the defendant pleaded the *715] *general issue of *non assumpsit* to the whole declaration; and, for further plea to the three special counts, averred, that the suit was brought to charge him for the debt of John B. Jones, and for no other purpose, and that, there being no evidence of his promise in writing, the suit was barred by the statute of frauds and perjuries. To this the plaintiff replied, that the suit was not so brought, but on original promises made by the defendant. The latter filed a general demurrer to this replication.

On the 12th of December the general issue joined as to the whole declaration appears to have been tried, and a verdict returned for $3,451.88, for which sum, at the same term, judgment was rendered and execution issued.

Nothing further took place till June 5th, 1845, when this writ of error was brought to reverse the judgment, assigning as the ground for it, that the demurrer to the replication should first have been disposed of, and that the statute of frauds pleaded in the preceding plea was a full defence to the matters alleged by the original plaintiff.

This case presents some questions of practice and of pleading which possess no little difficulty. They must be settled chiefly by the reasons which may be applicable to them; and when precedents in this court are not found for a guide in aid of those reasons, they may be strengthened by analogies established in the State courts or in England, where the systems of pleading and practice are somewhat similar. It seems proper, and is conceded, that, in a cause where several pleas are filed, as here, and some terminate in a demurrer and others in an issue to the jury, they should all, as a general rule, unless waived or withdrawn, be in some way disposed of by the court. The leading inquiry, then, is, if enough appears in all the proceedings here to render it probable that the issue, in law no less than in fact, was in some way disposed of, though this is not, *eo nomine*, mentioned in the record. Assuredly, it is usual in this country, as a matter of practice, when there is an issue of fact and another of law in the same action, to have the question of law heard and decided first. *Green* v. *Dulany*, 2 Munf., 518; *Muldrow* v. *McLelland*, 1 Litt., 4; Co. Litt., 72. *a*; Com. Dig., *Pleader*, *Demurrer*, 22. The 28th rule for the Circuit Courts accords

with this, by directing that, in such cases, "the demurrer shall, unless the court shall otherwise, for good cause, direct, be first argued and determined," because a decision on that, if one way, that is, if in favor of the demurrer, will frequently dispose of the whole cause, and supersede the expense and necessity of a jury trial of the other issue, as well as give an opportunity to move for an amendment. 5 Bac. Abr., *Pleas and Pleading*, No. 1; Tidd, Pr., 476; *Dubery* v. *Paige*, 2 T. R., 394. Yet this course *being a matter of sound discretion in the court rather than of fixed or inflexible right, it cannot always be absolutely presumed to have been pursued. See 28th Rule, *ante*, and cases before cited; 2 T. R., 394; 1 Saund., 80, *n.* 1. But as it is usual, and the defendant in this case did not file any exception, as if there had been a refusal by the court to decide first on the demurrer, the presumption does not seem so strong that there had been a refusal or neglect to do it, as that the demurrer had been waived by the defendant, or, if not waived, had been decided, and the particular minute of this on the record omitted by a mistake of the clerk. Several other circumstances exist, which, in connection with these, contribute to strengthen this last presumption, and to justify us on legal grounds in inferring that one of the above events, either a waiver or decision of the demurrer, actually took place here. First, as to those in favor of the position that the demurrer was waived. Only one cause of action existed here, though set out in several counts. This is stated not only, as before mentioned, in the summons by the original plaintiff, but by the defendant in his special plea, and in the argument of his counsel. The general issue, which was joined and tried, went to the whole declaration; and under that, at the trial, any parol evidence offered in its support could have been objected to as within the statute of frauds, which seems to have been the whole defence, as well as under the special plea setting up this statute against the special counts. This is clear from the books of practice. 1 Chit. Pl., 515; 2 Leigh, N. P., 1066; 1 Tidd, Pr., 646. Though, to be sure, it could be pleaded specially, also, and this may now be necessary under the new rules of court in England. 1 Bingh. (N. C.), 781; 2 Crompt. & R., 627. Hence, from abundant caution lest this objection might not be admissible under the general issue, the special plea here was probably at first filed. But before the trial came on, which was three days after, it is likely that the defendant had become convinced that it was admissible, under the general issue, and therefore went to trial without having the demurrer first argued and decided, or even joined, but waived it. [*716

If, on the contrary, he concluded to try the issue to the jury first, and then, if not allowed there to make his objection as to the statute, to argue the demurrer afterwards, the inference would be equally strong, that he was allowed to urge the objection at the trial, and had a decision on it there, and therefore waived his special plea and demurrer, and a separate and unnecessary decision on them, afterwards. Such was the presumption in the case of *Bond* v. *Hills*, 3 Stew., 283, more fully explained hereafter. It was held likewise in *Morrison* v. *Morrison*, 3 Stew. (Ala.), *444, that if a demurrer and an issue of fact were to the same matter, and the latter was tried first, it must be presumed that the other had been waived.

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In *Dufau* v. *Conprey's Heirs*, 6 Pet., 170, a writ of error was brought, for the same general cause as here, that one of the pleas intended for the court did not appear by the record to have been decided. But the court sustained the judgment below; the other plea, on examination, as will soon be shown to be the case here, being found immaterial after the finding of the jury. Where one material issue is decided going to the whole declaration, it is of no consequence how an immaterial issue going only to a part of it is found, if no injury be done by it to either party. 6 M., 544. And by parity of reasoning, it would be of no consequence whether it was decided at all or not, if enough else is decided to dispose properly of the whole case.

What fortifies these views is the fact, that the defendant never procured a joinder to his demurrer by the plaintiff. As he interposed this defence in a special plea, and filed the demurrer to the replication, it would be material for him, if wanting a decision on them, to get the pleadings finished. He should have moved for a joinder, or got a rule for one, (1 Chit. Pl., 628,) and should likewise have moved for a decision on them, if desired, before a final judgment was rendered on the verdict. It is true that some books appear to consider it the duty of the plaintiff to join in a demurrer soon after it has been tendered by the defendant. But this, it is believed, generally depends on a positive rule of court, which may exist, to require it. 33d Rule of Practice for Courts of Equity, 1 How., 43; *William's case*, Skinner, 217. And without such rule, as in this case, he may need and take time to decide on making a motion to amend, before joining; and the harshest penalty proper for delay in the joinder would seem to be, that the demurrer may be considered, when requested by the party making it, though no formal joinder has taken place. 3 Lev., 222; Skinner, 217. The omission of the

defendant, then, to obtain a joinder, to which he was by law entitled, (1 Chit., 647; Barnes, 143,) the omission to add one himself, which is sometimes permissible, (5 Taunt., 164, and 1 Ark., 180,) and the omission to request a decision without any joinder, as he may after much delay, (Skinner, 217,) all appear on the record, and look not only like a waiver of a decision on the demurrer by the defendant, but a neglect of his own duties on the subject. A waiver of a demurrer often takes place, and is, by law, permissible. 1 Tidd, Pr., 710; 1 East, 135; 2 Bibb. (Ky.), 12; 1 Burr., 321; 2 St., 1181. *Quilibet renuntiare potest jure* *pro se introducto. [*718 The want of a decision would, in this aspect of the subject, seem to be by his own consent; and *consensus tollit errorem*. The course of the defendant appears to have been, practically and substantially, if not formally, an abandonment of a wish for any separate decision on the demurrer. See cases of this kind. *Wright et al.* v. *Hollingsworth*, 1 Pet., 165; Bac. Abr., *Error*, K., 5; *Vaiden* v. *Bell*, 3 Rand. (Va.), 448; *Patrick* v. *Conrad*, 3 A. K. Marsh. (Ky.), 618; 2 Id., 227; *Casky* v. *January*, Hard. (Ky.), 539. As a plea of the general issue, while a demurrer is pending undisposed of, is considered a waiver of it. *Cobb* v. *Ingalls*, 1 Ill., 180.

In another view of the subject, looking to the defendant's own neglect of the cause, a party cannot be allowed to take advantage of his own wrong or inattention. Thus it has been decided, that a writ of error will not lie for one's own neglect or irregularity. 1 McCord (S. C.), 205; 1 Ark., 90; *Kincaid* v. *Higgins*, 1 Bibb. (Ky.), 396; 2 Blackf. (Ind.), 71; 3 McCord (S. C.), 302, 477; *Kyle* v. *Hayle*, 6 Mo., 544. It strengthens these conclusions, that the original defendant seems to have long acquiesced in what he now expects to,—that he does not appear to have asked for a decision on the demurrer, to have made any complaint at the time of the demurrer not being decided, to have filed any motion about it, offered any bill of exceptions, or even brought any writ of error, till after the lapse of nearly three years. So much as to the waiver of the demurrer. But if the demurrer was not, in truth, waived or withdrawn by the defendant, or cannot be now so considered, from all which appears on the record, the presumption from all is evident, that the demurrer and special plea were actually decided on by the court, and the omission to enter it on the record may be cured by the statute of jeofails. Such a decision would have been its ordinary and proper course of proceeding.

This court has held, in a state of things much like this, as will soon be more fully explained, that it was bound to pre-

sume that "justice was administered in the ordinary form." 4 How., 167. And hence, in 3 Stew. (Ala.), 447, 448, where a decree was averred in the record, but not its form, it was presumed to have been in the ordinary form. The court could not properly have decided and given judgment for the plaintiff in this case, as it did, and, as must be presumed, properly, in the first instance, if the demurrer had not been waived or settled in favor of the plaintiff. Nor was the defendant likely to have acquiesced in the judgment without putting an exception on the record, unless one of these circumstances had occurred. This question has arisen in several of the States, and been decided in conformity with these views. In the *719] case of *Cochran's Executors* v. *Davis*, 5 Litt. (Ky.), 129, the court very properly adopt a like principle, saying,—"To this plea there was a demurrer, and although there is no order of record expressly disposing of the demurrer, yet, as the court gave judgment for the plaintiff on the whole record, it must be taken that the demurrer was sustained and the plea overruled." So in substance it was held in *McCollom* v. *Hogan*, 1 Ala., 515; and in *Bond* v. *Hills*, 3 Stew. (Ala.), 283, where, as in this case, there was a plea, amounting to the general issue, or containing what was admissible under it, and it did not appear distinctly to have been disposed of, but the general issue was tried, it was held to be presumed that the defendant had the full benefit of the objection on the trial, and error will not lie. It is true that where one issue in a cause is found one way and another on a matter entirely distinct is not disposed of, it may not be proper always to consider it as decided. *Pratt* v. *Payne*, 5 Mo., 51. But here the questions involved in both issues were the same; both related to the same cause of action, and both to the same defence. The cases on this subject are so much more numerous in the States than in England or in this court, that we oftener find it necessary to resort to them for analogies in support of our reasoning as to what should, under all the facts, be presumed. But in this court, at this very term, we have a strong illustration of the correctness or truth of such a presumption, in the case of *Harris* v. *Wall*; where, on similar findings by a jury on some pleas and a demurrer to others, and a judgment for the defendant without any entry made specifically that the demurrer was disposed of, it happens, in point of fact, that it was decided, and the judge on that circuit, now present, has with him his written opinion, which he delivered when deciding it. So in *Stockton et al.* v. *Bishop*, 4 How., 167, in a writ of error, where a verdict appeared and a judgment, but not for any particular sum,

with several other important omissions, this court, by Catron, Justice, remarked,—"Still we are bound to presume, in favor of proceedings in a court having jurisdiction of the parties and subject-matter, that justice was administered in the ordinary form when so much appears as is found in this imperfect record."

Again, on a writ of error, many things will always be presumed or intended, in law as well as fact, to have happened, which are not *ipissimis verbis* or substantively so set out on the record, but are plainly to be inferred to have happened from what is set out. Cro. Eliz., 467; 4 How., 166. Thus, in this case, numerous circumstances stated on the record, and already referred to, indicate that the demurrer and special plea, if not withdrawn or waived, were actually disposed of. Among *them, raising a strong presumption that way, [*720
is the fact, that three days elapsed after the pleas and demurrer were filed, before the trial of the other issue; that within this period the court had time to hear the question of law argued; that it is the usual practice to hear such a question before going to a trial of the facts; and hence, unless the demurrer was waived, that the court, before the trial, did probably hear and decide the demurrer against the defendant. Again, the court would have been still less likely to have proceeded to final judgment without first disposing of the question of law, unless waived or settled either before, at, or after the trial. Such, too, being the duty of the court, they are to be presumed, till the contrary appears, to have done their duty.[1] *Wilkes* v. *Dinsman*, *ante*, 89. Nor is such a presumption here, as some have suggested, against the record; because the record says nothing on the subject. But it is consistent with every thing that is there said, and with what is fairly to be inferred from the whole record, carrying with us the probable idea, in that event, of some omission or misprision by the clerk in noting all which happened.

The omission of the clerk to enter on the record the judgment upon the demurrer, or to state its waiver, if it was abandoned, would be merely a clerical mistake; and it is well settled at common law, that a misprision by a clerk, if the case be clearly that alone, though it consist of the omission of an important word or expression, is not a good ground to reverse a judgment, where substance enough appears to show that all which was proper and required was properly done. *Willoughby* v. *Gray*, Cro. Eliz., 467; *Weston's case*, 11 Mass., 417. The statutes of jeofails usually go still further in rem-

[1] CITED. *Worsell* v. *Hall*, 13 How., 215.

edying defects after verdicts and judgments. Considering this, under those statutes, as a case of defect or want of form in the entry by the clerk, and not of error in the real doings of the court, the statute of jeofails of the United States, curing all defects or want of form in judgments, is explicit against our reversing this for such a cause. Sec. 32 of Judiciary Act of 1789, 1 Stat. at L., 91. If the State laws are to govern, the words of the statute of jeofails are equally explicit and more minute in Mississippi, in curing such defects, resembling more the English statutes. Hutchinson's Code for Mississippi, 841. It is not a little singular, that the unwillingness in England to have judgments disturbed by writs of error for defects in them or in the prior pleadings, where a verdict of a jury has been rendered for a plaintiff, is such, that something like five or six acts of Parliament were passed before our ancestors emigrated hither, and several more since, to prevent writs of error from being maintained for defects in form, as well as to empower *amendments in such cases. See those in 1 Bac. Abr., *Amendment and Jeofails; O'Driscoll* v. *McBurney*, 2 Nott. & M. (S. C.), 58. Some of the defects cured seem to be very near as strong as the present case. 11 Coke, 6 *b*; Act of 32 Hen. VIII. c. 30. The difficulty is in deciding "what is substance and what is form," and that is governed by no fixed test, but it is laid down that it "must be determined in every action according to its nature." 1 Bac. Abr., *Amendment and Jeofails*, E. 1; 1 Saund., 81, *n.* 1.

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At common law, defects in collateral pleadings, or other matters not preceding the verdict, and not to be proved in order to get a verdict, were not cured by it. Yet those were cured which related to matters necessary to be shown to get a verdict, and hence, after it, are presumed to have been shown. *Renner* v. *Bank of Columbia*, 9 Wheat., 581; Com. Dig., *Pleader Count*, c. 87; *Curson* v. *Hood*, 4 Dall., 108; 1 Sumn., 314; 1 Gall., 261; 1 Wils., 222; Burr., 17, 25; *Cotterel* v. *Cummins et al.*, 6 Serg. & R. (Pa.), 348; 1 Sumn., 319; 16 Conn., 586; 11 Wend. (N. Y.), 375; 7 Greenl. (Me.), 63. But these defects in collateral matters, as here, when they relate to form, are as fully cured by the statutes of jeofails as those connected with the verdict are by intendment at common law. *Stennel* v. *Hogg*, 1 Saund., 228, n. 1; *Dale* v. *Dean*, 16 Conn., 579. Any omission like this would certainly be amendable below, and some cases have gone so far as to hold, in error, that any defect amendable below will be considered as actually amended. *Cummings* v. *Lebo*, 2 Rawle (Pa.), 23.

In conclusion on this point, this court, by Catron, Justice,

in the writ of error before named, of *Stockton et al.* v. *Bishop* (4 How., 164), stated, that "it must be admitted that Congress acted wisely in declaring that no litigant party shall lose his right in law for want of form; and in going one step further, as Congress unquestionably has done, by declaring that, to save the parties' rights, the substance should be infringed on to some extent, when contrasted with modes of proceeding in the English courts, and with their ideas of what is substance."

After this, it would seem hypercritical, and contrary to the whole spirit of the statutes of jeofails both of the United States and of Mississippi, to allow an exception so contrary to legal presumption as this to be sustained. Nor does it promote the ends of justice to let parties lie by and not take exceptions, and afterwards reverse judgments for omissions, which, if noticed at the time, would have been corrected. *McCready* v. *James*, 6 Whart. (Pa.), 547. And this court, where the issues were three, and the verdict and judgment not separate on each, but general on all, and the objection was taken on the writ of error, in **Roach* v. *Hulings*, 16 Pet., 321, [*722 said, by Daniel, Justice,—"Objections of this character, that are neither taken at the usual stage of the proceedings nor prominently presented on the face of the record, but which may be sprung upon a party after an *apparent waiver* of them by an adversary, and still more *after a trial* upon the merits, can have no claim to the favor of the court, but should be entertained only in obedience to the strictest requirements of law"; and they were in that case accordingly overruled or considered as cured.

Another ground for affirming the judgment, which the plaintiff in error cannot easily overcome, is, that if the three counts to which the special plea is filed cannot be sustained, the defendant in error has obtained a verdict on all the counts; thus showing, at least, that there was no valid defence to the others. And if those three were conceded to be bad, the others are good, and, notwithstanding a verdict and judgment on all, the latter must not in such case be reversed on error. By an express statute in Mississippi, passed June 28th, 1842, one good count, though others are bad, will sustain a judgment. Hutch. Code for Miss., ch. 5, art. 1. This is not a peculiarity confined to Mississippi, but a like rule prevails in several other States. 2 Bibb (Ky.), 62; 2 Litt. (Ky.), 100; 2 Bay (S. C.), 204; 2 Hill, 648; 1 Blackf. (Ind.), 12; 1 Stew. (Ala.), 384; 2 Conn., 324. And though in some it is otherwise (1 Cai. (N. Y.), 347; 11 Johns. (N. Y.), 98; 9 Mass. 198), and is otherwise in England (*Grant* v. *Astle*,

Doug., 703), yet it has been regretted by some of her eminent jurists as "inconvenient and ill-judged."

If this provision, then, in Mississippi, should be regarded as a rule of practice, it existed there when the last process act, of May, 1828, passed, and hence, by acts of Congress and the rules of our Circuit Courts, binds them; but if it be a right conferred by her statute, it equally must govern us, by the Judiciary law of 1789, in all cases tried like this in that State. 16 Pet., 89, 303.

But, beside these reasonings and views, to some of which a portion of the court except, there exists another ground for affirming the judgment below, which appears to us fully established both on principle and adjudged cases. The first fault in the pleadings connected with the demurrer seems to have been committed by the defendant himself, and no reason appears on the whole record why the original judgment should not have been rendered against him on that ground. His only defence set up was the statute of frauds and perjuries. This statute was pleaded specially; but, on the facts and the law, it does not seem to have been applicable to the case. The case was a transaction of money paid by the plaintiff on account of the *defendant, and must have been considered by the court and jury as done under an original undertaking to repay it in a particular way, which the defendant had not fulfilled, and which was not within the provisions of the statute. The defendant was misled, by the mode of payment being special and to a third person, into an impression that the original promise was to a third person. The suit is not brought by the third person, to whom the original plaintiff owed a debt, nor was the promise made to a third person; but it is brought by the person who advanced money on account of the defendant, on a consideration moving from him alone, and on the promise made to him alone for its payment in a particular manner. See, on this, *Read* v. *Nash*, 1 Wils., 305; 2 Leigh, N. P., 1031; *King* v. *Despard*, 5 Wend. (N. Y.), 277; *Towne* v. *Grover*, 9 Pick. (Mass.), 306; *Hodgson* v. *Anderson*, 3 Barn. & C., 842.

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This was virtually, therefore, an undertaking by the defendant to pay his own debt, but simply specifying a particular manner of doing it; and unless it was found at the trial that the statute of frauds did not apply, it is to be presumed that a recovery would not have been had before the jury, where it was competent to make this an objection.

The matter of the plea, then, having been clearly bad, it appears to be well settled, that, when a demurrer is filed to a replication, if the plea is bad, judgment ought to be given for

the plaintiff. Anon., 2 Wils., 150; *Semble*, Moor, 692; Com. Dig., *Pleader*, *Proceedings in Error*, 3 B., 16; 1 Lev., 181. The whole record connected with the demurrer is open on the writ of error, and judgment goes against the earliest fault. 1 Ill., 207; *Morgan* v. *Morgan*, 4 Gill & J. (Md.), 395.

In regard to the suggestion, that the demurrer might have applied to some other objection than the statute of frauds, either in the plea, or, going back to the declaration, some defect there (as the first defect had on general demurrer is the fatal one, 1 Chit. Pl., 647), it is enough to say that no other appears, then or now, to have been pointed out, and none is intimated in the argument for the plaintiff in error.

It is very doubtful, also, if, in this particular case, a defect in the declaration would be considered at all on this demurrer, as the general issue is pleaded to all of the declaration covering these three special counts. And an issue in fact and a demurrer cannot both be allowed to reach the same count. Bac. Abr., *Pleas and Pleading*, n. 1; 2 Blackf. (Ind.), 34; 5 Wend. (N. Y.), 104. If there be an exception to this rule, it must be by some local law or practice not existing here. 1 Litt. (Ky.), 4; 4 Munf. (Va.), 104.

From the whole record, therefore, it appears that the judgment below in favor of the plaintiff was probably correct, even *if the demurrer had not been waived, and in this event it is clear that the judgment should not, on this [*724 writ of error, be reversed. Hob., 56; Com. Dig., *Pleader*, *Demurrer*, Q., 2; *Saunders* v. *Johnson*, 1 Bibb (Ky.), 322; 6 T. B. Mon. (Ky.), 295, 606; *Phelps* v. *Taylor*, 4 Id., 170; *Semble*, 3 Bibb (Ky.), 225; *McWaters* v. *Draper*, 5 T. B. Mon. (Ky.), 496; Hard. (Ky.), 164. In *Foster* v. *Jackson*, Hob., 56, the opinion says, "It is the office of the court to judge the law upon the whole record." The other cases cited show, that in writs of error, as well as demurrers, the same rule prevails.

The propriety of our conclusions in this case becomes more manifest when we consider that a reversal of the judgment would be of no use to the original defendant; because, if reversed, the order here could not be to render judgment for the defendant, but to have a record made of the waiver or decision of the demurrer, if either occurred, and if not, then a joinder in demurrer and an opinion below on the question presented by it, and which opinion, as already shown, must probably be for the plaintiff, and then the same judgment be entered again on the verdict which exists now.

McGriffin v. *Helson*, 5 Litt. (Ky.), 48; 2 Str., 972; *Jackson* v. *Runlet*, 1 Woodb. & M., 381.

Finally, so far as any presumptions or doubts on any of these considerations should operate against either party in forming our conclusions, we are unable to see anything in the acquiescent conduct of the original defendant before the judgment, or in the merits of his original defence, or in his writ of error, brought after such an uninterrupted silence and assent for years, which entitle him to any peculiar favor.

The plaintiff in error, likewise, must always make out his case clearly and satisfactorily, as every reasonable intendment should be in favor of a judgment already rendered. *Fentriss* v. *Smith*, 10 Pet., 161; *Lander* v. *Reynolds*, 3 Litt. (Ky.), 16; Lou. Code of Pract., 909, note, and cases there cited; 3 Mart. (La.) (N. S.), 29; 15 La., 480, &c. This not having been done in the present case, we think that the judgment below must be affirmed.

Mr. Chief Justice TANEY.

I think the judgment of the District Court may be supported, on the ground that the decision on the demurrer had become immaterial after the verdict on the general issue. The special plea out of which the demurrer arose applied only to three counts. There was a fourth count, to which no defence was made except by the plea of the general issue; and according to the law and practice of Mississippi, one good count is sufficient to support the judgment when there are several counts in a declaration, and the others bad. And *725] after the verdict on the *general issue, the decision of the demurrer was immaterial, and the judgment must still have been for the plaintiff even if the demurrer was decided for defendant. The omission to dispose of an immaterial issue is not a ground for reversing a judgment, as the decision of such issue could not influence the judgment of the District Court. But I do not concur in the other portions of the opinion, and think that many of the positions taken in it cannot be supported.

Mr. Justice CATRON concurs with the Chief Justice.

Mr. Justice DANIEL.

Regarding the opinion just delivered as in direct opposition to the very canons of pleading at law, I feel constrained to declare my dissent from it. I cannot subscribe to, and can hardly comprehend, a doctrine of presumptions, which, in proceedings at law and on questions of pleading, infers

that the parties or the court have acted in direct contravention of the facts apparent upon, and standing prominently out upon, the record, operating by such presumption a false feature of the record itself. In this case the defendant has tendered an issue in law to the replication to the third plea; the record discloses the fact, that this issue has never been tried; it is therefore undeniable that there is a chasm in the proceedings, and that the court has not passed upon the whole case. If presumption can be admitted to warrant the conclusion that this demurrer was withdrawn, where shall such presumption end? Would it not be equally regular to presume that any other plea or issue on the record had been withdrawn? Then, if any other source than the record itself can be resorted to in order to ascertain what was in truth involved in the trial, conjecture or evidence *aliunde* must be introduced to determine; and that which, by legal intendment, is the only evidence or proof of the proceedings, the record, becomes the weakest of all proof, or rather becomes no proof at all. I think the judgment should be reversed, and the cause remanded for a trial on all the issues of law and of fact.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and damages at the rate of six per cent. per annum.

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*WILLIAM HARDEMAN AND HENRY R. W. HILL, COMPLAINANTS, *v.* BENJAMIN D. HARRIS. [*726

If an exception be taken to an answer in chancery upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled.[1]

Therefore, when a bill charged that certain notes were given for the purchase of slaves introduced into the State of Mississippi, as merchandise and for

[1] See *Brown* v. *Pierce*, 7 Wall., 212.

sale, after the first day of May, 1833, and the answer omitted to notice the allegation, such omission was not a good ground for an exception.

This court has repeatedly decided that the fact stated is no defence to a suit at law. Still less can it be a defence in equity, after a judgment at law.

Where an allegation in the bill was, that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants.

THIS case came up from the Circuit Court of the United States for the Southern District of the State of Mississippi, on a certificate of division in opinion between the judges thereof.

The facts in the case are sufficiently set forth in the opinion of the court.

It was argued by *Mr. Nelson*, on behalf of the respondent, Harris; no counsel appearing for the complainants.

Mr. Nelson contended that neither of the exceptions was well taken.

The first, because the allegation to which it refers was wholly immaterial, and not therefore required to be answered.

The second, because the allegations therein referred to, contained in said bill, if at all material, which is denied, have been substantially responded to by said answer.

In support of the first proposition it is submitted,—

That to justify an exception to an answer in chancery upon the ground of insufficiency, it is necessary to show that the omission alleged is material to the purpose and object of the complainant's bill. 2 Dan. Ch. Pr., 261; Welford, Eq. Pl., 368; Hare on Disc., 160; 1 McClel. & Y., 334. In *Hirst* v. *Peirce*, 4 Price, 136, (2 Exch.,) Chief Baron Richardson says:—"There is a great mistake in general in this court as to what is a material exception. The true way of arguing and considering such an exception is by ascertaining whether, if the defendant should answer in the affirmative, his admission would be of use to the plaintiff. If it would, it must be answered; if not, it is not material."

And in *Bally* v. *Kenrick*, 13 Price, 294, (6 Exch., 99,) Sir
*727] William Alexander, Chief Baron, says:— The *materiality of the exception will depend on this,—whether the interrogatory be of such a nature, without reference to the objectionable part of the answer, as that the answer to it might, if it were answered simply as it is put, so far contribute to support the equity of the plaintiff's case as to con-

tribute to induce the court to give him the relief sought by the bill."

This being the clear and well-settled rule, it remains to inquire, whether the omission referred to in this exception be *material* to the object of the complainants' bill.

That it is not is unquestionably clear. *Groves* v. *Slaughter*, 15 Pet., 449; *Harris* v. *Runnels*, 5 How., 135; *Truly* v. *Wanzer et al.*, 5 How., 141; *Sims* v. *Hundley*, 6 How., 1.

In support of the second proposition in the defendant's brief, it is insisted,—

That the omission alleged in the complainants' second exception does not in fact exist to the extent therein stated, and if it did, it is wholly immaterial.

That Hardeman, one of the complainants, was a mere surety in the note sued upon at law, is substantially admitted by the defendant, and will be apparent upon the examination of the answer, wherein he states the sale of slaves, for which the note was given, to have been originally made to James M. Smith, on credit, and that he "received in payment therefor the notes or bonds of said James M. Smith and of the said William Hardeman." That upon one of said bonds or notes a judgment was obtained, as stated in the bill, and that the note or bond sued on, upon which the judgment enjoined was recovered, was given in satisfaction of the first-mentioned bond or note and judgment.

Now all that is necessary for a defendant to do, in a case like the present, is to answer substantially the allegations of the bill. Welford, Eq. Pl., 261.

As to the objection, that the allegation of the insolvency of James M. Smith's estate is not answered by the defendant, it is sufficient to say that the fact is nowhere so alleged in the bill as to require any answer. There is no such averment in the bill, the only suggestion being that "it seems that nothing can be found," &c.

But if it were otherwise, it is indisputably clear that the allegations are wholly immaterial; that, however answered, the complainants could not be aided in the purpose of their bill; and that therefore, upon the authority of the cases already referred to, the omissions furnish no sufficient grounds for an exception.

Mr. Chief Justice TANEY delivered the opinion of the court.

In this case, the complainants filed a bill in the Circuit Court *for the Southern District of Mississippi, praying a perpetual injunction against a judgment at law [*728

which had been obtained against them. The bill, among other things, states that the note upon which the judgment was awarded was given for the purchase-money of certain slaves brought by the defendant into the State of Mississippi, as merchandise and for sale, after the first day of May in the year 1833, and sold in the State to a certain James M. Smith, in violation of the constitution and laws of the State; that the complainant Hardeman was surety for Smith; that a judgment was afterwards obtained against him, and an execution issued and levied upon his property, and that, to prevent it from being sold, he executed a forthcoming bond with the other complainant, Hill, as his security, which bond had become forfeited, and therefore had the form and effect of a judgment against the complainants; and that Smith, for whom he was security, was dead, and his estate insolvent.

The defendant answered; and upon the coming in of the answer, the following exceptions were taken to it by the complainants:—

"1st. The bill charges that the slaves mentioned in complainants' bill, sold by the defendant, Harris, to James M. Smith, and which constitute the consideration of the note upon which the judgment at law enjoined in this cause was rendered, were introduced into the State of Mississippi by the said defendant, Harris, for sale and as merchandise, after the first day of May, 1833. This allegation has not been answered, admitted, or denied.

"2d. It is alleged in the bill, that complainant Hardeman was only surety in the note sued upon at law, and that C. P. Smith, executor of James M. Smith, was principal, and that the estate of James M. Smith is insolvent, &c. These allegations are neither answered, admitted, nor denied."

And upon the hearing of these exceptions, the judges were divided in opinion upon the point whether they were well taken and should be sustained, or not, and therefore ordered the question to be certified for decision to this court.

It is very clear that neither of these exceptions can be maintained. It has been repeatedly decided in this court, that the fact stated in the first is no defence at law, and still less can it be a ground of relief in equity after a judgment at law.

And as regards the second, certainly the insolvency of the principal debtor is no defence to the surety, either at law or in equity.

If, therefore, the defendant had admitted in the most explicit terms the allegations mentioned in the exceptions, they would not have contributed in any degree to support the

claim of the *complainants to the relief they ask. [*729
And consequently, the omission to answer (if the answer be open to that objection) furnishes no ground of exception. It is not a sufficient foundation for an exception, that a fact charged in a bill is not answered, unless the fact is material, and might contribute to support the equity of the case of the complainant, and induce the court to give the relief sought by the bill.

The exceptions ought, therefore, to have been overruled, and we shall direct it to be so certified to the Circuit Court.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Southern District of Mississippi, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court, for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the exceptions by the complainants were not well taken, and ought to have been overruled. Whereupon, it is now here ordered and decreed, that it be so certified to the said Circuit Court.

PLINY CUTLER, APPELLANT, *v.* WILLIAM A. RAE.

Where a vessel was run on shore by the captain in order to save the lives of those on board, and for the preservation of the cargo, by which act the vessel was totally lost, but the cargo saved and delivered to the consignee, a libel *in personam*, filed by the owner of the vessel against the consignee of the cargo, (and the result would be the same if filed against the owner of the cargo,) for a contribution by way of general average, cannot be sustained in the admiralty courts of the United States.

Those courts have jurisdiction wherever the vessel or cargo is subject to an absolute lien, created by the maritime law; and will follow property subject to such a lien into the hands of assignees. The lien, in such cases, does not depend upon possession. But in cases of general average, the lien is a qualified one, depends upon the possession of the goods, and ceases when they are delivered to the owner or consignee.[1]

Whatever may be the liability of the owner after he has received his cargo, it is founded upon an implied promise to contribute to the reimbursement of

[1] COMMENTED ON. *Dike et al. v. Propeller St. Joseph*, 6 McLean, 574. DISTINGUISHED. *Dupont de Nemours & Co. v. Vance et al.*, 19 How., 171 FOLLOWED. Id., 178; *Bags of Linseed*, 1 Black, 113.

the owner of the lost vessel, which promise is implied by the common law, and not by the maritime law.

The case is, therefore, beyond the jurisdiction of courts of admiralty, and the libel must be dismissed.[1]

THIS was an appeal from the Circuit Court of the United States for the District of Massachusetts.[2]

*730] It was a libel filed in the District Court, as a court of *admiralty and maritime jurisdiction, by Rae, the owner of a vessel called the Zamora, against Cutler, in a cause of contribution or general average, civil and maritime.

The facts in the case are set forth by Mr. Chief Justice Taney, in delivering the opinion of the court, to which the reader is referred.

The District Court decreed that Rae should recover $2,500 from Cutler, which decree was affirmed in the Circuit Court.

It was submitted upon printed arguments in this court by *Mr. Loring*, for the libellant below, and *Mr. Fletcher* and *Mr. Curtis*, for the respondent and appellant.

The Reporter would be gratified if he could insert the whole of these arguments, but want of room forbids it.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a proceeding in admiralty, and the point first to be considered is the question of jurisdiction.

The appellee filed a libel *in personam* against the appellant, in the District Court of the United States for the District of Massachusetts, setting forth that he was the owner of the bark Zamora, which sailed from New Orleans for Boston, on the 6th of November, 1845, with an assorted cargo, a part of which consisted of 154 bales of cotton, consigned to the appellant; that she was overtaken by a storm in Massachusetts Bay, and was run on shore by the captain, in order to save the lives of those on board, and for the preservation of the cargo, which, together with the vessel, were in imminent danger of being totally lost; that by this voluntary stranding, the vessel was totally lost, but the cotton was saved; and that the appellant had saved the value of it, to wit, $5,400; and that the appellee is entitled to contribution from the owners of the cargo and the appellant, to indemnify him for the loss of his vessel.

The appellant answered, admitting the ownership of the

[1] CONSIDERED OVERRULED. *Coast Wrecking Co.* v. *Phœnix Ins. Co.*, 7 Fed. Rep., 242.

[2] Reported below, 1 Sprague, 136. See 6 How., 615, app.

vessel as alleged in the libel; that she was wrecked in Massachusetts Bay, and that the cotton had come to his hands in a damaged state; but denies that the appellee is entitled to the general average he claims, and insists that he is not liable to contribute on account of the cotton, to indemnify the owner for the loss of his bark.

Upon this libel and answer, the parties proceeded to take testimony to show the circumstances under which the vessel had been stranded; and upon the hearing, a decree was passed in the District Court in favor of the appellee for $2,500, which was affirmed in the Circuit Court, and from which last-mentioned decree the present appeal to this court was taken.

*Upon the face of the proceedings, therefore, the question arises whether the District Court had jurisdiction, as a court of admiralty, to try the matter in dispute. And it is unnecessary to state more fully the pleadings and testimony until this question is disposed of. [*731

It is true, the counsel for the appellant has waived all objections on that score. But the consent of parties cannot give jurisdiction to the courts of the United States, in cases where it has not been conferred by the Constitution and laws. And if the proceedings show a case which the District Court was not authorized to try, it is the duty of this court to take notice of the want of jurisdiction, without waiting for an objection from either party.[1]

The court of admiralty undoubtedly has jurisdiction in cases where the vessel or cargo is subject to a lien created by the maritime law. And where the lien is attached to the vessel or cargo, it will, until it is discharged, adhere to the property in the hands of third persons, and will follow the proceeds, in certain cases, in the hands of assignees. And in such cases, the lien may be enforced in a court of admiralty, by a proceeding *in personam*, against the party who holds the property or proceeds. This doctrine was recognized in this court in the case of *Sheppard* v. *Taylor*, 5 Pet., 675. In that case, the holders of the proceeds of a ship which had been condemned in a Spanish tribunal, and the value of the vessel afterwards paid to the owners by the Spanish government, were held liable for seaman's wages, in a proceeding *in personam*, although they held them as assignees of the owners in payment of a *bond fide* preëxisting debt. And in deciding that case, the court said, that, in cases of prize, bottomry,

[1] CITED. *The Monte A.*, 12 Fed. Rep., 335; *Wenberg* v. *A Cargo of Mineral Phosphates*, 15 Id., 286.

and salvage, as well as seaman's wages, the party entitled to the lien may proceed in admiralty *in personam* against the party holding the proceeds of property to which the lien had attached.

But in the cases mentioned by the court, the maritime law attaches an absolute and unconditional lien upon the property. The possession is not necessary to its validity. Indeed, in cases of seaman's wages and bottomry, the party entitled to the lien never has possession; and the same is most commonly the case where salvage services are rendered.

But it is otherwise in general average. The party entitled to contribution has no absolute and unconditional lien upon the goods liable to contribute. The captain has a right to retain them until the general average with which they are charged has been paid or secured. And as he may do this for the security of the party entitled, he must be regarded as his agent in this respect, and exercising his rights. This *732] right *of retainer, therefore, is a qualified lien, to which the party is entitled by the maritime law. But it depends on the possession of the goods by the master or ship-owner, and ceases when they are delivered to the owner or consignee. It does not follow them into their hands, nor adhere to the proceeds. This is the doctrine not only in England, but on the Continent also. It is unnecessary to refer to the various authorities on this point, as the principal ones are collected in Abbott on Shipping, 507, (margin,) Perkins's edition, and 3 Kent, Com., 244.

In the case before us, the goods, with the bill of lading, were delivered to the consignee, and not to the owner. We do not, however, propose to inquire, whether, upon the facts stated in the libel, the consignee would be liable for the contribution in any form, but whether a court of admiralty can try the question. And treating the case as if the consignee stood in the place of the owner, and was liable to the same extent, we think it was not within the jurisdiction of the court of admiralty. The owner is liable, because, at the time he receives the goods, they are bound to share in the loss of other property by which they have been saved; and he is not entitled to demand them until the contribution has been paid. And as this lien upon his goods is discharged by the delivery, the law implies a promise that he will pay it. But it is not implied by the maritime law which gave the lien. It is implied upon the principles of the common law courts, upon the ground that in equity and good conscience he is bound to pay the money, and is therefore presumed to have made the prom-

ise when he received the goods.[1] Indeed this case seems, in its principles, to be nothing more than the common law action for money had and received, brought in a court of admiralty.

It is very much to be regretted, that the jurisdiction of the court of admiralty in this country is not more clearly defined. It has been repeatedly decided in this court, that its jurisdiction is not restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted. But there is no case, nor any principle recognized by this court, that would justify us in extending it to a subject like the one now before the court. Whether the court of admiralty might not have proceeded *in rem* to enforce the maritime law before the goods were delivered, is a question which does not arise in this case, and upon which, therefore, we express no opinion. But the case, as presented in the record, we think, is not within the admiralty jurisdiction, and the judgment must therefore be reversed, and the case remanded to the Circuit Court, with directions to dismiss the libel.

*Mr. Justice WAYNE.

I regret that this case has been sent to this court [*733 upon the printed arguments of the counsel in the court below, and still more regret that this court has decided an important constitutional question of admiralty jurisdiction, without either oral or printed argument.

It is the first time in this court that such a result has happened; and it was a sufficient reason, in my mind, to restrain this court from action, until after the point had been argued.

As I gather the facts of the case from the record, the question of jurisdiction was not argued either in the District or Circuit Court; though, in making up the record for this court, the point was suggested by the counsel for the respondents. It is a curious incident in the history of our jurisprudence, that a constitutional point should have been ruled here, which had neither been argued at the bar in this court, nor elsewhere; and I think it will be thought so much so, that it will not occur again. Such a silent and uncontested judicial disposition of a question arising under the Constitution is at variance with the interest hitherto shown by our courts, and by the public, in such matters, and does not partake of that watchful and patient inquiry concerning constitutional powers, which has been so much the characteristic of the American mind, when either of the departments of our government has been called upon to exercise them.

[1] DOUBTED. *Bank San Fernando* v. *Jackson*, 12 Fed. Rep., 342.

I think, too, that this decision should not have been made at this time; for though a full court was present in our consultation upon this case, one of the judges, Mr. Justice Catron, refused to deliberate with us upon it, stating as his reason for not doing so, that important points, constitutional and otherwise, were involved, and that the case was only before us upon printed arguments upon the latter. I think he did so with great propriety, and I agree with him, that the rule of the court permitting cases to be sent here upon printed arguments was not meant to embrace cases involving constitutional questions. That it was not meant to do so, I infer from this being the first case in which it has been done with the practical acquiescence of this court, and from our use, in having hitherto avoided the decision of such questions, except upon oral argument before a full court.

Mr. Justice Catron's withdrawal left eight of us to act upon the case, and we were for some time equally divided upon this point of jurisdiction. It was ultimately disposed of as it has been by a majority of the court, rather by our acquiescence in what was thought to be English authorities against the jurisdiction, than from a close and searching scrutiny into the practice *and jurisdiction of courts of admiralty, and how far they were comprehended within our constitutional extension of judicial power to all cases of admiralty and maritime jurisdiction.

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Under such circumstances, with every inclination to carry out without further inquiry the decisions of this court, and with unfeigned respect for all of the judges who have made this decision, I hope I shall not be considered as doing anything at variance with either, if I shall hear argument upon this point of jurisdiction, should such a case occur before me upon the circuit, or if I shall ask, should it ever arise here again, that we may hear argument from counsel upon a point which we had not an opportunity to hear when it was decided.

But my objection to the ruling of the point is greater than to the circumstances under which it has been made.

I think that the case is within our constitutional admiralty and maritime jurisdiction, and that it has been so decided by this court.

An attempt has been made to take it out of the case of *Sheppard* v. *Taylor*, 5 Pet., 675, by making a distinction between cases of absolute and unconditional maritime lien, and such as are now called qualified cases of lien, to which a party is *entitled by the maritime law*. And it is said, "in general average, that the party entitled to contribution has no absolute and unconditional lien upon the goods liable to con-

tribute; but that the captain has a right to retain them until the general average with which they are chargeable has been paid or secured."

Besides, not having been able to find, in the books and cases which I have read, any such distinction, (now, I believe, for the first time made,) I have always thought that a lien given by the maritime law, of whatever kind it may be, is one which can be enforced in a maritime court, for the purpose of consummating, for the benefit of all concerned, the equity which raised or created it. For instance, that if a master of a vessel gets a lien upon the saved cargo, in a case of jettison, or voluntary stranding of his vessel, and he is in any way dispossessed of any part of it, either by a freighter or other person, he may bring a possessory action in a maritime court to regain it, or a petitory libel, if the goods saved have got into the hands of a third person, who claims a right of property in them against the freighter. And further, that if the freighters, in a case of jettison or voluntary stranding of a vessel, disagree as to what should be their respective contributions, and there is no fixed rule for ascertaining it without suit in the country where the said cargo may happen to be, either the captain having the cargo in possession, or the freighters, or either of them, may go into a maritime court, to have it judicially *determined. And that a party [*735
interested in such a lien may file his libel *in personam*, in a maritime court, against a freighter for his contribution, if he has got possession of his part of the saved cargo, and has removed it beyond the sovereignty in which the court is, so that it may not be sequestrated or put under arrest, to answer the court's decree. And it matters not whether the freighter's possession of the saved goods has been obtained by the delivery of it to him by the master, or otherwise. A lien, or right given to the master "to retain the goods, until the general average with which they are chargeable has been paid or secured," as this court says the master has, has nothing in it of the character of a personal agency, which the master may throw off at his will; for neither in its beginning nor in its continuance has it a voluntary appointment; but it is a trust, which the maritime law casts upon him, from the necessity of the case, in virtue of his official relation to the vessel and cargo, and to those who are the owners of them. It is a lien given to the captain by the maritime law, for the purposes of a high equity, produced by necessity; and it cannot be taken from the jurisdiction of a maritime court by any act of a party interested in it, short of what that equity demands; though the parties interested may

themselves determine and receive from each other what they may think that equity gives to each of them.

And the foundation of this jurisdiction of a court of admiralty in such cases, both *in rem* and *in personam*, is not on account of the locality of the jettison or stranding, or that it is a thing done at sea; but because, happening at sea, the peril producing it makes new and involuntary relations between the freighters, where there were none before, and for which the interests of commerce require a tribunal, into which, by the law of its creation, all the parties interested may be brought together for settlement. Of course, in what I have said, I have had no reference to the admiralty jurisdiction in England since the time of Charles II., but to that of the maritime courts upon the Continent, and as the practice in them continues to be, and also to what had been the ancient practice and jurisdiction in England on admiralty, until the reign of James I., notwithstanding the statutes of 13 Richard II., ch. 5, and 15 Richard II., ch. 3; for we know historically, that, until the time of James, the statutes of Richard operated rather to restrain the usurped jurisdiction of the Court of Admiralty in England, than to limit it, in what rightfully belonged to its cognizance.

When, then, we are referred to Abbott on Shipping and to Kent's Commentaries, and to the cases cited by them, in support of the conclusion to which this court has here come, *concerning the want of jurisdiction, in an American court of admiralty, of a libel *in personam* to enforce a right in a maritime lien which cannot be enforced *in rem*, in consequence of the removal of the subject-matter of the lien beyond the reach of the court's monition and attachment, it will be found, by a perusal of Abbott and Kent upon General Average, and the cases cited by those writers, that neither of them is discussing at all the jurisdiction of a court of admiralty, even in England; but that each only states—and one from the other—what are the remedies in England for the recovery of the contributions of a general average. The language in Abbott is:—"In case of dispute, the contribution may be recovered, either by a suit in equity only, or by an action at law, instituted by each individual entitled to recover, against each party that ought to pay for the amount of his share." (§ 14, p. 610.) And it is admitted that the English jurisdiction in admiralty was not meant by the framers of the Constitution, when the judicial power was extended "to all cases of admiralty and maritime jurisdiction." The language of the court now is,—"It has been repeatedly decided in this court, that its jurisdiction is not

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restricted to the subjects of which the English courts of admiralty exercised jurisdiction at the time our Constitution was adopted." We must, therefore, in all cases, whether or not there has been an occasion in our courts for the exercise of jurisdiction in a particular case, look to the maritime courts on the Continent, and to works on admiralty jurisdiction, to determine whether the case in hand is embraced by our constitutional provision.

Nor can I partake of the regret just expressed, that the jurisdiction of the court of admiralty in this country is not more defined.

I know at one time it was thought so, but subsequent investigations of it by our judges and jurists, I believe, have given a very general impression to American lawyers, that the constitutional clause, "all cases of admiralty and maritime jurisdiction," is as well and as definitely expressed, for the purpose meant, as it can be, and that it leaves nothing doubtful, except as to some cases of which the admiralty court in England took jurisdiction, which had been there exclusively within the cognizance of the courts of common law, and also of other cases in the Continental maritime courts, which did not relate to "things done upon the sea, or to contracts, pleas, and quarrels which were not maritime." Among the latter is certainly not a case of general average, and, except in England, I believe, the jurisdiction of the maritime courts has always embraced, both *in rem* and *in personam*, "all cases of *freight, charter-parties, mariners' [*737
wages, debts due to material-men for the building and repairing of ships," and all accidents upon the sea, affecting the rights of those having any interest in the cargo of a vessel, or who are in any way connected with her. I do not think that there is any thing doubtful in the terms used in the Constitution. "To all cases of admiralty and maritime jurisdiction," means all cases arising or happening on the sea, growing out of war or commerce, and all cases strictly of maritime contracts,—admiralty jurisdiction meaning originally those cases of which the admiral took cognizance in virtue of his office upon the sea, and maritime, these also, with all others arising out of the perils or accidents upon the sea; trespasses upon it of all kinds; contracts relating to commerce in which a sea service was to be rendered; contracts for building and repairing of ships, and for money loaned upon bottomry. Now, it having been repeatedly ruled by this court, that its admiralty jurisdiction was not limited by what was the jurisdiction in England when the Constitution was adopted, the principal difficulty in the way

of interpreting the words of the Constitution relating to it has been overcome. And if we will but rid ourselves of those doubts in respect to what are cases for a maritime court caused by the limitation of them in England, I do not think we shall ever be at a loss to determine what cases are within the admiralty jurisdiction of the courts of the United States; and I believe the whole of them will be found to make no trespass upon, or interference with, the jurisdiction of the other courts of the United States, or with those of the States, either as to the modes of proceeding in them, or as to the suits of which they have cognizance.

Mr. Justice CATRON.

On the question of jurisdiction, for want of which this cause has been dismissed, I am not satisfied either way, and therefore give no opinion.

ORDER.

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 Massachusetts, and was argued by counsel. On consideration whereof, it is the opinion of this court, that neither the said Circuit Court, nor the District Court from which this case was removed to the said Circuit Court, had jurisdiction of this cause, and that consequently this court has not jurisdiction but for the purpose of reversing the decree of the said Circuit Court. Whereupon, it is now here ordered and decreed by this court, that the decree of the said
*738] Circuit Court, entertaining *jurisdiction in this cause, be, and the same is hereby, reversed for the want of jurisdiction in that court; and that this appeal be, and the same is hereby, dismissed for the want of jurisdiction; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

HEZEKIAH SMITH, PLAINTIFF IN ERROR, *v.* WILLIAM HUNTER, TREASURER OF BUTLER COUNTY, JAMES B. CAMERON, AUDITOR OF BUTLER COUNTY, AND THE PRESIDENT AND TRUSTEE OF THE MIAMI UNIVERSITY.

Where a complainant alleged that a school tax, which was levied upon his land, was contrary to the spirit and meaning of a law of the State of Ohio

which exempted his property from all State taxes, and conflicted also with the terms and conditions of the leases by which he held his land, and the State court dismissed the bill, this decision of the State court cannot be reviewed by this court by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The rules which regulate cases brought up to this court under that section again examined and affirmed.[1]

THIS case was brought up from the Supreme Court of Ohio, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts were these:—

By the fourth section of the act of Congress of the 3d of March, 1803, to enable the State of Ohio to form a State constitution, (2 Stat. at L., 226,) a township of land, to be laid off in the Cincinnati land district, was granted to the State of Ohio for the purpose of establishing an academy.

On the 17th of February, 1809, the legislature of the State of Ohio passed an act entitled "An act to establish the Miami University." (Pamphlet Acts of 1809, page 184.)

That act incorporated the university, provided for its support, government, &c. Section tenth vested the above-mentioned township in the corporation, for the use and support of the university, and authorized the corporation to divide the township into lots, and lease them out for the term of ninety-nine years, renewable for ever, subject to a valuation every fifteen years. The thirteenth section exempts the township from all State taxes. It reads in these words:—"That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors, and other officers, students, and servants of the university, and any buildings appertaining thereto, and also the dwelling-house and other buildings which may be built and erected on the lands, "shall be exempt from all State taxes." Under this act the university lands were divided into lots and [*739 leased out, the plaintiff in error being the lessee of a part of them.

On the 16th of March, 1839, the legislature of Ohio passed an act entitled "An act providing for the levying of a school tax in Oxford township, in Butler county." Local Laws of Ohio, p. 235 of Pamphlet Acts.

The township here named is the university township. The first section of the act directs the county commissioners of that county to appoint appraisers in the township of Oxford "to appraise the lands held under permanent leases

[1] See *post*, *743 n.

in said township at their true value in money, considered in their natural state," taking into view the rent encumbrance upon the same, payable to the university.

The second section of the act is in these words:—"Said commissioners shall, in addition to the levying of a tax on personal property in said township, authorize the levying of a school tax annually upon the *ad valorem* amount of appraisement in said township, the property of blacks and mulattoes excepted, not exceeding one mill on the dollar, which assessment shall be made by the county auditor, and collected by the county treasurer, in the same manner as other county, township, or State taxes are levied and collected."

The third section provides, that "the taxes so levied and collected under the provisions of this act shall be appropriated exclusively for the support of common schools in the respective districts in the township of Oxford; and in the disbursement of the same, the provisions of the act entitled 'An act for the support and better regulation of common schools, and to create permanently the office of superintendent,' passed March 7th, 1838, shall be conformed to, at least so far as it is practicable to carry out the objects of this act, having in view the support of common schools in the said township of Oxford."

Under this last-named act, a tax for the support of common schools in Butler township was levied on the university lands, and, among others, on the lands of the plaintiff in error. Whereupon he filed his bill in chancery in the Court of Common Pleas for said county of Butler, setting out in substance the facts as above stated, and praying that the treasurer and auditor of the county might be enjoined from collecting said tax, on the ground that it was imposed in contravention of the terms of his lease, and of the act of the 17th of February, 1809, to establish the Miami University.

The defendants demurred to this bill, and on the hearing the demurrer was sustained and the bill dismissed. From this decree of the Common Pleas the plaintiff appealed to the Supreme *Court of Ohio, where, upon hearing on the demurrer, the bill was again dismissed. From this last decree the plaintiff sued out a writ of error into this court.

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It was argued by *Mr. Schenck*, for the plaintiff in error, and *Mr. Vinton*, for the defendants in error.

Mr. Schenck contended that the case was drawn into the jurisdiction of this court,—

1st. Because it arises under a law of the United States.

It presents, in fact, a question as to the effect and objects of a grant of lands made in pursuance of an act of Congress for the purposes of education, and how far the same may be interfered with and controlled by State legislation.

2d. Because it is claimed that the act of the legislature of Ohio of 1839, taxing these lands, conflicts with a former act of the legislature in 1809, exempting them from taxation, and, being in violation of the rights of lessees (of whom the complainant is one) under that act of 1809, is a law impairing the obligation of contracts.

Mr. Vinton denied the jurisdiction of this court, and contended also that State taxes in Ohio were clearly distinguished from county and road and school and bridge taxes, which were entirely local, and not included in the exemption from State taxes.

Mr. Justice DANIEL delivered the opinion of the court.

This is a writ of error to the Supreme Court of Ohio, prosecuted under the twenty-fifth section of the act to establish the judicial courts of the United States, and arises out of the following facts and proceedings.

By the fourth section of an act of Congress of the 3d of March, 1803, (2 Stat. at L., 226,) a township of land in the Cincinnati land district was granted to the State of Ohio for the purpose of establishing a university.

On the 17th of February, 1809, the legislature of Ohio, by law, incorporated and established the Miami University, and, by the tenth section of this law, vested the township above mentioned in the corporation, for the support of the university, and authorized it to divide the township into lots, and to make leases of these lots for the term of ninety-nine years, renewable for ever, but subject to a valuation at intervals of fifteen years. The thirteenth section of the law contains the following provision:—"That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors, and other officers, students, and servants of the university, and any buildings *appertaining thereto, and also [*741
the dwelling-house and other buildings which may be built and erected on the lands, shall be exempt from all State taxes." Under the authority of this law of Ohio, the lands vested in the university were divided into lots and leased out, and the plaintiff in error became the lessee of a part of them. On the 16th of March, 1839, the legislature of Ohio passed an act entitled "An act providing for the levying of a school

tax in Oxford township, in Butler county." The township of Oxford is the same which was vested in the Miami University by the law of the 17th of February, 1809. The first section of the law of 1839 provided that the county commissioners of Butler county should appoint one or more appraisers in the township of Oxford, whose duty it should be to appraise the lands held under permanent leases in said township at their true value in money, considered in their natural state, and that, in making such appraisement, they should take into view the rent encumbrance upon the same annually or otherwise payable to the Miami University by reason of the condition of the leases under which such lands are holden. The third section of the act of 1839 appropriates the taxes thereby ordered to be assessed and levied on the lands in Butler county exclusively to the support of the common schools in the school districts of the township of Oxford, and directs the disbursement of the amount of these taxes in conformity with the provisions of a statute of Ohio for the regulation of common schools, passed on the 7th of March, 1838. The lease under which the plaintiff in error claims sets out specially the extent of his tenure, with the privilege of perpetual renewal, and, in general terms, refers to all the privileges and immunities granted to the lessees of the university by the several acts and laws of the State. In consequence of a demand made by the auditor and treasurer of Oxford township for the taxes assessed on the lands held by the plaintiff for the use of the common schools of that township, the plaintiff filed his bill in the Court of Common Pleas of Butler county, making defendants thereto the auditor and treasurer of the township and the trustees of the Miami University, and praying that the auditor and treasurer and their successors might be perpetually enjoined from collecting of the plaintiff any taxes whatsoever enacted by the State and imposed on the lands held by him under leases from the president and directors of the Miami University. The plaintiff claims an exemption from the payment of all taxes, under the provision of the tenth section of the act of 1809, and insists that the law of 1839 is inconsistent with the privilege or exemption secured to him by the former law. The bill was demurred to by the defendants; the demurrer was sustained

*742] by the Court of *Common Pleas, and the bill directed to be dismissed; and upon an appeal to the Supreme Court of the State, the decree of the Court of Common Pleas was in all respects affirmed.

In considering this case, a difficulty meets us at the threshold in the question of jurisdiction. This being neither an

appeal from, nor writ of error to, a court of the United States, but a case brought hither under the twenty-fifth section of the Judiciary Act, it must fall within some of the categories prescribed by that section, in order to justify the cognizance of it by this court; and this must appear too in the modes, and to the extent, which this court has repeatedly and distinctly announced. It is contended, in the argument on behalf of the plaintiff in error, that the act of the legislature of Ohio, of March 6th, 1839, is an invasion of his right to exemption from taxes, or rather *from all taxation*, alleged to have been conferred by the act of 1809, and therefore an infringement of that portion of the tenth section of the first article of the Constitution of the United States, which prohibits the passing of laws by the States impairing the obligation of contracts. On the other hand, it is insisted for the defendants, that the phrase "State taxes," contained in the law of 1809, was and is applicable to a well-known distinction between taxes for general revenue, and payable as a portion of the public fisc, and county or township dues levied by local power, and applicable only to purposes which were local and limited in their character. The latter would seem to be the interpretation adopted by the courts of Ohio of the two laws in question; they must have been regarded as reconcilable and consistent with each other, to justify the dismission of plintiff's bill on the merits. But whether these statutes of Ohio be reconcilable with each other, or in conflict with themselves and with the above-cited article of the Constitution, is a matter into which, according to the record before us, we do not think it material to inquire. The pleadings in this cause nowhere allege any right, title, or interest derived from or under any authority of the United States, nor the violation of any right, title, or interest so derived, nor any violation of the Constitution, nor of any right guarantied thereby. Nothing of this kind is apparent either on the face of the decree of the Court of Common Pleas, or of that of the Supreme Court of Ohio. The course of decision here, as to the requisites apparent upon the record to invest this court with jurisdiction under the twenty-fifth section of the Judiciary Act, would seem too clear, and too well established, to be misunderstood; but whether understood or regarded by parties or by counsel, this court cannot permit the disturbance of a settled rule of practice, whereby great confusion and [*743
*inconvenience would of necessity be induced. Some of the positions ruled by this court, upon the subject of jurisdiction, under the twenty-fifth section, will be here adverted to. In *Montgomery* v. *Hernandez*, 12 Wheat., 129, it is said that

"the Supreme Court has no jurisdiction under the twenty-fifth section of the Judiciary Act, unless the right, title, privilege, or exemption under a statute or commission of the United States be *specially set up*, by the party claiming it, in the State court, and the decision be against the same." In the case of *Crowell* v. *Randell*, 10 Pet., 392, the court, after reviewing all the previous cases touching the question of jurisdiction under the twenty-fifth section of the Judiciary Act, some of which cases were calculated to shed doubt upon the meaning of the statute, lays down these clear and well-defined propositions. That to give this court jurisdiction, two things should have occurred and be apparent on the record,—first, that some one of the questions stated in the section *did arise* in the court below; and secondly, that a decision was actually made thereon by the same court, in the manner required by the section. That if both these do not appear on the record, the appellate jurisdiction fails. It is not sufficient to show that such a question *might have occurred, or such a decision might have been made in the court below*. It must be demonstrable, *that they did exist, and were decided*. In the case of *McKinney* v. *Carroll*, 12 Pet., 66, it is said, two things must be *apparent on the record*, to give the Supreme Court jurisdiction under the twenty-fifth section of the Judiciary Act; — first, that some one of the questions stated in that section did arise in the State court; and secondly, that a decision was actually made thereon in the manner required by the section.

The same positions are ruled, almost in the identical words, in the cases of *Coons* v. *Gallaher*, 15 Pet., 18, and of *Fulton* v. *McAffee*, 16 Pet., 149.

In the last case which will be here cited, that of *Armstrong* v. *The Treasurer of Athens County*, reported in 16 Pet., 281, this subject of jurisdiction under the twenty-fifth section of the Judiciary Act appears to have been still more elaborately treated than it had been previously done, and the law concerning it propounded in a series of six plain propositions; they are as follow. That to give jurisdiction, it must appear on the *record itself* that the case is one embraced by the section,[1]—first, either by express averment or by necessary intendment in the pleadings in the case; secondly, by directions given by the court, and stated in the exceptions; or, thirdly, when the proceedings are according to the laws of Louisiana, by the statement of the facts, and of the decis-

[1] FOLLOWED. *Neilson* v. *Lagow*, 12 How., 109; *Christ Church* v. *Philadelphia*, 20 Id., 28. CITED. *Doe* v. *Eslava*, 9 How., 444.

ion as is usually made in *such cases by the court; [*744
fourthly, it must be entered on the record of the proceedings of the appellate court, in cases where the record shows that such a point may have arisen and may have been decided, that it was a fact raised and decided, and this entry must appear to have been made by order of the court or by the presiding judge by order of the court, and certified by the clerk as part of the record in the State court; or, fifthly, in proceedings in equity, it may be stated in the body of the final decree of the State court; or, sixthly, it must appear from the record, that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree without deciding it.

Thus, with respect to the construction proper to be given to the twenty-fifth section of the Judiciary Act, and with respect also to the modes of presenting upon the records from the State courts the questions arising under that section, which can properly draw the decisions of those courts within the cognizance of this tribunal, we find a series of adjudications embracing and settling the law as to both these subjects. The rules and principles settled by those adjudications are entirely approved, and could not be disturbed without much inconvenience and mischief. Recurring to the record of the case under consideration, and regarding it as deficient in all the requisites to give jurisdiction, according to the express demands of the authorities cited, we therefore adjudge and order, that the writ of error in this case be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record of the Supreme Court of the State of Ohio, and was argued by counsel. On consideration whereof, and it appearing to the court here, from an inspection of the transcript of the record, that there is nothing upon its face to give this court jurisdiction in the case, it is thereupon now here ordered and adjudged by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

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*WILLIAM MCDONALD, ADMINISTRATOR OF DUNCAN MCARTHUR, DECEASED, PLAINTIFF IN ERROR, v. MATTHEW HOBSON. [*745

Where the complainant and respondent in a suit in chancery entered into a mutual covenant, that, pending the suit, they would divide the money

between them in certain proportions, and that if, in the said suit, it should be decreed that these were not the correct proportions, they would respectively pay the difference so as to conform to the decree; and the result of said suit was a dismissal of the complainant's bill, with costs; and the respondent brought an action of covenant against the complainant, reciting the agreement in his declaration, with an averment, that, by virtue of the decree of dismissal, he was entitled to receive a certain sum of money,—held that this declaration was bad.

The agreement looked to a judicial determination of the rights of the parties in some court of law or equity, and the declaration omits all averment that these rights had been so settled.

The decree of dismissal did not, of itself, prove that the complainant owed the respondent any thing. It only proved that the respondent was not indebted to the complainant.

Nor is this defect in the declaration cured by verdict. It cannot be presumed that evidence was given upon the trial to show that some decree had adjusted the amount due, as claimed in the declaration, because this would be presuming against the record, which recites the substance of the decree. A total omission to state any cause of action is a defect which a verdict will not cure. [1]

The averment of the *virtute cujus* is insufficient either as a matter of law or fact;—as law, because no such legal consequence could follow from the premises, and as fact, because the averment was in contradiction to the record itself.

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Ohio.

There was no bill of exceptions in the case, but the whole record was brought up, upon the allegation of a fatal defect in it, because no cause of action was shown by the plaintiff below in his declaration.

Hobson, a citizen of Alabama, brought an action of covenant against McDonald, as the administrator of McArthur. As the whole case depended upon a very nice point of pleading, the Reporter has thought it proper to insert the whole of the declaration, which was as follows:—

"William McDonald, administrator of all and singular the goods, &c., of Duncan McArthur, deceased, (which said William is, and the said Duncan was, at the time of his death, a citizen and resident of the State of Ohio,) was summoned to answer unto Matthew Hobson, a citizen and resident of the State of Alabama, in the said United States of America, of a plea of covenant broken; and thereupon the said Matthew, by Wm. Key Bond and H. Stanbery, his attorneys, complains: for that whereas, heretofore, to wit, on the 25th day of Sep-

[1] S. P. *Reaner* v. *Bank of Columbia*, 9 Wheat., 595; *Miner* v. *Mech. Bank of Alexandria*, 1 Pet., 67; *Pearson* v. *Bank of Metropolis*, Id., 89; *Stockton* v. *Bishop*, 4 How., 155; *Washington* v. *Ogden*, 1 Black, 451; *De Sobry* v. *Nicholson*, 3 Wall., 420; *Kenrick* v. *United States*, 1 Gall., 208; *Scull* v. *Higgins*, Hempst., 90; *Stanley* v. *Whipple*, 2 McLean, 35; *Kemble* v. *Lull*, 3 Id., 272; *United States* v. *The Virgin*, Pet. C. C., 7; *Gray* v. *James*, Id., 476; *Dodson* v. *Campbell*, 1 Sumn., 319.

tember, A. D., 1830, at Chillicothe, in the said district of Ohio, by a certain article of agreement, made and executed, as well by the said Matthew as by the said Duncan, and sealed with their seals respectively, which said article being on file in this court, *as an exhibit in the case in chancery hereinafter mentioned, the said plaintiff is unable to make [*746 profert thereof, it was, among other things, witnessed: That whereas, on the 10th day of November, in the year of our Lord 1810, a contract was entered into by and between John Hobson and Matthew Hobson, (the said plaintiff,) of the one part, and Duncan McArthur, (the said defendant's intestate,) of the other part, providing for the withdrawal of certain entries of land-warrants, and the relocation of the same, as by reference to said contract will appear, since which time the said John Hobson had transferred his interest in said contract to the said Duncan McArthur; and whereas, on the 26th of May, 1830, the Congress of the United States passed and enacted a certain statute, in virtue of which it became competent for the parties to the said last-mentioned contract, as holders and owners of the reëntries made under said last-mentioned contract, to relinquish the same to the United States, and receive therefor the amount at which the lands included in said entries were valued by an inquest appointed by the United States, with interest, as by the said statute would appear. And whereas the said Matthew and Duncan were each willing to make such relinquishment to the United States, and avail themselves of the benefits of the said act of Congress, but had disagreed about their respective rights under said last-mentioned contract; in consequence of which said disagreement the said Duncan McArthur had then recently instituted a certain suit in chancery in the Supreme Court of the State of Ohio, in and for the county of Ross, in said State; and, among other things, had obtained an injunction in said cause, restraining the said Matthew Hobson from receiving any money under the said act of Congress, until the matters could be inquired into, as by reference to said suit would fully appear. And whereas, (as is further recited by said article of agreement first herein mentioned,) the said parties, to wit, the said Matthew and Duncan, were then mutually willing and anxious that the said money, so appropriated by the said act of Congress, or such part of it as should await the determination of said suit, should not remain inactive, and did therefore which to put the whole matter in such state as would make the fund available and profitable, pending the same suit, but without in any manner affecting, or being held, or interpreted as affecting, their said

controversy, in order to accomplish which it had then been determined and arranged, that the said Matthew should assign and transfer to the said Duncan all the interest of the said Matthew of, in, and unto the said entries and warrants in such way as would enable the said Duncan to receive from the United States the moneys aforesaid, out of which said *747] money the said Duncan should at *once pay to the said Matthew the sum of eleven thousand five hundred dollars, and retain the balance of the same in his, the said Duncan's, possession; and the said Duncan, in and by the said article of agreement first herein mentioned, did covenant, to and with the said Matthew, that if, in the said suit so instituted as aforesaid, it should be held, adjudged, decreed, or determined, that the said Matthew, his heirs or assigns, executors or administrators, were, or should be, entitled to any greater portion of said money, directly or indirectly, than the said sum of eleven thousand five hundred dollars, then, and in such case, he, the said Duncan, his heirs, executors, or administrators, should and would pay to the said Matthew, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, any such excess over and above said sum, together with interest on such excess, from the day of the date of said article of agreement, which said covenant last aforesaid, it was provided by said article of agreement, should be held to embrace any judgment, order, or decree, which might produce the said result, whether made and rendered in said suit in chancery, or in any other suit, or before any other tribunal, founded on the same subject-matter or contract; and in and by said first-mentioned article of agreement, it was further witnessed, that the said Matthew Hobson did thereby covenant to and with the said Duncan McArthur, that in case it should be determined, held, ordered, adjudged, or decreed in said chancery suit, or before any other tribunal finally decided in a suit founded on the same subject-matter, that he, the said Matthew Hobson, was entitled to a less sum than the aforesaid sum of eleven thousand five hundred dollars, then, and in such case, he, the said Matthew Hobson, his heirs, executors, and administrators, should and would refund and pay to the said Duncan McArthur, his heirs, executors, administrators, or assigns, at the Bank of Chillicothe, the said amount so received by him beyond what he was entitled to, with interest thereon from the said date of said article of agreement.

"The said plaintiff further says, that, in performance of his covenant in that behalf in said article of agreement mentioned, he did, afterwards, to wit, on the said 25th day of September,

A. D., 1830, at Chillicothe aforesaid, assign and transfer to the said Duncan McArthur all the interest of him, the said Matthew, of, in, and unto the said entries and warrants; which said assignment and transfer was then and there accepted and received by the said Duncan in discharge of the said covenant of the plaintiff in that behalf so made as aforesaid. In virtue of which said assignment and transfer, the said Duncan, afterwards, to wit, on the same day and year last aforesaid, at Chillicothe aforesaid, did receive from the United States the moneys so appropriated, amounting, in the whole, to a large sum of money, to wit, the sum of fifty-seven thousand six hundred and eight dollars. [*748

"And the said plaintiff further says, that such proceedings were afterwards had in the said suit in chancery, referred to in said before-recited article of agreement, that afterwards, to wit, at the December term, A. D., 1831, of said Circuit Court for the Seventh Circuit and District of Ohio, the said suit in chancery was, on the petition of said Matthew Hobson, on the ground of his residence and citizenship in the State of Alabama aforesaid, removed to and docketed in the said Circuit Court; and such further proceedings were afterwards had in said suit, that the same was finally heard and decided before the Supreme Court of the United States at Washington, (to which said court the same had been taken by appeal from the decree of said Circuit Court,) at the January term thereof, A. D., 1842; and such decree was, by the said Supreme Court of the United States then and there rendered, that it was adjudged and ordered, that the said Matthew Hobson should recover against the complainants in said suit, viz. Allen C. McArthur, James D. McArthur, Effie Coons, Mary Trimble, Eliza Anderson, Frances Walker, and John Kercheval, heirs at law of said Duncan McArthur, (he, the said Duncan, having deceased during the pendency of said suit, and the said last-mentioned complainants having been made parties thereto in his place and stead,) the sum of one hundred and sixty-six dollars and eighty-three cents, for his costs therein expended, and that he have execution therefor; and further, that the said cause should be, and the same thereby was, remanded to the said Circuit Court, with directions to the said last-mentioned court to dismiss the bill without prejudice.

"And afterwards, to wit, at the July term, A. D., 1843, of the said Circuit Court, to which the mandate of the said Supreme Court had been duly sent for execution of the said last-mentioned decree, the said bill was, by the order of said Circuit Court, in conformity with said mandate, dismissed

without prejudice; all which will more fully and at large appear by reference to the record and proceedings of said suit in chancery, and the said mandate, and several orders and decrees therein, now in said court remaining.

"And the said plaintiff further avers, and in fact says, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the said defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by the said Duncan McArthur as aforesaid, than the said
*749] sum of *eleven thousand five hundred dollars, (which last-mentioned sum the plaintiff admits he received from said Duncan at and after the execution of said article of agreement,) to wit, the sum of three thousand two hundred and one dollars, with interest thereon from the said 25th of September, A. D., 1830. Of all which premises the said defendant, afterwards, to wit, on the 10th day of July, A. D., 1843, at Cincinnati, in the District of Ohio aforesaid, had due notice; yet neither the said Duncan, whilst in life, nor the said defendant, as administrator as aforesaid, since the decease of said Duncan, has at any time, though thereto requested, paid to said plaintiff the said last-mentioned sum of money, at the Bank of Chillicothe or elsewhere, or any part thereof, but the same to do have hitherto refused, and the same, with the accruing interest, still remains wholly due and unpaid. Wherefore the said plaintiff saith, that neither the said Duncan nor the said defendant, his administrator as aforesaid, hath kept the said covenant in that behalf, but the same is broken, to the damage of the said plaintiff of ten thousand dollars; and therefore he brings suit, &c.

"BOND & H. STANBERY, *Attorneys for Plaintiff.*"

The defendant demurred to this declaration, but his demurrer was overruled.

At December term, 1843, the defendant craved oyer of the agreement, and pleaded *non est factum* and *non tiel record.* The plaintiff joined issue upon both pleas.

The case was submitted to the court upon both issues, neither party requiring a jury. The court decided in favor of the plaintiff upon both pleas, and assessed the damages at $5,833.30, with costs.

The defendant, McDonald, sued out a writ of error, and assigned the following causes:—

1st. That the declaration aforesaid, and the matters therein contained, are not sufficient in law to maintain the said action.

2d. That said judgment was given in favor of the said

plaintiff, when, by the laws of the land, it ought to have been given for the defendant.

3d. It does not appear, from the record, that there was any cause of action in favor of the said plaintiff against the said defendant, at the commencement of this suit; but, on the contrary, it does appear, from the record, that there was no cause of action.

Upon this writ of error, the cause came up to this court.

It was argued by *Mr. Vinton*, for the plaintiff in error, and *Mr. Stanbery*, for the defendant in error.

**Mr. Vinton* made the following points:— [*750

1st. Under the contract on which the suit was brought by Hobson, it was a condition precedent to his right to the money claimed, that he should obtain a decree in the suit mentioned in that contract establishing his right to it.

Such being the character of the contract, the declaration must aver the fulfilment of this condition precedent. 1 Chit., 351–401.

Till such condition precedent is performed, no action accrues on the contract. 1 Chit., 353; Doug., 683.

Every material *fact* which constitutes the ground of the plaintiff's action must be alleged in the declaration, and no proof at the trial can make good a declaration which contains no ground of action. *Buxendon* v. *Sharp*, 2 Salk., 662; *Drowne* v. *Stimpson*, 2 Mass., 444; *Rushton* v. *Aspinwall*, Doug., 683; *Avery* v. *Hoole*, Cowp., 825; 1 T. R., 145.

And after verdict nothing is to be presumed but what is expressly stated in the declaration, and is necessarily implied from those facts which are stated. *Spieres* v. *Parker*, 1 T. R., 141.

The averment in the declaration, that, by virtue of the decree set forth by the plaintiff below, he was well entitled to the money he sued for, is an inference of law deduced from the facts averred, and as such not traversable. A traverse must be taken on matter of fact, not on matter of law. 1 Chit., 645; 1 Saund., 23, *n.* 5; 11 Price, 343; 3 Wils., 284; 1 Moo. & P., 803.

The only exception to the rule, that the *virtute cujus*, *pretextu*, or *per quod*, are not traversable, is when they are compounded of law and fact, which are connected together. Then a traverse may be taken for the purpose of trying the fact which is connected with the law. 1 Chit., 646; *Beale* v. *Simpson*, 1 Ld. Raym., 413; *Trustees of Rochester*, v. *Symonds*, 7 Wend. (N. Y.), 396; 2 Blackf. (Ind.), 776; 2

Young & J., 304; 1 Saund., 23, *n.* 5; 11 Price, 343; 3 Wils., 234.

Mr. Stanbery, for defendant in error.

There are three causes of demurrer stated specially:—

1. That plaintiff has not shown any cause of action against McArthur, or his administrator.

2. That he has shown no breach of the covenant.

3. That there is nothing to show the plaintiff entitled to demand the said sum of $3,201, and interest.

The three grounds of demurrer are in effect one,—that no cause of action is shown; and though called, or intended for, a special demurrer, is in truth a general demurrer, for it relies on matter of substance, not of form.

*751] *We suppose the point intended to be made is, that we have not averred or shown how the final decree, which upon its face is simply a decree of dismissal, made the defendant liable to the payment of the $3,201.

Very clearly, the decree is not for any money; and if our action was upon that alone, we should show no case. It does not, *per se*, give us any action for any money. But our action is not founded on the decree, but on a covenant anterior to it.

In the sealed instrument containing that covenant, it is acknowledged, in such form as to estop any proof to the contrary, that certain lands belonging to this plaintiff and McArthur were to be paid for by the United States; that a controversy existed as to their relative rights to the land, which had led McArthur to commence a suit in chancery to enjoin the payment of the money by the United States; that both parties were anxious to make the fund available, and therefore they temporarily divide the fund, the plaintiff taking $11,500, McArthur all the residue. Upon this state of things the covenant is made; providing that the parties shall stand, as to the money, *in statu quo*, until the determination of the suit; and that if, directly or indirectly, by any decree to be made in such suit, it should be held that the $11,500 was less than Hobson's portion of the whole sum, or if such a result should in any way flow from any decree, then McArthur covenants to pay any excess that Hobson might be entitled to.

Now it is perfectly clear that the parties did not contemplate that the decree itself should be a decree for the money in dispute. A covenant to pay such a decree would be useless, for the decree itself would be better than the covenant to pay it. Besides, the express language is, that the covenant is to take effect upon any decree, which, directly or indirectly,

should or might produce a result in favor of the plaintiff's right to a greater portion of the money than the $11,500.

In setting forth a decree, then, which is not a decree for the money, we show the sort of decree which is contemplated by the covenant; but yet not such a decree as, without further averment, would make a case against McArthur.

We do not stop, however, by showing the decree, but by positive averment state, that in virtue of it Hobson became entitled, under the covenant, to the sum stated beyond the $11,500. In effect, following the language of the covenant, we aver that this was a decree which produced that result.

Must we show, by averment, how a decree of dismissal produced the result alleged? That is the only question that can be made. In other words, must we introduce all our evidence into our declaration? Unquestionably we must, on the trial, *prove the allegation, that the liability to pay more than the $11,500 resulted from the covenant and the decree. We admit that, but cannot admit that we must spread all the evidence out in the declaration. [*752]

There are instances in which the mere averment of the fact is not good, without showing the manner; as where there is a covenant to pay money on the release of all actions. An averment that the plaintiff executed a release will not do, for it must appear how the release was made, *i. e.* by an instrument under seal, that the court may judge of its sufficiency.

In this case that doctrine does not apply. The fact of liability to pay is not dependent upon a technical thing that can only be done in one way, and which must always be alleged to have been done in that way.

Simply, the case is an action for so much money received by McArthur to Hobson's use; and the only reason why we might not recover in *indebitatus assumpsit* is, that the covenant under seal drives us to this action of the higher nature.

It well appears that a certain sum of money arising out of joint property of Hobson and McArthur was in the treasury of the United States. The parties differ in the division: McArthur files a bill to enjoin it in the treasury; they then agree that Hobson shall take $11,500, and McArthur the residue, amounting to $46,108, and to stand upon that division until the end of the suit pending. The plaintiff avers the suit to be ended, and that he is entitled to $3,201 of the moneys so received by McArthur beyond the amount he has received; and all this is admitted by the demurrer.

I confess I am not able to see why this is not a good declaration.

But the case does not now stand upon the demurrer to the declaration, but upon a writ of error after a finding or verdict for Hobson, and a judgment consequent on such verdict.

It appears that, at the December term, 1843, the court below overruled the demurrer, and the defendant then took leave to plead, and filed two pleas,—*non est factum* and *nul tiel record*. Issue being joined on these pleas, the trial thereof was submitted to the court at the July term, 1844, and there was a finding on both pleas for Hobson, an assessment of damages, and judgment.

If there were any objection that might have been sustained to the declaration in consequence of any supposed defective statement of the plaintiff's right to recover the $3,201, with interest from September 25, 1830, it is now, after verdict, to be intended that such defect was supplied in the proof. The rule on this subject is nowhere better laid down than by Lord Mansfield, in *Rushton* v. *Aspinwall*, Doug., 679:—

*753] "But on looking into the cases, we find the rule to be, that where the plaintiff has stated his title or ground of action defectively or inaccurately,—because, to entitle him to recover, all circumstances necessary in form or substance to complete the title so imperfectly stated must be proved at the trial,—it is a fair presumption, after verdict, that they were proved; but that, where the plaintiff totally omits to state his title or cause of action, it need not be proved at the trial, and therefore there is no room for presumption."

In our declaration we set out the covenant with all necessary strictness, and aver that, in virtue of the decree, McArthur became bound to pay the money demanded. This averment, "in virtue of said decree," was traversable.

Where the *virtute cujus* contains only matter of law, it is not traversable; otherwise, where it is mixed with fact. *Beal* v. *Simpson*, 1 Ld. Raym., 408; Trustees of *Rochester* v. *Symonds*, 7 Wend. (N. Y.), 392.

Now if the covenant had been limited to a decree which, *per se*, was to be a decree for the money, and had been to pay so much money as should be so decreed, the decree alone would fix the liability without reference to any fact *aliunde*. Such is not the covenant, nor such the decree contemplated by the parties.

The decree may be any decree which, directly or indirectly,

that is in itself, or in reference to matter *dehors*, may produce the result.

When, therefore, we allege a decree which does not *per se* give us the money, or establish our right to it, and aver that, in virtue of it, we became, under the covenant, well entitled to a specific sum, the averment is clearly mixed with matter of fact, and is traversable, and must be proved at the trial, unless admitted by the pleadings.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States, held in and for the District of Ohio by the district judge.

The questions presented arise upon the record of judgment, no bill of exceptions having been taken to the rulings of the court at the trial. It is insisted that the declaration is fatally defective, and the judgment for that reason erroneous.

The action is covenant, brought by Matthew Hobson against William McDonald, as administrator of Duncan McArthur, deceased.

The declaration recites, that, on the 10th of November, 1810, a contract was entered into between the said Matthew and Duncan, providing for the withdrawal of certain entries of *land-warrants and relocation of the same; that on [*754
the 26th of May, 1830, Congress passed an act which enabled the parties, as holders and owners of these warrants, to relinquish the same, and receive their value in money; that the said Hobson and McArthur were each willing to make such relinquishment, and to avail themselves of the provisions of the act, but that they had disagreed as to their respective rights under the contract of 1810; in consequence of which disagreement, McArthur had commenced a suit in chancery in the State of Ohio against Hobson, and had obtained an injunction restraining him from receiving any of the moneys, under the act of Congress, until the matters in dispute should be settled; that both parties had then become anxious that the money, or such part of it as must otherwise await the determination of the suit, should not remain useless, and therefore desired to put their differences on such a footing as would make the fund available and profitable during the litigation, and, at the same time, without in any manner affecting the suit; that, in order to accomplish this, it had been agreed that Hobson should assign and transfer to McArthur all his interest in the said warrants, so as to enable him to receive the money from the government, out of which he should, at once, pay over to Hobson the sum of $11,500, and retain the bal-

ance; and the said McArthur did then and there covenant to and with the said Hobson, that if it should be adjudged and determined in the suit in chancery that the latter was entitled to a greater portion of the money than the $11,500, directly or indirectly, then and in such case McArthur would pay to him such further amount, with interest, at the Bank of Chillicothe. It was, at the same time, declared, that the covenant should be held to embrace any judgment or decree that might produce this result, whether rendered in the suit in chancery or in any other suit, or before any other tribunal, founded on the same subject-matter. And the said Hobson did also then and there covenant to and with McArthur, that in case it should be adjudged and determined in the suit in chancery, or in any other tribunal, that he was entitled to a less sum than the $11,500, then and in such case he would refund to McArthur the excess so received, with interest, at the Bank of Chillicothe.

The declaration, then, after setting out the transfer of the interest of Hobson in the land-warrants to McArthur, and also the receipt of the sum of $57,608 from the government by the latter, averred, that such proceedings were had in the suit in chancery, that it was removed into the Circuit Court of the United States, and that such further proceedings were there had, that it was finally heard and decided in the Supreme Court of the United States, at Washington, at the January *755] term, 1842, to *which the same had been carried by appeal, and such decree was then and there rendered, as adjudged and ordered, that Hobson recover against McArthur $166.83 for his costs, and that the cause be remanded to the Circuit Court, with directions to dismiss the bill without prejudice,—all which was afterwards done at the following July term of the Circuit Court accordingly.

The plaintiff then avers, that, in virtue of the decree aforesaid, he is well entitled to have and demand of and from the defendant, as administrator as aforesaid, a greater portion of the said moneys, so received by McArthur, than the sum of $11,500, to wit, the sum of $3,201, with interest from the 25th of September, 1830, the date of the articles of agreement,—of all which the defendant had notice.

The usual breach is then set out, concluding to the damage of the plaintiff of $10,000.

The defendant put in a demurrer to the declaration, which was afterwards overruled by the court. He then craved oyer of the articles of agreement, and, after setting them out *in hæc verba*, plead, 1st, *non est factum*, and 2d, as to the decree, *nul tiel record*. Upon which issues were

joined, and were found for the plaintiff, and the damages assessed at the sum of $5,833.30.

The question presented for our decision is as to the sufficiency of the declaration after verdict, and this depends upon the construction to be given to the articles of agreement upon which the action is founded, as set forth in the pleadings.

The construction given by one pleader is, that the decree or order on the suit in chancery mentioned in the agreement, and upon which the right to any portion of the fund in dispute, beyond the $11,500 already received is made to depend, need not determine either the right to any excess beyond that sum, or, if any, the amount of it; but, on the contrary, either or both may be established by evidence independently of the proceedings in that or any other suit, and that the decree is material only as showing the suit to be at an end. Hence, after setting out the decree by which it appears that the bill of complaint had been dismissed with costs, the pleader proceeds to aver, that, in virtue of the decree, the said plaintiff is well entitled to have and demand of and from the defendant a greater portion of the said moneys, so received by the said McArthur, than the sum of $11,500, to wit, the sum of $3,201, with interest.

This, it is said, is an averment of a matter of fact, and not of a conclusion of law; and that, after verdict, the court must presume that evidence was given on the trial to establish the right of the plaintiff to the amount recovered over and above *the sum already received, and that, upon this ground, the judgment may well be sustained. [*756

This is the view of the case, as set forth in the declaration, and which was sought to be sustained in the argument; and, conceding it to present the true construction of the articles of agreement,—though the averment is certainly informal and illogical in the mode of stating it, as it is difficult to perceive how the right to the sum of money claimed, or to any sum, can result to the plaintiff, even as a matter of fact, in virtue of a decree dismissing a bill in chancery against him, —yet, with the usual intendments of the law in support of a judgment after verdict, it might, perhaps, be deemed sufficient. The appellate court would presume that evidence had been required and given, under the averment, at the trial, to support the claim to the amount recovered. 1 Saund., 228, *n.* 1; 1 Chit. Pl., 589; 1 Man. & Sel., 234; Doug., 68; 7 Wend. (N. Y.), 396.

But the court is of opinion, that the pleader has mistaken altogether the true construction of the agreement in the par-

ticular mentioned, and has placed the right of action upon ground not warranted by any of the stipulations of the parties. This will be apparent, on recurring for a moment to the agreement as set forth in the pleadings.

The recitals show, that a dispute had arisen in respect to the division of a large sum of money coming from the government, in which the parties were jointly interested, and that a suit had been commenced by McArthur against Hobson, in chancery, enjoining him from receiving any part of it, until their rights had been judicially determined. The effect of this proceeding was to tie up the fund in chancery, pending the litigation, and until the court could make a proper distribution. It was to remedy this inconvenience, and to enable the parties to possess themselves of the fund, pending the controversy, that the agreement in question was entered into, and which was, in substance, as follows. McArthur was to receive the whole of the money from the government, and at once pay over to Hobson $11,500, retaining in his possession the residue; and if, in the suit then pending, it should be determined, directly or indirectly, that Hobson was entitled to a larger amount for his share, then McArthur would pay such additional sum, with interest, at the Bank of Chillicothe; and, on the other hand, if it should be determined that Hobson's portion of the fund was less than the sum already received, he would refund the excess, with interest, to McArthur, at the same place.

The object of the parties was to procure the money from the government, where it was lying idle, and, at the same time, to *make a provisional distribution, without in any way interfering with the suit in chancery. That was to be carried on for the purpose for which it was originally commenced; but as a provisional division had taken place, it became necessary to provide for a special decree, having reference to the changed situation of the fund, and, as the suit had become an amicable one, to provide, also, for the payment of any sum that might be found due from either party. Hence the stipulation, that the decree should be made upon the basis of this provisional distribution, and that the parties should pay over at once any balance that might be found due, without further proceedings.

*757]

The strongest proof exists, in the agreement itself, that the parties did not intend to interfere with the settlement of their differences by the suit in chancery, or by some other suit to be instituted for that purpose; for the last article provides, that this contract shall not be used by either party

in the suit pending, or in any other suit, or in any other court, or in any proceeding under the contract of 1810, as affecting or in any way changing the rights of either in the matters in dispute; but that the suit in chancery, or any suit which either might think proper to bring, should be conducted, in all respects, as though this contract had not been entered into.

We think, therefore, it is clear, the parties intended that their respective rights to the common fund in question should be settled and fixed by the chancery suit then pending, or by some other legal proceeding that might be instituted for the purpose; and that, when so settled, they would conform the provisional distribution already made to the decision, by paying over at once the amount adjudged to be due; for we have seen, that, instead of interfering with the suit which had been already commenced, great pains are taken to guard against any such consequence, and, as if apprehensive that their rights might not be definitively settled by that suit, provision is made for the institution of any other, by either party, before the same or any other tribunal having cognizance of the case.

In a word, the whole amount of the agreement is, to provide, first, for a provisional distribution of the fund, so that the money might be used pending the litigation; secondly, for a judicial determination of the controversy in respect to it, in some court of law or equity; and, thirdly, for the payment of any balance that might be found due from either, at the Bank of Chillicothe.

This being, in our judgment, the legal effect of the agreement, it is manifest that the pleader has failed to comprehend it, and has therefore failed to set out any cause of action in *the declaration. There is a total omission [*758
of any averment of the fact upon which the right of the plaintiff to any portion of the fund beyond the $11,500 is made to depend, namely, a judgment, order, or decree awarding to him the amount. There is not only an omission of any such averment, but the contrary appears upon the face of the declaration, as the decree in the chancery suit is set out, and its contents particularly described.

It is a decree simply dismissing the bill of complaint, with costs. It may show that the defendant (now plaintiff) had not received more than his share of the money in the division, otherwise the bill would not have been dismissed; but not that the defendant was entitled to more, unless the dismissal of a bill is evidence that something is due from the complainant to the defendant.

Neither can we presume, even after verdict, that evidence was given at the trial, by which it was made to appear that the decree did determine that the amount which has been recovered in this suit was due from McArthur to the plaintiff; for this would be a presumption against the face of the record. That shows what decree was rendered, and any one of a different import would have been inadmissible under the pleadings.

Besides, there should have been an averment, not only that a decree was rendered in the suit in chancery, but that the sum claimed had been therein adjudged to the plaintiff. This is made the foundation of the right to the money, and, of course, of the action, by the agreement; and the omission is fatal to the judgment.

It is the case of a total omission to state any title or cause of action in the declaration,—a defect which the verdict will not cure, either at common law or by statute. Doug., 683; Cowp., 826; 1 Johns. (N. Y.), 453; 2 Id., 557; 17 Id., 439.

The averment, that, in virtue of the decree, the plaintiff was well entitled to recover, &c., is insufficient, either as matter of law or of fact. As matter of law, it was given up in the argument, as no such legal consequence could follow from the premises stated; and, as matter of fact, the averment is in contradiction to the record itself. That shows, that the decree determined nothing in favor of the plaintiff; dismissed the bill against him with costs, and nothing more.

Some weight was given, in the argument, to the peculiar phraseology of the covenant, on the part of McArthur, wherein it is provided, that, if it should be determined in the chancery suit, that the plaintiff was entitled to any greater portion of the money, directly or indirectly, than the $11,500, *759] then, and *in that case, he would pay, &c. The object of using the words, *directly* or *indirectly*, in the connection found, is, perhaps, at best, but matter of conjecture. But as the chancery suit was against Hobson, for the purpose of asserting claims and demands against him by the complainant, it was, according to the rules of chancery, an inappropriate proceeding for the purpose of asserting claims on the part of the defendant against the complainant. These would have required a cross-bill. But as the suit had become an amicable one, it was provided that the claims of both parties might be settled therein, notwithstanding the irregularity of the proceeding, and hence the use of the peculiar phraseology referred to.

This explanation receives some confirmation from the covenant, on the part of Hobson, with McArthur. These words

are there omitted. The suit was appropriate to enforce any claim against him.

It was said, also, and some stress laid upon the remark, that the agreement would not have provided for the voluntary payment of the balance that might be due from one to the other, if it had contemplated an adjustment of the particular amount by the suit in chancery, as, in that event, the payment could be enforced by the decree.

But we think this consideration leads to an opposite conclusion. How could the payment be made at the bank, as provided, unless the amount in dispute was first adjusted.

There was no dispute about the payment, except as respected the amount. That being determined, each party was ready to satisfy it. Besides, it is difficult to believe, that, in providing so specially for the settlement of the controversy by judicial proceedings, the parties had in view simply the determination of the question whether the one or the other had recived more of the fund than his share, without regard to the amount. Such a decision would have been idle, as it could lead to no practical result in the settlement of their differences.

Upon the whole, for the reasons stated, we think the judgment below erroneous, and should be reversed, and the cause remanded to the court below for further proceedings.

Mr. Justice WAYNE, being indisposed, did not sit in this cause.

Mr. Justice WOODBURY dissented.

ORDER.

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 Ohio, and was argued by counsel. On consideration whereof, it is now here ordered and ad- [*760
judged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

W. AND H. MASSINGILL, PLAINTIFFS, *v.* A. C. DOWNS, CLAIMANT.

Where a judgment was obtained in the Circuit Court of the United States for the District of Mississippi in 1839, and in 1841 the State of Mississippi passed a law, requiring judgments to be recorded in a particular way, in order to make them a lien upon property, this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute.[1]

THIS case came up from the Circuit Court of the United States for the Southern District of Mississippi, upon a certificate of division in opinion between the judges thereof.

The facts are fully set forth in the opinion of the court, as delivered by Mr. Justice McLean, to which the reader is referred.

It was argued by *Mr. Sargent* and *Mr. Bell*, for the plaintiff, and *Mr. Lawrence* and *Mr. Badger*, for Downs, the claimant.

Mr. Sargent and *Mr. Bell* made the following points:—

1. When this judgment was entered, it became a lien on all the personal and real property of Chewning, in Mississippi. Hutch. Miss. Code, 881, 282. *Brown* v. *Clarke*, 4 How., 12; 4 Stat. at L., 184; Id., 278; *Rankin* v. *Scott*, 12 Wheat., 177; *United States* v. *Morrison*, 4 Pet., 124; *Burton* v. *Smith et al.*, 14 Pet., 464; *Taylor et al* v. *Thompson*, 5 Pet., 358.

2. The rules of court, so far as they are more than declaratory of the effect of the United States process act of 1828, adopt the State practice of November 25, 1839; they adopt nothing prospectively.

3. The State act of 1841 does not purport to operate on federal judgments. No State statute can operate *proprio vigore* to affect directly or indirectly a judgment of the federal courts. *Wayman* v. *Southard*, 10 Wheat., 1; *Bank of the United States* v. *Halsted*, Id., 51.

*761] *4. There had been no adoption by Congress, or the federal courts of Mississippi under the authority of Congress, of the State act requiring the filing of an abstract of judgments in the county where the defendant's property is situated, at the time this execution was levied.

[1] CITED. *United States* v. *Sturgis*, Law Jour., p. 532, and *post* *765 *n*, 14 Fed. Rep., 811. And see 4 Cent. *707 *n*.

Mr. Lawrence, for the claimant.

Is the law of Mississippi as to the limitation of liens of judgments applicable to the judgments of the federal courts?

We contend that it is, because the lien of a judgment is something affecting property, forming no intrinsic quality of the judgment itself as such, but derived entirely from the sovereignty within whose jurisdiction the property affected by it is situated.

It is said that a State cannot interfere with and control the federal courts in relation to the effect and operation of their judgments; that it would leave those courts entirely at the mercy of the State legislatures.

This is the most plausible, if not the only, argument against us in this case, and a slight examination will show that it is of no real weight.

We do not contend that the States can interfere with the *effect* of the *judgments* of the United States courts, either in making them less than judgments in fact or in law, or in preventing the fruition of those judgments by process of execution. Congress has, under the Constitution, the exclusive power to regulate the proceedings in the United States courts; and even where the forms of process used in the States are adopted, it is, after all, but an exercise of the same power of Congress, and not a recognition of any authority over the subject by the States. *Wayman* v. *Southard*, 10 Wheat., 1.

If, therefore, a State law should enact that a judgment should be no evidence of debt, or should abolish all writs of execution, such a law would not be applicable to the proceedings of the federal courts, because, in the first instance, it would take away the proper intrinsic effect of the judgment itself, and make it, in whole or in part, no judgment; and, in the other instance, it would take from the United States courts a necessary part of the organization of a court, namely, the power to carry into effect its own judgments.

But the lien of a judgment is not an intrinsic quality of the judgment itself, nor is it any part of the process of a court for enforcing a judgment.

1st. A judgment is in effect what it is defined to be in theory, "the sentence of the law given in a court of law."

The lien of a judgment is a quality added to it,—a quality *not in any manner altering it as the sentence of the court, but superadded to it, taking effect on property, [*762 qualifying property, restraining the alienation of property; not by an act of appropriation and sale under an execution, (which come under the denomination of "proceedings," and

are subsequent to the judgment,) but as the effect of the mere existence of the judgment.

Now it is a matter of legal history, that, originally, judgments did not constitute any lien at all on property in England, which proves that the lien of a judgment was no part of the judgment itself.

It is matter of legal history, that even executions could not be levied on lands in England before the Stat. of Westm., 2. Consequently the common law judgments could not affect real property, either by lien or otherwise.

It is true that it has been held in England, that this statute gave a lien on lands as a consequence of the elegit, and it has been supposed that therefore a lien was the consequence of every execution. But this by no means follows, for it has never been held that the right of levying an execution on personal property has created a lien on that species of property by the mere rendition of the judgment, as would have been the case if the lien resulted from the right of execution alone. We think that this consequence was peculiar to the writ of elegit, which was authorized by the Stat. of Westm., 2. It has never in England been held to result from any other writ of execution. Prior to 1824, judgments did not constitute a lien on property in Mississippi.

It is only by virtue of local law that this lien exists. It is a qualification of property which can only be derived from the sovereignty within whose jurisdiction the property to be affected by it is situated. That sovereignty can confer it or take it away, or modify it when conferred. That sovereignty can attach it to a judgment, or to a bond, or to any thing else. But wherever and however attached, it is a regulation of property emanating, not from the court, but from the local authority. *United States* v. *Crosby*, 7 Cranch, 115; *Wayman* v. *Southard*, 10 Wheat., 25; *McCormick* v. *Sullivan*, 10 Wheat., 192; *United States* v. *Morrison*, 4 Pet., 136; *Ross* v. *Duvall*, 13 Pet., 61; *Taylor* v. *Thompson*, 5 Pet., 367, 368; *Reid* v. *House*, 2 Humph. (Tenn.), 576; *Thompson* v. *Phillips*, 1 Baldw., 273, 274; *Manhattan Co.* v. *Evertson*, 6 Paige (N. Y.), 466, 467; *Conard* v. *Atlantic Ins. Co.*, 1 Pet., 443.

Second, the lien attached to a judgment is not within the meaning of the acts of Congress) any part of the "process" of a court, or of its modes of proceeding.

*763] *If it is, it must be a part either of the final process, or else of the modes of proceeding to carry the judgment into effect.

In *Annis* v. *Smith*, 16 Pet., 312, 313, this court has laid

down what "process" is, and what "modes of proceeding" are, as those terms are used in the act of 1828.

It is there said that "final process" means all the writs of execution then in use, and "modes of proceeding" are the exercise of all the duties of the ministerial officers of the States prescribed by the laws of the States for the purpose of obtaining the fruits of judgments. See also *United States Bank* v. *Halstead*, 10 Wheat., 61, 63.

Now a lien is certainly not a writ or precept of any kind. It is no part of the action of the court in a suit, nor is it the exercise of a ministerial duty of an officer of the court, nor even the result of any such exercise of duty. It is no proceeding at all, it implies no action at all; and the whole progress of a suit may go on now, as it did formerly, from the original writ to the satisfaction of the judgment by a sale under execution, without any lien whatever. It is a mere dormant, extrinsic quality, attached to the judgment not by the court, nor in the federal courts by the power creating those courts, but by another power, taking effect not on the judgment itself, but upon property, qualifying that property and restraining its alienation.

But it may be said, that the Circuit Court, in compliance with the law of 1828, did, in 1837, make a rule that the lien of judgments and decrees shall continue as now provided by law, and that the Mississippi act of 1841, now in controversy, has not been adopted.

To this we answer, that if the lien of a judgment is a regulation of property, and not a "process" or "mode of proceeding," then this rule of court can have no effect whatever. It was beyond the power of the court.

Whether or not Congress itself has the power to say what shall or shall not constitute a lien on property within a State, it is not necessary now to inquire, because we say that Congress has not attempted to do it, nor has it authorized the courts to attempt it.

We say, that, under the act of 1828, the Circuit Court of Mississippi had no power, by adoption or the want of adoption, to alter or continue a lien on property.

The act of May, 1828, directed that writs of execution and other final process, issued on judgments and decrees, and the proceedings thereupon, shall be the same in each State as are now used in each State. 4 Stat. at L., 278, 279.

The third section of that act declares, that it shall be in the power of the courts so far to alter final process in said courts as *to conform the same to any change made by the State legislatures for the State courts. [*764

The thirty-fourth section of the Judiciary Act of 1789 enacts that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or prescribe, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." 1 Stat. at L., 92.

The power of the court, then, in this respect, is confined to the alteration of final process.

The case of *Annis* v. *Smith* before referred to, (16 Pet., 312, 313,) has settled the meaning of "final process" to be writs of execution. The lien of a judgment not being a writ of execution, the court has no power to adopt it, under the third section of the act of 1828, and, besides, the third section obviously is confined to action in court.

Neither does the act of 1828, in the preceding sections, adopt the lien of judgments, unless it is "final process" or a "proceeding thereupon." But the case of *Annis* v. *Smith* has settled this latter expression to mean the exercise of a ministerial duty of some officer of the court in the service of "final process."

If this be so, then, under the thirty-fourth section of the Judiciary Act, the United States courts are bound to regard the law of the State upon the subject of the lien of judgments.

(The argument of *Mr. Lawrence* on the constitutionality of the Mississippi statute is omitted, the decision having turned upon the first point.)

Of *Mr. Badger's* argument the reporter has no notes.

Mr. Justice McLEAN delivered the opinion of the court.

This action was brought in the Southern District of Mississippi, to try the right of property which had been levied on. The plaintiffs showed a judgment of the Circuit Court, entered the first Monday of November, 1839, for $3,716.43, with interest, &c., against one J. J. Chewning and others, on which an execution had been issued and levied upon certain slaves claimed by A. C. Downs. At the time of the levy, the property was in possession of the defendant Chewning. Downs produced a mortgage on the slaves, executed by said Chewning, and regularly recorded, in favor of the "Commercial Railroad Bank of Vicksburg," to show a title in the bank adverse to the right of the plaintiffs. This mortgage bears date subsequent to that of the judgment.

On these facts, the court were requested by plaintiffs to *765] charge *the jury "to disregard the mortgage, because of the paramount right of the plaintiffs to have execu-

tion of their judgment by means of said levy, although no abstract or brief of the judgment had been recorded or enrolled in the county where the property was situated." And on this prayer for instruction to the jury, the opinions of the judges were opposed; and, at the request of the counsel on both sides, the point was certified to this court.

By the first section of the act of Mississippi of February 6th, 1841, it is provided that "all judgments and decrees of any circuit, district, or superior court of law or equity, holden within this State, shall operate as liens from the date of their rendition upon the property of the debtor, being within the county in which the sitting of such court may be holden, and not elsewhere, unless upon compliance with the conditions hereinafter enacted."

By the second section,—"That any judgment or decree heretofore rendered shall be a lien from the date of its rendition upon the property of the debtor, situated in any other county than that in which the same was rendered, on condition that an abstract thereof, on or before the first day of July next, be filed in the office of the Circuit Court of the county in which said property may be situate, in pursuance of the subsequent section of this act."

The third section provides, that where an abstract of a judgment or decree is filed in the office of the clerk of the Circuit Court, which it is made his duty to record, it shall be a lien on the property of the defendant within the county from the time of such filing.

The judgment under which the levy was made was rendered more than a year before the above act was passed.

Prior to the act of 1824, there was no statutory lien of a judgment in Mississippi. A lien was created in that State, as in England, by the delivery of the execution to the sheriff. The Stat. of Westm., 2, or 13 Ed. I., ch. 18, gave the elegit which subjected real estate to the payment of debts, and this, as a consequence, it has always been held, gave a lien on the lands of the judgment debtor. 3 Salk., 212; 1 Wils., 39.

"There is no statute in Virginia which, in express terms, makes a judgment a lien upon the lands of the debtor. As in England, the lien is the consequence of a right to take out an elegit." *United States* v. *Morrison*, 4 Pet., 136. And in *The Bank of the United States* v. *Wooster*, 2 Brock., 252, the chief justice says, "The lien depends on the right to sue out an elegit."[1]

[1] Cited. *Morsell* v. *First Nat. Bank*, 1 Otto, 360.

The same doctrine was held by the Supreme Court of
*766] *Indiana before the act of 1818 of that State, which gave a lien on the real estate of the defendant by the judgment. *Ridge* v. *Prather*, 1 Blackf. (Ind.), 401.

In North Carolina, the lien on lands is created by the delivery of the execution to the sheriff, there being no statute in that State on the subject. And in other States of the Union, the same principle has been long established.

Now in all these cases the lien arises from the power to issue process to subject real estate to the payment of the judgment, either by an extension or sale. In Maryland, this rule has been extended by long usage, so that a lien is created by the judgment without execution. *Taylor* v. *Thompson*, 5 Pet., 369.

The Circuit Courts of the United States exercise jurisdiction coextensive with their respective districts. And it has never been supposed, that, by the process act of 19th February, 1828, which adopted the process and modes of proceeding of the State courts, the jurisdiction of the Circuit Courts was restricted. The "process and modes of proceeding" in the State were adopted by Congress in reference to the jurisdiction of the Circuit Courts, and not with the view of limiting the jurisdiction of those courts.

In those States where the judgment on the execution of a State court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the State courts in a much better condition than in the federal courts.

That by the course of practice in Mississippi the lien of a judgment in the Circuit Court extended throughout the district, prior to the act of 1841, is not controverted. And the question is, whether that act can impair or affect in any respect a judgment rendered in the federal court before its passage. The point certified does not require us to consider whether the law can operate on judgment liens entered subsequent to its date. The plaintiffs in the above judgment acquired a right under the authority of the United States, and that right may be protected from any judgment of the

Supreme Court of the State which shall impair it, under the twenty-fifth section of the Judiciary Act.

*It is contended that the lien in Mississippi exists by the statute of the State, and that under the thirty-fourth section of the Judiciary Act of 1789, it is a rule of property, and that it is consequently a rule of decision for the courts of the United States, and that the process act of 1828 has no bearing upon the question. [*767

The above section provides that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in the courts of the United States, in cases where they apply."

No State statute is of more frequent application in the federal courts than the above section; and it has often been held that the settled construction of a State statute by its supreme court is considered as a part of the statute. And the statute, as thus expounded, is regarded as a rule of decision in the courts of the United States where it applies, "except where the Constitution or acts of Congress otherwise provide."[1]

The thirty-fourth section has never been considered as an act to regulate process. And it is argued that a statutory lien, being a rule of property, is applied to judgments in the Circuit Courts, under this section, without being influenced, in any degree, by the process act.

We have seen that, where there is no statutory lien, it is created by issuing and delivering to the sheriff an execution, which authorizes the sale or extension of the real estate of the defendant. In those States, it is the process authorized by the judgment which creates the lien; and in such cases we necessarily look to the nature of the process, and the extent of its operation, to determine the lien. It must act upon the land of the defendant, and consequently the land must lie within the jurisdiction of the court.

What is a judgment lien? In the argument, it was compared to a mortgage. "A mortgage is often called a lien for a debt, but it is something more. It is a transfer of the property itself as security for the debt. This is true in law and in equity." *Conard* v. *The Atlantic Insurance Company*, 1 Pet., 441. A judgment lien on land constitutes no property or right in the land itself. "It only confers a right to levy on the same, to the exclusion of other adverse interests subsequent to the judgment; and when the levy is

[1] CITED. *Leffingwell* v. *Warren*, 2 Black, 603.

actually made on the same, the title of the creditor for this purpose relates back to the time of the judgment, to cut out intermediate encumbrances."[1] Subject to this charge, the defendant may convey the land. "A judgment creditor has *768] no *jus in re*, but *a mere power to make his general lien effectual, by following up the steps of the law." What law? The law which authorizes the judgment, and the issuing of the process through which means the judgment may be satisfied. A failure to do this releases the charge on the property. *Id.*

The lien, if not an effect of the judgment, is inseparably connected with it. And this is the case, whether the lien was created by the judgment and execution, or by statute. And in either case, where the right has attached in the courts of the United States, a State has no power, by legislation or otherwise, to modify or impair it. Retrospective laws of a remedial character may be passed; but no legislative act can change the rights and liabilities of parties, which have been established by a solemn judgment.

This court therefore direct that it be certified to the Circuit Court, that the right of lien claimed by the plaintiffs under the judgment is paramount to that of the defendant claimed under the mortgage.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of Mississippi, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the right of lien claimed by the plaintiffs under the judgment it paramount to that of the defendant claimed under the mortgage; whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

[1] FOLLOWED. *Ward* v. *Chamberlain*, 2 Black, 437. CITED. *Brown* v. *Pierce*, 7 Wall., 217; *Baker* v. *Morton*, 12 Id., 158.

*Grant B. Udell and Jacob Miller, Plaintiffs in error, v. Alexander B. Davidson. [*769

The act of 1838, (5 Stat. at L., 251,) relating to preëmption rights, provides, that "before any person claiming the benefit of this law shall have a patent for the land which he may claim, by having complied with its provisions, he shall make oath, &c., that he entered upon the land which he claims in his own right, and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States should enure to the use and benefit of any one except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time."

Where a preëmptioner sold his inchoate title, which passed ultimately into the hands of a trustee, and the trustee loaned money out of the trust fund to the preëmptioner, in order to enable him to pay the government; and the title thus obtained from the United States was conveyed by the preëmptioner to the trustee, without any reference to the trust; and the trustee was ordered by a State court to hold the property subject to the trust,—he cannot remove the case to this court, by virtue of the twenty-fifth section of the Judiciary Act.

There is no title, right, privilege, or exemption, under an act of Congress, set up by the party and decided against him by the State court. By his own showing, he has acquired no title from the United States.[1]

The allegation is, that a fraud was perpetrated upon the government, and another meditated upon the *cestui que trust*, both of which this court is called upon to maintain and carry out.[2]

The case is dismissed for want of jurisdiction.

THIS case was brought up from the Supreme Court of the State of Illinois, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts in the case are sufficiently set forth in the opinion of the court.

A motion to dismiss it, for want of jurisdiction, was made by *Mr. J. Mason Campbell*, which motion was sustained by him and opposed by *Mr. Coxe*.

Mr. Chief Justice TANEY delivered the opinion of the court.

A motion has been made to dismiss this case, for want of jurisdiction.

It appears that a man by the name of Gregory had obtained, by residence on the land mentioned in the proceedings, a right of preëmption, under the act of Congress of 1838. But, before he paid the price fixed by the government

[1] CITED. *Wadsworth* v. *Kneeland*, 15 How., 353.

[2] IN POINT. *Henderson* v. *Tennessee*, 10 How., 323.

in such cases, or made the entry, he sold his right to Miller, one of the plaintiffs in error. Miller afterwards conveyed to a man by the name of Joslyn, in secret trust for himself, and subject to his control. Subsequently to this conveyance, Joslyn, by the direction of Miller, conveyed to Udell, the other plaintiff in error, in trust to sell to the highest bidder, and apply the proceeds to the payment of the creditors of Miller, *pro rata*, if they were not sufficient to pay all demands.

*770] *Udell accepted the trust, and, after having done so, made an agreement with Gregory, by which Gregory was to enter the land at the proper office, at the preëmption price, and then convey to Udell in trust, for the benefit of Miller's creditors, reserving a small portion of the land to Gregory himself. Udell was to furnish the money to enable Gregory to make the entry.

Under this agreement, Udell executed a release to Gregory of all his right to the land, in order to enable him to make the entry as preëmptioner, and at the same time took from him a note for a thousand dollars, which was to be given up if Gregory made the conveyance according to his agreement.

The land was worth a thousand dollars. The government price to the preëmptioner was only two hundred dollars, which sum was advanced by Udell to Gregory. One hundred and fifty dollars of this money belonged to the creditors of Miller, and was so applied at his request, and upon his statement that this application would be for the interest of his creditors. The remaining fifty was advanced by Udell, to be repaid out of the proceeds of the land when sold. But it does not appear that the defendant in error, or indeed any of Miller's creditors, sanctioned this transaction at the time, or had knowledge of this application of the trust funds.

With the money thus obtained, Gregory made the entry, and then executed a deed to Udell. This deed, upon the face of it, is absolute, and contains no trust for the creditors.

After having thus obtained a conveyance, Udell refused to execute the trust, and therefore the defendant in error, as one of the creditors of Miller, in behalf of himself and the other creditors, filed a bill in chancery, setting out more at large the facts above stated, and praying that the land might be sold for their benefit, in pursuance of the trust.

The plaintiffs in error demurred to the bill, assigning various causes of demurrer, and, among others, that the transaction with Gregory, by which Udell obtained a conveyance, was in violation of the act of 1838.

The chancery court, upon the hearing, decided that the

land in the hands of Udell was chargeable with the trust, and directed it to be sold, and the proceeds to be applied accordingly. This decree was affirmed in the Supreme Court of the State, and the present writ of error has been presented upon that judgment.

It is unnecessary to notice any of the various causes of demurrer assigned by the plaintiffs in error, except that which relies on the provisions of the act of 1838. For this being a writ of error to a State court, we have no right to revise its *decision upon any of the other causes [*771 assigned, and the only question before this court is, whether any title, right, privilege, or exemption, claimed by the plaintiffs in error in the State court under this act of Congress, was drawn in question and decided against them.

They do not claim that Udell obtained a valid title by the entry made by Gregory, and his subsequent conveyance to Udell. And if their defence had been placed on that ground, it would not have given jurisdiction to this court, because the proceeding to charge it with a trust created by contract would have been no impeachment of the grant made by the United States.

They defend themselves upon the ground, that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the act of 1838. This is undoubtedly true; for the act requires the party who claims the right of preëmption by residence to make oath that he has not contracted to sell or transfer the land to any other person. And he is not permitted to purchase at the low price at which the person entitled to preëmption is allowed to buy, until this oath is taken and filed with the register of the land-office. And if he swears falsely, he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a *bonâ fide* purchaser without notice.

The plaintiffs in error admit that they participated in the fraud, and consequently Udell, upon their own showing, has acquired no right to the land under the act of Congress on which he relies. They do not claim that he obtained a valid title under the law, but insist that the transaction was against its policy, and in violation of its principles. What right or privilege does he then claim under this act of Congress? It is this. He not only admits, but insists, that, by a fraud upon the government, he has obtained a deed to himself for this land, and that he, being trustee for the creditors of Miller, used the money which belonged to his *cestui que trusts* to

accomplish his purposes; and now contends, that, by means of this fraud upon the government, he has acquired under this act of Congress a right to perpetrate a fraud also upon his *cestui que trusts*.

This, in plain words, is the amount of his defence; and this is the right or privilege which he claims under the provisions of the act of 1838, and calls upon this court to recognize and maintain. We shall not comment on such a claim. The writ of error must be dismissed, for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the *772] *record from the Circuit Court of Winnebago county, State of Illinois, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that this writ of error be, and the same is hereby, dismissed, for the want of jurisdiction.

HALL NEILSON, PLAINTIFF IN ERROR, *v.* WILSON LAGOW.

Where, upon the trial of a case in a State court, a party claims the land in dispute, under an authority which he alleges has been exercised by the Secretary of the Treasury in behalf of the United States, and the decision was against the validity of the authority, the party is entitled to have his case brought to this court under the twenty-fifth section of the Judiciary Act.[1]

THIS case was brought up from the Supreme Court of Indiana, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

As a motion was made to dismiss it for want of jurisdiction, and the merits of the case were not discussed, a brief statement of the facts will be sufficient.

It was an action of disseizin, similar to an ejectment, brought by Lagow in the Circuit Court for the County of Knox and State of Indiana, against Neilson, Billis, and Thomas, to recover possession of a piece of property known by the name of the Steam-mill Tract, lying in the town of Vincennes. Billis and Thomas disclaimed all interest, and the suit was carried on by Neilson alone. On the 19th of September, 1821, Lagow and others conveyed the property to the President, Directors, and Company of the Bank of

[1] FURTHER DECISION. 12 How., 98. CITED *in dissenting opinion*. *Gill v. Oliver's Exec.*, 11 How., 549.

Vincennes, their successors and assigns, for ever, for the consideration of $98,000.

On the 1st of July, 1822, the bank conveyed this property to Badollet, Harrison, and Buntin, and their successors, in trust for the use of the Secretary of the Treasury of the United States, in extinguishment of the debt due by the bank to the United States. The trustees were to sell whenever requested by the Secretary of the Treasury, and continue to pay until the United States were paid the sum of $120,308, with interest. The Secretary of the Treasury was vested with power to fill up vacancies in the trust.

In July, 1822, there came on for trial in the court at Vincennes a *quo warranto*, which had been issued by the State of Indiana against the bank. The jury found a verdict of guilty, and the court decreed that all the franchises and property of the bank should be seized for the use of the State. The *sheriff returned that he had seized the franchises; but being unable to find any effects of any [*773 nature soever of the bank, he was unable to obey the command of the writ in respect to them. The writ was issued on the 6th of July, and the return made on the 19th of August, 1822.

In November, 1823, a judgment for $123.80 was obtained in the court at Vincennes against Lagow and the other partners of the steam-mill company, and execution issued thereon. The property in question was levied upon, sold at auction, and purchased by Lagow, to whom a deed was executed by the sheriff on the 26th of December, 1823.

In 1826, another sale of the property took place, by authority of the Supreme Court of Indiana. Badollet, Harrison, and Buntin, the trustees, had filed a bill and obtained a decree against Lagow and his partners in the State court, which was carried up to the Supreme Court. That court ordered the steam-mill tract, with all the buildings, engines, and appurtenances, to be sold, and appointed three commissioners to make the sale. It was accordingly made, ratified by the court, and a deed executed by two of the commissioners on the 20th of June, 1827. The purchasers were Badollet, Harrison, and Buntin, the trustees, who took the deed to themselves, their heirs and assigns, without noticing the trust. The amount of the purchase-money was one thousand dollars. Evidence was given upon the trial, that no money was paid excepting the costs and counsel fee, which payment was made from the funds of the United States, by order of the Secretary of the Treasury.

On the 28th of June, 1827, a deed was executed by Lagow

and his partners, by which they renounced all claim upon each other arising from transactions of the steam-mill company, and conveyed the whole property, debts, &c., to Lagow, he undertaking to pay all debts due to other persons than the partners.

Evidence was given upon the trial, that Hall Neilson had had possession of that property since 1832, claiming to hold it under Badollet, Harrison, and Buntin, who were all dead, however, prior to the commencement of the suit.

When the testimony was closed, the court, at the instance of the plaintiff, Lagow, gave the following instructions to the jury.

1. That on the proof of possession as owners by the steam-mill company in 1820, and of the conveyance by the company to Lagow, of June, 1827, Lagow, the plaintiff, is entitled to recover, unless the defendant has shown a better title.

2. That the seventh section of the act of Congress of the 1st of May, 1820, forbids "the purchase of any land on account of the United States," unless authorized by act of Congress.

*774] *3. That the term "purchase of land" in law, and in the act of Congress, means any and every mode of acquiring an interest in real estate other than by inheritance.

4. That if the government is prohibited from purchasing land directly in its own name, it is also prohibited from purchasing indirectly in the name of an agent or trustee.

5. That if there is any act of Congress or law authorizing the conveyance from the bank to the trustees, it is incumbent on the defendant to show it; and from the fact that the defendant does not set up any such act or law, the jury may infer there is none.

6. That all acts, deeds, and agreements, contrary to the plain language, or even to the policy, of an act of Congress, are void.

7. That if the deed of trust from the bank is contrary to the letter, or to the spirit and meaning, or to the policy, of the act of the 1st of May, 1820, it is void; and the interest which the bank then had in the land remained in the bank.

14. That it is incumbent on the defendant to show the conveyance made by the trustees, if any such they did make.

20. That to defeat the plaintiff's title, founded on prior possession, as owner, it is necessary that the title set up by defendant should be shown to be a subsisting title, and superior to Lagow's title. To which instructions the defendant at the time excepted.

The court then, at the instance of the defendant, gave the following instructions to the jury, to wit, that if they believe,

from the evidence, that defendant, and those under whom he claims, had been in peaceable adverse possession more than twenty years at the time this suit was commenced, the claim of the plaintiff is barred by the statute of limitations, and they must find for the defendant; to which instruction the plaintiff at the time excepted.

The defendant then asked the court to give to the jury the following instructions, to wit:—

2d. That the plaintiff in this case, in order to recover, must establish a good title in himself, and that he cannot recover if the defendant has shown the real title to the land to be in another person; that it is sufficient if the defendant has made it appear to the jury that a legal and possessory title does not subsist in the plaintiff.

3d. That it was competent for the Bank of Vincennes to make a deed to the trustees for the benefit of the United States, and such a deed is valid and lawful for the purpose for which it was made; but the court refused to give the same to the jury; to which refusal of the court the defendant at the time excepted.

*Under these instructions and refusals the jury found a verdict for the plaintiff, Lagow. A motion was made for a new trial, which was overruled, and the case carried up to the Supreme Court of Indiana, where the judgment of the court below was affirmed. A writ of error, issued in the manner already stated, brought it up to this court. [*775

A motion was made by *Mr. Bradley* to dismiss the case for want of jurisdiction, which was opposed by *Mr. Gillet.*

Mr. Chief Justice TANEY delivered the opinion of the court.

It appears, that, at the trial in the State court, the plaintiff in error claimed the land in dispute under an authority which he alleged had been exercised by the Secretary of the Treasury in behalf of the United States; and the decision was against the validity of the authority thus alleged to have been exercised. Whether the title of the plaintiff in error can be maintained under it, or not, will be the subject of inquiry when the case is heard on its merits. That question is not now before the court, and the only point to be determined at this time is, whether we have jurisdiction to try and decide it. We think it is evidently one of the cases prescribed for in the twenty-fifth section of the act of 1789; and the motion to dismiss is therefore overruled.

ORDER.

On consideration of the motion made in this cause on a prior day of the present term, to wit, on Friday, the 2d instant, to dismiss the writ of error, and of the arguments of counsel thereupon had, as well against as in support of the motion, it is now here ordered by the court, that the said motion be, and the same is hereby, overruled.

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*776] *WILLIAM LEWIS, WHO SUES FOR THE USE OF NICHOLAS LONGWORTH, PLAINTIFF, *v.* THOMAS LEWIS, ADMINISTRATOR DE BONIS NON OF MOSES BROADWELL, DECEASED.

By a law of the State of Illinois, passed in 1827, "every action of covenant shall be commenced within sixteen years after the cause of such action shall have accrued, and not after." But by a proviso, persons beyond the limits of the State were exempted from the operation of the law, and might bring the action at any time within sixteen years after coming within the State. Afterwards, in 1837, this proviso was repealed.

The statute of 1827 begins to run, as to non-residents, from the time of the repeal of the saving clause, in 1837, and not before.[1]

THIS case came up from the Circuit Court of the United States for the District of Illinois, on a certificate of division in opinion between the judges thereof.

It was an action of covenant under the following circumstances.

On the 12th of March, 1819, Broadwell executed a deed with a general warranty to William Lewis, by which he conveyed to him a tract of land in Ohio.

In June, 1825, one Matthews recovered, by ejectment, one hundred acres of the land.

Broadwell died in 1827, and one Cromwell was appointed his administrator.

In 1843, Thomas Lewis was appointed administrator *de bonis non*, and in the same year William Lewis brought this action.

Amongst other pleas filed (which it is not necessary to notice) was one of limitation, to which the plaintiff replied that he was beyond the limits of the State.

To this replication the defendant demurred.

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[1] FOLLOWED. *Sohn* v. *Watterson*, 17 Wall., 600. CITED. *Sayles* v. *Richmond &c. R. R. Co.*, 4 Bann. & A., 241.

The acts of the legislature of Illinois, under which the question was raised, were the two following.

The first, passed on the 10th of February, 1827, and entitled "An act for the limitation of actions and for avoiding vexatious lawsuits."

"Sec. 4. That every action of debt, or covenant for rent, or arrearages of rent, founded upon any lease under seal, and every action of debt or covenant, founded upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators, for the payment of money only, shall be commenced within sixteen years after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, single or penal bill, promissory note, writing obligatory, or award, within sixteen years after, such payment shall be good and effectual in law, and not after."

"Sec. 7. That every real, possessory, ancestral, or [*777 mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next after the right or title thereto, or cause of such action accrued, and not after: Provided, that in all the foregoing cases in this act mentioned, where the person or persons, who shall have right of entry, title, or cause of action, is, are, or shall be at the time of such right of entry, title, or cause of action, under the age of twenty-one years, insane, beyond the limits of this State, or feme covert, such person or persons may make such entry, or institute such action, so that the same be done within such time as is within the different sections of this act limited after his or her becoming of full age, sane, feme sole, or coming within this State."

The other act was passed on the 11th of February, 1837, and was as follows:—

"An act to amend an act entitled 'An act for the limitation of actions, and for avoiding vexatious lawsuits.'

"Sec. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that the proviso to the seventh section of the act, to which this is an amendment, shall not be held to extend to any non-resident, unless such non-resident be under the age of twenty-one years, insane, or feme covert, and then, in that case, the rights of such persons shall be saved for the time limited by the differ-

ent sections of said act, after his or her becoming of full age, sane, or feme sole. Approved February 11, 1837."

Upon the trial, the opinions of the judges were opposed upon the following points, which were certified to this court:—

"1st. Whether the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, or from the time the debt became due.

"2d. Whether the statute began to run before administration was granted.

"3d. Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1827."

The case was argued by *Mr. Wright*, for the plaintiff, and *Mr. Lawrence* and *Mr. Lincoln*, for the defendant.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case depends upon the construction and operation of the statutes of limitation of the State of Illinois, and comes before us upon a certificate of division between the judges of the Circuit Court.

*778] *It is an action of covenant, brought in 1843, upon causes of action which accrued before 1827. The defendant pleaded the statute of limitations; to which the plaintiff replied, that, at the time the causes of action accrued, he was in parts beyond the limits of the State, and has ever since remained, and yet is, beyond the limits of the State. The defendant demurred to this replication, and the plaintiff joined in demurrer.

An act for the limitation of actions was passed on the 10th of February, 1827, by which it was, among other things, provided, that every action for the performance of covenants should "be commenced within sixteen years after the cause of such action should have accrued, and not after." But, by a proviso in the seventh section of the act, it is declared, that every person who was or should be, at the time of such cause of action, beyond the limits of the State, might institute his action within the time limited in the act, after coming within the State. Afterwards, by a law passed February 11, 1837, it was enacted, that this proviso should not be held to extend to any non-resident, unless such non-resident was under the age of twenty-one years, insane, or feme covert.

Upon the argument of the demurrer, the following points

arose, upon which the judges were opposed in opinion, and which have been certified to this court:—

"1st. Whether the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, or from the time the debt became due.

"2d. Whether the statute began to run before administration was granted.

"3d. Whether the period which elapsed between the two administrations mentioned in the replication is to be deducted from the period of the statute of limitations of 1827."

Previous to the act of 1827, there was no law of the State of Illinois which limited the time within which an action of covenant should be brought; and, consequently, there was no restriction as to the period within which a suit might be instituted upon the cause of action now in question. The same thing was the case after the passage of this act, as long as the plaintiff continued beyond the limits of the State. For, until he came into it, the proviso above-mentioned excluded this cause of action from the operation of the statute. And as the plaintiff did not come into the State, there was no limitation running against it until the passage of the act of 1837. This act, by repealing the saving contained in the former law, brought the claim within its provisions, and subjected it to the limitations therein contained.

The question is, From what time is this limitation to be *calculated? Upon principle, it would seem to be clear, that it must commence when the cause of action [*779 is first subjected to the operation of the statute, unless the legislature has otherwise provided.[1] For it is at that time that the statute first acts upon it, and limits the period within which suit must be brought. Such is obviously the policy and intention of the Illinois statute of limitations. For if the plaintiff had come into the State the day before the act of 1837 was passed, and by that means subjected his cause of action to the provisions of the former law, the limitation would have commenced running on that day, and his action would not have been barred until the expiration of sixteen years afterwards. For the act of 1827 gave him sixteen years from the time he brought his cause of action within its operation.

He did not, however, come into the State; and his cause of action was brought within the limitation of that law, not by his own act, but by another law. Can there be any reason for a different run of limitation in the latter case, from

[1] Followed. *Sohn* v. *Waterson*, 17 Wall., 600.

that which the law itself has provided in the former? The construction and object and policy of the act of 1827 must be the same in both instances; and the act of 1837 makes no change in it in that respect. It merely subjects the cause of action to its limitations, and does precisely what the plaintiff himself would have done if he had come into the State,—that is to say, it brought the plaintiff within the limitations of the former law, and subjected him to the restrictions therein contained.

The question, however, has been already decided in this court in the case of *Ross et al.* v. *Duval et al*, 13 Pet., 62. In that case a saving clause in a statute of limitations of Virginia, similar to the one contained in the Illinois law, had been repealed by a subsequent statute. And this court decided, that, against the persons embraced in the saving clause of the original law, limitations would not begin to run until the time of the repeal; and that the party was entitled to the full period of limitation prescribed in the original act, commencing from the date of the repealing law.

A passage in the report of that case, in page 64, was cited in the argument, as maintaining a contrary doctrine. But it will be found to be entirely consistent with what the court had previously said. It relates to claims included in a statute of limitations, when, from the language of the law, it may be justly inferred that the legislature intended to embrace a period of time already past, during which the party had omitted to sue, yet still leaving him reasonable time to prosecute his claim. But the rule there stated can have no *780] application to the *case before us; for this claim was not embraced in, nor operated upon by, the statute of limitations of 1827. It was brought within it by the subsequent law. And that law makes no new limitations as to past or future time, and merely subjects the cause of action to the provisions of the original law. The passage above mentioned, therefore, cannot apply to it, and is not inconsistent with what had before been said in relation to the effect of a law repealing a saving in a former act of limitations.

Under this view of the subject, the court is of opinion, upon the first point in the certificate of division, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before; and will direct it to be so certified to the Circuit Court.

And as this decision disposes of the whole case presented by the demurrer, the other points do not arise; and it is unnecessary to examine them.

Mr. Justice McLEAN.

I dissent from the opinion just pronounced. It overrules a solemn decision of this court in the case of *Ross et al.* v. *Duval et al.*, 13 Pet., 57. And as that opinion is relied on as sustaining the decision now given, I shall examine it.

The judgment of the court in that case was placed upon two grounds. First, that the action was barred under the statute of Virginia of 1792. That act provided, that where an execution had not issued on a judgment, it might be revived within ten years, or where an execution was issued, and there was no return, other executions might be issued within the ten years from the rendition of the judgment. There was a saving in the act in behalf of infants and persons beyond the Commonwealth, "giving five years after the removal of the disability to proceed on the judgment."

By the act of 1826, the saving in the act of 1792 was repealed, but the time of the bar was to be computed, as specially provided, from the time of the repeal of the saving.

The court considered the act of 1792 as a limitation on the judgment, and, as more than ten years had elapsed, that all proceedings on the judgment were barred. There was nothing in the pleadings or evidence which showed that the plaintiff was within the saving of the statute.

And the court remark,—"There is another view of this case, which, though not much considered in the argument, is deemed important by the court." "And this arises under the process act of 1828," &c. "If the act of 1792, or any part of it, is to be considered as a process act merely, and not an act of limitations, the act of 1828 makes it the law of Congress for the State of Virginia, and gives immediate effect to it." "If it be viewed as an act of limitations merely, and not for the regulation of process, it then takes effect as a rule of property, and is a rule of decision in the courts of the United States under the thirty-fourth section of the Judiciary Act." "In either case, effect is given to the act of 1792, and it is decisive of the present controversy." [*781

"But if it be considered, as contended, an act of limitations adopted by the act of 1828, the court are to give a construction to the act of 1828. If this be clear in its provisions, we are bound to give effect to it, although it may, to some extent, vary the construction of the act of 1792. And this is no violation of the rule that this court will regard the settled construction of a State statute as a rule of decision. For in this case the construction of the State law, in regard

to the effect it shall have, is controlled by the paramount law of Congress."

"The judgment in the Circuit Court was entered in 1821, so that seven years of the ten years' limitation of the act of 1792 had run when it was adopted by the act of 1828. Now the question is, shall no effect be given to this act of Congress in Virginia before its passage, because of the construction by the Virginia courts of the act of 1792?"

"It must be recollected, that this act of 1828 is a national law, and was intended to operate in the national courts in every State. As it regards some of the States, it may at first have operated less beneficially in them than in others; but its provisions took immediate effect in all the States."

"It is a sound principle, that where a statute of limitations prescribes the time within which suit shall be brought, or an act done, and a part of the time has elapsed, effect may be given to the act, and the time yet to run, being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature in such cases."

"There may be some contradictory decisions on this point, in some of the States, which have been influenced by local considerations, and the peculiar language or policy of certain acts of limitations. But the rule is believed to be founded on principle and authority."

I have cited largely from the above decision, to show that the point was distinctly considered and decided, as arising under the act of 1828, that effect may be given to a statute of limitations, where a part of the time has run; but a reasonable part of the whole time has yet to run. And this is the principle which is repudiated in the case under consideration. I have a distinct recollection, that the point was *782] first suggested by the *lamented Justice Story, and was discussed, and the principle was laid down with the entire concurrence of the court, so far as I know. There was no dissent expressed, either in consultation or on the bench.

It is true there was another ground on which the decision was rested; but it was also placed upon this ground, so that one ground as well as the other was ruled by the court. In the case of Ross, the court say,—"The saving clause of the act of 1792, as to non-residents, is repealed, the only effect of which is to bring within the limitation of the statute of 1792 those who were within its saving clause, and against whom the statute had not begun to run. Against such persons the statute could not begin to operate, until the repeal of the exception by the act of 1826." And that remark is con-

sidered by the court, in the case before us, as having been made on general principles. Now such was the express provision of the act of 1826, that it should take effect from its date, and the remark was made in reference to that provision.

There is no rule better settled, in the construction of statutes of limitations, than that effect must be given to them according to their language. If they made no exception in favor of infants, femes coverts, or non-residents, the courts can make none. And when the exceptions of a statute of limitations are repealed, the act stands as though it had been originally passed without them. In *Jackson* v. *Lamphier*, 3 Pet., 280, the court say,—"The time and manner of their operation, [statutes of limitations,] the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature. Cases, however, may occur, where the provisions of the law on these subjects may be so unreasonable, as to amount to a denial of a right, and to call for the interposition of the court. If the legislature of a State should pass an act by which a past right of action shall be barred, and without any allowance of time for the institution of a suit in future, it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." It must be admitted that the legislature could not bar a claim, to which there was no bar; but no one can doubt that a statute may bar claims where the right of action existed, and a reasonable part of the whole time of the statute has to run. This is often done in some of the States. But, while it is not doubted that the legislature may do this, it is objected that it cannot be done as a matter of construction.

This objection is more plausible than sound. The statute creates a bar, and the question arises on its construction, [*783 whether "it is "so unreasonable as to amount to a denial of a right," in the language of this court in the case above cited. If the answer to this shall be in the affirmative, then, in the language above cited, "it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property." But if the question can be answered in the negative, then a court is bound to give effect to the statute. And here is an answer, in the words of this court, to the principal ground taken in the case under consideration, and on which the decision is founded. If the court may determine whether a statute is so unreasonable as to cut off a private right, of necessity they may decide whether it is not so reasonable as to be enforced.

In the case before us, the Illinois act of 1827 limits the

right of action to sixteen years, and the proviso gives the same time to sue to a non-resident, after he shall come within the State. But this proviso was repealed by the act of 1837, which placed residents and non-residents, as to the time of bringing an action, on the same footing. The plaintiff's cause of action accrued under the act of 1827; in 1837, the saving being repealed, six years were left for the statute to run to bar the claim. Was this a reasonable time? The answer must be in the affirmative. Then the act is not unconstitutional. It deprives the party of no right. In the language of the court in the case of *Ross* v. *Duval*, "the time yet to run, (when the proviso was repealed,) being a reasonable part of the whole time, will be considered the limitation in the mind of the legislature, in such cases." There can be no mistake as to the point decided by the court; and that point is directly opposed to the decision now made. In such cases, it is always better to overrule a former opinion directly, than to destroy its force by indirection. In their former opinion the court say, "The rule is believed to be founded on principle and authority."

In statutes of limitations it is usual to say, they shall begin to run from the time the action shall hereafter accrue, and when a saving of such act is repealed, that it shall operate from the date of the repeal; and if these provisions be not in the acts, they will, as a matter of course, take effect upon their passage. They must take effect from their passage, unless the language shows the time is to be computed from the date of the act. Without this provision, the question would arise whether a reasonable part of the time allowed by the statute, from the time the action accrued, had yet to run, as before remarked.

In *Luckett* v. *Dunn and Bass*, 3 Litt. (Ky.), 218, the court say,—"But the privilege previously allowed to persons who might be out of the country when their cause of action, or *[784] right of *entry, accrued, to maintain their action within ten years after their return, was expressly repealed by the first section of the act of January, 1814, which, by a subsequent clause in the third section of the same act, was to take effect at the expiration of six months from its passage; and it was not until more than a year after the passage of that act, that this suit was brought by Luckett in the Circuit Court. It is obvious, therefore, that the absence of Buckner Pittman cannot have prevented the time which has elapsed since the lot had been held adversely by the defendants, and those through whom they claim, from barring the plaintiff's action.

The rule of so construing a statute as not to give it a retrospective effect is admitted. And a legislature can never be presumed to intend to destroy a vested right. Indeed, they have no power to pass such a law. But a law may be constitutional, and yet have a retrospective effect. *Mattheuson* v. *Satterlee*, 2 Pet., 380. In the case under examination, it is not proposed to give the statute a retrospective effect, or to affect in any degree vested rights by a construction of it. The only question is, whether the six years that the statute had to run, on the repeal of the saving, is a reasonable part of the whole time required by the act to constitute a bar. The plaintiff, though not a resident of the State, might have sued so soon as the right of action accrued.

ORDER.

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 Illinois, and on the point or question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the statute of 1827 begins to run from the time of the repeal of the saving clause in 1837, and not before. Whereupon, it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court.

JEREMIAH VAN RENSSELAER, APPELLANT, *v.* JOHN WATT'S EXECUTORS.

Owings v. *Tiernan* (10 Pet., 447), followed, as to docketing causes where fee bonds were not filed in time.

Mr. Blount, of counsel for the appellant in this cause, moved the court to direct the clerk to docket the case as of the time *when the transcript of the record was received by him, [*785 and in support of his motion said, that this record was forwarded to the clerk early in 1848. That it was only recently he learned that the clerk had declined filing or docketing it, until the bond prescribed by the thirty-seventh rule of court was given. That his client supposed, when he gave bond in the Circuit Court, that he had done all that the law

required him to do. That the record had been lying in the clerk's office about a year, during which some sixty cases had been docketed. That the bond was now filed, as prescribed by the rule, and that the case ought to be docketed as of the day the record was deposited in the office.

Mr. Seward, for appellees, united in the application.

This motion was made on the 9th of March, when the court took time to consider.

On the 12th, Mr. Chief Justice TANEY announced the decision of the court as follows:—

On consideration of the motion made in this cause, on the 9th instant, by *Mr. Blunt*, of counsel for the appellant, to direct the clerk to docket this case as of the time when the transcript of the record was received by him, and to which *Mr. Seward*, of counsel for the appellees, assented, this court consider the practice established by the decision in *Owings* v. *Tiernan*, 10 Pet., 447, and do not wish to disturb it;[1] whereupon it is now here ordered by this court, that the said motion be, and the same is hereby, overruled.

Cornelius W. Lawrence, Plaintiff in error, v. Gilbert Allen and Samuel C. Paxton.

By the fifth section of the tariff act passed on the 30th of August, 1842, (5 Stat. at Large, 555,) a duty of thirty per cent. is imposed on "India-rubber oil-cloth, webbing, shoes, braces or suspenders, or any other fabrics or manufactured articles composed wholly or in part of India-rubber."

In the ninth section, among other articles declared to be exempt from duty, is, "India-rubber in bottles or sheets, or otherwise unmanufactured."

By these sections, the duty of thirty per cent. is payable upon shoes made of India-rubber in Brazil, although they are made by the same process as bottles or sheets, provided they come to this country in a condition to be worn without further material labor on them here, and were actually worn in this form, and provided they were called, in the language of commerce, "India-rubber shoes"; and of these two facts the jury ought to judge.

The articles come within the letter of the law, and the act of 1842 was framed with a desire to tax whatever might compete with our own manufactures.

When India-rubber is made into a shape suitable for use, it may be considered a manufactured article. Originally, it was made into the shape of boots, to be used *and worn in Brazil, and afterwards into shoes; but not intended to be sent abroad as a raw material. *786]

The fact, that the material of which these shoes are made is used for other articles of manufacture after their importation, does not change this view of the subject.

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[1] Followed. *Selma &c. R. R. Co.* *Edwards* v. *United States*, 12 Id., 576; v. *Louisiana Nat. Bank*, 4 Otto, 254; s. c., 1 Morr. Tr., 389.

THIS case was brought up by writ of error from the Circuit Court of the United States for the Southern District of New York.

It was an action of assumpsit, commenced by Allen and Paxton, the defendants in error, in the Supreme Court of the State of New York, for the purpose of recovering back from the plaintiff in error, collector of customs for the port of New York, certain moneys exacted by him, as collector, for duties upon a quantity of common India-rubber shoes, imported into the port of New York in September, 1845, by the defendants in error, from Para, in Brazil.

Under the provisions of the act of Congress of the 2d of March, 1833, the suit was removed into the Circuit Court of the United States for the Southern District of New York.

The declaration contained the common money counts, to which the defendant pleaded the general issue.

The cause was tried in May, 1847, and, under the instructions of the court, the jury found a verdict for the plaintiffs below for $2,908.60.

A great deal of evidence was adduced upon the trial by the plaintiffs, to show the manner in which the shoes are made in Brazil, and their use as an article of commerce. Much of this testimony was objected to as inadmissible. A part of it is transcribed, because it is referred to in the opinion of the court.

The plaintiff's counsel then called, as witnesses, James E. Smith, Amory Edwards, George G. Wales, and William H. Edwards, who, being sworn, severally testified that they were acquainted with the articles now the subject of controversy, and with other articles of India-rubber imported from Para; that they had been at Para, and were acquainted with the process of producing or making India-rubber; that the juice or sap of the trees, when collected, is about the color and consistency of milk, and is called milk; that it is placed in a vessel of convenient size; that moulds of clay, or of wood covered with clay, in the shape of a shoe, or bottle, or other shape, and to which a handle is attached, are dipped in the milk, and immediately held in the heat and smoke of a fire made of a peculiar kind of nut, which dries the milk and gives it a dark color; that this process is repeated several times, until the coating is sufficiently thick, when the article is taken from the mould, by breaking the clay of which it is made, or with *which it is covered, and the pieces of clay are taken [*787
out; that shoes and bottles are then generally stuffed with straw, and that the article is then ready for sale and exportation; that bottles are made in two or three minutes;

that it takes somewhat longer, say about five minutes, to prepare a shoe; there must be a new mould for every bottle;—the foot-shaped mould is the best form for dipping. The shoe shape is the most convenient mode of making India-rubber. The stuffing of the shoe is done by the parties who buy them in Para for exportation. The shoes are sometimes shipped in bulk, and sometimes stuffed. The term, India-rubber shoes, comprehends all kinds of shoes made of India-rubber, both manufactured and unmanufactured; that the price of India-rubber shoes, in Para, has varied greatly since 1826; that the great demand for India-rubber, of late years, in the United States, for dissolving for manufacturing purposes, has raised the price in Para; that no such things as suspenders are made in Para; that nothing is made there in a more manufactured state than the square sheets; that India-rubber shoes are sometimes sold and shipped at Para without being stuffed with straw.

Much evidence was also introduced by the defendant, the object of which was to show that the articles were known, in commerce, by the name of "India-rubber shoes," and were bought and sold in the market as imported, without any alteration of any consequence.

The counsel for the defendant then prayed the court to decide the law of the case, and to instruct and charge the jury, as follows:—

First. That in construing and applying the provisions of the tariff law of August 30, 1842, to the present case, the terms used therein are to be understood in their known commercial sense, as used and understood in the ports of the United States prior to, and at the date of, said law.

Secondly. That as all "India-rubber shoes," imported from foreign countries, are, by the said provisions, subject to thirty per cent. duty, the true and only inquiry in the present case is, whether, in a commercial sense, and among commercial men dealing therein, the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to and at the date of the law, under the name and denomination of "India-rubber shoes."

Thirdly. That if the jury shall be satisfied, from the evidence, that the articles in question were imported into, and usually known and bought and sold in, the ports of the United States, prior to the 30th of August, 1842, under the name and denomination of "India-rubber shoes," then they
*788] are liable, *under the law, to a duty of thirty per cent. *ad valorem*, and the jury should be instructed to find for the defendant; and that, in the case stated, the jury

should be instructed to find for the defendant, notwithstanding they should also be satisfied, from the evidence, either,—

1st. That the term "India-rubber shoes," as used in commerce, includes all other kinds of shoes made in whole or in part of India-rubber, as well as these; or,

2d. That "India-rubber shoes," in a more finished condition, and of a better quality, were imported from England, France, or other countries, prior to 1842, and were then, and are now, known in the markets; or,

3d. That some additional labor is usually applied to these articles, or is necessary to fit them for convenient use as shoes; or,

4th. That these articles are extensively used by manufacturers in the United States for the purpose of being made, in whole or in part, into other articles; or,

5th. That no more or other kind of labor is required to make these articles than is required to make India-rubber in bottles, or sheets, or other kinds of India-rubber, which, by the seventh article of the ninth section, is entitled to admission as free.

It being insisted, on the part of the defendant, that neither of these circumstances, nor all of them combined, can nullify the explicit terms of the preceding fifth section, by which all kinds of "India-rubber shoes" are subjected to the thirty per cent. duty, nor make free these articles, provided they are and were known in commerce under the name "India-rubber shoes."

But his honor, the presiding judge, refused so to decide the law of the case, or so to instruct the jury; and, on the contrary, the said judge did then and there decide, and did then and there charge and instruct the said jury, that the case, in the view taken thereof by the court, entirely depended on the true legal construction of the tariff act of August 30, 1842, and involved no question of fact for the jury; that India-rubber, when used, in whole or in part, in the manufacture of oil-cloth, webbing, shoes, braces, or suspenders, or any other fabrics or manufactured articles, was, by the tenth article of the fifth section of this law, subjected to the duty of thirty per centum *ad valorem*, specified in the clause relating to these fabrics, contained in said tenth article; that, by the seventh article of the ninth section of said act, India-rubber, in bottles or sheets, or otherwise unmanufactured, is declared to be exempt from duty; that, by virtue of this clause, India-rubber existing in the particular forms enumerated therein, and existing in any other form in which it may be imported, is free from duty, if *un- [*789

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manufactured; that, as these two clauses were both in the mind of the legislature when treating of India-rubber, they are to be construed together; and that, so construed, the fair conclusion is,—and such the said judge decided to be the true legal interpretation of said provisions,—that Congress, in laying the duty, had special reference to the manufactured article in a finished state, and intended to allow India-rubber to come in as free, whatever might be its form, if it had not been brought, by manufacture, into a finished state; that, as it was not pretended that the goods in question were shoes manufactured out of the material called India-rubber, and as it was admitted by all the witnesses that they were brought into the form of a shoe in the process of making the material called India-rubber, they were not "India-rubber shoes," within the meaning of the tenth article of the fifth section, but were to be regarded as raw material and as unmanufactured, within the meaning of the seventh article of the ninth section; that the goods in question were, therefore, entitled to be admitted free of duty; that the plaintiffs having protested in writing against the payment of any duty thereon, and the collector having, notwithstanding, illegally exacted a duty of thirty per centum *ad valorem* thereon, the plaintiffs were entitled to recover back the moneys so exacted, except so far as the same had been refunded by way of drawback; and that the jury would, therefore, render a verdict for the amount of such remaining moneys, with interest thereon to the day of trial, in favor of the said plaintiffs.

And thereupon the said defendant, by his counsel aforesaid, then and there excepted to the whole of the said decision, charge, and instruction of the said judge, and particularly to those parts thereof wherein the said judge decided and held that the said case involved no question of fact for the jury, and wherein the said judge instructed and charged the jury, as matter of law, that the goods in question were entitled, under the act of Congress above referred to, to be admitted free of duty; and wherein the said judge also instructed and charged the said jury, as matter of law, that the plaintiffs were entitled to recover back the moneys exacted by the defendant as duties on the said goods; and the said defendant, by his said counsel, did also then and there except to the aforesaid refusal of the said judge to decide the law of the case, and to instruct and charge the said jury in conformity with the prayer of the counsel of the said defendant, hereinbefore contained.

And the said defendant, by his said counsel, thereupon then and there further excepted to the decision of the said judge, in admitting as evidence against the defendant the deposition

of *Samuel K. Appleton, and the parts thereof particularly objected to by the said counsel, as hereinbefore mentioned; and in admitting as evidence against the defendant the testimony of James E. Smith, Amory Edwards, George C. Wales, William H. Edwards, and John L. Ripley, hereinbefore particularly objected to by the said counsel; and did also further except to the decision of the said judge in excluding the instructions of the Comptroller of the Treasury, hereinbefore mentioned. [*790

Upon this exception, the case came up to this court.

It was very elaborately argued in print by *Mr. Butler* and *Mr. Toucey*, (Attorney-General,) for the plaintiff in error, and *Mr. J. Prescott Hall* and *Mr. Curtis*, for the defendants in error. These arguments would, of themselves, fill a hundred pages, and the Reporter finds it difficult to select parts of them. He is therefore reluctantly compelled to omit the whole.

Mr. Justice WOODBURY delivered the opinion of the court.

This was a writ of error to reverse a judgment in the Circuit Court for the Southern District of New York. That judgment was rendered in favor of Allen et al., the original plaintiffs, in a suit to recover back the amount of duties which Lawrence, the defendant, as collector of the port of New York, had demanded and received on the importation of certain boxes of India-rubber shoes, in September, A. D., 1845, and which the importers claimed to be by law free. The duties therefore, paid under protest; and at the trial, the court, were, among other things, ruled, that, on the facts proved, these shoes were not, in point of law, subject to any duty; and, consequently, a verdict was returned for the plaintiffs below for the amount which had been paid to the collector, and interest.

The facts proved or admitted, which appear material, were, that these shoes consisted wholly of India-rubber, and in different sizes, suited for men, women, and children; that no other work had been expended on them except to dip the moulds or lasts into the milky liquid, as procured from the India-rubber trees, and then dry them over a fire, — performing this process several times, till a proper thickness was obtained. A small ornament was afterwards drawn on some of them, and a coarse stuffing inserted in others, and in this condition they had for many years been imported, and worn without any essential change or addition here, unless in some instances slightly to trim and stretch them on a last. It was also proved that shoes, made in part from India-rubber and in part

from cloth or leather, of a thinner and lighter fabric, had been sometimes imported from Europe, and for several years had been extensively manufactured in this country.

*791] *The law which governs the question whether these shoes ought to pay a duty of thirty per cent. *ad valorem*, or be admitted free, is the act of Congress of August 30, 1842 (5 Stat. at L., 555). In its fifth section, thirty per cent. is imposed "on India-rubber oil-cloth, webbing, *shoes*, braces or suspenders, or other fabrics or manufactured articles, composed wholy or in part of India-rubber." And in the ninth section, among other articles declared to be "exempt from duty," is "*India-rubber, in bottles or sheets, or otherwise unmanufactured.*"

The court below entertained an opinion, that the clause in this law imposing a duty of thirty per cent. on India-rubber shoes referred to those made in a finished state from that material, after being altered in Brazil from its liquid condition to the more solid state, and to the forms of sheets, shoes, bottles, &c., and that this alteration was not a manufacture, though into a shape designed for use without any material change, and hence, that shoes so made and imported were not dutiable. This view was, undoubtedly, correct to a certain extent, and in some aspects of the subject; but in others it seems to us to involve some errors, which we think ought to be corrected, and which require more extended explanations because overruling the judgment below. Thus, although this act of Congress clearly meant to impose a duty of thirty per cent. on shoes imported, which had been made in part from India-rubber after it had been hardened and fashioned into some crude shape in South America, yet we have no doubt it might likewise intend to impose this duty on shoes made abroad wholly from India-rubber while in its liquid state, and especially if, when so made, such shoes were in a condition to be worn without further material labor on them here, and were made to be so worn, and were in this form often actually worn.

It is our opinion, therefore, that the jury should have been so instructed; and if they were satisfied those shoes had been thus made to be so worn, and, in the language of commerce, if such shoes were called "India-rubber shoes," no less than those made here or in Europe in part from India-rubber and in a more finished form, that the duty of thirty per cent. ought to have been paid on them.

Some of our reasons for this opinion are briefly these.

The articles imported in this case manifestly come within the letter of the clause imposing a duty of thirty per cent. on

"India-rubber shoes." They are "India-rubber shoes." Being thus provided for as shoes, the subsequent clause, making certain articles free which were unmanufactured, and not enumerating shoes among them, cannot be presumed to embrace or refer to any thing already provided for. *United States* v. *Clarke*, 5 *Mason, 30. Indeed, these shoes were more emphatically India-rubber shoes, than those [*792 made only in part of that material, as are most, if not all, of those manufactured in this country and in Europe. Again, to remove difficulty in many cases whether an article should come under the description of those liable to duty, there it is added, in the first clause, taxing them, "manufactured articles composed wholly or in part of India-rubber"; and, in this way, the duty extends to any shoes, if a manufactured article, whether they be like these, composed wholly of India-rubber, or, like most others, composed only in part of it.

Much more do the shoes in this case appear to come within this provision in the act of Congress imposing the duty of thirty per cent., when we examine the spirit and object of that provision. To ascertain these with some degree of certainty, it may be useful, in the first place, to advert a moment to the past, as well as subsequent, legislation of Congress on this subject.

The import of India-rubber, in any form, into this country, does not appear to have attracted attention in the revenue laws, as a separate and specific article, till 1832. Before that, and especially in the tariff acts of 1828, 1824, 1816, all of which are usually conceded to have looked to protection as well as revenue, India-rubber is not enumerated *eo nomine* as free or dutiable, and hence was taxed generally, from twelve and a half to fifteen per cent., among the non-enumerated articles (3 Stat. at L., 310; 4 Stat. at L., 29 and 590). But in 1832, when the policy had become changed to reduce an overflowing revenue, by leaving free such unmanufactured articles as furnished raw materials to our own manufacturers, and such manufactured articles as did not compete with any made here, the act of July 14th, 1832, § 3, exempted from duty entirely "India-rubber" (4 Stat. at L., 590). In 1833, a like policy, for a like reason, was pursued, and so in 1841, by expressions in the former period placing "India-rubber" among the articles free from duty (4 Stat. at L., 630), and in the latter, making "India-rubber" still excepted from duty, though several articles before free were then taxed (5 Stat. at L., 563).

But in 1842, when the policy of the government again became adapted to protection no less than revenue, the act

now under consideration was shaped so as to tax whatever might compete with our own manufacturers, and to admit free only articles in such shape or form as were not calculated to rival our own. Now before 1842, it is well known that the making of shoes in part from India-rubber, so as to be water-proof, had been invented, patented, and extensively practised in this country. Consequently, such a protective
*798] tariff as that introduced in *1842 would be likely to tax any foreign fabric which was, in any considerable degree, a rival to the article made here for a similar use. And, consequently, a foreign-made shoe, whether "composed wholly or in part of India-rubber," was meant to be taxed thirty per cent., if, in either case, it was in a form suited to be used as water-proof, was so designed and so used, and this form would rival the shoe made here for a like purpose.

In construing statutes, it is not only our duty to give effect to all the words used in their ordinary sense, but to eviscerate, if possible, their true spirit and intent from all the connected circumstances, attendant or subsequent as well as preceding. *Bond* v. *Hoyt*, 13 Pet., 273; 1 Kent, Com., 461.

The statute applicable directly to the present case being, in some respects, awkwardly worded, the design of it on this subject has been made more explicit and clear by the subsequent act of July 30th, 1846, changing the forms of expression to describe the articles intended to be taxed. Thus, it is there provided, that a duty of thirty per cent. be imposed on "braces, suspenders, webbing, or other fabrics composed wholly or in part of India-rubber, not otherwise provided for." And, to prevent any misconception of the intention, it is added, under the same schedule and rate of duty, "shoes composed wholly of India-rubber."

It would also be very extraordinary if the spirit of the act of 1842, in its high protective policy, should not mean to tax the foreign India-rubber shoe made wholly of India-rubber, when it was, and still is, a most formidable and successful rival to the shoe made here in part of the same substance; when it was at first, and for many years, the only shoe used here as water-proof; and when, under all patents and improvements since in lightness and beauty, none seem able to surpass it now in durability, ease, and economy combined.

But it is contended that the India-rubber shoe, as made in Brazil and imported thence, is not a "manufactured article," and hence is not within the clause in the act of 1842 imposing a duty of thirty per cent. It may be conceded that this duty applies only to such an article. Yet what constitutes a manufactured article?

In some instances, and for some purposes, it may be one kind of process performed on what is found in a natural state, and in some, another kind. Thus the juice of the maple or of the cane is in some views manufactured when it is made into molasses or syrup, and in others, when again made into sugar or spirit from molasses. And so the juice of the grape is in one sense manufactured when converted into wine, and in another, *when made into brandy. And so is lye [*794
from ashes, when boiled down to potash or pearlash, manufactured into them. Here, the juice or sap of the India-rubber tree, while liquid or in its milky state, whether then called caoutchouc or some other name, is still a natural substance, and in its natural form; and, in one sense and to a certain extent, its being hardened and changed in color, no less than consistency and bulk, by fire and evaporation, whatever new form it may then be turned into, is a manufacture. It is so as much as butter or cheese is a manufacture from animal milk, or tar from turpentine, and rosin from tar. Yet from the words of the law, as well as its design, it is manifest that the India-rubber is not meant to be taxed as a manufacture, though so hardened and changed, unless, at the same time, it is put into a shape which is suitable for use, and adapted with a design to be used in a way that is calculated to rival some domestic manufacture here, rather than merely to furnish a raw material in a more portable, useful, and convenient form for other manufactures here. In the latter case, within the policy and purpose of the tariff law yielding protection, it is "unmanufactured," or, in other words, not made abroad for use in its existing form except as a raw material, like pig-iron or pig-lead. But in the former case, within that policy and purpose, it is "manufactured," as it is made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures.

After these, what requisite is wanting to bring it within the spirit, no less than the letter, of the provision imposing a duty? It has been changed, by fire and labor, in its color, consistency, and form, from its natural state as the milk of the India-rubber tree. It has been fashioned into an article of clothing, suitable and customary to be worn in its then shape. It is a rival to other shoes made here.

These elements would, on principles of common sense, seem to amount to a manufacture, and one, when imported from abroad, likely to be taxed.

Going to more technical definitions and to first principles,

such a process to make the shoe is making an article by the hand, which was once the literal meaning of the word *manufacture* or *manu factum*, and in the more modern idea attached to the word, it is making an article, either by hand or machinery, into a new form, capable of being used, and designed to be used, in ordinary life.

Indeed, these India-rubber shoes were originally made in Brazil, not as a form of sending abroad a raw material to be used for other purposes. But they were prepared as a shoe, *795] to *be worn in the shape as there finished, and for the purpose of excluding water. Travellers in Brazil described the use of India-rubber there first in the form of boots, because water-proof. 1 McCulloch's Dict., 311; Ure's Dict.

The shoe succeeded to the boot, and its export in sheets also, to be cut up to rub out pencil-marks, &c., gave to the substance itself the common name of India-rubber. Ibid.

In the form of the shoe, therefore, to be worn in Brazil or elsewhere, because water-proof, it was a manufacture, and one of such value for that purpose as to lead to a greatly increased export of the article in that shape within the last twenty years.

And as the invention was made, here and abroad, of thinner and lighter shoes manufactured in part from it, and of extending the use of India-rubber to many new objects in dress and the arts, the demand for it, in a state as hardened and colored, without regard to form, enlarged rapidly.

Considering, too, that a mode of dissolving it here has been discovered, and of easily giving to it, afterwards, any desired shape, it may be that shoes, no less than sheets or slabs of India-rubber, in a hardened form, become often, when convenient, melted down or dissolved, to be used for other purposes. This might often be done with them, though a manufacture, as their value per pound would vary but little, if any, from India-rubber in the shape of sheets, as the raw material of which they were manufactured was the same, and as the expense of making them is similar,—one being done by several dippings, like a candle, and the other by several layers of the gum or milk.

But this occasional use of the shoes for other purposes than wearing as water-proof shoes would not alter their original character as a manufacture for the latter purpose, nor the importation and present character of them, as a manufacture for the same purpose.

Thus, the importation of cast-iron in kettles or handirons in a state to be so used, and frequently so used, would not be altered, as a manufacture of that kind, and as subject to

pay the duty imposed on it in the tariff; because some of it, after imported, might occasionally be melted down and recast, and used for other or similar purposes.

Nor is the juice of the cane—converted into a different consistence and color abroad, and shipped here as molasses, ready to be used, and often used as such—any the less a "manufactured article," and any less subject to the duty on molasses, because some of it, after arriving in this country, may again be manufactured into sugar or spirit.

*A further illustration as to the distinction between [*796
the same article, put into a shape to be sold for use as it is, and into one not for use as it is, is that of melted iron.

In that state it may be run in moulds, either for pots or for pigs, and, in the former case, fitted and sold to be used in that shape, and hence a manufacture; while, in the latter, sold to be made up afterwards into new and different forms, and hence, for some purposes, is then not regarded as a manufacture till so made up.

So lead may be melted into the shape of pigs or bars, for exportation and for foreign manufacture, or be run into weights, for use as weights, and then be regarded as already a manufacture for that purpose.

It is another evidence that shoes composed wholly of India-rubber were considered by Congress as a manufactured article, that they place them in that category in the tariff with other clearly manufactured articles, while they place in the category of those unmanufactured such articles as are not in a shape to be used much, if at all, without being made up into new forms. Thus it is with the India-rubber images of alligators and lizards imported. If bottles are an exception, they are specially enumerated in the tariff among the free articles, in order to be free, while shoes are not; and the former are so enumerated, because usually made up here into new shapes, for other purposes, before used; and when not so made up, are little employed in their original shape, and have no rival manufacture to be protected by taxing them. Had Congress intended that shoes, when wholly of India-rubber, should be considered as unmanufactured, and be free, it is difficult to conceive why it did not place them in that list, and declare them unmanufactured and free, rather than in the list of manufactured and dutiable articles, as it did both in 1842 and again in the revised act of 1846.

Finally, another circumstance exists, which appears to be a decisive indication that this very importation of shoes, though called in the invoice "unmanufactured," was meant mainly as shoes for use, to be worn in their existing condi-

tion, rather than to be dissolved and used for other purposes. It is, that several of the boxes were invoiced as shoes for "ladies," and others for "misses," or children, and which different forms or shapes would be useless, as well as more expensive, if the shoes were intended merely to be cut up or dissolved for other uses, and not to be worn by different sexes and ages, as "manufactured" shoes in their present shape.

In several analogous cases, as to teas, cotton bagging, and sugar, this court has held, that it is a proper fact for the jury *797] to *decide, whether the imported article is or is not known in commerce by the words or terms used in the tariff imposing the duty, and not a question of law, to be settled by the court, as was done here.[1] *United States* v. 112 *Casks of Sugar*, 8 Pet., 277; *Elliott* v. *Swartwout*, 10 Pet., 151, 153; *United States* v. *Breed*, 1 Sumn., 164; 9 Wheat., 438; *Curtis* v. *Martin*, 3 How., 106.

Unless it be admitted in this case, then, as most of the testimony proves, that these shoes were known in a commercial sense and use as India-rubber shoes,—no less than others, made in part from it,—we think the jury should return a verdict on that fact; and next, that the jury should have been further instructed, that, if these shoes had been made into their present shape in order to be worn as water-proof, when the purchasers pleased, and that it was customary so to wear them, they were within the meaning of the act of Congress on this subject, "manufactured," and liable to pay a duty of thirty per cent.

Without going into other questions raised at the trial, and without dwelling longer on this, our opinion is, that the judgment below must be reversed, and a *venire de novo* awarded; and the new trial be governed by the principles here settled.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court of the United States for the Southern District of New York in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded

[1] Followed. *Tyng* v. *Grinnell*, 2 Otto, 470.

to the said Circuit Court, with instructions to award a *venire facias de novo*, and that the new trial shall be conducted in conformity to the principles laid down in the opinion of this court.

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*ELEAZER F. BACKUS, PLAINTIFF IN ERROR, *v.* WILLIAM GOULD AND DAVID BANKS, WHO SUE AS WELL FOR THE UNITED STATES AS THEMSELVES. [*798

By the sixth section of the act of February 3d, 1831, entitled "An act to amend the several acts respecting copyrights," the penalty of fifty cents on each sheet, whether printed or being printed, or published or exposed to sale, is limited to the sheets in possession of the party who prints or exposes them to sale.

It does not apply to those sheets which he had published or procured to be published, whether they were found in his possession or not.[1]

THIS case was brought, by writ of error, from the Circuit Court of the United States for the Northern District of New York.

It was a *qui tam* action, brought by Gould and Banks against Backus, for an alleged invasion of their copyright in nine volumes of Cowen's Reports, and the first three volumes of Wendell's Reports.

On the trial, the affidavit of John L. Wendell was read, stating that he, the deponent, was the real plaintiff, and that Gould and Banks were merely nominal plaintiffs.

In 1838, Backus published a book entitled "A Digest of the Causes decided and reported in the Superior Court of the City of New York, the Vice-Chancellor's Court, the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors, of the State of New York, from 1823 to October, 1836, with Tables of the Names of the Cases and of Titles and References, being a Supplement to Johnson's Digest."

To the declaration, Backus pleaded *nil debet*.

Upon the trial, the plaintiffs proved themselves entitled to the copyright of the first, second, and fifth volumes of Cowen's Reports, and of the second volume of Wendell's Reports. And that from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.

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[1] See Rev. Stat., §§ 4964–4970.

The counsel for the defendant then prayed the court to instruct the jury as follows.

1st. That John L. Wendell, and not the plaintiffs, was the owner and proprietor of the copyright to the said first, second, and fifth volumes of Cowen's, and to the said second volume of Wendell's Reports, and that, by the statute, no person but the owner or proprietor could maintain said suit for said penalty, and prayed the court so to instruct the jury. But the court decided that the suit might be maintained in the name of William Gould and David Banks, notwithstanding the facts set forth in the affidavits of John L. Wendell, and so instructed the *jury, and refused to instruct said jury as requested by defendant's counsel; to which decision, instruction, and refusal, the counsel for the defendant excepted.

*799]

2d. That the said books called the first, second and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, are not the subject of a copyright, and the publisher of them could acquire no exclusive right to the publication thereof, and therefore could not be unlawfully infringed, and prayed the court so to instruct the jury. But the court decided, that, although the opinions of the several courts, as contained in said volumes of reports, were not the subject of a copyright, yet that the indexes of said volumes, and the statement of the cases preceding the opinions, and the marginal notes, or synopsis of the case, at the head of each case, were the subject of a copyright, for any infringement of which this action would lie, and so charged and instructed the jury, and refused to charge or instruct the jury as prayed by the defendant's counsel, to which decision, charge, and instruction, and refusal, the defendant's counsel excepted.

3d. The defendant's counsel insisted, that if the said indexes were the subject of a copyright, yet it was the duty of the proprietor thereof, who obtained the copyright, to express, in the title deposited and published, (where he was not entitled to a copyright of the whole book,) the matter for which he claimed such copyright; that he could not obtain a valid copyright to such matter, which was a very small portion of the work, under a general claim to a copyright to the whole book, and in this case he had not only not claimed any such copyright to the indexes, but merely a copyright to the report of the cases, and therefore had not acquired any valid copyright to such indexes, and prayed the court so to instruct the jury. But the court decided, that a copyright to the whole book would secure to the proprietors the exclu-

sive right to such matter in the book as was susceptible of a copyright, although such matter composed ever so small a portion of the book, and so instructed the jury, and refused to instruct said jury as requested by the counsel for the said defendant; to which decision, instruction, and refusal, the counsel for the defendant excepted.

4th. The counsel for the defendant also insisted, that the plaintiffs having obtained a copyright purporting to be for the whole book, when they were only entitled to a copyright for a very small portion of the matter contained in such book, such copyright was wholly void, and no action would lie for any infringement of it, and prayed the court so to instruct the jury. But the court decided that such copyright would, and did, secure to the plaintiffs the exclusive right to such matter in *said book, whether it were more or [*800 less, as he was entitled to obtain a copyright for, and that said copyright was not void, and that this action would lie for an infringement or pirating of any part of the matter in said books for which the plaintiffs were entitled to obtain a copyright, and so instructed the jury, and refused to instruct the jury as prayed by defendant's counsel; to which decision, instruction, and refusal, the defendant's counsel excepted.

5th. The counsel for the defendant also further insisted, that the publication of the said supplement, or third volume of Johnson's Digest, was not a printing or publishing of the said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, of which the said plaintiffs claimed to have the copyright, within the section of either of the acts of Congress giving said penalty. That said penal sections of said acts were to be construed strictly, and did not impose any penalty for printing or publishing a small portion of the matter, for which a copyright was obtained; that, by the terms of the statute, the penalty was only inflicted for an unauthorized printing, reprinting, or publishing, &c., a copy or copies of the whole of the map, chart, book or books, for which the copyright had been obtained, and that for such printing, reprinting, or publishing any smaller portion than the whole, this action could not be sustained, and prayed the court so to instruct the jury. But the court decided, that an action for the penalty, given by the penal section of the act, would lie for the printing, reprinting, or publishing by the defendant of any part or portion of the matter in said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, to which the plaintiffs were entitled to a copyright, and so instructed

the jury, and refused to instruct the jury as prayed by the defendant's counsel; to which decision, instruction, and refusal, the counsel for the defendant excepted.

6th. The defendant's counsel also insisted that the offence for the which the penalty sued for was inflicted by the act of Congress was in the nature of a criminal offence; that the penalty was inflicted by the statute, in part, as a punishment for a criminal offence, and in part as a punishment for a tortuous, if not a criminal, invasion of private property, and that the action was local; and that the act or offence for which this action was brought was committed in the State of Pennsylvania, and therefore out of the jurisdiction of this court, and consequently the present action could not be sustained, and prayed the court so to instruct the jury. But the court decided that the action could be sustained in any State of the Union, and so charged the jury, and refused to instruct the jury as prayed by *the defendant's counsel; to which decision, charge, and refusal, the defendant's counsel excepted.

*801]

7th. The counsel for the defendant also insisted, that the publication by the defendant of a *bonâ fide* digest of the first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, was not an infringement of the copyright of the plaintiffs to said books; it was a benefit, and not an injury, to those books; and prayed the court so to instruct the jury, that if they found, from the evidence in the case, that the supplement, or third volume of Johnson's Digest, published by the said defendant, was a *bonâ fide* digest of the decisions of the cases contained in said volumes, and was published by the defendant in good faith, and not for the purpose of furnishing to the public the matter contained in said volumes in a cheaper form or for a less price than those volumes were sold for; and that said digest was, in fact, a benefit instead of an injury to said volumes, and would promote the sales thereof; that then said publication was no infringement of the plaintiffs' said copyright, and this action could not be sustained, and the defendant would be entitled to their verdict. But the court refused so to instruct the jury; but did charge and instruct the jury, that if the defendant had transferred to his said digest any part of the matter contained in the indexes of said first, second, and fifth volumes of Cowen's Reports, or second volume of Wendell's Reports, and thus availed himself of the labor of others contained in books of which the plaintiffs held the copyright, the plaintiffs were entitled to their verdict; to which refusal, and charge, and instruction, the defendant's counsel excepted.

8th. The counsel for the defendant also insisted, that from the very nature of the work published, the same idea contained in the indexes to said volumes of reports, if correctly stated in said indexes, must necessarily be stated in the digest published by defendant; and if published in English, substantially the same words must be used; and if the work was a *bona fide* digest, and not an evasion for the purpose of furnishing the public with the work in a cheaper form than the original, the publication of said digest by the defendant could not be deemed an invasion of the plaintiffs' copyright, unless the matter in said indexes had been literally transferred to the defendant's digest, and prayed the court so to instruct the jury. But the court refused so to instruct the jury, but instructed them, that if the defendant had transferred to the said digest, published by him, any part of matter contained in the indexes to said first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's Reports, it was an invasion of the plaintiffs' said *copyright, for which this action would lie; to [*802 which refusal and instruction the counsel for the defendant excepted.

9th. In regard to the amount of the penalty to be recovered, the defendant's counsel insisted that the plaintiffs could only recover fifty cents for every sheet of the matter transferred from said index to first, second, and fifth volumes of Cowen's Reports, and second volume of Wendell's, to the said digest of said defendant, as had been proved to have been found in his possession, either printing or printed, published, or exposed for sale; and that there was no legal proof that any such sheets of said matter had been so found in said defendant's possession, and prayed the court so to instruct the jury. But the counsel for plaintiffs insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not; and so the court decided and instructed the jury, and refused to instruct the jury as prayed by the counsel for the defendant; to which decision and instruction, and refusal to instruct, the defendant's counsel excepted.

And with such charge and instruction, the court submitted the cause to the jury, who, under such decisions, charge, and instruction, found a verdict for the plaintiffs for $2,069.75 debt, and six cents costs.

Upon all these exceptions, the case came up to this court.

They were all fully argued, by *Mr. James Bayard* and *Mr.*

Joseph R. Ingersoll, for the plaintiff in error, and *Mr. Wendell*, for the defendants in error.

The arguments upon all the points, except the one upon which the decision of the court turned, are omitted. The views expressed by *Mr. Bayard* were illustrated and enforced by *Mr. Ingersoll*, in his reply to *Mr. Wendell*.

Mr. Bayard said, that, before entering upon the argument, it was right, as well in justice to His Honor the District Judge (Conkling) before whom the case was tried, as to prevent any prejudice to the case from an apparent decision by the court below, to state the circumstances under which the case comes before this court.

This case, with another, embracing precisely the same questions, (which it is agreed shall abide the event of this,) came on to be tried before His Honor, Judge Conkling, who held the Circuit Court at Albany, in October, 1843, in the absence of the Circuit Judge, (the late Mr. Justice Thompson,) who was absent from sickness. In order to take a verdict which *803] should determine the facts in the case, and fix the amount of the *penalty, if any had been incurred, the points of law were stated by counsel, and ruled by the judge without argument, with the understanding that they were to be argued before a full court, when Judge Thompson should be able to sit. His continued indisposition, which at last terminated in his death, prevented this from being done; and in July, 1845, judgment was entered upon the verdict, by order of plaintiffs' attorney, without argument. And this writ of error was sued out to bring the record into this court, where the case is really now to be decided for the first time.

(*Mr. Bayard* then proceeded to argue the several points, until he came to the ninth prayer to the court below.)

Again, by the express words of the act, the offender is to forfeit and pay fifty cents only "for every such sheet which may be found in his possession."

This limitation has been totally disregarded by the learned judge of the Circuit Court, who adopted the views of the counsel for the plaintiffs, who "insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not," and so decided and instructed the jury.

This appears to be a most manifest disregard of the terms of the statute, in order to give what the judge seems to have considered an equitable construction, making it extend to a

case clearly beyond its terms, which is a mode of construction altogether inadmissible in the case of a penal statute.

The reason of this limitation of the penalty may not be very clear; but the words of the statute are plain, and when this is the case, there is no room for equitable construction in any statute, but especially in a penal one.

But it might not be difficult, if it were necessary, to find reasons for the limitation.

1st. Congress did not intend that an author should lie by during the two years allowed for bringing his action, permitting another to publish and vend his work during that time, and then recover fifty cents for every sheet so published.

This would be laying a trap for his ruin, as I have shown that the penalty upon an ordinary edition might exceed $15,000; and if it were a popular work, several such editions might be disposed of in the course of two years.

2d. But for this limitation, several penalties might be incurred by several different persons on account of the same sheets.

The penalty is to be inflicted upon "any person who shall print, publish, or import, or cause to be printed, published, or *imported, any copy, &c., without consent of the [*804
owner, or who shall (knowing the same to be so printed or imported) publish, sell, or cause to be published, sold, or exposed to sale, any copy," &c.

Not only, therefore, the publisher, but the printer, and every bookseller who sells a copy, may be liable to this penalty.

Now, upon the principle adopted by the court below, the penalty is incurred by the act of publication, printing, or selling, and the amount is to be fixed by the number of copies published, printed, or sold, without regard to where they may be found. In case, therefore, of an edition of such a work, the publisher who has caused it to be printed, the printer who has actually printed it, the bookseller in whose store the whole edition has been placed for sale, and every bookseller to whom he has sent a part of it for sale, may be liable to the penalty of fifty cents for the same identical sheets. This could never have been intended.

3d. Again, it might be that a person who had unintentionally violated a copyright by the publication of a book might, upon discovering that his publication was illegal, destroy the whole edition, and so relieve himself from the penalty. But according to the decision of the Circuit Court, he would still remain liable. Nay, if he were even to give the whole edition to the author of the protected work, he

would still, on the principle of this decision, remain liable to this penalty.

These are some of the reasons which might be given for this limitation of the penalty; but whatever the reasons may have been, the words are plain, and measure the amount of the penalty by the number of sheets "found in defendant's possession."

If the intention of the legislature was what the Circuit Court held it to have been, it would have been perfectly easy and most obviously proper to have expressed that intention, either by omitting the words, "which may be found in his possession," or by adding after the word "sale," in the next line, the words, "or which he may have sold, or caused to be sold"; either of which, particularly the former, would have been the simple and natural mode of expressing the intention contended for by the plaintiffs.

Accordingly we find, that in the British statutes on copyright, (of which there have been several,) there has been a change in this particular; and when the amount of the penalty was not intended to be measured by the number of books or sheets found in defendant's possession, it has been so expressed.

The first statute on this subject (from which all the subsequent ones, both in England and in this country, have been taken) was the statute 8 Ann, c. 19, (1710,) which gives to *805] *authors and their assigns the sole right of printing, publishing, and vending their books for fourteen years, with the right of renewal for fourteen years longer if the authors are living at the expiration of the first term. And the first section provides, that if any other person shall print, reprint, &c., any such book or books, without the consent of the author or his assignee, "then such offender or offenders shall forfeit such book or books, and all and every sheet or sheets, being part of such book or books, to the proprietor or proprietors of the copyright thereof, who shall forthwith damask and make waste-paper of them; and further, that every such offender or offenders shall forfeit one penny for every sheet which shall be found in his, her, or their custody, either printed or printing, published, or exposed to sale, contrary to the true intent and meaning of this act." Here we have the same limitation as in our act of Congress.

Next came the statute 12 Geo. II., c. 36, which was passed for the purpose of "prohibiting the importation of books reprinted abroad, and first composed or written and printed in Great Britain."

The first section of this statute, after prohibiting the im-

portation for sale of books first written or printed in England, directs the forfeiture of the books so imported, to be damasked or made waste-paper of, as in the former statute, and then adds, "And further, that every such offender or offenders shall forfeit the sum of five pounds, and double the value of every book which he or they shall so import or bring into this kingdom, or shall knowingly sell, publish, or expose to sale, or cause to be sold, published, or exposed to sale, contrary to the true intent and meaning of this act."

Here we have the penalty not limited to the books found in the offender's custody or possession, but extended to all the books imported, sold, or exposed to sale contrary to the provisions of the statute.

The next statute was that of 15 Geo. III., c. 53, which was "An act for enabling the two universities in England, the four universities in Scotland, and the several colleges of Eton, Westminster, and Winchester, to hold in perpetuity their copyright in books given or bequeathed" to them, &c.

The first section of this act secures to the said universities and colleges the perpetual copyright in books given or bequeathed to them. The second section provides, that if any person shall print, reprint, or import any such book or books, he or they shall forfeit the same, and every sheet thereof, to be damasked or made waste-paper of. "And, further, that such offender or offenders shall forfeit one penny for every sheet which shall be *found in his, her, or their custody, either printing or printed, published, or exposed [*806 to sale, contrary to the true intent and meaning of this act." Here we have the penalty limited to the sheets found in the custody of the offender.

The next was the statute 41 Geo. III., c. 107, entitled "An act for the further encouragement of learning in the United Kingdom of Great Britain and Ireland, by securing the copies and copyright of printed books to the authors of such books, or their assigns, for the time herein mentioned."

This act is remarkable in several particulars, and especially with reference to the point now under consideration, that it has, in different sections, both the kinds of penalty; viz. one limited by the sheets found in the custody of the offender, and the other measured by the whole number of books imported. By the first section, after reciting that "it is expedient that further protection should be afforded to the authors of books," &c., the sole right of printing and reprinting is given to the author, &c., for fourteen years, with the right of renewal for another term of fourteen years, as before. Then it is enacted, that if any one violates this right, the offender

or offenders shall be liable to a special action on the case, at the suit of the proprietor of the copyright, in which damages may be recovered. It is further enacted, that the offender shall forfeit such book or books, and all and every sheet and sheets, being part thereof, to be damasked, as before. "And all and every such offender and offenders shall also forfeit the sum of threepence for every sheet which shall be found in his or their custody, either printed or printing, or published, or exposed to sale, contrary to the true intent and meaning of this act."

After several other provisions, not material to the present question, we come to the seventh section, which forbids the importation for sale of books first printed in the United Kingdom and afterwards reprinted abroad. If any person shall import such book contrary to this act, "then every such book shall be forfeited, and may be seized by any officer of the customs, and the same shall be forthwith made waste-paper." "And all and every person so offending, upon conviction thereof, shall also, for every such offence, forfeit the sum of ten pounds, and double the value of each and every copy of such book or books which he, she, or they shall so import or bring, or cause to be imported or brought, into any part of the said United Kingdom."

Here was a statute intended to give "further protection" to authors, which it does by,—1st, extending the sole right of authors, &c., to the whole of the United Kingdom of Great Britain and Ireland; 2d, giving a special action on the case to
*807] *proprietors of copyrights; 3d, increasing the penalty on reprinting, &c., from one penny to threepence; 4th, giving to officers of the customs the right, and making it their duty, to seize and destroy any books imported in violation of the act; 5th, increasing the penalty on importing such books from five to ten pounds. But the court will observe, that although this statute was intended to increase the protection to copyright, and although the legislature had fully in view the two different modes of measuring the penalty, imposing one in the first section and the other in the seventh, yet they made no alteration in this respect with regard to books reprinted in the kingdom, but adhered to the original limitation, contained in the statute of Ann, only increasing the penalty from one penny to threepence, while they follow the statute of 12 Geo. II. in extending the penalty on imported books to all books imported.

The next act shows the intention of the legislature still more clearly. That was the statute 54 Geo. III., c. 156, entitled "An act to amend the several acts for the encourage-

ment of learning, by securing the copies and copyright of printed books to the authors of such books or their assigns."

The fourth section of this act extends the term of copyright to twenty-eight years, (with a subsequent extension, in section ninth, for the life of the author, if living at the expiration of the twenty-eight years,) gives the special action on the case for violation of the copyright, directs the forfeiture of every book printed, &c., in violation of the copyright, to be damasked, as before, and then provides, that "all and every such offender and offenders shall also forfeit the sum of three pence for every sheet thereof, either printed or printing, or published, or exposed to sale, contrary to the true intent and meaning of this act." Here the limitation to *sheets found in the custody of the offender* is omitted,—and this is particularly important, as I will show presently when I come to examine the acts of Congress on this subject.

I have been thus particular in the examination of these British statutes, because the acts of Congress have been evidently taken from them, copying the very words in many instances. And in the absence of decided cases, putting a judicial construction upon these acts, it is important to learn the sense of the legislature, as to the true meaning of the terms used, from the changes which have been made from time to time; and it is very evident, from this examination, that where the legislature intended to extend the penalty beyond the books or sheets found in the custody of the offender, they have said so in such a way as to leave no doubt about it; as, first, in the case of importation of protected books, the offender forfeits double the *value of every book imported, and, finally, in 1814, and not till then, in case [*808 of reprinting in England, the offender shall forfeit threepence for every sheet either printed or printing, or published, or exposed to sale, contrary to the act.

In the last British statute on this subject, 5 & 6 Vict., c. 45, which repeals the former acts, and forms a complete system of copyright law, the penalty of pecuniary forfeiture is omitted altogether; and the proprietor of a copyright has a special action on the case for damages, and a right to maintain detinue or trover for the pirated copies.

Now let us turn to the acts of Congress on this subject. The first was the act of the 31st of May, 1790, which gives to the author or authors of any map, chart, book, or books, (being citizens of the United States,) and their executors, administrators, and assigns, the sole right to print, reprint, publish, and vend the same for the term of fourteen years,

with the right of renewal by the author, if living, for another term of fourteen years.

The third section provides the penalty for violating this copyright, viz.:—1st. Forfeiture of every copy of the book, &c., wrongfully printed, to be destroyed, &c.; 2d. "And every such offender and offenders shall also forfeit and pay the sum of fifty cents for every sheet which shall be found in his or their possession, either printed or printing, published, imported, or exposed to sale, contrary to the true intent and meaning of this act."

The court will observe that these provisions of this act were taken from the British statutes then in existence. The same term of duration,—fourteen years, with the right of renewal for fourteen years more if the author were living. The same penalty,—forfeiture of books to be destroyed, and payment of a sum of money for every sheet found in the offender's possession. The difference in this part of the act being, that Congress uses the word "possession" instead of "custody," and fixes the penalty at fifty cents instead of threepence, thus making this act much more severe than the British statutes, as I remarked in a former part of my argument.

Then we come to the act of February 3, 1831, under which this action is brought, for it repeals the previous acts. This act extends the term of copyright to twenty-eight years, with the right of renewal for fourteen years more by the author, if living, and then, after providing the mode of securing the copyright by deposit of title-page, and giving notice by publication, the sixth section provides the penalty, which is, as in the former act, forfeiture of every copy of the book, but not to be destroyed, and "fifty cents for every sheet which may
*809] be *found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of this act."

Now the court will observe that this act of Congress was passed sixteen years after the statute 54 Geo. III., c. 156. And there can be no doubt that this statute was before the framers of the act of Congress, not only from the general presumption that Congress would be acquainted with an act of Parliament on the same subject passed sixteen years before, but from their adopting some of its provisions, such as the extended term of twenty-eight years. And yet Congress carefully adheres to the old penalty, limiting it to the sheets found in the offender's possession, although they must have seen the alteration made in the British statute, and known that the effect would be to extend the penalty to all sheets printed or imported. Perhaps Congress thought the penalty

of fifty cents a sheet was so large, that it ought to be limited to the sheets found in defendant's possession. Perhaps it was intended to excite the diligence of the informer to commence his action as soon as the work was published, and before it passed out of the possession of the publisher; or, more probably, the penalty thus limited was intended to operate as a restraint upon booksellers who might take the work for sale, and who would be subject to the penalty for the sheets found in their possession. But whatever may have been the reason, the words of the act of Congress are distinct and plain.

The legislature has prescribed a certain penalty, to be measured by a standard distinctly given. The British Parliament saw proper to alter and enlarge that penalty for the United Kingdom of Great Britain and Ireland. But the Congress of the United States, when their attention was specially called to the subject, have refused to adopt this alteration. They have adhered to the old penalty, and the courts of the United States will not make the alteration.

If this construction is correct, as I trust the court will agree with us in thinking it to be, it is very evident that the instruction given by the court, and the verdict found by the jury in this case under the direction of the district judge, impose a penalty totally different from that prescribed by the law,—for not a single sheet of this work was found to be in the possession of the defendant; and the judgment upon it must therefore be reversed.

Mr. Wendell.

It is said that the penalty of fifty cents is limited to the sheets found in the possession of the defendant, though the counsel candidly admitted it to be difficult to discern the reason *of that limitation. He, however, suggested [*810
that it might have been on account of the enormous penalty which would be imposed in the case of the reprint of a whole volume, and that it might have been to induce the bringing of an action forthwith, before the books had passed into the hands of innocent holders, and thus save them from prosecution. It was also said, that, although in the later acts of the Parliament of England upon the subject of copyright, the words "sheets found in the custody of the offender" are omitted, the similar words contained in our original act upon the subject are still continued in the last act of Congress; from which it was inferred, that these words contained some peculiar meaning, which, with us, was intended to be preserved. The answers to which suggestions are,—

1st, that the penalty will be equally enormous whether the action be brought forthwith or at the end of a year; 2d, that innocent holders of the pirated work are not exposed, for the penalty reaches only those who knowingly sell; and, 3d, the change of phraseology in the acts of Parliament shows that these words were considered mere matter of form, as "sheets printing and printed," the only state of things to which the words could attach, are retained in the act.

Mr. Justice McLEAN delivered the opinion of the court.

This cause is brought here by a writ of error to the Circuit Court of the United States for the Northern District of New York.

An action of debt was brought by Gould and Banks to recover certain penalties alleged to have been incurred by the invasion of the copyright of the plaintiffs in twelve volumes of law reports, to wit, nine volumes of Cowen's Reports and three of Wendell's, by the publication of a Digest as a supplement or third volume of Johnson's Digest. The defendant pleaded *nil debit*.

On the trial, the plaintiffs proved themselves entitled to the copyright of the first, second, and fifth volumes of Cowen's Reports, and of the second volume of Wendell's Reports; and that from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.

The injury complained of consisted in copying from the above reports the marginal notes or indexes of the reporter, and publishing them in the Digest. From the first volume of Cowen's Reports forty pages were copied, from the second volume twenty-nine, from the fifth fifty-four pages, and from the second volume of Wendell's Reports nineteen and a half *811] pages *were copied, which included the whole of the indexes of that volume except eight and a half pages. The change in the phraseology was so great in these pages that the witness did not consider them as having been transferred to the Digest.

This is a *qui tam* action, and was brought under the sixth section of the act of 1831, entitled "An act to amend the several acts respecting copyrights."

Before the Circuit Court many points of law were raised, and instructions prayed, on the facts in evidence; but as the decision will turn upon the construction of the above section, under the ninth prayer of the defendant, the other questions will not be considered.

The defendant's counsel insisted "that the plaintiffs could only recover fifty cents for every sheet of the matter transferred from said index to the first, second, and fifth volumes of Cowen's Reports, and the second volume of Wendell's to the said Digest of said defendant, as had been proved to have been found in his possession, either printing or printed, published, or exposed for sale; and that there was no legal proof that any such sheets of said matter had been so found in said defendant's possession, and prayed the court so to instruct the jury."

"But the counsel for plaintiffs insisted that they were entitled to recover fifty cents for every sheet of such matter which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not; and so the court decided and instructed the jury." And they found a verdict for plaintiffs for "two thousand sixty-nine dollars and seventy-five cents debt, and six cents costs."

The sixth section provides, that, if any person, within the term for which a copyright has been secured, shall print, publish, or import, etc., sell, or expose to sale, or cause to be published, sold, or exposed to sale, any copy of such book, without consent in writing, such offender shall forfeit every copy of such book to the person legally entitled to the copyright thereof; "and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, either printed or printing, published, imported, or exposed to sale, contrary to the intent of this act."

This penalty of fifty cents on each sheet, whether printed or being printed, or published, or exposed to sale, is limited to the sheets in possession of the defendant. But under the instruction of the court, a verdict was rendered for every sheet which the defendant had published or procured to be published.

As this is a penal section, it must be construed strictly. Under it, every copy of a book published without the consent *of the person having the copyright is forfeited, [*812
in addition to the penalty of fifty cents on each sheet in his possession.

The declaration seems not to have been drawn with the view of enforcing any other penalty than that which is imposed for each sheet found in the possession of the defendant.

The judgment of the Circuit Court is reversed, and the cause remanded for further proceedings.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of New York, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

JONATHAN W. NESMITH AND THOMAS NESMITH, COMPLAINANTS, *v.* THOMAS C. SHELDON, HORACE H. COMSTOCK, DAVID FRENCH, WILLIAM E. PETERS, JAMES FORTON, ATTA E. MATHER, HENRY B. HOLBROOK, SAMUEL P. MEAD, FRANCIS E. ELDRED, PHEBE ANN DEAN, CULLEN BROWN, AND CHARLES H. STEWART, RESPONDENTS.

The legislature of Michigan passed an act on the 15th March, 1837, entitled "An act to organize and regulate banking associations," and on the 30th of December, 1837, an act to amend the former act. By the first, any persons were allowed to form associations for the purposes of banking upon the terms specified in the law; and by the second, the stockholders were made liable, in their individual character, under certain circumstances, for the debts of the association.

The associations formed under these acts are corporations within the meaning of the constitution of Michigan, and the acts are unconstitutional and void.

The second section of the twelfth article of the constitution forbidding the legislature from "passing any act of incorporation unless with the assent of at least two thirds of each house," the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two thirds of each house must sanction and approve each individual charter.

The Supreme Court of the State of Michigan has so construed its constitution, and it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own statutes where that construction has been settled by the decision of their highest judicial tribunal.[1]

THIS case was formerly before this court, on a certificate of division in opinion between the judges of the Circuit

[1] APPLIED. *Williamson* v. *Berry*, 8 How., 559. FOLLOWED. *Fairfield County* v. *Gallatin*, 10 Otto, 52. CITED. *Van Rensselaer* v. *Kearney*, 11 How., 318; *Leffingwell* v. *Warren*, 2 Black, 603.

Court for the District of Michigan. Its facts and the reasons for its dismissal will be found in 6 How., 41.

It now came up upon the following certificate of division in opinion.

*"This case having been remanded by the Supreme Court, on the ground that it had not been properly certified on certain points under the act of Congress, and the cause being brought before the court for their consideration and decision, the opinions of the judges are opposed on the following point:— [*813

"Whether the banking associations organized under the act of the legislature of the State of Michigan entitled 'An act to organize and regulate banking associations,' approved March 15th, 1837, and the amended act entitled 'An act to amend an act entitled "An act to regulate banking associations and for other purposes,"' approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the constitution of the State of Michigan."

Article fourth, section first, of the constitution of the State of Michigan is as follows:—"The legislative power shall be vested in a Senate and House of Representatives."

Section second of article twelfth of said constitution is as follows:—"The legislature shall pass no act of incorporation, unless with the assent of at least two thirds of each house."

The first act referred to in the question upon which the judges decided, namely, that of March 15th, 1837, authorized any persons to form associations for the purpose of banking upon the terms specified in the law. It was passed by a vote of two thirds of each branch of the legislature.

The second act referred to provided as follows:—That, "for all debts of such banking association, the directors thereof, if such association shall become insolvent, in the first place shall be liable in their individual capacity to the full amount which such insolvent association may be indebted; and each other stockholder shall thereafter be also liable in like manner, in proportion to his or her amount of stock, for the payment of the full amount of the debts of such insolvent association."

The bill filed by the Nesmiths claimed to hold the defendants responsible, as stockholders, for the debts due by the Detroit City Bank.

The bill was demurred to, and, upon the hearing, the division between the judges occurred as above mentioned, and was certified to this court.

It was argued by *Mr. Seaman*, for the complainants, and *Mr. Romeyn*, for the defendants.

Mr. Seaman, in noticing the argument of the binding authority of the decision of the Supreme Court of Michigan, said:—

It is insisted by the defendants' counsel, that the case of *Green* v. *Graves* is a judicial exposition, by the Su-
*814] preme Court, of the constitution of the State, and of the general banking acts passed by the State legislature, and comes within the principles established by this court in the case of *Green* v. *Neal*, reported in 6 Pet., 291. The point there decided is, that "a fixed and received construction of a statute of a State by its own courts makes a part of the statute law," citing the case of *Shelby* v. *Guy*, 11 Wheat., 361, and also a case in 7 Wheat., 361, and several other cases. This rule is adopted on account of the State statute forming a rule of property, and it applies more particularly to real estate, as is stated in 2 How., 125, and 5 Cranch, 22. As stated in 6 Pet., 298, rights are acquired under this rule, and it regulates all the transactions which come within its scope; and on page 296, referring to the case of *Massie* v. *Watts*, 6 Cranch, 165, the court says,—"A great proportion of the landed property of the country depends on adhering to them." The professed object of the rule is, to prevent two rules of property, and particularly in relation to real property, in the same State,—one in the State courts, and another in the national courts. This is undoubtedly desirable. The principal reason on which the rule is founded appears to be this, as referred to on pages 298 and 296 in 6 Pet., citing the case of *McKeen* v. *Delaney* in 5 Cranch, 22, that when the State courts have given a construction to their statutes, and contracts, deeds, &c., have been made in pursuance of such construction, and rights have been thus acquired and have become vested, those rights ought not to be divested and contracts invalidated by a different construction of the statute by the national courts. This is undoubtedly in accordance with the principles of natural justice, and is sound reason as well as sound law. The principle recognizes the decision of the State court as forming "part of the statute," and thereby recognizes the highest court of the State as part of the law-making power; as vested with the power of legislating and making laws,—that is, of engrafting upon the enactments of the legislature new clauses and sections, explanatory of the original statutes; and that acts done, contracts made, and rights acquired under these judicial en-

actments, called decisions, shall be equally valid and sacred in the national as in the State courts. All this seems to be correct; the legislative power of our courts seems to arise from the structure of our institutions; and so far as regards common law rights, it arises from the very nature of things. The only difficulty in the case arises from the fact, that human reason is weak and feeble, short-sighted, cannot look into futurity to see the ultimate effect of its own opinions, and is extremely liable to be swayed by passion, prejudice, and *interest; and in attempting to engraft upon the statute explanatory clauses and sections, judges often [*815 materially change the purport, nature, and effect of it. If judges were omniscient in wisdom, pure in morals, free from passion and prejudice, and unerring in judgment, this difficulty would not exist. But let us suppose the State courts do, in effect, materially change the statute in constructing it, as seems to have been suspected and intimated by this court in the case of *McKeen* v. *Delaney*, 5 Cranch, 22, and rights are acquired under and on the faith of such wrong judicial expositions; such rights ought to be protected, and for that purpose the wrong judicial construction ought to be regarded as an alteration, as an amendment to the statute, and should be so treated, so far as respects all rights accruing under it, by courts of justice, both State and national.

The question, then, resolves itself into this,—Should these judicial alterations and amendments of the statute have a retrospective, or only a prospective effect? If they are to have only a prospective effect, their influence may be in the highest degree salutary; but if a retrospective effect and application are to be given to them, the consequences will be in many cases very pernicious. The second question is,—Will the judges of this court presume that the State Courts are infallible, and their decisions an unerring exposition of the State statute, and shut their eyes entirely to the terms and provisions of the statute, and refuse to inquire whether the decision of a State court is a fair explanatory law, or should be regarded in the light of a material amendment and change of the original statute. If your honors should look into the statute as well as into the decision, and find the decision equivalent to an amendment of the statute, then the amendment should not have a retrospective effect; and if the State courts give it a retrospective effect, and thereby wrong, injure, and defraud their own citizens, who are obliged to sue in those courts, it is no reason why the national courts, which were created to protect the rights of citizens of other States, should allow their suitors to be wronged and defrauded in

like manner. The next question is,—If your honors allow the State courts, not only to assume law-making powers, but to set the legislature of the State at defiance, disregard their statutes, and engraft upon such statutes as many alterations and amendments as they think fit and proper, will your honors allow them to play the same pranks with the State constitutions also, and engraft as many of their dogmas and as many alterations and amendments upon these fundamental laws of the people as they see fit?

Mr. Seaman then proceeded with his argument at great length.

*816] *Mr. Romeyn*, after stating the case, said:—

This question has been submitted to the Supreme Court of the State of Michigan, the highest judicial tribunal in the State. The report of the decision of that court is found in the case of *Green, Receiver of the Bank of Niles*, v. *Graves*, in 1 Doug. (Mich.), 351. The concluding sentence of the decision (on p. 372) is as follows:—"The result of our deliberations, then, is, that so much of the act under which the Bank of Niles was organized, as purports to confer corporate rights upon the associations organized under its provisions, is unconstitutional and void, and that the demurrer in this case must be sustained."

The court consisted of four judges, three of whom concurred in that opinion, and the fourth did not dissent, but declined to participate in it, because he had not heard the argument.

In the case of *Brooks et al., plaintiffs in error*, v. *Warren Hill, defendant in error*, decided in March, 1848, and not yet reported, the Supreme Court unanimously reaffirmed the decision in the case of *Green* v. *Graves*, and decided, further, that the associations under the laws in question had in no sense or form a valid and legal existence. The adjudications of the highest tribunal in the State are thus consistent and settled.

I do not propose to reargue the questions involved in these decisions. The opinion of the Supreme Court discloses fully the grounds of the judgment.

These decisions affect the construction of the organic law of the State in a most important particular, and they involve interests of vast extent. It is difficult to imagine a case in which a disagreement between the federal tribunals and the State judicatories would be more alarming or mischievous. The bills of these associations are principally payable to bearer, and transferable by delivery. Any holder in another State would therefore have a right to sue in the Circuit Court. They are not affected by the statutes of limitations.

Mich. Rev. Stat. of 1838, p. 576, § 4. It is plain that the consequences would be most disastrous of a decision by this court, by virtue of which a non-resident could, at any time, enforce the collection of the issues of these banks from parties who are prevented by the State decisions from collecting the assets of the bank, or availing themselves of its collateral securities, or compelling a contribution from others.

The obligation of this court to respect and follow the decisions of the State courts on the construction of their local laws will not be disputed. *Brown* v. *Van Braam*, 3 Dall., 344; note to the same case in 1 Pet. Cond., 159; *Elmendorf* v. *Taylor*, 10 Wheat., 152; *Swift* v. *Tyson*, 16 Pet., 18; *Groves et al.* v. *Slaughter*, 15 Pet., 497; *Rowan* v. *Runnels*, 5 How., 139.

*The last case contains the only limitations of the general rule. These limitations do not touch this suit. In it there has been no decision by this court. [*817

There was a decision by the Circuit Court of the United States for the District of Michigan, in the case of *Falconer and Higgins* v. *Campbell et al.*, reported in 2 McLean, 195. It was a suit against the defendants as directors, and it was followed by a bill in equity in the same court against the stockholders, to enforce the collection of the judgment. This case is still undisposed of,—the result, by stipulation, awaiting the decision of the suit now before this court. Surely a single decision in a single circuit, and that virtually appealed from and pending in this court, will not lead to a disregard of the settled and deliberate adjudications of the highest tribunal of a State upon a most important part of its own constitution.

Mr. Chief Justice TANEY delivered the opinion of the court.

In this case, the Circuit Court for the District of Michigan have certified that the following point arose in this case, upon which the justices were opposed in opinion:—

"Whether the banking associations organized under the act of the legislature of the State of Michigan, entitled 'An act to organize and regulate banking associations,' approved March 15th, 1837, and the amended act, entitled 'An act to amend an act, entitled "An act to regulate banking associations and for other purposes,"' approved December 30th, 1837, were or were not corporations or bodies corporate, within the meaning of the constitution of the State of Michigan."

This question, it appears, depends on the construction of

the constitution of Michigan, which declares that the legislature shall pass no act of incorporation unless with the assent of at least two thirds of each house.

The legislature chosen under this constitution, with the assent of two thirds of each house, passed an act authorizing any persons resident in any county in the State to form associations for banking business, upon the terms and conditions prescribed in the law; and declaring the stockholders in such associations to be a body politic and corporate, by such name as they should designate and assume, and conferring upon them the usual powers of banking corporations.

Under this act of the legislature, an association of persons was organized, under the name of the Detroit City Bank.

Another act was afterwards passed by the legislature, under a power reserved in the first, to amend its provisions. And this act, under certain circumstances, made the stockholders liable for the debts of the association.

*818] *The complainants in this case, having become creditors of the association, filed their bill in equity, to charge the defendants as stockholders, under the provisions of the last-mentioned act. And in the progress of this suit, the question arose which has been certified as above mentioned.

If we regarded the question as an open one, a more particular statement of the provisions of these acts of the legislature would be necessary, and also of the transactions which led to this suit. And the point certified would require a very careful and deliberate examination by this court.

But it appears that the same question has arisen in the State courts of Michigan, and been decided in its Supreme Court, upon full argument and consideration. We refer to the case of *Green* v. *Graves*, decided in 1844, and reported in 1 Doug. (Mich.), 351. In that case, the court held, that the banking associations organized under the acts of the legislature mentioned in the certificate of division were corporations within the meaning of the constitution of Michigan; and that these acts were unconstitutional and void.

The point certified is precisely the same. It relates altogether to the construction and legal effect of the constitution of that State, and of the two acts passed by its legislature. And it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own constitution and statutes, when that construction has been settled by the decision of its highest judicial tribunal. After the decision above mentioned, therefore, the question certified cannot be considered as open for

argument in this court. The cases of *Groves* v. *Slaughter*, 15 Pet., 449, and the two cases of *Rowan* v. *Runnels*, 5 How., 134, in relation to the construction of the constitution of Mississippi, stand on very different grounds, as will be seen by a reference to the cases.

Upon this view of the subject, it will be certified to the Circuit Court, as the opinion of this court, that the banking associations organized under the acts of the legislature mentioned in the certificate of division were corporations within the meaning of the constitution of Michigan; and that these acts of the legislature are unconstitutional and void.

ORDER.

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 Michigan, and on the point and question on which the judges of the said Circuit Court were opposed in opinion, and which was certified to this court for its opinion, agreeably to *the act of Congress in such case made and provided, and was argued by counsel. On consideration [*819 whereof, it is the opinion of this court, that the banking associations organized under the act of the legislature of the State of Michigan, entitled "An act to organize and regulate banking associations," approved March 15th, 1837, and the amended act entitled "An act to regulate banking associations, and for other purposes," approved December 30th, 1837, were corporations or bodies corporate within the meaning of the constitution of the State of Michigan, and that these acts of the legislature are unconstitutional and void; whereupon it is now here ordered and decreed by this court, that it be so certified to the said Circuit Court.

GEORGE B. STEARNS, ADMINISTRATOR DE BONIS NON OF JOHN O. PAGE, APPELLANT, *v.* RUFUS R. PAGE.

The general rules stated which govern a court of equity in opening accounts and sustaining claims which are barred by the statute of limitations.

Great caution is exercised, and the complainant is holden to stringent rules of pleading and evidence. He must state in his bill, distinctly, the particular act of fraud, misrepresentation, or concealment; must specify how, when, and in what manner it was perpetrated. The charges must be definite and reasonably certain; capable of proof and clearly proved.

If a mistake is alleged, it must be stated with precision and made apparent, so that the court may rectify it, with a feeling of certainty that they are not

committing another and perhaps greater mistake. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made.[1]

THIS was an appeal from the Circuit Court of the United States, sitting as a court of equity, for the District of Maine.

The bill, filed by Stearns as administrator *de bonis non* of John O. Page, proposed to open and review the accounts of the estate of said Page, which were filed from 1811 to 1816 by his widow and original administratrix, Sarah Page.

The record was very voluminous. There was a bill, and an amended bill, and amendments to the amended bill, and an amendment to one of the amendments to the amended bill. Then there were answers to all these bills, and exceptions to the answers, and motions for the production of books and papers; and a great mass of testimony filed. After all, the record was deemed incomplete, and a *certiorari* issued to bring up more.

*820] *It is unnecessary to give an extended account of all these things, because the opinion of the court is so intermingled with, and founded upon, the facts of the case, that it is sufficient for the Reporter to refer the reader to that opinion.

The defendant below pleaded the statute of limitations, although he answered the bill.

In October, 1843, the Circuit Court dismissed the bill, when the complainant appealed to this court.

It was argued by *Mr. Evans*, for the appellant, and *Mr. Allen*, for the appellee. Only such parts of their arguments will be given as bear upon the question of limitations.

Mr. Evans's third point was, that the plaintiff is not barred by the statute of limitations, nor by lapse of time.

The questions how far courts of equity are bound by statutes of limitations, and whether *ex proprio vigore*, or only by rules of their own by analogy to the statute, and how far and under what circumstances lapse of time is a bar, have been frequently discussed before this and other tribunals.

In many cases relief has been refused; in many cases it has

[1] APPLIED. *Bernheim* v. *Bernheim*, *Kimmell*, 9 Otto, 202, 210; *Pulliam* 23 How., 208. CITED. *Bailey* v. v. *Pulliam*, 10 Fed. Rep., 66. *Glover*, 21 Wall., 349; *Godden* v.

been granted. Many general expressions have been used, and frequent attempts been made to define with precision the principles which govern courts in these cases. But, after all, it comes to exactly this,—that there is and can be, in the nature of things, no certain and definite rule on the subject. Each case must depend upon the exercise of a sound discretion, growing out of the circumstances of the case. 3 Johns. Ch. Cas., 586.

Hercy v. *Dinwoody*, 2 Ves., 90–93, reviews the cases prior to that time, and repeatedly speaks of the *circumstances* as influencing the decision one way or the other.

What, then, are the particular circumstances, or the nature and kind of circumstances, which have been held to bar relief?

They will be found to be cases where the fraud was known to the party affected by it, and who has neglected, for a long time, to assert his rights.

Or where the circumstances afford a presumption almost irresistible, that the matter was adjusted and settled by the parties in the time of it.

Or where it appears satisfactorily, that evidence has been lost, papers burned, documents scattered, which could throw light upon it, thus leaving it altogether in doubt whether any fraud were really committed.

Or where it is inequitable to grant relief;—where there is a want of good faith and conscience in the party seeking it; *as where the sureties of an executor were called in, [*821
after a long period, to make good the fraud of his testator, &c.;—or where the property in question had passed into *bonâ fide* hands, large expenditures made, &c.

Where this is done with a knowledge of the party seeking relief, it is a want of good faith to seek it. Where without his knowledge, then it has arisen from want of reasonable diligence,—and the court will not permit an innocent man to suffer to help a negligent one.

Or where, on some ground of public policy, it is deemed right not to disturb family settlements and possessions.

But in cases of actual fraud, against the party himself, I know of no case where relief has been withheld, unless the circumstances of the case show clearly and satisfactorily that it was known and acquiesced in, or furnish sufficient presumption that it was settled.

Where is the case that mere lapse of time, without such circumstances, bars relief?

What would be said to a bill charging fraud, admitted by the answer, but repelling it by urging, You are too late.

True, I defrauded you; whether you knew it or not, I neither know nor care. I have had the fruits of it thirty years, and I set you at defiance. What would the court say? If they would grant the relief, as I think they would, then it follows that mere lapse of time, in such a state of things, is no bar.

The cases maintain this view. Any quantity of them may be found.

Lord Erskine, in *Cotterell* v. *Purchase*, Forrester, 66, says,—"No length of time can prevent the unkennelling of a fraud."

Lord Northington, in *Alden* v. *Gregory*, 2 Eden, 285, says, —"The next question is, in effect, whether delay will purge a fraud. Never, while I sit here. Every delay adds to its injustice, and multiplies its oppression."

So in 2 Ves., 281, 282. No length of time merely, a bar. (See case.) And that was a case where no fraud imputed.

So in our own courts. *Prevost* v. *Gratz*, 6 Wheat., 481:— "It is certainly true, that length of time is no bar to a trust clearly established; and in case where fraud is imputed and proved, length of time ought not, on principles of eternal justice, to be admitted to repel relief. On the other hand, it would seem that the length of time during which the fraud has been successfully concealed and practised is rather an aggravation of the offence, and calls more loudly upon a court of equity to give ample and decisive relief."

In *Michoud* v. *Girod*, 4 How., 560, 561, no length of time, as against a party to the fraud.

*822] *In *Warner* v. *Daniels*, 1 Woodb. & M., on p. 111, Justice Woodbury recognizes the general principle, that, where fraud exists, length of time is no bar, and cites several cases, *quod vide*.

So it will not be a bar if it would work injustice. Other cases cited by Woodbury, 112.

The true reason for the rule is stated in Fonblanque on Eq., 260 (marginal, p. 331) *in notis*:—"But though courts of equity will interpose to prevent these mischiefs, which would probably result from persons being allowed to bring forward stale demands at any distance of time to disturb the possessions of others, yet, as its interference in such cases proceeds upon the principles of conscience, it will not encourage, nor in any manner protect, the abuse of confidence, and therefore no length of time will bar a fraud."

He afterwards adds,—"Unless it appears that the circumstances of the fraud were known to the party, and that with such knowledge he has lain by a considerable length of time."

Before length of time can operate as a bar, it must appear,—be shown affirmatively,—that the party had knowledge.

It is important to keep this in mind. Some of the authorities speak of "equitable circumstances" being allowed to repel the bar, from which it would seem to follow, that the burden was on plaintiff; but the true rule is, that time is not of itself merely and *per se* a bar, but is made so, and may be made so, by the circumstances of the case.

There are numerous other cases, to the effect that time proves no bar, unless under circumstances. 10 Ves. (Sumner's edition), 423; 2 Johns. (N. Y.) Ch., 252; *Pugh's Heirs* v. *Bell's Heirs*, 1 J. J. Marsh. (Ky); *Bertine* v. *Varian*, 1 Edw. (N. Y.), 343.

But where a fraud appears in a stated account, the whole will be opened, though of a great many years' standing. *Vernon* v. *Vawdry*, 2 Atk., 119; *Whalley* v. *Whalley*, 1 Meriv., 436; 3 Bro. Ch. Cas. (Am. ed. 1844), 646, 527, *n.*

This subject has been before the court recently. Attention drawn to it in *Lewis* v. *Beard*, decided this term. They refer to *McKnight* v. *Taylor*, 1 How., 161, and to *Piatt* v. *Vattier*, 9 Pet., 416, as containing their views of the general rules applicable to such cases.

It is to be noticed, that all these cases were cases where the circumstances rendered it inequitable to grant the relief, —cases of unmitigated neglect, leaving no reasonable doubt of injustice being done by granting the relief sought.

There was no occasion, therefore, to examine the cases where such circumstances were wanting. Adopting the *principle applicable to such a state of facts, and almost the language of an English case, they say the [*823 court will not be called into activity, unless where conscience, good faith, and reasonable diligence exist on the part of the plaintiff. Certainly. Conscience and good faith, in not disturbing others' possessions, and reasonable diligence, so that no pretence of acquiescence might arise.

But whatever effect is to be given to lapse of time, or the statute of limitations, ordinarily, it is quite clear, from all the authorities, that it does not begin to operate until the discovery of the fraud. It must be full and complete discovery.

In cases of fraud, the statute begins to run from the time of such full and complete disclosure as enables the parties interested to see the nature and extent of the fraud committed. *Croft* v. *Administrators of Townsend*, 3 Desaus. (S. C.), 239; *Wamburzee* v. *Kennedy*, 4 Id., 474. See also the

cases cited by counsel in 4 How., 552; *Boone* v. *Chiles*, 10 Pet., 223.

Vague rumors not sufficient. A party possessing imperfect information is guilty of no laches. See cases cited by counsel as before, 4 How., 552.

In the case at bar, the discovery was made within six years from filing the bill. So alleged in the bill. Not denied by answer. Is therefore to be taken as true.

The defendant is bound to negative particularly all circumstances alleged in the bill calculated to avoid the statute. 8 Cow. (N. Y.), 360; 3 Johns. (N. Y.) Ch., 384, 391; Story on Eq. Pl., § 754 *et seq.*; 6 Ves., 586; 2 Paige (N. Y.), 576; same, in 11 Pick. (Mass.), 331; 3 Paige (N. Y.), 273; and cases in any number cited in Cow. & Hill's Phil. Ev. Discovery of paper written by J. O. P., since bill filed, not denied by answer.

The offer to refer to arbitrators is a waiver of the bar relied upon. This not denied by answer. *Baillie* v. *Sibbald*, 15 Ves., 185; *Farnham* v. *Brooks*, 9 Pick. (Mass.) 212; 2 Story, Eq., § 1521, *et seq.*; 1 Id., § 523, *et seq.*

Equitable circumstances may be shown to repel the whole effect of the bar. 2 Story, Eq., § 1524. (See note on p. 737.)

There are other equitable circumstances in the case, which should do away the effect of the lapse of time. The books and papers are in existence, and intelligible.

This was a reason assigned in *Pickering* v. *Lord Stamford*, 2 Ves., 585. But it appearing that the account had been so regularly kept, that there was no difficulty in ascertaining the personal estate of the testator, &c., relief was decreed; and a case, too, where the Master of the Rolls had said he should be glad to get rid of it.

*824] *Time has not obscured the transactions, or only to our detriment. We are the party whom time and death have injured.

The language in 4 Howard is, where the original transactions have become obscure, and by time.

The court must see that time has actually and in fact produced its accustomed effect, before it shall operate.

Above all, where it is evident that no such result has followed, why should effect be given to it?

This case differs from most others which are reported in this,—that the defendant is the original party, with all his faculties and knowledge fresh upon him.

Why then should plaintiff—the estate of J. O. Page—be deprived of its rights? Has he or any of the representatives

been guilty of such laches as shall debar him? Upon what ground will the court not be called into activity?

The case furnishes no presumption of payment. It is not a case for presumption. The answer negatives it.

Whatever error or fraud ever existed now exists. Whatever wrong was done remains.

It furnishes no evidence of acquiescence. The nature of the wrong, and the mode of doing it, so far as appellants were concerned, and proportions, three eights, forbid almost discovery. The then administrator disposed to peace, a woman. No means of redress then but at law; no means of proof; no opportunity for a discovery from defendant.

It seeks to disturb no innocent person's possessions, but is against the original wrongdoer. It is not against the representatives of the original party, and who may be supposed to be left without the means of defence, &c., as in *Mooers* v. *White*, 6 Johns. (N. Y.) Ch., 369. It will scarcely be urged by defendant, that, whatever errors or mistakes were committed, they did not originate in his representations. They could arise from no other source. Nobody else had the means of furnishing the *data*. Nobody else had inducements to falsify. The answer admits that he gave all the information in his power.

It will be said the answer denies all fraud. This is not sufficient; it does not deny, but admits, the gross errors which are the result of that fraud.

A denial of fraud is not sufficient nor conclusive, if the facts and circumstances are such as to lead to a different conclusion. *Howard* v. *Camp*, Walk. (Mich.) Ch., 427.

Fraud may be presumed in equity, though it must be proved at law. *Lord Chesterfield* v. *Jannsen*, 1 Atk., 352; *Denton* v. *McKenzie*, 1 Desaus. (S. C.), 300; *Warner* v. *Daniels*, (cases cited by court,) 1 Woodb. & M., 103; *Watkins* v. *Stockett*, 6 Har. & J. (Md.), 435; *Boyden* v. *Walker*, 2 Id., 292.

*But if there remains any doubt as to the fraudulent representations of defendant, we are entitled to relief on the ground of mistake. [*825]

The court will open a settlement made by mistake, though receipts have passed and a note has been given. 4 Desaus. (S. C.), 122.

"But if there has been any mistake, or omission, or accident, or undue advantage, or fraud, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the

parties, but will allow it to be opened and reëxamined." 1 Story, Eq., § 523.

In some cases the whole account will be opened, in others a more moderate remedy given. *Ib. seq.*

And though an account be settled by arbitrators, it is not conclusive if an error can be shown in the account. *Patterson* v. *Pearl*, 3 Atk., 530; 1 Mad. Ch., 101.

There must be error enough upon the bill to show there is reason for it; and if plaintiff proves some of the errors, he entitles himself to a decree. *Twogood* v. *Swanton*, 6 Ves., 486. He may take advantage of errors in law, as well as in fact. *Roberts* v. *Kuffin*, 2 Atk., 112.

Mistake is within the same rule as fraud, both as regards time and reliefs. 2 Younge & Coll., 58, cited in 2 Story, Eq., 739, note.

Time does not run against the remedy for a mistake until it be discovered. 4 J. J. Marsh. (Ky.), 77; *Bertine* v. *Varian*, 1 Edw. (N. Y.), 343; 1 Paige (N. Y.), 564. See also 1 Woodb. & M., p. 107, cases cited by Woodbury and remarks, showing what is equivalent to a fraud,—such as availing himself of false representations of others, enjoying fruits, &c.

The relation of these parties was of a fiduciary character, whether it were a copartnership or not,—a relation which the courts regard and watch with great scrutiny. Much in any aspect was intrusted to defendant; his control was great, his account large.

1 Story, Eq., 497, note:—"A settled account between attorney and client, or between other persons standing in confidential relations to each other, will be opened more readily than any others; and even, it is said, upon general allegations of error, without any errors being pointed out, when the answer admits errors."

So if a partner, who exclusively superintends the business of the concern, should, by concealment of the true state of the affairs, purchase the share of the other partner for an inadequate price, the purchase will be held void. 1 Story, Eq., § 220; *Maddeford* v. *Austwick*, 1 Sim., 89; *Smith in re Hay*, 6 Mad., 2; *E. I. Co.* v. *Donald*, 9 Ves., 275.

*826] *Mr. *Allen* said, that, where a bill calls for a general account on the ground of fraud, it is not sufficient to make a charge of fraud in general terms; it should be pointed out, and the point stated. 1 Story, Eq. Pl., 251.

This court will be governed by the decisions of the State courts, where the transactions arose in the construction given by them to the statute of limitations. 16 Pet., 455–457.

The statute applies to this case. 1 Mass. Laws, 280, 13th February, 1787; 1 Maine Laws, 297.

This court will not interfere after so great a lapse of time as has passed in this case. 1 How., 161, 189. The decisions of the State court upon the subject are found in 3 Pick. (Mass.), 212, 237-248.

Mr. Justice GRIER delivered the opinion of the court.

A brief history of the conceded facts of this case, anterior to the filing of the amended bill, may save the trouble of a more tedious analysis of the bill and answer, with their numerous amendments, and tend to elucidate the merits of the case and the questions decided by the court.

John O. Page, the complainant's intestate, was a merchant in Hallowell, Maine. He built and owned shares in vessels employed in trade, and had a retail shop or store, which, for some years before his death, was managed by his brother, Rufus K. Page. In 1810, John O. Page went to England, leaving his business chiefly in the care of his brother, and died there, in February, 1811, intestate, leaving a widow and three minor children. Sarah Page, the widow, took out letters of administration on the estate. She filed an inventory of the property, amounting to the sum of $64,000, and charged herself with additional receipts of cash in the administration accounts afterwards filed, showing the whole amount of the estate to be over $80,000.

Rufus K. Page claimed to have been a partner with his brother in the store, by a parol agreement with him, whereby John should furnish the capital, and Rufus conduct the business, dividing the profits, five eighths to John and three eighths to Rufus.

The sureties of Sarah Page in her administration bond were Nathaniel Dummer, her father-in-law, and Thomas Bond, Esq., her brother-in-law, who also aided and counselled her in settling the estate. In February, 1812, Chandler Robins, register of the Probate Court, and John Agry, a respectable merchant and ship-owner, were mutually chosen by the administratrix and Rufus K. Page to settle all accounts between the estate of John O. Page and Rufus K. Page. By their settlement or award, Rufus was charged as debtor to John,—

*827]	*For capital advanced to store, . .	$10,769.00
	For five eighths of profits of store, . .	12,934.00
	Amounting in all to	$23,703.00
	From which was deducted John's debt to store,	7,828.00
	Leaving a balance due by Rufus to the estate, .	$15,875.00

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After adding and subtracting various other matters of account not connected with the partnership, they found the balance due by Rufus to the estate to be $17,190, of which $8,106 was cash, and the remainder, $9,084, consisted of John's share of the notes and accounts due to the store, and which Rufus retained in his hands for collection. The first administration account filed by Sarah Page acknowledges the receipt in cash of the sum of $8,106 from R. K. Page, and the accounts afterwards filed show that she had received the balance of $9,804, partly in cash and partly in notes.

Sarah Page settled the final account of her administration on the 20th of February, 1816. She died in 1826. In 1828, Stearns, the complainant, intermarried with Louisa, one of the daughters and heirs of John O. Page. In 1834, he took out letters of administration *de bonis non* on the estate of John O. Page, for the purpose of prosecuting claims under the treaty, of the United States with France. After this he commenced an examination of the administration accounts of Sarah Page, and began to entertain suspicions that Rufus K. Page had taken advantage of her ignorance of accounts, and had defrauded her in his settlement. And finally, at November term, 1838, more than twenty-six years after the settlement of defendant's account with the administratrix, this bill was filed against Rufus K. Page for a discovery and account.

The amended bill abounds in general charges of fraud against the defendant; alleges that he concealed from the administratrix the true state of the affairs of the deceased, which had been intrusted to his care; that the partnership claimed by him with the deceased was a false pretence, "and that the said Sarah did not distrust, or had it not in her power to disprove, the same"; that the accounts exhibited of the partnership transactions were totally false and fraudulent in their statements and aggregates, calculated and designed to deceive and mislead.

It charges, also, that some ten thousand dollars of private debts due by Rufus to John were intermingled with the partnership accounts so as to produce an erroneous result, and that he had sold and converted to his own use the brig Emmeline, which was owned, in whole or in part, by John, and rendered no account of the same.

*828] *Afterwards, in October, 1841, by a further amendment to the bill, the complainant admits, that, "from means of information which he now has," there was a partnership between John and Rufus, but insists that the profits were to be divided between them in the ratio of two thirds to John and one third to Rufus.

The defendant, in his answer, after denying the general charges of fraud and mistake, asserts, that he entered into partnership, by parol agreement, with his brother, John, in 1806; that the business of the firm was transacted in the name of Rufus K. Page; that John advanced the capital, and Rufus superintended and conducted the business of the store, and the profits thereof were to be divided five eights to John and three eights to Rufus; that the books of the firm were kept on these principles, and always open to the inspection of John, and frequently examined by him; that when John advanced money or goods for the use of the firm, he took the notes of the firm; and that defendant gave notes to John for goods and money supplied, and (to use his own phrase) "for equalizing the capital," to the amount of over $10,000; that immediately on the announcement of the death of John O. Page, an inventory of the goods in the store was taken and placed in the hands of Bond, the attorney of Sarah Page, the administratrix; that he afterwards settled fully and fairly all accounts with the administratrix and her attorney, and produces the books, and the statement of their final settlement as made out by Robins and Agry, the referees chosen by the parties to make the settlement and adjust the accounts, and shows, moreover, by the administration accounts filed by said Sarah, that he had paid her the balance of over $17,000 found to be due by him according to the account thus stated.

He asserts, moreover, that John owned but one half of the brig Emmeline, which the administratrix afterwards sold to the defendant for the sum of $3,000, with which she charged herself in her administration account. And finally, the answer relies on the settlement of accounts thus made more than twenty-five years before the filing of the bill, as a bar to all further account, especially after so great a lapse of time, when papers are lost, witnesses dead, and transactions forgotten, and pleads the statute of limitations.

Statutes of limitation form a part of the legislation of every government, and are necessary to the peace and repose of society. When they are addressed to courts of equity as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction (as in matters of account), they are equally obligatory on each court. In other cases, courts of equity act upon *the analogy of limitations [*829
at law, and sometimes upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches or unreasonable delay. They also interfere in many cases to prevent the bar of the statutes, where it would be

inequitable or unjust: as, for example, if a party has perpetrated a fraud which has not been discovered till the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of the injured party. In cases of mistake also, as well as fraud, they will not consider the statute as running till after the discovery of the mistake, as laches cannot be imputed to the injured party till the discovery of the fraud or mistake has been made. 2 Story, Eq., § 1520. But as lapse of time necessarily obscures the truth and destroys the evidence of past transactions, courts of chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. Charges of fraud are easily made, and lapse of time affords no reason for relaxing the rules of evidence or treating mere suspicion as proof. If a defendant can be compelled to open settled accounts, to explain or prove each item, after a lapse of near thirty years, by general allegations of fraud,—if the fraud can be proved by his inability to elucidate past transactions after so great a length of time, or by showing some slips of recollection, or by contradicting him in some collateral facts by the frail recollection of other witnesses,—no man's property or reputation would be safe.

A complainant, seeking the aid of a court of chancery under such circumstances, must state in his bill distinctly the particular act of fraud, misrepresentation, or concealment,—must specify how, when, and in what manner, it was perpetrated. The charges must be definite and reasonably certain, capable of proof, and clearly proved. If a mistake is alleged, it must be stated with precision, and made apparent, so that the court may rectify it with a feeling of certainty that they are not committing another, and perhaps greater, mistake. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, of misrepresentation was discovered, and what the discovery is, so that the court may clearly see, whether, by the exercise of ordinary diligence, the discovery might not have been before made.[1]

Every case must, of course, depend on its own peculiar circumstances, and there would be little profit in referring to the very numerous cases to be found in the books on this
*830] subject. In the case of *Michoud* v. *Girod*, 4 How., 504, lately decided in *this court, transactions were investi-

[1] Applied. *Wood* v. *Carpenter*, 11 Otto, 140.

gated after a lapse of more than twenty years; but the facts proving the fraud were all on record, and were not disputed. The false accounts made out against the estate of the deceased by the executors were on file, and their iniquity was apparent on their face. Moreover, the complainants resided in Europe, and were kept in ignorance of their rights, and hindered from prosecuting them by the promises, threats, and fraud of the guilty parties.

In this case, the complainant seeks to open an account stated and settled twenty-six years before the filing of his bill, and this account not rendered by the defendant to a woman unacquainted with business, and received by her without examination, but stated from the books, by referees or arbitrators chosen for the purpose, and in the nature of an award between the parties, executed and acquiesced in by both without complaint for a quarter of a century.

Six years is a statute bar to an action of account, both at law and in equity. Has the complainant stated in his bill, and sustained by proof, such a case as would justify the interference of a court of equity after so great a lapse of time?

1. Has he discovered any thing which was not as open to discovery by himself or his predecessor in the administration, more than twenty years before?

2. Has he shown any fraud, misrepresentation, or concealment, practised by the defendant on Sarah Page, and "made it palpable to the court," so that it would be justified in directing the whole account to be opened and taken *de novo?*

3. Or has such clear mistake or omission been shown with regard to any of the items of the account, that the court would grant liberty to the complainant to surcharge and falsify generally, or as to any particular item?

In order to repel the imputation of laches, the complainant states that he did not take out letters of administration *de bonis non* on the estate of John O. Page till the year 1834, eight years after the death of Sarah Page, the administratrix, and six years after his marriage with one of the heirs; "that, on examining the papers and accounts, he discovered that there was a considerable amount of property of said estate included in the inventory which had not been administered by said Sarah in her lifetime; that, in pursuing the inquiry, he gradually obtained information by various means, afforded, in the first place, by the state of those papers, and from sundry other sources and conversations with persons now living or deceased, which produced the persuasion and firm belief, that there was much of said prop-

erty in the hands and possession of Rufus K. Page which has not been exhibited or accounted for by him," &c.; *831] "but that how far the said Sarah Page was in the knowledge and possession of all the information in respect to the premises that has come to his knowledge, he is not able to say, on account of her death before he had any reason or opportunity to ascertain the same." It appears, therefore, that the complainant has discovered no fact of which Sarah Page was ignorant. He can specify no misrepresentation, concealment, or fraud, practised by defendant, which has for the first time come to light. He does not state what property was not accounted for by Sarah Page, or how she was deceived or defrauded by Rufus. In fact, taking the various bills and amendments together, it is very plain that this bill was filed on suspicion of fraud, and for the purpose of a discovery of facts from the defendant on which to found specific charges of fraud. It is clear, also, that these suspicions had their origin, not on the discovery of any new facts concealed from his predecessor in the administration, but from his necessary ignorance of facts of which Sarah Page and her counsel must have been fully conversant, from the very nature and circumstances of the case.

When this bill is divested of its general and vague charges of fraud in matters of which the complainant could have no personal knowledge, it might well be doubted whether it contains sufficient matter properly set forth to entitle the complainant to call on the defendant, after so great a length of time, to answer to its allegations and make a discovery with regard to facts so likely to be forgotten or indistinctly remembered.

But, waiving this point, let us examine the specifications of fraud or mistake which some attempts have been made to substantiate.

1. The complaint about the ship Horatio being found untenable is left out of the amended bill, and need not be noticed.

2. The bill denied that any partnership had existed between Rufus and John O. Page; but, after taking testimony to contradict the answer in this respect, an amendment, filed in 1841, admits the partnership, but charges that the terms were different from those stated in the answer. On this point, the answer, being responsive to the bill, must be taken to be true unless disproved by two witnesses, or something equivalent. The memorandum in the handwriting of John O. Page, not being signed by Rufus or himself, and never

communicated to Rufus or assented to by him, cannot be received as evidence of the fact.

3. The notes of Rufus to John for $10,000, if given, as stated in the answer, to show the amount of capital advanced to the store by John, are fully and properly accounted for. *The referees who stated these accounts had the partnership books and the parties before them, and could best judge how the capital account had been kept, whether by credits in the books or giving the notes of the firm, which would be the notes of Rufus K. Page. The parties acquainted with the transaction had no difficulty about it, and the mere suggestion of a stranger to the whole transaction, now made, some thirty years afterwards, that possibly these notes were the private debt of Rufus, and not given to represent the capital of the store, cannot be received as evidence of mistake or fraud. The answer being responsive to the bill, and uncontradicted by the evidence, is conclusive of the fact. The accounts show that Rufus accounted with the administratrix for the goods of the store inventoried on the decease of John O. Page, for the capital of the firm, amounting to over $10,000, and for John's share of the profits, exceeding $12,000. The complainant has wholly failed to show any mistake, omission, fraud, concealment, or misrepresentation, on the part of Rufus K. Page, in connection with the subject. [*832

4. The interest of John O. Page in the brig Emmeline was transferred by Sarah Page, the administratrix, to Rufus, and the amount accounted for by her in the inventory and administration accounts settled by her. Whether the money was paid to her by Rufus, as he asserts in his answer, or she made a gift of it to him on account of the known intention of her husband to give it to him by his will, is wholly immaterial in this case, as the administrator *de bonis non* can have no concern with property administered and accounted for by his predecessor in the trust.

In the course of the argument, the learned counsel noticed other items of account, which they alleged to be erroneously stated or not sufficiently explained; but as they were not charged in the bill, they will not be noticed.

The decree of the Circuit Court must therefore be affirmed, with costs.

ORDER.

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 Maine, and was argued by counsel. On consider-

ation whereof, it is now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs.

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*833] *THE UNITED STATES, PLAINTIFFS IN ERROR, v. RICHARD KING AND DANIEL W. COXE, DEFENDANTS.

The case of the *United States v. King and Coxe* (3 How., 773) reviewed.[1]

According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions.

But this practice is not applicable to the courts of the United States. A writ of error in them brings up only questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below.[2]

Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where a special verdict is found or a case is stated, in neither of which is there any necessity for a bill of exceptions.

Where the court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is closed against it.

Leaving this statement out, there is still enough in the record to enable the court to take cognizance of this case, because the defendants below asserted a legal title to be in themselves by virtue of a grant which severed the land claimed from the royal domain.

The construction of this grant, issued in 1797, by the Baron de Carondelet, to the Marquis de Maison Rouge, is a question of law upon which this court must review the decision of the Circuit Court.[3]

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[1] This case and the previous decision in 3 How., 773, were subsequently relied upon by counsel as affording support to a motion to dismiss the appeal in *Sargent v. Lapice* (8 How., 48), but the court, *per* Catron, J., at page 65, say that this case "was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute; and as the United States cannot be sued in reconvention, if the defendant had claimed an equitable title in that case, it would have been no defence, because he could not make the United States a defendant, and himself a plaintiff, by a suit in reconvention. The whole proceedings were, necessarily, proceedings at law, and could therefore be removed by writ of error only, and not by appeal."

[2] FOLLOWED. *Boepler v. Insurance Co.*, 13 Otto, 95. CITED. *Prentice et al. v. Zane's Admr.*, 8 How., 486; *Jones et al. v. McMasters*, 20 Id., 22; *Burr v. Des Moines R. R. &c. Co.*, 1 Wall., 103; *Insurance Co. v. Folsom*, 18 Id., 249.

[3] CITED. *Arguello et al. v. United States*, 18 How., 550.

The two grants or contracts of 1797 and 1795 must be construed together. That of 1797 refers to the one of 1795, and cannot be understood without it.

The contract of 1795 was for the benefit of the emigrants, and must have been intended to be shown by Maison Rouge to those persons whom he was inviting to settle upon the land. No personal benefit or compensation to himself individually is provided in it. The object was to promote the policy of the Spanish government, as whose agent Maison Rouge acted, and not as the proprietor of the land.[4]

The contract of 1797 was intended to supply two omissions in that of 1795, namely, to designate with more particularity the place where the settlement was to be made, and to provide for a larger number of families than was mentioned in the original contract.

For both these purposes, a certain tract of land was marked out, and "destined and appropriated" for the uses of the settlement.

The grant of 1797 does not contain the words usually employed in Spanish colonial grants, when there was an intention to sever land from the royal domain and convey it as individual property.[5]

THIS case was formerly before this court, and is reported in 3 How., 773.

Being sent down to the Circuit Court under a mandate from this court, it came up for trial before the Circuit Court in May, 1845, when sundry proceedings took place before that court, which it is not necessary to specify. The result was, a judgment in favor of the United States, from which King and Coxe sued out a writ of error, and brought the case again before this court.

Whilst so pending, this court, on the 16th of February, 1848, passed the following order, which was announced by Mr. Chief Justice Taney.

* "KING AND COXE } Supreme Court of the United
v. } States, December Term, 1847. [*834
UNITED STATES. }

"Upon examining the record now before the court, and referring to the points originally in controversy and still remaining undecided, the court are of opinion, that the matters in dispute can be more conveniently and speedily heard, and finally determined, by reinstating the case in this court in the condition in which it stood at December term, 1844, previous to the judgment rendered at that term; and the counsel for the respective parties having, upon the recommendation of the court, consented to reinstate the case in the manner proposed,—

"It is thereupon, with the consent of counsel, as aforesaid, ordered, that the judgment rendered in this court at December term, 1844, and all the proceedings thereon, and subse-

[4] CITED. *Arguello et al. v. United States, supra* (p. 547).

[5] FOLLOWED. *United States v. Philadelphia and New Orleans*, 11 How., 653; *United States v. Turner*, Id., 664; *United States v. Coxe et al.*, 17 How., 41. CITED. *Dauterive v. United States*, 11 Otto, 705.

quent thereto, be, and the same are hereby, set aside and vacated, and the case as it stood at the term aforesaid, previous to the said judgment, reinstated. And it is further ordered, that it be placed on the docket of December term, 1848, to be argued at that term on such day as the court may assign,—the United States being, as before, the plaintiffs in error, and King and Coxe the defendants."

The case was therefore before the court just as it stood prior to the argument of it, as reported in 3 How., 773.

The history of the case is there given, and all the documents upon which the claim of King and Coxe was founded are set forth at large. It is unnecessary, therefore, to repeat them here.

The United States being plaintiffs in error, the argument was opened and concluded by *Mr. Toucey*, (Attorney-General,) who was replied to by *Mr. Coxe* and *Mr. Gilpin*, on behalf of the defendants in error.

All the parts of their arguments are omitted, except those which bear upon the points decided by the court.

The reporter has his own notes of *Mr. Coxe's* argument, but prefers to print the argument of *Mr. Gilpin*, as that gentleman has been kind enough to revise the notes of his argument.

Mr. Toucey, (Attorney-General,) for the plaintiffs in error.

Whether the paper dated 20th June, 1797, signed by the Baron de Carondelet, was a grant to the Marquis de Maison Rouge of a complete title to the thirty square leagues, is the principal question presented upon the record. It is supposed, that, under the Spanish or any other government, if a grant from the sovereign is set up and relied on, it would be necessary to appear, that there was an intention to make such grant. The intention is the principal thing. It is the essence of the act. *It is the disposing will which governs, when expressed. It lies at the foundation of all law and every contract. The rule that the intention must govern is not the property of any one system, but a maxim of universal law. If such an intention to make a grant do not appear, but the direct contrary, the supposition of a grant is absolutely excluded. And if this be the state of the case upon the face of the assumed paper title, the result will be fortified, if it be possible, by the fact, that the practical construction of both parties was in accordance with it. Such is the precise condition of the grant now alleged as a complete title in this court.

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It will be necessary to see,—1st, what was agreed to be done, on the part of the Spanish government; 2d, what was actually done, in pursuance of that agreement; and 3d, in what light it was viewed by the parties after it was done, or the practical construction.

First, what was agreed to be done by the Spanish government. This is in the form of a written agreement, clearly expressed, and not liable to misinterpretation, bearing date March 17th, 1795. From this paper it appears there were certain "families who proposed to transport themselves" to Louisiana. The Marquis proposes to bring thirty families, "for the purpose of forming an establishment with them, on the lands bordering upon the Washita." The government agrees,—1st, to pay two hundred dollars to every family of two laborers, and in proportion; 2d, to furnish them with a guide, and provisions, from New Madrid to Washita; 3d, to pay for transportation of their baggage and implements, not to exceed three thousand pounds for each family; 4th, to give each family of two four hundred arpens of land, ten arpens by forty, and in proportion for a greater number; 5th, to give the same to their European servants with families, after six years. This contract was signed, "that it might come to the knowledge of those families who propose to transport themselves hither." It proposes to give nothing to any one but the thirty familes who are to constitute the establishment and their European servants. It stipulates to give nothing to De Maison Rouge for his services, neither land nor money. There is not a stipulation in it for his benefit. The whole benefit stipulated, including the land promised, is to go to the thirty families composing the establishment. The whole contract was for their benefit. This is the clear, express, unequivocal contract at the outset, and there is no pretence that it was ever modified. The compensation to De Maison Rouge for his services was to be derived elsewhere, if he had any; either from collateral advantages, or through the emigrants, or in some other mode, which does not appear, except in the case of *Alexander Lawrence, [*836
where the Marquis secured the right to take to himself either the money or the land. This was the contract, "for the establishment on the Washita of the thirty families of farmers destined to cultivate wheat," which was approved by the king, "in all its parts." Thus, and thus only, it became obligatory upon the Spanish government, and its officers derived their authority to carry it into effect. The effect of it was to constitute the Marquis de Maison Rouge an agent of the Spanish government; it clothed him with authority to

act in its name; it was his letter of credence to the emigrants who proposed to come; and that was its avowed object, as expressed in the concluding paragraph. When used by the agent in treating with the emigrants, and acted upon by them, it became a complete and perfect contract between the Spanish government on the one hand, and the emigrants on the other, by which they were entitled to demand of the government the stipulated benefits. Thus far, then, there is no intention manifested by the Spanish government to bestow these benefits upon the government agent, or to permit them to be intercepted by him; but the express language of the contract, which received the royal assent, shows the direct contrary in every particular. Having this safe ground at the outset,—certain knowledge of the previous contract, of the land promised to be given, of the persons to whom it was to be given, and of the agency of De Maison Rouge,—it will be difficult to go astray afterwards, in tracing the acts of public functionaries, done in pursuance of this contract, and by virtue of this authority.

The absence of the usual formalities tends strongly to show that here was no grant or concession. There was no petition for a grant to De Maison Rouge. He did not ask for any land. There is no decree or adjudication granting a petition. There is no warrant of location, permit to occupy, or any other formality, giving him possession, with promise of title upon performance of the usual or the stipulated conditions. There was no consideration proceeding from him, moving the government, or that could be supposed to move the government, to grant to him this territory with the colonists upon it. He had introduced no emigrant at his own expense. The government had introduced all the families at its own expense. It had paid their transportation, furnished them with guides and provisions, given them a bounty in money, and promised them and their servants lands in proportion to their numbers. It had even paid the expenses of De Maison Rouge, as appears by the letter of Baron de Carondelet of the 1st of August, 1795, to Filhiol, the commandant of the post. "The journey of M. Maison Rouge has cost more than five hundred dollars."

*837] *But to come to the paper alleged to be a grant to De Maison Rouge. Why should the Spanish government give the whole territory to him? It does appear, upon the face of the instrument, that the government intended a benefit to him. The words are "We destine and appropriate for the establishment of the aforesaid Marquis de Maison Rouge." It is called his establishment by way of distinction.

Here is no grant in form to him, nor to any other person. The instrument does not name any grantee, nor contain words of grant. All the precedents require both. The instrument begins with the cause of the designation of the land. Because the establishment was nearly complete, it had become desirable to remove, for the future, all doubt respecting other families or new colonists who might come to establish themselves. The lands are expressly designated for the establishment, and the original contract, the king's approval, and the recital in this instrument, all show that the establishment is the colony of thirty families. The fact that the lands comprised in the figurative plan, as it is called, are the identical lands to be given to the emigrants composing this colony, is entirely decisive against the idea of a grant to De Mason Rouge. It was not the intention of the Spanish government to require the colonists to look to him for the title to their lands, but directly to the government, who introduced them, paid their expenses, gave them a bounty in money for coming, and promised to give them their lands upon the condition of inhabiting and cultivating them. The government did not intend to invest him with the title, because that would incapacitate it to perform its contract with the colonists, and with the European servants who should at the end of six years have becomes heads of families. The original contract, being specifically referred to, is incorporated in this instrument as fully as if recited *verbatim*, and the lands are designated under it, for the purposes set forth in it. There is no escape from the conclusion. The designation of the lands for the colony is expressly made "under the terms stipulated and contracted for" by the Marquis; and the royal order approving of that contract, and authorising it, is expressly referred to by name, description, and date. The effect of this act of the government was merely to prescribe certain limits within which these colonists should receive their lands, when they should become entitled to them, and within which other emigrants should not be permitted to intrude, without the consent of government. That is the effect produced, and it is the only effect produced. It does not come up to the standard of an inchoate title to De Maison Rouge. He had no title at all,—no promise of title to him upon the performance of conditions, *express or implied, imposed by the act [*838
of the parties or by act of law

Having thus shown what the government contracted to do, and what the government had done, and that neither in the one nor the other was there manifested an intention to convey this land to the Marquis de Maison Rouge, but the

direct contrary, it remains to be seen how the parties regarded it, and what was the practical construction given to this instrument by both of them.

First, the colonial government did not put such a construction upon it as would vest in him the title to the thirty leagues square, and require the colonists to look to him, instead of the government, for their titles. They did not regard the land as his property. The letters of Baron de Carondelet to Filhiol, the commandant of the post, abundantly show this. Subsequent grants in the same tracts, made by the government from time to time, show it also. The inventory made after the death of De Maison Rouge by Filhiol, as commandant, it is admitted by the claimant, did not contain this land. This was in April, 1800, before the secret treaty of San Ildefonso.

Second, the Marquis de Maison Rouge puts no such construction upon this instrument. This is shown by his letters to Filhiol. In that of the 21st of March, 1796, speaking of the claims of a Mr. Morrison, he says,—"Mr. Morrison alleges that M. Miro has promised to him that quantity of land, but he does not say that it was not for him alone, but for the sixteen families and upwards of Americans he was to have brought into the country and settled in the Prairie Chatellraud. Moreover, he has promised to discover a saline. He has fulfilled none of these conditions. This extent not having been granted to him individually, it still remains in the domain of the king. *He has no more right to claim it than I would have to consider myself as proprietor of the whole extent that has been granted to me, to settle agreeably to my contract with the families* that I have announced to the government, and that they know to be in mission for this place." Others of the letters are equally explicit. In his will, dated the 26th of August, 1799, which is subsequent to the date of the alleged grant, he declares that he possesses property in Paris, Berry, and Querry, which has been confiscated; he gives a house and land which he had purchased to his maid-servant; and he also mentions the place where he has all the articles necessary to build a saw-mill for cutting plank, and a pump-auger. But there is no mention of this tract of thirty square leagues, which is now claimed as his property. He nominates Louis Bouligny his legatee under a universal title: *839] —"And also the residue and remainder *of my goods, rights, and actions, as well within as out of this province, in case my parents are dead, I constitute and name for my sole and universal heir the aforsaid Louis Bouligny." The defendants now claim the absolute title to thirty square

leagues of land under this clause of the will, by this description of goods, rights, and actions.

Third, the inventory which was made by the government officer does not include this land. It was made when the agent of the legatee was present, sent from New Orleans to look after the property of the deceased. Filhiol states that he made the inventory "in presence of M. Michael Pommier, charged with a power from M. Louis Bouligny," but there was not any land mentioned in the said inventory.

Mr. Gilpin, for the defendants in error.

Under the decision of this court at the last term, this case is now presented as if the decree and opinion given in January term, 1845, (3 How., 784,) had never been made. The case was then treated as an appeal, presenting for revision all the facts and law. It was, in fact, a petitory action brought here by a writ of error; and, having been tried below without a jury, under the provisions of the Louisiana Code of Practice, (Art. 494, 495,) which are adopted by the act of Congress of the 26th of May, 1824, (4 Stat. at L., 63,) the finding of the court on all matters of fact was conclusive, and not subject to revision. *Parsons* v. *Armor*, 3 Pet., 414; *Hyde* v. *Booraem*, 16 Pet., 169, 176; *Minor* v. *Tillotson*, 2 How., 394.

It appeared, too, on the argument at the last term, that the record before the court in 1845 was extremely imperfect,—not presenting all the evidence which was before the Circuit Court, as required by the Louisiana practice on appeals, (*Thayer* v. *Littlefield*, 5 Rob. La., 153; *Parkhill* v. *Locke*, 15 La., 443; *Mitchell* v. *Jewell*, 10 Mart. (La.), 645; *Davis* v. *Darcey*, 1 Mart. (La.), 589,) nor correctly exhibiting the character of some of the material evidence which was presented. The depositions on which this court mainly relied, as establishing the certificate of Trudeau to the *plano figurative* to be antedated and fraudulent, (3 How., 785,) were shown to be *ex parte*, and to have been contradicted by many witnesses whose evidence did not appear in the record.

What we are now to discuss is, therefore, a case presented by a writ of error, founded on an allegation of an erroneous judgment of the Circuit Court of Louisiana on certain points of law apparent on the record.

What was the case before the Circuit Court?

By the treaty of the 30th of April, 1803, § 3, (8 Stat. at Large, 200,) all the inhabitants of Louisiana, at the time of cession, were protected in the full enjoyment [*849 of their property,—every species of property, real and per-

sonal, whether held by complete or inchoate titles. *Soulard* v. *United States*, 4 Pet., 511; *Delassus* v. *United States*, 9 Pet., 117. The defendant King is in possession of a tract of 4,666 acres on the west bank of the Washita, from which the United States seek to evict him. He has vouched in warranty his grantor, the defendant Coxe, in the mode prescribed by the law of Louisiana. Civil Code, §§ 2476, 2493; Code of Practice, §§ 378, 380, 384. Coxe has answered, and claims to have been the owner under a title derived directly from the Marquis de Maison Rouge, to whom the Spanish government granted, on the 20th of June, 1797, a large tract, which continued to be the property of his devisee at the time of the treaty, and of which the tract in controversy is part. Coxe also asks, by way of reconvention, (Code of Practice, § 375,) that his own title to two thirds of the whole tract granted to Maison Rouge may be confirmed; the other one third being vested, as he alleges, in the heirs of Turner, as set forth in a document describing their respective interests, and marked Schedule A. On the trial, much evidence, documentary and parol, was offered on the part of the defendants to maintain, and on the part of the United States to deny, the validity of the grant to Maison Rouge, and the title of the defendants under it. It was chiefly denied on three grounds; first, that the grant of the 20th of June, 1797, was connected with, or supplementary to, a contract made on the 17th of March, 1795, between the Spanish government and Maison Rouge, for the settlement of emigrant families at Washita, the conditions of which agreement, it was contended, had not been fulfilled by him; secondly, that the land embraced in the grant had never been separated by a survey from the royal domain, the one certified by Trudeau being alleged to be antedated and fraudulent; and, thirdly, that the defendant Coxe had estopped himself from all claim under the grant by accepting a league square, which was patented to him by the United States on the 20th of December, 1842, pursuant to the provisions of the act of Congress of the 29th of April, 1816 (3 Stat. at Large, 328). The Circuit Court dismissed the plea of reconvention, found the grant of the 20th of June, 1797, to be valid, and adjudged the title of the defendants to be good. A full opinion was prepared, filed, and is annexed to the record, setting forth the grounds on which the decree was made.

What error of law in these proceedings appears by the record to have been committed by the court?

*841] No exception was taken at the trial to the opinion of the *court, or to the judgment; bills of exceptions

were taken, both by the plaintiffs and defendants, to decisions in regard to the admission and rejection of evidence; no other exceptions appear upon the record.

Although the decisions excepted to by the defendants are clearly erroneous, yet it is not now material to inquire into them, as the judgment of the court is in their favor. It would be material so to do, if the decision of this court should be in favor of the plaintiffs, and they entitle the defendants, in that event, to the protection of a *venire de novo*, instead of a final judgment against them, so that they may have the benefit of the evidence of which the decisions excepted to deprived them.

Was there any error in law in the decisions excepted to by the plaintiffs?

The first, fourth, and fifth bills of exceptions have been abandoned by the Attorney-General.

Was there any error in law, in the form or substance of the judgment itself, on a review of which by this court it can be legally reversed?

No exception has been taken to the opinion of the Circuit Court, or any portion of it; there is no agreed case; there is no agreed or reported statement of facts; there is no testimony reduced to writing and sent up by the clerk; there is no certificate that all the evidence received in the Circuit Court is, directly or indirectly, before this court. If, then, there is any error, (beyond those in the bills of exceptions already disposed of,) it must be in the mere terms and language of the decree itself. Now the rules by which this is to be ascertained are incontrovertible. So far as the decree establishes a matter of fact, it is conclusive, and cannot be revised. *Penhallow* v. *Doane*, 3 Dall., 102; *Wiscart* v. *Dauchy*, 3 Dall., 327; *Jennings* v. *Thomas*, 3 Dall., 336; *United States* v. *Casks of Wine*, 1 Pet., 550; *Parsons* v. *Bedford*, 3 Pet., 434; *United States* v. *Eliason*, 16 Pet., 301; *Minor* v. *Tillotson*, 2 How., 394; *Phillips* v. *Preston*, 5 How., 289. So far as the decree establishes a matter of law dependent on a certain state of facts, it is conclusive, unless there be a formal exception taken to such decision, with a statement of all the facts necessary to its revision. *Dunlop* v. *Munroe*, 7 Cranch, 270; *Walton* v. *United States*, 9 Wheat., 657; *Parsons* v. *Armor*, 3 Pet., 414; *Carver* v. *Jackson*, 4 Pet., 80; *Hyde* v. *Booraem*, 16 Pet., 169, 176; *Phillips* v. *Preston*, 5 How., 289; Louisiana Code of Practice, §§ 488, 489, 495; *Porter* v. *Dugat*, 9 Mart. (La.), 92; *Mollew* v. *Thompson*, 9 Id., 275; *Kimball* v. *Lopez*, 7 La., 175. It is a presumption of law, that if any state of facts would sustain the decree, such state

of facts was established in the Circuit Court. *Campbell* v. *Patterson*, 7 Vt., 89; *Butler* v. *Despalir*, 12 Mart. (La.), 304; *Mitchell* v. *White*, 6 Mart. (La.), N. S., 409; *Hill* v. *Tuzzine*, 1 Id., 599; *Piedbas* v. *Milne*, 2 Id., 537; *Fitz* v. *Cauchois*, 2 Id., 265; *Miller* v. *Whittier*, 6 La., 72; *Love* v. *Banks*, 3 Id., 481. These rules apply as well to a decree of a court authorized to decide matters of fact, as to the verdict of a jury. *Mayhew* v. *Thompson*, 6 Wheat., 130; *Livingston* v. *Story*, 9 Pet., 656; *Reynolds* v. *Rogers*, 5 Ohio, 172; *Franklin Bank* v. *Buckingham*, 12 Ohio, 482; *M'Girk* v. *Chauvin*, 3 Mo., 237. Even if the decree is obscure or defective in form, or contains what is surplusage, yet it is sufficient if it follows the issue, and finds, affirmatively or negatively, the facts contested therein. *Brown* v. *Chase*, 4 Mass., 436; *Deering* v. *Hubert*, 2 Litt. (Ky.), 292; *Todd* v. *Potter*, 1 Day (Conn.), 288; *Shepherd* v. *Naylor*, 6 Ala., 638; *Keene* v. *M'Donough*, 8 La., 187.

[*842] Examine by these rules, the errors alleged to exist in the terms and language of this decree.

First, it is said that the Circuit Court adjudicated the title to lands for which the United States have not sued. The language of the decree does not warrant this allegation; the dismissal of the plea of reconvention shows, conclusively, that the decree was confined to the lands claimed in the petition of the United States. The introduction of the title of Maison Rouge was by the United States, in their petition, wherein they declare it to be a pretended title, under which the defendants set up a claim which they deny. The terms of the decree (even if obscurely expressed) are inconsistent with any other judgment than that of the right of the defendant King to the tract conveyed and warranted to him by Coxe, and so described in Schedule A, which is the land sued for by the United States, and no more.

Secondly, it is said that the Circuit Court erred in adjudicating the instrument of the 20th of June, 1797, to be a grant to Maison Rouge. Now, in the first place, it is to be remarked that the Circuit Court do not say this; their decree is, that the grant of land under that instrument, and so held by the defendants, is valid; that their title to the possession of it, as against the United States, is sufficiently established, and that they ought to be quieted in that possession. Such decrees against a claim of the United States, in a similar action, have been sustained by this court even where the defendant has received no formal instrument of grant whatever. *United States* v. *Fitzgerald*, 15 Pet., 420. They will, in such case, protect an equitable as well as a strictly legal title; they will

not give back to the United States property which has been separated from the royal domain. But besides, if the Circuit Court has *adjudged this instrument to be a valid grant,—a complete title in form,—have they erred, or, if they have erred, can this court revise such error? [*843

Even if the Circuit Court committed an error, this court cannot revise it. It is a question of fact. If the instrument was signed by the governor,—if it was in the form required by the Spanish law,—if there was a survey ascertaining the land granted,—if the conditions of the grant were performed by the grantee,—then the instrument was a valid grant. All these are questions of fact; they have been adjudged affirmatively by the Circuit Court; they cannot be revised here. If the Circuit Court erred, their error was in no sense an error of law; if any state of facts whatever could establish, in point of law, such a decree as they have made, that state of facts must be presumed to have been proved. In any event, this decision of the Circuit Court is not their judgment on the point at issue; it is merely their reason for the judgment; it is mere surplusage; if omitted entirely, the decree would still have been responsive to the issue.

It is not, then, necessary—it is not even competent—for this court to inquire whether the grant of the 20th of June, 1797, was a valid grant, even if the point were presented by the record, which it is not. But were that point examined, the decree of the Circuit Court would be fully sustained. The power of the governor to make the grant is indisputable; and the language of the grant is, according to the Spanish law, such as to convey an absolute title. *United States* v. *Arredondo*, 6 Pet., 728; *United States* v. *Clarke*, 8 Pet., 436. It was located by a survey,—a *plano figurativo*,—made by the surveyor-general. The conditions contained in it were performed, and were formally certified so to have been by the competent Spanish authorities. The objections —the only objections—have been two, both of which are futile. The genuineness of the certificate of the surveyor-general was disputed; this objection has been now but faintly pressed, if not entirely abandoned. It rests on the *ex parte* evidence of McLaughlin, Filhiol, and Pommier, which will not stand the test of examination. The performance of the conditions has been denied by an ingenious argument, which seeks to connect the grant of 1797 with the contract of 1795, though in reality the first was meant to supersede the last,—to take its place. The contract involved the Spanish government in heavy expenditures, and was particularly adverse to the policy of Morales, then becoming all-powerful in the

civil administration of Louisiana. It was considered by him desirable, especially after the treaty of 1795, to promote
*844] large settlements of foreign emigrants, excluding the *Americans, in that part of Louisiana, but, at the same time, to avoid the heavy expenditures and numerous inconveniences of the contract system. Hence the grants to Maison Rouge and Bastrop, in lieu of the previous plan of contracts and payments by the government. To suppose that the former was a continuance of, and not a substitute for, the latter, is not only unsustained by any evidence, but is adverse to the very objects the Spanish government sought to attain.

Mr. Chief Justice TANEY delivered the opinion of the court.

This case is one of much interest to the parties concerned, and to the public.

The peculiar practice of Louisiana, which has been adopted in the Circuit Court for that District, has produced some embarrassment in this case. According to the laws of that State, unless one of the parties demurs on trial by jury, the court decides the fact as well as the law; and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the Superior Court, therefore, in the State practice, necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding.

In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other States. And the removal of the case from the Circuit Court to this court is regulated by act of Congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a Circuit Court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the Circuit Court upon questions of fact are as conclusive as if they had been found by the jury.

When this case was tried in the Circuit Court, neither party demanded a jury, and the questions of fact which arose in it were decided by the court. The record transmitted on the writ of error set forth all the evidence, as is usual in

appeals in the State courts; and it appeared that the authenticity of one of the instruments, under which the defendants in error claimed title, was disputed, and the conflicting evidence upon that subject stated in the record. The Circuit Court decided that the paper was authentic, and executed at the time it bore date. This question was fully argued here, as will appear by the *report of the case in 3 How., 773; and the attention of the court not having [*845 been drawn to the difference between an appeal in the State practice and the writ of error from this court, it did not, in considering the case, advert to that distinction. And being of opinion that the weight of evidence was against the authority of that instrument, it rejected it as not legally admissible, and, proceeding to decide the case as if it were not before the court, it reversed the judgment which the court below had given in favor of the defendants. Upon reconsideration, however, we were unanimously of opinion, that the decision of the Circuit Court upon this question of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law; and that, in deciding the question of title in this court, the paper referred to must be treated and considered as authentic, and sufficiently proved.[1] And in order that the defendants might have the benefit of the decision in the Circuit Court, the case was reinstated in this court at the last term, to be heard and decided upon the questions of law presented by the record, as it was originally brought up, without prejudice from the former decision of this court.

It has been again argued at the present term; and the case as it appears upon the record is this.

It is a petitory action, brought and proceeded in in the Circuit Court, according to the Louisiana State practice. The suit is brought by the United States against Richard King, one of the defendants in error, for a parcel of land lying in that State, and described in the petition. King answered, admitting that he was in possession of the land, and claiming title to it under a conveyance with warranty from Daniel W. Coxe, the other defendant; and prayed that he might be cited to appear and defend the suit. On the same day, Coxe appeared and answered, and alleged in his defence, that the land sued for was part of a large tract of land which had been granted by the Baron de Carondelet to the Marquis de Maison Rouge, by an instrument of writing, dated June 20th, 1797,

[1] FOLLOWED. *The Abbotsford*, 8 Otto, 442. CITED. *Barreda et al. v. Silsbee et al.*, 21 How., 167.

which he sets out at large in his answer; and by sundry intermediate conveyances, he deduces a title from Maison Rouge to himself for three fourths of the entire tract. He insists that the instrument of writing executed by the Baron de Carondelet was a complete grant conveying to the Marquis de Maison Rouge an indefeasible title to the land therein mentioned, and that, from the date of the said instrument, it ceased to be a part of the royal domain, and became the private property of the said Maison Rouge. He also avers that this grant was made in consideration of services rendered by
*846] Maison Rouge in settling thirty *emigrant families on the Washita River, in Louisiana, under a contract made by him with the Baron de Carondelet, dated March 17, 1795, and approved by the king of Spain on the 14th of July in the same year. And he then proceeds, in his answer, to assume the character of plaintiff in reconvention, and prays that the grant of the 20th of June, 1797, to the Marquis de Maison Rouge may be declared valid, and that he and King may be recognized to be the lawful owners of the parts of the said grant held by them, as described in the answer of King, and in a schedule annexed to his (Coxe's) answer, and that they may be quieted in the ownership and possession of the same, and that the United States may be ordered to desist from treating and considering any part of said grant, as designated in a certain survey by John Dinsmore, referred to particularly in his answer, as public property.

Upon this issue the parties proceeded to take testimony, which is set out in full in the record. A great part of it is immaterial, and much of it relates to questions of fact which were disputed in the Circuit Court. This mode of making up the record, which is borrowed from the State practice, is irregular, and unnecessarily enhances the costs when a case comes up on writ of error. In cases where there is no jury, the facts, as decided by the court, ought regularly to be stated, and inserted in the record, provided the parties cannot agree on a statement. This is most usually done by the court in pronouncing its judgment. In this case, there is a statement by the judge who decided the case, containing his opinion both on the facts and the law, and which is attached to the record, and has been sent up with it. But this opinion appears to have been filed, not only after the suit had been ended by a final judgment, but after a writ of error had been served removing the case to this court. This statement of the judge cannot, therefore, be regarded as part of the record of the proceedings in the Circuit Court, which the writ of error brings up, and cannot therefore be resorted to as a statement

of the case. And as there is no case stated by consent, it is necessary to examine whether the facts upon which the questions of law arise sufficiently appear in the record to enable this court to take cognizance of the case.

As we have already said, the action brought by the United States is what, in the practice in Louisiana, is called a petitory action, and is in the nature of an ejectment in a court of common law. In a State court where there is no distinction between courts of law and courts of equity, the plaintiff in a petitory action might recover possession, or a defendant defend himself, under an equitable title. But the distinction between *law and equity is recognized everywhere in the jurisprudence of the United States, and prevails (as this [*847 court has repeatedly decided) in the State of Louisiana, as well as in other States. And if these defendants had possessed an equitable title against the United States, as contradistinguished from a legal one, it would have been no defence to this action. But no such title is set up, nor any evidence of it offered.[1] The defendants claim under what they insist is a legal title, derived by the Marquis de Maison Rouge from the Spanish authorities.

Under the treaty with Spain, the United States acquired in sovereignty all the lands in Louisiana which had not before been granted by the Spanish government, and severed as private property from the royal domain. It was incumbent, therefore, upon the defendants, to show that the land in question had been so granted by the Spanish authorities; otherwise the United States were entitled to recover it.

The defendants, in their answer, allege, that it is part of a tract of land that was granted to the Marquis de Maison Rouge by an instrument of writing executed by the Baron de Carondelet in 1797. This instrument refers to the royal order of 1795, and the figurative plan of Trudeau. The defendant Coxe also refers in his answer to these instruments, as containing a part of the evidence of his title; relying upon the paper of 1795 as showing the services which formed the consideration of the instrument upon which he relies as a grant. These instruments were all received by the Circuit Court as authentic and sufficiently proved, and are set forth at large in the record. The question between the United States and the defendants is, whether, according to the Spanish laws at that time in force in the province of Louisiana, the instrument of writing dated in 1797 passed the title to

[1] CITED. *Gilmer v. Poindexter*, 10 How., 267.

the land described in the figurative plan of Trudeau to the Marquis de Maison Rouge, as his private property.

This is a question of law to be decided by the court. And it is altogether immaterial to that decision to inquire what emigrants were introduced by Maison Rouge, or what authority he exercised within the territory in question, because whatever was done by him is admitted to have been done under and by virtue of the authority derived from the instruments before mentioned; and it depends upon their construction to determine whether it was done as the agent of the government or as owner of the land. His acts cannot alter their construction.

Confusedly, therefore, as this record has been made up, and loaded as it is with irrelevant and unnecessary parol testimony, the facts upon which the question of title arises are as fully *before us as if they had been set forth in the form of a case stated; the disputed question as to the authority of the plan of Trudeau being, so far as this writ of error is concerned, finally settled by the decision of the Circuit Court.

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We proceed, then, to examine the question of title, and to inquire whether the land in question was conveyed to the Marquis de Maison Rouge by the Spanish authorities before the cession to the United States.

The paper executed in 1795 is evidently a contract to bring emigrants into the province, and not a grant of land. But as the instrument relied on by the defendants as a grant refers to this, and is founded upon it, it is necessary to examine particularly the stipulations contained in it, in order to ascertain its object, and to see what rights were intended to be conferred in the land destined for the proposed settlement, and to whom they were to be granted.

This agreement states that the Marquis de Maison Rouge, an emigrant French knight, had proposed to bring into the province thirty families, also emigrants, for the purpose of forming an establishment with them on the lands bordering on the Washita River, designed principally for the culture of wheat and the manufacture of flour. And the provincial authorities agreed to pay to every family one hundred dollars for every useful laborer or artificer in it, to furnish guides from New Madrid or New Orleans to the place of destination, to pay the expenses of their transportation from those places, and to grant to each family containing two white persons fit for agriculture ten arpens of land, extending back forty arpens, and increasing in the same proportion to those which should contain a greater number of white cultivators. And

Europern servants brought by the emigrants, bound to serve six or more years, if they had families, were to be entitled to grants of land, proportioned in the same manner to their numbers, upon the expiration of their term of service.

It will be observed, that this contract contains no stipulation in favor of Maison Rouge. All the engagements on the part of the government are in favor of the emigrants who should accept the conditions. Indeed, it seems to have been no part of the purposes of this agreement to regulate the compensation which he was to receive for his services. Its only object, as appears by the concluding sentence, was to make known the offers made by the Spanish government to those who were disposed to come. It was therefore to be shown by the Marquis to those whom he invited to remove to his establishment, and it does not appear to have been thought necessary, and perhaps was not desirable, that his compensation or his interest in *forming the colony should be made public. That was a matter between [*849 him and the Spanish authorities, which doubtless was understood on both sides. And whether it was to be in money, or in a future grant of land, does not appear. Certainly it was not to be in the land on which this establishment was to be formed, because the government was pledged to grant it to the colonists. The provincial authorities, it seems, had not the power, by virtue of their official stations, to enter into this agreement. After it was drawn, it was transmitted to the king of Spain for his approval; and he ratified and confirmed it by a royal order. All that was done under it, therefore, was done under the authority of this special order, and not by virtue of any power which belonged to the provincial officers, in virtue of the offices they held.

It is manifest from this contract, approved as it was by the king, that Spain was at that time particularly anxious to strengthen herself in Louisiana, on the Washita River, by emigrants from Europe. It is a matter of history, that, at that period, the political agitations in France and the neighbouring nations on the continent of Europe induced many to emigrate. These emigrants were, for the most part, persons who were attached to the ancient order of things, or who were alarmed or dissatisfied with the changes which were taking place around them, and consequently were precisely of that character, and imbued with those political feelings, which the Spanish government would prefer in the colonists who settled in the province of Louisiana. The very liberal and unusual terms offered in this contract show its anxiety on the subject. Its evident object was to obtain a body of

agriculturists from the continent of Europe, who would settle together under one common leader, in whom the government could confide, and form a colony or establishment of themselves. Such a colony, in sufficient numbers to afford some degree of protection against Indian marauders, would, by opening, cultivating, and improving the place of their settlement, create inducements to others of their friends or countrymen to join them, and thus promote the early settlement of that part of the province, which this agreement shows the Spanish government was anxious to accomplish.

The Marquis de Maison Rouge, it seems, from his position as an emigrant French knight, was regarded as a suitable person to be employed in forwarding this policy. What were his peculiar duties is not defined in this agreement; but it appears that he was to make known the offers of the government, and select the colonists, and superintend the settlement and formation of the establishment. It is too plain to be *850] *questioned, that, in doing this, he was, by the agreement, to act as the agent of the government, and not as the proprietor of the land.

The contract specifies no particular place on the Washita. It merely provides that it should be on the lands bordering on that river. And the Spanish authorities, in their desire to settle that part of the province,—as these unusual offers so clearly evince,—would naturally be ready to make grants to others. There was danger, therefore, that the unity of the establishment of Maison Rouge might be broken in upon by intervening grants to persons with whom he had no connection, and who, as they did not come under his auspices, might not be disposed to submit to his superintendence, or acknowledge the authority which the Spanish government had conferred on him. The success of his establishment might thus be endangered. There was another omission. He contracted to bring in thirty families. It might well be doubted, under the terms of this agreement, whether the promises of the government extended beyond that number; and others might be deterred from coming, under the impression that they would not reap the like advantages. These omissions were calculated to embarrass the establishment, and retard its success. Indeed, it appears by the figurative plan of Trudeau, that grants to others had then already been made in the territory there marked out; and it will appear, we think, upon examining the instrument of 1797, that these were the omissions it intended to supply, and the difficulties it intended to remove. It was to carry the plan of 1795 into more perfect execution, not to make a grant to Maison Rouge.

It begins by reciting that the Marquis de Maison Rouge had nearly completed the establishment on the Washita which he was authorized to make by the royal order of 1795, and then assigns, as a reason for executing this instrument, the desire to remove for the future all doubts respecting other families or new colonists that might come to establish themselves. This is the only motive assigned, and therefore was the only object which this paper was intended to accomplish. The doubt had arisen under the contract of 1795, and that doubt did not concern Maison Rouge nor the thirty families which he had contracted to bring, but other families and new colonists that might come to establish themselves. And in order to remove these doubts, it destines and appropriates for the establishment aforesaid the thirty superficial leagues marked in the plan of Trudeau, under the terms and conditions stipulated and contracted for by the said Maison Rouge. That is to say, it appropriates a large tract of country, far beyond the wants of the thirty families, in order to show that there would be room for *the other families or new colonists. It is to be for the exclusive use [*851 of the colony which Maison Rouge was to establish, to prevent the apprehension of disturbance from other persons; and it is declared to be under the same terms and conditions, in order to satisfy those other families, or new colonists, that the liberal provision made for the thirty families would also be extended to them. And the instrument also states that this territory is appropriated for "the establishment aforesaid," that is, for the establishment authorized by the contract of 1795, and not for one to be made under a new contract; and it further states, that it is made by virtue of the powers granted by the king,—evidently referring to the royal order which was before mentioned in this instrument, and showing that the provincial officers who signed it were acting under special authority, and not under their general powers to grant land. Every expression in this instrument indicates that it was executed to remove doubts which might arise under the previous contract, and to carry that plan into full effect. There is not a word or provision in it which implies that there were any doubts about the rights of Maison Rouge under his contract, or that he was to have any other rights under this than were given to him by his former agreement. The land is appropriated for "the establishment aforesaid." In other words, it was to be the same establishment, with the same rights, but with limits more distinctly defined, and the rights of other families and new colonists

who might unite themselves with the original thirty more clearly recognized.

It is said that the last instrument should be construed by itself, as distinct from the previous contract, and that the contract of 1795 was referred to merely to show the services which were rendered under it by the Marquis de Maison Rouge, as the consideration upon which this grant was made to him. It is a sufficient answer to this argument to say, that the last instrument, in express terms, states that the motive for making it was to remove doubts in the former one as to other families and new colonists, and consequently could not have been designed to be an independent agreement, conferring new rights upon Maison Rouge alone. It in effect negatives the idea, that the first was regarded as a mere consideration; for upon such an interpretation, there would be no doubts to be removed as to the new colonists. They would have no interest in it. There would be the certainty that the services had been rendered by Maison Rouge, and that this instrument intended to reward him. Besides, the last instrument would be unmeaning and unintelligible without referring to the first, and construing them together. It would be *impossible without taking the two agreements together, to understand from the last what was meant by the establishment of the Marquis de Maison Rouge, or how it was to be formed, or what were to be the privileges of the new colonists, or what were the conditions contracted for by Maison Rouge. None of these things are specified in the instrument of 1797. It refers for them to the former contract.

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But if this instrument is taken by itself, and regarded as independent of the other, it contains no words of grant, none of the words which were employed in the colonial Spanish grants which intended to sever the land from the royal domain, and to convey it as individual private property. It is true that the Spanish colonial grants are in general more summary and brief than common law conveyances. But they are by no means loosely or carelessly expressed; and it must not be supposed that they are ambiguous because they are brief. On the contrary, the intention to convey is always expressed in clear and distinct terms. And these grants, like the patents for land issued by the government in this country, appear to have been prepared by officers of the government well acquainted with the colonial usages and forms. Thus, for example, in the case of Arredondo and Son, reported in 6 Peters, 694, where the grant was for a large tract, upon condition that the parties should at their own expense establish two hundred families upon it, it is expressly stated, that the land was

granted according to the figurative plat, "in order that they may possess the same as their own property, and enjoy it as the exclusive owners thereof."

It cannot be supposed that a grant of thirty superficial leagues, far beyond the quantity usually conveyed to an individual, would have been carelessly drawn in new and unusual terms, calculated to create doubts, and that established forms and usages would be disregarded and needlessly departed from. Certainly there is every reason to believe, that, if this land was intended to be conveyed to the Marquis de Maison Rouge, that intention would have been expressed with at least ordinary perspicuity. Yet, among the many cases of Spanish colonial grants which have come before this court, we are not aware of one, great or small, in which a paper in language resembling this has ever before been produced and claimed as a grant.

The note at the foot of this instrument has been relied on to prove that it was intended to be a grant. We think it is not susceptible of that construction, and that its language proves the contrary. The note is a short one, and merely says, that, "in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American on *the lands included in his grant." The lands mentioned in this note are undoubtedly the lands described [*853 in the body of the instrument, and his establishment was to be formed on them. The note apprises him, that, in doing so, he must conform to this contract, and not admit any American. There was therefore a preëxisting contract in relation to this settlement, by which the rights of the parties were defined, and by which Maison Rouge was prohibited from admitting or establishing Americans upon this land. The contract referred to is evidently the contract of 1795. We hear of no other. The thirty families which Maison Rouge was to introduce under that agreement were to be emigrants,—Europeans; and he is to conform to this stipulation, in introducing the other families and new colonists, in the thirty superficial leagues marked out on Trudeau's plan. They were not to be Americans. The establishment formed on this land was therefore to be made under the contract of 1795, and the rights of both parties regulated by it. The note in question was appended, because the body of the instrument referred only to the undertakings of the government, and without this note Maison Rouge might have regarded himself as absolved from his agreement as to the character of the additional or new colonists. But how could he be required to conform to his contract, unless the contract spoken of was to be carried

into execution upon this territory? The words, "lands included in his grant," which are used in the note, mean nothing more than the lands set apart and appropriated by this instrument for his establishment; and to give them any other meaning would make this brief note unmeaning and inconsistent with itself. He was not to admit or establish Americans in the territory destined and appropriated for the establishment which he was to form, under the contract of 1795,—that contract requiring this establishment to be formed of emigrants. This appears to be the plain meaning of this note, and we can see nothing in it that will justify a different construction, or give any reason to suppose that a grant was intended to Maison Rouge as his private property.

It is objected, also, that the decision of the Circuit Court, upon the question of title, is not brought here by the writ of error, because no exception was taken to it in the court below. But no exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court. It is hardly necessary to refer to authorities on this point; but it may be proper to say, that in *Craig* v. *The State of Missouri*, 4 Pet., 427, and in another case which we shall presently notice, this court *854] have held, *that, where the Circuit Court decides, as in this case, both the fact and the law, no exception can regularly be taken.[1] Even in a court of common law, an exception is never taken to the judgment of the court upon a case stated, or on a special verdict; yet the judgment is subject to revision in the appellate court. The same rule must prevail where the facts upon which the inferior court decided appear in the record;—like a case stated, the question in the superior court necessarily is, whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record.

Under this view of the subject, which brings the question of right directly before us for decision, it is perhaps hardly necessary to say any thing as to the manner in which the judgment was entered in the Circuit Court. But if the defence of King could have been maintained, yet the language in which the judgment was rendered is open to serious objection. It may have been intended to cover only the land in controversy in the suit against King. But it may well bear the construction of being not only a judgment in favor of King, but also in favor of Coxe, for the large portion of this territory to which he claims title in his answer, and for

[1] CITED. *Wcems* v. *George et al.*, 13 How., 195.

which he became plaintiff in reconvention against the United States under the Louisiana practice. In the opinion before mentioned, which was filed by the judge after the case had been removed by writ of error, he states that he overrules the plea in reconvention because it placed the United States in the attitude of a defendant as to the land thus claimed. This decision is undoubtedly right. But yet in the judgment, as stated in the record, the plea in reconvention is not overruled, and its language would rather seem to imply that it was a judgment against the United States in favor of Coxe for the land claimed by him in reconvention, as well as in favor of King for the land sued for by the United States. If this is the meaning of the judgment, it would be obviously erroneous, even if King had made good his defence. But it is unnecessary to decide what is its legal construction, because, in either view of it, the judgment is erroneous, and must be reversed.

Neither is it necessary to examine in detail the exceptions taken at the trial to the admission of testimony. In some unimportant particulars, the evidence objected to was not admissible. But where the court decides the fact and the law without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions. If evidence appears to have been improperly admitted, *the appellate court will reject it, [*855
and proceed to decide the cause as if it was not in the record. This is the rule laid down in the case of *Field et al. v. The United States*, 9 Pet., 202, and is undoubtedly the correct one. It is certainly proper, where evidence supposed not to be legal is received by the court, to enter on the record that it was objected to. But this is done to show that it was not received by consent, and a formal bill of exceptions is not required to bring it to the notice of the superior court. It may, however, be done in that form, if the parties and the court think proper to adopt it; and the objections have been so stated in this case, in conformity, we presume, with the Louisiana practice. But as the material evidence in the case was all legally before the Circuit Court, it would be useless to examine whether errors were committed as to portions of it which are altogether unimportant. And this court being of opinion, for the reasons hereinbefore stated, that this instrument of writing relied on by the defendants did not convey, or intend to convey, the land in question to the Marquis de Maison Rouge, the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to enter

a judgment for the United States for the land described in their petition.

Mr. Justice McLEAN, Mr. Justice WAYNE, Mr. Justice McKINLEY, and Mr. Justice GRIER dissented from this opinion. Mr. Justice McLEAN and Mr. Justice WAYNE filed opinions in writing, as follows.

Mr. Justice McLEAN.

Had not my brother judges pronounced the above opinion, I should not have supposed there could be any difficulty in determining the character and effect of the grant in question. Being in the minority, I shall only state some of the grounds on which my opinion has been formed.

The validity of the grant depends upon the laws of Spain in 1797, the time it bears date. Those laws were foreign, and are required to be proved. The incorporation of Louisiana into the Union cannot affect this principle. The treaty of cession and the acts of Congress subsequently enacted, recognizing private rights in the ceded territory, only reiterated the well-established principles of the laws of nations. In the language of the act of Congress, we are to look "to the laws and ordinances of the government under which the claim originated."

On the 17th of March, 1795, the Baron de Carondelet, Governor of Louisiana, and others, entered into a contract with the Marquis de Maison Rouge, which was sanctioned by *856] the king of *Spain, to bring into "these provinces thirty families, emigrants, for the purpose of forming an establishment with them on the lands bordering upon the Washita, designed principally for the culture of wheat," &c., on the following conditions:—1st. Two hundred dollars to be paid out of the royal treasury for every family composed of two persons fit for agriculture, &c., four hundred dollars to those having four laborers, and in the same proportion for a less number. 2d. A guide to be furnished them. 3d. Their transportation to be paid, not exceeding three thousand pounds to each family. 4th. Ten arpens of land, extending back forty arpens, for a family of two laborers, and in the same proportion for a greater number. 5th. Other privileges.

The Marquis performed much labor, and consequently incurred much expense, in the fulfilment of the contract. And on the 20th of June, 1797, the Baron de Carondelet and Andres Lopez Armesto executed to the Marquis the following instrument:—"Forasmuch as the Marquis de Maison

Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families, by the royal order of July 14th, 1795, and desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted to us by the king, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the Surveyor-General, Don Carlos Lareau Trudeau, under the terms and conditions stipulated and contracted by the said Marquis de Maison Rouge," &c.

"Note, that, in conformity with his contract, the Marquis de Maison Rouge is not to admit or establish any American in the lands included in his grant."

The certificate of the surveyor, Carlos Trudeau, laid down the surveys with precision, stating the superficial total at two hundred and eight thousand three hundred and forty-four superficial arpens, equal to thirty leagues, &c. And the surveyor adds:—"It being well understood that the lands included in the foregoing plats, which are held by titles in form, or by virtue of a fresh decree of commission, are not to compose a part of the thirty degrees; on the contrary, the Marquis of Maison Rouge promises not to injure any of the said occupants, promising to maintain and support them in all their rights, since if it should happen that the said thirty leagues should suffer any diminution of the land occupied, there will be no objection or inconvenience to the said Marquis de Maison *Rouge's completing or making up the [*857 deficiency in any other place where there are vacant lands, and to the satisfaction of the concerned."

This survey, being annexed to the patent and referred to in it, constitutes a part of the grant, with the conditions specified.

The error in the argument seems to be in supposing this grant to have been issued in fulfilment of the contract of 1795. The grant was in no way connected with that contract, except as showing the consideration on which the grant was made to the Marquis, and with the express view of relieving the royal treasury, which was often without funds, from the charges imposed by the contract. Charles Tessier, now a judge in Louisiana, was chief clerk in the land-office, and who made out the grant, states, that "Rendon and Morales successively filled the office of intendant, and being charged with the public finances, which were greatly embarrassed for

want of money, they made difficulties about paying for the families which Maison Rouge introduced and was authorized to introduce, and tried to get rid of farther advances to Maison Rouge." And the witness says the land was not worth so much as the expenses of the government might amount to in the end. And J. Mercier, another witness, confirms the statement of Tessier.

The truth of these statements is sustained by the words of the grant. The royal order of 1795 being referred to, the grant states:—"And desirous to remove for the future all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge," &c. Now it must be observed that the Marquis was the mere agent of the government under the contract of 1795. He was to have no interest in the land, nor did the government, in the contract, propose to pay him for his services. That this enterprise was deemed one of great importance is shown by the gratuity of land and money given by the government to families, and also in agreeing to pay the expense of their transportation. And the government being "desirous to remove for the future all doubts respecting other families or new colonists who may come to establish themselves," &c. These were no part of the families under the first contract, but "other families." So that the families or colonists which should come under the grant were not to come under the contract, but to settle under the grant, having no claim on the government. This relieved the royal treasury from any further embarrassment on account of the contract of 1795, and removed all doubts in regard to such settlers.

*858] *But the land was granted to the Marquis de Maison Rouge, subject only to the terms of the grant and of those specified in the certificate of the surveyor, which were incorporated into the grant. The conditions thus expressed were, that the Marquis should not admit "any American in the lands included in his grant." And he was to protect the rights of those who had a good title to lands within his grant, and should receive other lands in lieu of those thus held. These two conditions constituted the contract referred to, I have no doubt, in the note affixed to the grant. There was, then, no connection between the grant and the contract of 1795, except as the latter showed the meritorious services of the Marquis, which constituted, in part at least, the consideration of the grant.

But was this instrument a grant? Under the common

law it was not a grant, but it is one under the civil law. If the instrument separates the land from the public domain, and appropriates it to the use of an individual, it is a grant. No words of inheritance or terms of grant are necessary by the civil law. In this grant the words are, "We destine and appropriate conclusively for the establishment of the aforesaid Marquis," &c. Now these terms appropriate the land described "conclusively." Nothing could be more specific than this. It separates the land designated in the plat from the lands in the crown, and no subsequent condition was annexed. He had nearly completed the establishment of the Washita under the contract of 1795, and for these services the grant was made. If the grant had required the Marquis to do certain things, as to settle a number of families, there would be some apparent ground to say, that he, or those claiming under him, must show a performance of the condition. But even in such a case the grant would be good, for the cession of the country by Spain to France, and by France to the United States, within a short time after the grant, would have excused the performance of such a condition. It would be strange indeed if our government should require the performance of a condition which excludes our own citizens from benefits, and gives them to foreigners. This point has been decided in the case of Arredondo.

But the most conclusive answer to this view is, that the grant required no such condition, and that, in this respect, it has no connection with the contract of 1795. That contract, by this grant, was admitted to be nearly completed, and there was no requirement that it should be completed. It was found burdensome to the treasury, and was abandoned. Under that contract, titles were made to the settlers, and not to the Marquis. And the land for the thirty families would have required a small tract in comparison with that covered by the grant.

*This instrument, it is said, does not purport to be a grant. If this be so, those who issued it, and all others who have officially and professionally examined it heretofore, have been strangely mistaken. Charles Tessier, who was a principal clerk in the office of the Spanish government of Louisiana for making grants of land, and who made out this grant, says it "was denominated and considered as a *titulo en forma*, and was such complete and perfect evidence of title as not to require any other to validate or strengthen it." J. Mercier, who was a clerk in the land-office with Tessier, also states that it is a grant. Both of these persons, from their public duties, must have been as well acquainted [*859

with the forms of titles then used, and indeed better, than any other persons. And this is a matter of fact to be established.

The commissioners appointed by the government to investigate land titles in Louisiana reported, in 1812, "that the instrument under date of the 20th June, 1797, is a patent, or what was usually, in Louisiana, denominated a title in form."

This claim being before the House of Representatives in 1817, a committee reported, that they "are of opinion that it is a legal and formal title, according to the laws and usages of the province of Louisiana." Other reports were made by a committee of the Senate confirmatory of the grant. The confirmation of the claim to a league square, by Congress, was a recognition of the grant. On no other supposition could the act of the 29th of April, 1816, confirming the league square, have been passed.

There can be no question that this grant would have been held valid under the Spanish government, and, both by the treaty of cession, and the laws of nations, it must be held valid by this government. The largeness of the claim can be no objection to it. Tracts as large were given, for services less meritorious than those rendered by the Marquis de Maison Rouge, by the Spanish government. Grants were made, under that government, for services, civil or military, performed or to be performed. And there was no service deemed more meritorious by Spain, except military service, than that of establishing colonies, reducing the country to cultivation, constructing mills, and other improvements. The quantity granted was left generally to the discretion of the governor or other officer who represented his sovereign in making the grant.

If this instrument be a grant which would have been held valid by the Spanish government, then we are bound in good faith so to consider it. And I cannot entertain any doubt that it is a complete grant, and therefore I dissent from the decision of a majority of the court.

*860] *Mr. Justice WAYNE.

Four of us do not concur with the majority of the judges in the judgment given by them in this case.

I will now give my reasons for not doing so, comprehending in what I shall say, as well as I can, those objections which were urged, in our consultations upon the case, by Messrs. Justices McLean, McKinley, and Grier, against the judgment.

Apart from every consideration connected with the intrinsic validity of the grant, and the defendants' title under it, I regard this judgment as unwarranted either by the case pre-

sented on the record, by the conduct and decision of this court in respect to it at the last term, or by the course and argument of counsel which have necessarily resulted from, and been limited by, that decision. Besides, in my view, it does injustice to other parties, now regularly before the court, who were entitled to be heard, according to our rules and practice, before a decision was made which, in effect, decides their rights, and takes what may be their property from them, without a hearing.

On these grounds I dissent from the judgment. But in addition to them, the evidence on the record, imperfect as it may seem to be to others as to the intrinsic merits of the defendants' title,—for that point does not purport to be now presented for our adjudication,—is yet sufficient to satisfy me that the grant to the Marquis de Maison Rouge is, in form and substance, genuine, valid, and complete, conferring upon him, and those who claim under him, a just and perfect title under the treaty by which Louisiana was ceded to the United States.

This suit was a petitory action, brought by the United States in the Circuit Court of Louisiana, in the year 1843, to recover from the defendant, Richard King, a tract of land of 4,606 acres, lying on the west side of the Washita River, in that State. The defendant denied that the United States had any title to the land; and he further prayed, in accordance with the law and practice of Louisiana, that, as he derived his title by purchase from Daniel W. Coxe, who had warranted it, he might be cited as warrantor, and made a party defendant in the suit.

Coxe came in and filed his answer. He also denied that the United States had any title to the land; and he further alleged, that the tract in controversy was part of a large body of land to which his own title was a valid one, derived from the Marquis de Maison Rouge, who was an inhabitant of Louisiana, to whom the Spanish government had granted it in due form, and in whom it was legally vested previous to the treaty of the 30th of April, 1803, which ceded that territory to the United States, and guarantied to the inhabitants the full enjoyment of their property. In his answer, he further put in a plea of "reconvention," also in [*861 accordance with the law and practice of Louisiana, wherein he asked to be quieted in his own title to the whole grant, against the United States; and he annexed a statement, marked Schedule A, in which the different tracts sold by him since he became the purchaser were particularly set forth, among which was that conveyed to the defendant King, for the recovery of which the suit was brought.

By the Code of Procedure of Louisiana, (Art. 494, 495,) the mode of proceeding in which must, by the provisions of the act of Congress of the 26th of May, 1824, (4 Stat. at L., 63,) regulate the practice of the courts of the United States in that district, either party is entitled to a trial by jury; but if that mode is not preferred, the issue of fact, as well as of law, is to be tried by the court, the finding of the facts by the court being, in that event, equivalent to the verdict of a jury. This was done in the present case.

In the summer of 1843, the defendant and warrantor, Coxe, being anxious for the termination of the suit, entered into an agreement, which appears on the record, (page 80,) whereby it was stipulated that it should be immediately set down for trial, and he consented to the admission of much documentary evidence, chiefly derived from, or appended to, reports of committees of Congress. Among these documents was a pamphlet published by a person of the name of Girod, who was an adverse claimant to a tract of land alleged to be within the Maison Rouge grant; and also several depositions, annexed to the pamphlet, which purported to have been legally taken in suits that had been instituted many years before against the defendant Coxe. It was also stipulated by the agreement, that bills of exceptions might be taken by either party, not only during the actual trial, but even after the decision, until the record, if there should be a writ of error, was transmitted to this court.

When the trial came on, the plea of reconvention put in by the warrantor was dismissed by the court, "because, under the practice of Louisiana, it is to be regarded in the light of a new suit, and consequently places the government in the attitude of a defendant before the court." (Record, 182.)

In addition to the documentary evidence admitted by the agreement, a number of persons were examined at the bar. Their testimony appears to have been mainly directed to establish the genuineness and authenticity of the grant of Baron Carondelet to Maison Rouge, and of the *plano figurativo* of Trudeau, the surveyor-general, which was annexed to it; to rebut the contrary evidence derived from Girod's pamphlet, and which was supposed to exist in the old depositions printed with it; and to show the complete validity of *862] the grant in question, *so far as it depended on the Spanish laws and the recognized and settled practice of the Spanish government. None of the oral testimony—and there were seven or eight witnesses—was reduced to writing, or appears in any shape or form upon the record.

After a trial, which occupied several days, the Circuit Court found and decreed the grant of the 20th of June, 1797, to be a valid instrument, and adjudged the title under it of the defendant King, and Coxe, his warrantor, to be legal and good to the tract mentioned in the answer of the former, and in Schedule A annexed to that of the latter. This, under the law and practice of Louisiana, was a complete and definite finding by the court of the facts at issue,—equivalent to the verdict of a jury.

No opinion was delivered by the court at the time this decree was given, but one was subsequently prepared and filed, and is annexed to the record. It presents in a cogent and succinct manner, but more in detail, the matters of fact, of which the decree gives the summary result; and shows that they were founded on very full evidence, oral as well as documentary, and especially that the testimony derived from Girod's pamphlet, was, in the opinion of the court, conclusively disposed of by that of "persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth."

No exception was taken on the behalf of the United States to any portion of this opinion, although the agreement gave full power to counsel to do so at any stage of the legal proceedings.

In the progress of the trial, however, five bills of exceptions were taken by the counsel of the United States to the rulings of the court, and three by the defendants. Upon the latter it is unnecessary to express an opinion, as the judgment was in favor of the defendants, further than to remark, that, if it had been otherwise, they might have afforded a sufficient ground for its reversal.

The bills of exceptions on the part of the United States did not embrace any error in the opinion of the court, or in its decision of any legal point arising out of the validity of the grant, or its construction, or the Spanish law or practice in relation to such instruments, but were confined exclusively to the rejection and admission by the court of certain documentary evidence. To each bill of exceptions was annexed, separately and distinctly, the testimony connected with it and necessary to a decision upon it.

A writ of error was issued in behalf of the United States, returnable to this court at December term, 1843. With this writ of error were returned not only the five bills of *exceptions taken by the counsel of the United States, [*862 with the evidence embraced therein, but also the three bills of exceptions taken by the defendant. This, however, formed

but a small part of the errors of the clerk of the Circuit Court in making up and returning the record. To these bills of exceptions he annexed a great mass of documentary testimony, a large part of which consisted of printed pamphlets, and among them the pamphlet of Girod, with its appendix; but whether all even of the documentary testimony which had been exhibited at the trial was embraced, did not appear; and it is certain that no portion whatever of the parol evidence had been reduced to writing, or was embraced in the record, although the judge had expressly relied upon it as contradicting the allegations in the documentary evidence. It also contained evidence on the part of the defendant, to prove that the grant in question was a valid grant, according to the Spanish laws and practice in regard to such official acts.

On this singular record, the case was argued before this court on the 24th of February, 1845. The opinion of the court (3 How., 773) was against the validity of the grant, the judgment of the Circuit Court was reversed, and the cause was remanded to it "for further proceedings to be had thereon in conformity with the opinion of the court."

In the argument of the case, reference was largely had to the documentary evidence improperly introduced into the record; and the plaintiffs' bills of exceptions, which alone were properly before the court, were scarcely adverted to.

The opinion of the court was put upon the fact, which it considered established by the testimony, that the certificate of Trudeau, or the *plano figurativo*, annexed to the grant, was antedated and fraudulent; and that therefore, if the grant itself was a genuine instrument, it had not "the aid of an authentic survey to ascertain and fix the limits of the land, and to determine its location." This opinion in regard to the genuineness of the certificate of Trudeau was thus expressed:—"After an attentive scrutiny and collation of the whole testimony, we think it is perfectly clear that this certificate of Trudeau is antedated and fraudulent; and we refer to the evidence of Filhiol, McLaughlin, and Pommier, as establishing conclusively that the actual survey, upon which this certificate was made out, did not take place until December, 1802, and January, 1803; and that the one referred to by the governor in the paper of 1797 (the alleged grant) was for land in a different place, and higher up the Washita River. We are entirely convinced that the survey now produced was not made in the lifetime of the Marquis of Maison Rouge, who died in 1799, but after his death, and at the instance of
*864] Louis Bouligny, who, *according to the laws of Louisiana, was what is there termed the forced heir of the

Marquis; and that it was made in anticipation and expectation of the cession of the country to the United States, the negotiations upon that subject being then actually pending, and the treaty of cession signed on the 30th of April, 1803. We see no reason to doubt the truth of the witnesses to whom we have referred. On the contrary, they are supported by the testimony of other witnesses, and by various circumstances detailed in the record."

It will be seen from this opinion, that the judgment of the reversal of this court was not founded upon any error of law presented in the bills of exceptions in the record, nor even upon any facts stated in those bills of exceptions; but that it was purely a judgment on the facts of the case, different from that which was found by the Circuit Court of Louisiana, sitting without a jury, and found mainly upon the old depositions of three witnesses, which are in the appendix to Girod's printed pamphlet. Neither in the judgment, nor in the opinion of the court, did I concur at that time.

Upon the return of the record, with this opinion, to the Circuit Court of Louisiana, on the 9th of May, 1845, the attorney of the United States moved that the case should be taken up for final decision. The attorney of the defendant, on the other hand, moved for a new trial, and prayed for a jury; and in an affidavit, it was sternly urged upon the court, that, in the previous trial, the case had been prepared and conducted under the belief of the law being well settled, that, in a petitory action, in which neither party called for a jury, the finding of the facts by the court would be considered by the Supreme Court as equivalent to a special verdict, and would not be reversed, except so far as they might be brought up by bills of exceptions. The affidavit then went on to show, not only that several witnesses, whose testimony was not reduced to writing, had proved the genuineness of the certificate of Trudeau, and his unimpeachable official and private character, but that the very depositions of Filhiol, McLaughlin, and Pommier, from which the Supreme Court took the facts on which it mainly relied, discarding from them the finding of the Circuit Court, were *ex parte*, and had been taken without notice to, or the knowledge of, the claimants under the Marquis of Maison Rouge. The affidavit then alleged that the defendants could again prove before the jury, and corroborate with additional evidence, the facts which had been found by the court upon the former trial.

The Circuit Court overruled the application, and ordered a final judgment to be entered for the United States, and

*865] against *the defendant, regarding the judgment and opinion of the Supreme Court as a final one against the validity of the grant, and being commanded by its decree to "proceed according to that judgment and opinion." To this judgment a general exception was taken, and the case came again before this court on a writ of error, and was argued at the last term, December 15th, 1847. This argument has not been reported, probably because no formal decree of reversal or affirmance was made. It embraced, however, an elaborate view of the whole course of proceeding which had occurred, and made it apparent, that, in the statement of the merits of the case in the previous opinion of the Supreme Court, great error had been committed in the assertion of facts; and that, in rejecting the finding of the Circuit Court as conclusive evidence of the facts, and in permitting an inquiry into errors of law not made the subject of bills of exceptions, there had been a deviation equally great from the well-settled decisions of this court.

The suit was not, as this court admitted in its decision, "a controversy in a court of equity, but in a court of law; the petitory action brought by the United States in the Circuit Court of Louisiana being in the nature of an action of ejectment." 3 How., 787.

No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record. *Penhallow* v. *Doane*, 3 Dall., 102; *Wiscart* v. *Dauchy*, 3 Dall., 327; *Jennings* v. *Thomas*, 3 Dall., 336; *Talbot* v. *Seaman*, 1 Cranch, 38; *Faw* v. *Roberdeau*, 3 Cranch, 177; *Dunlop* v. *Munroe*, 7 Cranch, 270; *United States* v. *Casks of Wine*, 1 Pet., 550.

The case of *Parsons* v. *Bedford*, 3 Pet., 434, was, like the present, a petitory action, instituted in the District Court of Louisiana, and brought for review to this court, on a writ of error and bill of exceptions. It differed in one respect,—the facts were found by a jury. The parol evidence, however, had not been written or entered upon the record, although requested by the plaintiff. That refusal was made the ground of an exception. This court decided that it was no error, not merely because the refusal was not matter of error, but because, "if the evidence were before the court, it would not be competent for them to reverse the judgment for any error in the verdict of the jury."

By the Code of Practice of Louisiana (Art. 494, 495), which, under the act of 24th of May, 1824 (4 Stat. at L., 63),

is also the law by which the courts of the United States are governed, the decree of the Circuit Court upon the facts *was in all respects equivalent to the verdict of a jury; and the principle thus established by this court [*866 would be equally applicable to it. It was so held in *Parsons* v. *Armor*, 3 Pet., 425, where the parties had waived the trial by jury, and the case was brought up by writ of error, the court saying it was certainly not an attribute of that writ, according to the common law doctrine, to submit the testimony, as well as the law of the case, to the revision of the court.

In the year 1842, the effect which was to be given to the judgment of the court in Louisiana, asserting a conclusion of facts where a jury had been waived, was deliberately considered in the case of *Hyde* v. *Booraem*, 16 Pet., 176. It was then conclusively settled by this court, that it had no authority, on a writ of error, to revise the evidence which the Circuit Court had before it, or the interpretation they placed upon it, or the conclusions they drew from it. This court then said,—"That is the province of the judge himself, if the trial by jury is waived, and it is submitted to his personal decision. If either party in the court below is dissatisfied with the ruling of the judge on a matter of law, that ruling should be brought before this court by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with his supposed conclusions on matters of fact." In the subsequent case of *Phillips* v. *Preston*, 5 How., 290, the point was treated as conclusively settled.

It should, then, have been taken in this case as established, that every thing which was matter of fact in this controversy had been fixed beyond question in this court by the judgment of the Circuit Court of Louisiana; and that no portion of the proceedings of that court remained open for revision here, but "such rulings on matters of law as were brought before us by an appropriate exception, in the nature of a bill of exceptions."

No final opinion to this effect was written by this court for publication in our reports after the argument at the last term. But such opinion was expressed unanimously by us in our consultation. And, in accordance with it, this court ordered, that "the judgment rendered in this case at December term, 1844, (3 How., 788,) and all the proceedings thereon and subsequent thereto, should be set aside and vacated, and the case, as it stood at the term aforesaid previous to the said judgment, reinstated." Under this last order, the case has been before us at the present term.

The case has been argued, and in my opinion properly argued, by the counsel for the defendants in error, upon the correctness of the rulings of the Circuit Court on matters of law, *stated in the bills of exceptions taken by the United States, who are the plaintiffs in error.

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The judgment of the Circuit Court has established the fact, that the grant made by the Baron de Carondelet, as the governor of Louisiana, on the 20th of June, 1797, to the Marquis de Maison Rouge, was valid under the laws of the French and Spanish governments then prevailing in Louisiana, and consequently continued to be so by the treaty which ceded Louisiana to the United States. It has therefore been properly treated as a question which, under the decisions I have referred to, cannot, upon this record, now properly come before this court.

The validity of the grant must depend upon the genuineness of the instrument itself, and upon its sufficiency to give to the grantee a complete and formal title to the land mentioned in it, pursuant to the laws of Spain at the time it was made. The concurrence of these two facts is essential to the validity of the grant. It is therefore distinctly, but succinctly, affirmed in the judgment of the Circuit Court, and must be taken to be established thereby. From the opinion of the Circuit Court, explaining its reasons for this judgment, it is apparent that both of these points were fully examined, proved, discussed, and decided upon. The assertion that the certificate of Trudeau to the *plano figurativo* has been antedated, or is fraudulent, cannot be maintained. It rests solely upon evidence not worthy of credit, from the circumstances and manner it has been introduced by Girod in his pamphlet, which is shown to have been contradicted, and which, if it were necessary to sift it, would be found to present intrinsic and abundant proof of its own discrepancies and inconsistencies. That the grant is a complete and formal title to the land mentioned in it, pursuant to the laws of Spain, is also conclusively established. It depended on the laws and usages of that government, on the performance of the necessary conditions, and, finally, on the recognition of the grant by the Spanish authorities as the complete and formal investment of the full ownership of the land embraced in it. All these were matters of fact susceptible of proof. That such proof was adduced, and was sufficient, is an inference we are bound to take from the finding of the court, as is shown by its judgment, to which they were necessary. When we turn to the opinion which the Circuit Court has thought proper, though under no obligation to do so, to annex to its judg-

ment, we find such was explicitly the case. On each and every one of these points there was testimony in the Circuit Court. On that testimony that court founded its decision, as a fact, that the grant was a valid and complete one. It says, that the genuineness of the grant is "conclusively *established by the testimony of witnesses who were well acquainted with the signature of the Baron de Carondelet." Of the evidence in Girod's pamphlet, which alone impugned the genuineness of Trudeau's *plano figurativo* annexed to the grant, the court says,—"It is insufficient to counteract the force and effect of testimony emanating from persons who had equal, if not better, opportunities of acquiring a knowledge of the facts set forth." Of the performance of the conditions of the grant, the court says, there was "the most conclusive evidence that the conditions thereof, whatever they may have been, have been complied with." And finally, in regard to the evidence which established it as a complete and formal title, the court says, it is what was usually termed in Louisiana, under the Spanish government, a *titulo en forma*,—a title in form,—as is shown by the testimony of Tessier, who was examined under a commission, and who, as the court observes, was officiating at the time as secretary in the land department. He proved, under oath, that such an instrument was "such complete and perfect evidence of title as not to require any other to validate or strengthen it." [*868

The validity of the grant was therefore properly regarded as an established fact, not now open to argument, under the order of this court pursuant to which the case is now before us. It has been so treated by the counsel of the defendants in error, without interposition or remark from the court. And therefore, as it is now made to form the principal, if not the sole, basis of the decision just expressed as that of the majority, it is a point upon which, in my opinion, the counsel for the defendants have not had that hearing to which they are entitled, and which is necessary to a proper investigation of this important title. The points raised by the bills of exceptions taken by the United States are before this court on this writ of error, and they have been argued and may be decided. It is otherwise with that of the validity of the grant.

If the only persons to be affected by this decision were the defendants on the record, it seems to me it would be improper to make it under the circumstances I have stated. But it has been brought to the notice of this court, before its judgment has been pronounced, that an act of Congress was passed on the 17th of June, 1844, (5 Stat. at L., 676,) the object of

which was to bring in the best form, for final adjudication, those long unsettled titles in Louisiana, arising under the governments which existed there before the cession; and that, under this law, the heirs of Henry Turner, who are claimants under the land grant to the Marquis of Maison Rouge, but to a far larger extent of land than the quantity now in controversy, are at this time *defendants in error in this court, having been brought here by the United States, after having had a decree in their favor in the Circuit Court. These parties, by a formal motion, have asked that our present decision, if the same shall go to affect the validity of the grant, may be postponed until they shall be heard. They have stated, and the fact is so, that the record in their case was filed by the United States only a few days before the argument in the present case, and has only been printed since, so that, without any fault or negligence of their own, they have been unable to avail themselves of the rule of this court which permits parties in subsequent cases involving the same questions to be heard when the case first in order is reached; that while the question and point of law, so far as regards the validity of the grant, are the same, the evidence necessary to its fair and complete adjudication is much more fully established in their record than in the confused and imperfect one now before us; and especially, that it presents the testimony of numerous witnesses of the highest and most unimpeachable character, which has never been submitted to this court, directly establishing the authenticity of the documents in question, as well as proving the practice, usages, and laws of the Spanish government in regard to their form and effect. That in their case the facts were not found solely by the court below, but that their record exhibits the verdict of a jury, founded, in addition to other evidence, on the actual inspection of the original documents, which affirms their authenticity and completion, and the perfectness of the title under them. And finally, that if, under these circumstances, a decision shall now be made against the validity of the grant, it will be made on imperfect evidence, while fuller evidence is on the records of this court awaiting its examination, and also in prejudication of the rights of parties coming here under the sanction of an act of Congress, who have not been guilty of any delay in presenting themselves before this court, and who have been precluded from the benefit of the rule before alluded to by no fault of their own. Can we refuse with justice an application, to grant which injures no one, to refuse which may be productive of consequences the most serious, and perhaps irreparable wrong?

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Nor, in my opinion, are these the only considerations which should have induced us to refrain from a hasty decision, with imperfect evidence, on the validity of this grant. Four years ago, we made a decision relying on this same imperfect record, which contained an assertion and statement of facts rested on evidence since acknowledged by us to have been illegal in itself, and which we now know is positively contradicted. If *this grant is fraudulent in its execution, or in effect [*870
is such, though genuine, as to give no title to those who claim under it, it is our duty to say so. But that should only be done after the calmest consideration of all the testimony relating to it, whether in the record of this case or in that of any other case on our calendar in which is involved the question of the validity of the grant. We ought not to have forgotten, that, in doing otherwise, we may affect the rights and property of many of our citizens who have not been heard; that we shall controvert the opinions formerly expressed for almost half a century by the board of commissioners who first examined the title, by the officers of the general land-office, by the legislature of Louisiana, by committees of Congress, and by the Circuit Court of the United States,—all of whom, after investigation, have declared this grant to be valid, and which has never been said to be otherwise by any other tribunal than this court, when it gave its now recalled judgment, founded upon the depositions annexed to Girod's pamphlet.

If we examine the judgment of the Circuit Court now under review upon the principles that have been heretofore settled by this court, we shall find no error in the "rulings of the judge in a matter of law brought before this court by an appropriate exception in the nature of a bill of exceptions." *Hyde* v. *Booraem*, 16 Pet., 176.

In regard to the three bills of exceptions which were taken by the defendants, also in the record, we need not say any thing, because they are not properly before us, and have not been referred to in the argument. But it may not be amiss to remark, that they afford another reason why a final judgment should not now be entered against the defendants, though the decision of a majority of the court may be adverse to them, because they allege the rejection of important testimony in their favor in respect to the validity of the grant, for reasons which, without expressing a conclusive opinion upon them, I may say were strongly and plausibly urged.

Let us now examine the bills of exceptions taken in behalf of the United States, to see whether they present any illegal ruling of the Circuit Court.

They are five in number, but the first, fourth, and fifth have been properly and candidly conceded by the Attorney-General to be untenable. I am to remark, then, upon the second and third.

The second is an exception to the admission in evidence of a petition of Daniel Clark, the grantor of the defendant, to the Intendant Morales, on the 1st of August, 1803, together with the alleged copy of a certificate, purporting to be signed *871] by Leonard *and Amirez, officers of the royal treasury in Louisiana, on the 5th of August, 1803, in which it was declared, that the Marquis of Maison Rouge had complied virtually with the terms of his contract. The signatures are certified by a notary to be known to him as genuine, and both papers appear to be part of the same "instrument." The genuineness of the signatures was not denied by the Attorney-General. The only ground taken in the argument to sustain the exception was, the insufficiency of the testimony to prove a compliance by Maison Rouge with the conditions of the grant. It is certainly no valid objection to the admission of an authentic document as testimony, that it does not prove all for which the party offering it contends. This may affect its sufficiency, not the legality of its admission. It is a document from the Spanish archives, the authenticity of which was proved, as well as the removal of the records themselves, many years ago, by the Spanish authorities. Its admission is clearly within the rule established in the case of *The United States* v. *Wiggins*, 14 Pet., 345. The exception is limited to the admission of the evidence, not to the legal effect which has been or may be given to it, and it cannot be doubted that the decision of the Circuit Court to admit it was correct.

The plaintiffs' third bill of exceptions was also an objection to the admission of documentary evidence, namely, the report of the commissioners appointed under the act of the 3d of March, 1807, declaring that the grant to the Marquis Maison Rouge "is a patent, or what in Louisiana was denominated a title in form, transferring to him the title, in as full and ample a manner as lands were usually granted by the Spanish government, subject, however, to the conditions stipulated in his contract with the government." That such a report was made, and that the document in question was a copy of it, was not disputed. Such an official act of the officers of the United States in regard to the title was certainly legal evidence in the chain of proceeding, whatever its bearing and effect upon the validity of the title may be. But, if this were not so, it will be enough to say, to dispose of this exception, that, in

the course of the trial, another copy of this same document was introduced in evidence on the part of the United States.

These are the only exceptions to the judgment of the Circuit Court which were taken at the trial, and which have been brought before this court in this record. Neither can be sustained; nor do the majority of the court, in the opinion read by the chief justice, attempt to sustain them.

What, then, is there in the record, upon which the majority of the court rely to warrant their judgment?

*It has been argued, on the part of the United States, that there are errors apparent on the face of the record, which, though not made the subjects of exception, will be noticed by this court. These errors are said to be in the judgment itself. That judgment is in the following words:— [*872

"The court having maturely considered the law and the evidence in this case, doth now order, adjudge, and decree, that the plaintiffs' petition be dismissed; and that the grant made by the Baron de Carondelet, as the governor of Louisiana, on the 20th June, 1797, to the Marquis de Maison Rouge, be, and the same is hereby, declared valid; that the said Richard King, defendant, and the said Daniel W. Coxe, the warrantor, be, and they are hereby, declared and recognized to be the lawful owners of the parts of the said grants held by them, as described in the answer of the said Richard King, and in Schedule A, and that they be quieted in the ownership and possession of the same."

In this judgment, three patent errors are alleged to exist. It is said that it adjudicates the title for lands for which the United States have not sued; that the acceptance, by the defendant Coxe, of a league square, was an extinguishment of his claim to any other portion of the land; and that which was principally argued and urged was, that "the instrument executed by the Baron de Carondelet, on the 20th June, 1797, was not a grant to the Marquis de Maison Rouge." These errors are alleged to be apparent on the record, independently of any exception embracing them. None such, it is admitted, were taken in the court below, or brought here.

Admitting, for the purposes of this argument, that this court can reverse a judgment for such an irregularity as is said to be in this, in its adjudication of the title for lands for which the United States have not sued, without, however, conceding it as a fact that this court can properly do so, in a case brought to it upon a writ of error, this is not the case for the exercise of such a power.

The court having decreed that the petition of the United States should be dismissed, and that the defendant King should be quieted in the ownership and possession of that land for which the United States sued, is as "definitive a sentence," or judgment, as the court could have given upon the subject-matter of the suit. It put an end to the suit, and absolved the defendant, in the language of the civil law of Spain, from the demand which had been made or sued for. Any thing put with it, growing out of the mode of proceeding in the trial, but separable from that "sentence," so as not to interfere with its execution, is, in the civil law of
*873] Spain under which the *judgment was given, one of those divisions or points (*capitulos*) which can be appealed from, and set aside upon the appeal to a superior court, or by the court giving the "sentence," on account of its comprehending a thing not demanded or prayed for. But not so when the defendant has been acquitted and declared free from the demand, unless a right to revoke the sentence has been reserved by the judge (L. 9, tit. 22, p. 3); though it may be reversed upon appeal in a superior court, for meritorious cause, when there has been an error in the judge in acquitting the defendant from the demand for which he was sued. It cannot be denied, that, in this case, the "sentence" or judgment is conformable to the proceedings, so far as it acquits the defendant from the demand of the United States. The *jus in re*, or dominion in the thing sued for by the United States, is for so much land, particularly described in the action, as the mode of proceeding in Louisiana, or the civil law of Spain, in this particular still existing in Louisiana, requires to be done, with a recital—proper enough, and admissible in such actions, but not necessary—of a survey by Dinsmore, without authority of the plaintiffs, under an alleged pretended claim, "called the Maison Rouge claim." The answer of the defendant, after a general denial of all and singular the allegations in the petition, except as they are thereafter specially admitted, is, that "he is the true and lawful owner of the tract of land described in the petition," with a recital of his purchase from Coxe; that he is in possession of the same, and has made valuable improvements; with a prayer that he may be dismissed with costs, and that Coxe, as his warrantor, may be called to appear and defend him in the suit. The issue, then, according to the Louisiana mode of proceeding, or the civil law of Spain, between the United States and King, was certain, positive, and respondent upon the part of King to what the United States sued for, and is no way changed by the intervention of Coxe as his

warrantor. That makes another issue between Coxe and King, so far as his denial of King's statement of his warranty to him; but it is not a substitute for the first issue between the United States and King, as to the dominion of the land sued for. Coxe, it is true, comes in upon the prayer of King, to defend the suit as his warrantor; not, though, as the court here seems to suppose, exclusively to maintain King's ownership of the land sued for as a part of the Maison Rouge grant; for in this petitory action by the United States, King might have resisted it by any equitable title other than that which was equitable or legal connected with that grant. But King asks that Coxe may be brought in as a party; that, "if this suit should be decided against him, he *may have judgment against the United States and the said Coxe, for the value of his improvements on the land, and a judgment against Coxe for the purchase-money and interest thereon, from the time of eviction," and costs of suit. In such a case, no error or irregularity in the judgment, in respect to Coxe's answer, can invalidate the finding upon the answer of King, if the latter can be executed upon the thing sued for. In other words, there may be in the civil law of Spain, upon which the rights of the parties in this case exclusively depend, distinct findings in the same judgment, without the error of one of them having the effect to vacate the other; and in that case it often happens that one of the findings in the judgment is made the subject of appeal, and that it is reversed without affecting the other. Now, though this may not be done in our writ of error, what I contend for is, that, if, in a writ of error in a case from Louisiana, a judgment shall have distinct findings, one of them expressly comprehending and adjudging the subject-matter of the suit, we shall separate it from the others which we may think cannot be maintained, and affirm the first, as would be done in the courts of Louisiana, when the subject-matter of rights claimed and denied depends upon the Louisiana law, or upon that law which existed there when the parties to the suit respectively acquired their rights in the subject-matter of the suit. [*874

But further, the language of the judgment, as to the land upon which it is to operate, is explicit. It dismisses the petition of the United States, and quiets the defendant in the possession of precisely that land, in quantity and description, for which the United States sued him. Whether it was or was not the intention of the Circuit Court to adjudicate the title to other lands, in which the defendant King has no interest, but to which his warrantor, Coxe, may have a title, is

of no consequence, for both are so discriminated in the judgment that they cannot be confounded; and were so, that each might be independent of the other, or, in the language of the civil law of Spain, be firm and valid, from having passed into a thing adjudged (*cosa juzyada*). Besides, such adjudication of a thing not sued for cannot vitiate the judgment for the thing that is sued for in this case; for, if the former is not valid only because it is for land, as this court says, not sued for, the other part of the judgment in favor of King is valid, it being for the very land which was sued for. The fact that King and Coxe claim dominion of parts of what they say they respectively own, under the same grant, and that the court affirms their rights under it, cannot render that part of the judgment in favor of King less a judgment, be-
*875] cause it is for a thing in *contestation; and, though a part of the Maison Rouge grant, the whole of that grant never was so. It was neither so by the action brought by the United States against King, nor did it become so from the answer of Coxe, though that answer, as well as the answer of King, raised the question of the validity of that grant, for the purpose of having it judicially determined whether or not it gave to King the dominion of the land for which the United States sued him, as a part of the Maison Rouge survey. To so much of that land or survey, and to no more of it, is the judgment in favor of King an affirmation of his ownership, or of Coxe's right of alienation of it to King. A judicial determination in favor of the validity of the grant and survey, for any portion of the latter, is a good reason for the United States, by its proper functionaries, to consider that the land embraced in the survey was private property when Louisiana was ceded, or that it was not a part of the public land intended to be conveyed by the treaty to the United States. But the validity of the grant was not, nor can it be, as the case is in the record, the foundation for a judgment in favor of Coxe for all the land which he claims under it, because the United States had not submitted to the jurisdiction of the court for any such purpose. A "definitive sentence," or judgment, is only valid when it is given against a person subject to the jurisdiction of the judge. (L. 12, 15, tit. 22, p. 3.) But the United States did submit itself to the jurisdiction of the court, for the land for which it sued King; and the judgment acquitting him of that demand is final and conclusive in his favor against the United States, though it may be reversed for error in itself by this court, upon a proper exception, and though the execution of it is suspended by the cognizance which this court is legislatively empowered to take

of that "sentence" or judgment. I say legislatively empowered, for that phrase indicates the extent and boundary of this court's cognizance of a case in error. Until it shall be enlarged by Congress, I must think that the court has exceeded it, in this instance, by making an erroneous "division or point," in a judicial sentence containing two distinct "divisions or points," the foundation for the reversal of both, and that, too, without an exception having been taken in the court below to either of them, to bring one or the other of them up for concurrence in this court. If this court means to claim the power, and to exercise it in the review of a judgment, by a superior court, of an inferior, according to the civil Roman law, or as that law was modified under the Spanish rule in Louisiana, it may be done. But in doing it in this case, I may be allowed to dissent from my brethren, until some better *reasons for the exercise of such power shall be given than I have yet heard. [*876

However, does the language of the judgment necessarily embrace any other land than that which the United States claim in their petition? The inquiry should not alone be, whether the judgment may not bear that construction, but whether or not it does not admit of another, more coincident with the case as it is on the record and appeared to be on the trial, and more in harmony with the duty of the judge who gave it, in respect to the only "definitive sentence" which, under the civil law of Spain as it exists in Louisiana, can be given in a suit for real property where a warrantor appears to defend the respondent to the action in the character of a plaintiff in reconvention. If the judgment will bear such a construction, though the language of it may not obviously show it, we are bound to give that, of which it is susceptible, most favorable to its operative accuracy, or "executive process for a thing adjudged." Now my reading of this judgment is, that the petition of the United States is dismissed, and that King is quieted in the ownership and possession of the quantity of land for which the United States sued him, on account of the court having found the fact of the validity of the Maison Rouge grant, and that the further declaration in the judgment in respect to Coxe's ownership of the other lands in Schedule A, and that he is to be quieted in the enjoyment of them, is but an inference from the court's finding, from the proofs in the case, that the Maison Rouge grant and survey were valid. That it could not have been the intention of the court to be a judicial sentence seems to me certain,—first, because the court had disallowed or dismissed Coxe's plea in reconvention, by which alone his title

to other lands than that sued for was brought in question, and secondly, because the only judgments which the Louisiana law permits to be given in such a case are the affirmation of his title to the land by decreeing its ownership to his vendee, or the disaffirmation of it, with a sentence against the warrantor for the purchase-money, with interest upon it from the final eviction, and for the value of the improvements and costs. Besides, in all fairness of construction, if we consider the words of the judgment in connection with what, manifestly, the Circuit Court, throughout the trial, thought was the only issue before it, do the words, "that the said Richard King, and the said Daniel W. Coxe, warrantor, be, and they are hereby, declared and recognized to be the lawful owners of the parts of said grant held by them, as described in the answer of the said Richard King and in the Schedule A," imply an adjudication for more land than that for which King had been sued, and of which Coxe had been
*877] the owner, as *described in the schedule, before he sold it to King? Of themselves, the words may; but that it was not so meant seems to me to be certain, from the dismission of the petition of the United States for just the land for which it had sued. I have used this course of argument, however, in respect to the judgment, not so much for the purpose of establishing the correctness of my own construction of it, as to show, that, in this court's review of it, instead of doing as it has done, it should, in accordance with its own well-established rule, have made every reasonable presumption in favor of its correctness. So the court has done in all previous cases where that which was equivocal in a judgment has not interfered with the right to a forced execution upon it of the matter in controversy. And so essential is the propriety and policy, in jurisprudence, of putting an end to further controversy after a judgment rendered, though there may be surplusage in it, that no instance can be found in our books, nor in the English reports, of a judgment set aside, in a court of review, which distinctly finds the issue between the parties, on account of other matter in it, unless upon exceptions taken to the court's ruling of the law in the case applicable to the issue. This I believe to be the only instance to the contrary, and I cannot think it will ever be a precedent for another.

In the case under consideration, the action was instituted by The United States against King, for the recovery of a tract of land in the actual occupation of the defendant. The petition is in the general terms in which such pleadings are usually framed in Louisiana, and avers the invalidity of the

title under which the defendant claims to hold the land, and the paramount legal title of the United States. The answer of the defendant to this petition is equally general in its terms, and asserts, without any specification of details, the validity of his title, and controverts the allegations in the petition. So far the case is perfectly simple, and, being followed by a general judgment for the defendant, so far as that judgment disaffirms the title of the United States and affirms that of the defendant, there is no ground upon which error can be alleged. In such a state of the case, without the intervention of the warrantor, I am warranted in saying, from the decision just read by the chief justice, that the judgment of this court would have been in favor of the judgment of the Circuit Court. The supposed difficulty, however, which the case presents, and which has caused the reversal of the judgment of the Circuit Court, arises from the circumstance, that King not only puts distinctly and simply in issue the question of title between himself and the United States, but he vouches, in warranty, Coxe, from whom he *purchased. King was, by the practice in Louisiana, [*878 obliged to do that. Let us for a moment inquire into the nature of that practice, and what it is meant to accomplish. In my opinion, it has a decisive and hostile bearing against the ground taken by this court, that the judgment of the Circuit Court should be reversed on account of its supposed adjudication of title for more land than the United States sued for.

At common law, as is familiar to all of us, when an action is brought to recover real estate which a defendant holds by purchase from another, accompanied with a covenant of warranty, the defendant may, at his option, elect either to give notice of the pending action to his vendor and warrantor, or to await the result of the suit, and, if judgment passes against him, sue upon his covenant of warranty. In the first case, the warrantor may take upon himself the burden of the defence, if he pleases, or may omit it. In either case, notice of the suit having been given to him, he is bound by the judgment. It is, nevertheless, still necessary that an action upon the warranty should be brought against him to enforce his personal liability. And upon proof that he had notice of the first suit, the judgment against his vendee will be conclusive evidence against him of the breach of his covenant.

If no such notice of the first suit be given to him, he may, in an action on the covenant, controvert the title of the original plaintiff, and require full proof of it to fix his liability. In

all cases, however, the responsibility of the warrantor is judicially settled in the second suit.

The Louisiana law seeks to accomplish precisely the same results by a speedier process. It permits the defendant to call, in warranty, the party from whom he derives title. The warrantor may forthwith appear in court as a party, and in his own name defend the suit. Notwithstanding this, however, no judgment is entered against him at the suit of the original plaintiff; but in case he shall be adjudged entitled to the property in contestation, a second judgment is entered simultaneously, in favor of the original defendant, against his warrantor.

This subject was fully discussed in this case at our last term; but, as I have remarked before, we have no report either of the argument or the decision. I depend upon my own notes of that argument, and upon those of Mr. Coxe, of counsel in the case, from which I have derived much information. In my view, however, of the Louisiana law and practice, it is clear that the original proceedings and pleadings between the original parties to the suit remain as they were before the intervention of the warrantor, and the defence interposed by the warrantor cannot be made the foundation of any judgment to be rendered in favor of the plaintiff in the original action.

*879] *If this view of the matter be correct, in giving judgment in favor of King against the United States, the Circuit Court was necessarily limited to the pleadings between the parties. And so this court regarded the question at the last term; for although Coxe, in the defence interposed by him, sets up a claim to a larger portion of the entire Maison Rouge grant, and although this court, when this case first came before it, considered that the controversy was thus enlarged so as to comprehend this addition to the subject-matter involved, and that Coxe became answerable to a judgment coextensive with his claim, yet we were all satisfied, at the last term, that in this we had, as in other respects, misapprehended the local law, and the majority of the court now —as it ought to have done before, as I then thought—have confined us within our legitimate limits, and restricted the judgment to King alone, and to the property described in the petition. It would seem necessarily to follow, from this view of the case, that, in our consideration of the judgment of the Circuit Court, we ought to be restricted to the matters put in issue by the pleadings between the original parties.

In this aspect of the case, the grounds upon which the pres-

ent decision is made to rest, in the opinion of the court, are wholly dehors the record.

Be this, however, as it may, this point in the case, so vital in the view taken by the majority of the court, has not been argued by counsel on either side. Nor is it considered distinctly and independently in the opinion of the court. In the absence of both, I am not disposed to pass any definite judgment. It is a point, however, which must be surmounted or avoided to warrant the judgment just given by this court.

But it is said that Coxe's acceptance of a league square was an extinguishment to any other portion of the land, and that there was error because it is not so declared in the judgment. This is certainly a matter dehors the record. Nothing concerning it is either on the face of the judgment or in the bills of exceptions. It is not in any way before this court, by any principle or rule of practice known to this court or any other court having the power to reverse, upon writs of error, the judgments of inferior courts. Some correspondence in regard to it is found, like Girod's pamphlet, in the mass of documents improperly sent up with the record; but we have no means of knowing whether or not it is the whole of the correspondence. I repeat, we cannot consider it by any known rule of judicial proceeding. Suppose it, however, to be before us for examination: can it be contended that the acceptance of this league square by Mr. Coxe was an extinguishment of his claim to the rest of the land in *the [*880
grant, if that were otherwise valid, or that it annulled the conveyance to King made by Coxe long before the patent for the league square? The act of Congress of the 29th of April, 1816, confirmed all claims recognized as complete grants in the report of the commissioners appointed under the act of the 3d of March, 1807, and authorized a patent to be issued therefor; and the Maison Rouge claim had been so recognized and reported; but it was provided that under "no one claim shall any person or persons be entitled, under this act, to more than the quantity contained in a league square." Had no stipulation been made with Mr. Coxe when he received this patent, his right to any further quantity would not, by the language of this law, have been lessened or impaired. It did not, nor was it meant to, impair the quantity assumed by the United States in the treaty of cession of Louisiana, by which all the inhabitants were protected and maintained in the enjoyment of their whole property. And if it had been so meant, I do not think that I venture any thing which will not be acquiesced in by my associates

in this court, when the subject shall be fully examined, in saying, that Congress cannot constitutionally pass an act taking from the inhabitants of Louisiana, or those of any other purchased territory now making a part of the United States, any property guarantied to them, their descendants or assigns, by treaty, so as to exclude them from having their rights to the whole of what they claim judicially ascertained. A treaty is the supreme law of the land, and it limits the legislation of Congress to the fulfilment of all of its provisions, to the fullest extent of them, and not for less or a part of what individuals have a right to claim under it as property, but for the whole. And what that whole may be, where there is a dispute about it between the United States and those claiming, can only, under our system, be judicially ascertained and determined, unless, by the treaty or by the consent of the claimants, some other mode of determining the right has been agreed upon. But if this were not so, in this case there cannot be a doubt; for before Coxe accepted the patent for a league square, he made an inquiry what effect his acceptance would have upon his claim, and he was assured at the general land-office, acting under the instructions of the Attorney-General, that it did not preclude him from seeking the recognition or confirmation of his entire claim by Congress or the courts of the country.

I will now consider, as briefly as I can, the only other error assigned by the majority of the court on this judgment. It is, that the Circuit Court adjudicated the instrument executed by the Baron de Carondelet, on the 20th June, 1797, to be a grant to the Marquis de Maison Rouge. This is surely not *881] an *error brought before this court by a proper exception, and more, it is not an error apparent upon the record. It not only is not in any bill of exceptions, but it is not a ruling of the Circuit Court which was at any time formally objected to, directly or indirectly, in the court below. If it is an error, it exists in the language and office of the judgment itself—nowhere else.

Accuratively speaking, this is not the judgment of the Circuit Court upon the issue made and submitted by the pleadings. It is the reason or cause assigned for the judgment. The prayer in the petition of the United States is, that they may "be decreed, by a judgment of this honorable court, to be the true and lawful owners of the aforesaid land and premises." The judgment responsive to this prayer is, that "King, the defendant, and Coxe, the warrantor, are declared and recognized to be the lawful owners," and are to be quieted in the ownership and possession of the same. The portion,

therefore, of the decree now excepted to is a reason of the court for rendering such judgment. It is no necessary part of the issue submitted for adjudication, or of the judgment actually given. As a reason of the court, it is mere surplusage, and can be altogether rejected without affecting the validity of the judgment. It is well settled, that, if a judgment be defective in form, yet if it follows and is responsive to the issue, and is substantially right in that respect, neither such defect, nor any surplusage contained in it, is a ground for error. *Moore* v. *Tracy*, 13 Wend. (N. Y.), 282; *Buckfield* v. *Gorham*, 6 Mass., 447; *Brown* v. *Chase*, 4 Mass., 436; *Deering* v. *Halbert*, 2 Litt. (Ky.), 292; *Todd* v. *Potter*, 1 Day (Conn.), 238. In Louisiana, in the case of *Keene* v. *McDonough*, 8 La., 187, it is said, "An erroneous reason, given in a judgment which is correct in itself, is no ground for reversal." In any event, the reasoning of the court on which it either partially or wholly puts its judgment, even if incorrect, can only form the ground of an exception to be submitted to the court below; and if there persisted in, must be made the foundation of a bill of exceptions to be revised by this court. No exception whatever was taken to this portion of the judgment or reasoning of the Circuit Court.

If, however, the declaration, or decree embraced in the judgment, is an essential and necessary part of it, can it be revised by this court? It is the assertion of a fact, depending exclusively upon the performance by the grantee of the conditions of the grant, and upon the laws and usages of Spain, in cases where such instruments were issued and such conditions performed. Whether or not this fact was established is, as I have already shown, a matter belonging to the Circuit Court exclusively to decide. That court had before it the evidence of the performance of the conditions of the grant, and of the laws *and usages of Spain in regard [*882 to it. We have not. Nay, more, we are bound to presume that this judgment was right, so far as it did or could, by any possibility, depend upon a matter of fact. Every matter of fact necessary to sustain it will be presumed to have been proved, and will be taken by this court to have been fully proved in the Circuit Court. This is a principle too well settled, alike by the common law and the law of Louisiana, to need discussion. *Campbell* v. *Patterson*, 7 Vt., 89; *Butler* v. *Despalir*, 12 Mart. (La.), 304; *Mitchell* v. *White*, 6 Mart. (La.), N. S., 409; *Hill* v. *Tuzzine*, 1 Id., 599; *Piedras* v. *Milne*, 2 Id., 537, also 265; *Miller* v. *Whittier*, 6 La., 72; *Love* v. *Banks*, 3 La., 481.

And in the case of *Carroll* v. *Peake*, 1 Pet., 18, this court

said, in the absence of proof to the contrary, if any possible state of the case can be imagined, or any amount of testimony supposed, necessary to sustain the opinion of the Circuit Court, this court will assume that such a state of the case existed, and that such evidence was offered on the trial. Whether or not this is a complete "title in form" under the Spanish law, as it existed in 1797, and whether the conditions contained in it (supposing the performance of them to be necessary to its validity) were performed, are purely matters of fact, depending upon evidence which was before the Circuit Court. We ought, and are bound, to presume they were legally and conclusively established by that evidence. If so, the decree and judgment of the Circuit Court were free from error, and should be so affirmed by this tribunal.

I think I may say, that no error assigned, either in the record or by a majority of this court, in behalf of the United States, has been sustained. In my opinion, if the case could be justly decided now, a judgment of affirmance should be entered. I wish sincerely that I could, consistently with what I have felt myself bound to do, close my remarks upon the course pursued by a majority of the court in this case with what I have said. Something remains to be done.

In the opinion expressed by the majority of the court, they have deemed it proper to discuss the validity of the Maison Rouge grant, as if it were not affected in any way by the facts ascertained in the judgment of the court below, and as if in every aspect, whether of fact as to the performance of the condition, or of legal effect according to the law and usages of Spain, its validity was here before us for examination and adjudication. This course I deem at variance with the settled law and practice of this court. But as I regard the grant to be clearly valid, and the opinion now given by the majority of this court against it as of the highest impor-

*883] tance to one of the States *of this Union, and to a large portion of its people, I will submit the grounds on which I think that the Circuit Court in Louisiana properly adjudged the grant of the 20th June, 1797, to the Marquis de Maison Rouge, to be valid, legal, and complete.

Under the royal order of the 24th August, 1774, the governor of Louisiana had the amplest powers to grant lands, without limitation as to quantity, and without the necessity of a confirmation by the Spanish government. This power existed undiminished until the royal order of 22d October, 1798, when it was conferred on the Intendant. 2 White's New Recopilacion, 245; *United States* v. *Arredondo*, 6 Pet., 727; *United States* v. *Clarke*, 8 Pet., 452.

After the treaty of the 17th October, 1795, between the United States and Spain, by which the latter government relinquished its claim to the territory on the eastern side of the Mississippi north of the 31st degree of latitude, so that the settlements of the United States were rapidly approaching the inhabited portions of Louisiana, it became, even more than had been previously the case, an object of Spanish policy to promote the establishment of colonies of European emigrants on the outposts of Louisiana, and to encourage the cultivation of wheat, so as to supply its inhabitants, and make them independent to the people of the United States for that food. At no period of Spanish colonization was the disposal of the public lands a source of revenue, as ours have been in the United States. Conditions of settlement on the performance of other stipulations were imposed, but in no instance was the payment of money exacted, except in a few cases in Florida, where grants of land were permitted by the king to be made by the Indians to individuals for depredations upon the latter. But money for the king's revenue, or for colonial purposes, was never exacted in payment for lands granted. The land granted was usually limited in quantity, but varied according to the objects for which the grant was made. Several cases determined in this court exhibit the ratification by it of grants made by the Spanish governors of Florida and Louisiana, from a few acres to hundreds of thousands of acres. Every kind of consideration for them is also exhibited. Sometimes the settlement and cultivation by the grantee himself; sometimes by settlers to be introduced by him; at other times, the construction of mills, or the establishment of large grazing farms; again, a reward for military services; sometimes the liquidation and settlement of previously existing contracts. Of all these considerations, and of many others, which were the foundations of grants of land by the Spanish governor, the records of this court afford ample evidence.

*In this state of the country, and under that system of policy, the Spanish governor, Carondelet, made a [*884 contract on the 17th of March, 1795, with the Marquis de Maison Rouge, a French emigrant, then lately arrived in the colony. The object of it was to establish a colony of European immigrants on the Washita River, to cultivate wheat, and to erect mills for manufacturing flour. The Spanish government agreed to pay in money two hundred dollars for every family of two persons, four hundred for those having four laborers, and one hundred for those having one useful laborer. It also agreed to facilitate their passage to the place of settle-

ment, supply them with provisions, to pay for the transportation of them and their luggage, when they came by sea to New Orleans, and to grant to every family containing two white persons fit for agriculture four hundred arpens of land, and a corresponding proportion for more or less. In the outset, the number of families was limited to thirty.

The contract of March, 1795, was designed to be the beginning of a national policy deemed by the Spanish government, and its representatives in Louisiana, essential to the independence of that province, and to the preservation of other territories of Spain still farther south. The government, therefore, undertook to defray all the expenses of its commencement, knowing that, after the settlement of thirty families in a wilderness, others would be induced to migrate to it, paying their own way, on account of that security which first settlers always give to new lands. The Marquis de Maison Rouge stipulated for nothing to be performed on his part but the introduction of thirty emigrant families into the province. Every other term of the agreement is to be performed by the Spanish government. The inspection of it, at pages 58 and 103 of the record, will show that all the onerous stipulations were on the part of the Spanish authorities, but none of them could in any way, or by any construction of it, result in any pecuniary gain to Maison Rouge. Guides, and provisions, expenses of transportation, and grants of land and money, were to be furnished, given, paid, and made to the emigrants. Not a dollar was to be paid to the Marquis. The contract does not give him an acre of land. Not the smallest benefit from it was to come to him.

The Intendant, Morales, a man of vigorous character, and strict in his administration of the colonial finances, did not approve of the Baron de Carondelet's mode of colonization in his contract with Maison Rouge, on account of the expenditures to which it led; but at the same time he expresses his opinion, that it was the policy of the Spanish government to "have an extensive settlement on the Washita, to protect the possession of the kingdom of Mexico." But Carondelet's contract with Maison Rouge, for the settlement of the thirty families, had received the royal sanction as early as July, 1795. The burden of it, except so far as the services of the Marquis had aided in its accomplishment, had fallen on the Spanish government. The literal compliance with it had been nearly fulfilled by the settlement of the thirty families, and the importance of the extension of such settlements became more apparent after two years had passed, as Morales acknowledged, than it had been when the policy was first adopted. It was

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then that the Baron de Carondelet recollected the unrewarded services of Maison Rouge,—that he was a noble *emigré*, impoverished and driven from France by the Revolution,—and, no doubt, excited by the success of his policy, in his first experiment in colonizing the Washita under the personal agency of the Marquis, determined to extend it, by making a large grant of land to him; which policy he was to carry out on his own account, at his own expense, and for his own benefit. The language of the grant is, "Forasmuch as the Marquis de Maison Rouge is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795, and desirous to remove, for the future, all doubt respecting other families or new colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge, by virtue of the powers granted us by the king, the thirty superficial leagues marked in the plan annexed to the head of this instrument, with the limits and boundaries designated, with our approbation, by the surveyor, Don Carlos Laveau Trudeau, under the terms stipulated and contracted for by the said Marquis de Maison Rouge." This grant was made on the 20th June, 1797, eleven days after the letter of the 9th June from Morales to the Marquis de Maison Rouge, (record, p. 24,) in which the Intendant, after refusing to alter a previous decision concerning the payment of money to some of the Marquis's emigrants, under the contract of 1795, says,—"I doubt not that your intentions are the best for the interest of my august sovereign; that with this object, besides the convenience of living under his wise laws, you formed your plan, and I cannot disguise my belief, that it would be very useful for Spain to plant an extensive settlement on the Washita, to protect the possession of the kingdom of Mexico; but I cannot admit, with all his reasoning, that your project will be the best and most advantageous to effect that purpose; far from it. I entertain the opinion, that, if the government desire to benefit by the present circumstances, they can accomplish their ends *without great expense." It may be reasonably concluded, that the extract from the letter of Morales was [*886 in reply to one from Maison Rouge, concerning the contract of 1795. The internal evidence warrants such an inference. And, as it shows a difference of opinion between the Intendant and the Baron de Carondelet concerning the mode of colonization, and the disapproval by the former of the manner in which the latter had carried out that policy in his contract with Maison Rouge,—both of them, however, acknowledging

the wisdom and necessity of such policy, though differing upon whom the expense of it should fall,—we have the motives and the reason for Carondelet's grant to the Marquis. Further, the grant in quantity, two hundred thousand arpens, was not more than enough for five hundred families, at the rate of allowance fixed by the contract of 1795. It could only become valuable to the Marquis by being colonized by him. The general policy on which it was made justifies the extent of the grant, and shows the strong desire of the government to extend and promote the settlement on the Washita, without incurring the expense of the previous arrangement. It was well known, before the contract of 1795 was made with Maison Rouge, and from the execution of it by him, that settlers could not be induced to fix their residences in such a wilderness then, without gratuities of land and money, and their transportation being paid. These were to be borne, therefore, by the Marquis. It is not at all improbable, if his life had been spared to carry out his design, that the cost of it would have left him but a small part of what at first seems, from the magnitude of the grant, to be a principality. Time only has ever repaid the actual cost of colonization; but individual settlers in new countries, when not disturbed by wars, or destroyed by savages, have commonly gathered fruits for themselves and for their posterity. Still, the grant was an inducement for the Marquis to attempt to colonize it. The man who has fallen from a high estate into nothing, seizes upon ventures to regain his elevation, and the greater the risk he may run and overcome, the greater will be his pride at his re-exaltation, or, if of another temper, his thankfulness to Providence for his success.

I cannot help thinking, too, that there is a caution in the terms of the grant, if taken in connection with the contract of 1795, very much in favor of its validity. As that contract did, it guards against the introduction of American settlers, which, under the former, the government had been able to prevent, by making its payments and grants of land only on proof that the families or emigrants had come from Europe. And it not only forbids any interference with the previous *887] settlers within the *grant, who held by "title in form," or by virtue of a fresh commission, but imposes on the Marquis an obligation "to maintain and support them in all of their rights,"—that is, titles made and granted to other persons within the region comprehended in the figurative plan of Trudeau, just as that grant was made to the Marquis, and which, when they were found to exist, the

Marquis was permitted to have land elsewhere, in equal quantities.

Hitherto I have endeavoured to show, in this part of the case,—made so, however, only by the decision of the majority of the court,—that the grant was authentic and genuine, from the internal evidence in it connected with that of the contract of 1795, and from the services of the Marquis in fulfilling that contract, in conformity with the national policy of Spain in respect to settlers on the Washita. But I have done so more for the purpose of showing its reasonableness, and to resist suggestions against it, than with any intention of relying upon it myself, exclusively, as conclusive of the fact of the execution of the grant by Carondelet, with the figurative plan of Trudeau contemporarily annexed; for the execution of the grant is proved by the witness Tessier, just as the law of Louisiana, or the civil law of Spain, required that it should be, for the purpose of verifying, in the trial of a suit, any instrument (*escritura*) upon which a party in it relies for establishment of his right.

An instrument of writing (*escritura*) is every deed that is made by the hand of a public *escribano*, or notary of a corporation, or council (*concejo*), or sealed with the seal of the king, or other authorized "person." L. 1, tit. 18, p. 3. "Hence arise the two kinds which produce full faith and full proof;—one public, made by the *escribano* or notary, with the solemnities prescribed by laws"; "another authentic, which is that sealed by the king, bishops, prelates, and great men of the kingdom." Either of these is, in suits, judicially proved, when such as are distinctively "public" are signed by a "public *escribano*," when it is not wanting in any required solemnity, and when the deed or original is confirmed by the register or protocol, in the *escribano*'s records; and when the deed is of that denomination called "authentic,"—from being signed by the king, or an officer authorized by the royal order of the king, special or general,—the proof of such signature, and the instrument having a proper seal, establishes it, without any reference to the protocol of it, in the public archives, when it appears that the protocol, or order for it, has been lost, or is beyond the jurisdiction of the court, so that the conformity between the original and the protocol cannot be ascertained by *the process of the court. It must be recollected, that the deed given to the party is the original, though taken from the register or protocol; and that, in the law of Louisiana, or civil law of Spain, a copy, or *traslado*, is the transcript from that original. [*888

Now, it is by just such proof as I have mentioned, that the

grant to the Marquis de Maison Rouge has been established in this case, as an authentic original, proved not by one witness only, but by two, with a positiveness of declaration and knowledge of the fact of the signatures to the grant that cannot be made stronger. Mr. Dubigny, Secretary of State for Louisiana, (pp. 53, 54, of the record,) says, that "he recognizes the signatures 'to the deed' of the aforesaid Baron de Carondelet, and of Don Andres Lopez Armesto, the secretary of the government of Louisiana, as genuine, and of the proper handwriting of these persons respectively; that the said instrument is in the handwriting of Charles Tessier, Esq., of Baton Rouge, who was then first clerk in the secretary's office"; and he "moreover declares, that he had a knowledge thereof about the time it was issued, and that it (the grant) was a maker of public notoriety." This affidavit was made by Mr. Dubigny in 1824, before Galvin Prual, Esq., a justice of the peace for the city of New Orleans. Nineteen years afterwards, on the 22d of May, 1843, Charles Tessier, Esq., the same person mentioned by Mr. Dubigny, is examined in this case, by virtue of a commission for that purpose issued by the Circuit Court, and he says, in answer to the direct interrogatories put to him, repeating the same also to the cross-interrogatories, without deviation or alteration, except in other particulars, showing his forbearance in speaking of the transaction after such a lapse of time,—he says that "he is above sixty-seven years of age; that he was a native of Louisiana; that he was, when the grant was made, principal clerk in the office of the Spanish government for making grants of land; and that he is now the judge of the parish of East Baton Rouge; that the grant marked A is filled up in the handwriting of this deponent, who was chief clerk of the Spanish government of Louisiana at the time, and did the land-office business in filling up grants; that he is familiar with the handwriting of the governor, Baron de Carondelet, and of Don Andres Lopez Armesto, secretary of the government; the deponent has often seen them both write and sign their names; the signatures of Governor Carondelet and Secretary Armesto to the document A are both genuine." What more than the testimony of these two witnesses—both of unquestioned character, each in his life signalized in their *889] community by holding offices of public *trust and confidence—can be wanting, to establish the genuineness of the grant to Maison Rouge? But there is more. Tessier further says, that "he has a personal knowledge of the time when the said grant was made and issued, because he filled it up at the time of its date; his knowledge was

therefore personal, as he performed the service; the grant was not a secret, but of public notoriety; that the grant was denominated and considered a *titulo en firma*, and was such complete and perfect evidence of title as not to require any other to validate or strengthen it; that he was familiar with the operations, forms, usages, and customs of the land department under Governor Carondelet; and that though he, at this distance of time, nearly fifty years since, cannot recollect whether Carlos Trudeau's plan and process verbal was or was not before his eyes when he filled up the body of the grant A, he always obeyed the orders of the Baron de Carondelet, and of the secretary of the government, Don Andres Lopez Armesto, and in this instance, as in others, performed his official duty." He repeats, to another interrogatory, "that at this distance of time, forty-six years, he is unable to say whether he had or had not Trudeau's figurative plan and process verbal before him; but he is certain he performed his duty, either by dictation or written instructions of his superiors, or by seeing the document B (Brengier's copy of Trudeau's figurative plan), though he cannot say in which of the three respective modes he acted upon the occasion; there was a general form of ordinary grants, which changed when the grant was special, for certain purposes and under certain conditions, and the governor or secretary then usually dictated or wrote the words of the grant, which was afterwards copied; but he cannot recollect how it was in this instance." And in his answer to the cross-interrogatory, he says that, "in his answers to the interrogatories in chief, he has answered the different questions as well as he could, and endeavoured to discriminate between their opinions and his own personal knowledge of matters."

The proof of the grant, then, is positive, but suspicion is attempted to be thrown upon it by the denial of the fact it recites, that the figurative plan of Trudeau was annexed to it, when it was signed by the governor. And that denial rests upon Tessier's forbearing to state positively that it was before him when he filled up the grant, and upon Girod's pamphlet and the *ex parte* testimony annexed to it. Now, before any suspicion of the grant can arise from Tessier not being able to swear positively to that fact, it must appear that it was in the order of the business of the Spanish land-office, and that it was required by the laws and usages of Spain in Louisiana, that such *figurative plans—which, it must be [*890 remembered, are not actual surveys, but descriptions of natural boundaries in a grant, in conformity with which actual surveys were afterwards to be made—should form a

part of that muniment of title in the land-office from which the secretary made or filled up the grant, and that it was not sufficient for such a statement to be made of it as there is in the grant in this instance. I will make no assertion upon this point in respect to what was the practice in Louisiana when it was a province of Spain; but Florida land grants and those of Louisiana were made under royal orders of the king of Spain, and I can say, that, in our judicial affirmation in this court of Florida land claims, we have not in any instance called for a figurative plan in any one of them, but have in several of them ordered surveys to be made from the descriptions in the grants. But I may also say, that there is a good reason why the figurative plan of an extended grant should not have been before the secretary who filled it up at the time when he did so, and it is this;—that the figurative plan was a mere delineation of what the grant, by conformable description, gave, and that, as the verification of the delineation by actual survey could only establish the locality of the land, it was not in a condition before that was done for official registry. Under the Spanish law, the survey of the surveyor-general or his authorized deputies was conclusive of the locality of the grant, but the grant itself gave property to the grantee. It was property meant to be protected by the treaty. Though no survey had been made by the Spanish surveyors before the treaty was made, surveys afterwards, in conformity with the grant, have been always deemed sufficient by this court, and where a case has occurred, under a claim of a Spanish grant, where there had been, either before or after the treaty, an imperfect survey, this court, upon being satisfied of the genuineness of the grant, has ordered the survey to be made, to carry out the grant to its originally intended consummation. See the case of *The United States* v. *Forbes*, 15 Pet.

But how can the contemporary annexation of the figurative plan to the Maison Rouge grant be denied in this case, after the proof of the signatures of the governor and secretary to the grant? Those officers assert in the grant that it was annexed, with limits and boundaries designated by Don Carlos Trudeau. Now, unless these signatures are disproved, or it is proved that the governor, Carondelet, and the secretary, Arnesto, had combined to practise a fraud upon their sovereign, by the assertion of a fact in a deed which did not exist, the fact that it was annexed to the grant when it was made cannot be denied. The deed or grant, when proved, is good for all that it contains, whether *it be for what is granted, or for a fact by which that is to be thereafter

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practically ascertained; and neither is deniable but for fraud in the making of the grant. Or the grant may be shown to have been made without authority or contrary to law. Neither fraud nor violation of law is imputed to this grant, and it stands good for all that is asserted in it, against any suspicion of fraud which alleges that the figurative plan of Trudeau had been antedated. But, further still, against such a suspicion, shall no force be given to the declaration of Trudeau himself in such a case? His signature to the figurative plan is proved. He was the surveyor-general, whose duty it was to make for the governor, by his order, such a figurative plan, before the governor could make the grant. A plan is made purporting to be signed by Trudeau, his signature is proved to be genuine, the governor and his secretary recognize it to be such by making a grant according to it; the character of Trudeau for private virtue and official ability and integrity is proved by those who knew him. If all this be not proof positive that the figurative plan had been made and was annexed to the grant contemporarily with its execution, then no proof will suffice, and our rejection of it involves a denial of all truthful character in the three highest functionaries then representing the king of Spain in Louisiana, the Baron de Carondelet, Secretary Armesto, and the Surveyor-General Trudeau. Such is the consequence concerning these men; but I know the majority of this court do not mean it, for if the more subordinate condition of two of them had not imposed upon their contemporaries the conviction that they were uninfected by the corruption which we are too apt to suppose degraded the provincial officers of Spain, the Baron Carondelet lived in his long career of public service to his sovereign, and died in it, unsuspected.

I will not take up further time by making any remarks upon the suggestion, that the grant of June, 1797, was not meant to convey land to the Marquis de Maison Rouge for himself, but was a grant for emigrants, as the contract of 1795 with him was, except to say, that it would indeed be very singular if the two were for the same purpose; that in that of 1795 the government of Spain bore all the burdens of colonization, and in the grant of June 20th, 1797, no provision is made for such a purpose, but they were to be borne by the Marquis de Maison Rouge, an impoverished *emigré* from France, and whose poverty in his humble residence in a wilderness, bought by him for a small price, is proved in the record, and relied upon by this court, as it is shown in his will by his use of the word *bienes* as a reason that such a grant was not made to him. He used that word *bienes*—as

*892] any other person who had been brought up *under the civil law would have done—as signifying all that a man can own, or which can be property. Besides, however, the difference in regard to the expenses of colonization in the two instruments just mentioned, that they were not meant for the same purpose, without benefit to the Marquis in the last, is very conclusively shown by the fact that they were made by different authorities,—the one by the governor, Carondelet, without operation until it received the approval of the king, because it involved the expenditure of the king's revenue; that of June, 1797, by the governor himself, who, by the royal order, was authorized to make grants of land without the special assent of the king to such grants.

It is true that the language of the grant to the Marquis, after saying that he "is near completing the establishment of the Washita, which he was authorized to make for thirty families by the royal order of July 14th, 1795," does recite further, "that, desirous to remove for the future all doubt respecting other families or colonists who may come to establish themselves, we destine and appropriate conclusively for the establishment of the aforesaid Marquis de Maison Rouge the thirty superficial leagues marked in the plan annexed to the head of this instrument." But the extension of colonization implied by it certainly cannot become a fact of a previous contract for that purpose, almost already completed, without the same terms for its enlargement as the king of Spain imposed upon his treasury in the first contract, or other terms expressed and assented to by the Marquis. And I will further say, if this grant, from its terms, can be interpreted to convey land for emigrants, of which the Marquis was only a trustee, that the terms used in it will be equally effective to convey to the Marquis the dominion of the land for himself, if the facts in the case and the reasoning upon them shall preponderate in favor of the latter interpretation. In other words, the suggestion of the court in the opinion, of a conveyance having been intended for colonists, and not for the Marquis, admits, so far as the suggestion conveys the first idea, that the words of the grant are sufficient to convey the land by such an instrument. There can be no objection to the grant, then, on account of a deficiency of formal terms of conveyance. Such services were never required by the civil law of Spain to make a good grant for land. Any words for that purpose are enough, in a grant from which an equitable title can be inferred for the grantee. The suit of the United States against King is in the nature of a writ of ejectment. Inasmuch, however, as

the distinction, so well known in England and in our States in the United States, between courts of equity and courts of common law does not prevail in *Louisiana, what in [*893 England would be recognized as a purely equitable title may serve as well in a court in Louisiana as a perfect legal title, either to maintain the claim of the United States, or as a defence on the part of the defendant against such demand. In the case of *The United States* v. *Fitzgerald*, 15 Peters, 407, this court recognized what has just been said to be the correct doctrine of the Circuit Court of the United States sitting in Louisiana, and gave judgment for the defendant in a writ of error, upon a right purely equitable, against the strictly legal title of the United States, in a petitory action for the recovery of land.

But let it be admitted, for the sake of the argument, that the instrument of June 20th, 1797, was designed to carry out more extensively the contract of 1795, either for the benefit of the settlers who had been already introduced under that contract, or for other colonists who might thereafter be placed upon the land by the Marquis, I cannot see how the right of the United States to recover in this action is in any way strengthened.

Whether the thirty leagues were assigned to the Marquis for his own use, or in trust for others,—whether he was to be the sole and exclusive proprietor, or was to hold it, as is contended, for the benefit of others,—is a question with which the United States have nothing to do. That is wholly between the Marquis, as holding the legal title, and those who may advance a claim as *cestui que use*.

In either case, the land was severed from the public domain and became a private property. It could not, in either case, pass, by any construction of the treaty, to the United States. They have neither a legal nor equitable title to the land. In order to entitle the United States to a judgment, they must affirmatively aver and prove a title in themselves.

The very pretension that the Marquis received this grant as a trustee for others is as fatal against a recovery by the United States as if the entire legal and equitable title were conceded to be, as in my judgment it is clearly shown to be, vested absolutely and exclusively in the Marquis de Maison Rouge.

I have written much upon this case, I know,—more than I usually permit myself to do in any case; but less would not have shown the judicial history of this, from the beginning of the action to its first appearance in this court, or our judgment and vacated judgment afterwards, and now the course

which this court has taken upon the writ of error to reverse the judgment of the Circuit Court.

One word more. The mandate upon the decision here made is for the reversal of the judgment given in favor of King for the land for which the United States sued him. *894] The case will *of course be before the Circuit Court of Louisiana again, when new evidence on both sides may be introduced, or, if that does not exist, for that court to correct the error in its judgment. It cannot do so by any decision of this court upon the bills of exceptions in the record. The reversal is for causes or errors said to be in the judgment. If, then, the Circuit Court shall, in its further trial of this cause, be of the opinion that the evidence proves title to the land in King, I presume that the mandate will be satisfied if it gives a judgment in his favor again for that quantity of land for which the United States has sued, without saying any thing about the validity of the title, or declaring that Mr. Coxe is an owner of any part of the Maison Rouge grant.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here 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 that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to enter judgment for the United States for the land described in the petition.

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TO THE

MATTERS CONTAINED IN THIS VOLUME.

[The references are to the STAR (*) pages.]

ACCOUNTS.

1. Where a running account is kept at the Post-Office Department between the United States and a postmaster, in which the postages are charged to him, and credit is given for all payments made, this amounts to an election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances. *Jones* v. *The United States*, 681.
2. This the creditor has a right to do in the absence of instructions from the debtor. The English decisions and those of this court examined. *Ib.*
3. The act of Congress of 1825 (4 Stat. at L., 102), which exonerates the sureties if balances are not sued for within two years after they occur, does not apply to this case, because, by this mode of keeping the accounts, the balance due from the postmaster is thrown upon the last quarter. *Ib.*

ADMIRALTY.

See JURISDICTION, 30–34.

APPEAL.

1. Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal. *McLaughlin* v. *Bank of Potomac*, 220.
2. Where a decree in chancery refers the matters to a master to ascertain the amount of damages, and in the mean time the bill is not dismissed, nor is there a decree for costs, the decree is not a final one, from which an appeal will lie to this court, although there is a perpetual injunction granted. *Barnard* v. *Gibson*, 650.
3. The amount of damage which will follow from restraining a party from using a machine held under a patent right is a proper consideration to be addressed to the Circuit Court, but does not constitute a ground of appeal.
4. The meaning of the forty-third rule of this court is, that, if a judgment or decree in the court below be rendered more than thirty days before the commencement of the term of this court, and the record be not filed within the first six days of the term, the appellee or defendant in error may docket the case, and move for its dismissal as the rule prescribes. *United States* v. *Boisdoré*, 658.
5. But if the judgment or decree of the court below be rendered less than thirty days before the commencement of the term of this court, the rule does not apply. *Ib.*

ATTACHMENT.

See BANKRUPTCY, 4–9.

ATTORNEY.

1. It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested, when he held certain notes only for the purpose of paying the money over to his clients when recovered. *Patton* v. *Taylor*, 132.

BANKRUPTCY.

1. By the fifth section of the United States Bankrupt Act (3 Stat. at L., 444), the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act. *Mace* v. *Wells*, 272.
2. Therefore, when the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it. *Ib.*
3. The proviso of the second section of the Bankrupt Act, passed on the 19th of August, 1841, preserves all liens which may be valid by the laws of the States respectively. *Peck* v. *Jenness*, 612.
4. In some of the States attachments are issued on mesne process, by which the property seized is made to await the result of the suit. This constitutes a lien, which is saved by the proviso in the Bankrupt act. *Ib.*
5. The various kinds of liens explained. *Ib.*
6. Therefore, where an attachment was issued and the defendants afterwards applied for the benefit of the Bankrupt Act, a plea of bankruptcy was not sufficient to prevent a judgment from being rendered condemning the property under attachment. *Ib.*
7. The fourth section of the statute, if it stood alone, would make a plea of bankruptcy a good plea in bar in discharge of all debts; but if the whole statute be construed together, this is not the result. *Ib.*
8. A rejoiner, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder. *Ib.*
9. The District Court could not oust the State court of its jurisdiction, which had already attached. *Ib.*
10. A decree of the District Court of the United States, sitting in bankruptcy, whereby a person proceeded against, *in invitum*, was declared to be a bankrupt, is sufficient evidence, as against those who were not parties to the proceeding, to show that there was a debt due to the petitioning creditor, that the bankrupt was a merchant or trader within the meaning of the act; and that he had committed an act of bankruptcy. *Shawhan* v. *Wherritt*, 627.
11. The first section of the Bankrupt Act declares that the making of any fraudulent conveyance, assignment, sale, gift, or other transfer of lands, tenements, goods, or chattels, is the commission of an act of bankruptcy. *Ib.*
12. No creditor can, by instituting proceedings in a State court, after the commission of an act of bankruptcy by his debtor, obtain a valid lien upon the property conveyed by such fraudulent deed, if he has notice of the commission of an act of bankruptcy by the debtor. It passes to the assignee of the bankrupt for the benefit of all the creditors. *Ib.*
13. A lien thus acquired is not saved by the proviso of the second section of the bankrupt law. That proviso does not protect liens which are inconsistent with the second and fifth sections of the act, and these sections declare such a lien to be void. *Ib.*

BOUNDARIES OF STATES.

1. The western and northern boundary-lines of the State of Missouri, as described in the first article of the constitution of that State, were as follows: — from a point in the middle of the Kansas River, where the same empties into the Missouri River, running due north along a meridian line, to the intersection of the parallel of latitude which passes through the rapids of the River Des Moines, making said line correspond with the Indian boundary-line; thence east from the point of intersection last aforesaid, along the said parallel, to the middle of the channel of the main fork of the said River Des Moines; thence, etc., etc. *Missouri* v. *Iowa*, 660.
2. The constitution of the State of Missouri was adopted in 1820. But in

BOUNDARIES OF STATES—(*Continued.*)
1816 an Indian boundary-line had been run by the authority of the United States, which, in its north course, did not terminate at its intersection with the parallel of latitude which passed through the rapids of the River Des Moines, and in its east course did not coincide with that parallel, or any parallel of latitude at all. *Ib.*
3. Missouri claimed that this north line should be continued until it intersected a parallel of latitude which passed through certain rapids in the River Des Moines, and from the point of intersection be run eastwardly along the parallel to these rapids. *Ib.*
4. Iowa claimed that this Indian boundary-line was protracted too far to the north; that by the term "rapids of the River Des Moines" were meant certain rapids in the Mississippi River, known by that name, and that the parallel of latitude must pass through those rapids; the effect of which would be to stop the Indian boundary-line in its progress north, before it arrived at the spot which had been marked by the United States surveyor. *Ib.*
5. There being a bill and a cross-bill, each State is a defendant, and this court can pass such a decree as the case requires. *Ib.*
6. The southern boundary-line of Iowa is coincident with, and dependent upon, the northern boundary-line of Missouri. *Ib.*
7. Iowa is bound by the acts of its predecessor, the government of the United States, which had plenary jurisdiction over the subject as long as Iowa remained a Territory; and the United States recognized the Indian boundary-line, — 1st. By treaties made with the Indians; 2d. By the acts of the general land-office; 3d. By Congressional legislation. *Ib.*
8. On the other hand, there are no rapids in the River Des Moines so conspicuous as to justify the claim of Missouri. *Ib.*
9. This court therefore adopts the old Indian boundary-line as the dividing line between the two States, and decrees that it shall be run and marked by commissioners. *Ib.*

CARRIERS.
See CONSTITUTIONAL LAW, 5.

CERTIFICATE OF DIVISION.
1. Although the motion under argument in the Circuit Court was addressed to its discretion, yet if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions. *United States* v. *Chicago*, 185.
2. So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point. *Ib.*
3. Where an appeal, from a Circuit Court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as would give this court jurisdiction. *Sadler* v. *Hoover*, 646.

CHANCERY.
1. A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. *Patton* v. *Taylor*, 132.
2. Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings. *Ib.*
3. When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the

CHANCERY—(*Continued.*)
purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice. *Smith* v. *Kennedy*, 198.

4. If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction. *Ib.*

5. The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late. *Ib.*

6. A former suit in chancery between the original parties to the mortgage involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed, upon the ground that the mortgage was void, was good evidence in an ejectment brought by the assignee claiming to recover by virtue of the same mortgage. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it. *Ib.*

7. There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. The authorities upon this point examined. *Ib.*

8. The highest court of the State of Alabama having decided that the original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State. *Ib.*

9. Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal. *McLaughlin* v. *Bank of Potomac*, 220.

10. A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law. *Ib.*

11. A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards. *Ib.*

12. Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to pursue and exhaust that trust-property before proceeding against the indorser and his property. A judgment had been obtained against the administrator of the indorser, which fixed his liability. *Ib.*

13. This judgment against the administrator in which a devastavit had been suggested, and a return of *nulla bona* to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate. *Ib.*

14. Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate. *Ib.*

15. Although by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit, and the personal property was chiefly left in the hands of the surety, who was also the person charged with being a fraudulent grantee of the intestate, the general rule is not applicable. *Ib.*

16. In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative. *Ib.*

CHANCERY—(*Continued.*)

17. There is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations directly governs the case. In such cases, the court often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. *Wagner* v. *Baird*, 234.

18. The rule upon this subject, originally laid down by Lord Camden, in *Smith* v. *Clay*, 3 Brown's Chancery Reports, page 640, note, and adopted by this court in 1 Howard, 189, again asserted. *Ib.*

19. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. *Ib.*

20. The party guilty of such laches cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability. *Ib.*

21. The facts in this case bring it within the operation of the above principles, and the bill must, therefore, be dismissed. *Ib.*

22. The Commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly, rendered it proper that a general assignment should be made for the benefit of its creditors and completion of the railroad"; it therefore assigned all of its property, real, personal, and mixed, to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding $250,000, to allow claims against the bank of a certain description, and out of the proceeds collected first to pay the principal and interest of the above loan; after the completion of the said road, dividends were to be made *pro rata* amongst the creditors of the bank who had filed their claims, should there not be a sufficient amount to pay all the claims; the trustees to receive eight thousand dollars each per annum for their services. *Bodley* v. *Goodrich*, 276.

23. This deed was fraudulent and void as to all creditors of the bank who did not become parties to it by filing their claims. *Ib.*

24. Where a decree in chancery refers the matter to a master to ascertain the amount of damages, and in the mean time the bill is not dismissed nor is there a decree for costs, the decree is not a final one from which an appeal will lie to this court, although there is a perpetual injunction granted. *Barnard* v. *Gibson*, 650.

25. The amount of damage which will follow from restraining a party from using a machine held under a patent right, is a proper consideration to be addressed to the Circuit Court, but does not constitute a ground of appeal. *Ib.*

26. If an exception be taken to an answer in chancery upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. *Hardeman* v. *Harris*, 726.

27. If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled. *Ib.*

28. Therefore, when a bill charged that certain notes were given for the purchase of slaves introduced into the State of Mississippi, as merchandise and for sale, after the first day of May, 1833, and the answer omitted to notice the allegation, such omission was not a good ground for an exception. *Ib.*

CHANCERY—(*Continued.*)
20. This court has repeatedly decided that the fact stated is no defence to a suit at law. Still less can it be a defence in equity. *Ib.*
30. Where an allegation in the bill was, that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants. *Ib.*
31. The general rules stated which govern a court of equity in opening accounts and sustaining claims which are barred by the statute of limitations. *Stearns* v. *Page*, 819.

CHICAGO.
See Lands, Public, 1–4.

COMMERCIAL LAW.
1. A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards. *McLaughlin* v. *Bank of Potomac*, 220.
2. Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to pursue and exhaust that trust-property before proceeding against the indorser and his property. *Ib.*
3. By the fifth section of the United States Bankrupt Acts, (5 Stat. at L., 444,) the surety upon a promissory note had a right to prove the demand against the maker, who became a bankrupt, and by the fourth section the bankrupt was discharged from all debts which were provable under the act. *Mace* v. *Wells*, 272.
4. Therefore, where the surety paid the note to the creditor, after the discharge of the bankrupt, and brought suit against the bankrupt for the amount, he was not entitled to recover it. *Ib.*

COMMON CARRIERS.
See Constitutional Law, 5.

CONSTITUTIONAL LAW.
See Jurisdiction.
1. Although no State could establish a permanent military government, yet it may use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The State must determine for itself what degree of force the crisis demands. *Luther* v. *Borden*, 1.
2. After martial law was declared, an officer might lawfully arrest any one who he had reasonable grounds to believe was engaged in the insurrection, or order a house to be forcibly entered. But no more force can be used than is necessary to accomplish the object; and if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party whom, or by whose order, it is committed would undoubtedly be answerable. *Ib.*
3. A statute of the State of Alabama, directing that promissory notes given to the cashier of a bank may be sued and collected in the name of the bank, is a law which effects the remedy only, and although passed after the note was executed, does not impair the obligation of the contract. *Crawford* v. *Branch Bank of Mobile*, 279.
4. Besides, the record does not show that the question of the consistency of the statute with the Constitution of the United States was raised in the State court; and therefore a writ of error issued under the twenty-fifth section of the Judiciary Act must be dismissed on motion. *Ib.*
5. Statutes of the States of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those States, declared to be contrary to the Constitution and laws of the United States, and therefore null and void. *Passenger Cases*, 283.

COPYRIGHT.
1. By the sixth section of the act of February 3d, 1831, entitled "An act to

COPYRIGHT—(*Continued.*)
amend the several acts respecting copyrights," the penalty of fifty cents on each sheet whether printed or being printed, or published, or exposed to sale, is limited to the sheets in possession of the party who prints or exposes them to sale. *Backus* v. *Gould*, 798.

2. It does not apply to those sheets which he had published, or procured to be published whether they were found in his possession or not. *Ib.*

COURTS MARTIAL.
See Navy, 1, 2.

CUSTOMS.
See Duties.

DUTIES.

1. By the fifth section of the tariff act passed on the 30th of August, 1842, (5 Stat. at L., 556,) a duty of thirty per cent. is imposed on "India-rubber oil-cloth, webbing, shoes, braces or suspenders, or any other fabrics or manufactured articles composed wholly or in part of India-rubber." *Lawrence* v. *Allen*, 785.
2. In the ninth section among other articles declared to be exempt from duty, is "India-rubber in bottles or sheets, or otherwise unmanufactured." *Ib.*
3. By these sections, the duty of thirty per cent. is payable upon shoes made of India-rubber in Brazil, although they are made by the same process as bottles or sheets, provided they come to this country in a condition to be worn without further material labor on them here, and were actually worn in this form, and provided they were called, in the language of commerce "India-rubber shoes"; and of these two facts the jury ought to judge. *Ib.*
4. The articles come within the letter of the law, and the act of 1842 was framed with a desire to tax whatever might compete with our own manufactures. *Ib.*
5. When India-rubber is made into a shape suitable for use, it may be considered a manufactured article. Originally, it was made into the shape of boots, to be used and worn in Brazil, and afterwards into shoes; but not intended to be sent abroad as a raw material. *Ib.*
6. The fact, that the material of which these shoes are made is used for other articles of manufacture, after their importation, does not change this view of the subject. *Ib.*

EQUITY.
See Chancery.

ERROR, (Writ of).

1. Where the judgment of the state court may be sustained on error, on any ground within the exclusive cognizance of that court, this court will not reverse such judgment merely because some point which can be examined here was erroneously ruled. *Erwin* v. *Lowry*, 172.
2. Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error.
3. Where the highest court of a State affirmed the judgment of a court below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. *Matheson* v. *Branch Bank of Mobile*, 200.
4. The intention of the parties to raise a constitutional question is not enough. It must be actually raised and decided in the highest court of the State. *Ib.*

EVIDENCE.

1. In a suit brought by a marine against the commanding officer of a squadron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evidence a letter which he had written to the Secretary of the Navy relating to the circumstances of the enlistment. *Wilkes* v. *Dinsman*, 89.

EVIDENCE—(*Continued.*)

2. An acquittal of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual. *Ib.*
3. The burden of proof, that the officer exceeded his powers, is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable. *Ib.*
4. It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error. *Ib.*
5. It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the grounds of his being interested, when he held certain notes only for the purpose of paying the money over to his clients, when recovered. *Patton* v. *Taylor*, 132.
6. A former suit in chancery between the original parties to a mortgage, involving directly the validity of that instrument, in which suit a bill to foreclose was dismissed upon the ground that the mortgage was void, was good evidence in an ejectment brought by an assignee claiming to recover by virtue of the same mortgage. *Smith* v. *Kennedy*, 198.
7. The instrument had been declared void by a court of competent jurisdiction, and neither the parties nor their privies could recover upon it. *Ib.*
8. There is no difference, upon this point, between a decree in chancery and a verdict at law. Either constitutes a bar to a future action upon the instrument declared to be void. *Ib.*
9. A judgment against an administrator, in which a devastavit had been suggested and a return of *nulla bona* to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate. *McLaughlin* v. *Bank of Potomac*, 220.

EXECUTORS AND ADMINISTRATORS.

See Louisiana, 1-6.

1. A judgment against an administrator, in which a devastavit had been suggested and a return of *nulla bona* to an execution, was good evidence against the surety of the administrator, and also against the fraudulent grantee of the intestate. *McLaughlin* v. *Bank of Potomac*, 220.
2. Although the creditor has a remedy against the surety of the administrator by a suit at law upon the bond, yet he may also file a bill in chancery against all the parties who are concerned in the alleged fraud, and such other persons as are interested in the estate.—*Ib.*
3. Although, by the laws which prevail in the District of Columbia, the personal estate of a deceased person should be resorted to for the payment of debts before applying to the realty; yet, where the administrator was found guilty of a devastavit and the personal property was chiefly left in the hands of the surety, who was also the person charged with being fraudulent grantee of the intestate, the general rule is not applicable. *Ib.*
4. In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative. *Ib.*

FRAUDULENT CONVEYANCES.

1. A note held by a bank for a debt due to it, and renewed from time to time with the same maker and indorser, is sufficient to constitute the bank a creditor in claiming to have conveyances set aside as fraudulent, although the note was not due when the conveyances were made, and the present note was renewed afterwards. *McLaughlin* v. *Bank of Potomac*, 220.
2. Where the original debtor had made a conveyance of property to a trustee for the purpose of securing his indorser, it was not necessary to

FRAUDULENT CONVEYANCES—(*Continued.*)
pursue and exhaust that trust-property before proceeding against the indorser and his property. A judgment had been obtained against the administrator of the indorser, which fixed his liability. *Ib.*
3. In a bill against the fraudulent grantee, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative. *Ib.*
4. The Commercial and Railroad Bank of Vicksburg assigned all its property to trustees, reciting that "the embarrassed situation of the bank and the present inability of its debtors to meet their liabilities, and by consequence that the bank was unable to pay its debts promptly, rendered it proper that a general assignment should be made for the benefit of its creditors and completion of the railroad"; it therefore assigned all its property, real, personal, and mixed, to trustees, with authority to sell the effects assigned, to collect all debts due to the institution, to complete the railroad, for which purpose they were authorized to borrow a sum not exceeding $250,000, to allow claims against the bank of a certain description, and out of the proceeds collected first to pay the principal and interest of the above loan; after the completion of the said road, dividends were to be made *pro rata* amongst the creditors of the bank who had filed their claims, should there not be a sufficient amount to pay all the claims; the trustees to receive eight thousand dollars each per annum for their services. *Bodley* v. *Goodrich*, 276.
5. This deed was fraudulent and void as to all creditors of the bank who did not become parties to it by filing their claims. *Ib.*

INSURANCE.
1. In an insurance upon freight, there is no total loss of a memorandum article as long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to their destined port, no matter what may be the extent of the damage. *Hugg* v. *Augusta Insurance and Banking Co.*, 595.
2. If, however, the articles are not capable of being carried, in specie, to the port of destination, arising from danger to the health of the crew or to the safety of the vessel; or the public authorities at the port of distress order the articles to be thrown overboard, from fear of disease, there would be a total loss. *Ib.*
3. In construing the contract of insurance upon freight, the interest of the insured, or of the underwriters of the cargo, is not considered. Therefore, if the vessel is in a condition to carry on the cargo to the port of destination, or another vessel can be procured for that purpose, it is the duty of the owner of the vessel to carry it on, although it may be for the interest of the insured and insurers of the cargo to sell it at the port of distress. *Ib.*
4. If so sold, the insured cannot recover for a total loss of freight. *Ib.*
5. But although it is the duty of the owner of the vessel, either to repair his own or to procure another at the port of distress to carry on the cargo, yet, if it should be made to appear that the repairs or procurement of another vessel would necessarily produce such a retardation of the voyage as would, in all probability, occasion a destruction of the article, in specie, before it could arrive at the port of destination, or, from its damaged condition, it could not be reshipped in time, consistently with the health of the crew or safety of the vessel, or would not be in a fit condition, from pestilential effluvia or otherwise, to be carried on, it then became the duty of the master to sell the goods for the benefit of whom it might concern. *Ib.*
6. A policy of insurance upon "freight of the bark Margaret Hugg, at and from Baltimore to Rio Janerio and back to Havana or Matanzas, or a port in the United States, to the amount of $5,000, upon all lawful goods, etc., beginning the adventure upon the said freight from and immediately following the lading thereof aforesaid at Baltimore, and

INSURANCE—(*Continued.*)
continuing the same until the said goods, wares, and merchandise shall be safely landed at the port aforesaid," upon which a greater premium was paid than was usual for the outward voyage alone, must not be construed as a policy upon the round voyage. *Ib.*
7. The insurers were, therefore, not entitled to a deduction for the outward freight. *Ib.*

IOWA.
See Boundaries of States.

JUDICIAL SALE.
1. Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed, in the Circuit Court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee, and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a State court against a purchaser at sale, and attempt to prove that the Circuit Court had no jurisdiction over the case, because the executor was not a citizen of Louisiana. Evidence dehors the record cannot be introduced to disprove it. *Erwin* v. *Lowry*, 172.
2. Where a lien existed on property by a special mortgage before the debtor's death, and the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. *Ib.*
3. The Circuit Court of the United States, having jurisdiction over the parties and subject-matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts. *Ib.*
4. Although the marshal did not give the notice required by law to the executor against whom the petition was filed, yet, if the executor was served with process on the spot where the the property was situated and where the advertisements were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate. *Ib.*

JURISDICTION.
1. At the period of the American Revolution, Rhode Island did not, like the other States, adopt a new constitution, but continued the form of government established by the charter of Charles the Second, making only such alterations, by acts of the Legislature, as were necessary to adapt it to their condition and rights as an independent State. *Luther* v. *Borden*, 1.
2. But no mode of proceeding was pointed out by which amendments might be made. *Ib.*
3. In 1841 a portion of the people held meetings and formed associations, which resulted in the election of a convention to form a new constitution, to be submitted to the people for their adoption or rejection. *Ib.*
4. This convention framed a constitution, directed a vote to be taken upon it, declared afterwards that it had been adopted and ratified by a majority of the people of the State, and was the paramount law and constitution of Rhode Island. *Ib.*
5. Under it, elections were held for Governor, members of the Legislature, and other officers, who assembled together in May, 1842, and proceeded to organize the new government. *Ib.*
6. But the charter government did not acquiesce in these proceedings. On

JURISDICTION—(*Continued.*)
the contrary, it passed stringent laws, and finally passed an act declaring the State under martial law. *Ib.*

7. In May, 1843, a new constitution, which had been framed by a convention called together by the charter government, went into operation, and has continued ever since. *Ib.*

8. The question which of the two opposing governments was the legitimate one, viz., the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision. *Ib.*

9. The courts of Rhode Island have decided in favor of the validity of the charter government, and the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State. *Ib.*

10. The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution cannot be settled in a judicial proceeding. *Ib.*

11. The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation. *Ib.*

12. The President of the United States is vested with certain power by an act of Congress, and in this case he exercised that power by recognizing the charter government. *Ib.*

13. Where a petition for the seizure and sale of the mortgaged property of a deceased person was filed, in the Circuit Court of the United States for Louisiana, against the executor of that deceased person, which petition alleged the plaintiff to be a citizen of Tennessee, and the defendant to be a citizen of Louisiana, and the proceedings went on to a sale without any objection to the jurisdiction of the court being made by the executor upon the ground of residence of parties, it is too late for a curator, appointed in the place of the executor, to raise the objection in a State court against a purchaser at the sale, and attempt to prove that the Circuit Court had no jurisdiction over the case, because the executor was not a citizen of Louisiana. Evidence dehors the record cannot be introduced to disprove it. *Erwin* v. *Lowry*, 172.

14. Where a lien existed on property by a special mortgage before the debtor's death, and the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. *Ib.*

15. The Circuit Court of the United States, having jurisdiction over the parties and subject-matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts. *Ib.*

16. Although the motion under argument in the Circuit Court was addressed to its discretion, yet, if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions. *United States* v. *Chicago*, 185.

17. So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point. *Ib.*

18. When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State, for the purpose of throwing the case into the Circuit Court, it is necessary,

JURISDICTION—(*Continued.*)
in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice. *Smith* v. *Kernochen*, 198.

19. If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction. *Ib.*
20. The question of jurisdiction, in such a case, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late. *Ib.*
21. Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal. *McLaughlin* v. *Bank of Potomac*, 220.
22. Where the highest court of a State affirmed the judgment of a court below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. *Matheson* v. *Branch Bank of Mobile*, 260.
23. The intention of the parties to raise a constitutional question is not enough. It must be actually raised and decided in the highest court of the State. *Ib.*
24. Where the record does not show that the question of the consistency of a statute of a State with the Constitution of the United States was raised in the State court, this court will not entertain jurisdiction under the twenty-fifth section of the Judiciary Act. *Crawford* v. *Branch Bank of Mobile*, 279.
25. A rejoinder, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder. The District Court could not oust the State court of its jurisdiction, which had already attached. *Peck* v. *Jenness*, 612.
26. Where an appeal from a Circuit Court, sitting in chancery, is brought up to this court upon a certificate of division in opinion, and the certificate states that the court was not able to agree in opinion, one of the judges being of the opinion that a decree should be rendered for the complainants, and the other that a decree should be rendered for the defendants, this was not such a distinct statement of the point or points upon which the judges differed as would give this court jurisdiction. *Sadler* v. *Hoover*, 646
27. The appeal must, therefore, be dismissed, for want of jurisdiction. *Ib.*
28. Where a decree in chancery refers the matters to a master to ascertain the amount of damages, and in the mean time the bill is not dismissed, nor is there a decree for costs, the decree is not a final one, from which an appeal will lie to this court, although there is a perpetual injunction granted. *Bernard* v. *Gibson*, 650.
29. The amount of damage which will follow from restraining a party from using a machine held under a patent right is a proper consideration to be addressed to the Circuit Court, but does not constitute a ground of appeal. *Ib.*
30. Where a vessel was run on shore by the captain in order to save the lives of those on board, and for the preservation of the cargo, by which act the vessel was totally lost, but the cargo saved and delivered to the consignee, a libel *in personam*, filed by the owner of the vessel against the consignee of the cargo, (and the result would be the same if filed against the owner of the cargo,) for contribution by way of general average, cannot be sustained in the admiralty courts of the United States. *Cutler* v. *Rae*, 729.
31. Those courts have jurisdiction wherever the vessel or cargo is subject to an absolute lien, created by the maritime law; and will follow property subject to such lien into the hands of assignees. The lien, in such cases, does not depend upon possession. *Ib.*

JURISDICTION—(*Continued.*)

32. But in cases of general average, the lien is a qualified one, depends upon the possession of the goods, and ceases when they are delivered to the owner or consignee. *Ib.*

33. Whatever may be the liability of the owner after he has received his cargo, it is founded upon an implied promise to contribute to the reimbursement of the owner of the lost vessel, which promise is implied by the common law, and not by the maritime law. *Ib.*

34. The case is, therefore, beyond the jurisdiction of courts of admiralty, and the libel must be dismissed. *Ib.*

35. Where a complainant alleged that a school tax, which was levied upon his land, was contrary to the spirit and meaning of a law of the State of Ohio which exempted his property from all State taxes, and conflicted also with the terms and conditions of the leases by which he held his land, and the State court dismissed the bill, this decision of the State court cannot be reviewed by this court by a writ of error issued under the twenty-fifth section of the Judiciary Act. *Smith* v. *Hunter*, 738.

36. The rules which regulate cases brought up to this court under that section again examined and affirmed. *Ib.*

37. The act of 1838, (5 Stat. at L., 251,) relating to pre-emption rights, provides, that "before any person claiming the benefit of this law shall have a patent for the land which he may claim, by having complied with its provisions, he shall make oath, etc., that he entered upon the land which he claims in his own right, and exclusively for his own use and benefit, and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatever, by which the title which he might acquire from the government of the United States should enure to the use and benefit of any one except himself, or to convey or transfer the said land, or the title which he may acquire to the same, to any other person or persons whatever, at any subsequent time." *Udell* v. *Davidson*, 769.

38. Where a pre-emptioner sold his inchoate title, which passed ultimately into the hands of a trustee, and the trustee loaned money out of the trust fund to the pre-emptioner, in order to enable him to pay the government; and the title thus obtained from the United States was conveyed by the pre-emptioner to the trustee, without any reference to the trust; and the trustee was ordered by a State court to hold the property subject to the trust,—he cannot remove the case to this court, by virtue of the twenty-fifth section of the Judiciary Act. *Ib.*

39. There is no title, right, privilege, or exemption, under an act of Congress, set up by the party and decided against him by the State court. By his own showing, he has acquired no title from the United States. *Ib.*

40. The allegation is, that a fraud was perpetrated upon the government, and another meditated upon the *cestui que trust*, both of which this court is called upon to maintain and carry out. *Ib.*

41. The case is dismissed, for want of jurisdiction. *Ib.*

42. Where, upon the trial of a case in a State court, a party claims the land in dispute, under an authority which he alleges has been exercised by the Secretary of the Treasury, in behalf of the United States, and the decision was against the validity of the authority, the party is entitled to have his case brought to this court under the twenty-fifth section of the Judiciary Act. *Neilson* v. *Lagow*, 772.

JURY.

1. A question, whether or not certain conveyances were fraudulent, was properly submitted to the jury. Fraud is often a mixed question of law and fact, and the jury can be instructed upon matters of law. *McLaughlin* v. *Bank of Potomac*, 220.

LACHES.

See CHANCERY, 17-21.

LANDS, PUBLIC.

1. The corporate powers of the city of Chicago have no right to open

LANDS, PUBLIC—(*Continued.*)
streets through property belonging to the United States, adjacent to the city, although the ground had been laid out in lots and streets by the government. *United States* v. *Chicago*, 186.
2. Their right was limited to that part which, by a sale of the government, had become private property. *Ib.*
3. The fact, that streets had been laid out by an agent of the government, did not amount to a dedication of them to public use, so as to vest the control over them in the city. *Ib.*
4. The United States, having been the proprietor of all the land and reserved a part for military purposes, hold this part by a different title than where land is purchased by them in a State. *Ib.*
5. The proviso in the second section of the act passed on the 1st of March, 1823, (3 Stat. at L., 773,) entitled, "An act for extending the time for locating Virginia military land-warrants and returning surveys thereon to the General Land-Office,"—which proviso is as follows, viz. "Provided, that no locations, as aforesaid, in virtue of this or the preceding section of this act, shall be made on tracts of lands for which patents had previously been issued, or which had been previously surveyed; and any patent which may nevertheless be obtained for land located contrary to the provisions of this act shall be considered null and void,"—protected an entry which had been made in the name of a dead man in 1822. And a subsequent conflicting entry came within the prohibition of the statute, and was therefore void. *McArthur's Heirs* v. *Dun's Heirs*, 262.
6. The cases of *Galt* v. *Galloway*, 4 Peters, 345; *McDonald's Heirs* v. *Smalley*, 6 Peters, 264; *Jackson* v. *Clarke*, 1 Peters, 628; *Taylor's Lessee* v. *Myers*, 7 Wheat., 23; and *Galloway* v. *Finley*, 12 Peters, 264, reviewed. *Ib.*
7. Forbes and Company obtained a grant of land in 1807 from Morales, Intendant-General under the Spanish government, which land was adjacent to Mobile, in West Florida. This grant purported to be, in part, the confirmation of a concession granted in 1795 and surveyed in 1802. The survey terminated at high-water-mark upon the river. *Kennedy's Executors* v. *Hunt*, 586.
8. The grant of 1807 included the land between the then bank of the river and the high-water-mark of 1802. *Ib.*
9. The grant of 1807 was excepted from the operation of the act of Congress passed on the 20th of March, 1804, which annulled all Spanish grants made after the 1st of October, 1800, and was recognized as a valid grant by the act of 3d March, 1819. *Ib.*
10. An act of March 2d, 1829, confirmed an incomplete Spanish concession which was alleged to draw after it, as a consequence, certain riparian rights conflicting with those claimed under the grant of 1807. *Ib.*
11. A decision of a State court, giving the land covered by these riparian rights to the claimants under the grant of 1807, was only a construction of a perfected Spanish title, and cannot be reviewed by this court under the twenty-fifth section of the Judiciary Act. It did not draw in question an act of Congress, or any authority exercised under the Constitution or laws of the United States. *Ib.*
12. The case of the *United States* v. *King and Coxe* (3 Howard, 773) reviewed. *United States* v. *King et al.*, 803.
13. According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions. *Ib.*
14. But this practice is not applicable to the courts of the United States. A writ of error in them brings up only questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below. *Ib.*
15. Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where

LANDS, PUBLIC—(*Continued.*)
a special verdict is found or a case is stated, in neither of which is there any necessity for a bill of exceptions. *Ib.*
16. Where the court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is closed against it. *Ib.*
17. Leaving this statement out, there is still enough in the record to enable the court to take cognizance of this case, because the defendants below asserted a legal title to be in themselves by virtue of a grant which severed the land claimed from the royal domain. *Ib.*
18. The construction of this grant, issued in 1797, by the Baron de Carondelet, to the Marquis de Maison Rouge, is a question of law upon which this court must review the decision of the Circuit Court. *Ib.*
19. The two grants or contracts of 1707 and 1795 must be construed together. That of 1797 refers to the one of 1795, and cannot be understood without it. *Ib.*
20. The contract of 1795 was for the benefit of the emigrants, and must have been intended to be shown by Maison Rouge to those persons whom he was inviting to settle upon the land. No personal benefit or compensation to himself individually is provided in it. The object was to promote the policy of the Spanish government, as whose agent Maison Rouge acted, and not as the proprietor of the land. *Ib.*
21. The contract of 1797 was intended to supply two omissions in that of 1795, namely, to designate with more particularity the place where the settlement was to be made, and to provide for a larger number of families than was mentioned in the original contract. *Ib.*
22. For both these purposes, a certain tract of land was marked out, and "destined and appropriated" for the uses of the settlement. *Ib.*
23. The grant of 1797 does not contain the words usually employed in Spanish colonial grants, when there was an intention to sever land from the royal domain and convey it as individual property. *Ib.*

LIEN.
See BANKRUPTCY.
1. Where a judgment was obtained in the Circuit Court of the United States for the District of Mississippi in 1839, and in 1841 the State of Mississippi passed a law, requiring judgments to be recorded in a particular way, in order to make them a lien upon property, this statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the statute. *Massingill* v. *Downs*, 760.

LIMITATION OF ACTIONS.
1. There is a defence peculiar to courts of equity founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, the court often act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, by refusing to interfere where there has been gross laches in prosecuting rights, or long acquiescence in the assertion of adverse rights. *Wagner* v. *Baird*, 234.
2. The rule upon this subject, originally laid down by Lord Camden in *Smith* v. *Clay*, 3 Bro. Ch., 640, note, and adopted by this court in 1 Howard, 189, again asserted. *Ib.*
3. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the party in possession, which will appeal to the conscience of the chancellor. *Ib.*
4. The party guilty of such laches cannot screen his title from the just imputation of staleness, merely by the allegation of an imaginary impediment or technical disability. *Ib.*
5. By a law of the State of Illinois, passed in 1827, "every action of covenant shall be commenced within sixteen years after the cause of such

LIMITATIONS OF ACTIONS—(*Continued.*)
action shall have accrued, and not after." But by a proviso, persons beyond the limits of the State were exempted from the operation of the law, and might bring the action at any time within sixteen years after coming within the State. Afterwards, in 1837, this proviso was repealed. *Lewis* v. *Lewis*, 776.
6. The statute of 1827 begins to run, as to non-residents, from the time of the repeal of the saving clause, in 1837, and not before. *Ib.*
7. The general rules stated which govern a court of equity in opening accounts and sustaining claims which are barred by the statute of limitations. *Stearns* v. *Page*, 819.
8. Great caution is exercised, and the complainant is holden to stringent rules of pleading and evidence. *Ib.*
9. He must state in his bill, distinctly, the particular act of fraud, misrepresentation, or concealment; must specify how, when, and in what manner it was perpetrated. *Ib.*
10. The charges must be definite and reasonably certain; capable of proof and clearly proved. *Ib.*
11. If a mistake is alleged, it must be stated with precision and made apparent, so that the court may rectify it, with a feeling of certainty that they are not committing another and perhaps greater mistake. *Ib.*
12. And especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery might not have been before made. *Ib.*

LOCAL LAW.
See LOUISIANA.
1. The courts of Rhode Island have decided in favor of the validity of the charter government, and the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the constitution and laws of the State. *Luther* v. *Borden*, 1.
2. The highest court of the State of Alabama having decided that an original mortgagee (an incorporated company) violated its charter in the transaction which led to the mortgage, this court adopts its construction of a statute of that State. *Smith* v. *Kernochen*, 198.
3. The legislature of Michigan passed an act on the 15th March, 1837, entitled "An act to organize and regulate banking associations," and on the 30th of December, 1837, an act to amend the former act. By the first, any persons were allowed to form associations for the purposes of banking upon the terms specified in the law; and by the second, the stockholders were made liable, in their individual character, under certain circumstances, for the debts of the association. *Nesmith* v. *Sheldon*, 812.
4. The associations formed under these acts are corporations within the meaning of the constitution of Michigan, and the acts are unconstitutional and void. *Ib.*
5. The second section of the twelfth article of the constitution forbidding the legislature from "passing any act of incorporation unless with the assent of at least two thirds of each house," the judgment of the legislature is required to be exercised upon the propriety of creating each particular corporation, and two thirds of each house must sanction and approve each individual charter. *Ib.*
6. The Supreme Court of the State of Michigan has so construed its constitution, and it is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own statutes where that construction has been settled by the decision of their highest judicial tribunal. *Ib.*

LOUISIANA.
1. The jurisdiction of courts of probate in Louisiana is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over

LOUISIANA—(*Continued.*)
cases of alleged fraud or waste, or embezzlement of the estate. *Fourniquet* v. *Perkins*, 100.
2. The District Courts are courts of general civil jurisdiction. *Ib.*
3. Hence, where a petition was filed in the Court of Probate against an administrator, praying that he might account and also be held liable for maladministration and spoliation, it was proper to transfer the case for trial to the District Court. *Ib.*
4. The judgment in the District Court, being generally for the defendant, must be supposed to cover the whole case, and not to have rested upon only a branch of it, viz. a release which was pleaded by the defendant. *Ib.*
5. Therefore, where a bill was filed in the Circuit Court by the same petitioners against the same defendant, it was correct for that court to consider the question as *res judicata*. *Ib.*
6. The Louisiana decisions upon the jurisdiction of the Probate and District Courts examined. *Ib.*
7. According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions. *United States* v. *King et al.*, 833.
8. But this practice is not applicable to the courts of the United States. A writ of error in them only brings up questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below. *Ib.*
9. Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where a special verdict is found or a case is stated, in neither of which is there any necessity for a bill of exceptions. *Ib.*
10. Where a court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is closed against it. *Ib.*

MARINE CORPS.
See Navy.

MARINE INSURANCE.
See Insurance.

MARTIAL LAW.
See Constitutional Law, 1, 2.

MISSOURI.
See Boundaries of States.

MORTGAGE.
See Chancery.
1. Where a lien existed on property by a special mortgage before the debtor's death, and the property passed, with the lien attached, into the hands of an executor, and was in the course of administration in the Probate Court, the Circuit Court of the United States had jurisdiction, notwithstanding, to proceed against the property, enforce the creditor's lien, and decree a sale of the property. And such sale was valid. *Erwin* v. *Lowry*, 172.
2. When a mortgagor and mortgagee are citizens of the same State, and the mortgagee assigns the mortgage to a citizen of another State for the purpose of throwing the case into the Circuit Court, it is necessary, in order to divest the court of jurisdiction, to bring home to the assignee a knowledge of this motive and purpose. Till then, he must be considered an innocent purchaser without notice. *Smith* v. *Kernochen*, 198.
3. If the assignment was only fictitious, then the suit would in fact be between two citizens of the same State, over which the court would have no jurisdiction. *Ib.*

NAVY.
1. In a suit brought by a marine against the commanding officer of a squad-

NAVY—(*Continued.*)
ron, in which the marine alleged that he was illegally detained on board after the expiration of his term of enlistment, it was competent for the defendant to give in evidence a letter which he had written to the Secretary of the Navy relating to the circumstances of the enlistment. *Wilkes* v. *Dinsman*, 89.
2. An acquital of the commanding officer by a court-martial, when tried for the same acts by order of the government, is not admissible evidence in a suit by an individual. *Ib.*
3. The act of Congress passed on the 2d of March, 1837, (5 Stat. at Large, 153,) authorized a re-enlistment of marines to serve during the cruise then about to take place, they being included in the denomination of "persons enlisted for the navy." Prior laws recognize marines as a part of the navy. *Ib.*
4. Under the same act, the commander of the squadron had power to detain a marine after the term of his enlistment expired, if, in the opinion of the commander, public interest required it. *Ib.*
5. At the time of enlistment, the marine corps being subject to such laws and regulations as might, at any time, be established for the better government of the navy, it was a part of the contract of enlistment that the party should obey them, whenever passed. It was, therefore, no objection to such laws, that they were passed after his entering the service. *Ib.*
6. By the third article for the government of the navy, the commander is authorized to cause twelve lashes to be inflicted, for scandalous conduct, without a court-martial. Every successive disobedience of orders a fresh offence, and subject to additional punishment. *Ib.*
7. The commander had not only a right to cause corporal punishment to be inflicted, but to resort to any reasonable measures necessary to insure submission. He had, therefore, a right to imprison the refractory party on shore, if done without malice. *Ib.*
8. The commander was acting as a public officer, invested with certain discretionary powers, and cannot be made answerable for any injury, when acting within the scope of his authority, and not influenced by malice, corruption, or cruelty. His position is quasi judicial. *Ib.*
9. Hence, the burden of proof that the officer exceeded his powers is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable. *Ib.*
10. It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error. *Ib.*

NOTICE.
1. Although the marshal did not give the notice required by law to the executor against whom the petition was filed, yet, if the executor was served with process on the spot where the property was situated and where the advertisments were posted up, was present at the sale and named one of the appraisers, and requested that the land and negroes should be sold together, he cannot afterwards impeach the sale because formal steps were not strictly complied with. Nor can the curator who subsequently represented the same estate. *Erwin* v. *Lowry*, 172.

OFFICERS, PUBLIC.
1. The burden of proof, that the officer exceeded his powers, is upon the party complaining; the rule of law being, that the acts of a public officer, on public matters, within his jurisdiction and where he has a discretion, are to be presumed legal till shown by others to be unjustifiable. *Wilkes* v. *Dinsman*, 89.
2. It is not enough to show that he committed an error in judgment, but it must have been a malicious and wilful error. *Ib.*

PLEAS AND PLEADINGS.
1. A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money upon the two grounds of

PLEAS AND PLEADINGS—(*Continued.*)
want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. *Patton* v. *Taylor*, 132.
2. Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings. *Ib.*
3. The question of jurisdiction arising in a case where a mortgagor and mortgagee were citizens of the same State, and the mortgagee had assigned the mortgage to a citizen of another State, should have been raised by a plea in abatement. Upon the trial of the merits, it was too late. *Smith* v. *Kernochen*, 198.
4. In a bill against a fraudulent grantee of a deceased person, it is not necessary to aver a deficiency of the personal estate of the deceased; it is sufficient to aver the fraud and the waste of the personal assets by such grantee, who was also the personal representative. *McLaughlin* v. *Bank of Potomac*, 220.
5. A general demurrer by the defendant, assigning reasons why the plaintiff should not recover, must be considered and treated as a special demurrer, which is an objection for defects in form. *Tyler* v. *Hand*, 573.
6. In this case, none of the reasons are valid as objections to a matter of form, but the court, nevertheless, will examine them as if brought forward to sustain a general demurrer. *Ib.*
7. Where bonds were given to the President of the United States, and his successors in office, for the use of the orphan children of certain Indians, and the declaration so averred, it was not a good cause of demurrer to allege that they were taken without authority of law. They were valid instruments, though voluntarily given and not prescribed by law; and as the demurrer admitted the facts stated in the declaration, the defendant was estopped from contesting the right of the obligee to sue. *Ib.*
8. So, also, it was not a valid reason to say, in support of the demurrer, that the bonds were given without consideration; and if there was any illegality in the transaction, it should have been pleaded in bar. *Ib.*
9. Where the defendant demurred, and assigned as a reason, that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff. *Ib.*
10. So, also, it is not a good ground for the defendant to say that the plaintiff has shown no title to the bonds. It is not a good objection to a matter of form or substance. *Ib.*
11. Nor was it a good ground of demurrer to say that the *cestui que* use was not named in the declaration. The demurrer admits that the recital of the use in the declaration was correct, and it was not necessary for the plaintiff to set out the individual uses, when the uses were general in the bonds. *Ib.*
12. A rejoinder, setting forth that the District Court of the United States had decided that the attachment was not a valid lien upon the property, was not a good rejoinder. The District Court could not oust the State court of its jurisdiction, which had already attached. *Peck* v. *Jenness*, 612.
13. Although, as a general rule, all issues, whether of law or fact, ought to be disposed of in some way by the court below, yet, under the particular circumstances of this case, which presented the appearance upon the record of a demurrer which had not been disposed of, this court will presume that the demurrer had been withdrawn or overruled. *Townsend* v. *Jemison*, 706.
14. The thirty-second section of the Judiciary Act (1 Stat. at L., 91) forbids a reversal of the judgment on account of the omission of the clerk to record such waiver or overruling. *Ib.*
15. The statutes of jeofails examined. *Ib.*

PLEAS AND PLEADINGS—(*Continued.*)

16. Where there are special and general counts in a declaration, and a demurrer is filed which affects only the special counts, and the party goes to trial upon the general issue plea to the general counts, a verdict and judgment so obtained will not be set aside because the demurrer was undisposed of. A statute of Mississippi, where the cause was tried, allows one good count to sustain a judgment. *Ib.*
17. Where the plea was bad, and the demurrer was to a replication to this bad plea, the first fault in pleading was committed by the defendant, and judgment against him was properly given. *Ib.*
18. If an exception be taken to an answer in chancery, upon the ground that certain allegations in the bill are neither answered, admitted, nor denied, it becomes necessary to inquire whether the facts charged in the allegations are material, and might, if established, contribute to support the equity of the complainant. *Hardeman* v. *Harris*, 726.
19. If they will not, the omission to answer the allegations is not a good ground for exception to the answer, and the exception must be overruled. *Ib.*
20. Therefore, when a bill charged that certain notes were given for the purchase of slaves introduced into the State of Mississippi, as merchandise and for sale, after the first day of May, 1833, and the answer omitted to notice the allegation, such omission was not a good ground for an exception. *Ib.*
21. This court has repeatedly decided that the fact stated is no defence to a suit at law. Still less can it be a defence in equity. *Ib.*
22. Where an allegation in the bill was, that the complainants were only sureties, and that their principal was insolvent, the answer was not justly subject to exception for omitting to notice it. The fact in no way strengthened the equity of the complainants. *Ib.*
23. Where the complainant and respondent in a suit in chancery entered into a mutual covenant, that, pending the suit, they would divide the money between them in certain proportions, and that if, in the said suit, it should be decreed that these were not the correct proportions, they would respectively pay the difference so as to conform to the decree; and the result of said suit was a dismissal of the complainant's bill, with costs; and the respondent brought an action of covenant against the complainant, reciting the agreement in his declaration, with an averment, that, by virtue of the decree of dismissal, he was entitled to receive a certain sum of money,—this declaration was bad. *McDonald* v. *Hobson*, 745.
24. The agreement looked to a judicial determination of the rights of the parties in some court of law or equity, and the declaration omits all averment that these rights had been so settled. *Ib.*
25. The decree of dismissal did not, of itself, prove that the complainant owed the respondent any thing. It only proved that the respondent was not indebted to the complainant. *Ib.*
26. Nor is this defect in the declaration cured by verdict. It cannot be presumed that evidence was given upon the trial to show that some decree had adjusted the amount due, as claimed in the declaration, because this would be presuming against the record, which recites the substance of the decree. A total omission to state any cause of action is a defect which a verdict will not cure. *Ib.*
27. The averment of the *virtute cujus* is insufficient either as matter of law or fact;—as law, because no such legal consequence could follow from the premises, and as fact, because the averment was in contradiction to the record itself. *Ib.*

POLITICAL QUESTIONS.

See Constitutional Law, 1, 2; Jurisdiction, 1–12.

POST-OFFICE DEPARTMENT.

1. Where a running account is kept at the Post-Office Department between the United States and a postmaster, in which all postages are charged to him, and credit is given for all payments made, this amounts to an

POST-OFFICE DEPARTMENT—(*Continued.*)
election by the creditor to apply the payments, as they are successively made, to the extinguishment of preceding balances. *Jones* v. *United States*, 681.
2. This the creditor has a right to do in the absence of instructions from the debtor. *Ib.*
3. The English decisions and those of this court examined. *Ib.*
4. The act of Congress of 1825 (4 Stat. at L., 102), which exonerates the sureties if balances are not sued for within two years after they occur, does not apply to this case, because, by this mode of keeping the account, the balance due from the postmaster is thrown upon the last quarter. *Ib.*

PRACTICE.
See Louisiana.
1. Where the court below ordered that a sum of money should be paid over by the party in whose favor they decided to the losing party, the reception of this money by the losing party, before the writ of error was sued out, will not be a sufficient cause for dismissing the writ of error. *Erwin* v. *Lowry*, 172.
2. Although the motion under argument in the Circuit Court was addressed to its discretion, yet, if the questions which arose and upon which the judges differed involved the right of the matter, this court will entertain those questions. *United States* v. *Chicago*, 185.
3. So, also, where the questions are several in number, and so material as to decide the whole case, this court will not dismiss them, provided they appear to have arisen at one time, at one stage of the cause, and to have involved little beyond one point. *Ib.*
4. Where an issue is sent by a court of equity to be tried by a jury in a court of law, and exceptions are taken during the progress of the trial at law, these exceptions must be brought before the court of equity and there decided, in order to give this court cognizance of them when the case is brought up by appeal. *McLaughlin* v. *Bank of Potomac*, 220.
5. The meaning of the forty-third rule of this court is, that, if a judgment or decree in the court below be rendered more than thirty days before the commencement of the term of this court, and the record be not filed within the first six days of the term, the appellee or defendant in error may docket the case, and move for its dismissal as the rule prescribes. *United States* v. *Boisdore's Heirs*, 658.
6. But if the judgment or decree of the court below be rendered less than thirty days before the commencement of the term of this court, the rule does not apply. *Ib.*
7. The conditions under which a party is permitted and a magistrate authorized to take a deposition *de bene esse* by the thirtieth section of the Judiciary Act are,—
1st. That the witness lives at a greater distance from the place of trial than one hundred miles.
2d. Or is bound on a voyage to sea.
3d. Or is about to go out of the United States.
4th. Or out of such district to a greater distance from the place of trial than one hundred miles before the time of trial.
5th. Or is ancient or very infirm. *Harris* v. *Wall*, 693.
8. And to entitle himself to read the deposition upon the trial, the party must show,—
1st. That the witness is dead.
2d. Or gone out of the United States.
3d. Or to a greater distance than one hundred miles from the place where the court is sitting.
4th. Or that, by reason of age, sickness, or bodily infirmity, he is unable to travel and appear at court. *Ib.*
9. The authority or jurisdiction conferred on the magistrate is special, and confined within certain limits or conditions, and the facts calling for the

PRACTICE—(*Continued.*)
exercise of it should appear upon the face of the instrument, and not be left to parol proof. *Ib.*

10. Therefore, where the magistrate, in his notice to the opposite party, only said that the witness was about to "depart the State," and in his certificate omitted to state the reason for taking the deposition, it was not competent for the party, at the trial, to supply the defect by proving that the witness was about to go out of the United States. *Ib.*

11. The service of the notice upon the opposite party should be certified by the magistrate as well as the marshal. *Ib.*

12. When counsel have signed an agreement that a deposition may be read in evidence to the jury, it is too late, after its reading, to ask the court to exclude from the consideration of the jury a part of the deposition. *Ib.*

13. Under the thirty-seventh rule of this court, the clerk is not bound to docket a case until the bond for costs is given. *Van Rensselaer v. Watts' Executors*, 784.

PRESUMPTION.

1. The Circuit Court of the United States, having jurisdiction over the parties and subject-matter, and having issued an order of seizure and sale, the presumption must be, in favor of a purchaser, that the facts which were necessary to be proved in order to confer jurisdiction were proved. No other court can inquire into those facts. *Erwin v. Lowry*, 172.

TARIFF.

See DUTIES.

VENDOR AND PURCHASER.

1. A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained. *Patton v. Taylor*, 132.

WITNESSES.

1. It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested, when, as a mere naked trustee, he held certain notes only for the purpose of paying the money over to his clients, when recovered. *Patton v. Taylor*, 132.

WRIT OF ERROR.

See ERROR.