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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

DECEMBER TERM, 1850.

By BENJAMIN C. HOWARD,

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

VOL. X.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

NEW YORK AND ALBANY

BANKS & BROTHERS, LAW PUBLISHERS

1884.

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.

JOHN J. CRITTENDEN, Esq., Attorney-General.

WILLIAM THOMAS CARROLL, Esq., Clerk.

BENJAMIN C. HOWARD, Esq., Reporter.

RICHARD WALLACH, Esq., Marshal.

RULES OF COURT.

No. 58.

ORDERED, that, when a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument will be received unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

CHANCERY RULE.

ORDERED, that the fortieth rule, heretofore adopted and promulgated by this court as one of the rules of practice in suits in equity in the Circuit Courts, be, and the same is hereby, repealed and annulled.

And it shall not hereafter be necessary to interrogate a defendant specially and particularly upon any statement in the bill, unless the complainant desires to do so, to obtain a discovery.

ADMIRALTY RULES.

ORDERED, that the following supplemental rules be added to the rules heretofore adopted by this court for regulating proceedings in admiralty.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the Marshal and the court in those cases only in which it is required by the laws of the State, where an arrest is made upon similar or analogous process issuing from the State courts. And imprisonment for debt on process issuing out of the Admiralty Court is abolished in all cases where by the laws of the State in which the court is held imprisonment

for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a State court.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars exclusive of costs, unless the District Court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice, in the case before the court.

All rules and parts of rules heretofore adopted inconsistent with this order are hereby repealed and annulled.

It is further ordered that these rules be published in the next volume of the Reports of the decisions of this court, and that the Clerk cause them to be forthwith printed and transmitted to the several District Courts.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED DECEMBER TERM, 1850.

J. Simon Cohen,	*Philadelphia, Penn.*
Andrew Ewing.	*Nashville, Tenn.*
William A. Porter,	*Philadelphia, Penn.*
Jeremiah Laroeque,	*New York.*
Andrew Boardman,	*New York.*
Charles Abert,	*Washington, D. C.*
Robert C. Winthrop,	*Boston, Mass.*
Almon W. Griswold,	*Boston, Mass.*
Edward H. Daveis,	*Portland, Me.*
Henry A. Bullard,	*New Orleans, La.*
I. J. Coombes,	*Gallipolis, Ohio.*
John W. Latson,	*New York City.*
John H. Ing,	*Baltimore, Md.*
Edward N. Dickerson,	*Paterson, N. J.*
John Ferguson,	*Ohio.*
Charles Chapman,	*Connecticut.*
Francis Parsons,	*Connecticut.*
Henry E. Davies,	*New York.*
Myron O. Wilder,	*New York.*
Nathan Evans,	*Ohio.*
Livingston K. Miller,	*New York.*
R. H. Marr,	*Louisiana.*
Moses Norris,	*New Hampshire.*
W. F. Hunter,	*Ohio.*
H. H. Strawbridge,	*Louisiana.*
Hamilton Alricks,	*Pennsylvania.*
S. Nixon Van Dyke,	*Tennessee.*
Samuel Judah,	*Indiana.*
L. Madison Day,	*Mississippi.*
B. R. Curtis.	*Massachusetts.*
C. L. Dunham,	*Indiana.*
J. G. Clarkson,	*Pennsylvania.*
James Green,	*New York.*
John C. Wright,	*New York.*
Charles B. Moore,	*New York.*
Frederick Cunningham,	*New York.*
Chancey Donaldson,	*Pennsylvania.*

Reuben A. Chapman,	*Massachusetts.*
S. Corning Judd,	*Washington, D. C.*
Jesse P. Bishop,	*Ohio.*
Oliver S. Halsted, Jr.,	*California.*
Hiram Ketchum,	*New York.*
Coleman Yellott,	*Maryland.*
John L. Hayes,	*New Hampshire.*
Mitchell Sanford,	*New York.*
Frederick A. Coe,	*New York.*
A. C. Harris,	*Ohio.*
H. C. Day,	*New York.*
C. S. Chase,	*Wisconsin.*
J. Edgar,	*New York.*
Francis B. Fogg,	*Tennessee.*
R. J. Meigs,	*Tennessee.*
Russell Smith,	*New York.*
James H. Campbell,	*New York.*
Nelson Merrill,	*New York.*
J. B. Purroy,	*New York.*
Gilbert Dean,	*New York.*
Walter D. Davidge,	*Washington, D. C*
James Moncrief,	*New York.*
Charles S. Wallach,	*Washington, D. C.*
Henry R. Selden,	*New York.*
Sanford C. Blanton,	*Mississippi.*
Walter S. Cox,	*Georgetown, D. C.*
John Van Dyke,	*New Jersey.*
Grafton Baker,	*Mississippi.*
Marshall J. Wellborn,	*Georgia.*
J. A. Spencer,	*New York.*
W. B. Lawrence, Jr.,	*New York.*
George W. Julian,	*Indiana.*
Roswell Marsh,	*Ohio.*
Andrew Garrison,	*New York.*
Henry Bennett,	*New York.*
Timothy Fitch,	*New York.*

A TABLE OF THE CASES REPORTED

IN THIS VOLUME.

[The references are to the STAR (*) pages.]

A TABLE

OF THE

CASES CITED IN THIS VOLUME.

[The references are to the STAR (*) pages.]

A.

B.

T.

U.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1850.

THE STATE OF MISSOURI, COMPLAINANT, *v.* THE STATE OF IOWA, RESPONDENT.—*Original Bill.*

THE STATE OF IOWA, COMPLAINANT, *v.* THE STATE OF MISSOURI, RESPONDENT.—*Cross Bill.*

The report of the commissioners appointed by this court in 7 How., 660, to run and mark the line dividing the States of Missouri and Iowa, adopted and confirmed, and the boundary line finally established.

THE commissioners appointed by this court to run and mark the boundary line between said states, according to our decree of the December term, 1848, having performed that duty, and reported to the court at this term the manner in which said work had been performed: and it appearing that two surveyors had been employed by said commissioners to aid them in doing the work in the field; and that other assistants had been employed, and that various expenses had been incurred in running and marking said line: now, in order that the parties to said controversy may be informed of the amount of means necessary to be provided to pay for said services, and also for other costs and charges, incident to the suit, it is ordered that the clerk of this court do examine witnesses, and resort to other evidence, for the purpose of ascertaining what is the proper compensation to be allowed to said commissioners and the surveyors they employed; and also what compensation is due to the Hon. Robert W. Wells for such services as he may have performed as commissioner before he resigned. And said clerk will also ascertain the amount of expenses, of every description, incurred by said commissioners, besides the compensation to themselves and

said surveyors, together with the costs and charges incurred in this court in carrying on the *controversy here. All of which he will include in a detailed account, and report the same to this court at an early day, for its final action thereon.

*2]

And in taking said account, the report of said commissioners will be taken as *primâ facie* true.

Said clerk will also ascertain and report the amount of moneys already advanced to said commissioners by the states of Missouri and Iowa respectively; and the manner in which said moneys have been expended.

12 *December*, 1850.

And now, on this third day of January, A. D. 1851, this cause came on for further order and decree therein, when it appeared to the court that at the December term, 1848, thereof, Henry B. Hendershott and Joseph C. Brown were appointed commissioners to run and mark the line in controversy between the states of Missouri and Iowa; and the said Brown having died, the Hon. Robert W. Wells was appointed in room and stead of said Brown by the Chief Justice of this court, in vacation. And said Wells having resigned his appointment, William G. Minor was appointed commissioner in room and stead of said Wells, by this court, at its last December term of 1849; and at which term the time for running and marking said line was extended to this present term of December, 1850, for the reasons stated in the report of said Wells and Hendershott, made to the last term; and which is hereinafter embodied. And the present commissioners, Henry B. Hendershott and William G. Minor, have made their report in the premises to this term; and which report is as follows:—

To the Honorable the Supreme Court of the United States.

The undersigned, appointed commissioners by this honorable court, in the above cases, to establish the boundary line between the aforesaid states, respectively report, that, for the purpose of arranging the operations in the field so as to combine economy with speed, we met in the city of St. Louis, in March last, and there, after consulting experienced surveyors as to the time that might be consumed in running the line, the probable amount of expense to be incurred, the necessary force to be employed, and the proper outfit, we determined a plan of operations, and agreed to meet at the supposed site of Sullivan's "northwest corner," between the 1st and 20th

of April last. While in St. Louis, we obtained from Major M. L. Clark, Surveyor-General of the States of Missouri and Illinois, a copy of the field notes of the survey made by John C. *Sullivan, in the year 1816, of a line beginning on the east bank of the Missouri River, opposite the middle of [*3 the mouth of the Kansas River, and extending north one hundred miles, where he made a corner, and also of the line run by him in an easterly course to the Des Moines River. We were also furnished by Major Clark with several charts, diagrams, and copies of surveys which had at various times been made of portions of Sullivan's line, and which were of much service in the prosecution of the work.

The surveyors severally appointed by us were William Dewey, Esq., of Iowa, and Robert Walker, Esq., of Missouri. Both these gentlemen had been connected with the public works of their respective states, and enjoy a high professional reputation.

According to our agreement, we left our respective homes on the 10th of April last, and soon after reaching the point of meeting, in view of increased prices of transportation, provisions, &c., caused by the immense emigration through Southern Iowa and Northern Missouri to California, we altered our plan of work and reduced our force.

No precise trace of the "old northwest corner" remained, —the witness-trees to it were on the margin of a vast prairie, and had apparently been destroyed by fire years ago. Consequently its exact position could not be ascertained. Yet from the running of many experimental lines, diligently examining the evidences before us, together with the reports of the surveyors, we became satisfied of its proper position, and accordingly established it.

Its latitude taken resulted as follows:—

40° 34′ 40″ N.

At the corner so determined we planted a large, solid cast-iron pillar, weighing between fifteen and sixteen hundred pounds, four feet six inches long, squaring twelve inches at its base and eight inches at its top. This pillar was deeply and legibly marked with the words (strongly cast into the iron) "Missouri" on its south side, "Iowa," on its north side, and "State Line" on the east.

From the monument so planted at the "northwest corner" aforesaid, in the said latitude, the survey of the line was commenced, running due west on said parallel of latitude to the Missouri River, as directed by this honorable court, and at its terminus, as near the bank of said Missouri River as the per-

ishable nature of the soil would admit, we planted a monument similar in figure, weight, dimension, and inscription to the one planted at the "northwest corner," the words "State Line" facing the east.

*4] *Unexpected delays, arising from a condition of the weather which prevented the surveyors from making reliable astronomical observations, together with the fact, that, to a great extent, in the vicinity of said line there were no roads, and the settlements distant and sparse, compelling us to open a track for the transportation of the monuments and baggage of the corps, and also to construct necessary bridges and grade fords, greatly retarded the work.

Returning to the "northwest corner," the survey of the line was commenced, extending eastwardly from said "corner" to the Des Moines River, as run and marked by said Sullivan, in 1816, from said corner to said river. On this line, by close examination, we discovered abundant blazes and many witness-trees, which enabled us to find and re-mark the said line, as directed by this honorable court.

The survey of this portion of the line, more than one hundred and fifty miles in length, was commenced on the 13th day of August, and finished on the 18th of September.

Near the bank of the Des Moines River where the line terminated, we planted a cast-iron pillar, similar in weight, figure, dimensions, and inscriptions to those planted at the "northwest corner," and near the bank of the Missouri River, the words "State Line" facing the west.

Solid pillars of cast-iron, weighing each between three and four hundred pounds, and minutely described as to figure and inscriptions in the report heretofore made to this honorable court by Messrs. Wells and Hendershott, commissioners, we caused to be planted at every ten miles, in the due west line extending from said "northwest corner" to the Missouri River, and also at every ten miles in the line extending east from the "northwest corner" aforesaid to the Des Moines River.

No iron monument was planted at mile 150 in the line running east, because between it and the point where the large one is planted on the bank of the Des Moines River there existed but a small fraction of ten miles, being only fifty-one chains.

For a fuller account of the said survey we respectively refer to the report of the surveyors made to us, marked A, and to the following exhibits herewith transmitted —

Field notes of said survey, accompanied by a map of the line (marked B.)

Tabular statement of the costs and charges incurred in said survey (marked C.)

All of which is most respectfully submitted.

HENRY B. HENDERSHOTT, *Comm'r, &c., Iowa.*
W. G. MINOR, *Commissioner, Mo.*

*And the report of the surveyors employed by the commissioners, and above referred to as part of said commissioners' report, is in the words and figures following:— [*5

Keokuk, September 30, 1850.

MESSRS. HENDERSHOTT AND MINOR, *Commissioners of the Boundary Commission.*

Gentlemen.—Having been appointed by you, on the part of the states of Iowa and Missouri severally, to locate and survey the boundary between those states, under the decree of the Supreme Court of the United States, we met according to your appointment, on the 28th of April last, near the supposed site of the old northwest corner, for the purpose of commencing operations in the field.

We proceeded to search for the old corner, which was to be the basis of our future operations. Having a certified copy of Sullivan's field notes, from the Surveyor-General's office at St. Louis, we knew that the corner had been originally located in timber, and designated by two witness-trees. Aided by a view of the topography of the locality,—as indicated in the notes, and especially by the manner in which Sullivan's north line crossed the Platte River near its terminus,—we were able to determine the locality of the corner approximately; and an inspection of the ground satisfied us that every evidence of its *exact* position had long since disappeared. Time, and the fires that annually spread over the prairies, had destroyed the witness-trees and every trace of both lines near the corner.

This point, known familiarly as the "old northwest corner," was the termination of the line surveyed by Sullivan, in 1816, from the mouth of the Kansas River north one hundred miles, and was the point at which he turned east, in running to the Des Moines River, his miles being numbered north from the Kansas, and east beginning again at the corner.

Having no *direct* evidence of the exact site of the required point, it became necessary to find determinate points in the two lines as near the corner as possible. Prolonging the lines severally from such points, their intersection would be the point to be assumed as the corner, and, if Sullivan's measure-

ment were correct, would be the precise spot where he established it.

Near the supposed locality of the 99th mile corner on the north line, we found a decayed tree and a stump, which correspond in course, distance, and description with the witness-trees to that corner, and cutting into the tree we saw what we supposed to be the remains of an old blaze, upon which was preserved a part, apparently, of the letter M. This sup-
*6] position *was verified by measuring south two miles to a point, which we found to be Sullivan's 97th mile corner from one witness-tree, which was perfectly sound. The marks upon it, two or three inches beneath the bark, were plain and legible.

On the east line we found the witness-tree to the 3d mile corner. The wood upon which the marks had been described was decayed, but their reversed impression appeared upon the new growth which covered the old blaze, and which was cut out in a solid block.

Prolonging the lines three miles each from the points thus determined, their intersection was assumed as the required corner, and at that point was planted the monument specified in the decree. By measurement made from the surveyed lines, we found the corner to be in the northeast quarter of section 35, township 67 north, range 33 west. Its exact position with reference to those lines can be seen in the diagram in the field notes. See *post*, *15.

The latitude of the corner, determined by a series of observations taken on the ground, we found to be 40° 34′ 40″ north. While employed upon these observations, we were delayed by unfavorable weather, and it was not till the 24th of May that we were in readiness to commence the survey of the west line from the corner to the Missouri River.

This portion of the boundary, being required to be a parallel of latitude, was run with Burt's solar compass, the use of which requires the longitude of the place of observation to be at least approximately known. Not having the requisite means of ascertaining the longitude of the corner, we calculated it from maps to be about 94° 30″ west from Greenwich, which was sufficiently accurate for the purpose. The instrument used being an untried one, some delay was experienced in its adjustment. To insure accuracy in the work, a telescope was attached to it.

The principles upon which this line was run involve a mathematical investigation, which will be found in Note A, accompanying this report, but the mode of running it will be briefly described here. Each successive mile was prolonged

in the plane of the prime vertical passing through its beginning. The direction indicated by the instrument stationed at the beginning of a mile is in the plane of the prime vertical passing through that point, and that direction was continued through the mile by means of fore and back sights. At the end of the mile, an offset north was made to compensate for the sphericity of the earth. This offset, it will be seen by the note, is 6.855 inches for one mile. The instrument being moved at the end of the mile the proper distance north, and a new direction *given and continued as before, the parallel passing through the initial point was continued throughout the line. In some instances, however, it became convenient, whenever the nature of the ground admitted of it, instead of offsetting, to continue the same direction through several miles. It will be seen by the note, that the offsets increase as the squares of the distances, being for one mile 6.855 inches, for two miles, four times that distance, &c. [*7

Thus it appears that the offsets rapidly increase with the distance run, and that, by continuing the direction of the prime vertical from the corner to the terminus, the southing would have been over 2,000 feet.

At the western terminus of the line, the observations for latitude were repeated. Having established that point, we returned to the northwest corner and commenced retracing Sullivan's east line on the 13th of August.

It is thirty-four years since this line was run, and every vestige of the mounds and pits established in the prairie has disappeared. Much of the country through which it passes consists of brushy barrens, or high rolling prairies, dotted with detached groves, or covered with a thin growth of dwarf timber. Much of this description of timber has been destroyed by fire, forming in some instances prairie, and in others brushy barrens, destitute of trees; while in some places an entirely new growth of young timber, principally hickory, has sprung up. In all such cases the witness-trees and other marks mentioned in Sullivan's field notes were gone, and thus it occurred that we frequently were several miles without finding any traces of the line. But in heavy bodies of timber no difficulty was experienced in discovering evidences of the precise location of the line, not only by blazes, but by line and witness-trees, many of which are sound, and the marks in good preservation. The general topography of the country, and especially the crossings of the streams, greatly facilitated us in following the line, and in some instances, when confirmed by the old blazes, enabled us to establish it with sufficient certainty. In the absence of any traces of the line between two known

points, distant from each other more than one mile, we assumed the line to be straight between such points, and established our posts accordingly. This was done by running a random line from the last found corner, in a direction as near that pursued by Sullivan as we could determine, until another point was found, and then correcting back. No notice, however, is taken of these random lines in the field notes, which relates to the true line only.

We soon satisfied ourselves that the line run by Sullivan *8] *was not only not a due east line, but that it was not straight. That more or less northing should have been made in the old line was to have been expected from the fact that Sullivan ran the whole line with one variation of the needle, and that variation too great. This would account for the fact that the northing increases as he progressed east. But there are great irregularities in the course of the line, for which it is difficult to find a cause. Sudden deviations amounting to from one to three degrees frequently occur, and it rarely happens that any two consecutive miles pursue the same direction.

A resurvey of the line between the 91st and 134th miles was made in the year 1845, and we found the witness-trees on that part of the line defaced, and others substituted. We succeeded, however, in identifying Sullivan's trees, and we destroyed the marks of that survey as far as they related to the old line. In all instances where a corner on Sullivan's line is mentioned in our field notes, one or both witness-trees were found to identify it and we did not always think it necessary to repeat the fact in the notes.

Accompanying this report are the field notes and map of the boundary, the former of which are sufficiently explained in the note prefixed to them.

On the west line the monuments every ten miles were deemed sufficient. On the east line mile posts are established, marked, and witnessed as described in the field notes.

It will be perceived that the measurement of this line as run by us exceeds that of Sullivan by $11\frac{80}{100}$ chains, and that this increase, although gradual, is not regular. Some portions of the old line agree very nearly with our measurement, while others differ materially, and the greatest gain is generally made in brushy and broken land.

For the convenience of estimating distances, and that the true length of the line might be indicated by the mile posts, they were established by our measurement, taking care in every instance to note the distance of the posts set by us from the corresponding corners in the old line whenever found.

The different courses being extended from one known point to another, the line was not altered at those points, being made to pass through them, but only its length corrected.

The length of the entire line is 211 miles and $32\frac{80}{100}$ chains, embracing 4° 1′ 7″.29 of longitude. The length of a second of longitude is calculated in Note C, and the longitude of any point of the line being known, that of any other point can be deduced.

The map is platted from the field notes on a scale of half an inch to the mile, and is only intended to represent the general *features in the topography of the line. The scale upon which it is made is much too small to show the angles in the east line, to do which would require it to be extended to a length that would render it inconvenient. All the purposes for which it can be used will be attained by its present form. [*9

WM. DEWEY,
Surveyor on the part of Iowa.
R. WALKER,
Surveyor on the part of Missouri.

NOTE A.

Put a = semi-equatorial axis of the earth.
c = semi-polar axis.
x = abscis, y = ordinate } to a point S on the terrestrial meridian.
e = eccentricity.
l = latitude of S.
r = radius of curvature at S.

Then considering the centre as the origin of the co-ordinates, we have

$$y^2 = \frac{c^2 (a^2 - x^2)}{a^2}$$

and, differentiating,

$$d\,y = -\frac{c^2\, x\, d\, x}{a^2\, y};$$

whence,

$$d\,x^2 + d\,y^2 = \frac{(a^4\, y^2 + c^4\, x^2)\, d\, x^2}{a^4\, y^2}. \quad . \quad . \quad . \quad . \quad . \quad (1.)$$

Differentiating again, we find

$$d^2\, y = -\frac{(a^2\, c^2\, y^2 + c^4\, x^2)\, d\, x^2}{a^4\, y^3}. \quad . \quad . \quad . \quad (2.)$$

Substitute these values (1 and 2) in the general equation

$$r = -\frac{(d x^2 + d y^2)^{\frac{3}{2}}}{a x d^2 y},$$

and we have

$$r = -\left(\frac{(a^4 y^2 + c^4 x^2)\, d x^2}{a^4 y^2}\right)^{\frac{3}{2}} \times -\frac{a^4 y^3}{(a^2 c^2 y^2 + c^4 x^2)\, d x^3}$$

$$= \frac{\left[a^4 \left(\frac{c^2 (a^2 - x^2)}{a^2}\right) + x^2 (a^2 - e^2)^2\right]^{\frac{3}{2}} a^4 y^3 d x^2}{a^6 y^3 \left(a^2 c^2 \frac{c^2 (a^2 - x^2)}{a^2} + c^4 x^3\right) d x^3}$$

$$= \frac{(a^4 c^2 - a^2 c^2 x^2 + (a^2 - e^2)^2 x^2)^{\frac{3}{2}}}{a^4 c^4}$$

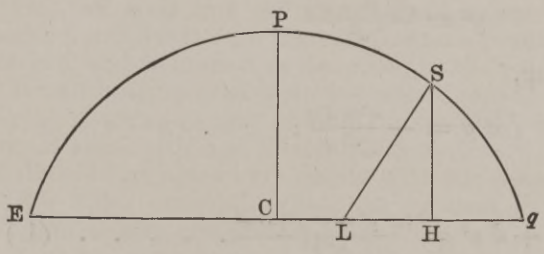
$$= \frac{(a^6 - a^4 e^2 - a^4 x^2 + a^2 e^2 x^2 + a^4 x^2 - 2 a^2 e^2 x^2 + e^4 x^2)^{\frac{3}{2}}}{a^4 c^4}$$

$$= \frac{(a^6 - a^4 e^2 - a^2 e^2 x^2 + e^4 x^2)^{\frac{3}{2}}}{a^4 c^4} = \frac{[(a^4 - e^2 x^2)\ (a^2 - e^2)\ ]^{\frac{3}{2}}}{a^4 c^4}$$

$$= \frac{[(a^4 - e^2 x^2)\ c^2]^{\frac{3}{2}}}{a^4 c^4} = \frac{(a^4 - e^2 x^2)^{\frac{3}{2}} c^3}{a^4 c^4};$$

and, finally, $$r = \frac{(a^4 - e^2 x^2)^{\frac{3}{2}}}{a^4 c} \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (3.)$$

The foregoing equation (3) is the proper expression for the radius of curvature when the value of x is known; but as, in the present case, the value of this quantity is unascertained, it will be better to deduce an equivalent expression involving only quantities which must, from the nature of the question, necessarily be known.



Let $E\,q$ represent the equatorial axis of the earth; $C\,P$, the semi-polar axis; P, the pole; S, a point on the terrestrial meridian at which the radius of curvature is required, and whose latitude $S\,L\,H = l$ is known; then, retaining the notation hitherto adopted, $C\,q = a$; $C\,P = c$; $C\,H = x$; and $S\,H = y$. $S\,L$ is normal to the meridian at

S, and is, consequently, a part of r, the radius of curvature. In the right-angled triangle SHL, $LH : SH :: \cos. l : \sin. l$, and, from the properties of the ellipse, $\overline{Cq}^2 : \overline{CP}^2 :: CH : LH$;

whence $LH = \frac{\overline{CP}^2 \times CH}{\overline{Cq}^2} = \frac{c^2 x}{a^2}$.

And the first analogy becomes

$$\frac{c^2 x}{a^2} : y :: \cos. l : \sin. l,$$

or, since $y = \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}}$,

$$\frac{c^2 x}{a^2} : \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}} :: \cos. l : \sin. l;$$

whence,

$$\frac{c^2 x \sin. l}{a^2} = \frac{c}{a}(a^2 - x^2)^{\frac{1}{2}} \cos. l,$$

and, dividing by $\frac{c}{a}$,

$$c x \sin. l = a (a^2 - x^2)^{\frac{1}{2}} \cos. l.$$

Squaring, we find

$$c^2 x^2 \sin.^2 l = a^2 (a^2 - x^2) \cos.^2 l = a^4 \cos.^2 l - a^2 x^2 \cos.^2 l.$$

Hence, since $c^2 = a^2 - e^2$,

$$(a^2 - e^2) x^2 \sin.^2 l = a^2 x^2 \sin.^2 l - e^2 x^2 \sin.^2 l = a^4 \cos.^2 l - a^2 x^2 \cos.^2 l;$$

and transposing,

$$a^2 x^2 \sin.^2 l + a^2 x^2 \cos.^2 l - e^2 x^2 \sin.^2 l = a^2 x^2 (\sin.^2 l + \cos.^2 l) - e^2 x^2 \sin.^2 l = (\text{since } \sin.^2 l + \cos.^2 l = 1)\ a^2 x^2 - e^2 x^2 \sin.^2 l = x^2 (a^2 - e^2 \sin.^2 l) = a^4 \cos.^2 l.$$

Whence we deduce

$$x^2 = \frac{a^4 \cos.^2 l}{a^2 - e^2 \sin.^2 l}. \quad \ldots\ldots\ (4.)$$

If now, in equation (3), we substitute for x^2 its value just found, we have

$$r = \frac{\left(a^4 - e^2 \frac{a^4 \cos.^2 l}{a^2 - e^2 \sin.^2 l}\right)^{\frac{3}{2}}}{a^4 c} = \frac{\left(a^4 \left[\frac{a^2 - e^2 \sin.^2 l - e^2 \cos.^2 l}{a^2 - e^2 \sin.^2 l}\right]\right)^{\frac{3}{2}}}{a^4 c}$$

$$= \frac{a^6 \left(\frac{a^2 - a^2}{a^2 - e^2 \sin.^2 l}\right)^{\frac{3}{2}}}{a^4 c}$$

$$= \frac{a^2}{c}\left(\frac{c^2}{a^2 - e^2 \sin.^2 l}\right)^{\frac{3}{2}} = \frac{a^2\, c^3}{c}\left(\frac{1}{a^2 - e^2 \sin.^2 l}\right)^{\frac{3}{2}}$$

whence, at last, we find

$$r = \frac{a^2\, c^2}{(a^2 - e^2 \sin.^2 l)^{\frac{3}{2}}}, \quad . \quad . \quad . \quad . \quad . \quad (5.)$$

which is a general expression for the radius of curvature at any point on the elliptic meridian.

The determination by Bessel of the equatorial and polar diameters of the earth, may be regarded as more accurate than that of any other geometer. His results, deduced from a consideration of the most accurately measured arcs of the meridian in various latitudes, are therefore adopted.

We have, then,

$$a = 20{,}923{,}596 \text{ feet.}$$
$$c = 20{,}853{,}662 \text{ "}$$

Hence, if we express the other quantities in terms of a, we shall have, after a good deal of troublesome computation,

$$a \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad = 1.000000000$$
$$c^2 \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad = 0.993326469$$
$$l^2 \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad = 0.006673531$$
$$\sin.^2 l = \sin.^2 40^\circ\ 34'\ 40'' \quad . \quad . \quad = 0.4231238233$$

and, substituting these values in equation (5), we have

$$r = \frac{.993326469}{(1 - 0.006673531 \times .4231238233)^{\frac{3}{2}}} = \frac{.993326469}{.99717627^{\frac{3}{2}}}$$

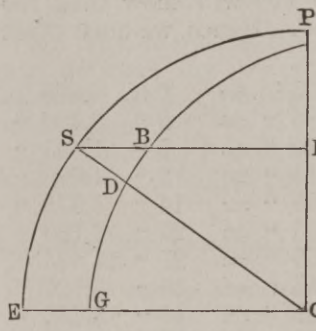
$$= \frac{.993326469}{.995767396} = .997548697, \quad . \quad . \quad . \quad . \quad (6.)$$

or, resuming the foot as a unit,

$$r = 20{,}923{,}596 \times .997548697 = 20{,}872{,}306 \text{ feet.} \quad . \quad (7.)$$

A line traced upon the earth's surface in an east or west direction, and accurately prolonged by means of fore and back sights, will always remain in the plane of the prime vertical passing through its beginning; and consequently will gradually tend southward, according to a certain law. Hence, in running the line from Sullivan's corner to the Missouri River, it was necessary to apply certain corrections in order to regain the parallel of latitude passing through the initial point. These corrections may be ascertained in the following manner:—

We may, without sensible error, consider that part of the earth's surface on which we have been operating as a portion of the surface of a sphere whose radius is equal to the radius of curvature, as above ascertained.



Let $E\,C$, $P\,C$, represent the equatorial and polar radii, respectively, and $E\,C\,S = C\,S\,F = l$, the latitude of S. $C\,S$ and $F\,S$ represent, and are in the planes of, the prime vertical and the circle of latitude.

It is evident that these planes intersect each other at S, and that the line of intersection is tangential to the earth at that point. If, then, a line be traced from S, at right angles to the meridian $P\,E$, it will intersect any other meridian $P\,G$ at D. But the parallel intersects the same meridian at B. Hence, $D\,B$ is the required correction.

It thus appears that the planes represented by $S\,C$, $S\,F$, intersecting the plane of the second meridian, will form, externally to the earth, a figure which may be represented by $S\,D\,B$; and, the arc $D\,B$ being very small, this figure may be treated as a plane triangle, right-angled at D. The angle S, when projected upon the plane of the second meridian, will, of course, undergo a diminution; but when (as is the case here) the inclination of the two meridians is small, this diminution becomes almost infinitesimal in amount, and may be disregarded. If, therefore, we put $u = S\,D$, and $v = B\,D$, we shall have

$$v = u \tan. l. \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (8.)$$

But, making $d =$ the distance along the line between the meridians, we have from the properties of the circle

$$2\,r + u : d :: d : u;$$

whence, $u\,(2\,r + u) = d^2$, and $u = \frac{d^2}{2\,r + u}$; and the quantity u, in the divisor of the second number, being so minute, when compared with $2\,r$, as to have no effect upon the result within the limits we have adopted, this expression becomes,

$$u = \frac{d^2}{2r},$$

and, substituting this value in equation (8), we have

$$v = \frac{d^2 \tan. l}{2r} \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad . \quad (9.)$$

If now, in this expression, we make $d = 1$ mile, and substitute for the letters their numerical values, we shall have

$$v = 6.855 \text{ inches.}$$

A simple inspection of equation (9) will show that, the latitude being constant, v varies as d^2. Hence, we must offset north as follows:—

When $d =$	1 mile,	$v =$	1×6.855 in. $=$	0 ft.	6.855 in.
" " $=$	2 miles,	$v =$	4×6.885 " $=$	2 "	3.420 "
" " $=$	3 "	$v =$	9×6.875 " $=$	5 "	1.695 "
" " $=$	4 "	$v =$	16×6.855 " $=$	9 "	1.680 "
" " $=$	5 "	$v =$	25×6.855 " $=$	14 "	3.375 "
" " $=$	6 "	$v =$	36×6.855 " $=$	20 "	6.780 "
" " $=$	7 "	$v =$	49×6.855 " $=$	27 "	11.895 "
" " $=$	8 "	$v =$	64×6.855 " $=$	36 "	6.720 "
" " $=$	9 "	$v =$	81×6.855 " $=$	46 "	3.255 "
" " $=$	10 "	$v =$	100×6.855 " $=$	57 "	1.500 "
" " $=$	60 "	$v =$	3600×6.855 " $=$	2056 "	6.000 "

Note B.

In note A, equation (7), we find 20,872,306 feet to be the length of the radius of curvature of the terrestrial meridian at the parallel of 40° 34′ 40″; and as this value may be considered constant for a short distance north or south of that parallel, and as radius, expressed in seconds, is equal to 206,264,806″, we have, for the length of a second of longitude on either side of the line, for a few miles,

$$1'' = \frac{20,872,306}{206,264,806} = 101.2 \text{ feet.}$$

Note C.

It is plain that the abscis x is equal to the radius of the circle of latitude passing through S.

In note A, equation (4), we have

$$x^2 = \frac{a^4 \cos.^2 l}{a^2 - e^2 \sin.^2 l};$$

whence,

$$x = \frac{a^2 \cos. l}{(a^2 - e^2 \sin.^2 l)^{\frac{1}{2}}};$$

or, using a as a unit, and substituting the numerical values,

$$x = \frac{.75953361}{(1 - .006673531 \times .4231238233)^{\frac{1}{2}}} = \frac{.75953361}{.99717627^{\frac{1}{2}}}$$

$$= \frac{.75953361}{.998587137} = .76060824; \text{ and, resuming the foot as a unit,}$$

$$x = 29,923,596 \times .76060824 = 15,914,660 \text{ feet,}$$

Hence, along (or near) the parallel of 40° 34′ 40″, we have for the length of a second of longitude,

$$1'' = \frac{15.914,660}{206,264,806} = 77.1564 \text{ feet.}$$

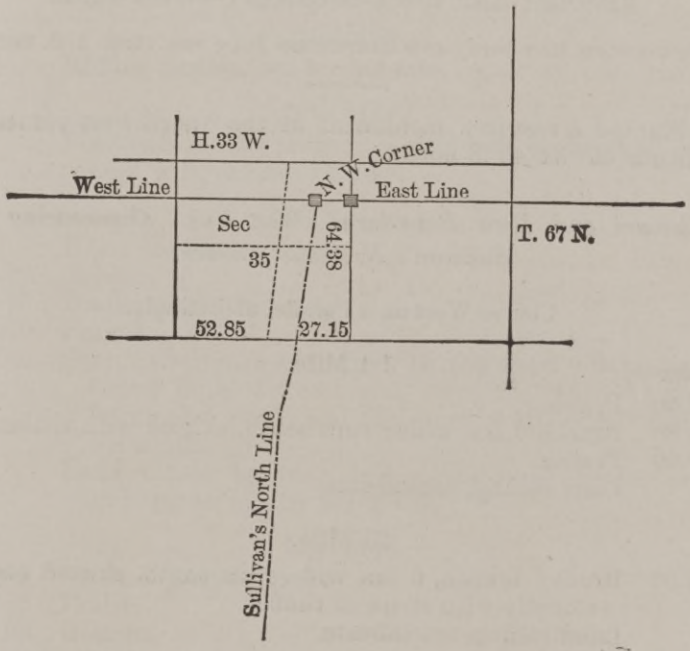
We may, therefore, easily ascertain the difference of longitude between any two points in the line; and consequently, whenever the longitude at any one of these points shall have been determined, it will become known for all the others.

The following is a statement of the differences of longitude between the principal points in the line, viz.:—

	°	′	″
Between Sullivan's corner and monument near the Missouri River,	1	8	25.94
" " " " " Des Moines,	2	51	48.49
" the extreme monuments, ...	4	0	14.43

And since the line extends west of the monument near the Missouri River 61 chains, and east of the monument near the Des Moines 80 links, we see that the whole extent of longitude embraced by the line is 4° 1′ 7.29″.

Diagram showing the situation of the corner.



And the field notes referred to by the said surveyors, Walker and Dewey, as part of their report, are in the words and figures shown in the diagram on the preceding page.

NOTE.

The field notes relate to the true line, as established on the ground. No notice is taken of random lines. The distances are reckoned in chains and links from the beginning of each mile.

When a post is noted as set in a mound, the pit is invariably nine links west, to designate it from other surveys. In the prairie the posts are marked with the letters "B. L." facing the east, the letter "I." facing the north, and the letter "M." facing the south, and the number of the mile marked on the west face of the post. In timber the number of the mile is marked on the witness-trees, with the letter appropriate to each state, there being one tree marked on each side of the
*16] line whenever *possible. The foot of each witness-tree is marked with the letters "B. L."

MISSOURI AND IOWA BOUNDARY—WEST LINE.

COMMENCED MAY 24TH, AND COMPLETED JULY THE 12TH, A. D. 1850.

Planted a cast-iron monument at the "northwest corner," latitude 40° 34′ 40″.3 north.

Missouri and Iowa Boundary. West line. Commencing at Sullivan's Northwest Corner.

Course West on a Parallel of Latitude.

Dist.	1st Mile.
5.00	Prairie.
18.30	Branch 6 lks. wide; runs south, skirted with timber.
27.00	Prairie.
	Land rolling, second-rate.
	2d Mile.
33.90	Brushy branch, 6 lks. wide, runs south, skirted occasionally with strips of timber.
	Land rolling, second-rate.

Dist.

3d Mile.

78.00 Timber.
Land rolling, soil second-rate.

4th Mile.

75.00 Honey Creek, 25 lks. wide, runs south.
78.00 Prairie.
Land rolling and second-rate, timber ordinary, black and burr-oak, elm, hickory and walnut, and undergrowth brush of same.

5th Mile.

Second-rate rolling prairie.

6th Mile.

Second-rate rolling prairie.

7th Mile.

30.00 A small branch runs southwest.
74.00 Branch 4 links wide, runs south.
These branches unite about 10 chains below the line, and at their junction commences an extensive grove extending south.
Land rolling, soil second-rate.

8th Mile.

Rolling prairie, soil second-rate.

*9th Mile. [*17

First half rolling prairie; second half broken and covered with patches of hazel.

10th Mile.

Hazel continues.
50.00 Timber.
58.00 Drain runs northwest.
71.00 Prairie.
80.00 Set a cast-iron monument with the word "Boundary" facing both the east and west, the word "Iowa" facing the north, and the word "Missouri" facing the south.
Land rather broken; soil second-rate; timber poor and sparse, mostly black oak

11th Mile.

4.50 Timber (a small grove).
6.25 Prairie.
13.00 Bottom.

Dist.

21.00 East Fork, of 102.40 links wide, runs southwest.

27.00 Prairie.

Land rolling; second-rate. Prairie interspersed with hazel thickets. Timber tolerable; elm, lind hickory, walnut, &c. The ridges are covered with hazel and scrub oak.

12th Mile.

54.50 Timber.

56.50 Middle Fork, of 102.25 links wide, runs south.

61.50 Prairie with patches of hazel.

Land rolling, soil second-rate. Bottom on the creek level and rich; timber indifferent.

13th Mile.

69.00 Timber.

74.50 West Fork, of 102.50 links wide, runs south, skirted with a narrow belt of sparse timber.

Land rolling, second-rate. Bottom rather wet.

14th Mile.

Rolling, second-rate prairie.

15th Mile.

Prairie, rather broken, second-rate. Patches of hazel and small groves of sparse timber.

16th Mile.

Same as last mile.

*18] *17th Mile.

31.00 Timber.

31.25 Small branch runs northwest. Northeast corner of Mr. Short's field 300 links S. 45° W.

50.00 Northwest corner of Short's field 200 links south.

64.00 Clear Creek, 10 links wide, runs southwest.

Land rolling; second-rate. Timber tolerable, black and burr-oak, elm and walnut, &c., with undergrowth.

18th Mile.

1.50 Prairie. Land rolling, second-rate.

19th Mile.

Rolling, second-rate prairie.

20th Mile.

5.00 Drain runs northwest. Grove short distance north.

39.00 Cut off southwest corner of Davidson's field.

18

Dist.

67.00 Drain northwest.

80.00 Set cast-iron monument facing as before.
Land rather broken; soil second-rate.

21st Mile.

Rolling, second-rate prairie.

22d Mile.

Mostly bottom prairie, level and rich.

23d Mile.

7.30 Nodaway River, 100 links wide, runs south, muddy channel, narrow belt of timber on the banks. The first half is rather wet bottom prairie. Last quarter of the mile brushy, and the end in a dense thicket.

24th Mile.

First quarter brushy, with thickets of hazel, &c.
Balance prairie, rolling, second-rate.

25th Mile.

Upland prairie, rolling, second-rate.

26th Mile.

Same as last mile.

27th Mile.

Rolling, second-rate prairie.

28th Mile.

29.50 Sparse timber.
34.00 Brushy prairie.
49.50 Drain southwest.
57.00 Timber.
65.00 Bottom.
68.50 Thicket of dense brush.
72.00 Branch, 6 links wide, runs southeast.
73.50 Prairie.
Land rolling, soil second-rate. Timber poor.

*29th Mile. [*19

5.00 Left bottom.
19.50 Small grove.
25.50 Left same. Prairie.
35.00 Bottom.
38.00 Timber.
43.00 Mill Creek, 15 links wide, runs south.
45.50 Prairie.
53.00 Left bottom (same as last mile).

Dist. 30th Mile.

16.40 Small branch runs northeast, hazel on the banks.

80.00 Set cast-iron monument in a swale, facing as before. Land very rolling, second-rate.

31st Mile.

Rolling upland prairie.

32d Mile.

Same.

33d Mile.

Same.

34th Mile.

13.60 East Taskio, 80 links wide, runs south, banks steep, channel muddy, narrow belt of timber on the banks, occasionally spreading out into considerable groves. Upland rolling, second-rate. Bottom about ¾ mile wide, level and rich.

35th Mile.

Rolling upland prairie.

36th Mile.

The same.

37th Mile.

The same.

38th Mile.

9.90 Middle Taskio, 6 links wide, runs south. Same as last mile.

39th Mile.

7.50 A wet swale.

17.00 Left swale.

50.00 East edge of a grove about 5 chains south, extending west.

40th Mile.

29.00 Timber.

69.25 West Taskio, 60 links wide, runs southwest. Prairie.

80.00 Set cast-iron monument, facing same as above. Upland rolling, second-rate; bottom rich. Timber, burr-oak, hickory, elm, &c.

*20] *41st Mile.

Upland rolling prairie.

42d Mile.

The same.

43d Mile.

The same.

44th Mile.

The same.

45th Mile.

The same.

46th Mile.

The same.

47th Mile.

26.40 High Creek, 5 links wide, runs southwest.
The same.

48th Mile.

The same.

49th Mile.

The same.

50th Mile.

80.00 Set cast-iron monument in a low, wet swale, facing as before.
Land same as last mile.

51st Mile.

44.90 Field fence north and south.
69.30 Fence north and south.
71.00 Timber.
Land as before.

52d Mile.

4.70 Left field fence north and south. Timber.
51.25 Branch, 4 links wide, runs north.
79.00 Road north and south. Prairie.
79.50 Touched the northwest corner of a field.
Land as usual. Timber tolerable, oak, hickory, elm, &c.

53d Mile.

7.75 Timber.
28.00 Field fence north and south.
40.10 Left field fence north and south. Prairie.
45.50 Timber.
64.75 Small branch runs south.
66.80 Field fence north and south (Sager's). Left timber.
Land broken, soil second-rate. Timber, oak, hickory, elm, &c.

*54th Mile. [*21

00.60 Fence north and south, dividing Sager and Sebo.
7.50 Left field north and south.

Dist.	
10.00	Open burr-oak timber.
45.75	Spring branch southwest.
59.50	Road north and south.
60.00	Field fence north and south. Prairie.
	Land broken, second-rate. Timber, burr-oak, hickory, &c. The 51st, 52d, 53d, 54th, and 55th miles run through what is known as McKissock's Grove, embracing a fine farming country.
	55th Mile.
2.50	Left field.
5.10	Top of steep bluff, sparse timber on the slope.
9.50	Bottom prairie.
30.00	Timber.
33.50	Nishnebotone River, 150 links wide, runs southwest. The bottom is level and rich, affording fine pasturage. There is a narrow strip of timber on the river.
	56th Mile.
	Level, rich bottom.
	57th Mile.
22.80	Slough runs south.
	Land the same.
	58th Mile.
	The same.
	59th Mile.
	The same.
	60th Mile.
80.09	Set cast-iron monument, the words "State Line" facing the east, and the word "Iowa" facing the north, and the word "Missouri" facing the south. The ground here is high, affording a much more appropriate site for the monument than the terminus on the bank of the Missouri River, where the land is extremely liable to wash, and is frequently overflowed.
	61st Mile.
9.50	Road north and south. The ground begins to become lower from this point.
15.75	Field fence north and south.
24.00	Left field fence north and south. Timber.
57.50	A cottonwood, 30 inches diam., notched on the east and west sides, and marked with the letter "I." on on the north, and "M." on the south.

Dist.

61.00 Set a post on the bank of the Missouri River.

Bearings, { Cottonwood, 10 in diam., S. 67° E. 6 lks.
" " " N. 21° W. 12 "

Rich bottom land, heavy body of timber, principally cottonwood and elm.

Missouri and Iowa Boundary. East Line from Sullivan's Northwest Corner.

Course S. 89° 24′ E.

1st Mile.—Var. of needle 11° E.

4.00 Small branch, runs southwest.
10.50 Prairie.
23.50 Drain south. Brushy prairie.
65.00 Touched south point of a grove.
80.00 Set post in mound.
Land very rolling, soil second-rate.

2d Mile.

10.50 Small branch runs southeast; bottom sparse timber.
16.00 Branch, 25 links wide, runs south.
27.00 Bottom prairie.
61.20 Branch, 25 links wide, runs southeast. Narrow skirt of timber on the banks.
75.00 Bushy upland prairie. Barrens.
80.00 Set 2d mile post in mound.

3d Mile.

59.50 Sparse timber.
77.00 Prairie.
80.00 Sullivan's 3d mile corner found by one witness-tree. Set 3d mile post in mound. 2d and 3d miles very rolling, with sparse timber and barrens.

Course N. 89° 45′ E.

4th Mile.

19.00 Bottom prairie.
50.50 Platt River, 75 links wide, runs south-southeast. Narrow skirt of timber, Sullivan's blazes.
58.50 South point of a sharp bend in the river; the line enters the river a short distance.
66.00 Prairie.
72.00 Upland.
80.00 Set post in mound.
Land rolling, second-rate. Timber poor, hickory, elm, burr-oak, &c.

*5th Mile.

Dist.	
80.00	Set post in mound. Rolling upland prairie.

6th Mile.

80.00	Set 6th mile post in mound. Land as last mile.

7th Mile.

13.50	Branch, 20 links wide, runs southwest. Timber
14.25	" " " " " north.
16.00	" " " " " southwest.
	Found Sullivan's blazes on the line.
35.60	Prairie.
51.50	Bottom.
80.00	Set 7th mile post in mound. Upland broken, brushy barrens; bottom rich.

8th Mile.

40.00	West fork of Grand River, 100 links, runs south. Timber.
61.50	Prairie.
80.00	Set 8th mile post in mound. Land level and rich. Timber good, hickory, elm, black walnut, &c.

9th Mile.

28.00	Brushy upland prairie; sparse scrub-oak on the ridges.
54.50	Small branch runs southwest.
80.00	Set 9th mile post in mound. Upland broken and brushy.

10th Mile.

42.50	Road northeast; open prairie.
80.00	Set cast-iron monument with the word "Boundary" facing both the east and the west, and the word "Iowa" facing the north, and the word "Missouri" facing the south. First half-mile broken and brushy, second half open prairie.

11th Mile.

80.00	Set 11th mile post in mound. Land broken and brushy.

12th Mile.

25.00	Sparse timber, land broken.
29.00	Branch, 10 links wide, runs east-southeast.

Dist.

31.00 Prairie.

80.00 Set 12th mile post in mound near a small branch.
Land rolling, second-rate.

*13th Mile. [*24

0.05 Small branch runs south, scattering trees and brush on each side.

59.00 Timber. Creek a few links south.

71.00 Creek, 50 links wide, runs south.

73.00 " " " " northwest.

78.50 " " " " south.

This creek is very crooked, and has probably changed its channel since Sullivan run his line. The line is on his blazes.

80.00 Set 13th mile post.

Bearings, { Burr-oak, 18 in. diam., S. 20° E. 41 links.
Elm, 20 " " N. 20° W. 57 "

Land rolling, second-rate. Timber, elm, burr-oak, hickory lind, &c.

14th Mile.

1.40 Sullivan's 13th mile corner found by one witness-tree still standing.

Course N. 89° 43′ E.

40.20 Field. Left timber. The line is on Sullivan's blazes, through this timber.

50.75 Left field. Prairie.

80.00 Set 14th mile post in mound.
Land rolling, second-rate. Timber good, white and burr oak, elm, hickory, &c.

15th Mile.

80.00 Set 15th mile post in mound.
Land rolling prairie.

16th Mile.—Var. 10° 30′ E.

39.00 Small branch runs southeast.

46.00 Branch, 12 links wide, runs south-southwest.
Narrow belt of timber on bank. Sullivan's blazes.

55.00 Sparse timber.

69.00 Prairie.

80.00 Set 16th mile post in mound.
Land rolling, second-rate.

17th Mile.

80.00 Set 17th mile post in mound.
Land same.

18th Mile.

Dist.

30.00 Bottom.

80.00 Set 18th mile post in mound.
Upland rolling. Bottom rich.

*25] *19th Mile. [*25

13.50 Branch, 10 links wide, runs south; narrow belt of timber on the branch.

30.00 Timber (Lot's Grove).

32.50 Creek, 25 links wide, runs southwest.

80.00 Set 19th mile post.

Bearings, { White oak, 10 in. diam., N. 20° W. 129½ lks.
" " 14 " " S. 8° W. 85 "

Land rolling, second-rate. Timber good, white, black, and burr oak, elm, hickory, &c.

20th Mile.

2.15 Sullivan's 19th mile corner found by both witness-trees.

Course S. 89° 47′ E.

6.50 Small branch runs northwest. Prairie.

30.50 Small branch runs northwest.

80.00 Set cast-iron monument, facing as before.
Land broken and brushy; a few trees on east end of mile.

21st Mile.

67.50 Drain runs southwest.

80.00 Set post 21st mile.

Bearings, { Burr oak, 14 in. diam., S. 61° E. 181 links.
" " " " " N. 35° E. 74 "

Land broken and brushy.

22d Mile.—Var. 10° 10′ E.

1.00 Sullivan's 21st mile corner found by both witness-trees.

Course N. 89° 29′ E.

6.00 Small branch, west-southwest, a few trees.

12.50 A small branch runs southwest.

80.00 Set 22d mile post in a mound.
Land broken and brushy. Barrens.

23d Mile.

5.00 Small branch runs north.

27.50 Small branch runs southwest.

80.00 Set 23d mile post in mound.
Land very rolling, with patches of hazel.

24th Mile.

Dist.

23.00 Creek, 50 links wide, runs southwest. Timber.
26.09 " " " " northwest.
33.50 " " " " southwest.
35.00 Prairie.
80.00 Set 24th mile post in a mound.
Land rolling, second-rate. Timber indifferent, elm, hickory, and burr-oak.

*25th Mile.—Var. 9° 54′ E. [*26

67.50 Small branch runs northwest. Sparse timber.
80.00 Set 25th mile post.
Bearings, { Black oak, 20 in. diam., S. 31° W. 190 lks.
" " 20 " " N. 41° W. 262 "
Rolling, brushy prairie. Timber poor, black and burr-oak, and hickory.

26th Mile.

2.00 Prairie.
14.50 Road northeast.
66.25 Small branch runs south. Grove 206 links south.
80.00 Set 26th mile post in a mound.
Land rolling, second-rate.

27th Mile.

80.00 Set 27th mile post in a mound.
Land same as last mile.

28th Mile.

22.00 Creek, 20 links wide, runs south. Timber.
27.84 Red oak, 36 in. diam., Sullivan's line tree. Noted by him as 26 chains.
80.00 Set 28th mile post on Sullivan's blazes.
Bearings, { Elm, 10 in. diam., S. 50° E. 60 links.
Black oak, 14 " " N. 5° E. 352 "
Land rolling. Timber good, white, burr, and red oak, elm, hickory, &c.

Course N. 89° 4′ E.

29th Mile.

3.00 Prairie.
60.00 A few trees and brush.
80.00 Set 29th mile post in mound.
Rolling prairie.

30th Mile.

Dist.	
12.00	Small branch runs southeast.
80.00	Set cast-iron monument, facing as before.
	Rolling prairie; rather brushy.

Course N. 88° 20′ E.

31st Mile.

11.50	Timber.
16.00	Creek, 50 links wide, runs southeast.
22.00	Prairie.
80.00	Set 31st mile post in mound.
	Land same as before.

32d Mile.

80.00	Set 32d mile post in mound.
	Rolling prairie.

*27] *33d Mile.

20.50	Creek 25 links wide, runs southeast. Timber.
22.50	Prairie.
36.75	Stream, 10 links wide, runs south.
80.00	Set 33d mile post in mound.
	Land same.

34th Mile.

69.83	Stream, 35 links wide, runs southeast. Timber.
78.50	Prairie.
80.00	Set 34th mile post.
	Bearings, { Elm, 10 in. diam., N. 75° W. 63 links. " 9 " " S. 45° W. 148 "
	Land rolling; soil second-rate.

35th Mile.

3.67	Sullivan's 34th mile corner found by one witness-tree.

Course N. 88° 53′ E.

80.00	Set 35th mile post in mound.
	Land rolling.

36th Mile.

40.75	Stream, 25 links wide, runs south; few trees on banks.
54.00	Timber.
78.50	Prairie.
80.00	Set 36th mile post in mound.
	Rolling prairie.

37th Mile.

80.00	Set 37th mile post in mound.
	Rolling prairie.

38th Mile.

Dist.

80.00 Set 38th mile post in mound.
Rolling prairie.

39th Mile.

31.00 Grove of young timber, hickory.
32.50 Prairie.
44.00 Grove of young hickory.
46.50 Prairie.
60.00 Timber.
62.60 Stream, 25 links wide, runs south; dry at present.
66.50 Small prairie, surrounded with timber.
76.50 Timber.
80.00 Set 39th mile post.
Bearings, { Burr oak, 9 in. diam., N. 20° E. 39 links.
Black oak, 12 " " S. 30° E. 22 "
Land rolling. Timber, burr and black oak, &c.

40th Mile.

5.50 Sullivan's 39th mile corner found by one witness-tree.
9.50 Prairie.
80.00 Set a cast-iron monument, facing as above, on the slope of a hill in the prairie.
Rolling prairie.

41st Mile. [*28

80.00 Set 41st mile post in mound.
Land as above.

42d Mile.

10.00 River bottom.
60.00 Timber.
76.00 Sullivan's line tree (an elm).
80.00 Set 42d mile post.
Bearings, { Cottonwood, 18 in. diam., S. 20° E. 17 links.
Maple, 9 " " S. 35° W. $1\frac{1}{2}$ "
Land bottom and rich. Timber cottonwood, elm, maple, walnut, &c.

43d Mile.

0.50 Grand River, 200 links wide, runs southeast.
6.50 Sullivan's mile corner.

Course N. 89° 6′ E.—Var. 9°. 6′ E.

11.50 Prairie bottom.
79.50 Upland and timber.
80.00 Set 43d mile post.

Dist.

Bearings, { Elm, 10 in. diam., N. 8° W. 79 links.
White oak, 10 " " S. 60° W. 158 "

Level, rich land.

44th Mile.

6.73 Sullivan's 43d mile corner found by one witness-tree.

Course N. 89° 47′ E.

61.00 Prairie.
73.00 Timber.
76.00 Prairie.
80.00 Set 44th mile post.

Bearings, { Pin oak, 15 in. diam., S. 82° W. 390 links.
" " " N. 63° W. 342 "

Land rolling. Timber oak and hickory.

45th Mile.

7.00 Sullivan's 44th mile corner found by one witness-tree.
Timber.

Course N. 89° 9′ E.

22.00 Prairie.
80.00 Set 45th mile post in mound.
Land as usual.

46th Mile.

73.00 Timber with thick undergrowth.
80.00 Set 46th mile post in mound. Barrens.

*29] *47th Mile.

80.00 Set 47th mile post in mound.
Brushy barrens.

48th Mile.

53.00 Stream, 12 links wide, runs south.
80.00 Set 48th mile post in mound.
Brushy barrens.

49th Mile.

52.50 Timber.
60.50 Little River (a fork of Grand River), 60 links, runs S. E.
66.50 Same stream runs north.
71.50 " " " south.
80.00 Set 49th mile post.

Bearings, { White oak, 36 in. diam., S. 76° E. 39 lks.
" " 18 " " N. 63° E. 27 "

Land first-rate.

50th Mile.

6.20 Sullivan's 49th mile corner found by one witness-tree.

Dist.

Course N. 80° 16′ E.

10.00 Brushy prairie.
80.00 Set cast-iron monument facing as before. Barrens.

51st Mile.

80.00 Set 51st mile post in mound.
Rolling prairie.

52d Mile.

12.00 Timber.
25.00 River bottom.
28.50 East Grand River, 150 links wide, runs southwest.
38.50 " " " " " north.
52.30 " " " " " south.
80.00 Set 52d mile post.
Bearings, { Elm, 18 in. diam., N. 87¼° E. 10½ lks.
Burr oak, 12 " " N. 22° W. 38 "
Mostly rich bottom. White & burr oak, elm, hickory, &c.

53d Mile.

Course N. 88° 47′ E.

0.30 A pond, 250 lks. wide; direction of its length N. and S.
5.00 Prairie.
15.00 Timber.
30.00 Field (Stokes) fence nearly north and south.
57.50 Left field. Brushy prairie.
80.00 Set 53d mile post.
Bearings, { Black oak, 8 in. diam., S. 53° E. 15 links.
" " 6 " " N. 53° E. 64 "
Land rolling. Timber, oak and hickory, with undergrowth.

54th Mile. [*30

1.50 A small prairie surrounded by timber.
9.00 Timber and dense undergrowth of thorn, oak, &c.
80.00 Set 54th mile post.
Bearings, { Black oak, 12 in. diam., N. 55° W. 73 lks.
" " 14 " " S. 9° W. 124 "
Growth of small timber and dense underbrush.

55th Mile.

4.07 Sullivan's 54th mile corner found by both witness-trees.

Course N. 89° 2′ E.

32.70 Branch 10 links wide, runs south.
42.50 " " " " northwest.
62.75 Prairie (small and surrounded with timber).

Dist.

71.00 Alexander's field fence nearly north and south.
80.00 Set 55th mile post in a field; first-rate upland.

56th Mile.

7.00 Fence nearly north and south.
9.00 Fence runs a little south of east.
11.00 Brushy thicket; plum, scrub-oak, sumac, &c.
20.00 Timber.
31.00 Prairie.
75.00 Fence about N. 65° E. (Hodges.)
80.00 Set 56th mile post in mound.
Land same as before.

57th Mile.

8.50 Fence about N. 25° W.
47.50 Road north and south.
80.00 Set 57th Mile post in mound.
Rolling prairie.

58th Mile.

31.00 Timber with dense undergrowth.
31.35 Stream, 10 links wide, runs northeast.
31.80 Same; runs east.
32.25 Same; runs northeast.
49.75 Same; runs south.
53.00 Prairie.
57.50 Brushy prairie.
58.75 Prairie.
60.50 Brushy thicket.
65.00 Timber, with dense undergrowth.
75.90 Sullivan's line tree (elm).
80.00 Set 58th mile post.
Bearings, { Pin oak, 8 in. diam., S. 77° E. 43 links.
" " 6 " " N. 11° E. 41½ "
Land rolling; soil good. Timber small, with a dense undergrowth.

*31] *59th Mile.

2.53 Sullivan's 58th mile-corner found by both witness-trees.

Course N. 89° 27′ E.

3.65 West fork of Muddy Creek, 25 links wide, runs south.
55.00 Middle fork of Muddy Creek, 25 links wide runs southeast.
79.00 Prairie.
80.00 Set 59th mile post, in mound.
Land same as before.

Dist.	
	60th Mile.
0.45	Field Sullivan's fence north and south.
12.45	Fence north and south. Prairie.
35.25	Field (Sullivan's and Lochlin's) fence about S. 25° W.
45.20	Fence about S. 65° E.
80.00	Set cast-iron monument facing as before.
	Land good.
	61st Mile.
19.80	East fork of Muddy Creek, runs south; very little timber on banks.
80.00	Set post to 61st mile in mound.
	Land good.
	62d Mile.
80.00	Set 62d mile post in mound.
	Rolling prairie.
	63d Mile.
80.00	Set 63d mile post in mound.
	Rolling prairie.
	64th Mile.
	Set 64th mile post in mound.
	Same.
	65th Mile.
7.00	Timber.
11.00	Prairie.
19.65	West fork Medicine Creek, 40 links, runs south. Timber.
22.50	Field fence north and south.
33.25	Left field fence north and south.
47.50	Prairie.
80.00	Set 65th mile post in mound.
	Land good. Timber indifferent.
	66th Mile.
62.50	Timber.
80.00	Set 66th Mile post.
	Bearings, { White oak, 16 in. diam., N. 63° E. 14 lks. " " 16 " " S. 55° W. 20 "
	Rich land.
	*67th Mile. [*32
4.50	Sullivan's 66th mile-corner found by one witness-tree.
	Course N. 89° 42′ E.
9.20	Middle Medicine Creek, 25 links wide, runs southeast.
13.40	Same; runs northeast.

Dist.

16.20 Same; runs southeast.
18.00 Prairie.
44.50 Timber.
45.21 Big Medicine Creek, 60 links wide, runs southeast.
80.00 Set 67th mile post.
Bearings, { White oak, 10 in diam., S. 47° E. 48 lks.
" " 8 " " N. 40° W. 25 "
Broken, second-rate land.

68th Mile.

4.62 Sullivan's 67 mile-corner found by both trees.

Course N. 89° 35′ E.

25.48 Sullivan's line tree (a white oak).
31.30 Collins's field; fence nearly north and south.
41.25 Left field fence nearly north and south.
61.50 Timber.
72.50 Prairie.
80.00 Set 68th mile post in mound.
(Corrected this mile from the line tree.)
Land second-rate.

Course N. 89° 21′ E.

69th Mile.

8.00 East Medicine Creek, 30 links wide, runs southeast.
Timber on the bank.
17.00 Timber open white oak.
47.50 Prairie.
80.00 Set 69th mile post in mound. Land rolling.
Timber white oak, elm, and hickory.
Land second-rate.

70th Mile.

80.00 Set cast-iron monument facing as before.
Same. Rolling prairie.

71st Mile.

80.00 Set 71st mile post in mound.
Same.

72d Mile.

80.00 Set 72d mile post in mound.
Same.

73d Mile.

80.00 Set 73d mile post in mound.
Same.

Dist.	
	*74th Mile.
41.00	Stream, 15 links wide, runs south. Timber.
47.50	Prairie.
60.10	Stream, 10 links wide, runs southwest. Narrow strip of timber on banks.
80.00	Set 74th mile post in mound.
	Land same.
	75th Mile.
80.00	Set 75th mile post in mound.
	Same.
	76th Mile.
80.00	Set 76th mile post in mound.
	Same.
	77th Mile.
66.30	Stream, 50 links wide, runs southwest. Timber.
80.00	Set 77th mile post.
	Bearings, { Bell oak, 15 in. diam., S. 23° W. 30 links. " " 15 " " N. 44° E. 20 "
	Broken, second-rate land.
	78th Mile.
9.20	Sullivan's 77th mile corner found by both witness-trees.
	Course N. 89° 45′ E.
47.00	Prairie.
55.75	Smith's field fence north and south.
58.40	Timber.
64.50	Prairie.
74.00	Field fence north and south.
80.00	Set 78th mile post in a field.
	Land rolling, soil second-rate. Timber, oak and hickory.
	79th Mile.
9.00	Left field fence north and south. Prairie.
49.50	Timber generally small, with underbrush.
59.20	Stream, 10 links wide, runs south.
77.50	Small prairie.
80.00	Set 79th mile post in mound.
	Same.
	80th Mile.
2.50	Timber.
14.60	Stream, 10 links wide, runs south.
41.50	Prairie.
80.00	Set cast-iron monument, facing as before.
	Same.

Dist.

81st Mile.

40.50 Mormon trace north and south.
80.00 Set 81st mile post in mound. Rolling prairie.

*34] *82d Mile.

4.50 Stream, 10 links wide, runs south. Timber on the banks.
80.00 Set 82d mile post in mound.
Same.

83d Mile.

80.00 Set 83d mile post in mound.
Same.

84th Mile.

80.00 Set 84th mile post in mound.
Rolling prairie.

85th Mile.

80.00 Set 85th mile post in mound.
Same.

86th Mile.

29.50 Benner's house, about 150 links north.
80.00 Set 86th mile post in mound.
Prairie, with clumps of oak.

87th Mile.

80.00 Set 87th mile post in mound.
Land same.

88th Mile.

38.50 Timber.
80.00 Set 88th mile post in mound.
Prairie, with scattering trees. Sparse timber.

89th Mile.

13.34 Sullivan's 88th mile corner found by one witness-tree.

Course N. 89° 12′ E.

33.75 Stream, 50 links wide, runs southeast.
65.28 Sullivan's line tree (a white oak).

Course S. 89° 15′ E.

80.00 Set 89th mile post.
Bearings, { White oak, 24 in. diam., N. 15° W. 65 links.
" " 24 " " S. 13° W. 82 "
Poor, broken land.

90th Mile.

3.50 Small prairie, surrounded by timber.
12.82 Sullivan's 89th mile corner.

Dist. Course N. 88° 57′ E.

15.00 Timber.

80.00 Set cast-iron monument facing as before. Timber white and black oak, with undergrowth.
Land rolling.

91st Mile. Var. 9° 36′ E.

12.71 Sullivan's 90th mile corner.

Course N. 89° 5′ E.

38.40 Small branch runs southeast.

80.00 Set 91st mile post.

Bearings, { White oak, 24 in. diam., S. 2½° E. 49 links.
" " 20 " " N. 18½° E. 89 "

Land broken, third-rate. Timber, white and black oak, &c.

*92d Mile. [*35

8.55 Corner to intersection of supposed Sullivan's line with range-line between ranges 17 and 18 (Iowa sur.).

12.19 Sullivan's 91st mile corner.

Course N. 89° 12′ E.

34.05 Corner to intersection of supposed Sullivan's line with range-line between ranges 17 and 18 (Mo. sur.).

43.00 Prairie.

46.50 Cut off the southeast corner of a field.

49.10 Left field.

52.00 Timber.

54.70 West fork of Chasiton, 100 links wide, runs southeast.

80.00 Set 92d mile post.

Bearings, { White oak, 14 in. diam., S. 4½° E. 41 links.
" " 14 " " North 41 "

Upland broken, third-rate; narrow bottom on the river, first-rate. Timber, white and black oak, &c.

93d Mile.

12.36 Sullivan's 92d mile corner.

15.00 Small branch runs northwest.

19.33 Sullivan's line tree.

80.00 Set 93d mile post.

Bearings, { White oak, 12 in. diam., N. 23° W. 30 links.
" " 6 " " S. 4° E. 40 "

Land broken, third-rate. White and black oak, hickory, &c.

94th Mile.

12.20 Sullivan's 93d mile corner.

Course N. 89° E.

Dist.

25.00 Prairie.

80.00 Set 94th mile post in mound.
Land broken, second-rate soil.

95th Mile.

0.30 Road northeast and southwest.

80.00 Set 95th mile post (in the brush) in a mound.
Land broken, second-rate. Brushy, a few trees.

96th Mile.

63.00 Jack-oak grove.

68.50 Small prairie, surrounded by timber.

75.75 Small branch runs northeast.

80.00 Set 96th mile post.
Bearings, Burr oak, 14 in. diam., N. 11° E. 235 links.
Land broken, second-rate. Scrub-oak, crab, thorn, &c.

*36] *97th Mile.

71.80 Sullivan's 96th mile corner found by his elm tree.

Course N. 88° 33′ E.

22.00 Heavy timber, more open.

35.00 Sparse, open timber.

53.00 Thicket of scrub-oak, crab, thorn, &c.

80.50 Set 97th mile post.
Bearings, { Black oak, 6 in. diam., N. 40° E. 12 links.
Pin " 12 " " S. 29° E. 126 "
Land broken, second-rate. Timber poor.

98th Mile.

11.84 Sullivan's 97th mile corner, witness-trees defaced.

Course N. 89° 3′ E.

26.50 Small branch runs north.

29.50 Barren, brushy prairie.

42.00 Sparse timber.

56.58 Sullivan's line tree (black oak, 24 inches diameter.)

Course N. 88° 53′ E.

78.00 Bottom prairie.

80.00 Set 98th mile post in mound.
Land rolling, soil second-rate.

99th Mile.

19.85 Field fence north and south; north side of field 25 links north of line and parallel with it.

35.35 Left field.

37.00 Thicket and sparse timber.

42.00 Bottom prairie, level and wet.

Dist.

80.00 Set 99th mile post in mound.
Upland is good soil.

100th Mile.

7.50 Timber.
12.06 Sullivan's 99th mile corner, witness-trees defaced.

Course N. 88° 57′ E.

14.00 Right bank of Chariton, 150 links, runs southwest.
17.25 Left bank of river (by triangulation); left bottom.
80.00 Set cast-iron monument, facing as before.
Land rolling, second-rate. Timber good, white and black oak, hickory, &c.

101st Mile.—Var. 9° 30′ E.

9.00 Timber.
12.77 Sullivan's 100 mile corner.

Course N. 89° 2′ E. [37

20.29 Sullivan's line tree.
34.00 Low, wet prairie. Land rolling, to this point.
63.00 Timber, upland.
80.00 Set 101st mile post.
Bearings, { Black oak, 14 in. diam., S. 38° E. 62½ lks.
White " " " " N. 10¾° E. 119 "
Timber good, white and black oak, hickory, &c.

102d Mile.

12.78 Sullivan's 101st mile corner. Trees defaced.

Course N. 88° 47′ E.

54.80 Road north and south.
80.00 Set 102d mile post.
Bearings, { Hickory, 14 in. diam., S. 4° E. 88 lks.
White oak, 12 " " N. 58¾° W. 61½ "
Land rather broken. Timber good, white and black oak.

103d Mile.

6.00 Small branch runs north.
12.40 Sullivan's 102d mile corner.

Course N. 88° 56′ E.

43.60 Road nearly north and south. House 500 links south.
64.00 Prairie.
77.50 Timber.
80.00 Set 103d mile post.
Bearings, { Elm, 20 in. diam., N. 12° E. 46 links.
" 20 " " S. 22° W. 46 "
Land rolling, second-rate. Timber indifferent, brush.

Dist.	
	104th Mile. Var. 8° 45′ E.
11.96	Sullivan's 103d mile corner, one witness [tree] standing.
	Course N. 88° E.
12.00	Prairie.
17.20	Field (Veach) fence north and south.
48.20	Left field fence north and south.
80.00	Set 104th mile post in mound.
	Land rolling; soil second-rate.
	105th Mile.
80.00	Set 105th mile post in mound.
	Same.
	106th Mile.
52.00	Small grove and thicket.
65.75	Small branch, runs south.
69.50	Prairie.
80.00	Set 106th mile post in mound.
	Land same.
	*38] *107th Mile.
45.00	Grove and thicket.
80.00	Set 107th mile post.
	Bearings, { Black oak, 12 in. diam., S. 20° E. 43 links. " " 12 " " N. 8° W. 7 "
	Land rolling, second-rate. Brushy, timber poor.
	108th Mile.
12.69	Sullivan's 107th mile corner.
	Course N. 87° 39′ E.
20.00	Small prairie.
26.00	Timber.
30.20	Small branch runs south.
64.50	Prairie.
80.00	Set 108th mile post in mound. Timber poor.
	109th Mile.
80.00	Set 109th mile post in mound.
	Rolling prairie.
	110th Mile.
11.40	Field fence north and south (Wright).
20.00	Left field.
70.00	Timber and patches of brush.
75.00	House 200 links north of line (Baker).
80.00	Set cast-iron monument, facing as before.
	Land rolling. Timber poor and sparse.

Dist.

111th Mile.

12.34 Sullivan's 110th mile corner.

Course N. 86° 7′ E.

80.00 Set 111th mile post in mound. In small prairie, surrounded by dense thickets.

Land broken, second-rate. Scrub timber and small prairies.

112th Mile.

3.00 Heavy timber.

11.50 Sullivan's 111th mile corner.

Course N. 87° 56′ E.

14.50 Small branch, general course east; the line runs down it, crossing it several times.

41.50 Left branch, course northeast.

73.00 Same branch runs south.

76.00 " " " northeast.

80.00 Set 112th mile post on Sullivan's blazes.

Bearings, { White oak, 20 in. diam., N. 3° E. 119 links.
" " 14 " " S. 15½° W. 155 "

Land good. Timber, white, black, and burr-oak, hickory, elm, &c.

*113th Mile. [*39

11.09 Sullivan's 112th mile corner.

Course N. 88° 21′ E.

60.50 Field fence north and south.

74.75 Left same.

76.50 Bottom prairie.

80.00 Set 113th mile post in prairie.

Bearings, Burr oak, 20 in. diam., N. 15½° E. 268 links.

Land and timber as last mile.

114th Mile.

25.00 Timber.

33.00 Fabius River (west fork), 50 links, runs southeast.

50.72 Sullivan's line tree.

65.00 Barrens.

80.00 Set 114th mile post.

Bearings, { Black oak, 12 in. diam., N. 42½° W. 177 lks.
" " 6 " " S. 29½° E. 40 "

Land good. Timber, hickory, black oak, elm, &c.

115th Mile.

7.70 Field fence north and south. Prairie.

Dist.

34.00 Left field fence north and south.
80.00 Set 115th mile post in mound.
Rolling prairie.

116th Mile.

36.00 Scrub-oak thicket.
48.00 Prairie.
75.00 McAtee's field fence north and south.
80.00 Set 116th mile post in field.
Same.

117th Mile.

15.50 Left field fence north and south.
40.00 Timber on Sullivan's blazes.
75.15 East fork of Fabius, 50 links wide, runs south.
80.00 Set 117th mile post.
Bearings, { Hickory, 12 in. diam., S. 3½° E. 73 links.
" 20 " " N. 14° W. 91 "
Land good. Timber hickory, elm, white and black oak, &c.

118th Mile.

Course N. 88° 17′ E.

65.00 Prairie.
80.00 Set 118th mile post in mound.
Land good. Timber, burr and black oak, hickory, &c. and brush.

119th Mile.

9.25 Field fence north and south.
19.40 Left field near southeast corner. Thicket.
53.50 Hickory branch, 15 links wide, runs east-southeast.
80.00 Set 119th mile post in black-oak thicket.
Bearings, { Black oak, 8 in. diam., S. 38° W. 15½ links.
" " 5 " " N. 5° E. 14½ "
Land second-rate. Timber poor, black oak and hickory.

*40] *120th Mile.

2.00 Prairie.
80.00 Set cast-iron monument, facing as before.
Rolling prairie.

121st Mile.

80.00 Set 121st mile post in mound, edge of thicket.
Same.

122d Mile.

13.00 Branch, 10 links wide, runs south. Timber thicket.
17.55 Range-line between ranges 12 and 13.

Dist.	
29.50	Prairie.
40.00	Jack-oak thicket.
80.00	Set 122d mile post.
	Bearings, Jack-oak, 6 in. diam., S. 12° E. 47 links.
	Land second-rate. Timber poor.

123d Mile.

15.04	Sullivan's line tree (a black oak, noted as a hickory).
	Course N. 88° 12′ E.
20.00	House 300 links south (J. N. Bish).
23.00	Touched northeast corner of field.
31.50	Small low, wet prairie, extending south.
45.00	Timber.
53.20	Wyacondah Creek, 40 links wide, runs southeast.
56.20	Enter creek, running east.
59.70	Left same creek, running southeast.
67.00	Cut off south corner of field.
69.00	Brushy prairie.
80.00	Set 123d mile post
	Bearings, White-oak, 24 in. diam., S. 28½° W. 54 links.
	Land brushy, timber poor.

124th mile.

1.50	Prairie.
15.00	Thicket and a few trees.
29.50	Open prairie. House 300 links south.
33.00	Touched northwest corner of a field.
80.00	Set 124th mile post in mound.
	Land rolling. Timber poor, with undergrowth.

125th Mile

80.00	Set 125th mile post in mound.
	Rolling prairie.

*126th Mile. [*41

46.00	Timber.
47.00	Branch, 25 links wide, runs south-southeast.
52.00	Prairie.
63.50	Thicket of black and jack oak.
71.00	Prairie.
80.00	Set 126th mile post in mound.
	Land as usual.

127th Mile.

29.00	Drain runs southeast.
80.00	Set 127th mile post in mound.
	Rolling prairie.

Dist.	
	128th Mile.
30.20	Small branch runs southeast. Small grove.
80.00	Set 128th mile post in mound.
	Rolling prairie.
	129th Mile.
10.84	Sullivan's 128th mile corner.
	Course N. 87° 58′ E.
13.00	North point of a grove.
80.00	Set 129th mile post in mound.
	Same.
	130th Mile.
80.00	Set cast-iron monument, facing as before.
	Same.
	131st Mile.
53.50	Small branch runs southeast. Timber on banks.
80.00	Set 131st mile post in mound.
	Same.
	132d Mile.
80.00	Set 132d mile post in mound.
	Same.
	133d Mile.
13.00	Branch, 10 links wide, runs southeast. Timber.
13.50	Sullivan's 132d mile corner.
	Course N. 87° 50′ E.
80.00	Set 133d mile post in mound.
	Same.
	134th Mile.
16.50	Field fence nearly north and south.
28.40	Left field. Thicket and sparse timber.
54.50	Small wet prairie.
59.25	Timber. Thicket.
61.50	Creek 15 links north of line.
63.50	Little Fork Creek, 40 links wide, runs south.
67.80	Sullivan's line tree.
80.00	Set 134th mile post.
	Bearings, { Burr oak, 10 in. diam., N. 35° E. 69 links. Hickory, 14 " " S. 46° E. 89 "
	Land good. Timber poor. Dense undergrowth.
	Course N. 88° E.
*42]	*135th Mile.
35.00	Brushy prairie.
46.10	Field fence north and south. Thicket. Field is waste ground.
57.50	Left field. Thicket.

Dist.	
58.00	House 250 links south (Circles).
60.85	Small branch runs south. Brushy prairie.
62.00	Road to Keozanqua, north and south.
80.00	Set 135th mile post in mound.
	Prairie, with brush and thickets.

136th Mile.

5.00	Road to Farmington a little north of east.
11.50	Touched northwest corner of a field in a lane.
30.75	Touched southeast corner of another field. Prairie.
60.00	Northeast corner of a field, 12.00 south.
80.00	Set 136th mile post in mound.
	Rolling prairie.

137th Mile.

22.00	Road to Farmington east-northeast.
60.00	Brushy barrens.
80.00	Set 137th mile post in mound.
	Same.

138th Mile.

27.50	Prairie.
30.00	A small drain runs northwest.
42.00	A field fence north and south.
71.60	Left field fence north and south. Prairie.
80.00	Set 138th mile post in mound.
	Same.

139th Mile.

21.00	Timber.
25.00	Small stream runs north.
26.50	Prairie.
66.00	Road northeast and southwest.
80.00	Set 139th mile post in mound.
	Rather level, second rate.

140th Mile.

6.50	Sparse timber and barrens.
14.83	Sullivan's 139th mile corner.
	Course N. 87° 24′ E.
75.00	Heavy timber.
80.00	Set cast-iron monument, facing as before.
	Land rolling. Timber, black and white oak, hickory, and dense undergrowth of same, with crab, &c.

*141st Mile. [*43

14.54	Sullivan's 140th mile corner.
	Course N. 87° 56′ E.

Dist.

38.76 Big Fox River, 50 links, runs a little east of south.
49.84 Same, runs north.
56.50 Same, runs east-southeast.
59.25 Same, runs north.
77.00 Enter river, runs southeast.
80.00 Left same, and set 141st mile post on the bank.

Bearings, { Birch, 22 in. diam., N. 55° E. 128 links.
Elm, 24 " " S. 15° W. 58 "

Land on river level; other, same as last.

142d Mile.

8.20 Fox River runs south.
13.85 Sullivan's 141st mile corner.

Course N. 88° 9′ E.

23.00 Fox River runs north.
25.00 Same, " south.
35.00 Enter river, " east.
40.70 Left " " southeast.
43.00 Prairie.
75.00 Timber. Upland.
80.00 Set 142d mile post.

Bearings, { Black oak, 30 in. diam., N. 8¼° E. 115 lks.
" " 20 " " S. 69 "

Land level, second-rate. Timber poor; dense undergrowth.

143d Mile.

49.50 Road to Churchville runs southeast.
80.00 Set 143d mile post in mound (in the brush).
This is exccedingly brushy; scrub oak, &c.

144th Mile.

11.80 Sullivan's 143d mile corner.

Course N. 87° 15′ E.

80.00 Set 144th mile post.

Bearings, { White oak, 10 in. diam., S. 10° W. 28 links.
" " 10 " " N. 29° E. 81 "

This mile is brushy; barrens.

*44] *145th Mile.

2.50 Prairie. Barrens.
43.00 Brushy barrens.
80.00 Set 145th mile post in brush.

Bearings, { Burr oak, 14 in. diam., South 75 links.
" 18 " " North 34 "

Barrens.

Dist.

146th Mile.

12.00 Sullivan's 145th mile corner.

Course N. 87° 38′ E.

29.50 Prairie.
46.50 Touched northwest corner of a field, a lane runs parallel with and 25 links north of the line.
57.50 House 50 links north (William Hatton).
67.50 Lane turns south, field fence north and south.
74.00 Left field fence north and south. Prairie.
80.00 Set 146th mile post in mound.
Land as before.

147th Mile.

12.00 Thicket.
42.00 Prairie.
69.00 Thicket.
80.00 Set 147th mile post in thicket.
Bearings, Red oak, 30 in. diam., S. 46° E. 256 links.
Barrens.

148th Mile.

3.00 Branch, 6 links wide, runs north.
30.00 Prairie.
58.50 Field fence north and south.
61.00 Road to Churchville north and south.
80.00 Set 148th mile post in a field.
Prairie, with brushy barrens.

149th Mile.

3.90 Left field fence north and south.
30.00 Brush and timber.
59.00 Road north and south.
80.00 Set 149th mile post in edge of a small prairie.
Bearings, Burr oak, 12 in. diam., S. $1\frac{1}{2}$° E. 172 links.
Land good. Timber indifferent, burr and black oak, hickory, elm, &c., with a dense undergrowth.

150th Mile.

3.50 Timber.
80.00 Set 150th mile post.
Bearings, { White oak, 10 in. diam., N. 27° W. 93 links.
" 20 " " S. $30\frac{1}{2}$° E. 90 "
Land broken, second-rate. Timber, white and black oak, hickory, &c., underbrush.

*151st Mile. [*45

4.90 A small saltpetre cave, noted by Sullivan.
41.50 River bottom.

Dist.

51.00 Set a cast-iron monument on the bank of the Des Moines River, with the words "State Line" facing the west, and the word "Missouri" facing the south, and the word "Iowa" facing the north.

51.80 Sullivan's terminus on the lower bank found by one witness-tree still standing. River bottom rich. Timber, white and black oak, hickory, lind, elm, &c.

September, 18, 1850.

Keokuk, September 30, 1850.

We certify the foregoing to be the correct field notes of the survey of the boundary between Iowa and Missouri, as run by us.

R. WALKER,
Surveyor on the part of Missouri.
WM. DEWEY,
Surveyor on the part of Iowa.

And the report of the Hon. Robert W. Wells and Henry B. Hendershott, which is above referred to, and which was made to the last term of this court, is as follows:—

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES.

The undersigned, appointed by this honorable court commissioners in the above cases, to establish the boundary line between the states of Missouri and Iowa, respectively report that upon being furnished with copies of the decree, they, in compliance therewith, addressed letters to the chief magistrates of those states, through their Secretaries of State, respectfully requesting the coöperation and assistance of the state authorities in the performance of the duties imposed on the commissioners by said decree; and they received assurances, in answer to their letters, of all the aid and assistance within their power.

The Governor of the state of Missouri consented to consider an appropriation of two thousand dollars, made by the
*46] General *Assembly for the purpose of conducting the suits, as applicable to the establishment of the boundary by the commissioners; and agreed to place that sum at their disposal for that object.

The Governor of the state of Iowa entertained the opinion, it is understood, that no appropriation had been made by the

Legislature of that state, applicable to the survey of the boundary, but endeavored to obtain the necessary funds from other sources; and, as the undersigned are advised, obtained them. But the commissioners were not informed of this until about the 23d of October last,—then too late to procure the necessary assistants, fit out an expedition, travel to the place of commencing operations and complete the work in the field, before the weather would, in all probability, become too inclement in the vast and high prairies through which the line will pass. As the grass in the prairies is burned in October, there would also be some difficulty, after that, in procuring provender for the teams necessary for the transportation of the baggage, provisions, and monuments.

For these reasons, and others with which it is unnecessary to trouble the court, the commissioners resolved not to attempt the work in the field until the opening of the spring.

The commissioners have procured all the monuments necessary for the line. Three are of the size and description directed in the decree. Nineteen other cast-iron monuments, six of which are four feet long, eight inches square at the base, and five inches square at the top, to be placed at intervals of thirty miles; and thirteen of which are seven inches square at the base, and four inches square at the top, and four feet long. These nineteen monuments each have the word "Missouri" on one side, and "Iowa" on the opposite side, and the word "Boundary" on the other opposite sides, strongly cast into the metal. All the monuments are cast *solid;* and will weigh about 13,000 pounds, and cost three cents per pound.

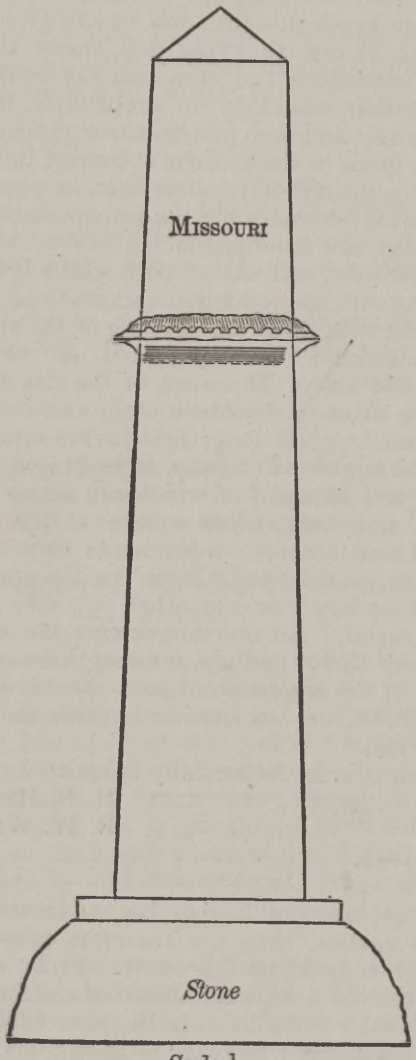
A drawing of the largest sized monument is annexed. [See page 47.] The others are similar in form, except as hereinbefore mentioned.

All of which is most respectfully submitted.

H. B. Hendershott,
R. W. Wells.

November, 1849.

*And said reports not having been excepted to by either of the parties, they are therefore respectively confirmed and adopted by this court. From said reports, it appears that the old northwest corner of the Indian boundary line, made by John C. Sullivan in the year 1816 (and referred to in our former decree), is found to be at forty degrees thirty-four minutes and forty seconds of north latitude, and at about ninety-four degrees thirty minutes of west longitude from Greenwich; that at said "northwest corner" was planted a large cast-iron monument, weighing between fifteen and six- [*48



Scale $\frac{1}{12}$

teen hundred pounds, four feet six inches long, squaring twelve inches at its base, and eight inches at its top. This monument is deeply and legibly marked with the words (strongly cast into the iron) "Missouri" on its south side, and "Iowa" on its north side, and "State Line" on the east.

And this court doth adjudge and decree, that said monument doth mark and witness the true northwest corner of the Indian boundary lines, as run by John C. Sullivan, in 1816. And the precise corner is hereby established and declared to be in the center of the top of said monument.

Said reports further show, that from the monument a line was run due west, on a parallel of latitude, to the eastern bank of the Missouri River; which line appears, by the field notes accompanying the reports, to be sixty miles and sixty-one chains in length. And it further appears, by the reports and field notes, that the commissioners caused to be planted cast-iron pillars in the line running west from the old northwest corner, at intervals of ten miles apart. with the word "Boundary" cast in the iron, on the east side and on the west side of said pillars; and the word "Iowa" facing on the north; and the word "Missouri" facing on the south. That in running west, one such pillar was planted at the end of ten miles from the old northwest corner; another at the end of twenty miles; a third at the end of thirty miles; a fourth at the end of forty miles; and a fifth at the end of fifty miles. And at the end of sixty miles was planted a monument similar to that erected at the old northwest corner, marked "Missouri" on its south side, "Iowa" on its north side, and "State Line" on the east. This monument stands sixty-one chains east of the eastern bank of the Missouri River, on firm ground, the bottom lands beyond being soft and subject to overflow; for which reason the monument was planted so far east of the river. From this last monument, the line runs due west, on a parallel of latitude, through a cottonwood-tree thirty inches in diameter, notched on the east and west sides, and marked with the letter "I." on the north, and the letter "M." on the south. And on *the bank of the Missouri River, [*49
sixty-one chains west of the iron monument last planted, a wooden post is set in the ground, with two cottonwood pointers,—one of ten inches diameter standing S. 67° E. 6 links; and the other at N. 21° W. 12 links from the wooden post. And said line having been run and marked according to our former decree, it is therefore now adjudged and decreed, that the true and proper boundary line between the states of Missouri and Iowa, extending west from the centre of the monument standing at Sullivan's old northwest corner,

runs through the centre of the five iron pillars and the monument near the Missouri River; and through the cottonwood-tree above described; and through the centre of the wooden post planted by the commissioners on the eastern bank of the river; and then due west on a parallel of latitude to the middle of the Missouri River.

And it further appears from the report of said commissioners, that, pursuant to our former decree, they had ascertained and re-marked Sullivan's line, as run and marked by him in 1816, extending eastwardly from the old "northwest corner," above described and established. Sullivan's line, as run and marked in 1816, from said corner east, to the Des Moines River, was found not to be a due east line; but that more or less northing should have been made in the old line. Nor is it a straight line, as sudden deviations amounting to from one to three degrees frequently occur; and it rarely happens that any two consecutive miles pursue the same direction. It also appears, that, if the whole line was reduced throughout to a straight line, its southing would be about two degrees from a due east line.

The length of this line is one hundred and fifty miles fifty-one chains and eighty links, from the old northwest corner to the western bank of the Des Moines River. At the end of each intermediate space of ten miles, on tracing Sullivan's line from the old northwest corner eastwardly, cast-iron pillars were planted, of a similar description to those erected in the western part of the line between the old northwest corner and the monument near the Missouri River. These pillars were planted in Sullivan's line as found at the particular point; but as the line was bending in the ten mile spaces between the pillars, it was found necessary to erect wooden posts, at the termination of each mile, in order to mark the line with more accuracy. In the prairies the mile posts are marked with the letters "B. L." facing the east, the letter "I." facing the north, and the letter "M." facing the south; and the number of the mile is marked on the west face of the
*50] post. Where timber *exists, the number of the mile is marked on witness-trees or pointers, with the letter appropriate to each state; there being one tree marked on each side of the line, whenever it was possible so to do. The foot of each witness-tree is marked with the letters B. L.

In all cases where posts are set in mounds, the pit is invariably nine links west, to designate it from other surveys.

At the end of the one hundred and fiftieth mile, no iron pillar was planted, because at fifty-one chains west of this point, the Des Moines River was reached; and there, accord-

ing to our former decree, a large mounument was planted, of similar description to that placed at the old northwest corner, with the words "state line" facing the west, the word "Missouri" facing the south, and the word "Iowa" facing the north.

And the re-marking of Sullivan's line as above set forth, partly with wooden posts at the termination of each mile, having been submitted to the counsel of the parties, it was by them deemed sufficient, because the public surveys of the lands of the United States are to be governed and closed on said line as run by the commissioners; and therefore private titles will be established on both sides, the state line being the dividing boundary of such private rights. And in these views of the counsel the court concurs. It is therefore adjudged and decreed, that Sullivan's line is established to run through the wooden mile posts and the cast-iron pillars planted ten miles apart on said line; and that the true and proper dividing line between the states of Missouri and Iowa, east of the monument erected at the "old northwest corner," begins at the centre of said monument, and runs eastwardly, (southing about two degrees of a true east line,) through the centre of each wooden post and iron pillar, to the centre of the monument erected on the bank of the Des Moines River. And it is further adjudged and decreed, that a straight line from one mile post to another, and from a mile post to a pillar, and from the last mile post to the monument on the bank of the Des Moines River, is the true and proper line, and that such straight line shall conclude all other marks. And it is further adjudged and decreed, that a line extended north eighty-seven degrees thirty-eight minutes east, from the centre of the monument erected on the bank of the Des Moines River to the middle of said river, is the true and proper boundary line between the states of Missouri and Iowa west of said monument.

And this court having had submitted to its consideration what amount of compensation should be allowed to the different commissioners, and to the surveyors employed by them, for services performed in running and marking the line in controversy; *and also the amount of expenses incurred in performing the duties imposed on said [*51 commissioners by our former decree; and these matters having been referred to the clerk of the court to ascertain the proper compensation and charges, and he having reported thereon; and also on other costs and charges incident to the suit; and said report not being excepted to, is in all things

confirmed, and which report is in the words and figures following, to wit:—

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Pursuant to an order of this honorable court made the 12th instant, in the case of the state of Missouri and the state of Iowa, now pending on bill and cross bill, the undersigned, after a careful examination of witnesses and all the sources of information within his reach, respectfully reports:—

1. That the $8 per diem, which the commissioners agreed to pay each of the surveyors in the field, is a fair and reasonable compensation for their labors.

2. That $10 per day to each of the three commissioners while engaged in this duty is a fair and reasonable compensation for their services;—and that a further per diem of $2 to each of the two commissioners engaged in the field would be a reasonable and proper allowance on account of their personal expenses.

3. That the statement of the expenditures by the commissioners, and of their purchases, appears to be very moderate and reasonable.

4. That the whole expense of the survey amounted to $10,880.41.

5. That each of the said states advanced $2,000.

6. That the commissioners realized from sales of camp furniture $13.15.

7. That the instruments purchased by the commissioners for the survey (which cost $247.22) have been retained by them for safe keeping, subject to the order of this court.

8. That the fees now due to the clerk of this court, and up to this term, by both parties in this case, amount to $48.67.

Lastly. That in a detailed account, stated upon the preceding basis and hereto appended, each of the said states is charged with $3,457.96½, being a moiety of the balance ($6,867.26) due on the survey, and a moiety of the fees (48.67) now due the clerk of this court.

All of which is respecfully submitted by

Wm. Thos. Carroll,

17 *December*, 1850. *Clerk of Supreme Court, U. S.*

**The States of Missouri and Iowa, in Account with the Adjustment of the Boundary Line between them.* *Dr.*

To 22 cast-iron monuments, ...	$ 386.95
" Freight, transportation, and expenses on same,	246.40
" Camp furniture, provisions, expenses in going to and returning from the line, and upon the line, postage, stationery, hire of horses, expenses in going to and returning from Iowa City, Jefferson City, and St. Louis, .	826.92
" Wages to hands in the field, . . .	1,718.92
" Wm. Dewey, surveyor, for 184 days, at $8 per day, ...	1,472.00
" Robt. Walker, surveyor, for 183 days, at $8 per day, ...	1,464.00
" Robert W. Wells, commissioner, for 15 days,	150.00
at $10 per day, ...	2,124.00
" William G. Minor, commissioner, for 177 days at 12 per day, ...	2,124.00
" Henry B. Hendershott, commissioner, for 187 days, at $12 per day, ...	2,244.00
" Sextant, barometer and thermometer, solar compass, and other instruments necessary for the survey, ...	247.22
" Fees now due the clerk in the case pending in Supreme Court of U. S., . . .	48.67
	$10,929.08

Contra. *Cr.*

By Cash received from State of Missouri, . .	$2,000.00
" Cash received from State of Iowa, . .	2,000.00
" Proceeds from sale of camp equipage, . .	13.15
" Balance, of which $3,457.96½ is due by the State of Missouri, and $3,457.96½ is due by the State of Iowa, ...	6,915.93
	$10,929.08

And it appearing to the court here, that there will be due to the clerk of this court, for the duties devolved on him by this decree, and for the services performed by him at this term, the further sum of sixty-three dollars and sixty cents, in addition to the forty-eight dollars and sixty-seven cents stated in his report to be now due him; and it also appearing to the court, that the said clerk should be allowed, for making his

report, for carrying on the correspondence incident to this
*53] cause and paying *the expense thereof, and also in consideration of any future service to be performed by him in the progress of this cause, the further sum of fifty dollars; it is thereupon ordered and decreed, that said commissioners Hendershott and Minor, do pay to the clerk of this court, in full discharge of all costs and charges that have now accrued or that may hereafter accrue for any service done or to be performed by the said clerk, in the progress of this cause, the sum of $162.27 out of the first moneys received by them under this decree.

And it appearing that certain advances had been made by the states of Missouri and Iowa, respectively, to the commissioners, and said advances having been credited, it now appears that the state of Missouri is bound to pay the further sum of $3,514.76½; and that the state of Iowa is bound to pay the further sum of $3,514.76½ of the charges and costs of the controversy.

And it is ordered and decreed, that the state of Missouri pay over the said sum of $3,514.76½, and that the state of Iowa pay over the said sum of $3,514.76½, to the commissioners, Henry B. Hendershott and William G. Minor, in final and full discharge of their portions, respectively, of said costs and charges.

And it is further ordered and adjudged, that said commissioners receive the several sums of money, and distribute and pay over the same to those entitled thereto, according to the report of the clerk of this court.

And it also appearing that certain instruments purchased by the said commissioners are retained by them, subject to the order of this court, it is further ordered that the commissioners dispose of the said instruments at such times and places, and on such terms, as to them may seem most advantageous for the interests of the parties to this suit; and that they pay the proceeds of the sales into the treasuries of the said states of Missouri and Iowa, respectively, that is to say, one half of the proceeds into each treasury, and take receipts from the proper officers for the moneys paid.

And it is further ordered, that said commissioners, Hendershott and Minor, report to the next term of this court the manner in which they have executed the duties hereby imposed upon them; and to which end this cause is kept open.

And it is ordered, that the clerk of this court do forthwith transmit to his Excellency, the Governor of the state of Iowa, a copy of this decree (including the reports of the commissioners, surveyors, and clerk, together with a copy of the field

notes of said surveyors), duly authenticated under the seal of this court.

*And it is further ordered, that a similar copy in all respects be by said clerk forwarded to his Excellency, the Governor of the state of Missouri. [*54

And it is further ordered, that the clerk forward a copy to each of said commissioners, Hendershott and Minor, of the order referring the matter of costs and charges, the clerk's report thereon, and so much of the foregoing decree as respects the costs and charges, for the guidance of said commissioners in the performance of their duties in this respect.

Henry Webster, Plaintiff *v.* Peter Cooper.

Where it appears that the whole case has been certified *pro forma*, in order to take the opinion of this court, without any actual division of opinion in the Circuit Court, the practice is irregular, and the case must be remanded to the Circuit Court to be proceeded in according to law.[1]

The decision of this court in the case of *Nesmith and others* v. *Sheldon*, (6 How., 41,) affirmed.[2]

This case came up on a certificate of division of opinion, *pro forma*, between the judges of the Circuit Court of the United States for the District of Maine.

It was a real action, in which the plaintiff demanded a certain parcel of land situated in Pittston, in the county of Kennebec and state of Maine, and claimed title under the will of one Florentius Vassal, made in England in 1777.

Most of the points of division certified arose upon the construction of this will, and the remainder were upon the right of the plaintiff to maintain the action, and the rule of estimation as to improvements; covering in fact the whole case.

The cause was argued by *Mr. Dexter* and *Mr. E. H. Daveis*, for the plaintiff, and *Mr. Allen*, for the defendant; but as no decision was had upon the merits, the arguments of counsel are omitted.

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

This case has been argued at the bar upon points certified as upon a division of opinion in the Circuit Court. But it appears by the record that the whole case has been divided

[1] Followed. *Dennistoun* v. *Stewart*, 18 How., 569. Relied on *in dissenting opinion, Steamer Oregon* v. *Rocca*, 18 How., 576.

[2] See note to *Nesmith* v. *Sheldon*.

into points and sent up to this court,—and several of the latter points could not have arisen on the trial until the previous ones were first decided. We understand it was a *pro forma* division, certified at the request of the counsel for the respective parties.

*55] *This court has frequently said that this practice is irregular, and would, if sanctioned, convert this court into one of original jurisdiction, in questions of law, instead of being, as the Constitution intended it to be, an appellate court to revise the decisions of inferior tribunals. Indeed, it would impose upon it the duty of deciding in the first instance, not only the questions of law which properly belonged to the case, but also questions merely hypothetical and speculative, and which might or might not arise, as previous questions were ruled the one way or the other.

The irregularity and evil tendency of this practice has upon several occasions attracted the attention of the court, although it has been occasionally acquiesced in, and the points so certified acted upon and decided. But at December term, 1847, the subject was very fully considered, and it was then determined that this practice ought not to be sanctioned, and that this court would in all cases refuse to take jurisdiction, when it was obvious that the whole case had been certified *pro forma*, in order to take the opinion of this court, without any actual division of opinion in the Circuit Court. The result of this determination will be found in the case of *Nesmith and others* v. *Sheldon and others*, 6 How., 41. The case before us cannot be distinguished from the one referred to. It is true that it was certified before that decision was pronounced. But the opinion in that case conformed to all the opinions previously expressed by this court upon the irregularity of this practice.

This case, therefore, must be remanded to the Circuit Court, to be proceeded in according to law.

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 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. 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 Congress has been certified to this court, it is thereupon now here ordered and

adjudged 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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*ISAAC SHELBY, COMPLAINANT, *v.* JOHN BACON, ALEXANDER SYMINGTON, THOMAS ROBINS, JAMES ROBERTSON, RICHARD H. BAYARD, JAMES S. NEWBOLD, HERMAN COPE, THOMAS S. TAYLOR, AND GEORGE BEACH. [*56

By a statute of Pennsylvania, passed in 1836, "assignees for the benefit of creditors and other trustees" were directed to record the assignment, file an inventory of the property conveyed, which should be sworn to, have it appraised, and give bond for the faithful performance of the trust, all of which proceedings were to be had in one of the state courts.

That court was vested with the power of citing the assignees before it, at the instance of a creditor who alleged that the trust was not faithfully executed.

The assignees of the Bank of the United States chartered by Pennsylvania, recorded the assignment as directed, and filed accounts of their receipts and disbursements in the prescribed court, which were sanctioned by that court.

A citizen of the state of Kentucky afterwards filed a bill in the Circuit Court of the United States for the Eastern District of Pennsylvania, against these assignees, who pleaded to the jurisdiction of the court.[1]

The principle is well settled, that where two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other.[2]

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[1] REVIEWED. *Andrews* v. *Smith*, 19 Blatchf., 109.

[2] CRITICISED. *Loring* v. *Marsh*, 2 Cliff., 323. FOLLOWED. *Riggs* v. *Johnson County*, 6 Wall., 205. CITED. *Union Mut. Life Ins. Co.* v. *Chicago University*, 10 Biss., 197 *n*; *Chapman* v. *Borer*, 1 McCrary, 50.

The pendency of another suit for the same cause of action in the same state is pleadable in abatement. *Piquignot* v. *Pennsylvania R. R. Co.*, 16 How., 104; *Earl* v. *Raymond*, 4 McLean, 233; *Bond* v. *White*, 24 Kan., 45; and so is a suit pending in the courts of another state. *Ex parte Balch*, 3 McLean, 221; *Hacker* v. *Stevens*, 4 Id., 535; *Contra*, *Hadden* v. *St Louis, &c. R. R. Co.*, 57 How. (N. Y.), Pr., 390; but not if the other action was commenced since the last continuance. *Renner* v. *Maishall*, 1 Wheat., 215; nor if the suit in which the plea is interposed be a suit *in personam* in a Circuit Court. *White* v. *Whitman*, 1 Curt., 494; *Whitaker* v. *Bramson*, 2 Paine, 209; and a suit pending in a foreign country is not so pleadable. *Lyman* v. *Brown*, 2 Curt., 559.

Where a suit is pending in a foreign jurisdiction, between the same parties and upon the same cause of action as one instituted in our own courts, either of two courses may be taken by the latter, viz., (1) the continuing of the foreign action may be enjoined, or (2) proceedings in the home action may be stayed. In the leading English case of *The Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas., 416, Lord Cranworth, Ch., said: "There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign courts, whenever the circumstances of the case make such an interposition necessary or expedient. The court acts *in personam*, and will not suffer any one

within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction." And having examined the early authorities he stated their result to be that, "if the circumstances are such as would make it the duty of the court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign court."

In *McHenry* v. *Lewis*, 31 W. R., 305; 22 Ch. D., 397, the jurisdiction to make an order staying proceedings in the home action, was emphatically asserted, although in the particular circumstances the motion was refused.

Admiralty, from the extent of its jurisdiction, and the nature of the claims which come before it, is peculiarly concerned with questions of *lis alibi pendens;* and has repeatedly exercised this discretionary jurisdiction. Thus, in *The Mali Ivo*, L. R. 2 A. & E., 356, it was laid down that if the evidence established that there was a *lis alibi pendens* before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were technically *in rem* or *in personam*, it would be the duty of the court either to suspend proceedings, or to put the parties to their election as to which action they would continue (see also *The Cattarina Chiazzare*, L. R. 1 P. D., 368, and *The Peshawur*, 31 W. R., 660; L. R. 8 P. D., 32.) But the decisions in the other courts, prior to *McHenry* v. *Lewis*, seem to have proceeded upon an opposite principle; for in *Cox* v. *Mitchell*, 8 W. R., 45; 7 Com. B. N. S., 55, where it was admitted that no authority could be produced in favor of the application, it was held that "the court will not stay proceedings in an action here because an action for the same cause is pending in a foreign country;" and Erle, C. J., said, "Though there may be hardship that property may be doubly perilled, possible hardship is not a sufficient ground for our interference. If there were judgment in one country, I should expect that the court in the other country would stay the proceedings." In *Ostell* v. *Le Page*, 2 De G. M. & G., 892, although a decree for an account in a partnership suit had been actually made by the Supreme Court in Calcutta, the English court refused to stay proceedings in a suit for the same purpose, the defendant having, since the institution of the Indian suit, come to reside permanently in this country. "If," said Lord Cranworth, "there has been in a foreign court of competent jurisdiction a *final* adjudication upon the same matter between the same parties, and that matter, so adjudicated upon, is attempted to be renewed here between the same parties, it would be a good plea in bar to plead that final adjudication." This seems to imply that, in his lordship's opinion, pending litigation in a foreign court is no ground for staying an English suit; but his language is confined to the technical defence of a plea, and the decision arrived at rested on the fact that the entire subject of the English suit was not covered by the decree in India. Again, in *Wilson* v. *Ferrand*, L. R., 13 Eq., 362, which involved the construction of a French contract according to French law, Malins, V. C., in refusing an application to stay proceedings on the ground of pending litigation in France, characterized the motion as "on principle totally unjustifiable and unsustainable."

In *McHenry* v. *Lewis*, above cited, the Master of the Rolls said: "Where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *primâ facie* vexatious to bring two actions where one will do. But where a right is being enforced in a foreign country, it certainly appears that we cannot draw the same inference. Not only is the procedure different, but the remedy is different." Therefore in such cases a special case must be made out to justify the interference of the court.

In another very recent case—*Peruvian Guano Company* v. *Bockwoldt*, 31 W. R., 851; 23 Ch. D., 225, the court declined to put a plaintiff to his election whether he would proceed with an English or a French action, the fact that the former was in respect of seven cargoes, while the latter was for six of them only, being held sufficient to prevent a stay of proceedings.

To avail in abatement of a second suit, the first suit must have been pending when the second was commenced, and must have been pending in this state. *Hadden* v. *St. Louis &c. R. R. Co.*, 57 How. (N. Y.), Pr., 390.

The first suit must be pending at

But the proceedings in the state court cannot be considered as a suit. The statute was not complied with, and even if it had been, the Circuit Court would still have had jurisdiction over the matter.[3]

THIS cause came up on a certificate of division of opinion between the judges of the Circuit Court of the United States for the Eastern District of Pennsylvania.

The complainant was a citizen of Kentucky, and the defendants were all citizens of Pennsylvania. The latter (under three assignments bearing date the 7th of June and the 4th and 6th of September, 1841) were trustees of the Bank of the United States, a banking institution incorporated by the legislature of the state of Pennsylvania, by an act passed on the 18th day of February, 1836.

It appeared that the bank, being unable to meet its liabilities, made an assignment of a part of its property on the 1st of May, 1841, to certain trustees, to secure the payment of sundry post-notes, held by certain banks of the city and county of Philadelphia. Afterwards, on the 7th of June, 1841, it made another assignment of a portion of its property to the defendants Bacon, Symington, and Robins, in trust to

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the time of plea pleaded, to effect an abatement of the second suit; if dismissed before plea pleaded, it will prevent the abatement. *Leavitt* v. *Mowe*, 54 Md., 613.

The pendency of another action in the courts of another state is not a ground of abatement. *Grider* v. *Apperson*, 32 Ark., 332. S. P. *Cole* v. *Flitcraft*, 47 Md., 312.

Where a suit in equity and a suit at law are pending between the same parties for the same matter, one cannot be pleaded in abatement or in bar of the other; but the court of equity will sometimes order a stay of proceedings in one until the other is determined. *Graham* v. *Meyer*, 4 Black 129. S. P. *United States Ins. Co.* v. *Brune*, 6 Otto, 588.

The objection of *lis pendens* can be sustained only, where the two suits are of the same character, and where the plaintiff in both suits is the same. *Certain Logs of Mahogany*, 2 Sumn., 589.

Where the action is for the recovery of land, and the plaintiff in the one suit is the defendant in the other and *vice versa*, the plea is not good. The two actions must be by the same plaintiff against the same defendant. *Wadleigh* v. *Veazie*, 3 Sumn., 165; S. P. *Blackburn* v. *Watson*, 85 Pa. St., 241; *Cook* v. *Burnley*, 11 Wall., 659.

[3] The pendency of a prior suit in a state court is not a bar to a suit in a Circuit Court of the United States or in the Supreme Court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action. *Stanton* v. *Embrey*, 3 Otto, 548.

A suit pending in a United States court in another state does not defeat the prosecution of a suit brought in the courts of North Carolina, although between same parties and for same cause of action. *Sloan* v. *McDowell*, 75 N. C., 29.

A plea in abatement of a cause in the Federal court, that another suit is pending in a state court, is not good, where the parties to the two suits are not the same. *Brooks* v. *Mills County*, 4 Dill., 524.

Pendency of a general creditor's bill in a state court does not preclude a creditor who is not a party thereto from bringing an action in a United States Circuit Court, to recover judgment upon his demands. *Parsons* v. *Greenville &c. R. R. Co.*, 1 Hughes, 279.

secure the payment of its bank-notes and deposits. Subsequently, two other assignments were made by the bank to the defendants Robertson, Bayard, Newbold, Cope, and Taylor, in trust for the payment of its debts generally, the first of which was executed on the 4th, and the other on the 6th of September, 1841. These several assignments were duly recorded, and the trustees accepted and proceeded to minister the trusts.

The bill and amended bill, after setting forth the chartering *of the bank, and the assignment of its property to the defendants in trust, alleged that on the 6th day of September, 1841, one George Beach, a citizen of Pennsylvania, recovered a judgment in the District Court for the city and county of Philadelphia, against the said bank, for the sum of $53,688.66, besides interest and costs; that this judgment was founded on promissory notes of said bank, called post-notes. That subsequently the said George Beach, in a suit on said judgment, in the Commercial Court of New Orleans, recovered a judgment for the sum of $53,688.66, with interest thereon and costs; on which the sum of $4,075 was paid; and that the residue of both said judgments remains unpaid. The bill then alleged, that through several mesne assignments the complainant became invested with all right under said judgments; that the debt due is provided for in said assignments, but that the trustees have refused to pay any part thereof; and that they have kept complainant and other creditors in ignorance of the situation of the trust funds. Prayer for a decree for an account of the trust, for the payment of complainant's debt in full or a distributive share thereof, and for general relief.

*57]

The defendants Robertson, Bayard, Newbold, Cope, and Taylor pleaded as follows:—

"That the said corporation mentioned in said complainant's bill, viz., the President, Directors, and Company of the Bank of the United States, incorporated by the state of Pennsylvania, and having its banking-house and chief place of business in the city of Philadelphia, did, on the fourth and sixth days of September, in the year one thousand eight hundred and forty-one, execute and deliver to these defendants assignments and transfers of certain property upon trusts therein particularly set forth,—as by reference to copies of said assignments attached hereto, and made by reference part of this their plea, will fully and at large appear; that said assignments, after having been duly proved, were afterwards, to wit, on the fourth and seventh days of September, A. D. 1841, recorded, according to the statute of Pennsylvania in such case made

and provided, in the office for the recording of deeds, &c., for the city and county of Philadelphia,—the execution of the trusts thereof having been previously accepted by these defendants. And these defendants further aver, that, in accordance with the provisions of the laws of the said state of Pennsylvania, full and complete jurisdiction of and over the said trust fund so conveyed to these defendants, and of and over the execution of the said trusts, and of and over these defendants personally, as trustees as aforesaid, was and is vested in the Court of Common Pleas of the city and county of Philadelphia, which now *has cognizance of the same, with ample power and authority in said tribunal to enforce [*58 the execution of the said trusts, to decide upon the rights of all parties claiming an interest therein, and right and justice fully to administer in the premises; that, in the execution of the trusts aforesaid, and the collection of the assets so assigned to them, these defendants have been governed by the laws of Pennsylvania, and, among other things, by certain laws of the said state, by which they have been compelled to accept and receive from their debtors, in payment of debts due to the said bank or to the said trustees, at par, the notes and other evidences of debt issued or created by the said bank; and the defendants further aver, that, having in part executed the trusts so as above committed to them, they did, on the seventh day of January, A. D. 1843, file in the office of the prothonotary of the Court of Common Pleas aforesaid an account, duly verified, of their receipts and disbursements, and of their acts and doings, as trustees as aforesaid, from the commencement of said trust down to the first day of January, A. D. 1843; and subsequently, to wit, on the thirteenth day of January, A. D. 1844, they did file a further account in the office aforesaid, and duly verified as aforesaid, of their receipts and disbursements, acts and doings, as aforesaid, down to the first day of January in the year 1844, which said accounts were absolutely confirmed by the said court, agreeably to the laws of the said state; and the defendants further aver, that on the seventeenth day of January, 1845, and on the thirteenth day of January, 1846, respectively, they filed additional accounts as aforesaid, in the office aforesaid, showing their receipts and disbursements, acts and doings, aforesaid, down to the first day of January, A. D. 1846, which said last-mentioned accounts were referred by the said court to auditors, who have made reports thereon, respectively, to the said court; and the defendants further aver, that on the fourteenth day of January, A. D. 1847, they filed another account as aforesaid, showing their administration of said trust down to the first day of

January, A. D. 1847, which said last-mentioned account was likewise referred by the said court to auditors, before whom the same is now pending,—as by reference to the records of the said court will fully appear; and these defendants further aver, that, in pursuance of the direction and decree of the said court, they have distributed and paid over large sums of money, being the proceeds of the assets assigned to them as aforesaid, and have likewise, under the direction of the said court, invested large sums of money to await the result of pending litigation, and in all other respects have conformed to the directions of the said court in relation to the trust aforesaid.

*59] *"All which matters and things these defendants do aver to be true, and plead the same to the whole of the said bill, and humbly demand the judgment of this honorable court, whether they ought to be compelled to make answer to the said bill of complaint; and humbly pray to be hence dismissed, with reasonable costs and charges in this behalf most wrongfully sustained."

The other defendants pleaded the same plea in substance, *reddendo singula singulis.*

The cause coming on to be heard on the amended bill and pleas, the judges were divided in opinion on the following points:

"First. Whether the facts stated in the plea to the amended bill filed by John Bacon, Alexander Symington, and Thomas Robins, deprive this court of jurisdiction of the case, and whether the said plea is a sufficient plea to the plaintiff's bill, and ought to be allowed.

"Second. Whether the facts stated in the plea to the amended bill, filed by the defendants, James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, deprive this court of jurisdiction of the case, and whether the said plea is a sufficient plea to the plaintiff's bill, and ought to be allowed."

The following sections of the Act of Assembly of Pennsylvania, of 14th June, 1836, were relied on in argument, and are therefore inserted.

"Sect. VII. It shall be lawful for the Court of Common Pleas of the proper county, on the application of any person interested, or co-trustee or co-assignee, to issue a citation to any assignee or trustee for the benefit of creditors, whether appointed by any voluntary assignment, or in pursuance of the laws relating to insolvent debtors and domestic attachments, requiring such assignee or trustee to appear and exhibit, under

oath or affirmation, the accounts of the trust in the said court, within a certain time, to be named in such citation.

"Sect. IX. The several Courts of Common Pleas shall, by a general order, or by such order as the circumstances of any particular case may require, direct the prothonotary of the same court to give notice of the exhibition and filing of every account as aforesaid, during such time, and in such public newspapers, as they shall appoint, setting forth in such notice, that the accounts will be allowed by the courts at a certain time, to be stated in such notice, unless cause be shown why such account should not be allowed.

"Sect. XI. Whenever it shall be made to appear in a Court of Common Pleas, having jurisdiction as aforesaid, that an assignee *or trustee as aforesaid has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, when so required by law, or to file accounts of his trust, or that such assignee or trustee is wasting, neglecting, or mismanaging the trust estate, or is in failing circumstances, or about to remove out of the jurisdiction of the court, in any such case it shall be lawful for such court to issue a citation to such assignee or trustee to appear before the court, at a time to be therein named, to show cause why he should not be dismissed from his trust. [*60

"Sect. XII. On the return of such citation, the court may require such security, or such other and further security from such assignee or trustee, as they may think reasonable, or may proceed at once to dismiss such assignee or trustee from the trust.

"Sect. XIII. The like proceedings may be had whenever it shall be made to appear to such court, that any person who shall have become surety for any assignee or trustee as aforesaid, in any bond, given for the due execution of the trust, is in failing circumstances, or has removed out of this Commonwealth, or signified his intention so to do.

The case was argued by *Mr. Clay*, for the complainant, and by *Mr. Wm. A. Porter* and *Mr. George M. Wharton*, for the defendants.

Mr. Clay, for complainant.

The Bank of the United States, chartered by the state of Pennsylvania, having become insolvent, executed several deeds of trust conveying all their assets for the purpose of paying their debts, according to classifications of them described in the said deeds. By two of the same deeds provision

was made for the payment of the debt of the complainant, to recover satisfaction for which is the object of this suit. That debt originally existed in the form of post-notes. These post-notes were reduced to a judgment, in the name of George Beach, obtained in the Court of Common Pleas of Philadelphia. This judgment, by various assignments, was transferred to the complainant, and became his property.

The defendants refused to pay the amount of this judgment. They refused even to recognize the complainant as one of the creditors of the bank, who was entitled to a ratable proportion of the assets of the bank, transferred to the defendants, in common for his benefit and that of other creditors.

It was under these circumstances that the complainant instituted this suit. The objects of this suit were, first, to compel the defendants to admit the complainant as one of the
*61] creditors, *to receive his distributive share of the common fund; second, to have an account of the execution of the trust, as far as the defendants had proceeded in it; third, to compel the defendants to complete the execution of the trust, by collecting, selling, and distributing all the assets on which they have not previously administered.

The complainant is a citizen of Kentucky, and the defendants are citizens of Pennsylvania. The parties, therefore, stand exactly in that relation to each other, which, according to the provision of the Constitution of the United States and the law of the United States, entitled the Federal judiciary to entertain jurisdiction of the controversy. In consequence, the complainant brought this in the Circuit Court of the United States for the Eastern District of Pennsylvania.

The defendants pleaded to the jurisdiction of the court. Their plea, in substance, is, that by the local laws of Pennsylvania jurisdiction is conferred upon one of her local tribunals over all matters of trust, to control, manage, and finally and exclusively to settle and close them. That the defendants have proceeded before that tribunal, in part, to settle and account for the assets which they have received; and that they are only amenable to that local tribunal for the further and complete execution of the entire trust.

The two judges composing the Circuit Court of the United States for the Eastern District of Pennsylvania, being divided in opinion as to the sufficiency of this plea to the jurisdiction of the court, certified that difference, and the question and only question which this court has now to determine is, whether the Circuit Court had or had not jurisdiction of the cause.

That question involves two others;—first, had the com-

plainant a right, by the Constitution and the law of the United States, to resort to the Federal tribunal; and secondly, whether he could be divested of that right by the laws of any state, in the passage of which he had no voice. To which may be added a third question, and that is, whether, if the state of Pennsylvania could divest a citizen of Kentucky of a right with which he is invested by the Constitution of the United States, that has been done by the laws of that state, and the proceedings which have taken place under them.

The mere statement of these questions is an answer to them. The Constitution of the United States expressly confides to the Federal judiciary all controversies arising between citizens of different states. It is the constitutional privilege, therefore, of a citizen of one state to sue a citizen of another state in the tribunal which is common to them both. He cannot be deprived of this right by any act of the state of which he is *not a citizen. Nor is this right at all impaired or affected by the nature or object of the [*62 suit which he prosecutes. It cannot be contended, that, because the subject-matter of controversy arises out of the local laws of a state, he is bound to submit to the tribunals of that state, and is stripped of his privilege to appeal to the Federal tribunal. It is true, when he goes before the latter, that is bound, in the particular case, to administer the laws of the state which govern it. But the Constitution of the United States is founded on the presumption, that the Federal judiciary will be less biased and more impartial in the administration of justice between citizens of different states than the local tribunal of one of them would be.

If, by any arrangement of its own laws and tribunals, a state or legislature of a state could divest the Federal judiciary of that branch of its jurisdiction which relates to controversies between citizens of different states, it might, by other or similar arrangements, divest their judiciary of all judicial power granted to it by the Constitution of the United States.

So careful has Congress been to preserve to the citizens of different states their right to be heard before the Federal tribunal, that it has provided, by the act of 1789, that when a citizen of one state is sued by a citizen of another state, in a state court, the defendant may remove the cause into the Federal court.

It is not, therefore, true, as a universal proposition, that in cases of concurrent jurisdiction the court that first acquires it can hold fast on the case, to the exclusion of the concurrent court.

If the defendant fail to avail himself of his privilege to

remove the cause in due season, he deprives himself of the benefit of the Federal tribunal, and is bound to submit to the local jurisdiction. But it is not pretended that the complainant in this cause has ever waived his right to the Federal jurisdiction. He was no party to the proceedings of the trustees in the Court of Common Pleas of Philadelphia. No process from that court was ever served upon him; no opportunity ever existed, therefore, for him to remove the cause from the local to the Federal tribunal. And if such opportunity had presented itself, the complainant, being only one of the numerous persons concerned in the trust, could not have removed the settlement of the accounts of the trustees from the Court of Common Pleas of Philadelphia to the Circuit Court of the United States.

I submit, then, with great confidence, to the court, that the Constitution of the United States, which is paramount to all state constitutions and laws, having secured to Isaac Shelby,
*63] *the complainant, a citizen of Kentucky, the privilege of bringing his suit in the Circuit Court of the United States against the defendants, citizens of Pennsylvania, the power of that state is incompetent to deprive him of that privilege. Upon an examination of the laws of Pennsylvania in relation to trusts, the settlement of trustees' accounts, and the distribution of trust funds, it will be found, I think, that the jurisdiction conferred on the several Courts of Common Pleas was only preliminary and precautionary, and not final and absolutely conclusive. The object was, on the one hand, to exert a salutary supervisory authority over the trustees, to prevent the waste and misapplication of the trust funds, and, on the other, to afford protection and security to the trustees, by the sanction of a court of justice, in the periodical settlement of their accounts, and in the investment and distribution of the trust funds.

The provisions in the laws of Pennsylvania bear a strong similitude to the laws which prevail in all the states, in respect to the settlement of the accounts of executors and administrators. The County Courts and the Courts of Probate have full jurisdiction over executors and administrators, their removal, the settlement of their accounts, and the final distribution of the estates of the deceased. It has never been thought or contended that their jurisdiction excludes that of courts of justice, to which appeals are made for a revisal of the conduct and accounts of such executors and administrators; and on such appeals, what has been done under the sanction of the County Court or Court of Probate will be so far respected as to be presumed to be rightly done, and the

onus probandi will be thrown on the party impeaching it. So, in a case of the settlement of a trustee's account before the Court of Common Pleas, the account will be held *primâ facie* evidence of a proper settlement, until the contrary be shown by the party contesting it.

Assuming that the Court of Common Pleas has any *exclusive* jurisdiction over these trusts and their administration, what is the extent of that exclusive jurisdiction? It must be limited to what has been actually done by that court, or is now pending before it. It cannot extend to the question, for example, of the rights of Isaac Shelby, which are not submitted to that court. It cannot extend to what remains to be done in the execution of the trust, that is to say, in collecting outstanding debts, selling real estate and other property not yet disposed of, collecting the proceeds of sale, &c., &c. These are matters which are not *now* before the Court of Common Pleas, which may never be brought by the trustees before it, but which are properly and legitimately included in this suit.

*I made an examination into the laws of Pennsylvania in respect to trustees some time ago, and regret I have been unable to refresh my recollection of them by a perusal at this time. If my memory does not deceive me, they recognize, if they do not expressly authorize, the investigation of the conduct of trustees before other tribunals than the Court of Common Pleas. [*64

Messrs. Porter and *Wharton*, for the defendants.

The judgment on which the complainant claimed was recovered after the assignments, and was assigned to him after the accounts of the trustees had been settled in the Common Pleas of Philadelphia, without exception or appeal. The complainant claims subject to the assignments, and not against them. When he took the transfer of the judgment, he was bound to inquire what had been done or permitted by his assignors. It is a fair legal presumption, that he knew the accounts had been filed in the Common Pleas, and that the jurisdiction of that court had attached to the subject-matter of the trust. Shall he be allowed to upturn what has been done in that court?

The law of Pennsylvania is, that such accounts, although partial, are nevertheless conclusive in favor of the accountants, when properly filed, settled, and confirmed. *Moore's Appeal*, 10 Pa. St., 435; *Weber* v. *Samuel*, 7 Id., 499. The trustees have relied on this principle, and have regulated their conduct by it. Shall they have its protection? or shall they

be required to re-settle their past, and file their future accounts in the Federal court?

The argument of the complainant's counsel assumes that there is no such thing as a proceeding, and an adjudication *in rem*, which, by its operation on the subject-matter, shall bind the world, no matter who the parties claimant may be, or where they may reside. In the case of a vessel seized under a replevin issued out of a state court, and process subsequently issued out of the admiralty against the same vessel, the former retains the jurisdiction. *Taylor* v. *Royal Saxon*, 1 Wall. Jr., 311. Here the suitor was turned out of the admiralty, not for any defect in his cause of action, nor because the question had been decided, but because the replevin was pending in the state court. In the case of an attachment of money in the state court, and an action against the debtor in the Federal court, the former, having first obtained possession of the subject, retains jurisdiction over it. *Wallace* v. *McConnell*, 13 Pet., 136. The question is not as to the original right of the party to come into this court, but is it a proceeding *in rem?* Has *jurisdiction attached? Would it produce collision of jurisdiction to disturb it?

*65]

In opposition to the complainant's positions, the defendants take the following grounds:—

1. The party assignor, the Bank of the United States, being a corporation created by an act of the Legislature of Pennsylvania, was a local corporation, and, so far as a corporation can be such, was a resident or inhabitant of that state, was liable for its debts in the manner prescribed by the laws thereof, and could only dispose of its property by virtue of the said laws.

2. That becoming insolvent, and, in consequence thereof, making an assignment to secure the payment of its debts, the validity and effect of the assignment are to be determined and regulated by the laws of Pennsylvania.

3. That the administration of the assets, under such an assignment, should be in accordance with the laws of Pennsylvania, and under the direction of the tribunal, and according to the rules, which those laws have prescribed.

4. That a suit like the present, brought to administer the trusts of the assignment of an insolvent local corporation, made to citizens of the same state, in order to secure the payment of its debts, in pursuance of the laws of that state which control and regulate the whole subject-matter, is not within the jurisdiction of the courts of the United States.

5. That even if the foregoing proposition be not correct, the jurisdiction of the state court had attached, by the filing therein of their partial accounts by the trustees of the bank,

and jurisdiction over the subject-matter of these trusts having thus become vested in the state tribunal, the United States court could not withdraw the same therefrom.

6. That the trustees, being subject to the jurisdiction of the state court, and having partially settled their accounts under its authority, are compellable to settle their future accounts before the same tribunal; and if the present bill be sustained, will be also compelled to adjust and settle, at an additional expense to the trust estate, their accounts in a court of the United States, which may be governed by different rules from the state court, and may adjust the same accounts upon different principles.

That court which first rightfully takes possession of the subject, or in which suit has been first commenced, or application made, or petition presented, or writ issued, shall retain the jurisdiction until a final disposition is made of the matter in controversy. *Smith* v. *McIver*, 9 Wheat., 532; *Pratt* v. *Northam*, 5 Mason, 95; *Merrill* v. *Lake*, 16 Ohio, 373; *Ship Robert Fulton*, *1 Paine, 620; *Peck* v. *Jenness*, 7 How., 612; *Campbell* v. *Emerson*, 2 McLean, 30; *Embree* v. [*66 *Hanna*, 5 Johns. (N. Y.), 101; *Holmes* v. *Remsen*, 20 Id., 229; *Hall* v. *Dana*, 1 Aik. (Vt.), 381; *State* v. *Yarborough*, 1 Hawks (N. C.), 78.

The jurisdiction of the Common Pleas of Philadelphia has attached to the settlement of the trusts by the filing of the accounts. That court has had exclusive possession of the subject for several years. Not only have proceedings been had, but questions have been decided and decrees entered. Why should the filing of a petition, or issuing of a writ, fix the jurisdiction, and not the filing and adjustment of an entire account, the decree of the court on it, and the distribution of the balance exhibited by it? Why should matters of form work such important differences in result?

But what is the subject-matter to which the jurisdiction of the state court has attached? We answer, the entire trust which the trustees have undertaken to execute,—the duties and responsibilities imposed by the assignment,—the rights conferred by the property conveyed by it.

It is said, Why not allow the past accounts to remain stable, and compel the trustees to file their future accounts in the Federal court? The answer is, All the accounts are but parts of a whole, conclusive so far as they go, but unfinished parts of the same thing. Until the last account is filed, the work is incomplete. The future accounts, if filed in the Circuit Court, must start with the balances ascertained in the Common Pleas accounts, and must contain items similar to those

embraced in the former accounts. That court has considered these items, and entered decrees upon them. The Circuit Court may make a different decision on the same subject. This is the collision of decision which it is the policy of the law to prevent, and which the rule regulating cases of concurrent jurisdiction was intended to prevent.

In regard to the sixth and last proposition submitted, it will not be contended that this court has any power to terminate the proceedings in the Common Pleas. Other creditors have obtained rights which that court will not allow to be defeated. The statute of Pennsylvania directs attachment and imprisonment if the trustee refuses to file his account, and this court has no power to deliver him. The trustees in this case cannot remove the proceedings into the Federal court, because they are not defendants in the state court, as the Judiciary Act requires, and they are citizens of Pennsylvania, and not of another state. Whatever be the result of the present application, they will be obliged to continue to file their accounts in the state court. The practical consequences are easily foreseen. *They must give public notice to creditors to claim the same fund in two courts. A portion of the creditors will prove their debts in the Common Pleas, and the remainder in the Circuit Court. Some may claim in both places. A creditor excluded by one tribunal may apply to the other. The courts may readily differ in their views of the facts presented by the accounts, and the principles regulating them. One court may surcharge with one amount, and the other with a different amount. A dividend of fifteen per cent. may be declared in one court, and of twenty in the other. How are the trustees to pay? If payment be made, with what balance shall the succeeding account start? At whose expense will the litigation be conducted?

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If the prayer of the bill be granted, the complainant is not benefited; if refused, he is not injured. If he alleges an error, he may go into the Common Pleas, and move to open the accounts. This court will not have surrendered any power which it possesses. It will only have said, that, as the complainant stood by while the settlements were made, it is too late now to open them. The effect on the trustees of granting the prayer deserves attention. They are officers of the law, and are engaged in executing a public trust. Their office is difficult and responsible, and they are entitled to the highest protection the law can afford them. A protracted litigation must withdraw their time and attention from the execution of their trust, without an equivalent advantage.

Mr. Justice McLEAN delivered the opinion of the court.

This case comes before us from the Circuit Court of the Eastern District of Pennsylvania, on a certificate of a division of opinion between the judges.

The complainant, who is a citizen of Kentucky, filed his bill against John Bacon and others, assignees of the late Bank of the United States under the charter from the state of Pennsylvania. The bank, being in a failing condition, executed assignments of its assets for the benefit of its creditors, and of certain creditors of the Bank of the United States chartered by Congress.

The complainant represents himself to be a creditor of the late bank, to a large amount, which is shown by judgments recovered in the "District Court" for the city and county of Philadelphia; and in the Commercial Court of New Orleans. That, on application to the trustees aforesaid, they refused to pay the said judgments or any part of them, although they have funds in their hands or under their control, to pay the debts of the bank, &c.

*The defendants pleaded to the jurisdiction of the court. They admit the trust as alleged, and aver that [*68 the assignments were recorded as required by the acts of Pennsylvania; and they aver that the Court of Common Pleas of the city and county of Philadelphia has ample power to enforce the trust, in regard to the rights of all parties claiming an interest therein. That the defendants under those laws, at different periods down to the 1st of January, 1847, filed their accounts, duly verified, "of their receipts and disbursements, with the prothonotary of the said court," which were sanctioned by the court. That under its direction they have vested large sums of money to await the result of pending litigations. And they submit to the court whether they ought to be compelled to answer.

On the hearing the judges were opposed in opinion on the following points:—

1. Whether the facts stated in the plea to the amended bill filed by John Bacon, Alexander Symington, and Thomas Robins, deprive the court of jurisdiction of the case; and whether the plea to the plaintiff's bill is sufficient and ought to be allowed.

2. Whether the facts stated in the plea to the amended bill filed by the defendants James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, deprive the court of jurisdiction of the case, and whether the said plea is a sufficient plea to the plaintiff's bill, and ought to be allowed.

There is no principle better settled, than that, where two or more tribunals have a concurrent jurisdiction over the same subject-matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other. And the question we are now to consider is, whether the procedure in the Court of Common Pleas, above stated, under the special acts of Pennsylvania, abates the suit of the plaintiff.

Can the proceeding stated in the plea be considered a suit? The revised act of Pennsylvania, of the 14th of June, 1836, entitled, "An Act relating to assignees for the benefit of creditors and other trustees," requires in the first six sections the assignment to be recorded in thirty days, and the assignment being voluntary, "the assignees shall file an inventory or schedule of the estate or effects so assigned, which shall be sworn to;" on which it is made the duty of the court to appoint appraisers, who shall return an inventory and appraisement; on the return of which the assignees are required to give bond "to the Commonwealth, that they will in all things comply with the provisions of the act of Assembly, and shall faithfully execute the *trust confided to them" &c. The defendants aver, "that having in part executed the trust so as above committed to them, they did, on the 7th of January, 1843, file in the office of the prothonotary of the Court of Common Pleas aforesaid an account, duly verified, of their receipts and disbursements," &c. And several other and similar returns are averred to have been made.

*69]

By the seventh section of the act, the court are authorized, on the application of any person interested, to issue a citation to any assignee or trustee for the benefit of creditors, whether appointed by a voluntary assignment or in pursuance of the laws relating to insolvent debtors, &c., requiring him "to appear and exhibit, under oath or affirmation, the accounts of the trust in the said court," &c. The ninth section authorizes the court to give notice, by publication, when the accounts will be acted on, that objections to them may be made. And by the eleventh section, where a trustee has neglected or refused, when required by law, to file a true and complete inventory, or to give bond with surety, when so required by law, or to file the accounts of his trust, "it shall be lawful for the court" (of Common Pleas) "to issue a citation, &c., to show cause why he should not be dismissed."

Now it does not appear from the plea that the assignees ever filed the inventory of the assets in their hands with the prothonotary of the court, as required by the first section,

and it would seem that not only the inventory must be filed, where the assignment is voluntary, to give jurisdiction to the court, but also that it must be sworn to, an appraisement of the trust property made and returned, and bond given by the assignees. This is a proceeding under a statute, and to bring the case within the statute, every material requirement of the act must be complied with. And if the above requisites have not been observed, it is not perceived how the court could take jurisdiction of the case.

In the plea it is stated that accounts have been filed by the assignees at different times, and moneys distributed among the creditors. But how can this give jurisdiction? The court has no evidence of the extent and value of the trust, and no bond of the assignees faithfully to account. If these important steps have been taken, they should have been stated in the plea; as it must show, to be effectual, that the court had jurisdiction of the whole matter. The plea is defective in not setting out the above requirements.

But if the plea had been perfect in this respect, it would not follow that the complainant could not invoke the jurisdiction of the Circuit Court. He being a non-resident has his option *to bring his suit in that court, unless he has submitted, or is made a party, in some form, to the special jurisdiction of the Court of Common Pleas. [*70

It appears from the bill, that the assignees have refused to allow the claim of the plaintiff, or any part of it. To establish this claim as against the assignees, the complainant has a right to sue in the Circuit Court, which was established chiefly for the benefit of non-residents. Not that the claim should thus be established by any novel principle of law or equity, but that his rights might be investigated free from any supposed local prejudice or unconstitutional legislation. On the most liberal construction favorable to the exercise of the special jurisdiction, the rights of the plaintiff, in this respect, could not, against his consent, be drawn into it.

It is difficult to define the character of this procedure under the Pennsylvania law. There being no court of chancery in that state, statutory provision was made for the execution of trusts. The statutes adopt some of the principles of chancery, but do not invest the court with the powers of a court of equity which are necessarily exercised in administering trusts.

It is not strictly a proceeding *in rem*. The proceeding is intended to adjust the rights of debtors and creditors of the bank, beyond the jurisdiction of the state of Pennsylvania. Citizens residing, perhaps, in a majority of the states of the Union, are debtors or creditors of the bank. It is difficult to

perceive by what mode of procedure the state of Pennsylvania can obtain and exercise an exclusive jurisdiction over the rights of persons thus situated. From the plea, it does not appear that any notices have been given, or citations issued, as authorized by the statute. Nothing more seems to have been done by the assignees than to file their accounts, have them referred to auditors, and finally sanctioned by the court. Whether this procedure is evidence of a faithful discharge of the trust so far as the accounts have been so adjusted, it is not necessary to inquire. We suppose that it could not be contended, that fraud or collusion might not be shown to avoid the proceeding before any tribunal having jurisdiction.

No suit seems to be pending in the Common Pleas. The action of the assignees appears to be voluntary, for their own justification, and not in obedience to the order of the court. By the statute, any person interested may, on application to the court, obtain a citation to the assignees to appear and answer. But this is nothing more than the ordinary exercise of a chancery power to compel them to account. And it is only an exercise of jurisdiction over them from the time the bill is filed and a notice served, or the application for a cita-

*71] tion is made *on due notice. If no such proceeding is had, the assignees, it would appear, file their accounts or omit to do so at their pleasure.

This is not in the nature of a bankrupt or insolvent procedure. Neither the person nor the property of the assignor is entitled to exemption, under the statute, from the claims of creditors. But in such a proceeding, notice to the creditors and a schedule of debts, as well as assets, are required by law.

Under the laws of Pennsylvania a debtor may assign his property for the benefit of his creditors, giving a preference to some of them over others. This may be done by the common law. The assignment made by the late Bank of the United States specifies different classes of creditors, but none are excluded from the benefits of the assignment.

The assignees admit, in their plea, that they have vested a large amount of assets to await the determination of certain suits still pending. Suppose they had reduced to possession the whole amount of the assets of the bank, and held them ready for distribution; could it be doubted that the complainant would have a right to file his bill in the Circuit Court, not only to establish his claim against them, but also for a proportionate share of the assets? The Circuit Court could not enjoin the Court of Common Pleas, nor revise its proceedings, as on a writ of error; but it could act on the assignees, and enforce the rights of the plaintiff against them. The debts

due by the bank being ascertained, and the amount of its assets, after the payment of all costs, the equitable distribution would not be difficult.

Not doubting that the complainant may file his bill in the Circuit Court for the purposes stated, against the defendants, we deem it unnecessary at this time to consider questions which may arise in the exercise of the jurisdiction. The questions certified by the Circuit Court are both answered in the negative.

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 Pennsylvania, 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 facts stated in the amended plea to the amended bill filed by John Bacon, Alexander Symington, and Thomas Robins, do not deprive *the said Circuit Court of jurisdiction of this case; 2d. That the facts stated in the plea to the amended bill filed by the defendants James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, do not deprive the said Circuit Court of jurisdiction of this case;—and that this opinion renders it unnecessary for this court to answer the remainder of the questions certified. Whereupon it is now here ordered and adjudged by this court, that it be so certified to the said Circuit Court. [*72

JOHN MCNULTY, PLAINTIFF IN ERROR, *v.* JOHN BATTY, ROBERT SHAW, DANIEL WANN, AND THOMAS C. LEGATE.

Where a case had been brought up to this court from the Supreme Court of the territory of Wisconsin, and was pending in this court at the time when Wisconsin was admitted as a state, the jurisdiction of this court over it ceased when such admission took place.

Provision was made in the act of Congress for the transfer, from the territorial courts to the District Court of the United States, of all cases appropriate to the jurisdiction of the new District Court; but none for cases appropriate to the jurisdiction of state tribunals.

By the admission of Wisconsin as a state, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in this court.

The act of Congress passed in February, 1848, supplementary to that of February, 1847, applies only to cases which were pending in the territorial courts, and does not include such as were pending in this court at the time of the admission of Wisconsin as a state.

Even if Congress had directed the transfer, to the District Court of the United States, of cases appropriate to the jurisdiction of state courts, this court could not have carried its judgment into effect by a mandate to the District Court.

THE facts in this case are stated in the opinion of the court. It was submitted on printed arguments by *Mr. May*, for the plaintiff in error, and *Mr. Carlisle*, for the defendants in error.

Mr. May's argument was as follows:

This case comes here by writ of error to the Supreme Court of Wisconsin Territory.

In the District Court of Iowa County, on the 3d of November, 1845, the plaintiff in error sued out his writ of attachment, in an action of debt against the defendants in error, founded on his affidavit (according to the law and practice of that territory).

The sheriff seized certain goods and chattels of one of the defendants, to wit, Legate, which, on motion, were ordered by the court to be sold.

The defendants, at the next term of said court, on the 4th of *March, 1846, appeared by their counsel, and moved for a rule on plaintiff to file his declaration within three days, which was denied.

*73]

At the next term of the court, the plaintiff, by leave of the court, filed his declaration, containing three counts. The first upon a judgment against the defendants, recovered in the state of Illinois. The second on a bill of exchange, drawn by one of the defendants and accepted by the others. The third upon an account for goods, wares, and merchandise.

The defendants moved the court to strike out all the said counts except the first, on account of a variance, because the action was founded on the affidavit, which stated the judgment alone as the cause of action, which motion was granted; whereupon the defendants pleaded, and after several pleas, replications, and demurrers, issue was joined by agreement of the parties, and the cause tried by the court.

The plaintiff read a record of a judgment of the Circuit Court of Illinois.

The defendants then offered to read the record of the same case in the Supreme Court of Illinois (which showed a reversal of the judgment of the Circuit Court). The plaintiff objected to the offering of this record, because it was not

properly authenticated, but the court overruled his objection, and he excepted.

Judgment was rendered for the defendants, by the District Judge.

Plaintiff moved for a new trial, and filed his reasons, which was denied.

The case was carried by writ of error to the Supreme Court of Wisconsin territory, where the judgment of the District Court was affirmed.

The plaintiff in error will contend here, that the judgment of the said Supreme Court ought to be reversed, because,—

First, the District Court erred in striking out the counts of the declaration as aforesaid, after defendants had appeared to the action. Statutes of Wisconsin concerning Attachments, § 7. *Rowen* v. *Taylor*, Wisconsin Reports, July term, 1842. He ought to have pleaded in abatement. *McKenna* v. *Fisk*, 1 How., 241; 11 Wheat., 280.

Second, the record of the said Supreme Court of Illinois was not duly authenticated, so as to be used as evidence in said suit, and ought not to have been received.

The certificate of Samuel H. Treat does not certify that the attestation of the clerk "is in due form," and styles him clerk of "the State of Illinois."

It appears also, on the face of the certificate, that the judge *was "an associate justice," while the same record discloses that there was a "chief justice" of said court. [*74
1 Stat. at L., 122 (Act of May 26, 1790). 2 Stat. at L., 298.

Mr. Carlisle's argument was as follows.

The defendants in error were also defendants below. The action was commenced by attachment, in the District Court of Iowa County, Territory of Wisconsin. The affidavit of the plaintiff, dated 3d November, 1845, sets forth a debt "arising out of, and based and founded upon, a judgment at law," obtained three days before (31st October, 1845), in a county court of the state of Illinois. Pending the attachment, and before the plaintiff had declared, to wit, at the December term, 1845, of the Supreme Court of Illinois, the judgment upon which the attachment was founded was reversed. And this reversal having been pleaded and given in evidence on the trial of the attachment, in Wisconsin, the judgment was for the defendants.

The plaintiff carried the case, by writ of error, to the Supreme Court of the Territory of Wisconsin, where the judgment below was affirmed; and thence the case is brought to this court by writ of error.

The defendants in error will contend that there is no error in either of the points assigned.

1. As to the order to strike out the second and third counts in the plaintiff's declaration, it was addressed to the discretion of the court, and is not subject to be assigned for error. 1 Tidd, 559.

It was not excepted to in the court below.

But if the order can be reviewed here, it was well founded. The proceeding by attachment is regulated by the act of 1838–39. (Stat. of Wisconsin, p. 165, § 7.) The affidavit must specify the cause of action, which must be "arising out of, founded upon, or sounding in contract, or upon the judgment or decree of some court of law or chancery." Accordingly, the affidavit set forth the cause of action as "arising out of, and based and founded upon, a judgment at law," specifying the same. The attachment recites the same, specially and alone. The first count in the declaration is upon this judgment. But the judgment having been reversed in January, 1846, and the plaintiff in the attachment not declaring till October following, two other counts are added to that upon the judgment; viz, a count upon an instrument described as a bill of exchange, being the same which was merged in and extinguished by the judgment set forth in the first count, and a count for goods sold and delivered, which were the consideration for that "bill of exchange."

*75] *The second and third counts were therefore merely frivolous and vexatious, and intended to evade the effect of the reversal of the judgment. And the court properly ordered them to be stricken out.

The second and third counts, if material, could only be so because they were variant from the first count, and consequently variant from the affidavit and the attachment.

2. As to the special demurrer to the defendant's second plea, the plea itself was immaterial. The first plea was *nul tiel record*, and put in issue the existence of the record set forth in the first count; and at the time of that plea pleaded there "was no such record remaining in full force and effect," &c., but the same had been reversed and annulled before the plaintiff filed his declaration. The record of such reversal was admissible in evidence upon the issue joined on that plea. From the time of the reversal "it is no such record *ab initio*," *Green* v. *Watts*, 1 Ld. Raym., 274; *Knight's case*, 1 Salk., 329; S. C., 2 Ld. Raym., 1014.

It would appear that the demurrer should have been sustained. But the effect would have been simply an amendment. The plaintiff has not been prejudiced. He could not

have recovered. Under such circumstances judgment will not be reversed.

But the plaintiff obtained leave to withdraw his demurrer, and put in a replication. He thereby waived his demurrer, and it cannot be revived here. *Craig* v. *Blow*, 3 Stew. (Ala.), 448; *Peck* v. *Boggis*, 1 Scam. (Ill.), 281; *United States* v. *Boyd*, 5 How., 29.

3. As to the objection to the admissibility of the record of the Supreme Court of Illinois, it was not specified at the trial. The precise objection was not disclosed till errors were assigned on the writ of error. This court will not now entertain it. *Cambden* v. *Doremus*, 3 How., 515.

But the objection itself was not well founded. Although the record was not authenticated according to the act of Congress, so as to have effect independently of the local law, yet it was authenticated in such manner and form as to be admissible in evidence in the courts of Wisconsin by virtue of the act of the legislature of that territory. Statutes of Wisconsin, p. 246; Act concerning Testimony, &c., § 51.

If the points assigned as error shall not have been sufficiently answered above, to the satisfaction of the court, the counsel for the defendants in error further suggests to the court the following objection to the jurisdiction.

Two acts of Congress were passed for the admission of Wisconsin into the Union, viz., Act 3d March, 1847 (9 Stat. at L., 178); and Act 29th May, 1848 (Id., 233). *The first act prescribed a condition, upon compliance with [*76 which, and upon the annunciation of such compliance by the President's proclamation, the admission was to take effect. It does not appear that this condition was complied with; and it is supposed that the admission took effect exclusively under the second act, and that its date is the 29th of May, 1848.

The acts of Congress regulating the appellate jurisdiction of this court, and supposed to confer jurisdiction in this case, are 1847, ch. 17, and 1848, ch. 12 (9 Stat. at L., 128 and 211).

It is the second section of the act of 1848, ch. 12, which contains the general provision as to states thereafter to be admitted into the Union. It makes the provisions of the act of 1847, ch. 17, applicable, "so far as may be," to cases which may be pending in the Supreme Court of any territory at the time of its admission, and to cases in which judgments shall have been rendered in such Supreme Court at the time of admission, and not previously removed by writ of error or appeal.

The date of the admission is 29th May, 1848. The date of

the judgment in the Supreme Court of the territory is 31st July, 1847. The citation upon this writ of error was served 4th December, 1847. The record was filed here 29th February, 1848. This case, therefore, was not "pending in the Supreme Court of the territory" at the time of admission, nor was it a case in which judgment had been rendered there, "and not previously removed by writ of error."

But if it were in either of these categories, the provisions of the act of 1847 do not apply, and cannot "be made applicable." That act gave jurisdiction only in cases where the proceedings below were transferred to the Federal court, to which this court was authorized to send its mandate; and not in cases "legally transferred to the state courts."

The appellate jurisdiction of this court was not intended to be reserved except in cases of "Federal character and jurisdiction." Act 22d February, 1848, § 3.

The sixth section of the act for the admission of Wisconsin provides only for the transfer to the Federal court of the records of judgments, &c., "in cases arising under the Constitution and laws of the United States," which is equivalent language to "cases of Federal character and jurisdiction."

The judgment below is "legally transferred to the state court." It is now a judgment in the Supreme Court of the state of Wisconsin. The record shows that it is not a case of Federal character and jurisdiction. But in such a case only can the mandate of this court go to the state court. (*Martin* v. *Hunter*, 1 Wheat.) And in such cases only do the acts in question provide for the operation of the mandate by transferring the records *below from the territorial to the
*77] District Courts.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the late Territory of Wisconsin. The suit was commenced by a writ of attachment in the first judicial district of that territory, on the 3d of November, 1845, founded upon a judgment for $2747.49 previously obtained against the defendants in a Circuit Court in the state of Illinois. A large amount of property was attached belonging to one of the defendants.

All the defendants appeared by attorney, and put in two special pleas to the declaration, upon which issues were joined; and such proceedings were afterwards had thereon, that at the October term, 1841, judgment was rendered in the said suit for the defendants. The cause was then removed to the Supreme Court of the territory on error; and at the July term of that court, to wit, on the 31st of July, 1847, the judg-

ment below was in all things affirmed. This judgment has been appealed from to this court, and is now before us for review. The citation is signed the 20th of November, 1847.

The case has been submitted by counsel on written arguments under the fortieth and fifty-sixth rules of the court.

The first question presented is, whether or not this court has jurisdiction to review the judgment below.

The Territory of Wisconsin was admitted into the Union as a state, on the 29th of May, 1848. (9 Stat. at L., 233.)

An act had been previously passed, on the 2d of March, 1847, assenting to the admission on certain terms and conditions to be first complied with; and providing that upon a compliance with them, and on the proclamation of the President announcing the fact, the admission should be considered complete. The admission did not take place under this act, and no proclamation was issued by the President in pursuance of it.

The people of the territory again assembled, by a convention of delegates, and formed their constitution, on the 1st of February, 1848, as is recited in the preamble of the act of Congress, passed 29th May, 1848, by the first section of which the state is declared to be admitted into the Union on an equal footing with the original states. The date of the admission, therefore, is the 29th of May, 1848.

The writ of error having been issued on the 20th of November, 1847, was, therefore, regularly issued during the existence of the territorial government, and the case was pending in this court at the time when that government ceased, and with it *the jurisdiction and power of the territorial courts. [*78
(*Benner* v. *Porter*, 9 How., 235.)

The fourth section of the act of Congress admitting the state into the Union organized a District Court of the United States for the state (see also § 4 of the Act of 6th August, 1846, 9 Stat. at L., 57), and the 5th section provided, that the clerks of the District Courts of the territory should transmit to the clerk of the above District Court "all records of all unsatisfied judgments, and suits pending in said courts, respectively, attaching thereto all papers connected therewith, in all cases arising under the laws or Constitution of the United States, or to which the United States shall be a party;" and the said District Court shall enter the same on its docket, and shall proceed therein to final judgment and execution, as if such suits or proceedings had originally been brought in said court.

The sixth section provides for the delivery by the clerk of the Supreme Court of the territory to the clerk of the Dis-

trict Court, of all records and papers relating to proceedings in bankruptcy under the late bankrupt act; and also all records of judgments, and of proceedings in suits pending, and all papers connected therewith, in cases arising under the Constitution and laws of the United States.

These sections provide for the Federal cases pending in the courts at the termination of the territorial government, and for unsatisfied judgments of that character, by transferring them to the Federal court, there to be proceeded in and completed, or executed. But no provision is made for the class of cases pending, and unfinished, that belong to the state judicature after the admission of the territory into the Union. That class seems to have been left to be provided for by the state authorities. We had occasion to express our views on this subject in the recent case of *Benner* v. *Porter*, and need not repeat them.

The case before us is one of this character; and is, therefore, unaffected by the transfer of cases to the District Court above provided for. And the question is, whether, under these circumstances, this court has jurisdiction to review it.

By the admission of the state of Wisconsin into the Union, on the 29th of May, 1848, the Territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of their judgments in this court by appeals or writs of error. This appellate power does not depend upon the Judiciary Act of 1789, but upon laws regulating the judicial proceedings of
*79] *the Territory. And these necessarily ceased with the termination of the territorial government.

In the case of the *United States* v. *Boisdore's Heirs* (8 How., 121), it is said, that, as this court can exercise no appellate power over cases, unless conferred upon it by act of Congress, if the act conferring the jurisdiction has expired, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act.

The cases on this point are referred to in the brief in that case, and afford full authority for the principle, if any were needed. (1 Hill (N. Y.), 328; 9 Barn. & C., 750; 3 Burr., 1456; 4 Moo. & P., 341.)

The writ of error, therefore, fell with the abrogation of the statute upon which it was founded.

Besides, since the termination of the territorial government, there is no court in existence to which the mandate of this court could be sent to carry into effect our judgment. Our power, therefore, would be incomplete and ineffectual, were we to consent to a review of the case. (*Palao* v. *Hunt*,

4 How., 589.) And, had the records been transferred to the District Court, as in the Federal cases, we do not see but that the result must have been the same; for the case being one not of Federal jurisdiction, should the judgment be affirmed or reversed, and sent down to that court, it would possess no power to carry the mandate into execution, having no power over the case under the Constitution or laws of Congress conferring jurisdiction upon the Federal courts. (Art. 3, § 2, Const. U. S.; Judiciary Act of 1789, § 11.)

There is another act of Congress bearing upon this question which it is material to notice; and that is, an act supplementary to the act entitled "An Act to regulate the exercise of the appellate jurisdiction of the Supreme Court in certain cases, and for other purposes," passed the 22d of February, 1848, ch. 12 (9 Stat. at L., 211).

The second section provides, "that all and singular the provisions of the said act to which this is a supplement, so far as may be, shall be, and they hereby are, made applicable to all cases which may be pending in the Supreme or other Superior Court of and for any territory of the United States, which may hereafter be admitted as a state into the Union, at the time of its admission; and to all cases in which judgments or decrees shall have been rendered in such Supreme or Superior Court at the time of such admission, and not previously removed by writ of error or appeal."

The act to which the above is a supplement was passed *22d February, 1847, ch. 17, (9 Stat. at L., 128,) and its several provisions related to cases pending, and [*80 unsatisfied judgments existing in the courts of the territory of Florida at the time of its admission into the Union as a state, and which were the subject of examination in the case of *Benner* v. *Porter*, already referred to.

As the territory of Wisconsin has been admitted into the Union as a state since the passage of this supplementary act, the second section applies the provisions of the Florida act to the cases pending in its courts, and to the judgments existing therein at the time of its admission.

But it will not be material to refer particularly to those provisions, as this second section does not bring the case before us within them. It applies them to all cases pending in the several courts of the territory; and to all cases in which judgments or decrees shall have been rendered at the time of the admission, and not previously removed by writ of error or appeal to this court. In this case the judgment had been rendered and removed before the admission, and was

pending here at the time; and is, therefore, unaffected by this supplementary act.

The section was drawn, doubtless, under the supposition that, if the suit was pending here, at the time of the admission of a territory into the Union as a state, on appeal or writ of error, no legislation was necessary to preserve or give effect to the jurisdiction of the court over it; an opinion, as we have seen, founded in error.

In placing the want of jurisdiction, however, upon this ground, we must not be understood as admitting, that, if the provisions of the Florida act of the 22d of February, 1847, applied to the case, the jurisdiction could be upheld. For, if we are right in the conclusion, that, even assuming the record in the case had been transferred from the territorial to the District Court of the state, our jurisdiction would still be incomplete and ineffectual, inasmuch as that court possessed no power to carry the mandate into execution, the case not being one of Federal jurisdiction, the result would be the same as that at which we have arrived.

In every view, therefore, we have been able to take of the case, we are satisfied, that our jurisdiction over it ceased with the termination of the territorial government and laws; and that it has not been revived or preserved, if, indeed, it could have been, by any act or authority of Congress on the subject, and that the writ of error must be abated.

Order.

This cause came on to be heard on the transcript of the
*81] record *from the Supreme Court of the territory of Wisconsin, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that this writ of error be, and the same is hereby, abated.

Mr. WALKER, of counsel for the defendants in error, moved the court to direct the clerk to what court the mandate, or other process prescribed by the forty-third rule of court, should be addressed. On consideration whereof, it is now here ordered by the court, that the clerk do not issue any mandate or other process in this case, but only a certified copy of the judgment this day rendered in this cause.

SYLVESTER B. PRESTON, WILLIAM KENDALL, WILLIAM NICHOLS, AND WILLIAM T. PHILLIPS, PLAINTIFFS IN ERROR, *v.* CHARLES BRACKEN.

This case was decided on the same ground as the preceding case of *McNulty* v. *Batty* and others.

THIS was a writ of error to the Supreme Court of the late Territory of Wisconsin.

An action of ejectment was commenced at the April term, 1845, of the Iowa County Court, by the defendant in error, against the plaintiffs in error, to recover a lot of land situate in that county. The venue was afterwards changed to the county of Milwaukie. Issue having been joined, and a jury impanelled and sworn, a verdict was found for the plaintiff, upon which a judgment was entered.

On the 19th of July, 1847, the case was carried by writ of error to the Supreme Court of Wisconsin Territory, and on the 2d day of August, the judgment of the County Court was affirmed by a divided court.

Whereupon a writ of error to the Supreme Court of the Territory of Wisconsin was sued out of this court, and the citation served on the 24th of November, 1847.

Wisconsin was admitted into the Union as a state by the act of Congress approved 29th May, 1848.

The cause was submitted on printed arguments by *Mr. May*, for the plaintiffs in error, and *Mr. Walker*, for the defendant in error. As the case was determined upon the point of jurisdiction, and as the argument for the plaintiffs in error was upon the merits, and as the argument for the defendant in error on the question of jurisdiction, assumed substantially the same ground as was taken by the counsel for the defendant in error in the case of *McNulty* v. *Batty*, *et al.*, *ante*, p. 72, the arguments are not here inserted.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Supreme Court of the late Territory of Wisconsin.

The suit was an action of ejectment brought by the plaintiff *below, the defendant in error, in the second; and removed to the third judicial district of the territory, to [*82 recover possession of a small piece of land; and was commenced on the 15th of April, 1845.

Issue being joined between the parties, such proceedings

were had thereon, that judgment was afterwards rendered against the defendants in the June term of said court in the year 1846.

The case was afterwards removed to the Supreme Court of the territory, and the judgment of the court below affirmed by a divided opinion at the July term of that court, to wit, on the 2d of August, 1847.

The judgment was afterwards removed to this court by a writ of error for review. The citation is signed 22d November, 1847.

The case was, therefore, pending here on the 29th of May, 1848, at the time of the admission of the territory into the Union as a state. It is one not of a Federal character, but belonging to the state judicature, and therefore falls within the decision of the case of *McNulty* v. *Batty* and others, just made, and the writ of error must be abated.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the Territory of Wisconsin, 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, abated.

MR. WALKER, of counsel for the defendant in error, moved the court to direct the clerk to what court the mandate, or other process prescribed by the forty-third rule of court, should be addressed. On consideration whereof, it is now here ordered by the court, that the clerk do not issue any mandate or other process in this case, but only a certified copy of the judgment this day rendered in this cause.

JACOB STRADER, JAMES GORMAN, AND JOHN ARMSTRONG, PLAINTIFFS IN ERROR, *v.* CHRISTOPHER GRAHAM.

Under the 25th section of the Judiciary Act, this court has no jurisdiction over the following questions, viz., "Whether slaves who had been permitted by their master to pass occasionally from Kentucky into Ohio acquired thereby a right to freedom after their return to Kentucky?" The laws of Kentucky alone could decide upon the domestic and social condition of the persons domiciled within its territory, except so far as the powers of the states in this respect are restrained or duties and obligations imposed upon them by the Constitution of the United States.[1]

[1] FOLLOWED. *Dred Scott* v. *Sandford*, 19 How., 452 (but see Id., 462); *Van Fossen* v. *State*, 37 Ohio St., 320. CITED. *East Hartford* v. *Hartford Bridge Co.*, 10 How., 539.

There is nothing in the Constitution of the United States that can in any degree control the law of Kentucky upon this subject.

The Ordinance of 1787 cannot confer jurisdiction upon this court. It was itself superseded by the adoption of the Constitution of the United States, which placed all the states of the Union upon a perfect equality, which they would not be if the Ordinance continued to be in force after its adoption.[2]

Such of the provisions of the Ordinance as are yet in force owed their validity to *acts of Congress passed under the present Constitution, during the territorial government of the Northwest Territory, and since to the constitutions and laws of the states formed in it.[3] [*83

In error to the Court of Appeals for the state of Kentucky.

The defendant in error, who was a citizen of Kentucky, filed his bill in the Louisville Chancery Court, against Jacob Strader and James Gorman, who were citizens of Ohio, and owners of the steamboat Pike, which plied between Louisville, Kentucky, and Cincinnati, Ohio, and John Armstrong, who was the captain of said steamboat.

The bill alleged that the complainant was the owner of three negro slaves, George, Henry, and Reuben, of the value of about fifteen hundred dollars each, who had left his residence at Harrodsburg, Kentucky, and made their way to Louisville, whence they were taken on board of said steamboat Pike, and carried to Cincinnati, from which place they escaped to Canada, and were lost to their owner. Complainant averred that he had a lien on said boat by reason of the asportation of said slaves, for the damages he had sustained, and prayed an attachment and sale of said boat, and general relief.

An attachment was ordered and served, but the boat was relieved upon bond being given to perform all orders of the court, or to have the boat forthcoming.

Two of the defendants in the court below (Strader and Gorman), in their answer, stated that they were not on board the boat at the time of the alleged transportation, had no knowledge of such transportation, and they therefore denied it. They alleged that the boat was under the command of the defendant Armstrong, her captain, and that the negroes in question had been permitted by the complainant to travel out of the Commonwealth as if free; and in an amended answer, they averred that, long before the alleged transportation, the said negroes had actually become free. The answer of Armstrong was substantially to the same effect. There were various proceedings had in the state courts, the case having been twice carried to the Court of Appeals, when

[2] CITED. *Huse* v. *Glover*, 15 Fed. Rep., 297.

[3] CITED. *Escanaba Co.* v. *Chicago*, 17 Otto, 689.

Graham finally succeeded in obtaining a decree in the Louisville Chancery Court for $3.000 damages, to be paid before a day named, or the boat, her furniture, tackle, &c., to be sold if forthcoming, and if not forthcoming, the court to make the necessary order against the obligors, in said forthcoming bond; which decree was affirmed by the Court of Appeals. To reverse the decree of affirmance, this writ of error was sued out.

By the statute of Kentucky approved 7th January, 1824, any master or commander of a steamboat or other vessel, who shall hire or employ, or take as passengers on board of such *84] *steamboat or other vessel, or suffer it to be done, or otherwise take out of the limits of the Commonwealth, any slave or slaves, without permission of the master of such slave or slaves, shall be liable to damages to the party aggrieved by such removal; and the steamboat or other vessel on board of which such offence was committed shall be liable, and may be proceeded against in chancery, and may be condemned and sold to pay such damages and costs of suit.

The amended act, approved 12th February, 1828, extends the remedies given by the former act, so as to embrace the owners, mate, clerk, pilot, and engineer, as well as the master, and they are declared to be liable to the action of the party aggrieved, "either jointly with the masters, or severally, and either at law or in chancery."

It appeared in evidence, that the negroes were the slaves of Graham, and that they were musicians; that, for their improvement in music two of them were placed under the care of one Williams, who was a skilful performer and leader of a band, and were permitted to go with him to Louisville, and other places, and play with him at public entertainments. The following permit was filed as an exhibit, and proved.

"*Harrodsburg, August 30th*, 1837.

"This is to give liberty to my boys, Henry and Reuben, to go to Louisville, with Williams, and to play with him till I may wish to call them home. Should Williams find it his interest to take them to Cincinnati, New Albany, or any part of the South, even so far as New Orleans, he is at liberty to do so. I receive no compensation for their services, except that he is to board and clothe them.

"My object is to have them well trained in music. They are young, one 17 and the other 19 years of age. They are both of good disposition and strictly honest, and such is my confidence in them, that I have no fear that they will ever [act] knowingly wrong, or put me to trouble. They are

slaves for life, and I paid for them an unusual sum; they have been faithful, hard-working servants, and I have no fear but that they will always be true to their duty, no matter in what situation they may be placed. C. GRAHAM, M. D.

P. S. Should they not attend properly to their music, or disobey Williams, he is not only at liberty, but requested, to bring them directly home. C. GRAHAM."

Under this permission, Williams, in the year 1837, made several excursions with his band, including the slaves Reuben and Henry, to Cincinnati, Ohio, and New Albany and Madison, *Indiana, for the purpose of playing at balls or public entertainments; after which he returned to [*85 Louisville, his place of residence, said slaves returning with him; from which time to the time of their escape in 1841, they had remained within the state of Kentucky.

The case was argued by *Mr. Jones*, for the plaintiffs in error, and *Mr. Crittenden*, Attorney-General, for the defendants in error.

Mr. Jones, for the plaintiffs in error.

The owner of the slaves in question placed them under the care of a person to learn music, who carried them out of the state of Kentucky into an adjoining free state to play at balls and parties for hire. As soon, then, as they touched the soil of Indiana or Ohio, with the consent of their master, the quality of freedom attached to their persons, and could never afterwards be dissociated from them; and it made no difference whether they went permanently, or as mere temporary sojourners. There was no distinction, either in reason or in law, to be drawn from the mere duration of commorancy, if the removal to a free state was voluntary on the part of the slave and with the permission of the master. The Ordinance of 1787 declares that neither slavery nor involuntary servitude shall exist in the Northwest territory. The laws of Ohio and Indiana only reiterate the provisions of that Ordinance. The instant, therefore, the slave came within the boundaries of such states, the laws of those states took effect upon his condition, and *eo instanti* he became clothed with every attribute of freedom.

Mr. Jones concluded the opening argument by reading from the brief of *Mr. Duncan*, filed in the case, as follows:—

The Ordinance of 1787 was made after Somerset's case, and after several of our states had passed laws, whose object was to put an end to slavery within their jurisdictions, by opera-

ting on the *post nati*. It has been claimed to be a solemn compact, as well as an ordinance. Its provisions are as broad and comprehensive as they could be made, inhibiting slavery and involuntary servitude, except for crime, within the Northwest Territory.

That the courts of Kentucky are bound to take notice of this Ordinance, and to know judicially that slavery is forbidden in this Northwest Territory, are propositions long since settled by the Appellate Court of Kentucky. See *Rankin* v. *Lydia*, 2 A. K. Marsh. (Ky.), 467.

When Ohio and Indiana were permitted to make their constitutions, and were admitted into the Union by acts of Congress, the courts of Kentucky were still bound to know, judicially, *that slavery was prohibited there by the fundamental law of each of those states. It will not be forgotten, that all this territory and Kentucky were component parts of Virginia when the Ordinance was made.

*86]

By force of the Ordinance and of the Constitution of the United States, and the acts of Congress for the admission of Ohio and Indiana as states, those states stand as to the subject of slavery like England, excepting only the cases provided for by the Constitution of the United States, and fairly embraced within its provisions.

For national purposes, all of our states are governed by the same laws, and constitute one government; for other purposes, they are separate and independent sovereignties, with laws and institutions altogether different. 2 Pet., 590. And with respect to their municipal regulations the several states are to each other foreign. 2 Wash., 298. Slavery has been decided to be local, and to depend upon the local law. *Somerset's case*, State Trials; 1 Lofft, 1; 3 A. K. Marsh. (Ky.), 470–472; 3 Bos. & P., 69; 2 Barn. & C., 448; 2 Mart. (La.), N. S., 403.

In the case last cited, *Lunsford* v. *Coquillon*, the Supreme Court of Louisiana decided, that by removing a slave to Ohio that slave became instantly free by operation of law, and being once free there, the slave was free everywhere. The case of *Rankin* v. *Lydia*, above cited, maintains substantially the same propositions.

The case of *Elizabeth Thomas* v. *Generis*, *&c.*, 16 La., presented these facts. The slave was sent from Kentucky to Illinois, to be put under the charge of an eminent physician, during the absence of the owner. But this was done under circumstances to warrant the inference that the owner consented to the slave residing there. The Supreme Court of Louisiana on such facts say (p. 488)—"If the plaintiff resided

in Illinois with the express or implied consent, and with the knowledge and tacit authorization, of her former master, she was under no obligation to serve him there. The bond of slavery once dissolved cannot be renewed by a subsequent removal of a slave so circumstanced into a slaveholding state." 5 Leigh (Va.), 615; 10 Id., 697; 9 Gill & J. (Md.), 19.

In the case of *Louis* v. *Cabarrus*, 7 La., 172, the converse of the proposition was laid down in these words:—"The residence of a slave in Ohio contrary to the will or without the knowledge of his owner, does not deprive the owner of his property."

In *Frank* v. *Powell*, 11 La., 500, the court says,—"The owner must be presumed to consent to emancipation of a slave by his removal to Ohio."

*In *Smith* v. *Smith*, 13 La., 444, the court says the fact of a slave being taken to a country where slavery or involuntary servitude is not tolerated, operates on the condition of the slave, and produces immediate emancipation. [*87

In 4 Mart. (La.), 385, it said,—"The slave has no will, and cannot give consent to serve in a free state."

In 11 La., 501, it appeared that the plaintiff was brought or left in Ohio, by the person claiming to be owner, for the purpose of serving an innkeeper until $150 was received for his hire. It was there decided that the hiring of a slave for service in a free state operated on the freedom of the slave.

In 9 La., 474, the court decided, that where a slave was taken into a free state, even temporarily, for any other purpose than a mere passage through such country, such slave would become free, and that freedom once impressed was indelible.

The case of *Winney* v. *Whitesides*, 1 Mo., 334–336, formally settled the proposition that the United States had power to purchase the Northwest Territory. It treats the Ordinance as a compact ("assented to the articles of compact"), and as in full force (p. 335), and says (p. 336),—"The sovereign power of the United States has declared that neither slavery nor involuntary servitude shall exist there, and this court thinks that the person who takes his slave into said Territory, and by the length of his residence there indicates an intention of making that place his residence, and that of his slave, does by such residence declare his slave to have become a free man."

The case of *Lagrange* v. *Choteau*, 2 Mo., decides that any sort of residence, continued or permitted by the legal owner, to defeat or evade the Ordinance, and thereby introduce slavery *de facto*, would doubtless entitle a slave to freedom.

This case also says the Ordinance was intended as fundamental law.

The case of *Ralph* v. *Duncan*, 3 Mo., 140, says,—"The object of the Ordinance of 1787 was to prohibit the introduction of slaves into the territory, of which the present state of Illinois constitutes a part, and the master who permits his slave to go there to hire himself offends against that law as much as one who takes his slave along with himself to reside there, and if we are at liberty to regard the moral effect of the act, it is much more to permit the slave to go there to hire himself to labor, than for the master to take him along with himself to reside," &c. 3 Mart. (La.), N. S., 699.

In the case of *Julia* v. *McKinney*, 3 Mo., 196, the court said, —"Here was a hiring of a person bound to labor in Kentucky, *whilst in Kentucky, brought into Illinois (not to reside there, say if you will), and hired to labor for one or two days by the owner. What difference can it make if the hiring had been for one hundred days? We can see none, except in the degree or quantity of time."

*88]

The court is referred also to *Stewart* v. *Oakes*, 5 Harr. & J. (Md.), 107, *n.;* also to 3 Harr. & J. (Md.), 491, 493; 3 Mon. (Ky.), 104; 5 Litt. (Ky.), 285; 1 Gilm. (Va.), 143; and many other cases might be cited from the decisions of the courts of last resort in the states where slavery exists, to show that the principles contained in the cases cited are generally recognized.

In all these cases, it is believed the length of residence was considered immaterial. The fact that the slave was taken or permitted to reside, or hired, or sent to labor, where slavery was forbidden, determined the right to freedom.

The grand object and settled policy of the Ordinance would be evaded and defeated, if citizens of Ohio or Indiana could hire slaves in Virginia and Kentucky to cultivate their farms. If they could thus hire for a day, or a month, or a year, they could do so for any number of years. It would be no answer to say the master resided in a slave state, contracted in a slave state, and never intended to change the permanent residence of his slave.

The proposition is maintained, that if a master voluntarily hire his slave to a citizen of a non-slaveholding state, to perform service and labor in such non-slaveholding state, and if he in fact send the slave there for that purpose, the slave becomes free.

There is no principle of comity which requires any sovereignty to surrender the interest of its citizens, or its established laws, or its settled policy, in deference to or respect

for any foreign law. If the non-slaveholding states, out of comity, would allow citizens of slaveholding states to cultivate their soil with their slaves, they would soon be converted into slaveholding states. If the citizens of non-slaveholding states could themselves introduce slaves under contracts of hire, they would violate the settled policy of their state by bringing slave labor in competition with their poor. 16 Pet., 539, 2 McLean, 596.

When Connecticut passed her law to provide for the eradication of slavery, she began it with a preamble which declared in concise terms the reason and policy of the law to be, "that slavery is inconvenient and injurious to the poor."

The defendant in error, by express written authority, gave Williams authority to take the slaves to Indiana and to Ohio, to serve him, Williams, in those states. This was done upon a consideration which the master deemed adequate. Under *that express written authority of the master, they were so taken, again and again, to those states, to perform [*89 service for pay. Now this either did or did not make them free. If it did make them free, it was either by virtue of the Ordinance, or of the Constitution or laws of the United States admitting those states under that Ordinance with constitutions prohibiting slavery. The defence of Strader, &c., turned on the giving, or refusing to give, validity to the Ordinance or acts of Congress. A state court has decided against that defence,—and this is claimed to be one of the very cases in which jurisdiction is given to this court under the twenty-fifth section of the Judiciary Act. *Pollard* v. *Kibbe*, 14 Pet., 417.

Mr. Crittenden, contra. Much argument has been urged to show, that, in regard to the operation of the Ordinance of 1787 and the laws of Ohio and Indiana upon the condition of slaves brought into those states with the consent of their masters, there is no difference between a temporary and a permanent residence. But in this case there was no residence at all. It was only a transient visit to Madison for part of one night, and for a fleeting and temporary purpose. Williams's residence was in Louisville. There was no change of domicile, nor was there the most remote intention of such change. The slaves accompanied Williams in his short visit, and voluntarily returned with him to Kentucky; and it was not till some four years after their return to their master that they made their escape. A distinction is attempted between a temporary residence and a visit *in transitu*. There is no foundation for such a distinction. The only legal distinction

is that of domicile and transient residence, or stoppage *in itinere*.

But the important fact in this case is the voluntary return of the slave to his master. The question, then, is, What is the condition of the slave on his return, by the laws of Kentucky? not what was his condition by the laws of Indiana or Ohio, when within the limits of those states. This is a question purely of local law, to be decided by the local courts. The laws of Kentucky could alone determine the *status* or condition of persons residing within the state, and the courts of the state were the appropriate expounders of those laws. This court has, consequently, no jurisdiction to reverse or review the decision of the Court of Appeals in this case. It does not arise under any act of Congress. It does not arise even under the Ordinance of 1787. If the slaves had sued for their freedom, it might have been brought under the Ordinance. It is simply a case arising under the statute law of Kentucky. *Owens* v. *Norwood's Lessee*, 5 Cranch, 344.

*90] *What have the Supreme Court of Kentucky decided? They have decided that there was *no* residence, that there was a *temporary* visit for a *temporary* purpose; and that such a visit, followed by a voluntary return to their master, gave no title to freedom under the Ordinance of 1787. The Ordinance of 1787 declares that there shall be no involuntary servitude northwest of the Ohio. It says nothing of the effect of a mere temporary sojourn of a slave in that territory with the consent of his master, and a voluntary return to the state from which he came. The Ordinance was founded in wise counsels, for large purposes, and has been faithfully kept. It was not to catch up a wandering fiddler, as in this case, upon a mere visit for playing at a ball, that the Ordinance of 1787 was passed. It degrades the character of that Ordinance to suppose so. It would give to it the effect of creating a border warfare, instead of cultivating the courtesies and amenities of life.

If, however, that decree be examinable in this court, it will be further insisted,—

1st. That under the circumstances of this case, the transient excursion of the slaves in question to Cincinnati, for a temporary purpose, with intention to return, and within their actual obligations to the service of their master, conferred no right to freedom after such voluntary return, either under the Ordinance, or under the Constitution or laws of the United States.

Judge Story, in his Conflict of Laws, § 96, on the question of a voluntary return to slavery, considers the law to be that

the slave acquires no right to freedom. In the case of the *Commonwealth of Massachusetts* v. *Aves*, 18 Pick., 193, the court in Massachusetts decide that a slave who has been in a free state, but returns voluntarily to the state from which he came, returns to the condition in which he was when he left. He waives his right to freedom by his voluntary return. And so did Sir William Scott decide, in 2 Hagg. Adm., 94. And the court of Kentucky decide the same thing.

2d. That the plaintiffs in error have no right thus collaterally to make any defence or question as to the claims of those slaves to their freedom, claims which they themselves had apparently abandoned, and which they certainly never asserted. Their right, if any, was personal, and cannot be revived and brought into litigation, as attempted in this case by the plaintiffs in error.

I suppose it is very clear that the only question here is, whether this decision conflicts with the Ordinance of 1787. It may conflict with the law of Ohio, or Indiana, or the constitution of Ohio or Indiana; but that confers no jurisdiction on this court.

*If the doctrine maintained on the other side be established, the Ohio will be made like the fabled Styx, the river of death, which, if once crossed, can never be re-crossed. It will destroy that amenity of intercourse, that interchange of social courtesies, which now exist, and which do so much to preserve those kindly and fraternal feelings upon which the success of our institutions so much depends. He trusted in the wisdom of the court to arrive at such a decision as should be acquiesced in by all. [*91

Mr. Jones, in reply and conclusion.

The defence is, that these slaves having once had the indelible character of freedom stamped on them by a residence, sojourn, or commorancy within the territory over which the Ordinance of 1787 extended, it could never afterwards be obliterated.

The penalty or forfeiture is for transporting slaves, and it is a necessary prerequisite that the *status* of slavery should be established.

Suppose a slave emancippated, and I am indicted for dealing with him, a slave, can I not set up a defence that the condition of slavery did not exist under the Ordinance of 1787? And did not the court of Kentucky in this case decide upon the effect of the Ordinance of 1787?

It is agreed that this case arises under the laws of Kentucky. But Kentucky could not pass laws inconsistent with

the Ordinance. They cannot make a slave of one whom the Ordinance makes free. All that Kentucky has done has been to apply the penalty to the asportation of *slaves*. The question, then, is, Bond or free?

It is decided as to the condition of slavery in those states where it is not recognized, that there is no obligation under common law, in the national law, or the comity of nations, to recognize it where the slave is brought into such state voluntarily. Then, as to the permanence of the removal, all the authorities concur, that no matter how temporary the purpose, if the slave be brought or sent by the master for ever so short a time, once there, *eo instanti* he becomes free. Some state courts have distinguished between slaves temporarily employed and slaves *in transitu*.

This is illustrated by the acts of coterminous slave states. Maryland and Virginia were obliged to pass laws to prevent freedom from resulting from a temporary residence.

What is the difference between temporary and permanent residence? *Animus morandi* and *animus revertendi*.

The only true distinction is between domicile, on the one *92] *hand, and mere residence, whether for a short or for a long time, on the other. Various words have been applied to express the idea, such as *sojourning*, *commorancy*, *residence*, &c. Many persons pass their whole lives in a strange land. The Israelites sojourned in Egypt for four hundred years; yet it was not their home. It is true that in the case in 2 Martin, the slave was removed into Indiana for a permanent residence, and the court seemed to indicate a distinction between a permanent and temporary residence; but it was only incidentally laid down, and has been overruled in Louisiana since. In the case in 18 Pickering, the slave was a mere attendant *in itinere*, and the decision was, that even that conferred freedom. In fact, the states of Kentucky, Louisiana, and Missouri concur (with the exception of persons *in itinere*) with the courts of the Northern states as to the effect of residence. And the length of residence was immaterial. There are two cases in Louisiana where slaves were taken to France and brought back again, which entirely abolish all distinction between one sort of residence and another.

The case of the slave Grace has been referred to, where the right to freedom, which might have been asserted, was considered as waived by a return to the place of slavery. But does that construction of law as existing in England apply here? It is a monstrosity in morals and in law, that a man who has been made free by the operation of law can make

himself a slave. On the coming of the slave into the free state, by the mere force of the prohibition, his shackles fall from him. Are they ever to be restored? By what law? If he be free in Ohio and Indiana, how shall he be a slave elsewhere? What power of man is to redintegrate that condition? Nor is there any real distinction as to right of dominion and right of property. If the slave be made free, there can be no right of property in his service. Where is the law which makes a distinction between the right of property *quoad* the state, and an absolute divestiture of all right of property by operating on the *status* of slavery? It cannot be said that the slave is free, and yet that my right of property remains intact.

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

This case is brought here by writ of error directed to the Court of Appeals of the state of Kentucky.

The facts in the case, so far as they are material to the decision of this court, are briefly as follows: The defendant in error is a citizen of the state of Kentucky, and three negro men whom he claimed and held as his slaves were received on board the steamboat Pike, at Louisville, without his knowledge *or consent, and transported to Cincinnati; and from that place escaped to Canada, and were finally lost to him. [*93

The proceedings before us were instituted under a statute of Kentucky, in the Louisville Chancery Court, against the plaintiffs in error, to recover the value of the slaves which had thus escaped, and, in default of payment by them, to charge the boat itself with the damages sustained. Strader and Gorman were the owners of the boat, and Armstrong the master.

The plaintiffs in error, among other defences, insisted that the negroes claimed as slaves were free; averring that, some time before they were taken on board the steamboat, they had been sent, by the permission of the defendant in error, to the state of Ohio, to perform service as slaves; and that, in consequence thereof, they had acquired their freedom, and were free when received on board the boat.

It appears by the evidence, that these men were musicians, and had gone to Ohio, on one or more occasions, to perform at public entertainments; that they had been taken there for this purpose, with the permission of the defendant in error, by a man by the name of Williams, under whose care and direction he had for a time placed them; that they had always returned to Kentucky as soon as this brief service was over;

and for the two years preceding their escape, they had not left the state of Kentucky, and had remained there in the service of the defendant in error, as their lawful owner.

The Louisville Chancery Court finally decided, that the negroes in question were his slaves; and that he was entitled to recover $3,000 for his damages. And if that sum was not paid by a certain day specified in the decree, it directed that the steamboat should be sold for the purpose of raising it, together with the costs of suit. This decree was afterwards affirmed in the Court of Appeals of Kentucky, and the case is brought here by writ of error upon that judgment.

Much of the argument on the part of the plaintiffs in error has been offered for the purpose of showing that the judgment of the state court was erroneous in deciding that these negroes were slaves. And it is insisted that their previous employment in Ohio had made them free when they returned to Kentucky.

But this question is not before us. Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory; except in so far as the powers of the states in this respect are restrained, or duties and obligations imposed upon them, by the Constitution of the United States. There is nothing in the Constitution of the United States that can in any degree con-
*94] trol *the law of Kentucky upon this subject. And the condition of the negroes, therefore, as to freedom or slavery, after their return, depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio. It was exclusively in the power of Kentucky to determine for itself whether their employment in another state should or should not make them free on their return. The Court of Appeals have determined, that by the laws of the state they continued to be slaves. And their judgment upon this point is, upon this writ of error, conclusive upon this court, and we have no jurisdiction over it.

But it seems to be supposed in the argument, that the law of Ohio upon this subject has some peculiar force by virtue of the Ordinance of 1787, for the government of the Northwestern Territory, Ohio being one of the states carved out of it.

One of the articles of this Ordinance provides, that "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment for crimes whereof the party shall have been duly convicted: Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states,

such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." And this article is one of the six which the Ordinance declares shall be a compact between the original states and the people and states in the said territory, and for ever remain unalterable unless by common consent.

The argument assumes that the six articles which that Ordinance declares to be perpetual are still in force in the states since formed within the territory, and admitted into the Union.

If this proposition could be maintained, it would not alter the question. For the regulations of Congress, under the old Confederation or the present Constitution, for the government of a particular territory, could have no force beyond its limits. It certainly could not restrict the power of the states within their respective territories; nor in any manner interfere with their laws and institutions; nor give this court any control over them. The Ordinance in question, if still in force, could have no more operation than the laws of Ohio in the state of Kentucky, and could not influence the decision upon the rights of the master or the slaves in that state, nor give this court jurisdiction upon the subject.

But it has been settled by judicial decision in this court, that this Ordinance is not in force.

The case of *Permoli* v. *The First Municipality*, 3 How., 589, depended upon the same principles with the case before us. It *is true that the question in that case arose in Louisiana. But the act of Congress of April 7, 1798, [*95 chap. 28 (1 Stat. at L., 549), extended the Ordinance of 1787 to the then territory of Mississippi, with the exception of the anti-slavery clause; and declared that the people of that territory should be entitled to and enjoy all the rights, privileges, and advantages granted to the people of the territory northwest of the Ohio. And by the act of March 2, 1805, chap. 23 (2 Stat. at L., 322), it was enacted that the inhabitants of the then territory of Orleans should be entitled to and enjoy all the rights, privileges, and advantages secured by the Ordinance of 1787, and at that time enjoyed by the people of the Mississippi territory.

In the case above mentioned, Permoli claimed the protection of the clause in one of the six articles which provides for the freedom of religion, alleging that it had been violated by the First Municipality. And he brought the question before this court, upon the ground that it had jurisdiction under the Ordinance. But the court held that the Ordinance ceased to be in force when Louisiana became a state, and dismissed the

case for want of jurisdiction. This opinion is, indeed, confined to the territory in which the case arose. But it is evident that the Ordinance cannot be in force in the states formed in the northwestern territory, and at the same time not in force in the states formed in the southwestern territory, to which it was extended by the present government. For the ordinances and pledges of the Congress of the old Confederation cannot be more enduring and obligatory than those of the new government; nor can there be any reason for giving a different interpretation to the same words used in similar instruments, because the one is by the old Confederation and the other by the present government. And when it is decided that this Ordinance is not in force in Louisiana, it follows that it cannot be in force in Ohio.

But the whole question upon the Ordinance of 1787, and the acts of Congress extending it to other territory afterwards acquired, was carefully considered in *Pollard* v. *Hagan*, 3 How., 212. The subject is fully examined in the opinion pronounced in that case, with which we concur; and it is sufficient now to refer to the reasoning and principles by which that judgment is maintained, without entering again upon a full examination of the question.

Indeed, it is impossible to look at the six articles which are supposed, in the argument, to be still in force, without seeing at once that many of the provisions contained in them are inconsistent with the present Constitution. And if they could be regarded as yet in operation in the states formed within the *limits of the northwestern territory, it would place them in an inferior condition as compared with the other states, and subject their domestic institutions and municipal regulations to the constant supervision and control of this court. The Constitution was, in the language of the Ordinanace, "adopted by common consent," and the people of the territories must necessarily be regarded as parties to it, and bound by it, and entitled to its benefits, as well as the people of the then existing states. It became the supreme law throughout the United States. And so far as any obligations of good faith had been previously incurred by the Ordinance, they were faithfully carried into execution by the power and authority of the new government.

*96]

In fact, when the Constitution was adopted, the settlement of that vast territory was hardly begun; and the people who filled it, and formed the great and populous states that now cover it, became inhabitants of the territory after the Constitution was adopted; and migrated upon the faith that its protection and benefits would be extended to them, and that they

would in due time, according to its provisions and spirit, be admitted into the Union upon an equal footing with the old states. For the new government secured to them all the public rights of navigation and commerce which the Ordinance did or could provide for; and moreover extended to them when they should become states much greater power over their municipal regulations and domestic concerns than the Confederation had agreed to concede. The six articles, said to be perpetual as a compact, are not made a part of the new Constitution. They certainly are not superior and paramount to the Constitution, and cannot confer power and jurisdiction upon this court. The whole judicial authority of the courts of the United States is derived from the Constitution itself, and the laws made under it.

It is undoubtedly true, that most of the material provisions and principles of these six articles, not inconsistent with the Constitution of the United States, have been the established law within this territory ever since the Ordinance was passed; and hence the Ordinance itself is sometimes spoken of as still in force. But these provisions owed their legal validity and force, after the Constitution was adopted and while the territorial government continued, to the act of Congress of August 7, 1789, which adopted and continued the Ordinance of 1787, and carried its provisions into execution, with some modifications, which were necessary to adapt its form of government to the new Constitution. And in the states since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the *United States, and the constitutions and laws of the respective states, and not to the authority of the [*97
Ordinance of the old Confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in this court.

In every view of the subject, therefore, this court has no jurisdiction of the case, and the writ of error must on that ground be dismissed.

Mr. Justice McLEAN.

I agree that there is no jurisdiction in this case, and that it must be dismissed.

The plaintiffs obtained this writ of error to reverse a judgment of the Court of Appeals of Kentucky, which affirmed the judgment of the inferior court, in which Graham obtained a verdict and judgment against the defendants below for three thousand dollars, on the ground that three of the servants of

the plaintiff had been conveyed from Louisville, Kentucky, to Cincinnati, in the steamboat of defendants, by which means they escaped, and the plaintiff lost their services.

The defendants set up in their defence the Ordinance of 1787, for the government of the Northwestern Territory, which prohibited slavery in the sixth article of the compact, and which was declared "to be unalterable unless by common consent." The defendants alleged that, with the permission of Graham, the slaves had been permitted to visit Ohio and Indiana as musicians, by which they were entitled to their freedom; although they had returned voluntarily to their master, in Kentucky. And the right to their freedom was asserted under the Ordinance, which, it is insisted, brings the case within the twenty-fifth section of the Judiciary Act of 1789, and gives jurisdiction to this court.

The provision of the Ordinance in regard to slavery was incorporated into the constitution of Ohio, which received the sanction of Congress when the state was admitted into the Union. The constitution of the state, having thus received the consent of the original parties to the compact, must be considered, in regard to the prohibition of slavery, as substituted for the Ordinance, and consequently all questions of freedom must arise under the constitution, and not under the Ordinance.

This, in my judgment, decides the question of jurisdiction, which is the only question before us. And any thing that is said in the opinion of the court, in relation to the Ordinance, beyond this, is not in the case, and is, consequently, extra-judicial.

*98] *Mr. Justice CATRON.

The Ordinance of 1787 provides that the six articles contained in it shall be unalterable, and remain a compact between the original states and the people of the Northwestern Territory, "unless altered by common consent."

1. The sixth article declares, that slavery shall be prohibited. 2. And that absconding slaves there found shall be surrendered to their owners.

The constitution of Ohio incorporates the first part of the sixth article, but leaves out the second part. The state constitution having received the sanction of Congress, the alteration was made by common consent, as this was the mode of consent contemplated by the compact; that is to say, by the states in Congress assembled, whether under the Confederation or present Constitution. This being an "engagement entered into" before the adoption of the Constitution, was equally

binding on the one Congress as the other, according to the sixth article of the new Constitution; and the new Congress, equally with the former one, had power to consent to alterations. The power to alter necessarily involves the power to annul, or to suspend; and when the state constitution of Ohio was assented to by Congress, the article stood suspended, or abolished, as an engagement among the states, and can *now* only be recognized as part of the organic state law. And as this law is drawn in question here, no jurisdiction exists to examine the state decision.

But in regard to parts of the other five articles, I am unwilling to express any opinion, as no part of either is in any degree involved in this controversy.

The fourth article secured the free navigation of the waters leading into the rivers Mississippi and St. Lawrence, and the carrying-places between them, as common highways; and exempted them from tax, impost, or duty. The mouths of the two great rivers were in possession of foreign powers, and closed to our commerce, at the date of the Ordinance and Constitution; and therefore it was more necessary that the tributaries should be always open, and the carrying-places free, so that the Ohio and St. Lawrence could be reached from the great lakes, and back and forth either way. Some of these tributary rivers and the carrying-places, it was known, would fall into a single new state, as contemplated by the Ordinance. This is true of every carrying-place, and is equally true as respects most of the rivers leading to the carrying-places; and as Congress had only power given by the new Constitution "to regulate commerce among the states," it is a question now unsettled, whether such inland rivers and carrying-places *could be regulated, where the navigation and carrying-places began and ended in a single state. [*99

For thirty years, the state courts within the territory ceded by Virginia have held this part of the fourth article to be in force, and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative to the rights of others, in a case where the fourth article is in no wise involved, and when our opinion might be disregarded by the state courts as *obiter*, and a *dictum* uncalled for. When the question arises here on the fourth article, it is desired by me, that no such embarrassment should be imposed on this court as necessarily must be by now passing judgment on the force of the fourth article, and pronouncing that it stand superseded and annulled.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the state of Kentucky, 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 the want of jurisdiction.

JAMES G. WILSON, APPELLANT, *v.* GEORGE A. SANFORD AND ROBERT G. MUSGROVE.

The seventeenth section of the act of 1836 gives the right of appeal to this court, when the sum in dispute is below the value of two thousand dollars, "in all actions, suits, controversies on cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries," provided the court below shall deem it reasonable to allow the appeal.[1]

But a bill filed on the equity side of the Circuit Court to set aside an assignment, upon the ground that the assignee had not complied with the terms of the contract, is not one of these enumerated cases; and the value in dispute being less than two thousand dollars, this court has no jurisdiction over the case.[2]

THIS was an appeal from the Circuit Court of the United States for the District of Louisiana.

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[1] CITED. *Hay* v. *Railroad Co.*, 4 Hughes, 344. See *Magic Ruffle Co.* v. *Elm City Co.*, 2 Bann. & A., 157. See U. S. Rev. Stat., § 699.

[2] APPLIED. *Albright* v. *Teas*, 16 Otto, 617, 618; s. c. 13 Fed. Rep., 413. FOLLOWED. *Hartell* v. *Tilghman*, 9 Otto, 552 (but see Id., 558). RELIED ON. *Bloomer* v. *McQuewan*, 14 How., 550. REVIEWED. *Consolidated Fruit Jar Co.* v. *Whitney*, 2 Bann. & A., 32. See *White* v. *Lee*, 5 Id., 574.

Where a bill is filed to enforce the specific execution of a contract in relation to the use of a patent right, the Supreme Court has no appellate jurisdiction, unless the matter in controversy exceeds $2,000. The jurisdiction, where the bill is founded on a contract, differs materially from the jurisdiction on a bill to prevent the infringement of a monopoly of the patentee, or of those claiming under him by legal assignments, and to protect them in their rights to the exclusive use. *Brown* v. *Shannon*, 20 How., 55.

The rights given by the acts of February 18th, 1861, and July 20th, 1870, of appeal or writ of error without regard to the sum in controversy in questions arising under laws of the United States, granting or conferring to authors or inventors the exclusive right to their inventions or discoveries, applies to controversies between a patentee or author and an alleged infringer as well as to those between rival patentees. *Philip* v. *Nock*, 13 Wall., 185.

Where a judgment in a patent case was affirmed by the Supreme Court with a blank in the record for costs, and the Circuit Court afterwards taxed costs at a sum less than $2,000, and allowed a writ of error, this writ was dismissed on motion. The writ of error brings up only proceedings subsequent to the mandate, and there is no jurisdiction where the amount is less than $2,000, either under the general law or the discretion allowed by the patent law. The latter only relates to cases which involve the construction of the patent laws and the claims and rights of patentees under them. *Sizer* v. *Many*, 16 How., 98.

The appellant had filed his bill in the court below, setting forth a patent to William Woodworth, dated December 27th, 1828, for a planing machine; also an extension, in 1842, of said patent for seven years, granted to William W. Woodworth, administrator of the patentee; an assignment of all right and interest in said extended patent throughout the United States (except Vermont) to complainant, Wilson; and a license from Wilson to the defendants to use one machine upon payment *of $1400, as follows, viz., $250 in cash, and the remainder in nine, twelve, eighteen, and twenty-four months, for which promissory notes were given, dated 23d April, 1845, one for $150, and four for $250 each. [*100

The license was made an exhibit in the case, which, after setting forth the consideration of $1400 above mentioned, and the promissory notes for part thereof, contained the following provision:—"And if said notes, or either of them, be not punctually paid upon the maturity thereof, then all and singular the rights hereby granted are to revert to the said Wilson, who shall be reinvested in the same manner as if this license had not been made."

The first two of said notes were not paid when they fell due, payment having been demanded and refused before the filing of the bill. The bill further insisted, that the license was forfeited by the failure to pay the notes, and that the licensor was fully reinvested at law, and in equity, with all his original rights. That the defendants, nevertheless, were using the machine, and thus were infringing the patent. Prayer for an injunction, *pendente lite*, for an account of profits since the forfeiture of the license, for a perpetual injunction, for a reinvestiture of title in complainant, and for other and further relief.

The defendants demurred to the whole bill, and also (saving their demurrer) answered the whole bill. They admitted all the facts alleged; and averred, on their part, that the contract set forth in the bill had been modified and varied by a new contract, which the complainant had broken, and that the respondent, being in the lawful use of a planing-machine at the expiration of the patent, had the right to use such machine without license, and consequently that the notes were without consideration.

There was a general replication, and the cause was heard first on bill and demurrer, and afterwards (the demurrer having been overruled) on bill, answer, and replication. Whereupon the bill was dismissed, with costs, and an appeal to this court taken.

The cause was argued by *Mr. Seward*, for the appellant, no counsel appearing for the appellees. As, however, the appeal was dismissed for want of jurisdiction, the argument of Mr. Seward, which was wholly upon the merits, is not inserted.

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

The bill in this case was filed by the appellant against the appellees in the Circuit Court of the United States for the District of Louisiana.

*101] *The object of the bill was to set aside a contract made by the appellant with the appellees, by which he had granted them permission to use, or vend to others to be used, one of Woodworth's planing-machines, in the cities of New Orleans and Lafayette; and also to obtain an injunction against the further use of the machine, upon the ground that it was an infringement of his patent rights. The appellant states that he was the assignee of the monopoly in that district of country, and that the contract which he had made with the appellees had been forfeited by their refusal to comply with its conditions. The license in question was sold for fourteen hundred dollars, a part of which, the bill admits, had been paid. The contract is exhibited with the bill, but it is not necessary in this opinion to set out more particularly its provisions.

The appellees demurred to the bill, and at the final hearing the demurrer was sustained, and the bill dismissed. And the case is brought here by an appeal from that decree.

The matter in controversy between the parties arises upon this contract, and it does not appear that the sum in dispute exceeds two thousand dollars. On the contrary, the bill and contract exhibited with it show that it is below that sum. An appeal, therefore, cannot be taken from the decree of the Circuit Court, unless it is authorized by the last clause in the seventeenth section of the act of 1836.

The section referred to, after giving the right to a writ of error or appeal in cases arising under that law, in the same manner and under the same circumstances as provided by law in other cases, adds the following provision:—"And in all other cases in which the court shall deem it reasonable to allow the same." The words "in all other cases" evidently refer to the description of cases provided for in that section, and where the matter in dispute is below two thousand dollars. In such suits no appeal could be allowed but for this provision.

The cases specified in the section in question are, "all actions, suits, controversies on cases arising under any law of

the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries." The right of appeal to this court is confined to cases of this description, when the sum in dispute is below two thousand dollars. And the peculiar privilege given to this class of cases was intended to secure uniformity of decision in the construction of the act of Congress in relation to patents.

Now the dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of Congress providing *for or regulating contracts of this kind. [*102
The rights of the parties depend altogether upon common law and equity principles. The object of the bill is to have this contract set aside and declared to be forfeited; and the prayer is, "that the appellant's reinvestiture of title to the license granted to the appellees, by reason of the forfeiture of the contract, may be sanctioned by the court," and for an injunction. But the injunction he asks for is to be the consequence of the decree of the court sanctioning the forfeiture. He alleges no ground for an injunction unless the contract is set aside. And if the case made in the bill was a fit one for relief in equity, it is very clear that whether the contract ought to be declared forfeited or not, in a court of chancery, depended altogether upon the rules and principles of equity, and in no degree whatever upon any act of Congress concerning patent rights. And whenever a contract is made in relation to them, which is not provided for and regulated by Congress, the parties, if any dispute arises, stand upon the same ground with other litigants as to the right of appeal; and the decree of the Circuit Court cannot be revised here, unless the matter in dispute exceeds two thousand dollars.

This appeal, therefore, must 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 District of Louisiana, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that this cause be, and the same is hereby, dismissed for the want of jurisdiction.

ALFRED C. DOWNS, PLAINTIFF IN ERROR, *v.* JOSEPH KISSAM.

Where the Circuit Court instructed the jury, "that, if any one of the mortgages given in evidence conveyed more property than would be sufficient to secure the debt provided for in the mortgage, it was a circumstance from which the jury might presume fraud," this instruction was erroneous.
Any creditor may pay the mortgage debt and proceed against the property; or he may subject it to the payment of his debt by other modes of proceeding.

IN error to the Circuit Court of the United States for the Southern District of Mississippi.

A writ of *fieri facias* issued on the 5th of January, 1842, *103] *from the Circuit Court of the United States for the Southern District of Mississippi, at the instance of Joseph Kissam (the defendant in error), against one James J. Chewning, for $2336.22, besides costs, and was levied by the marshal, April 14th, 1842, on negro slaves Nancy and her child, Milley and her child, Viney and her child, Tempey and her child, Mary, Louisa, Juliana, and Charlotte, as the property of the said Chewning; and these negroes were claimed by the plaintiff in error as his property. And thereupon the defendant in error, by plea, averred in the said Circuit Court, that the said slaves, at the time, &c., were the property of the said Chewning, and upon this plea issue was tendered and joined between the defendant in error and the plaintiff in error. This issue was tried at November term, 1846, when a verdict passed for the defendant in error as to all the slaves except Juliana, and a bill of exceptions was tendered by the plaintiff in error; and upon the judgment rendered upon the verdict, this writ of error is brought.

From the bill of exceptions, the case appears to have been this:—

On the trial of the issue, the defendant in error produced the deposition of the said Chewning, taken by consent of parties. On his examination, the counsel for the plaintiff in error exhibited to the witness a mortgage, marked A, made by him to the Commercial and Railroad Bank of Vicksburg, dated 31st December, 1839; and in answer to questions proposed by said counsel, he deposed that he executed the mortgage on the day of its date; that he then owed the bank $130,000, &c.; that all the slaves seized under the execution were embraced in the mortgage except Juliana. The counsel also exhibited to the witness mortgages made by him, as follows: one to William M. Beal, dated 7th March, 1842, and marked B; one to James Cuddy, dated 13th July, 1840, and

marked C; one to F. Sims, dated 13th July, 1840, and marked D; one to the plaintiff in error, dated 8th September, 1841, and marked E; and witness deposed to the execution of the same at the times of their respective dates; that some of the slaves in controversy were embraced in each of the said mortgages, and in that to the plaintiff in error, all except Juliana; that he was indebted to the mortgagees respectively in the sums mentioned in the instruments; that all the slaves in controversy, except Juliana, were on December 31st, 1839, in Carroll Parish, Louisiana, and so remained until removed by the witness into Mississippi, in March, 1842, in consequence of his having sold his lands in Louisiana.

The mortgages were referred to in, and accompanied, the deposition.

*Exhibit A recited a debt evidenced by a promissory note bearing even date with the mortgage for $130,000, [*104 to be paid (as provided in the mortgage) in yearly instalments, one of $500, and nine of $13,888.88, besides accruing interest.

Exhibit B recited a debt of $7470.60, contracted in January preceding.

Exhibit C recited a debt of $1200, evidenced by notes bearing even date with the mortgage.

Exhibit D recited a debt of $4871.92, evidenced by a note dated four days preceding.

Exhibit E was made to indemnify plaintiff in error as surety of Chewning, on an administration bond in the penal sum of $50,000, and also to secure two debts, in amount $6000.

On the trial, the defendant in error, having read to the jury the whole examination of the witnesses excepting said exhibits, refused to read them to the jury; whereupon the counsel for the plaintiff in error moved the court to exclude the whole deposition, which motion was overruled, and the counsel excepted.

The said counsel then read to the jury the said exhibits, as evidence for the plaintiff in error, and produced the note for $130,000 recited in Exhibit A, which was admitted to be in the handwriting of Chewning.

And the court, on the prayer of the defendant in error, gave the following instructions to the jury:—

1st. If the jury find that any one of the mortgages conveys more property than would be sufficient to secure the debt provided for in such mortgage, such mortgage is fraudulent; that is, the fact of more property being conveyed in the mortgage

than was necessary to secure the debt is a circumstance from which the jury may presume the mortgage was fraudulent.

2d. If a mortgage is made to cover more property than is sufficient to pay the debt intended to be secured, for the purpose of preventing other creditors from levying, it is fraudulent and void, though the debt intended to be secured be *bonâ fide;* that is, the fact of more property being conveyed than was necessary to secure the debt is a circumstance from which the jury may infer fraud.

3d. If the jury believe that the object of Chewning was to hinder, delay, or defraud his *bonâ fide* creditors by the execution of the mortgages, then the mortgages are void, and the jury should find for the plaintiff in the execution; but, in coming to your conclusion on this subject, you must recollect that Chewning, the defendant in the execution, was authorized to prefer one of his creditors to another, provided his object only was to enable such creditor to collect his debt; he had no *105] right, *in enabling one creditor to collect his debt, to give him control of an amount of property much larger than was necessary to pay the debt.

To which instructions the plaintiff in error excepted.

The case was argued by *Mr. Crittenden*, Attorney-General, and *Mr. Lawrence*, for the plaintiff in error, and by *Mr. Key*, for the defendant in error.

On the part of the plaintiff in error, it was insisted, that the court below erred in not requiring the defendant in error to read the mortgages referred to in, and forming part of, the deposition of Chewning, If it was competent for the defendant in error to decline reading the interrogatories put to the witness by the plaintiff in error, and compel the plaintiff in error to read them and the answers himself, yet, having read the interrogatories and the answers referring to the mortgages, he was bound also to read the mortgages as forming part of the answers; unless a party is at liberty to read part of an answer to a question, and refuse to read the residue, both parts being pertinent and admissible evidence; which it is submitted cannot be done.

As to the instructions given to the jury, it was insisted,—

1st. That the three instructions were altogether erroneous, because there was no evidence in the cause tending in law to show that the property mortgaged was more than sufficient to secure the debt specified in any one of the mortgages, and therefore the question as to the value of the property in comparison with the amount of the debts could not be rightfully

submitted to the jury; and also because there was no evidence that before or at the time of making the mortgage of 31st December, 1839 (Exhibit A), Chewning owed any debt besides that secured by that mortgage.

2d. That the position assumed in the first instruction, to wit, if any one of the mortgages conveyed *more* property than sufficient to secure the debt, the jury might presume the mortgage fraudulent, is not law, either as a general proposition or as applied to this case. For first, it assumes that any excess of value, *however small*, raises a presumption of fraud; which is not *in any case* true, it being always necessary that there be a gross or large excess, not to be accounted for by the just care of a prudent man, to guard against all probable contingencies. Again, it does not distinguish between general or particular assignments by the debtor for creditors, and a mortgage to a particular creditor, or a deed of assignment to which a creditor is a party for securing his debt; the rule as to excess, *if applying at all in the terms used by the judge, only applying to the former, and not to the latter classes of securities. Thirdly, it does not distinguish between a mortgage voluntarily made for securing a pre-existing debt contracted upon the faith of the debtor's personal ability only, and a mortgage taken at the time of making a debt, as part of the security originally contracted for, the note or bond bearing even date with the mortgage, and forming with it one assurance, or a mortgage given for a pre-existing debt upon some new consideration moving from the creditor, to which the position assumed in the instruction has no application. [*106

And in support of these objections it was argued, that every mortgagee is a purchaser of the thing mortgaged so far as his interest extends; that he has a right to stipulate for any amount of property to be mortgaged; just as he may demand any number of personal sureties, and no inference against his honesty arises from the one more than from the other; and if this is not true of every mortgage, it is at least true where the mortgage is taken simultaneously with the advance of money or other creation of the debt as part of the contract; and also where, for a former debt, a mortgage is taken upon a new consideration, as, for example, giving further credit, surrendering other securities, &c., to which cases the rule laid down by the judge does not apply.

The following authorities were relied upon:—Roberts on Fraud, ch. 4, § 1, particularly pages 371 to 375, and § 2, page 429 to the end; *Wheaton* v. *Sexton*, 4 Wheat., 503; *Freeman* v. *Lewis*, 5 Ired. (N. C.), 91; *Wright* v. *Stanard*,

2 Brock., 311; *Fullenwider* v. *Roberts*, 4 Dev. & B. (N. C.), 278; *Goss* v. *Neale*, 5 Moo., 19; *Pickstock* v. *Lyster*, 3 Mau. & Sel., 371; *Benton* v. *Thornhill*, 2 Marsh. (Ky.), 427; 7 Tenn., 149; *Dewey* v. *Baynton*, 6 East, 257; *Holdbird* v. *Anderson*, 5 T. R., 235; *Riches* v. *Evans*, 38 E. C. L., 268 (9 Car. & P., 640).

3d. As to the second instruction, it was insisted, that it is erroneous for the reasons given as to the first; and also because it assumes that an intent to prevent other creditors from levying is *per se* fraudulent; whereas that is not true, unless that be the *only* or at least the *primary* intent. And if the object is to give or acquire a priority for a just debt, and thereby prevent other creditors from levying, or to defeat one creditor in order to prefer another, there is in law no fraudulent intent, the object being wholly lawful. The above-cited authorities were relied upon, and particularly *Holdbird* v. *Anderson*, *Pickstock* v. *Lyster*, *Goss* v. *Neale*, *Benton* v. *Thornhill*, and *Riches* v. *Evans;* and also *Marbury* v. *Brooks*, 7 Wheat., 566.

4th. It was insisted that the third instruction is erroneous, *107] *because it makes the validity of the mortgages depend solely upon the intent of Chewning, without reference to the knowledge or purpose of the mortgagees; whereas, all the mortgagees being purchasers, and two of them purchasers in the strict sense of the mortgage, as a security taken simultaneously with the creation of the debt, are not affected by the intent of the mortgagor, unless known to and approved or aided by them. And also because the instruction rescinds the mortgages, if it was any part of Chewning's purpose to hinder or delay other creditors, although his chief purpose had been to prefer the mortgagees; and the hindering or delaying others was only a subordinate purpose as necessary to accomplish the leading or chief design.

The above authorities were relied on, and particularly *Wheaton* v. *Sexton;* and also the following:—*Magniac* v. *Thompson*, 7 Pet., 348; *Harrison* v. *Trustees of Phillips Academy*, 12 Mass., 456; *Bright* v. *Eggleston*, 14 Id., 245; *Kittredge* v. *Sumner*, 11 Pick. (Mass.), 50; *Foster* v. *Hall*, 12 Id., 89.

Mr. Key, for the defendant in error.

The points presented are, first, that the court below erred in not excluding certain evidence; and, secondly, that the court below erred in its instructions to the jury.

1. The evidence which it is thought should have been excluded is the deposition of J. J. Chewning.

The ground upon which this exclusion is contended for is,

that the plaintiff below read to the jury only a portion of said deposition, and refused to read the exhibits A, B, C, D, and E. It will be perceived that the deposition was not *ex parte;* it was taken by consent, "to be read in behalf of the parties, plaintiff and defendant." It was competent, therefore, for either party to read portions of said deposition. The entire deposition was read to the jury, all the interrogatories, and the exhibits. So, if there was error in not compelling the plaintiff below to read such exhibits, such error was cured when the said exhibits were permitted to be read to the jury in behalf of the defendant.

2. It is thought the principles of law applicable to the case, and contained in the three instructions of the court below, are erroneous.

It is contended for the defendant in error, that said instructions are correct in law, and the following authorities are referred to: 4 Kent Com., 160; 2 Id., 512 to 536; Powell Mort., 79 *et seq;* *Hamilton* v. *Russell*, 1 Cranch, 309; *Edwards* v. *Harben*, 3 T. R., 587; *Ryall* v. *Rowles*, 1 Ves., 348; *Worseley* v. *DeMattos and Slader*, 1 Burr., 467; *Alexander** v. *Deneal*, 2 Munf. (Va.), 341; *Clow* v. *Woods*, 5 Serg. & R. (Pa.), 275; *Sturtevant* v. *Ballard*, 5 Johns. (N. Y.), 337; *Crowninshield* v. *Kittridge*, 7 Metc. (Ky.), 520. [*108

Mr. Justice McLEAN delivered the opinion of the court.

This writ of error brings before us the judgment of the Circuit Court, held by the District Judge for the Southern District of Mississippi.

An execution having been levied on certain slaves as the property of one James J. Chewning, at the instance of the defendant in error, which slaves were claimed by the plaintiff in error, an issue was joined, under the laws of Mississippi, to try the right of property. On the trial, a mortgage was given in evidence, executed by Chewning in 1839, long prior to the levy, to secure to the Railroad Bank of Vicksburg a debt of $130,000. This mortgage embraced all the slaves levied on, except one. Other mortgages were given in evidence, executed by Chewning, to secure the payment of several other debts.

On the trial, the Circuit Court instructed the jury, that if "any one of the mortgages conveyed more property than would be sufficient to secure the debt provided for in the mortgage, such mortgage was fraudulent," and that the fact of more property being conveyed as aforesaid was a circumstance from which the jury might presume fraud.

This instruction is erroneous. It is no badge of fraud for a mortgage, which is a mere security, to cover more property

than will secure the debt due. Any creditor may pay the mortgage debt, and proceed against the property; or he may subject it to the payment of his debt, by other modes of proceeding.

The judgment of the Circuit Court is reversed, and a *venire de novo* awarded.

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*.

JESSE HOYT, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

When Treasury transcripts are offered in evidence under the act of March 3, 1797 (1 Stat at L., 512), although they are not evidence of the indebtedness of the defendant, as to money which comes into his hands out of the regular course of official duty, yet they are so when they arise out of the official transactions of a collector with the Treasury, and are substantial copies of his quarterly returns, rendered in pursuance of law and the instructions of the secretary.[1]

These transcripts need not contain the particular items in each quarterly return; it is sufficient if they state the aggregate amount of bonds and duties accruing within the quarter, and refer to an abstract containing the particular items.[2]

This rule can work no surprise upon the defendant, because every item which is litigated must have been previously presented to the accounting officers of the treasury, and been by them rejected. The items must be known, therefore, to the defendant.[3]

The acts of 1802 (2 Stat. at L., 172, § 3) and March, 1822 (3 Stat. at L., 694, 695, §§ 3, 7), limit the annual compensation of the collector to a certain sum. This limitation includes the fees as well as commission.

The act of 1838 (5 Stat. at L., 264) provides that the collector shall return an account under oath of these fees to the Treasury, and the act also limits the compensation. The fees, therefore, cannot be claimed in addition to the compensation. In the case in question, the time of service of the collector was whilst this act was in force, as it was extended by the acts of 1839, 1840, and 1841, and to 2d March of that year.[4]

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[1] REVIEWED. *United States* v. *Hodge*, 13 How., 485. CITED. *Soule* v. *United States*, 10 Otto, 11.

[2] CITED. *United States* v. *Gaussen*, 19 Wall., 213.

[3] IN POINT. *Bruce* v. *United States*, 17 How., 440. See *United States* v. *Pinson*, 12 Otto, 554.

[4] CITED. *Donovan* v. *United States*, 23 Wall., 399. See *Hedrick* v. *United States*, 16 Ct. of Cl., 102.

The acts above mentioned do not deprive the collector of his share in fines, penalties, and forfeitures. He is allowed to claim this share in addition to his annual compensation.

But this share does not include a claim to a part of the duties upon merchandise which has been seized, and in order to regain the possession of which the owner has given a bond for the payment or securities of the duties, as well as for the appraised value of the merchandise itself. In case of condemnation, the collector is entitled to a share of the proceeds of the merchandise, the thing forfeited, but not to a share of the duties also. These are secured for the exclusive benefit of the government.

Nor is a collector entitled to a commission for accepting and paying drafts drawn upon him by the Treasury Department. The act of 1799 made it his duty to receive all money paid for duties and pay it over upon the order of the officer authorized to direct the payment; and the eighteenth section of the act of 1822, and the act of 1839 (5 Stat. at L., 349), contain limitations which forbid an allowance beyond the compensation prescribed by law.

The collector does not appear, by the evidence, to have been charged twice with the amount of unascertained duties at the Treasury Department, and, therefore, the court properly refused to submit the point to the jury.

THIS was a writ of error to the Circuit Court of the United States for the Southern District of New York.

The United States brought an action of assumpsit in the court below against the plaintiff in error. The declaration contained four counts; viz., for money lent and advanced; for money laid out and expended; for money had and received; and upon an account stated. The general issue was pleaded and joined. The cause came on for trial at the April term, 1843, before Mr. Justice Thompson and Judge Betts, when a verdict was found for the United States, and a judgment entered upon the verdict on the 7th of May, 1843, for $221,083.39, including damages, costs, and charges. A bill of exceptions was taken during the progress of the trial, which was signed *by Judge Betts on the 9th of October, 1847, Mr. Justice Thompson having died in the interval [*110 between the trial of the cause and the time when the bill of exceptions was signed. The writ of error was sued out on the 3d of February, 1847, several months before the signing of the bill of exceptions.

Upon the trial, the plaintiffs below introduced evidence to prove that the defendant was appointed collector of the port and district of New York, on the 29th day of March, 1838, and that he ceased to be such collector and went out of office at the close of the 2d day of March, 1841; and then gave in evidence certain transcripts under the seal of the Department of the Treasury of the United States, and thereupon rested the case on their part. These transcripts are intended to be statements made up by the accounting officers of the Treasury Department from the quarterly accounts rendered by the officer with whom the account is kept, after an examination and adjust-

ment of such quarterly accounts, and the allowance or disallowance of the several items contained therein.

After the counsel for the plaintiffs below had rested their case, it was objected on the part of the defendant below, that the said plaintiffs had not shown enough to entitle them to rest their case, without producing other evidence in support of said transcripts, because,—

1. The law relating to Treasury transcripts, which, under some circumstances, gives them the effect of evidence, does not apply to accounts of the description contained in the transcripts offered.

2. That, in order to constitute the transcripts legal evidence, they must specify the particular items which are made the ground of claim, and not aggregated items; a balance, which, in the present case, makes up the principal part of the claim contained in the transcripts offered.

3. That the statute does not apply to collections made on account of the government, but to money advanced by it to public agents.

4. When the ground of claim on the part of the government arises, not out of payments or advances by it, but out of accounts rendered by a public agent of money collected for the government, the accounts themselves must be introduced as the highest evidence.

The court decided that the transcripts were in conformity to the statute, and were legal evidence, to which decision the counsel for the defendant excepted.

The counsel for the defendant then called upon the counsel for the plaintiffs for the original letters from the defendant to the First Auditor and Comptroller of the Treasury, under date *111] *of the 30th June, 1841, which accompanied the defendant's last quarterly account, and the same not being produced, the defendant, among other matters to maintain the issue on his part, introduced and read in evidence copies of said letters, in the words and figures following:—

"*Custom House, New York, June 30th*, 1841.

"SIR,—Herewith you will receive, in thirteen packages, the accounts of the customs of this district from the first of January to the 2d of March, in the first quarter of 1841, as per account current and memorandum of papers inclosed, said period being the termination of my accounts as collector of the district of New York. The account current is prepared by the auditor of the custom-house, with the exception of the item of commission for accepting and paying treasury drafts, which I have directed to be inserted; this account, as well as

other accounts heretofore transmitted to the department, has been prepared in the auditor's office, none of which have undergone my personal examination, they having been signed by me when presented.

"This account, or those which have preceded it, contains some radical error or errors to a large amount. Where the errors are to be found, or the best probable mode of undertaking to detect them, I am unable at this moment to determine, but request that a thorough examination may be made at the department, with the view of testing the accuracy of present and past accounts, and I shall direct my efforts to discover them here.

"At the time of the passage of the law requiring all money received on deposit for unascertained duties to be immediately paid into the treasury, I received a circular from the department, containing instructions relative to the accounts to be kept under that law. The circular bears date the 13th March, 1839, and, alluding to an account for excesses of deposits, contains this clause:—'This account has no connection, immediate or remote, with your account of the customs.'

"The amount I have paid to the merchants for such excesses, and have also credited in the accounts of the customs to the United States, is over $109,000. I early objected to this credit, as will be seen by my letter to the comptroller, under date of the 14th of February, 1840, and my mind has never been satisfied with the reasons assigned by the comptroller in his letter of April 11th, 1840, for the change in the direction originally given by the circular referred to. I most earnestly request that the principle involved in this question may be carefully examined.

*"The balance of the money which was paid to me under protest amounts to $189,871.17. The suits [*112 brought for the recovery of the same are against me as an individual, for which I am liable, upon the recovery of judgments under execution, and am compelled to rely upon and wait for the justice of the government for protection in indemnification.

"Very respectfully, your obedient servant,

"J. HOYT, *Late Collector.*

"TO JESSE MILLER, ESQ., *First Auditor, &c.*"

"*Custom House, New York, 30th,* 1841.

"SIR,—It was not until yesterday, at near three o'clock, that I procured the signature of Mr. Morgan, my successor in office, to the abstracts of bonds delivered by me to him, without which my final accounts could not be forwarded. I send

them to-day to the First Auditor of the Treasury, with a letter, a copy of which I now inclose to you as the head of the accounting department of the government. I have to request that you will be so good as to acknowledge the receipt of this letter with its inclosure. I hope by the time the First Auditor shall have examined the accounts now sent him, that you will have had leisure to look at my account of fines, penalties, and forfeitures, about which I wrote you some months since.

"With great respect, your obedient servant,

"J. HOYT, *Late Collector.*

"TO WALTER FORWARD, ESQ., *Comptroller.*"

The counsel for the defendant here called upon the counsel for the plaintiffs, in pursuance of notice for that purpose given, for the respective quarterly accounts of defendant, rendered to the Treasury Department for his whole term of office, and the same were produced and read in evidence by the defendant.

The accounts introduced are the following, placed in the following order:—

1. The third quarter account of 1838.
2. The first quarter account of 1839.
3. The second quarter account of 1839.
4. The first quarter account of 1840, including expenditures for lighthouse on Robbin's Reef.
5. Statement of fees of office and disbursement, for the year 1839.
6. Schedule of weekly balances to credit of Treasurer.
7. Schedule of Treasury drafts taken up by defendant.
8. Weekly return of collector, November 24th, 1838.
9. J. Hoyt's account with Treasurer, November 24th, 1838.
10. Weekly return, June 16th, 1838.

*113] *These accounts are too voluminous to be inserted, and would rather perplex than lead to an understanding of the points discussed by the counsel and decided by the court. It is proper, however, to state, that some of the items credited by the defendant to the United States were for unascertained duties; and also, that in the schedule of Treasury drafts taken up at the custom-house, New York, and returned to the Treasurer, there were many on war and navy warrants.

The counsel for the defendant then put in evidence certain documents referred to in the quarterly account current of defendant, bearing date the 31st day of March, 1838, and particularly the abstract of bonds, or bond-books, purporting to represent the number and amount of bonds transferred to the defendant by Samuel Swartwout, the former collector.

Witnesses were called by the defendant, who testified to certain errors in the amount of bonds purporting to have been received by Mr. Hoyt of his predecessor in office. These witnesses stated the circumstances under which the errors were discovered, and that no examination was made, for want of time, of any of the bonds, except those received from Mr. Swartwout. That about one hundred thousand bonds were taken for duties by Mr. Hoyt, while in office, and the time it would take to test the accuracy of these bonds would be very great. That the bonds transferred to Mr. Hoyt by Mr. Swartwout formed about one tenth part of the subject of bonds.

In the further progress of the trial, a witness, Wm. Moore, was called for the defendant, for the purpose of showing that bonds had been abstracted from the custom-house, without the knowledge of the collector, and that some of them had found their way to Switzerland, and that the witness, as one of a commercial house, had paid at the custom-house three several bonds of the firm of E. & G. Fehre & Co., then in Europe, to the amount of $3290, who had become possessed of the same without having paid them, and that, long after such possession, the said firm directed the payment to be made; and it was made by the house to which witness belonged.

The counsel for the plaintiff objected to the testimony of this witness, and the court sustained the objection, and the counsel for the defendant excepted.

Testimony was introduced on the part of the defendant, to the effect that the duties of the collector were such that he could not make a personal examination of the quarterly accounts, but signed them as made up by his subordinates; that the defendant had no personal agency in the receipt or disbursement of the money at the custom-house; that it is the *duty of the naval officer to examine the accounts, and that this is intended as a check upon the collector's [*114
accounts; that the amount of duties on each entry is ascertained from calculation, for which the cashier must receive either the cash or a bond; that the entries are scattered through the impost-book and cash-books, and that it would take a long time to examine all the entries; that the quarterly accounts are but results, derived from a mass of particulars.

The record contained a series of letters from Mr. Hoyt to the Treasurer of the United States and different officers of the Treasury Department, in which he frequently complained of the rejection of particular items of credit in his quarterly accounts, sometimes maintaining a different view of the law from that adopted by the Department; particularly in a letter

dated 14th November, 1839, to I. N. Barker, wherein he contends that he is entitled by law to charge fees and emoluments for the whole year 1838, though he did not enter upon the duties of his office till the 29th day of March of that year, and sometimes complaining of the manner in which his accounts were stated at the Department. These letters were read in evidence for the defendant.

After which, letters from Mr. Hoyt to the First Comptroller, dated the 12th and 22d of December, 1842, and the 17th, 25th, and 28th of January, 1843, were offered in evidence for the defendant. Upon the counsel for the plaintiffs asking the object in offering said letters, and upon being informed by the counsel for the defendant that all of said letters related to the naval office returns under the circular of 15th March, 1839 (except that of the 25th of January), and that the object was to show that there were no copies of such returns on file in the naval office, and that the defendant had sought explanation from the comptroller, in the letters referred to, regarding such returns, and had received no answers to such letters; and that said letter of the 25th of January related to items in the last transcript, in regard to which the defendant had also sought information from the comptroller, and had received no reply: the counsel for the plaintiffs objected to the reading of said letters, and the court decided the objection to be well taken, as the defendant was not bound to go to trial without getting the explanation, and the court would not have compelled him so to do, and it was therefore a waiver of his right. Whereupon the counsel for the defendant excepted to such decision.

It was admitted that the defendant had received as profit on a storage account, while he was in office, the sum of $30,000, and the like amount for his share of forfeitures.

It appeared by the accounts connected with the Treasury *transcripts, that the defendant had given three bonds to the United States, one dated March 22d, 1838, one dated 30th November, 1838, and one dated 14th December, 1839.

*115]

The court below requested that it might be furnished with a statement in writing of the claims of both parties, and the counsel for the respective parties introduced and laid before the court and jury the following statements.

The plaintiffs' counsel furnished to the court and jury a statement of the amount of balance as struck by the comptroller, and the items of the account rejected by the comptroller, as follows:—

Balance of account as certified, . . .	$226,295	60
1. Duties claimed as forfeiture for fourth quarter, 1838, and first and third quarters of 1839. Allow two thirds the amount distributed, .	5,749	15
2. Revenue-cutter disbursements, Lieutenants Brushwood and Shattuck, . . .	7	50
3. Overcharge for commissions	0	55
4. Revenue-cutter disbursements, Lieutenant Frazier, ...	62	62
5. Amount overcharged for marker's expenses,	254	97
6. Paid Lieutenant Shattuck, ...	6	06
7. George A. Wasson and others, . . .	1,516	33
8. Another for same person, ...	251	00
9. Expenses paid measurers and gaugers not legal, but allowed because paid under order of Secretary of Treasury, . . .	9,543	43
10. Costs paid B. F. Butler, ...	5,229	98
11. Costs in case of David Hadden and others,	213	03
12. Four cases *v.* Hoyt suspended, . . .	175	00
13. Overcharged for bonds in suit cancelled by warrant from Secretary of Treasury, . .	1,203	45
14. Charged in first quarter, 1841, expenses of fire commissioners, ...	180	50
15. Emolument claimed for 1838. The claim is for whole compensation for part of the year ensuing, ...	1,063	84
16. Charged by him for fees, ...	36,212	71
17. Amount overcharged for lighthouse disbursements, ...	70	48
18. Commissions for accepting and paying drafts of Treasurer, ...	201,580	00
19. Duty on goods seized for undervaluation, not credited or accounted for, ...	14,035	29

The defendant introduced the following statement:—

Amount claimed by the United States for official transcripts, ...	226,295	60
Deduct difference in commission consequent on other differences, ...	963	00
Apparent claim of United States, . . .	$225,332	60

Against which the defendant has shown errors, viz.:—

Smith, Thurgar & Co., twice charged,	$ 1,703	33
Specific errors in books, . . .	33,853	87

Specific errors in quarterly accounts current, ...	109,469 05	
Amount actually expended in public business now disputed by the United States, ...	17,594 03	
Duties part of forfeiture, . .	19,784 45	
Fees in controversy, $1,063 84, $36,212 71, ...	37,276 55	
Balance exclusive of claim for commission, ...	5,651 31	
		225,332 60

Against the apparent balance of $5,651.32, Mr. Hoyt claims commissions, $201,580.

The counsel of the defendant prayed the court to instruct the jury, among other things, as matters of law, as follows:—

1. The official transcript and accounts current on which it is founded are only *prima facie* evidence against the defendant, and do not preclude him from proving that they do not exhibit the true state of his liability to the United States.

2. The defendant's letter of 30th June, 1841, is to be read with, and as a part of, the account current by which it was accompanied, and he is entitled to the benefit of its contents as contemporaneous qualifications of the admissions and statements contained in the accounts.

3. The defendant is at liberty to show that the accounts were prepared upon the plan of the instructions of the Treasury Department, communicated to collector under the act of Congress authorizing the Department to regulate the form and manner of keeping them.

4. He is at liberty to show how far, and in what particulars, accounts thus kept and rendered exhibit the character and extent of his liability, and to what extent they answer, and were intended to answer, collateral purposes.

5. He is at liberty to show errors, omissions, or overcharges in the accounts rendered, or that entries have been suppressed or untruly made, or that he is charged with money which has been wrongfully withheld by subordinates in the custom-house, or by other persons.

*117] *6. He is not legally responsible to the United States for the consequence of acts or omissions of other persons, which he could not by ordinary vigilance have detected and prevented.

7. In defining the degree of vigilance which is to be deemed ordinary vigilance within this rule, the jury are at liberty to take into consideration the testimony as to the extent and

variety of the details of the duties of his office, and the difficulty or impossibility of personal attention on his part to the details of the accounting department of the custom-house.

8. To the proof of errors in detail, the defendant is at liberty to superadd evidence of errors in gross, so far as such proof may tend to show that the defendant is charged with a greater amount of cash than he was properly accountable for.

9. If the defendant has proved, to the satisfaction of the jury, what amount of money came to his own custody or possession during his whole term of office, and has discharged himself of this amount, by proving its faithful and appropriate disbursements for account of the United States, this testimony may be taken into consideration by the jury, as tending to prove that he is charged with more money than he is properly accountable for.

10. The defendant is, in this respect, entitled to indulgent and favorable consideration, as to the character of the proof of errors in the accounts, if the jury believe that, by the acts or omissions of others, he was deprived of the intended checks and means of testing the accuracy of the accounts in the cash returns, and the accounts in the naval office.

11. It is not necessary for the defendant to prove that credit was claimed at the Treasury Department for errors now shown in the accounts, where the defence operates by way of traverse denial, or impeachment of the case in chief of the plaintiffs.

12. By the instructions of the Treasury Department, and course of business under them, as to the retention and disbursement of the surplus amounts of public money remaining with the defendant as the banker or fiscal agent of the government, the duties performed and responsibilities assumed by him are extra-official, for which the jury may allow him such reasonable compensation and indemnity as they may find him entitled to therefor.

13. The fees of office, under the act of 1799, sec. 2, payable by persons concerned in trade and navigation to the collector for defined services, and not forming a deduction from invoices of the United States in his hands, are not embraced in the term "emolument," as used in the limitation clauses of the acts of 1802, ch. 37, and 1822, ch. 107; and consequently the defendant is entitled to credit for the items in controversy under this head.

*14. If the jury believe that the forfeited goods, as to which one half of the amount of duties is in controversy, were restored to the claimants upon a stipulation or bond for their value, estimated as at the place of export, and [*118

that this mode of estimating was adopted by the court, on the ground that the amount of duties constituted a part of their entire value, and distribution after condemnation ought, in law and in equity, to be made accordingly, and the defendant should receive credit for the amounts in controversy under this head.

15. There has been no legal evidence in support of the claims of the United States, as to the items under this head, mentioned in the additional or supplemental adjustment of 28th December, 1842.

16. After the unconditional allowance at the Treasury Department of credits to the defendant in official adjustments of his accounts, the disallowance and rejection of the same credits by the accounting officers of the department in subsequent adjustments was unofficial, unauthorized, and irregular, and did not constitute legal rescission of the credit.

17. Similar payments afterwards made by the defendant, on the credit of these allowances, and before the receipt of notice of any change in the views of the department, should be credited to him, independently of any decision of the abstract question of their regularity on original grounds.

18. If the defendant, in good faith, paid accounts presented in due form by officers of the government authorized to present them, and to receive the amounts, he is not to be held responsible as a guarantor that such amounts were in every instance strictly chargeable as between such officers and the government, in the absence of evidence of culpable inattention or remissness on his part.

And the counsel for the plaintiffs insisted to the contrary, and prayed the court to charge the jury in conformity with the following propositions of law:—

I. The collector is the officer who receives all the duties, is consequently chargeable with the whole amount, and can discharge himself from that liability only by showing duty bonds unpaid, and cash paid to, or legally for, the government.

II. The certified accounts from the Treasury Department being made up from the collector's quarterly returns, and agreeing with the quarterly accounts, except in the items specifically disallowed by the comptroller, are *primâ facie* evidence that the amount stated as the balance is due from the collector to the government.

III. The items disallowed by the comptroller are the only items of account in issue, being the only items on which the
*119] *collector's statement of the amount differs from the comptroller's statement of them.

IV. The collector can discharge himself from the balance stated by the comptroller, only,—

1. By maintaining, by facts or law, the validity of the items rejected by the comptroller; or,

2. Proving, by the clearest evidence, error in some other item in the account with which he charged himself in his quarterly accounts.

V. There is no evidence given in the cause that impeaches the accounts, so as to authorize a jury in their verdict to diminish the balance stated by the comptroller, except so far as the defendant has given clear proof of specific errors.

VI. Items of difference not allowable:—

1. Wasson's bill, being rejected items Nos. 7 and 8.

2. Fees paid B. F. Butler, being rejected items Nos. 10, 11, and 12.

3. Measurers' and gaugers' expenses, being rejected item No. 9.

(The several items rejected by the comptroller, and numbered, in the foregoing statement on the part of the plaintiffs, Nos. 7, 8, 9, 10, 11, and 12, being allowed to the defendant by the jury, under the charge of the court, do not form any part of the exceptions, and this part of the prayer of the plaintiff's counsel is therefore omitted.)

4. Collector's fees. They are subject to the limitation in the act of 7th May, 1822, as emoluments of office.

5. Duties on forfeited goods. They are not penalty, and collector is entitled to no part of them.

6. Commissions for paying drafts:—

1st. Paying drafts of the Treasury is a legal duty, incident to the office of the collector, and is a service for which the fees and percentage specified in this act is the only compensation allowed by law.

2d. The limitation to the emolument of office precludes any claim for commission for paying the drafts of government.

Whereupon the court then charged the jury in conformity with the first, second, third, fourth, and fifth propositions of law, as above submitted on the part of the plaintiffs, and respecting the items of account contained in the above statement, also submitted by the plaintiffs, the court charged the jury that items numbered 2, 3, 4, 5, 6, 13, 17, involved no question of law, and the jury would upon the facts determine whether all or any of them had been properly rejected by the comptroller; that, as to item 1 in said statement, being a claim for half the duties upon goods forfeited for undervaluation *though not a legal claim, the jury should allow it to the defendant, inasmuch as it had been distributed, [*120

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and such distribution sanctioned by the Treasury Department; that they should also allow to the defendant the items numbered 7, 8, and 9, as they had been paid by defendant, and as such payments had been sanctioned by the Treasury Department, and items numbered 10, 11, 12, and 14, as properly chargeable to the government.

The court further charged the jury, that the item number 15, in said statement, was an illegal charge, being a claim to retain a whole year's compensation for a part of a year; that item number 16, in said statement, was an illegal charge, being a charge for fees as something distinct from, and independent of, the emoluments allowed and limited by law; that item number 18 was an illegal charge, being a claim for commissions for accepting and paying the drafts of the Treasury; and that item number 19 was an illegal charge, being a claim for half the duties for goods seized and forfeited for undervaluation; and that none of said items numbered 15, 16, 18, and 19, should be allowed to the defendant in account by the jury.

The court further charged the jury, that there was one item in the account of the defendant with the plaintiffs of great importance, respecting which the defendant contended that he was charged twice with the amount, and that was an item of about $109,000, for the excess of deposits for unascertained duties. It is the practice of the merchants, when they want their goods immediately, to deposit with the collector a sum sufficient by estimate to cover the duties, and when the duties are ascertained, the merchant calls for repayment of any excess of the deposit over the ascertained duties, which excess is thereupon paid over by the collector to the claimants. The whole amount of the estimated duties deposited having at the time of the deposit been paid by the collector, under requirement of law, into the Treasury, is credited to the collector by the government in his account, but in that account he is only charged with the actual duties. The collector repays the excess to the merchant out of his own money, and the government afterwards returns it to him by a warrant from the Treasury, and charges him with that warrant. If the government had retained the whole sum deposited, and at the same time had required the collector to pay back to the merchant the excess, there would be some ground to sustain the allegation of the defendant; but as it is, there is no ground for the allegation of the defendant of a double charge, or error in this sum, and the jury are wholly to disregard this claim, and make no allowance for it whatever.

The court further charged the jury, that the book of general

*accounts, and the cash-book of the custom-house, introduced before the jury as evidence by the defendant, were the books of the defendant, with the keeping of which the plaintiffs had no connection, and over which they had no control; and that, if there was any discrepancy between them, it was for the defendant and not the government to explain such discrepancy.

And the court further refused to charge the jury in conformity with the points above submitted on the part of the defendant, and in conformity with which the said defendant prayed the said court to charge the jury, except so far as in the foregoing charge is contained.

And thereupon the said defendant then and there excepted to so much of the said charge of the said court, wherein the said court charged the jury in conformity with said 1st, 2d, 3d, 4th, and 5th propositions of law, so as above submitted on the part of the plaintiffs, and to so much of the said charge of the said court, wherein the said court charged the jury that the items numbered 15, 16, 18, and 19, in said statement, so as above submitted on the part of the plaintiffs, were illegal charges, and not to be allowed to the defendant in account with the government; and also to so much of the said charge of the said court as related to the claim of the defendant to have the item $109,000, or thereabouts, for excess of deposits for duties over ascertained duties, allowed him in account, and as directed the jury to disallow such claim; and also to so much of the said charge of the said court as related to the book of general accounts, and the cash-book of the custom-house.

And the said defendant thereupon then and there further excepted to the refusal of the said court (in so far as the said court did so refuse) to charge the jury in conformity with the points so as above submitted by the said defendant, and in conformity with which the said defendant so as above prayed the said court to charge the jury.

And the said defendant thereupon then and there further excepted to the decision of the said court, in admitting as evidence against the defendant the Treasury transcripts introduced by the said plaintiffs, and also to the decision of said court in excluding the testimony of William Moore, a witness introduced by said defendant, and also to the decision of said court in excluding the letters of defendant dated the 12th and 22d December, 1842, and 17th, 25th, and 28th January, 1843.

The record contained numerous circulars from the Treasury Department to collectors and receivers of public money. That

of the 9th June, 1837, and extracts from those of 13th March, *122] 1839, and 9th July, 1840, only are inserted, these *having been more particularly referred to in the argument of the case.

Circular instructions to Collectors of the Customs and Receivers of the Public Money.

"*Treasury Department, June 9th*, 1837.

"SIR,—Should all the banks in your vicinity, selected as depositories of the public money, have suspended specie payments at any time, so that you can no longer legally deposit in them, as usual, to the credit of the Treasurer, all public moneys received by you, except such sums as may be required to meet the current expenses of your office, the payment of debenture certificates by collectors, &c., in other words, the sums you would formerly have placed in bank to the credit of the Treasurer of the United States, will, under the present arrangements, be placed to his credit, in a separate account, on the books of your office. They will be drawn for by him in the following manner, and no other.

"1st. By the Treasurer's draft on the officer having funds to his credit, directing the payment, which draft will be recorded by the Register of the Treasury, who will authenticate the record by his signature. A private letter of advice will be transmitted by the Treasurer in each case.

"2d. By a transfer draft signed as above, and approved by the signature of the Secretary of the Treasury, for the purpose of transferring funds to some other point where they may be required for the service of the government.

"No deduction whatever is to be made from the moneys placed by you to the credit of the Treasurer, except in one of these two modes, until they can be lodged by you with some legal depositary.

"On payment of any draft, the party to whom it is paid will receipt it. You will note on it the day of payment; will charge it on the same day to the Treasurer, and will transmit it to him with the return of his account in which it is charged. In charging these payments, it will be proper to enter each draft separately, and to state the number and kind of draft, whether transfer, or on Treasury, War, or Navy warrants, and the amount.

"It is also necessary that the Treasurer's accounts be closed weekly with the conclusion of Saturday's business, and transcripts thereof forwarded in duplicate; one copy to the Secretary of the Treasury, and one to the Treasurer. When the

quarter of the year terminates on any other day of the week, the account should be closed on the last day of the quarter, leaving *for an additional return the transactions from that time to the close of the week, so that neither the [*123 receipts nor payments of different quarters be included in one return. Punctuality in transmitting the returns is indispensable.

"To produce uniformity in the manner of making the returns of the Treasurer's account, a form is herewith transmitted. For the purpose of binding, it is requested that they be made on paper of nearly the same size. Your monthly returns must be rendered to the Department as heretofore.

"When the public money shall have accumulated in your hands to an amount exceeding —— dollars, you can make a special deposit of the same in your name, for safe keeping, in the nearest bank in which you have heretofore deposited the public money, and which will receive the same, to be held by it specially, subject to the payment of checks or drafts drawn by the Treasurer of the United States on the officer by whom the same has been deposited.

"LEVI WOODBURY,
Secretary of the Treasury."

Extract from Circular to the Collectors of the Customs, or persons acting as such.

"*Treasury Department,*
First Comptroller's Office, March 13th, 1839.

". . . . . In this spirit I have to inform you that it is deemed indispensably requisite that you should open an account special with the Treasurer of the United States, agreeably to the form annexed, A. Having been required heretofore to keep a separate account of this nature, it will not materially increase your labors. In this account you will pass the moneys referred to, as soon as received, to the credit of the Treasurer; and in order that it may be kept in as simple and clear a form as is consistent with your business operations, I have especially to request that, in making the debit and credit entries, you will distinguish the deposits for duties unascertained from duties paid under protest, and both from other moneys, to be denominated cash received, or placed opposite to the distinctive heads of receipts; and also designate the kind, number, and amount of each paid draft issued upon you by the Treasurer.

"But as you will not be able readily to observe this distinction of moneys in the special account with the Treasurer,

or without great inconvenience and difficulty, in some cases, adjust the excess of the deposits over the ascertained duties, or the duties to be refunded as having been paid under protest, which are to be so refunded, if at all, in pursuance of a *124] Treasury *warrant, and upon the order of the Department, according to the usage that has so long prevailed, I deem it also equally indispensable that you should keep separate and distinct accounts of them,—the one to be called 'the unascertained duty account,' and the other 'the protested duty account,' agreeably to the forms annexed, B and C. In these accounts, according as the case may need, you will enter upon the debit side the deposit made by the importer, which will be balanced by the ascertained duty, and the excess paid back to the importer; or enter on the debit side the amount of duty paid under protest, and balance it by the draft of the Treasury in favor of the importer. . . . . There are other reasons that might be given, but these are in themselves sufficient. It has, therefore, upon full deliberation, been decided upon as the more proper course, and as a substantial compliance with the section, that you should make exhibits of the sum necessary for the purpose of refunding excess in deposits to importers to the Secretary of the Treasury, monthly, to be examined and countersigned by the naval officer, agreeably to form annexed, D, on which the Secretary will issue his warrant for the same in your favor, as assignee in fact of the respective importers. You will thus be put in funds to meet this class of re-payments, and you will take of each importer duplicate receipts, and account quarterly for the same at the department. The form of the account you are to render to the First Auditor of the Treasury is annexed, E. In this account you will charge yourself with the Treasury warrant, and claim credit for the vouchers produced. This account has no connection, immediate or remote, with your accounts at the customs. In the latter account, you are charged with the true ascertained amount of duties, but the former arises from the government, out of abundant caution, taking under its control for a time the money of individuals, mingled with that of the public, for the better security of its own just and legal portion. . . . . .

"Very respectfully, your obedient servant,

"J. N. BARKER, *Comptroller.*"

Extract from Circular.

"*Treasury Department, July 9th*, 1840.

". . . . . As a depositary of the public money standing to

the credit of the Treasurer of the United States, you will keep an account current with him, in which you will debit yourself with all sums received on his account, and credit yourself with all payments made by his order, and no other. . . . . .

"Be pleased to understand thoroughly this principle, that all *money in your hands to the credit of the Treasurer, is, in fact, money in the Treasury of the United [*125 States, and cannot be used for any other purpose than the payment of warrants (or the drafts thereon) issued in pursuance of appropriations by Congress; but these moneys may be transferred from one depositary to any other depositary, by direction of the Secretary of the Treasury, under the authority of the tenth section of the act. . . . . Respectfully,

"LEVI WOODBURY,
Secretary of the Treasury."

The cause was argued by *Mr. Evans* and *Mr. Walker*, for the plaintiff in error, and by *Mr. Crittenden*, Attorney-General, for the defendants in error.

Mr. Attorney-General Crittenden moved the court to dismiss this cause for irregularity in the bill of exceptions, which was opposed by *Messrs. Evans* and *Walker*, of counsel for the plaintiff in error. Whereupon this court, not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

On consideration of the motion made in this cause by Mr. Attorney-General on the 6th instant, and of the arguments of counsel thereupon had, it is now here ordered by the court, that the whole case be argued upon the bill of exceptions.

Mr. Evans, for the plaintiff in error.

1. Mr. Hoyt went into office at a peculiar juncture, when great embarrassment was felt in the business community. He was made the depositary of the public money, and had many new duties to perform. Many of the duties of his office he could neither personally perform nor personally supervise.

This is an action of assumpsit for money had and received against plain Jesse Hoyt. It is not upon his official bonds. The action is founded on an *implied* contract; whilst that upon the bond is an *express* one. This action can only be sustained for so much as the plaintiff in error had actually received; and if he had failed to collect, the action should have been upon his bond. It is questionable whether an action of assumpsit can be maintained at all against a public officer

who has given bonds for his official conduct. *Trafton et al.* v. *United States*, 3 Story, 646; *Perkins* v. *Hart*, 11 Wheat., 237; 8 Barn. & C., 324; 5 Mees. & W., 83; *Toussaint* v. *Martinnant*, 2 T. R., 105.

But how do the United States prove their action? Why, by Treasury transcripts made up in the Treasury Department. The act of 3d March, 1797 (1 Stat. at L., 512), makes the Treasury transcripts evidence in certain cases, arising in the ordinary transactions of the Treasury, against *public officers* for *official delinquency*. But it does not apply to accounts like these. These transcripts are made up from a variety of other papers. Those papers should have been produced. So with the quarterly accounts. They are made up from a variety of papers which should have been produced. The *aggregated* accounts are not evidence, but the items should have been offered in order that the court might *test* the accuracy of the government officers. The particulars, and not the results, *126] should have *been before the court. *United States* v. *Jones*, 8 Pet., 383; *United States* v. *Edwards*, 1 McLean, 447.

In short, all the evidence that was before the accounting officers should have been before the court.

2. The judge erred in refusing the first ten instructions requested by the defendant below, and in giving the first five prayed for by the plaintiffs.

The instructions given and refused were upon the ground that the defendant was responsible in this action for bonds or money fraudulently abstracted from the custom-house without his fault or knowledge. The instructions should have left it to the jury to find how much money of the United States had been received by the defendant; and whether the same had been accounted for. *Sthreshley* v. *United States*, 4 Cranch, 169.

It was never contemplated by any law that the collector should *personally* perform all the duties of his office. The law provides for other officers, and provides for their compensation, and defines their duties. Such persons are, therefore, officers of the government, and the collector is not responsible for the fidelity of these subordinates, beyond what may grow out of his own neglect in not properly superintending the discharge of their duties. *Dunlop* v. *Monroe*, 7 Cranch, 242–263.

Briscoe et al. v. *Lawrence* is direct to the point. Wherever it is otherwise it is by express enactment, and is so set forth in the bond. Thus the condition of the Treasurer's bond (1 Stat. at L., 66, § 4) is for the faithful performance of the duties of his office, *and for the fidelity of the persons to be* by him employed. So, by the act of 21st July, 1789 (1 Stat. at

L. 37), the collector is made answerable for the neglect of his deputy. So also naval officers and surveyors were empowered to appoint deputies for whom they were to be held responsible (1 Stat. at L., 155). *Supervisors of Albany* v. *Dorr et al.*, 25 Wend. (N. Y.), 440.

Mr. Evans read the letter of 30th June, 1841, and said that the quarterly accounts accompanied by that letter were not to be considered as evidence of indebtedness to the amount therein stated. In that letter Mr. Hoyt states that this account as well as others, were prepared in the auditor's office and signed by him without personal examination. It was therefore no admission at all.

The 4th and 5th instructions prayed for by the plaintiff, and given by the judge, were erroneous, in requiring the defendant to prove by the "*clearest evidence*" certain parts of his claim. It was beyond the province of the court to determine for the jury what *degree* of evidence should satisfy them. *Carver* v. *Astor*, 6 Pet., 588; *Rex* v. *King*, 5 Car. & P., 124. The expressions * "clearest evidence," "clear proof," were calculated to mislead the jury. 1 Serg. & R. [*127 (Pa.), 72; 11 Wend. (N. Y.), 83; 7 Id. 408; 1 Pet., 182; 14 Id., 431; 9 Conn., 247; 1 Hawks, (N. C.), 190.

The judge erred in the instruction as to the $109,000, twice charged as excess of deposits for unascertained duties. The question involved was one of *fact* merely. An excess for duties is paid into the Treasury. The merchant calls for the excess, and the collector pays it out of funds in his hands; and the amount is refunded to him by warrant. The warrant is charged to him, but he is not *credited* for the amount which he has paid. Was it not a matter of fact for the jury to determine whether the errors of which the defendant complained did not exist? *Cheval* v. *Burnham*, 2 Pet., 623; *McLanahan* v. *Universal Ins. Co.*, 1 Id., 170, 182; *United States* v. *Jones*, 8 Id., 415; *Greenleaf* v. *Birth*, 9 Id., 299; *Scott* v. *Lloyd*, Id., 445; *United States* v. *Tillotson*, 12 Wheat., 181, 183; *Corning* v. *Call*, 5 Wend. (N. Y.), 253, 257; *Long* v. *Ramsay*, 1 Serg. & R. (Pa.), 72; *Reid* v. *Hurd*, 7 Wend. (N. Y.), 408, 411.

[*Mr. Evans* also maintained that the defendant was entitled to one moiety of certain goods seized and forfeited for undervaluation, and cited 1 Stat. at L., 697; *McLane* v. *United States*, 6 Pet., 404; *Gelston* v. *Hoyt*, 3 Wheat., 264; *Jones* v. *Shore*, 1 Id., 462; *Van Ness* v. *Buel*, 4 Id., 74; Opinions of Attorneys-General, 853, 862.]

The judge erred in charging the jury that the claim for commissions for paying the drafts of the Treasurer was an

illegal charge. The service which was rendered did not belong to the duties of his office as collector, but was imposed upon him by the Treasury Circular of 9th June, 1837, on account of the embarrassments into which the financial affairs of the government were thrown by the suspension of specie payments by the banks. And he was not precluded from receiving compensation, therefore, by the law limiting the amount he should receive as collector. The act of 7th May, 1822 (3 Stat. at L., 695), refers to offices then existing and then known to the law. The duty of collecting and the duty of disbursing were separate and distinct, and were regarded so by the whole spirit of our legislation.

Mr. Crittenden, Attorney-General, *contra*.

The first question raised by the other side is whether this action for money had and received can be maintained. As early as 9 Wheat., 651, a case occurred like this. It was an action of assumpsit against a defaulting officer. The same objection was taken there as here, that the suit should have been on the bond; and the court decided that the official *128] bond *did not extinguish the simple contract debt arising from a balance of account due to the United States. In that case the same objection to the Treasury transcripts was made, but the court decided that they were admissible in evidence. The second section of the act of 3d March, 1797 (1 Stat. at L., 512), expressly makes the Treasury transcripts evidence in case of the delinquency of a public officer. It is contended on the other side, that this only applies to cases where money is *paid out* of the Treasury. The case of *United States* v. *Buford*, 3 Pet., 12, is directly against this position. There the money was received by Buford from Morrison, and it was held to have been received to the use of the United States; and what can be better evidence against an officer, than a transcript made up at the Treasury upon his own reports? The transcripts in this case are founded upon the quarterly official reports of the collector. But it is said, Why not produce *them?* I can only answer, that the object of the law was to get rid of the necessity of producing all those voluminous original evidences. It was intended to simplify the matter. *United States* v. *Eckford's Executors*, 1 How., 251.

But even if this were not so, these very quarterly accounts were handed over to the defendant, and were given in evidence by him. But it is complained of, that the judge decided the *fact* that the transcripts from the Treasury and the quarterly accounts *agreed*. This was a mere matter of *eyesight*. The

testimony of Moore was properly ruled out. That testimony was to the effect that one of his correspondents had *seen* a bond somewhere in Switzerland, and that *therefore* bonds had been abstracted. Well, give his testimony all its weight, and how is it known that the bonds ought to have been in the Treasury? They might have been paid. If such loose evidence is admissible, the Treasury of the United States would be at the mercy of public officers. There would be no security. So, too, the letter of Hoyt, dated 30th June, 1841, was properly ruled out. That letter was written after he had retired from his office and had become a private citizen, and could no more be made an available protest against his official admissions in his quarterly accounts, than a letter written at or after the execution of a bond could be adduced to show the invalidity of the bond. The same may be said of the letters from Hoyt to the First Comptroller in 1842 and 1843.

As to the first five instructions granted, the prayer was that the judge would instruct the jury in conformity with those propositions. It does not appear that the judge used the particular language of those propositions. But if he did, it amounts to the same thing. For "clear proof," "satisfactory *proof," and "the clearest proof," all mean that the thing must be proved. [*129

The claim for goods forfeited was clearly illegal. Mr. Hoyt, having received his portion of the proceeds of the bond, now claims also a portion of the duties. The goods are the things to which the collector is primarily to look for his compensation. But the law has provided that, until the suit is decided, the importer may give his bond, and take the goods into possession, paying the duties as though the goods had been legally entered. The claim for half duties is only arrived at by argument, not from the words of the law. There is only one case similar to this, that of *McLane* v. *United States*, 6 Pet., 404. But that was a case of *prohibited* goods, and the court say that duties, as such, do not accrue upon goods which are prohibited. But it does not support the proposition that duties do not accrue upon goods which are *forfeited*. Whatever the government took in that case was in the nature of a penalty.

Next as to the item of $109,000, alleged to be twice charged. It has not been shown where it is twice charged. It is assumed, not proved. I say that it does not *appear* to have been twice charged; and until it is pointed out, it is needless to discuss it. The practice of the department is easily understood. The collectors, prior to 1829, retained in their hands duties paid under protest, or for unascertained duties, under

the idea that they were personally responsible. After 1829 this practice was changed. Since then, the collector credits the United States with the amount of unascertained duties, and pays to the importer (out of moneys in his hands) the excess when ascertained. For this amount he receives a warrant from the Treasury, with which he is charged. And it is contended that, being charged with the money paid back to the importer, and also with the Treasury warrant, he is thus twice charged. He receives the money twice, once from the importer and once from the Treasury in the shape of a warrant. And he credits the United States with the money when received from the importer, and he also credits the Treasury warrant. And this balances the account. There was consequently no error in the stating of the account, and no double charge. But if there had been, it should have been presented to the accounting officers under the act of 3d March, 1797, before a credit could be claimed for it in this suit.

The charge of commissions for paying drafts has never been allowed, from the first. The services were not extra-official, but were properly imposed on him as collector, and for which the fees and emoluments embraced in the act of 1822 were the compensation allowed by law. The decision of Mr. Jus-
*130] tice *Story in 6 Pet., which is relied on, is not in point. That was the case of a man appointed to *two* offices, and for which he was to receive two distinct salaries. It was not a commission claimed for the discharge of the duties of a single office.

Mr. Walker, in reply and conclusion, referring to the statements of accounts and to the testimony in the record, argued that Mr. Hoyt never, in fact, received or disbursed personally a dollar of the public money. The duties were performed by subordinate officers, and the statements which were signed by him were prepared by those officers. He could not possibly verify the accuracy of those accounts. It was physically impossible. If there was any defalcation it was not his.

As to the item of $109,000, it is said that it nowhere appears to have been twice charged. Now this was not a single error, but an aggregate of many errors running through the quarterly accounts current. Some were in one account, some in others. Now these quarterly accounts are considered as admissions by virtue of the letter of 10th June, 1841; and yet we are asked to throw out the letter, and take the account of which it forms a part. The accounts must stand or fall by the letter as an admission. The excess of deposits for unas-

certained duties was paid to the merchant by the cashier for the collector, and was not charged on the cash-book. And by the circular from the comptroller's office he was directed to enter upon the debit side of his accounts the whole deposit made by the importer, which would be balanced by the ascertained duty, and the excess paid back to the importer. But the excess having been paid by the cashier for the collector, and the collector being charged with the warrant which was to replace the money thus paid back to the importer, the account would not stand balanced. He has in fact paid these duties to the importer, and not received any thing in return.

The Attorney-General has insisted that the Treasury transcripts were evidence, by virtue of the act of 3d March, 1797. The authorities show that they are only evidence between the government and its disbursing officers.

Until 1839, the collector paid moneys on the *order*, not the draft of the Secretary of the Treasury. By what law has the collector been shown to be a disbursing officer of moneys in the Treasury. Can he be made a disbursing officer for the War and Navy Departments? If so, then he could be made the general disbursing officer for all the expenditures of the government. [*Mr. Walker* referred to the financial history of the times, the message of the President, the reports of the Secretary of the Treasury, &c.]

*Different auditors had the oversight of different officers; one for the Navy, one for the War Department, &c. And they could only officially certify the accounts which were within their supervision. Now, by making the collector disbursing officer for these different classes of duties, can you give the First Auditor power to certify all these different accounts? [*131

Next as to commissions. [*Mr. Walker* referred to several acts of Congress to show that the spirit of the whole legislation on this subject was to separate the duties of collecting from those of disbursing the public moneys.] The responsibility of the collector was increased by a change in the mode of drawing money by the Treasurer's draft and by a transfer draft. It was increased by his being obliged to pay drafts of which he had no previous notice. These services did not appertain to the office of collector, and were of that description for which compensation has been repeatedly allowed. *Gratiot* v. *United States*, 15 Pet., 336; *Milner* v. *Gratz*, 16 Id., 221.

Suppose these duties had been devolved on some bank, would not that bank be entitled to commissions? Was it not so before the Independent Treasury Act, either that they

should receive commissions, or, what was better, interest on the money deposited? Now what is the difference whether you select a person who holds no office, or one who holds an office with particularly defined duties and a defined salary for those duties? The act of 1822 limits the *emoluments* of an office. What is an emolument? It is a compensation for the performance of an official duty. Is a commission for performing duties *not* belonging to an office an emolument of that office? The act of 7th May, 1822 (3 Stat. at L., 684), gave to the collectors in Florida compensation in addition to fees and emoluments. The act of 1839 does not apply to this case, first, because Hoyt was not a disbursing officer "in any branch of the public service, known and recognized by law, or who had given bond for the performance of such duties." Second, because he was neither an "officer" nor a "person" whose pay or emoluments are *fixed by law*. His compensation as collector was contingent, depending upon the business done at the custom-house.

As to the form of the action. This claim can only be sustained under that count in the declaration which is money had and received. It must have been money. Suppose goods had been received, could this action be maintained? If not, could it be maintained for bonds or anything else than money? The account is for bonds some of which are not yet due. Nor do the transcripts alter the case in this respect. They only stand in place of the voluminous accounts. They do not change the form of action. The instruction of the *132] judge, which *required that the defendant should show an error in the quarterly accounts by the *clearest* evidence, is not defensible. It is a superlative, and rejects two inferior kinds of evidence, viz., *clear* evidence and *clearer* evidence. Now by what rule of law is a jury bound to reject clear testimony? Would the same rule apply to a note of hand in which error should be alleged?

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court held in and for the Southern District of New York, in a suit brought by the United States against the late collector of the port of New York, to recover a balance claimed in the settlement of his accounts.

The defendant had been collector from the 29th of March, 1838, to the 2d of March, 1841, and on a final adjustment of his accounts, at the close of his official term, a balance against him was found due by the accounting officers of the Treasury of $216,048.07.

The counsel for the plaintiff produced on the trial four Treasury transcripts containing a statement of his accounts with the government for the whole period of his term, and which resulted in the balance above stated.

These transcripts were objected to, as not competent evidence against the defendant of the balance therein found due, within the meaning of the act of Congress providing for this species of proof. Act of 3d March, 1797 (1 Stat. at L., 512).

The second section of the act provides, that in every case of delinquency, where a suit has been brought, a transcript from the books and proceedings of the Treasury, certified by the Register, and authenticated under the seal of the department, shall be admitted as evidence, upon which the court is authorized to give judgment.

It has been already determined, under this act, that an account stated at the Treasury, which does not arise in the ordinary mode of doing business in that department, can derive no additional validity from being certified according to its provisions; and that the statement can only be regarded as establishing items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books; in such cases the officers have official knowledge of the facts stated. (*United States* v. *Buford*, 3 Pet., 29.) That when moneys come into the hands of an individual, not through the officers of the Treasury, or in the regular course of official duty, the books of the Treasury do not exhibit the facts, nor can they be known to the department. (Id.)

It was held in the *United States* v. *Buford*, that a Treasury *transcript was not competent proof against the defendant in respect to moneys coming into his hands from [*133 a third person not in the regular course of official business; and that the evidence on which the statement of the account was founded should have been produced. (See also *United States* v. *Jones*, 8 Pet., 375.)

In the case before us, the several items of account in the transcripts arise out of the official transactions of the defendant, as collector, with the Treasury Department, and were founded upon his quarterly and other accounts, rendered in pursuance of law and the instructions of the Secretary. They were substantial copies of these quarterly returns, revised and corrected by the accounting officers as they were received, and with copies of which the defendant had been furnished in the usual course of the Department; they present a mutual account of debit and credit, arising out of his official dealings with the government in the collection of the public revenue.

We can hardly conceive of a case, therefore, coming more directly within the act of Congress as expounded by the cases referred to.

In the case of the *United States* v. *Eckford's Executors*, (1 How., 250), a transcript corresponding with the one in question was held to be competent evidence of the balance of the account. The point was presented in a certificate of a division of opinion of the judges.

It has also been objected to these transcripts, that some of the items included contain a charge against the defendant in gross; such as the aggregate amount of the duty bonds, and of duties accruing within the quarter, reference being made to the abstracts for the particular items composing each amount. This objection was not specially pointed out at the trial, as the one made then was to the admissibility of the transcripts generally. If made then, it might have been removed by the production of copies of the abstracts. They were called for, in the course of the trial, in respect to the item of bonds in the quarterly account of the 31st March, 1838, and produced. This affords a full answer to the objection.

But we do not intend to admit that it would have been available, if made at the proper time. We agree, that a transcript of a gross balance against the officer would be objectionable, as the act of 1797 obviously contemplates, to some extent, a detailed statement of the accounts between him and the government. It must be "a transcript from the books and proceedings of the Treasury," which doubtless will usually present such a statement. The amount of the detail, or degree to which the particulars of the account should be carried, *must necessarily be left open to the exercise of some discretion, as there can be no fixed rule by which to determine it.

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The necessity of greater particularity than exhibited here in the several transcripts, to guard the officers against surprise, and afford an opportunity for explanation, is not very apparent; for they contain the several items making up the quarterly returns of the party himself, with the addition of such errors as the accounting officers may have detected in their examination; and with all of which he had been furnished.

If the accounting officers, therefore, have fallen into error, the officer has had ample time and means for inquiry and correction. This is true as it respects each quarterly account rendered.

Besides, by the fourth section of the act of 1797, no claim for an equitable credit can be admitted, upon the trial, but such

as shall appear to have been presented to the accounting officers for examination, and by them disallowed, except in case of vouchers, which the officer was not before able to procure, or was prevented from exhibiting, by absence or unavoidable accident.

As a general rule, therefore, every item of the account that can be the subject of litigation at the trial, on the production of a transcript, must have been a matter of dispute at the Treasury Department, and, of course, presenting nothing new or unexpected to either of the parties.

If the transcript contains the accounts, debits, and credits, as acted upon at the Department by the accounting officers, it would seem to be sufficient as it respects the particulars of the account required by the act.

The court is of opinion, therefore, that the several Treasury transcripts given in evidence were properly admitted.

The comptroller, in the adjustment of the accounts, rejected nineteen items, that were claimed by the defendant as legal or equitable credits, which, in the aggregate, exceeded the amount of the balance reported against him. All of them except four were either allowed by the court, or submitted to the jury as a matter of fact involving no principle of law, and, of course, require no further notice.

Among the items rejected is a charge of $36,712.71, for fees payable by persons engaged in trade and navigation for certain services, performed by the collector at each port, such as giving permits to land goods, clearances, bills of health, &c., and which were chargeable under the compensation act of 2d March, 1799 (1 Stat. at L., 705, § 2). These fees were divided between the collector, naval officer, and surveyor, in districts in which these several officers are appointed. The *collector in the district of New York was also entitled to a commission of one quarter of one per cent. on all [*135 moneys received on account of duties on goods, or tonnage of vessels.

By an amendment of this act, April 30, 1802 (2 Stat at L., 172, § 3), it was provided, that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, shall amount to more than five thousand dollars, the excess shall be accounted for, and paid into the Treasury. The act was not to extend to fines, forfeitures, and penalties, a share of which the collector was entitled to, under the twentieth section of the act of 2d March, 1799 (1 Stat. at L., 697).

The act of 7th March, 1822, reduced this maximum to four thousand dollars per annum, and the commission to one sixth

of one per cent. on the moneys received. (3 Stat. at L., 694, 695, §§ 7, 9.)

It is insisted by the defendant, that the limitation in the aforesaid acts does not refer to or embrace the fees allowed to him under the act of 1799; and that the collector was still entitled to apply them to his own use.

At the date of the act of 1802, the compensation of the collector was derived from three sources:—1, fees allowed for the services already referred to; 2, commissions on the duties received; and 3, a share of the fines, penalties, and forfeitures. The emoluments of the office were dependent upon the receipts from these sources; and the officer was entitled to apply to his own use the whole amount derived from them.

The provision in this act, therefore, that whenever the annual emoluments, after deducting the expenses, exceeded the amount of five thousand dollars, the excess should be accounted for, necessarily embraces in the limitation the fees as well as commissions belonging to the office, and would have embraced also the fines and forfeitures, had it not been for the proviso to the act taking them out of the limitation.

The argument would be quite as strong in favor of excluding the commissions as in the case of fees, as the one can in no more appropriate sense be regarded as emoluments of office than the other, and thus the limitation would become a nullity.

These terms denote a compensation for a particular kind of service to be performed by the officer, and are distinguishable from each other, and are so used and understood by Congress in the several compensation acts; they are also distinguishable from the term *emoluments*, that being more comprehensive, and embracing every species of compensation or pecuniary profit derived from a discharge of the duties of the office; and such is the obvious import of it in these acts.

*136] *The act of 1822, so far as respects this question was simply a reënactment of that of 1802, with the exception of fixing the limit of compensation to four instead of five thousand dollars.

But it is unnecessary to pursue this argument further, as there is another view of the question, founded upon subsequent acts of Congress, that is entirely decisive.

The third section of "An Act to provide for the support of the Military Academy of the United States for the year 1838, and for other purposes," passed 7th July, 1838 (5 Stat. at L., 264), provides, that the Secretary of the Treasury shall be authorized to pay collectors, out of any money in the treasury not otherwise appropriated, such sums as will give to them the same compensation in the year 1838, according to the importa-

tions of that year, as they would have been entitled to receive, if the act of 14th July, 1832, had not gone into effect; provided, that they shall not receive a greater annual salary or compensation than was paid for the year 1832; and provided, also, that the collectors shall render to the Secretary, under oath, a quarterly account of all fees and emoluments whatever, by them received, together with the expenses of their office; and provided further, that no collector shall receive more than four thousand dollars per annum.

This provision was continued in force for the years 1839, 1840, and down to the 3d of March, 1841, when the mode of compensation was materially changed. (5 Stat. at L., p. 431, § 2; p. 432, § 7. 6 Stat. at L., 815.)

The provision relating to the year 1840 is not to be found in the public statutes at large, as it is embraced in the seventh section of "An Act for the relief of Chastelain and Ponvert, and for other purposes," passed 21st July, 1840. Being a private act, it was not incorporated in the public statutes in Little & Brown's edition of 1846.

It will be seen by the act of 1838, that the collector is bound to account to the Secretary of the Treasury for all the fees and emoluments received by him in the execution of the duties of his office, and that his annual compensation was limited, as in the act of 1822, to an amount not exceeding the sum of four thousand dollars. The same act required that the naval officers and surveyors should make a return of their fees and emoluments, and limited the annual amount of their compensation.

During the period, therefore, of the term of office of the defendant as collector of the port of New York, which extended from the 29th of March, 1838, to the 2d of March, 1841, there can be no pretence for claiming that the limitation, as respected *his annual compensation, did not [*137
apply as well to the fees received under the act of 1799, as to commissions or emoluments of office derived from any other source. He was required in express terms to account for them to the Treasury, the same as in the case of other emoluments.

Another item claimed, and which was rejected by the court, is a charge of $14,035.29 for a moiety of the duties received on goods that were seized, and afterwards condemned for a violation of the revenue laws.

This question turns upon a construction of sections 89 and 91 of the revenue act of 2d March, 1799 (1 Stat. at L., 695, 696).

Section 89 provides, among other things, that the claimant,

after the seizure of the vessel and merchandise, may procure the same to be re-delivered to him on the execution of a bond with sureties for the payment of the appraised value, together with the payment or security of the duties, the same as if the vessel and goods had been legally entered at the customs. If judgment shall afterwards pass in favor of the claimant in the proceedings instituted, the bond shall be cancelled; if against him, then, unless he pays into the court the amount of the appraised value of the ship and goods, together with the costs, within twenty days, judgment shall be entered on the bond by a motion in open court, without further delay.

In case no bond is given by the claimant, and the vessel and goods have been condemned, the same are to be sold at public auction by the marshal to the highest bidder, and the proceeds paid over to the collector. (§ 90.)

Section 91 provides, that all fines, penalties, and forfeitures recovered by virtue of the act, after deducting costs and expenses, shall be disposed of as follows: one moiety shall be paid by the collector into the treasury for the use of the United States; and the other equally divided between him, the naval officer, and the surveyor of the port.

It will be seen, therefore, by these provisions, in cases of seizure, where the claimant elects to give a bond, and pay or secure the payment of the duties, with a view to a re-delivery of the vessel and goods, that, if the same be condemned, he loses as well the duties paid or secured, as the property seized and condemned. It is a moiety of these duties which accrued during the term of the defendant, as collector, that he claims as a portion of the forfeitures belonging to him under the ninety-first section of the act.

A conclusive answer to this claim, in the judgment of the court, is, that the duties thus paid constitute no part of the proceeds of the goods forfeited, in which only the collector *has an interest. The proceeds are the appraised value secured by the bond, or, in case no bond be given, the amount derived from the sale by the marshal, after the deduction of all proper charges. The payment of the duties is a condition to the acceptance of the bond, and re-delivery of the goods, and is the voluntary act of the claimant. They do not enter into the question of condemnation, nor constitute any part of the forfeiture declared by the act, or the judgment of the court.

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It is true, the collector acquires by the seizure an inchoate right to the goods, which, when followed by condemnation, becomes absolute to the extent of his share of the forfeiture (1 Wheat., 462; 4 Id., 74); but it is a right only in the goods

themselves, which have been seized and forfeited,—the *rem*, a moiety of which, it is admitted, has already been allowed to him.

This view is in conformity with the language of the act (§ 91), which is, that all fines, penalties, and forfeitures, recovered by virtue of this act, shall be disposed of, one moiety to the government, the other to the collector, to be divided as therein declared.

The case is not like that of *McLane* v. *The United States*, 6 Pet., 405. There the sum in controversy was reserved out of the forfeiture by the act for the relief of the owners; and was regarded by the court as part and parcel of it.

The only doubt that existed was, whether or not the amount thus reserved should be considered as the legal duties belonging to the government, or a portion of the forfeiture, the residue of which had been remitted. The amount reserved was to be equal to the double duties imposed upon goods imported, under certain circumstances, by an act which had been passed since the forfeiture accrued; and the court was of opinion, that duties mentioned in that act were referred to simply as a measure to determine the sum to be reserved, and not as duties in the common acceptation of the term. The amount reserved, therefore, was so much excepted out of the forfeiture remitted, a moiety of which properly belonged to the collector.

Another item rejected by the court is a charge by the defendant of $201,500 commissions, for accepting and paying drafts of the treasury during his term in office.

These commissions are claimed on the ground that the services required and performed were extra services, not incident to the proper legal duties belonging to the office of collector, and that he is entitled, therefore, to a reasonable remuneration for the same, beyond the compensation annexed to the office.

By the act of 2d March, 1799, § 21 (1 Stat. at L., 642), it *is provided that the collector shall receive all moneys [*139
paid for duties, and take all bonds for securing the payment thereof; and shall, at all times, pay to the order of the officers, who shall be authorized to direct the payment thereof, the whole of the moneys which he may receive by virtue of the act, and shall once in every three months, or oftener, if required, transmit his accounts to the Treasury Department for settlement.

The Secretary of the Treasury is the head of that Department; and has devolved on him the superintendence and collection of the public revenue; and is the officer properly

authorized to direct the safe-keeping and payment or disbursement of the same. (1 Stat. at L., 65, 66.)

Under the authority thus given, and which has been exercised since the foundation of the government, the Secretary, by a circular dated 9th June, 1837, in consequence of the suspension of specie payments by the banks in which the public moneys had been deposited, directed that all public moneys received by the collectors, except such as were required for current expenses of the office, &c., should be placed to the credit of the Treasurer of the United States, in a separate account, on the books of the customs, and that the same would be drawn for by the Treasurer's drafts on the collector, from time to time, as the necessities or the convenience of the government required.

This mode of keeping and paying out the public moneys received by the collectors in the different collection districts continued during a considerable part of the term of office of the defendant; and, doubtless, very much increased the duties of the office, its labors and responsibilities, for which he may well be equitably entitled, at the hands of the proper authorities, to a corresponding compensation; and it is not at all improbable, that to the necessity of keeping on hand such large sums of the public moneys as are daily and weekly collected at the port of New York, and the disbursement in comparatively small sums, upon the drafts of the Treasurer, may be attributed, in part, at least, the great deficiency in the accounts. It must have required extraordinary diligence and accuracy, and very competent and faithful subordinates, to have prevented it.

But be this as it may, we are unable to perceive that the duties thus imposed, onerous and responsible as they undoubtedly were, exceeded those legally incident to the office; or such as the Secretary was authorized to require as the head of the Treasury.

The depositaries of the public revenue, as provided by the act of 23d June, 1836, having failed to comply with the conditions required of them, the duty of regulating the safe-keeping and disbursement devolved upon the sound discretion of *140] this *officer; and indeed, on looking into the provisions of that act, and the numerous and complicated conditions and restrictions annexed to the employment of the banks as depositaries, it is difficult to say, that the authority there conferred to use them formed any exception to this discretion. If they refused to become depositaries, or failed to comply with the conditions, or, in the judgment of the Secretary, were unsafe, it was his duty to provide some other mode for the

safe-keeping and disbursement, and until some other was provided, those officers immediately concerned in the receipt and collection of the revenue must necessarily become the depositaries, and disbursing officers of whatever amount they may have received.

If other depositories be provided by law, or by the regulations of the Secretary, the money is then deposited there by the collector, in sums large or small, as received, according to the instructions of the Secretary; if not, it remains in their hands until drawn out, from time to time, as the necessities of the government may require, upon drafts by the same authority. In either case, the collector is but performing the duties enjoined by the act of 1799, which provides, that he shall receive all moneys paid for duties, and shall, at all times, pay them over upon the order of the officer authorized to direct the payment. The duty is the same in both cases, the nature of the service the same, and the obligation to perform the service dependent upon the same authority.

This mode of keeping and disbursing the public revenue has existed since the foundation of the government. Even when the banks have been used as depositories, either by act of Congress, or by the regulations of the head of the Treasury, it was not, at all times and places, practicable for the different collectors and receivers to make the deposit, and in such cases the moneys were kept until drawn for by the proper authority.

The Bank of the United States, and the state banks, under the act of 1836, with some slight exceptions, are the only instances, I believe, in which Congress have undertaken to control the discretion of the Secretary, as to the place in which the public moneys shall be kept, down to the act of 1840, when a new system was established, usually known as the sub-treasury. (5 Stat. at L., 385.)

With these exceptions, the place of deposit, if any was designated, or the mode of making payments by the collectors, depended upon the regulations of the Treasury. And it is not to be doubted but that it was as much their duty to conform to the orders of that department, under such circumstances, whether for deposit or payment, as in the cases in which the depositories had been designated by act of Congress. In the *one case, the orders rested upon the general power vested in the department by the act of 1789; in the others, upon the same power, modified by the subsequent acts prescribing the particular depositories. [*141

But there is another view of this branch of the case, which must not be overlooked, and that is, whether, assuming that

the services of the defendant were extra and beyond those incident to the office, the court erred in rejecting the claim.

The act of 1822, already referred to, as we have seen, limited the fees and emoluments of the office to an amount not exceeding the sum of $4000. The act of 1838, and which was continued through the term of office of the defendant, contained a like restriction, and the eighteenth section of the act of 1822 further provided, that no collector should ever receive more than four hundred dollars, exclusive of his compensation as collector, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any other office or capacity.

It would be extremely difficult to say, even if the defendant is right as to the nature of the service performed, in the face of this provision, that a court of law could sanction the compensation claimed, or any other compensation for such service. The very ground of claim here is that the service was rendered in a capacity other than that of collector.

The two limitations, the one upon his compensation as collector, and the other upon compensation for service in any other office or capacity, while acting as collector, would seem to close up every "loophole" through which any additional remuneration could be claimed in a court of justice. But this is not all.

By the eighth section of the act of 3d March, 1839 (5 Stat. at L., 349), it is provided, "that no officer in any branch of the public service, or any other person whose salaries, or whose pay or emoluments, is or are fixed by law and regulations, shall receive any extra allowance or compensation, in any form whatever, for the disbursement of public money, or the performance of any other service, unless the said extra allowance or compensation be authorized by law."

It is impossible to misunderstand this language, or the purpose and intent of the enactment. It cuts up by the roots these claims by public officers for extra compensation, on the ground of extra services. There is no discretion left in any officer or tribunal to make the allowance, unless it is authorized by some law of Congress.[1] The prohibition is general, and applies to all public officers, or *quasi* public officers, who have a fixed compensation.

*142] *This act, together with the act of 13th August, 1841, making it penal for any officer charged with the safe-keeping or disbursement of the public money to convert it to his own use, or to neglect or refuse to pay it over upon

[1] Followed. *United States* v. *Shoemaker*, 7 Wall., 342.

the authority of the Secretary of the Treasury, present a system of legislation against these claims for extra compensation by public officers, that, if fairly carried into effect, must, for aught we see, effectually extinguish them, except when allowed by the authority of Congress; and which, it must be admitted, is the proper constitutional tribunal to decide upon the matter.

Another item in the account rejected by the court is a claim of $109,000, for excess of deposits for unascertained duties, which it is supposed has been twice charged by the accounting officers against the defendant in the adjustment of his accounts.

The item does not appear among those presented to the comptroller, and to have been rejected by him, but it is claimed that the error is shown upon the face of the account, and, therefore, available to the defence.

This sum was the subject of comment by the defendant in his correspondence with the department at the time of closing the settlement of his accounts, in June, 1841, but he seems to have been unable to satisfy himself at that time that the amount had been twice charged against him.

By the second section of the act of 3d March, 1839 (5 Stat. at L., 348), all moneys paid to the collector for unascertained duties were directed to be placed to the credit of the Treasurer, and to be kept and disposed of as other moneys paid for duties; and should not be held by him to await the ascertainment of the duties; and, whenever it was shown to the Secretary of the Treasury that more money had been paid than covered the actual duties when ascertained, it should be his duty to draw a warrant upon the Treasurer to refund the amount.

The regulation, under this act, at the Treasury, was, to permit the collector to refund the excess of duties, as they were ascertained, to the importer, keeping a separate account of the same, and at the end of each month to make a return to the department of the amount, accompanied with the vouchers, when a warrant was drawn in his favor, refunding the amount. The aggregate amount of this excess thus paid by the collector during his term, and for which warrants were drawn in his favor, constitutes the sum in question. The defendant supposes it has been twice charged in his accounts, once in the credit given to the government for the amount of unascertained duties, and again by charging him with these warrants. If this were true, *the error would be obvious, and being so obvious, it is difficult to believe it could have oc- [*143

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curred; or, if it had, that either the department or the defendant could not have readily detected it.

It is, however, sufficient for the purposes of this case to say, we are unable to perceive any evidence upon the face of the accounts, or indeed in the record, tending to establish it, and that the court were right, therefore, in the instructions given to the jury.

If the whole of the unascertained duties were credited to the government, then the warrants drawn to reimburse the collector for the payment of the excess should not be charged in his customs account. If the credit was for the net or actual duties only, then it would be proper to charge them. How this may be, it is impossible to say from anything in the record. An examination at the Treasury Department would, doubtless, have removed any difficulty in the account.

Another item claimed by the defendant, and rejected by the court, is a charge of $1063.84 deducted from the maximum compensation for the year 1838, the service having commenced on the 29th day of March in that year, when he entered upon the duties of his office. The defendant claimed compensation for the entire year.

The act of 1838, already referred to in another branch of this case, which provided for the compensation of the collector for the year, made it virtually a salary office, with the addition of his share of the fines, penalties, and forfeitures, and the *pro rata* allowance, therefore, for the portion of the year the defendant held an office was all that could be legally claimed. The case is distinguishable from that of *The United States* v. *Dickens*, 15 Pet., 141.

The question is of no importance now, as it has since been settled by an express act of Congress. (9 Stat. at L., 3.)

There were some other questions of minor importance presented in the argument, but which, in our judgment, cannot materially affect the result, and need not, therefore, be particularly noticed.

After the best consideration we have been able to give to the case, we are of opinion that the several rulings of the court below were correct, and that the judgment should be 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 Southern District of New York, and was argued by counsel.

*144] 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 damages at the rate of six per centum per annum.

EX PARTE: IN THE MATTER OF HENRY W. RHODES *v.* THE STEAMSHIP GALVESTON, &C.—*In Admiralty.*

In order to sustain a motion to docket and dismiss a case under the forty-third rule of this court, it is necessary to show, by the certificate of the clerk of the court below, that the judgment or decree of that court was rendered thirty days before the commencement of the term of this court.

Hence, where the certificate of the clerk stated that a final judgment was pronounced at April term, 1850, it was not sufficient, because *non constat* that the April term might not have been prolonged until December, 1850.

MR. COXE filed the following motion and certificate:

"A certificate being produced from the District Court of Texas, by which it appears that at the April term, 1850, of said court a final decree was rendered by said court in favor of the defendants and respondents, and that an appeal from said decree was prayed and obtained by the libellants to the Supreme Court of the United States,—and it appearing that the record in said case has not been filed,—Mr. Coxe for said respondents and defendants, moves the court that the said cause be docketed and dismissed with costs.

"COXE, *for Defendants and Respondents.*"

"*United States District Court.—District of Texas.*

"Henry W. Rhodes, Libellant, *v.* The Steamship Galveston, her Tackle, Apparel, and Furniture, John R. Crane, Master. Charles Morgan, Israel C. Harris, and Henry R. Morgan, Claimants and Respondents.—*In Admiralty.*

"I, James Love, Clerk of the United States District Court for the District of Texas, do hereby certify, that at the April term, 1850, of said court, a final judgment or decree was rendered by the court here in the above-entitled cause, in favor of the defendants and respondents, and that the libellant prayed and obtained an appeal from the said final decree of the said District Court to the Supreme Court of the United States.

"In testimony whereof, I have hereunto set my [SEAL.] hand and affixed the seal of said court, this 27th day of December, A. D., 1850.

JAMES LOVE, *Clerk.*"

Mr. Chief Justice TANEY delivered the opinion of the court. 153

*A motion has been made to docket and dismiss the case of Henry W. Rhodes, libellant, against the steamship Galveston, and John B. Crane, master, and Charles Morgan and others, respondents and claimants, in which it appears that a decree was rendered in the District Court of the United States for the District of Texas against the libellant, and from which decree he prayed an appeal.

The motion is made in behalf of the respondents and claimants under the forty-third rule of this court; and in support of the motion they produce the certificate under seal of the clerk of the District Court, stating that at the April term, 1850, a final decree was rendered in the above-mentioned case in favor of the respondents and claimants; and that the libellant prayed and obtained an appeal to this court. The certificate does not state on what day the decree was made.

The rule referred to entitles a party, in a case like the present, to have it docketed and dismissed, where the decree was rendered thirty days before the commencement of the term of this court, unless the appellant shall docket the case and file the record within the first six days of the term. The record has not yet been filed and the case docketed by the appellant. But in order to entitle the appellees to docket and dismiss, they must show by the certificate of the clerk that the decree was rendered thirty days before the present term. The certificate produced states only the term of the District Court at which it was rendered, and not the day. And it often happens that the term of a court continues by adjournments from time to time for several months. For aught that appears in this certificate, the April term, 1850, of the District Court may have continued until the meeting of this court; and we are not aware of any case that has been docketed and dismissed under this rule, unless the day of the judgment or decree was stated in the certificate. And as we have no evidence before us to show how long the term of the District Court continued, or on what day this decree was rendered, the motion to docket and dismiss is overruled.

Order.

On the motion of R. S. Coxe, Esq., to docket and dismiss, under the forty-third rule of this court, the appeal in this case from the District Court of the United States for the District of Texas.

On consideration of this motion, it is now here ordered by the Court, that the said motion be, and the same is hereby, overruled.

*Granville S. Oldfield, Plaintiff in error, *v.* William H. Marriott.

The second article of the treaty between the United States and Portugal, made on the 26th of August, 1840 (8 Stat. at L., 560), provides as follows, viz.:—"Vessels of the United States of America arriving, either laden or in ballast, in the ports of the kingdom of Portugal, and, reciprocally, Portuguese vessels arriving, either laden or in ballast, in the ports of the United States of America, shall be treated, on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place, with respect to the duties of tonnage, lighthouse duties, pilotage, port charges, as well as to the fees and perquisites of public officers, and all other duties and charges, of whatever kind or denomination, levied upon vessels of commerce, in the name or to the profit of the government, the local authorities, or any public or private establishment whatever."

This article is confined exclusively to vessels. It does not include cargoes, or make any provision for an indirect trade,—that is, it does not provide for the introduction of articles which are the growth, produce, or manufacture of some third country, into the ports of Portugal in American vessels upon the same terms upon which they are introduced in Portuguese vessels, or the introduction of such articles into the ports of the United States in Portuguese vessels upon the same terms upon which they are introduced in American vessels. These classes of cases are left open to the legislation of each country.

The Tariff Act of Congress, passed on the 30th of July, 1846, has the following section:—"Schedule I. (Exempt from duty.) Coffee and tea, when imported direct from the place of their growth or production, in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges."

The treaty with Portugal is not one of those referred to in this paragraph.

Consequently, a cargo of coffee, imported from Rio Janeiro in a Portuguese vessel, was subject to a duty of twenty per cent., being the duty upon non-enumerated articles.

An historical account given of the course pursued by the government of the United States, showing that, since the year 1785, it has been constantly endeavoring to persuade other nations to enter into treaties for the mutual and reciprocal abolition of discriminating duties upon commerce in the direct and indirect trade.

This case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

It was an action brought by Oldfield against Mariott, who was the collector of the port of Baltimore, to recover back the amount of duties paid under protest upon an importation of coffee in a Portuguese vessel from Rio Janeiro.

On the 26th of August, 1840, a treaty was made between the United States and Portugal (8 Stat. at L., 560), the second article of which provided that "vessels of the United States of America arriving, either laden or in ballast, in the ports of the kingdom of Portugal, and, reciprocally, Portuguese vessels arriving, either laden or in ballast, in the ports of the United States of America, shall be treated, on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place,

with respect to the duties of tonnage, lighthouse duties, pilotage, port charges, as well as to the fees and perquisites of public officers, and all other duties and charges, of whatever kind *or denomination, levied upon vessels of com- *147] merce, in the name or to the profit of the government, the local authorities, or any public or private establishment whatever."

On the 30th of July, 1846, Congress passed "An Act reducing the duty on imports and for other purposes," the third section of which enacted, "that from and after the first day of December next, there shall be levied, collected, and paid on all goods, wares, and merchandise imported from foreign countries, and not specially provided for in this act, a duty of twenty *per centum ad valorem.*"

In the same act of 1846, was the following section:—

"Schedule I. (Exempt from duty.) Coffee and tea, when imported direct from the place of their growth or production, in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges; coffee, the growth or production of the possessions of the Netherlands, imported from the Netherlands in the same manner."

In the trial of the cause in the Circuit Court, the following statement of facts was agreed to:—

GRANVILLE S. OLDFIELD *v.* WILLIAM H. MARRIOTT, *Collector of the Port of Baltimore.*

It is agreed and admitted, in the above cause, that the brig Sandade Eterna arrived at the port of Baltimore, from Rio Janeiro, in Brazil, with a cargo of coffee, the production and growth of Brazil, on or about the 15th day of November, 1847; that the said brig was, at the time of said arrival and importation of said coffee, a regularly documented vessel of the kingdom of Portugal; that 1188 bags of the coffee so imported were consigned to the plaintiff in the above cause, who proceeded, on the 16th of the said month of November, to make an entry of the same as if free of duty, and to obtain a permit, agreeably to such entry, to unload and discharge from said brig the said 1188 bags of coffee so imported and consigned to him, as appears by the papers herewith filed and marked No. 1 and No. 2.

(Then followed the import entry, the consignee's oath, and the permit.)

It is further admitted and agreed, that after the said permit had been given to the plaintiff, but before any portion of the said coffee was unloaded from said brig under said permit,

and before the permit was delivered or shown to the inspector of customs of the aforesaid port, in whose charge the said vessel had been placed for custody and delivery of her cargo, the said permit was countermanded by the defendant, as collector as *aforesaid, so far as he could legally countermand [*148
it, and the aforesaid entry made of the said coffee by the plaintiff as if the same were free of duty refused, so far as the said collector could refuse, and a claim and charge of duty of twenty per cent. *ad valorem* made by the said collector (amounting to $2070.60) against the said coffee, as being due and payable upon the same, under the provisions of Schedule I of the Tariff Act of the United States of the 30th of July, 1846.

It is further admitted and agreed, that the said plaintiff wholly denied the legality of the said claim of duty made as aforesaid by the said collector, and protested against the payment of the same; and that only because of his inability to obtain possession of his said coffee without the payment of the said duty so claimed and demanded, and after filing with the said collector a protest and notice, of which the annexed paper, marked No. 3, is a copy, did the said plaintiff pay to the said collector the aforesaid sum of $2070.60 as a duty upon the said coffee. (Then followed a copy of the protest and notice.)

It is further agreed, that a paper herewith filed, and marked No. 4, is a true copy of the decree of the government of Portugal, of which it purports to be a translation and copy, and that the said decree had been in full force from the time of its date, in all the dominions of the Queen of Portugal, until and after the importation of the aforesaid coffee and payment of the duty herein before mentioned.

No. 4. *Decree of the Queen of Portugal.*

(Copy.) "*Treasury Department of State.*

"Donna Maria, by the grace of God and the constitution of the monarchy Queen of Portugal, &c., &c., make known to all our subjects that the General Cortes have decreed, and we have sanctioned, the following law:—

"Article 1. The premium of fifteen per cent. granted by art. 1 of the decree of 16th January, 1837, to articles, merchandise, and manufactures imported in Portuguese vessels, and entered at the custom-houses of the kingdom and adjacent islands, is abolished.

"Sect. 1. Articles, merchandise, and manufactures, coming from countries or ports where the Portuguese flag is not

admitted, imported and entered for consumption, shall pay the respective duties, and one-fifth more of the amount of said duties.

"Sect. 2. Articles, merchandise, and manufactures, coming from countries or ports where the Portuguese flag is admitted, and not subjected to differential duties, imported in foreign vessels, not of the country of the production of said articles, *119 *merchandise, and manufactures, and entered for consumption, shall also pay the respective duties, and one fifth more of the amount of said duties.

"Sect. 3. Articles, merchandise, and manufactures, coming from countries or ports where the Portuguese flag may be subjected to differential duties, imported in foreign vessels, and entered for consumption, shall pay the respective duties, and the additional duties which the government is bound to impose on them according to article 8th of the general tariff of duties, organized in conformity to the law of the 11th of March, 1841.

"Article 2. The provisions of the present law shall commence to take effect three months after its publication, for articles, merchandise, and manufactures which shall be entered in vessels coming from ports in Europe and North America, and six months for all other ports.

"Article 3. All contrary legislation is hereby revoked.

"We therefore order all authorities, &c.

"Given at the Palace of Necessidades, the 18th of October, 1841.

"THE QUEEN.

"ANTONIO JOSE D'AVILA,
Secretary of the Treasury."

Article 8th of the General Tariff Law referred to.

"A special order of the government shall authorize the collectors to receive an additional duty on goods imported from foreign countries, equivalent to the difference of duties which said nations shall make between their national vessels and those of Portugal, or between Portuguese goods on their importation."

(And the said decree regulated and controlled within the kingdom of Portugal the indirect trade between the United States of America and the kingdom of Portugal at the time of the said importation and demand and payment of said duties; and that, under said decree, coffee and other articles of merchandise the production and growth of Brazil, and imported into any port of the kingdom of Portugal in vessels of the said United States, were subjected in said kingdom, by

virtue of said decree, to the payment of a discriminating duty of twenty per cent. upon the amount of duty payable upon the same articles if imported into the kingdom of Portugal in a Portuguese vessel.)

It is agreed that the facts herein stated may be modified and added to in such way as may be thought proper and necessary by the court for a full and correct presentation and decision of the issue in the cause.

*It is also admitted that the said decree of Portugal is executed in like manner, in reference to all foreign vessels and their cargoes, as in reference to those of the United States. [*150

It is also admitted, that, since the passage of the Tariff Act of 1846, several Portuguese vessels have arrived from Rio de Janeiro, in ports of the United States, with cargoes of coffee the growth of Brazil; that such coffee was admitted free of duty, the Secretary of the Treasury not having been consulted in reference thereto, and having given no directions about the same.

It is further agreed that the court shall render a judgment, upon this statement, for the plaintiff or for the defendant, according to the views which the court may take of the law of the case; and that either party may prosecute a writ of error from whatsoever judgment may be rendered by the court in this case.

GEO. M. GILL, *for Plaintiff.*
W. L. MARSHALL, *for Defendant.*

Upon this statement of facts the Circuit Court gave judgment for the defendant. Whereupon, Oldfield brought the case up to this court.

It was argued by *Mr. Gill* and *Mr. David Stewart*, for the plaintiff in error, and by *Mr. Crittenden*, Attorney-General, for the defendant in error.

The counsel for the plaintiff in error contended,—

First. That upon the true construction of the act of 1846, in connection with the treaty with Portugal, the coffee imported by appellant was free from duty, it having been imported from its place of growth to this country in a Portuguese vessel, which, under the treaty with Portugal, is exempt from discriminating duties, tonnage, and other charges.

Second. That in the construction of the act of 1846, each word used is to have its usual and ordinary meaning; and while effect is to be given to each word, the whole sentence is

to be governed by grammatical rules. Respect is also to be had to the order and relation between themselves of the words employed, and such interpretation is to be given as will elucidate the meaning of the whole sentence, and yet give effect, if possible, to each word thereof. If, upon applying the above rules of construction, the meaning of the whole is clear and apparent, then there will be no necessity to look beyond the context. In this case, it is contended that, upon the application of the above principles, the meaning of the law is clear and without ambiguity; and that all coffee imported into this *151] *country from the place of its growth, in American vessels, or in foreign vessels which, under reciprocal treaties, are exempt from discriminating duties, tonnage, and other charges, is free.

Third. That revenue laws are, in no just sense, either remedial laws or founded upon permanent public policy, and are, therefore, not to be liberally construed. Nor is it necessary or proper to look beyond the context of the law to ascertain its meaning or intent, which ought to be gathered from the law itself. In support of this view, the appellant relied upon the case of *The United States* v. *Wigglesworth*, 2 Story, 370.

Fourth. That if, in ascertaining the construction of the act of 1846, reference be had to acts *in pari materia*, the necessity of which in this case is not admitted, the appellant relied upon the following acts. Act of 27th April, 1816, § 3 (3 Stat. at L., 313); Act of 22d May, 1824, § 2 (4 Id., 29); Act of 14th July, 1832, § 10 (Id., 592); Act of 30th August, 1842, §§ 9, 10 (5 Id., 561).

These various acts of Congress all contain a similar provision, by which an additional duty of ten per cent. is imposed upon goods imported in foreign vessels beyond that imposed on the same goods imported in American vessels, unless the said goods are entitled, by treaty or act of Congress, to be imported in such foreign vessels on payment of the same duties as they would be if imported in the vessels of the United States. In all these cases the exemption from the additional duty refers in express terms to the goods themselves. In the case under consideration, the exemption has reference to the vessels, and not to the goods. The difference in the mode of expressing these exemptions was relied on as showing that, in the act of 1846, the exemption from discriminating duties has reference to the vessel, and not to the cargo, and it was contended that other and different language would have been used in the act of 1846, if the policy of the previous

acts of 1816, 1824, 1832, and 1842 had been designed to be continued in that act.

Fifth. The appellant, in considering acts *in pari materia*, further contended, that the acts of 7th January, 1824 (4 Stat. at L., 4), and of 31st May, 1830 (Id., 425), were general laws, to regulate the duties of tonnage and impost; and, being such, were founded upon views of reciprocity, and were intended to repeal discriminating duties on vessels of foreign nations only where the nations to which these vessels belonged had no discriminating duties against our vessels; and that the same principle is applied to cargoes in foreign vessels.

The law of the 7th of January, 1824, in the first place, refers *to a discriminating duty on tonnage; and in the second place, to a discriminating duty on goods. Now, [*152 if the framer of the act of 1846 meant to continue the same policy in that law as that contained in the laws of 1824 and 1830, the same or similar language would have been used, and the same distinction would have been drawn, which have not been done; and hence the appellant contended that the same policy has not, in fact, been pursued, and was not intended to be pursued. In this view, the appellant relied upon the act of 14th July, 1832, the third section of which provides that coffee shall be free from duty. Under this last law, coffee, no matter whence imported, or in what vessels, is free from duty.

Sixth. The appellant also contended, that the true object and policy of the law of 1846 was to reduce the cost of tea and coffee to the consumer in the United States. Hence, these articles are to be free from duty only if imported from their place of growth; and, secondly, to enjoy this privilege, these articles must be imported either in American vessels, or in foreign vessels the charges of which in our ports are not greater than those of American vessels. This policy may be illustrated by the act of 1832, which, as shown, admits all coffee, no matter whence imported, or in what vessels, free, and that of 1842, which admits tea and coffee free only when imported from the place of their growth, and in American vessels. Now, the act of 1846 was framed upon the idea that, by admitting these articles as free when imported from their place of growth, and in vessels which might transport them at the lowest freight, the object of reduction of price would be most certainly accomplished.

Seventh. The appellant contended that laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizens upon doubtful interpretations. If a doubt, therefore, exist in this case, the appellant is entitled to the benefit of that doubt,

and the duty in question is not to be imposed. In support of this view, he relied upon the cases of *Adams* v. *Bancroft*, 3 Sumn., 384; *United States* v. *Wigglesworth*, 2 Story, 370.

Eighth. The appellant further contended, that it is a general rule, in the interpretation of statutes levying taxes or duties, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specifically pointed out, although standing upon a close analogy. He referred, in support of this view, to Dwarris on Statutes, 749, found in 9 Law Lib., 76; to 9 Pick. (Mass.), 412; and to the authorities in Sumner and Story already referred to.

*153] *The counsel for the plaintiff also cited the following authorities: 1 Kent Com., 462, 5th ed.; 20 Wend. (N. Y.), 461; 4 Dall., 30; 4 Gill (Md.), 332; 4 Mees. & W., 195; 7 Id., 202; 10 Id., 389, 434, 719; Dwarris on Stat., 707, 708, 743, 749; 3 Ga., 146; 9 Port. (Ala.), 266; 3 Sumn., 384; 4 Wheat., 202.

Mr. Crittenden, Attorney-General, for the defendant in error, contended,—

I. Exemption of American vessels, in the ports of Portugal, from discriminating duties of tonnage, lighthouse duties, and port charges upon the hulls of the vessels, whilst the discriminating duties upon the cargoes remain to be collected and paid, does not satisfy the sense and policy of the statutes of the United States, nor the true meaning and reason of the Schedule I, for exempting from discriminating duties the foreign goods imported in foreign vessels into the ports of the United States.

II. It is a known rule of interpretation of all instruments, that such construction be made upon the whole, as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any interpretation it may be rendered useful and pertinent. 4 Bac. Abr., *Statutes*, I, § 9, p. 645; *Butler* v. *Duncomb*, 1 P. Wms., 457; Touchstone, ch. 5, p. 87; 19 Vin. Abr., *Statutes*, E., 6, pl. 160, p. 528.

III. Another rule for the interpretation of statutes is, that the words must be understood as having regard to the subject-matter, "sermones semper accipiendi sunt secundum subjectam materiam." The legislator is always supposed to have that in his eye, and to have directed all his expressions to the subject, occasion, and end which caused him to speak and to enact the law. 1 Bla. Com., Introduction, pp. 60, 61.

IV. It is an established rule of construction of statutes, to compare one statute with other statutes that are made by the

same legislature, "that have some affinity with the subject, or that expressly relate to the point."

"All acts *in pari materia* are to be taken together as if they were one law." *Ailesbury* v. *Pattison*, Doug., 30; *The King* v. *Mason*, 2 T. R., 586; 1 Tuck. Bl. Com., p. 60, *n.* 8.

"If divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them; notwithstanding some of them may be expired, or are not referred to in the statute, they must all be taken as one system, and construed consistently." *Rex* v. *Loxdale* and others, 1 Burr., 447; 4 Bac. Abr., *Statute*, I., 3, pl. 21 to 28, pp. 64 to 67 (edition by Dodd, Vol. VII., pp. 454, 455).

*Blackstone has given two examples, his annotator one, and Bacon four, with the citations of the adjudged cases, from which he has extracted the substance of each case; to which the counsel for defendant respectfully refers the court. [*154

Mr. Crittenden then proceeded, under these authorities, to show, by reference to former statutes, that the expressions in the act of 1846—viz.: "Schedule I. (Exempt from duty.) Coffee and tea when imported direct from the place of their growth or production, in foreign vessels, entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges; coffee the production of the possessions of the Netherlands, imported from the Netherlands in the same manner,"—have relation to a system of discriminating duties for the protection of the ship-building, ship-owning, navigating, and commercial interests of the citizens of the United States; that the expressions quoted from the act of 1846 have a well-defined meaning explained by previous acts, a sense understood at home and abroad, as belonging to the public policy of the United States for countervailing, by discriminating duties, the policy of foreign nations injurious to the commerce of the United States; that this system of countervailing duties, this public policy of the United States, is not satisfied and fulfilled by the repeal to be made by a foreign nation of the discriminating duties of tonnage and port charges on the hulls of vessels of the United States arriving in the ports of that foreign nation, whilst the discriminating duty on merchandise remains; that the reciprocity required by the United States from a foreign nation, to exempt foreign *merchandise* from our discriminating duties on *merchandise* imported into the United States in foreign vessels, is, and must include, an exemption from the discriminating duty on merchandise when conveyed in American vessels into the ports of such foreign nation.

He cited and commented on,—The Act of Congress of 3d March, 1815 (3 Stat. at L., 224). The Convention between the United States and Great Britain, ratified 22d December, 1815 (8 Stat. at L., 228). The Act of Congress of 1st March, 1816 (3 Stat at L., 255), passed in consequence of that Convention. The Act of Congress of 3d March, 1817 (3 Stat. at L., 377); Act of 20th April, 1818 (3 Stat at L. 465). (Both these acts, he said, defined "discriminating duties" to include duties of tonnage on vessels and duties on merchandise composing the cargoes of the vessels). The Proclamations of President Monroe, found in 3 Stat. at L., Appendix, Nos. 3, 4, 5, 6, 7. The act of Congress of April 20th, 1818 (3 Stat. at L., 464.) The Act of 3d March, 1819 (3 Stat. at L., 510). The
*155] Act of 7th January, 1824 *(4 Stat. at L. 2). (In this act the term "reciprocal exemption" is used and explained to mean duties on goods and tonnage duties also.) The Act of May 24th, 1828 (4 Stat. at L., 308). The Proclamations issued by the President under this act found in 4 Stat. at L., Appendix, pages 814, 815, 816, 817. The Act of Congress of 31st May, 1830 (4 Stat. at L., 425). The act of 13th July, 1832 (4 Stat. at L., 578.)

Since these two acts of 31st May, 1830, and 13th July, 1832, took effect, an exemption by one nation of the vessels of the United States from the duty of tonnage may gain for the vessels of that nation a reciprocal exemption from the duty of tonnage in the ports of the United States. But neither before nor since those acts can an exemption from the discriminating duties of tonnage alone, allowed by a nation to vessels of the United States, gain for that nation an exemption from the discriminating duties imposed by the laws of the United States upon goods imported into the United States in foreign vessels. Such an unequal exemption would be in direct contravention of the established policy of the United States, adopted for the purpose of countervailing the policy of foreign nations prejudicial to the commerce of the United States.

The act of 3d August, 1846, passed in consequence of the treaty of 19th January, 1839, between the United States and King of the Netherlands (8 Stat. at L., 524).

Mr. Crittenden then said,—In the series of legislative acts, treaties, and proclamations, under the powers conferred upon the President, I have not found a single instance in which the United States have released or abolished, in favor of any nation, or proposed to release or abolish, the discriminating duties upon goods imported into the United States in foreign vessels, without a reciprocal release or exemption, by such foreign nation, of the discriminating duties upon the vessels

of the United States, and upon their cargoes also, in the ports of such foreign nation.

An exemption from the foreign discriminating duties of tonnage might obtain a reciprocal exemption from the discriminating duties of tonnage in the ports of the United States; but nothing short of an exemption from the foreign discriminating duties, both of tonnage and impost, upon the cargoes, could gain for a foreign nation an exemption from the discriminating duties upon goods, wares, and merchandise imported in foreign vessels into the ports of the United States.

In opposition to the positions taken by the counsel for the plaintiff in error, and the authorities cited in support of them, *Mr. Crittenden* referred to the following:—

*The revenue laws are not to be construed with great strictness, like penal laws, "but so as most effectually to accomplish the intention of the legislature in passing them." *Taylor* v. *United States*, 3 How., 210. [*156

"Statutes which concern the public good ought to be construed liberally." "A statute made *pro bono publico* shall be construed in such manner as that it may, as far as possible, attain the end proposed." Bac. Abr., *Statute*, I. pl. 68, 69, 73, 84, 85, 86, Vol. IV., pp. 650, 652; 19 Viner, *Statutes*, E., 6, pl. 49, 50, p. 516; 5 Com. Dig., *Parliament*, R., 10, pl. 15, 17, 18, 19, 28, pp. 337, 338, 340; *Taylor* v. *United States*, 3 How., 210.

"Statutes must be so construed as that no collateral prejudice grow thereby." "In statutes, incidents are always supplied by intendment." 2 Inst., 112 and 222; 19 Viner, *Statutes*, E., 6, pl. 145, 146, p. 527.

"A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." 4 Bac. Abr., *Statute*, I., pl. 42, p. 648; 19 Viner, *Statutes*, E., 6, pl. 80, 81, p. 519; *Mountjoy's case*, 5 Co., 1 resolve, p. 5; *Beawfage's case*, 10 Co., 101; *Stowell* v. *Zouch*, Plowd., 366.

"It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law,—*quia ratio legis, est anima legis.*"

"And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel; and as you will be no better for the nut if you make use only of the shell, so you will receive no benefits by the law if you rely only upon the letter." *Eyston* v. *Studd*, Plowd., 465.

The argument for the plaintiff, that "the exemption has reference to the vessels, and not to the goods," sticks in the letter, disregards the meaning and reason of the law, makes use only of the shell, and tastes not of the kernel,—the substance and intention of the law. As it is the foreign character of the ships which subjects their cargoes to the discriminating duties, so the exemption from such duties must be communicated by the ships to their cargoes through the instrumentality of a treaty (or other equivalent act) of the nation to which the ships belong, in extending a reciprocal exemption in her ports to the ships of the United States and their cargoes.

A reciprocal exemption from discriminating duties of tonnage and port charges only, omitting the reciprocal exemption from the discriminating duties upon goods, wares, and merchandise, *did not entitle the Portuguese vessel Sandade Eterna to an entry and permit to her master to unload her cargo of coffee exempt from the duty levied by the third section of the act of 1846, operating as a discriminating duty between the cargoes of American vessels and of foreign vessels, according to Schedule I. of the act.

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Mr. Justice WAYNE delivered the opinion of the court.

This cause was tried and decided in the Circuit Court, upon a statement of facts made by the parties.

The question arising from it is, whether or not the vessels of Portugal are within that clause of the act of the 30th of July, 1846, to reduce duties on imposts, in which it is said coffee and tea are exempt from duty when imported direct from the place of their growth or production in American vessels, or in foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges.

It is contended that Portuguese vessels are within the act, upon a proper construction of it in connection with the second article of the treaty with Portugal.

This article is in these words:—"Vessels of the United States of America arriving, either laden or in ballast, in the ports of the kingdom and possessions of Portugal, and, reciprocally, Portuguese vessels arriving, either laden or in ballast, in the ports of the United States of America, shall be treated on their entrance, during their stay, and at their departure, upon the same footing as national vessels coming from the same place, with respect to the duties of tonnage, lighthouse duties, pilotage, port charges, as well as to the fees of public officers, and all other duties and charges, of whatever kind or

denomination, levied upon vessels of commerce in the name or to the profit of the government, the local authorities, or of any public or private establishment whatever." Its meaning is, that there shall be an entire reciprocity of duties and charges upon the *vessels* of the two nations in their respective ports; that is, that Portuguese vessels in our ports shall pay no other charges than American vessels do, and that American vessels in Portuguese ports shall be charged with the same duties as Portuguese vessels may be liable to pay. What these duties may be shall be determined by each nation for its own ports.

There is not a word in the article relating to the duties upon the *cargoes of the vessels* of either nation. Nor is there a provision in the treaty,—as we shall show there is in other treaties between the United States and other nations,—restricting either nation from levying discriminating duties upon cargoes carried by the vessels of either into the ports of the other, *when they are made up of articles, merchandise, or manufactures the growth or production of a different [*158 nation than that to which the vessel carrying it belongs, or when the cargo shall not be the production either of Portugal or of the United States.

This is the view which both nations have taken of the second article, and of the other parts of the treaty relating to the cargoes of vessels.

The Queen of Portugal, in October, 1841, in less than six months after the ratification of the treaty had been proclaimed by the United States, promulgated a decree of the general Cortes, imposing a discriminating duty upon goods imported in foreign vessels which were not the production of the countries to which such vessels might belong. The object of it was to secure to Portuguese vessels the direct carrying-trade of such merchandise to the ports of Portugal.

The United States did the same by the eleventh section of the act of the 30th August, 1842, two years after the treaty was made. It placed an additional duty of ten per centum above the rates of duty fixed in the act, "upon goods, on the importation of which, in American or foreign vessels, a specific discrimination between them is not made in the act, which shall be imported *in ships not of the United States.*"

This legislation was acted upon by both nations without any complaint, or even suggestion, that it was not in conformity with the treaty stipulations between them. It shows that the views of both were that the vessels of both were to pay in their respective ports the charges their own vessels were subjected to, and no more, and that the duties upon goods,

not of American or Portuguese production, imported into the ports of either nation by the vessels of the other, might be made liable to such discriminating duties as either might think would give to their own vessels the direct trade of such articles.

We will now show that this practice of both nations was exactly what the treaty itself had provided for between them.

The third, fourth, fifth, and sixth articles of the treaty relate to the introduction of merchandise into the two countries, and are all that do so. The seventh and eighth exclude from the operation of those before them the coastwise trade of both nations, and the ports and countries in the kingdom and possession of Portugal where foreign commerce and navigation were not admitted. And the thirteenth article is a mutual undertaking, if either nation shall grant to any other nation a particular favor in navigation or commerce, that it shall become common to the other party, upon the same terms upon which the grant may be made. The third article pro-
*159] vides that the *productions of either nation shall be admitted into their respective ports upon payment of the same duty as would be payable on the same merchandise if it were the growth of any other foreign country. No prohibition can be put upon the importation or exportation of the produce of either nation which shall not extend to all other foreign nations; nor shall there be any higher or other duty in either country, upon the exportation of articles to either from the other, than is put upon the like articles exported to any other foreign country. As yet nothing has been said about the transportation of commodities from one nation to the other, or from foreign states. That is provided for in the fourth, fifth, and sixth articles. By the fourth, both nations can carry in their vessels the productions of each into the ports of the other upon the same terms,—the produce and manufactures of Portugal and the United States, it must be remembered, not the produce or manufactures of any foreign country; for the stipulation in the fifth article in respect to the transportation of these permits it to be done only whenever there may be lawfully imported into any or all of the ports of either nation, in vessels of any foreign country, articles which are the growth, produce, or manufacture of a country other than that to which the importing vessel shall belong. By the sixth article, the vessels of both nations may export and re-export from the ports of each all kinds of merchandise which can be lawfully exported or re-exported from the ports of either, without paying higher or other duties

or charges than the same articles pay when exported or re-exported in the vessels of either nation.

From all this it must be seen that neither nation has a right by the treaty to carry in its vessels to the ports of the other the produce of foreign countries, except upon the payment of such duties, discriminating and otherwise, as each nation may impose.

So stood both nations under the treaty from the time of its ratification, and under their respective legislation afterwards relating to duties upon cargoes of foreign produce, without any misapprehension by either, or by the merchants of either, of the privileges of commerce conferred by the treaty. Indeed, there could have been none. But it was necessary to state particularly what our treaty stipulations are, that the nature of the claim now made for her vessels may be more fully understood.

It is now said, that that which the treaty does not permit the vessels of Portugal to do, our own legislation allows, in that part of the act of 1846, to reduce duties on imports, which exempts coffee from any duty.

*There was such a misapprehension for some time. [*160
It was acted upon, too, for several months, by some of our merchants and collectors,—perhaps until corrected in this instance. The error arose from a misapplication of the act to the treaties which we had with nations abolishing discriminating duties of tonnage and port charges, *instead* of confining it to our treaties with those of them in which the same thing had been done, with the additional reciprocity, permitting our vessels and theirs to import into the ports of either, on payment of the same duties, the productions of other foreign countries, whether they are shipped from the country in which they are produced, or from any other foreign country.

When the act of July 30, 1846, was passed, we had commercial treaties with twenty-four nations. Thirteen of them —Russia, Austria, Prussia, Sweden, Denmark, Hanover, Sardinia, the Hanseatic cities, Greece, Venezuela, Brazil, Central America, and Ecuador—" had acceded to the most liberal and extended basis of maritime and commercial reciprocity."

They admit our vessels to enter their ports, whether coming from the United States or any other foreign country, laden or in ballast,—whether laden with the produce of the United States or of any other foreign country,—paying the same tonnage duties and charges as national vessels. Our vessels may clear from their ports, either for the United States or for any foreign country, whether laden or in ballast,—whether laden with national or any other produce. They admit the

produce of the United States to entry, either for consumption or for re-exportation, on payment of the same duties and charges as similar articles the produce of any other foreign country pay, whether imported in American or national vessels; and the productions of other foreign countries, likewise, on payment of the same duties and charges, whether imported in American or national vessels, and whether coming from the United States, the country of production, or any other foreign country. When re-exported, the productions of the United States are allowed the same drawbacks as similar productions of other countries, whether originally imported in American or national vessels; and other goods are allowed the same bounties, whether exported in American or national vessels. (Senate Report 80, 26th Congress, 1st Session.) These provisions give to us and to them a direct and indirect carrying trade. Each nation gets as much of both as its ability and enterprise can secure, and gathers a supply of the produce of other nations by foreign vessels, which they may not be able to bring in their own.

Between the treaties of which we have been just speaking *161] *and our treaty with Portugal there is nothing in common, except the provision in the latter abolishing discriminating duties of tonnage and all other port charges upon vessels. In the negotiation of our treaty with her, our Chargé d'Affaires, Mr. Kavanagh, was instructed to offer and to ask for the same enlarged intercourse which we had with these nations. But Portugal preferred to keep the direct trade, placing herself with those nations which had denied to us the indirect trade, or the transportation of foreign produce in our vessels from the place of its growth to their ports.

Having shown that there are nations which have a right by treaties to bring into our ports in their vessels the produce of foreign nations, from the places of their production, upon the same terms that our own vessels may import them, the act exempting coffee from duty when brought in American vessels direct from the place of its growth, or when brought by foreign vessels entitled by reciprocal treaties to be exempt from discriminating duties, tonnage, and other charges, has a plain intention and certain application. Its terms are no longer doubtful. No room is left for interpretation. The nations to which it applies are known. It would, indeed, be a very wide construction to include other nations under the act, with which the United States have no such reciprocity either by mutual legislation or by treaties. If a different application of the act is made, it opens a trade to our ports in the article of coffee in foreign vessels, which those nations

deny to the United States. The act itself shows a careful consideration of our carrying trade of that article. Reciprocity is what the United States had desired in that particular. It cannot be supposed that Congress meant to disregard it, or that it was inadvertently done, or that, for some unavowed and undiscoverable cause or reason, Congress has permitted foreign vessels to bring into our ports, from the place of its growth or manufacture, merchandise duty free, only because we have treaties with the nations to which they belong abolishing duties of tonnage and port charges. Such an interpretation of the act of July, 1846, involves a departure from a point in our commercial system which has never been yielded to any nation, except when reciprocally done, or where a compensating advantage has been gained by doing so, which was supposed to be the case in our treaty with France of 1822. With Portugal there was no such inducement. The plaintiff in error relies upon the second article of the treaty with Portugal in connection with the tariff act of July, 1846, and upon nothing else. They do not avail for his purpose. The suggestion that such an interpretation may be given to the act, because it might have been the intention *to give [*162
the consumption of coffee duty free to the people of the United States, is not at all probable. It surrenders a principle more important,—one upon which the United States have invariably acted,—not to grant an indirect trade to our ports to any nation by which it is not reciprocated.

Our conclusion in this case affirms what has been the unvarying policy of the United States since they began as a nation their commercial intercourse with other nations. Its effects upon our own interests have been beneficial; its influence upon other nations has been ultimately decisive and successful.

Perhaps it is not too much to say,—however much the changed political and productive condition of nations, during the last half-century, may have aided in liberalizing navigation between them,—that it would not have been what it now is, if it had not been for the stand taken by the United States, in respect to navigation and commerce, as early as 1785, which has been kept ever since. Its basis was to ask for no exclusive privileges and to grant none,—to offer to all nations, and to ask from them, that entire reciprocity of navigation which is made by each carrying to the other, in its own vessels, its own productions and those of all nations, without regard to the places from which they may be shipped, upon the same terms, both as to vessels and cargoes, as the vessels of each nation may take them to its own ports. One great object has been

to produce such relations, either by corresponding legislation or by treaties; the latter being preferred, as legislative liberty to trade is too vague and uncertain to secure to a nation all the advantages of its own commercial condition. Thirty years, however, passed, before our proposals made any impression upon the restricted navigation system of Europe, and then only partially so. During all that time our vessels could only take to the countries with which we traded the productions of the United States. Even that could not be done to many of the ports and colonies of other nations. Repeated efforts were made to get for our vessels a larger carrying trade, by offers to all nations of the same reciprocity.

It may be said, as it has been, that our liberal views were forced upon the United States, by the necessities of their commercial condition at the close of the Revolutionary war. It may be so; but the remark admits the restraints that were upon navigation between nations, and it cannot be denied that the application of them to the United States brought its appropriate wisdom.

Our views upon commerce and navigation were a part and parcel of the intellect and spirit of our men of that day,—
*163] *made what they were by the great events in which they had borne their parts, and the difficulties which they saw were to be overcome before their country would be put upon a commercial equality with other nations. The trade which the states as colonies had been allowed with the other colonies of England was cut off by our separation; that with the mother country was subjected to the rigid exclusions of the third section of the navigation act of Charles II., ch. 12. The English system, too, in respect to navigation, had been adopted by the other nations of Europe, with very slight exceptions, which can scarcely be said to have been relaxations. Heavy duties were laid upon our vessels and their cargoes by all of them. The trade and navigation of the United States with all parts of the world were altogether permissive,—such as each nation chose to allow upon its own terms. Our treaty stipulations at that time with France, the Netherlands, and Sweden were not exceptions of any value. The only benefit from them was, that the commerce and navigation of the United States could not be burdened more than that of any other foreign nation. With Great Britain, Spain, Portugal, and Denmark there was not even that reciprocity. In such a state of things, the United States began their career as a nation. How changed our condition now!

Our views upon commerce were promulgated in the state papers of that day. As early as 1785, Mr. John Adams, then

representing the United States in England, proposed a reciprocation of trade in the produce and manufactures of both nations, and in foreign produce in the vessels of each, upon the same terms and duties, upon the vessels and their cargoes, as national vessels might pay. His proposals were rejected, with a refusal to make any commercial treaty with the United States. Mr. Adams says, in a letter to Mr. Jay, dated London, 21st October, 1785,—"This being the state of things, you may depend upon it the commerce of America will have no relief at present, nor, in my opinion, ever, until the United States shall have generally passed navigation acts. If this measure is not adopted we shall be derided, and the more we suffer the more will our calamities be laughed at. My most earnest exhortation to the states, then, is, and ought to be, to lose no time in passing such acts." The temper of the times concerning navigation and commerce generally, and towards the United States especially, had been previously shown in Parliament by its rejection of Mr. Pitt's bill "to permit vessels belonging to citizens of the United States to go into the ports of the West India islands, with goods or merchandise of American origin, and to export to the United States any merchandise or goods *whatever, subject only to the same duties and charges as if they had been the property of British natural-born [*164 subjects, and had been exported and imported in British vessels." Afterwards American vessels were altogether excluded from the British West Indies, and the staple productions of the United States could not be carried there even in British vessels.

The exhortation of Mr. Adams had been disregarded by most of the states. Some of them adopted his recommendations, but, as others refused to concur, they were unavailing. The statesmen of England knew that it would not be generally done by the states, and thought, rightly too, that, as Congress had not the power by the Articles of Confederation to pass national countervailing restrictions, England might trade with some of the states directly, and through those indirectly with the rest of them, upon her own terms. It was also truly said, in reply to our offers to negotiate, that in a confederacy of states, without plenary power to regulate their trade and navigation conjointly, it would be difficult to make and to exercise treaty commercial arrangements between them. This result awakened the American people to the full extent of their actual and prospective commercial condition. Greater efforts were made to get the states to pass connectively countervailing restrictions. They were urged to do so by every argument which could be drawn from these foreign restraints upon com

merce which had already pressed the known enterprise of the American people almost into inaction,—by all that aggravation of commercial distress which would inevitably follow from the legislation of Great Britain in respect to American commerce since 1783, unless it was resisted. The newspaper essays of that day upon the subject will amply compensate a perusal of them. Without such a perusal, and a careful attention to the acts of Parliament preceding that of the 28th George III., ch. 6, in connection with that act, no one can have an historical idea of American commerce, or of those causes which so much lessened the harmony of feeling between the two nations for so many years afterwards; now no longer felt, and lost in the interest which both have in preserving their present liberal commercial intercourse.

Still the states did not pass countervailing restrictions. On that account more than any other, those conventions were held which happily terminated in the present Constitution of the United States. The first countervailing act under it attracted the attention of the nations of Europe, particularly of the statesmen of Great Britain. The advantages which they had in our former national condition were lost. An English writer says the acts passed by the first Congress that met under the *new form of government, imposing discriminating tonnage duties, did not escape the notice of British statesmen. Their injurious effects upon the navigating interest of Great Britain were at once perceived by them. They saw that American commerce was no longer at the mercy of thirteen distinct legislatures, nor subject to the control of the king and council. As early as September, 1789, therefore, the acts imposing those duties were referred to the lords of the Board of Trade. The same committee was afterwards instructed to consider and report what were the proposals of a commercial nature it would be proper for the government to make to the United States. In January following, the committee made a report upon the subject of American duties, and also upon the general subject of the commercial relations between the two countries. The report was drawn up by Mr. Jenkinson, then Baron Hawkesbury, afterwards Lord Liverpool.

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On the subject of a commercial treaty, especially in respect to navigation, it states,—"After a full consideration of all that has been offered on the subject of navigation, the committee think that there is but one proposition which it would be advisable for the ministers of Great Britain to make on this head to the government of the United States, in a negotiation for a commercial treaty between the two countries;

viz., that British ships trading to the ports of the United States should be treated, with respect to the duties upon tonnage and imports, in like manner as the ships of the United States shall be treated in the ports of Great Britain; and also, if Congress should propose, as it certainly will, that this principle of equality should be extended to our colonies and islands, and that the ships of the United States should be there treated as British ships, it should be answered that this demand cannot be admitted even as a subject of negotiation."

These extracts from that report show that the statesmen of Great Britain did not entertain the liberal notions of trade and navigation which then prevailed in the United States. They were brought up under an opposite policy, which had long prevailed,—probably very proper at first, as a war measure, to break up the carrying trade of the Dutch, the great rival of Great Britain; but it had become with most of her writers and public men a fixed principle of the protection which each nation should give to its trade and navigation against the competition of other nations. We do not intend to enter upon that discussion. But in confirmation of those differences of opinion concerning trade and navigation which at that time existed between American and British statesmen, we refer to Lord Sheffield's contemporary strictures on the necessity of inviolably *preserving the navigation and colonial system of Great Britain. [*166

Pursuing the point, however, that the stand originally taken by the United States has contributed to the present extended reciprocity of navigation between nations, we remark that the example of England towards the United States had directed the commercial policy of all the other nations of Europe with which the United States then traded. The utmost that could be gained from France, Spain, Portugal, the Netherlands, Denmark, and Sweden was, that our commerce with them should be put upon the footing of the most favored nation. That, however, was very short of what the United States had proposed to Great Britain and the other nations just mentioned.

Those nations, yielding to the commercial supremacy of Great Britain, had not then made an effort to release themselves from it. Nor were they in a condition to do so. In three years afterwards, the intelligence and enterprise of the United States, unsubdued by past failures, induced them to renew their efforts to gain a more extended trade and navigation. Mr. Jefferson, then Secretary of State, made a report to Congress upon the subject. It has the ability of every paper written by him in his long political career. Mr. Forsyth says that it suggested, "First, friendly arrangements with the

several nations with whom the restrictions existed, or separate acts of our legislation to counteract these defects. The end proposed to be attained by the first would have been a free commerce of exchange between the different nations in those descriptions of commodities which nature had best fitted each to produce, subject to such modifications as purposes of revenue might render necessary; and it was supposed that its operation would be an exchange of the raw materials then produced in the United States, either for manufactures which had received the last finish of art and industry, or mere luxuries. Failing this, the alternative of statutory prohibitions and countervailing duties and regulations was to be applied." (Report of the Secretary of State to the Senate, 30th December, 1839.) Upon the earlier state papers and newspaper essays already mentioned,—the report of Mr. Jefferson, another by Mr. Hamilton (which preceded it), and the proposals of Mr. Adams in 1785,—we rest our assertion that the United States were in advance of other nations in respect to the principles by which commerce and navigation should be conducted between nations. The refusal of Great Britain to meet our proposals in a corresponding spirit proves it. From what has been said, it must be admitted, also, that, from the beginning, the countervailing commercial legislation of the United States
*167] has been strictly *retaliatory. If further proof of either were wanting, it may be found in the correspondence of Mr. Jay, connected with his negotiation of the treaty of 1794 with Great Britain, and in the treaty itself. As all of us know, the restrictions which were put upon our commerce by that treaty were offensive to the pride as well as the interests of the American people. But being the utmost that England would yield at that time of her own long-established system, it was thought that the exigencies of our commercial condition required its ratification. Results proved it to be so. It did not reciprocate in any way the liberal views of commerce which had been indulged in the United States. But we now know that it was the most that could be got; and history not only relieves Mr. Jay from the complaints of that day, but places his memory far above them.

Notwithstanding the failure of every effort to place our navigation and commerce upon a better footing, nothing was done legislatively by the United States from which it can be said that there was any departure from the liberal policy which had been proposed to other nations. The natural advantages of the United States, the value of our productions, and the wars in Europe aiding the consumption of them, were constantly overcoming foreign exclusions, and kept us forbear-

ing, if not always in good temper. In fact, except discriminating duties upon tonnage in favor of our vessels, to countervail such as all the nations of Europe had imposed in favor of their own ships,—several of them intended to bear particularly upon American commerce,—our legislation was, up to that time, and for twenty years afterwards, exempt from every interference with a free navigation. In 1812, as a war measure, Congress passed an act doubling all duties upon goods imported into the United States, with an additional duty of ten per cent. upon such as might be brought in foreign vessels. The act also increased the duty upon the tonnage of foreign ships one dollar and fifty cents. That it was strictly a war measure is shown by its limitation to the continuance of the war with England.

When the war was at an end, and those in Europe had ceased by the overthrow of Napoleon, the United States took the earliest opportunity to renew their efforts for a more liberal navigation than had been at any time allowed by the nations of Europe with each other, or with the United States.

In March, 1815, Congress declared that the discriminating duties laid by the act of July, 1812, upon foreign ships and their cargoes, were no longer to be levied, when the President should be satisfied that the discriminating and countervailing duties of any foreign nation had been abolished, so far as they operated to the disadvantage of the United States. When *that declaration was made, or shortly after it, our [*168
plenipotentiaries, Mr. John Quincy Adams, Mr. Clay, and Mr. Gallatin, were in London, engaged in negotiating the commercial convention of 1815 with England. It is not doubted that the act had its influence upon the result. The convention contains all that the act proposes. It was the first relaxation made by Great Britain of her navigation laws in favor of free navigation, and the first step taken to meet the liberal principles of commercial intercourse which had been proposed to all nations by the United States so early in our history as has been already stated. It secured national treatment for our vessels; equal terms for cargoes, whether imported or exported in United States or English ships; equal import duties on the produce of the United States, as on like articles the produce of other foreign nations. But it still restricted the intercourse between the two nations to the production of either,—in other words, to the direct trade.

Every effort which had been made by the United States, for more than thirty years, to give and to get an indirect trade, had failed. Indeed, the Continental nations were not only unwilling to make any such arrangement, but they refused to

accept, as England had done, the terms offered by the act of the 3d of March, 1815. It was then determined to renew the discriminating duties which that act had modified. It was confidently believed, that, by doing so, some of those nations which had disregarded that act would be coerced to accept its terms. It was done in April, 1816; and in January following another act was passed, subjecting foreign vessels coming from any port or place to which the vessels of the United States were not permitted to go and trade, to a duty of two dollars a ton. The act was limited to six months; but in two months afterwards, during the same session, Congress, believing that the indefinite extension of it would effect its object sooner, passed such a law. Within the year, Prussia, the Netherlands, and the Hanse Towns, repealed their discriminating duties upon American vessels in their ports, and their vessels were consequently admitted into the ports of the United States upon corresponding terms.

Much was gained, compared with what had been our carrying trade. Still the great object, to get and to give an indirect trade, had failed. It had been defeated by the refusal of England to relax that clause of the navigation act of Charles II., ch. 12, which prohibited the produce and manufactures of every foreign country from being imported into Great Britain except in British ships, or in such as were the real property of the people of the country or place in which the goods were produced, or *from which they could only be or were most usually exported. The same principle had been adopted by the Continental nations to protect their own from the superior mercantile marine of England. Its increase, too, of English tonnage and commerce, its influence upon both of the other nations of Europe, and the recollection of its ruinous effects upon the trade of the Dutch, which it was originally meant to crush, had misled the judgment of most European statesmen into the conclusion that it was an essential regulation to protect the navigation of each nation from the competition of others. But the general pacification of 1815 restored the long-suspended commercial intercourse between them, and with it sounder views of trade. It was believed, indeed it had become known, that there were nations in Europe who had become as anxious as the United States were to rid themselves of the restrictions imposed upon their commerce by the English navigation act. They were not, however, in a condition to do so immediately in respect to each other, or unitedly against the supremacy of English navigation. Besides, our overtures to some of them for an indirect trade had not been met with the promptness or decision which had been antici-

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pated. The time was favorable for more efficient legislation by the United States than had been made before. It was a matter of doubt and hesitation with many of our public men what could or should be done in such a crisis. Fortunately, there were those among them who were more decided; and Congress determined to adopt the clause of the English navigation act of which we had always complained, with this proviso, however, that it should not be extended to the vessels of any foreign nation which had not adopted and which should not adopt a similar regulation. The proviso explains the purpose of the act of the 1st March, 1817. Before that was passed, the United States had not had a navigation act. It was not, however, followed for several years by any coincident result. But about that time an incident occurred in the political world, which was destined to change, in a great measure, the commercial intercourse between nations. It was the revolt of the Spanish American provinces from Spain, and the recognition of them by the United States and by England as independent nations. Both were anxious to secure a trade with these new states. The United States sought it upon terms of the most extended reciprocity, both as to vessels and cargoes,—England with more commercial liberality than her usual policy, without, however, yielding that main point of it which prevented foreign vessels from having an indirect trade to her ports. Indeed, so fixed had that exclusion become with the nations of Europe, that France, five years afterwards, would *not relinquish, [*170
in her treaty with the United States, her right to impose discriminating duties upon cargoes brought into her ports by foreign vessels.

In 1825, the United States reaped the first fruits of the act of March 1, 1817. Then a treaty was made with Central America, the first known between nations, establishing that reciprocity, in respect to vessels and cargoes, which had been offered forty years before by the United States to other nations, and which had for seven years been tendered by the act of March 1, 1817. That treaty was followed by others. Russia, Austria, Prussia, Denmark, Sweden, Sardinia, Greece, the Hanseatic cities, Hanover, Brazil, Ecuador, and Venezuela made treaties with the United States upon the same principle. The vessels of each of those nations were permitted to carry into the ports of the other, without discriminating duties, the productions of any foreign country, whether they were shipped from the places of production or elsewhere. In other words, the vessels of the United States, under those treaties, carry on with those nations an indirect trade, which they can do in

their vessels to our ports. The act of 1817 was slow in producing any arrangement of a like kind with Great Britain. But it has ultimately done so. The original interpretation of it by Mr. Secretary Crawford having been renewed by Mr. Secretary Walker's circular, after an interruption of several years, a negotiation was opened with England upon the subject, which resulted in giving to both nations the full intention and benefit of the act of the 1st March, 1817. Its operation, as we have said, had been suspended for several years, from some official misapprehension of its import, when a case occurred in the Circuit Court of the United States for the Southern District of New York, in which the learned judge who presided gave the first judicial interpretation of the act. Judge Betts in that case reviews the legislative history of the act. The question presented in the case of the Recorder and her cargo was, whether an importation into the port of New York by a British vessel from London of a quantity of silks, the production of the British possessions in India, was prohibited by the first section of the act of 1st March, 1817. The court decided that the word "country" used in the section comprehended the British possessions in India, and that consequently the importation was lawful. The learned judge took occasion also to give his views as to the effect of the proviso in the first section. Upon the publication of the court's opinion, the Secretary of the Treasury availed himself of its authority, in connection with what had been the first interpretation of the act, and issued his circular on the 6th of
*171] November, 1847, to the collectors and officers *of the customs, directing them that, "where it is satisfactorily shown that any foreign nation allows American vessels, laden with goods the growth, produce, or manufacture of any country out of the United States, freely to enter and land such merchandise in any of the ports of said country, whether such goods be carried directly from the place of origin, or from the ports of the United States, or from any other country whatsoever, the penalties of the act of the 1st March, 1817, are not to be enforced against the vessels of such nations bringing like goods either from the country of production or from the ports of the country to which the vessels may belong." The opinion of Judge Betts and Secretary Walker's circular led to a negotiation, which terminated in Great Britain passing, in 1849, the statute of 12 and 13 Victoria, ch. 49, and thus accomplished the great purpose of our policy which had been proposed by the United States to the nations of Europe, to England particularly, in 1785, by Mr. Adams. The circular

of Mr. Meredith of the 15th October, 1849, shows what that policy was, and why it was issued. We give it at length.

"In consequence of questions submitted by merchants and others, asking, in consideration of the recent alteration of the British navigation laws, on what footing the commercial relations between the United States in Great Britain will be placed on and after the first day of January next,—the day on which the recent act of the British Parliament goes into operation,—the Department deems it expedient at this time to issue the following general instructions for the information of the officers of the customs and others interested.

"First. In consequence of the alterations of the British navigation laws, above referred to, British vessels, from British or other foreign ports, will, under our existing laws, after the first day of January next, be allowed to enter our ports with cargoes of the growth, manufacture, or production of any part of the world.

"Second. Such vessels and their cargoes will be admitted, from and after the date before mentioned, on the same terms as to duties, imposts, and charges, as vessels of the United States and their cargoes."

With such facts to sustain it as have been recited,—and they are all official,—it may very truly be said that the reciprocity of navigation now existing between nations, and particularly between Great Britain and the United States, is in a great degree owing to the perseverance of the United States in proposing and contending for it for more than sixty years. It cannot, therefore, be said, as it has been said by more than one foreign writer, that, after the American Colonies had established *their independence, they set about to form a code of navigation laws on the model of those of England. Those writers have mistaken our legislation for our history, without seeking in the latter the causes of the former. [*172

Discriminating duties were never laid by Congress, except they were retaliatory, and for the purpose of coercing other nations to a modification or repeal of their restrictions upon commerce and navigation. The leading point and constantly avowed intention of the United States have been, to produce that reciprocity of trade for the vessels of different nations which had been denied by the nations of Europe for more than two hundred years. It was the American system contradistinguished from the European,—the last now happily no longer so to the extent of its former and long-continued exclusiveness.

The judgment of the Circuit Court is affirmed.

Note.—It has been stated that the opinion of Judge Betts and Secretary Walker's circular led to a negotiation, which terminated in Great Britain passing, in 1849, the statute of 12 and 13 Victoria, and thus accomplished the great purpose of our policy, which had been proposed by the United States to the nations of Europe, and to England particularly, by Mr. Adams in 1875. Mr. Walker's circular of November 6th, 1847, restoring the construction given to the act of March 1, 1817, by Mr. Crawford, having been cited, the importance of the subject will justify a reference to another official document.

On the 18th of January, 1849, Mr. Buchanan, then Secretary of State, referred to the Secretary of the Treasury a note of the British Chargé, Mr. Crampton, requesting the views of the United States government, as to the effect here of the proposed change of the British navigation laws. In his reply of the 31st January, 1849, to the letter of Mr. Buchanan, Mr. Walker, in discussing the subject, made the following remarks.

"The alterations in the navigation laws of Great Britain, contemplated by the printed memorandum accompanying Mr. Crampton's note, if adopted to the extent proposed therein, it is conceived, would remove most of the restrictions and disabilities to which our navigation and commercial interests are at present subjected in their intercourse with Great Britain and her colonies, and if the privileges proposed by the measure to be accorded to her colonies should be exercised in a liberal spirit, all the restrictions and disabilities which have heretofore attended our intercourse with said colonies would be likely to be removed.

"Arbitrary restrictions upon navigation or trade are as *173] adverse *to the liberal spirit of our institutions as they are opposed to our true interests. The navigation act of the 1st of March, 1817, was passed with a view to counteract the restrictive policy of other nations, and mainly in reference to that of Great Britain, operating as was alleged to the prejudice of our shipping and trade.

"In pursuance of the construction given to the before-mentioned act of 1817, and its present practical operation, as contained in the accompanying copy of circular instructions issued to the officers of the customs, under date of the 6th of November, 1847, it will be perceived that its provisions are not construed to prohibit any foreign nation from pursuing the *indirect trade* with the United States, provided such nation does not interdict the shipping of the United States from carrying on a similar trade with her ports and possessions.

Consequently, should Great Britain remove her restrictions in this particular, *no additional legislation on our part* would be necessary to extend to her shipping the privilege referred to."

This official construction by the Treasury Department of the act of 1st March, 1817, was communicated in February, 1849, by the Secretary of State, to the British Chargé, and by him it was transmitted to his government, by whom, after full deliberation and legal advisement, it was adopted as the true interpretation of the act of 1817. As a consequence, the act of Parliament, before referred to, was submitted as a ministerial measure by the British Cabinet, and became a law early in 1840; upon the express assurance of the ministry that our act of 1817 would thus, *proprio vigore*, be brought into operation, the British act being but an acceptance of the terms of reciprocity in the trade, direct and indirect, between the two countries, tendered by the American Congress in 1817. Mr. Meredith, in his circular, consummated the views of Mr. Crawford, Judge Betts, and Mr. Walker, and put into effect the act of 1817; in this way restoring the original construction of it which had been given by Mr. Crawford, but which had been suspended by a Treasury circular issued by Mr. Forward, on the 6th of July, 1842, upon an opinion given by Mr. Legaré, then Attorney-General, which was overruled by the decision of Judge Betts in the case of the *Recorder* and her cargo.

Thus, after the lapse of sixty-four years from our first offer, in 1785, and thirty-two years from our second offer, in 1817, Great Britain, in 1849, abandoned her restrictions upon American vessels, and accepted the full reciprocity in the trade, direct and indirect, so long tendered to all nations by the United States.

* *Order.* [*174

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 Maryland, 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.

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WILLIAM R. HALLETT AND ROBERT L. WALKER, EXECUTORS OF JOSHUA KENNEDY, DECEASED, JOHN G. AIKIN AND CLARISSA HIS WIFE, JOHN H. HASTIE, AND HIS WIFE SECLUDA, AUGUSTUS R. MESLIER AND HIS WIFE, MARY AUGUSTA KENNEDY, JOSHUA KENNEDY, JAMES INERARITY, SAMUEL KITCHEN, WILLIAM KITCHEN, JAMES CAMPBELL, AND THE BRANCH BANK OF THE STATE OF ALABAMA AT MOBILE, APPELLANTS, *v.* SIDNEY E. COLLINS.

In order to constitute a valid marriage in the Spanish colonies, all that was necessary was that there should be consent joined with the will to marry.

The Council of Trent, in 1563, required that marriage should be celebrated before the parish or other priest, or by license of the ordinary and before two or three witnesses. This decree was adopted by the king of Spain in his European dominions, but not extended to the colonies, in which the rule above mentioned, established by the Partidas, was permitted to remain unchanged.

An ecclesiastical decree, *proprio vigore*, could not affect the *status* or civil relations of persons. This could only be effected by the supreme civil power.

In 1803, Collins obtained from the military commandant at Mobile a permit to take possession of a lot of ground near that place, and made a contract with William E. Kennedy that the latter should improve it, so as to lay the foundation for a perfect title, and then they were to divide the lot equally.

Kennedy's ownership of a hostile claim, whether held then or acquired subsequently, enured to the joint benefit of himself and Collins; and when Kennedy obtained a confirmation of his title under the acts of the commissioners appointed under an act of Congress, he became a trustee for Collins to the extent of one half of the lot.

The deeds afterwards made by Kennedy, under the circumstances of the case, did not destroy this trust; but the assignee, having full knowledge of the trust, must be held bound to comply with it.[1]

This assignee obtained releases, for an inadequate consideration, from the heirs of Collins, who had just come of age, were poor, and ignorant of their rights. These releases were void.

Before Kennedy conveyed to the assignee just spoken of, he had conveyed the property to another person who held it as a security for a debt; and who, when the debt was paid, transferred it to the same assignee to whom Kennedy had conveyed it. This added no strength to the title, but only gave to this assignee a claim to be reimbursed for the money which he paid to extinguish the debt.

The absence of the complainant from the state, and the late discovery of the fraud, account for the delay and apparent laches in prosecuting his claim.[2]

THIS was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The controversy had its origin in transactions long anterior *175] *to the acquisition of the country by the United States, and involved also the discussion of events long afterwards; so that the case became very complicated, and the record voluminous. Being an appeal in chancery, all the

[1] CITED. *Craft* v. *Russell*, 67 Ala., 12.

[2] See *Collins* v. *Thompson*, 22 How., 246, 248.

evidence was brought up to this court. Instead of giving a narrative of the case, it appears best to set forth the grounds of complaint in the bill, and of defence in the answer.

The defendant in error, Sidney E. Collins, was complainant below in a bill in equity against the heirs and executors of Joshua Kennedy, deceased, and others. The bill sets forth that the complainant is both heir and devisee of his late father, Joseph Collins, and sole heir-at-law of his deceased brothers George and Joseph, the co-heirs and co-devisees with himself of his father's estate. That Joseph Collins, his father, had obtained a grant of a certain lot of land from the Spanish government, in or near the city of Mobile. That William E. Kennedy claimed an interest in the same lands, through a grant to one Alexander Baudain. That on the 21st of November, 1806, Collins and Kennedy entered into an agreement to divide the land between them; Kennedy to have the northern half, and Collins the southern; Kennedy covenanting "to improve the lot by fencing and ditching so that it might not be forfeited." That, in pursuance of this agreement, Kennedy held possession of the lot, and made the necessary improvements, during the time that Spain held possession of the territory. That when it came into possession of the United States, the Collins and Baudain permits or claims were both laid before the commissioners. That the first report of Mr. Crawford, the commissioner, was unfavorable to both. That Collins being at this time dead, his claim was not revived by Kennedy, but it was renewed under the Baudain grant alone, and in July, 1820, a favorable report was made in favor of Kennedy in virtue of the Baudain grant, and the legal title confirmed in him by the act of the 8th of May, 1822. That in the meantime, to wit, on the second day of March, 1820, a deed was made by W. E. Kennedy reciting the original agreement between Collins and himself, and conveying the southern half of the lot to James Inerarity, the administrator of Collins, for the use of the estate, with a covenant for further assurance to Inerarity or the heirs of Collins, on the issuing of the patent for the land. The bill also charges, that about this time W. E. Kennedy became very intemperate; that his brother Joshua, who had unbounded influence over him, and was a witness to the deed to Inerarity, and acquainted with the title of Collins's heirs in the property, contrived a scheme to defeat it and defraud the heirs. That in pursuance thereof he obtained a deed from W. E. Kennedy to *Samuel [*176
Kitchen, his father-in-law, for the Collins half of the lot, antedated so as to appear to be prior in date to the deed to Inerarity. That Joshua Kennedy transacted the business

in Kitchen's name, at first without his (Kitchen's) knowledge, and paid the consideration, if any was paid, and afterwards took a transfer from Kitchen to himself, for a nominal consideration. That in 1824, in further pursuance of the same scheme, he procured a deed from W. E. Kennedy for all his property, and, among other things, a claim or grant from the Spanish government to one Price, of a very suspicious character, which had been rejected by the commissioners. That having succeeded in obtaining a confirmation of the Price claim in 1829, he surveyed it over the claim of Baudain previously confirmed to W. E. Kennedy in right of Baudain, in 1822, and took a patent under it. That this was done for the purpose of complicating the title and defrauding the heirs of Collins. The bill charges, also, that Joshua Kennedy, in further prosecution of this scheme, had certain proceedings entered on the docket of the Circuit Court of Mobile in the name of William Kitchen against James Inerarity, and, without bill, answer, or pleadings of any kind to furnish any key to the claim of Kitchen, a decree was entered, in pursuance of which Inerarity made a deed to Kitchen for the Collins half of the land, in consideration of Kitchen paying to him a debt claimed by Forbes & Co. (of which firm Inerarity was a partner) against Collins's estate, amounting to the sum of $2233; the property conveyed being then worth $75,000, and now $200,000. That having thus complicated the title of the heirs of Collins to the land in dispute, Joshua Kennedy applied to George and Sidney E. Collins, the heirs, as soon as they came of age, representing that their claim was of no value whatever, and utterly hopeless, but that, for the sake of peace and quieting his title, William Kitchen was willing to give them each the sum of $1,000. That by means of these fraudulent misrepresentations he obtained deeds from them to Kitchen releasing their claims. That William Kitchen was a brother-in-law of Joshua Kennedy, and a young man without means residing in the family of Kennedy, and his name was used by him for a cover; and that he took a conveyance from Kitchen as soon as the complete title was supposed to be thus fully vested in him by these fraudulent schemes and contrivances.

The bill prays for a conveyance of the land, and an account of rents and profits.

The matters of defence set forth in the several answers of the defendants, and relied upon in the argument of the case, were substantially as follows:—

1. That the will of Joseph Collins was not properly proved.
2. That the complainant and his brothers were illegitimate,

*and therefore incapable of inheriting from their father or from one another.

3. That Collins had no valid claim to the property. That his concession was abandoned after its rejection, and no possession ever taken under it, nor any attempt made by Collins or his heirs to obtain a title under it.

4. That Joshua Kennedy held the lot under a grant from the Spanish government to Thomas Price, and a confirmation of the same by the United States, and a patent issued in 1837.

5. That the deed to Inerarity was "a special transaction, and not a recognition of title in Collins's heirs, given to enable Inerarity to recover a debt due from Collins's estate to John Forbes & Co., or as a compromise." That the deed to Samuel Kitchen was prior in date to that of Inerarity. That Kitchen was a *bonâ fide* purchaser without notice; that he paid for the land through Joshua Kennedy, who was indebted to him; and that in pursuance of his purchase Kitchen took possession of the lot and made improvements, and afterwards gave Joshua Kennedy a written obligation to convey to him; and that the "transaction was closed" in 1834, by his making a deed to William Kitchen at the request of Joshua Kennedy.

6. That the title of Collins, whatever it was, if any, was extinguished and transferred to William Kitchen by the deed of Inerarity made under a decree of the court, and in consideration of the payment of the debt claimed by Inerarity in behalf of Forbes & Co. against Collins's estate.

7. That the claim of complainant was extinguished by his own release and that of his brother to William Kitchen for a consideration paid by Joshua Kennedy.

8. And lastly, the answers, denying all fraud, insist that the full value of the property was paid by Kennedy to the administrator and heirs; and that the sale and releases so made have been acquiesced in by complainant for many years, without any offer to return the consideration or annul the deeds, until after the death of Joshua Kennedy.

The immense mass of evidence taken under the authority of the Circuit Court occupied a printed volume of nearly five hundred pages. The following is an abstract of the points which the complainant sought to establish. It is not necessary to refer to the evidence in support of each point.

1. That the plaintiff claimed the south half of the Baudain claim in Mobile as the devisee of his father, and the heir of two brothers, under a Spanish grant to his father and articles of agreement between his father and William E. Kennedy, and possession under them, and a deed confirmatory of them.

2. That the title of Alexander Baudain became perfect

*by the confirmation of the United States, under an act of Congress dated 8th May, 1822, relative to claims of lots in Mobile.

3. That a fraud was practised in the deed made by William E. Kennedy to Samuel Kitchen, and that Joshua Kennedy was a party to it.

4. The participation of Joshua Kennedy in the preparation of the deed to Samuel Kitchen, his beneficial interest in that deed, and his conception of the fraudulent design, are shown by the use that was made of it, by the relations between the parties, and by the fact that all the benefits flowing from it came to him.

5. That Joshua Kennedy brought forward the claim of Price, for the fraudulent purpose of superseding the Baudain claim, in which Collins had an interest, and thus obtaining the whole for himself.

6. That Kennedy, after having obtained a confirmation and location of the Price claim, purchased from the children of Collins all their rights, under circumstances which show the purchase to have been invalid.

7. That the deeds from the children of Collins were made to William Kitchen, and ought to be set aside.

8. That William Kitchen conveyed to Joshua Kennedy, who obtained a patent in 1837 for the Price claim, covering the land in which Collins had an interest.

9. That the children of Collins left the state of Alabama, and the fraud was not discovered until after the death of Joshua Kennedy (in 1838), and in the progress of a suit which ensued thereupon. The plea of limitations therefore does not apply.

10. That the purchase money paid to the children of Collins was greatly below the real value of the property.

On the other hand, the points which the defendants endeavored to establish by the evidence were the following:

1. That Joseph E. Collins was never married to Elizabeth Wilson.

2. That the agreement in 1806, between William E. Kennedy and Joseph E. Collins, was not a settlement of conflicting claims under the Baudain grant.

3. That Kennedy had a right to waive the conditional concession from Collins, and throw himself upon his own better title; and that, in fact, he did disavow all title derived from Collins.

4. That the deed made in 1820, from William E. Kennedy to Samuel Kitchen, was not fraudulently made for the benefit of Joshua Kennedy.

*5. That the purchase made by Joshua Kennedy from the children of Collins was fair and *bonâ fide;* that their interest was only contingent, after paying their father's debts; that the property was a marsh liable to be overflowed, and at the distance of several squares from the business parts of the city, whose value was entirely speculative; and that Kennedy paid as much as their interest in it was worth.

6. That Joshua Kennedy never attempted to complicate the title or obscure the rights of other persons.

7. That the enhanced value of the property is owing entirely to Joshua Kennedy's industry and judgment in reclaiming and defending it at great expense; and that a court of equity should not deprive his heirs of this advantage without clear proof of fraud.

It has already been mentioned, that the evidence taken in the cause was very voluminous to sustain the above positions upon both sides, some of which indeed are rather inferences in law than distinct allegations of fact.

But the two classes are so intermingled together, that it appeared impossible to separate them and yet give a thorough explanation of the case.

On the 13th of April, 1847, the cause came on for argument in the Circuit Court, which rendered the following decree, viz.:

"SIDNEY E. COLLINS *v.* THE HEIRS AND EXECUTORS OF JOSHUA KENNEDY.

"This cause this day came on to be heard, and it is ordered, adjudged, and decreed, that the deeds of Sidney E. Collins and his brother, George Collins, to William Kitchen, be set aside, and that the representatives of Joshua Kennedy account for the rents and profits received from the said south half of the said lot of land, and also the money derived from the sale of any portion thereof, together with interest thereon, and that the said representatives be allowed for all permanent improvements made on the said land; also the money paid to Sidney E. and George Collins, with interest; and that it be referred to the master to take an account between the parties, in conformity to the principles of this decree."

From this decree, the defendants appealed to this court.

It was argued by *Mr. Hopkins*, and *Mr. Reverdy Johnson*, for the appellants, and *Mr. J. A. Campbell*, for the appellee. Their arguments were so blended of matters of fact as deduced from the evidence and matters of law arising thereupon, that *it is impossible to make an accurate report of them [*180 without going too much into detail.

Mr. Justice GRIER delivered the opinion of the court.

It will not be necessary, in the consideration of this case, to notice particularly the great mass of documents and testimony spread upon the record, further than to state the results as they affect the several points raised by the pleadings and argued by the counsel.

1. The first of these in order is that which relates to the sufficiency of the probate of the will of Joseph Collins, under whom the complainant claims. But as his claim to two thirds of the property in dispute is through his deceased brothers, he is compelled to remove the objection which has been urged to his and their legitimacy; and if he can succeed in this, and thus establish his right by descent, the decision of the question as to his title by devise will be unnecessary. We shall therefore proceed to examine the second point, as to the legitimacy of the complainant.

2. It is not denied that the complainant and his deceased brothers Joseph and George were the children of Joseph Collins by Elizabeth Wilson, but it is contended that the parents were never legally married.

The evidence on this subject is as follows: Joseph Collins resided in the country south of the 31st degree of north latitude, between the Iberville and Perdido, and died there about the year 1811 or 1812, while that country was still in the actual possession of the Spanish government. In the year 1805 he resided in Pascagoula. Elizabeth Wilson resided also in the same place, and in the family of Dr. White, who was a syndic or chief public officer in that place. A contract of marriage was entered into by Joseph Collins and Elizabeth Wilson before Dr. White, who performed the marriage ceremony. The parties continued to live together as man and wife, and were so reputed, till the death of Collins. It is true that some persons did not consider their marriage as valid, because it was not celebrated in presence of a priest, while others entertained a contrary opinion. It is in proof, also, that Collins himself, when he made his will, entertained doubts on the subject.

It is a matter of history, that many marriages were contracted in the presence of civil magistrates, and without the sanction of a priest, in the Spanish colonies which have since been ceded to the United States. Whether such marriages are to be treated as valid by courts of law is a question of some importance, as it may affect the titles and legitimacy of
*181] *many of the descendants of the early settlers. It is not the first time that it has arisen, as may be seen by

the cases of *Patton* v. *Philadelphia*, 1 L. Ann., 98, and *Phillips* v. *Gregg*, 10 Watts. (Pa.), 158.

The question, then, will be, whether an actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, but without the presence of a priest, was valid, and the offspring thereof legitimate, according to the laws in force in the Spanish colonies previous to their cession.

That marriage might be validly contracted by mutual promises alone, or what were called *sponsalia de presenti*, without the presence or benediction of a priest, was an established principle of civil and canon law antecedent to the Council of Trent. (See Pothier du Contrat de Mariage, Part II., ch. 1; Zouch, Sanchez, &c.; and *Dalrymple* v. *Dalrymple*, 2 Hagg. Cons., 54, where all the learning on this subject is collected.)

Whether such a marriage was sufficient by the common law in England, previous to the marriage act, has been disputed of late years, in that country, though never doubted here. (See the case of *The Queen* v. *Millis*, 10 Cl. & F., 534.)

On the Continent, clandestine marriages, although they subjected the parties to the censures of the Church, were not only held valid by the civil and canon law, but were pronounced by the Council of Trent to be "*vera matrimonia.*" But a different rule was established for the future by that council, in their decree of the 11th of November, 1563. This decree makes null and void every marriage not celebrated before the parish or other priest, or by license of the ordinary, and before two or three witnesses.

But it was not within the power of an ecclesiastical decree, *proprio vigore*, to affect the *status* or civil relations of persons. This could only be effected by the supreme civil power. The Church might punish by her censures those who disregarded her ordinances. But until the decree of the council was adopted and confirmed by the civil power, the offspring of a clandestine marriage, which was ecclesiastically void, would be held as canonically legitimate. In France the decree of the council was not promulgated, but a more stringent system of law was established by the Ordonnance de Blois, and others which followed it. In Spain it was received and promulgated by Philip the Second in his European dominions. But the laws applicable to the colonies consisted of a code issued by the Council of the Indies antecedent to the Council of Trent, and are to be found in the code or treatise called Las Siete Partidas *and the Laws of Toro. The law of marriage [*182
as contained in the Partidas is the same as that
which we have stated to be the general law of Europe ante-

cedent to the council; namely, "that consent alone, joined with the will to marry, constitutes marriage." We have no evidence, historical or traditional, that any portion of this code was ever authoritatively changed in any of the American colonies; nor has it been shown, that in the "Recopilacion de los Indies," digested for the government of the colonies by the order of Philip the Fourth, and published in 1661, nearly a century after the Council of Trent, any change was made in the doctrine of the Partidas on the subject of marriage, in order to accommodate it to that of the council. It may be supposed, that, as a matter of conscience and subjection to ecclesiastical superiors, a Catholic population would in general conform to the usages of the Church. But such conformity would be no evidence of the change of the law by the civil power. Indeed, the fact that the civil magistrates of Louisiana had always been accustomed to perform marriage ceremonies, where the parties were Protestants, or where no priest was within reach, is conclusive evidence that the law of the Partidas had never been changed, nor the decree of the Council of Trent promulgated, so as to have the effect of law on this subject in the colony. The case of *Patton* v. *Philadelphia*, already referred to, shows the opinion of the Supreme Court of Louisiana on this subject, which, on a question relating to the early history and institutions of that country, should be held conclusive.

3. These preliminary questions being thus disposed of, our next subject of inquiry must be, whether Joseph Collins had any right or title to the land in dispute which descended to and vested in his heirs.

On the 3d of January, 1803, Joseph Collins, who was captain of dragoons and surveyor of the district, made application to Don Joaquim de Osorno, military commandant of Mobile, and obtained a permit, in the usual form, to take possession of a certain lot of marshy ground therein described, near to or in the city of Mobile. The permit was dated on the 26th of April, 1803. This, though merely an inception of a title, was capable of being ripened into a legal title by possession and improvement, which would give him a right to call on the Intendant-General to perfect his grant by a complete title. In order to keep up his possession and improvement on this lot, Collins entered into agreement under seal, dated the 21st of November, 1806, with William E. Kennedy, by which Kennedy covenanted to improve the lot, "so that, by fencing and ditching, the said lot may not be forfeited, and that he will begin to improve said lots immediately." By this agree-

ment, *Collins was to have the south half of the lot, and the north half was to be conveyed to Kennedy.

Whether Kennedy was at this time the owner of the Baudain claim to the same lot, and the compromise of their conflicting claims was in part the consideration of this contract, or whether the Baudain claim was first purchased by Kennedy in 1814, when its transfer bears date, is a question of no importance in the case. For it is clearly proved that Kennedy took and held possession of the lot, and made the improvements in pursuance and under his contract with Collins. And whether we consider him as agent, partner, or tenant of Collins, his purchase of another claim would enure to their joint benefit. He could not use the possession and improvement made for Collins to complete an imperfect and abandoned grant to Baudain, as was done, and by such act exclude Collins from his half of the lot. The deed which Kennedy afterwards gave to Inerarity shows clearly that he entertained no such dishonest intention. For after acknowledging by this deed his contract with Collins, and stating his intention to complete the title under the Baudain permit or grant, he proceeded to substantiate his title before the commissioners by proving the possession and improvements made by him under his contract with Collins as the meritorious foundation of his claim; and thus obtained a favorable report from the commissioners under the Baudain grant, which had been before rejected for want of such proof.

By the act of Congress of the 8th of May, 1822, § 2, all claims to lots in the town of Mobile, on which favorable reports had been made by the commissioners, "founded on orders of surveys, requettes, permissions to settle, or other written evidence of claims, derived from either the French, British, or Spanish authorities, and bearing date before the 20th of December, 1803, and which ought in the opinion of the commissioners to be confirmed, were confirmed in the same manner as if the title had been completed."

By this act, the legal title to this lot became vested in William E. Kennedy. A patent would be but further evidence of a title which was conferred and vested by force of the act itself. Having thus obtained the legal title in his own name, Kennedy required no deed from Collins or his representatives, but became seized thereof for his own use as to the northern half, and for the use of Collins, or in trust for his heirs, as to the southern. Inerarity might have maintained an action of covenant on his deed, and compelled him to transfer the legal title by a further assurance. There might be some question,

perhaps, whether the legal estate did not immediately vest in
*184] Inerarity *by estoppel. But as the conveyance is a deed poll, in the nature of a quit-claim and release, without a warranty, and with a covenant for further assurance to Inerarity, or the heirs of Collins, it most probably would not. But for the purposes of this case the question is wholly immaterial. Inerarity, as a creditor of the estate of Collins, would have a right to demand the payment of his debt, before he should make a transfer to the heirs. But whether as holder of the legal or equitable estate in trust, his beneficial interest amounted to no more.

Some objections have been urged to the view we have taken of this transaction, on the ground that the contract made in 1806 with Collins was not binding. But although we cannot perceive the right of persons, who have purchased the legal title from Kennedy, with full notice of the trust, to object to a contract which Kennedy has executed, we shall proceed to notice them. The first objection is, that Collins did not sign the indenture or articles of agreement of 21st November, 1806, and was therefore not bound to convey to Kennedy; and there was therefore no consideration which could make the deed binding on him. But the deed on its face purports to be an indenture, of which Collins, from the nature of the transaction, would be holder of the counterpart, signed by Kennedy. The original, which is signed by the grantor, would be in possession of Kennedy the grantee, who cannot object to the validity of his covenant, because a paper is not produced which, if in existence, is in his own possession. Much less could he be heard to make this allegation after the contract has been executed by his own deed sealed and delivered in pursuance of it.

It has been objected, also, that the original contract with Collins was void as against the policy of the law. But it was certainly not against the policy of the laws of Spain, under which it was made; for it was a fulfilment of the conditions of the grant made to Collins. And it cannot well be said to be contrary to the policy of the laws of the United States, who have confirmed the land to Kennedy in virtue of the very possession and improvements made in pursuance of the contract.

Thus far, then, we have in 1822 the legal title to the whole lot vested in W. E. Kennedy, in trust, as to the southern half, for the heirs of Collins.

4. What, then, was the effect of the deed made to Samuel Kitchen, dated, or antedated, some two months before the deed to Inerarity?

The circumstances which tend to show that this deed was made *after* that to Inerarity, and for the purpose, if possible, of defeating it, are very strong and convincing.

1st. Joshua Kennedy, who acted as the agent for Kitchen, or *used Kitchen's name for his own purposes, was a witness to the deed to Inerarity, and made no objections nor suggestions that he had bought and paid for this lot a few days before as agent of Kitchen,—a circumstance not easily accounted for, if such had been the fact. 2d. The deed to Kitchen was acknowledged *after* that to Inerarity, at the same time with another deed from W. E. Kennedy to Joshua Kennedy, containing property previously sold to Inerarity, and having the same witness, Diego McBoy. "And thirdly. The frequent declarations of Joshua Kennedy that the object of the deed made to Kitchen, through his intervention, was to defeat Inerarity's claim to that property." And lastly, the fact that Samuel Kitchen gave Joshua Kennedy an obligation to convey the lot to him on request; which was afterwards fulfilled by giving his deed to William Kitchen for a nominal consideration; and that William's name was used by Kennedy for the purpose of covering and complicating the transaction. [*185

But it is a question of no importance in the case, whether the deed to Samuel Kitchen was delivered on the day it bears date, or that on which it was acknowledged. He was not the purchaser of a legal title without notice of a secret equity. The rule with regard to purchasers of a mere equity is, *Prior in tempore potior in jure.*

The equitable title of Collins, of which the deed to Inerarity contained a new acknowledgment, had its origin at least as far back as 1806. So that, even if we could bring ourselves to believe that Joshua Kennedy, whether acting for Kitchen or himself, had purchased and paid his money without notice of the title of Collins's heirs, it would not enable him to defeat their claim. The legal title first became vested in W. E. Kennedy in 1822, and passed by his deed of 1824 to Joshua Kennedy, with full knowledge of the trust. His attempt to defeat it, by covering the land with the vagrant and probably fraudulent claim under Price, after he had obtained the legal title from the United States, was as unsuccessful as the first, and wholly inoperative, except to show the shifts and contrivances resorted to, in order "to defeat Inerarity's claim."

5. We come now to the consideration of the validity of the deeds of release obtained from George and Sidney E. Collins, in 1829 and 1830.

At this time the property had risen in value, with a prospect

of a much greater increase; and the frailty of the title was but too transparent to a man of the judgment and shrewdness of Joshua Kennedy, notwithstanding the means used to obscure it. The heirs had just come of age. They were ignorant of the nature or value of their title. Kennedy is not *186] only *in possession of their land, but of the legal title. He persuades them to release their title to William Kitchen for the sum of one thousand dollars each; a sum which, to young men just out of their apprenticeship, poor, and ignorant of their rights, would appear large and attractive. Kennedy is well acquainted with the nature and value of their claim; they are wholly ignorant of it. He informs them that their claim is worthless, but that Kitchen was willing to give them this sum for the sake of peace and quieting his title. Besides, he had so complicated and covered up the title, that it was impossible that they could comprehend it, or know the value of their claim, if the documents had been laid before them. Under such circumstances should a chancellor hesitate in setting aside the releases, if it appeared that the title thus obtained was for a consideration much below the value of the property? It needs no citation of authorities to show that deeds obtained under such circumstances would be held void.

6. The transfer by Inerarity of the equitable trust title held by him, can add nothing to the validity of Kennedy's title. Whether transferred by him voluntarily, or through the medium of a decree in chancery, can make no difference in this case. Nor is Inerarity liable to any imputations of collusion or improper conduct in the matter. He was bound to transfer his title to the heirs on payment of his debt. And when their releases to Kitchen were produced, by which he appeared to be substituted to their rights, Inerarity, who was ignorant of the means used to obtain them, might justly believe that he was bound to convey to him. He did so, after consulting counsel, and after a decree in equity. Such a decree would be made as a matter of course. But its effect would only be to substitute Kitchen or Kennedy to the rights of Inerarity. The title would be still subject to the trust for Collins's heirs, and unless their title was vested in Kennedy by these releases, he held the land still subject to their rights. But when the release to the heirs are set aside, Kennedy is entitled to recover the money paid to Inerarity, as there is no allegation that the debt claimed by Forbes & Co. against Collins's estate was not justly due.

But before leaving this part of the case, it will be proper to notice an objection urged with some plausibility in the argument. The record exhibits much contradictory testimony as to the value of this property at the time the releases were

executed, and it has been contended that Kennedy paid the full value for it, being altogether over $4,000. After such a length of time, it may be expected that the estimates of witnesses from recollection will differ widely. But when we look at the public assessments, and the sales of contiguous property about the *same time, which are the best tests, it would seem that the boast of Joshua Kennedy himself, that [*187 "he had bought for $4,000 property worth $40,000," was not an exaggeration of the truth. But assuming the true value to have been one half that sum, and taking into consideration the facts and circumstances already stated, we think the Circuit Court was fully justified in setting aside these conveyances, and decreeing that the defendants should account.

7. The absence of the complainant from the state, and the late discovery of the fraud, fully account for the delay and apparent laches in prosecuting his claim, which have been objected to, on the argument.

The decree of the court below is therefore affirmed, but with this addition: "that the master, in taking the account of rents, profits, sales, &c., shall allow to the defendants the sum paid to James Inerarity for his claim against the estate of Joseph Collins."

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 Alabama, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, 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, and with this addition: "that the master, in taking the account of rents, profits, sales, &c., shall allow to the defendants the sum paid to James Inerarity for his claim against the estate of Joseph Collins;" and that this cause be, and the same is hereby, remanded to the said Circuit Court, to be proceeded with in conformity to the opinion of this court.

SHERBURNE SEARS, PLAINTIFF IN ERROR, *v.* JOSEPH R. EASTBURN.

The act of Congress passed in May, 1828, (4 Stat. at L., 278), directs that the forms and modes of proceeding in the courts of the United States, in suits at common law in the states admitted into the Union since 1789, shall be the same with those of the highest court of original jurisdiction in the state.

Therefore, where the state of Alabama passed an act to abolish fictitious proceedings in ejectments, and to substitute in their place the action of trespass for the purpose of trying the title to lands and recovering their possession, the Circuit Court of the United States should have conformed, in its mode of proceeding, to the law of the state.[1]

And the judgment of the Circuit Court, dismissing an action of trespass so brought, upon the ground that the law of the state was not in force in the Circuit Court, was erroneous.

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[1] See Rev. Stat., §§ 914, 915, 916. The practice of the state courts is not controlling unless adopted by act of Congress or rule of court. *Wilcox* v. *Hunt*, 13 Pet., 378; *Long* v. *Palmer*, 16 Id., 65; *The Delaware*, Olc., 240; *Bayard* v. *Mandeville*, 4 Wash. C. C., 445; *The Mayor* v. *Lord*, 9 Wall., 409. But the state practice *may*, by an established usage, be adopted by the federal courts, if they see fit, without any statute or rule of court. *Fullerton* v. *Bank of United States*, 1 Pet., 604; *Hiriart* v. *Ballou*, 9 Id., 156.

The state practice cannot be permitted to interfere with the distinction preserved in the federal courts between law and equity, either in substance or procedure. *Bills* v. *New Orleans, &c., R. R. Co.*, 13 Blatchf., 227; *Butler* v. *Young*, 1 Flipp., 276; *Nickerson* v. *Atchison, &c., R. R. Co.*, 1 McCrary, 383; *Parsons* v. *Denis*, 2 Id., 359.

Rev. Stat., § 914, applies to suits prosecuted in behalf of the United States, *United States* v. *Fetlow*, 2 Low., 159.

State statutes authorizing examination of parties before trial, or inspection of books and papers, do not apply to suits in the Federal Courts; but such course as is indicated by the Federal legislation on those subjects must be followed. *Easton* v. *Hodges*, 7 Biss., 324.

The codes of procedure of the states, as regulations of pleadings in the Circuit and District Courts of the United States, within such states, are adopted. Thus the common law forms of pleading are no longer necessary in the United States courts within the state of New York; nor are they admissible, except as they may be deemed to be substantially a compliance with the requirements of the Code of Procedure of the state, as to pleadings. Hence a pleading in a suit at law in the United States Circuit Court, which is not authorized in a like suit in a court of the state, will be set aside on motion. *Lewis* v. *Gould*, 13 Blatchf., 216.

Judgment may be entered on a referee's report without an application to the court, where such is the practice in the state courts. *Fourth Nat. Bank of Chicago* v. *Neyhardt*, 13 Blatchf., 393.

The rules of practice under N. Y. Code or Pro., have no application to writs of error and bills of exceptions in the United States Courts. *Whalen* v. *Sheridan*, 18 Blatchf., 308, 324.

In common law actions in the Federal courts, depositions may be taken pursuant to the state law or the act of Congress, as parties may elect. *Flint* v. *Crawford County Comm'rs*, 5 Dill., 481.

Where the statute of a state allows a defendant in an ejectment suit a new trial upon the payment of costs, this statute is binding upon the United States Circuit Court in an action of ejectment. *Hiller* v. *Shattuck*, 1 Flipp., 272.

In Pennsylvania it is not usual to make a record of the judgment in any legal form. But there is no necessity that the courts of the United States should follow such careless precedents. *Piquignot* v. *Pennsylvania R. R. Co.*, 16 How., 104.

The agreement of parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes, nor can the laws of a state, regulating the proceedings of its own courts, authorize a district or circuit court sitting in the state, to depart from the modes of proceeding and rules prescribed by the acts of Congress. *Kelsey* v. *Forsyth*, 21 How., 88.

Only those rules of practice which are merely such are adopted, and not those enactments of state legislation relating to practice in the courts which deprive them of power to control the application of rules of practice according to their discretion. *Mutual Building Fund* v. *Bossieux*, 1 Hughes, 386.

The employment, by United States courts of state or municipal agencies

*THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Alabama.

In August, 1845, Sherburne Sears brought an action of *trespass quare clausum fregit*, in the Circuit Court of the United States for the Southern District of Alabama. The short note, expressive of the cause of action, filed at the time of issuing the writ, declared it to be "as well to try titles as to recover damages," &c., and the declaration described a particular lot in the city of Mobile, where the trespass was alleged to have been committed.

In April, 1846, the counsel for the defendant moved the court to dismiss the suit, because the statute of Alabama entitled "An Act to abolish fictitious proceedings in eject-

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to enforce judgments or decrees of such courts, must be in conformity with state laws, and such courts cannot, by *mandamus*, compel state officers to do what they have no legal right to do. *United States* v. *Knox County Court*, 1 McCrary, 608.

Where, by the local law, a foreign corporation is amenable to suit in the state courts, service being made upon an agent within the state, the Federal Courts may be regarded as courts of the state, and may take jurisdiction upon such service as would be good in a state court. *Eaton* v. *St. Louis, &c., Mining Co.*, 2 McCrary, 362.

A motion for a new trial is not a mere matter of proceeding or practice in the district and circuit courts. It is, therefore, not within the act of June 1, 1872, and cannot be affected by any state law upon the subject. *Indianapolis, &c., R. R. Co.* v. *Horst*, 3 Otto, 291.

The United States courts cannot, by *mandamus*, compel the collection of a tax to pay certain bonds until judgment has been obtained, although the statute authorizing the bonds provided for such a remedy in the state courts, as in the former courts the writ is only granted in aid of an existing jurisdiction. *Davenport* v. *Dodge County*, 5 Otto, 237.

Where lands have been mortgaged and parcels thereof subsequently sold at different times to different purchasers, the order in which such parcels shall be subjected to the satisfaction of the mortgage is, where the rule is established by the statutes or by the decisions of the courts of the state where the lands lie, a rule of property binding on the courts of the United States sitting in that state. *Orvis* v. *Powell*, 8 Otto, 176.

Where, touching the competency of witnesses, there is a conflict between the law of the state and an act of Congress, the latter must govern the courts of the United States. *King* v. *Worthington*, 14 Otto, 44.

A party in whose favor a judgment is rendered in a common law cause, by a court of the United States sitting in the state of New York, is, in order to reach the property of the judgment debtor, entitled to the remedy provided by the statute of that state, and known as proceedings supplementary to execution. *Ex parte Boyd*, 15 Otto, 647. But compare *Frazer* v. *Colorado Dressing, &c., Co.*, 2 McCrary, 11.

The act of the Louisiana legislature abolishing the writ of *fi. fa.* for the enforcement of judgments against the city of New Orleans is not obligatory upon the United States Courts. *New Orleans* v. *Morris*, 3 Woods, 115.

Statutes of the several states regulating remedies by means of judicial proceedings, are to be understood as intended to apply only to proceedings in the courts of the particular state where adopted, unless it clearly appears that they were intended to have a wider scope. *Majors* v. *Cowell*, 51 Cal., 478.

Damages should be assessed, in a United States Court, by a jury or otherwise, according to the practice of the state courts. *Raymond* v. *Danbury, &c., R. R. Co.*, 43 Conn., 596.

ment, and for other purposes therein mentioned," approved December 17, 1821, under which the suit was brought, did not extend to the Circuit Court; and the court, being of that opinion, dismissed the suit.

The plaintiff sued out a writ of error, and brought the case up to this court.

It was argued by *Mr. Sewall*, for the plaintiff in error.

The plaintiff contends that the action of trespass in this case was maintainable in the Circuit Court of the United States in Alabama, and was therefore improperly dismissed.

1st. By an act of Alabama, approved December 17, 1821, the action of trespass was substituted for that of ejectment (Clay's Dig., p. 320, §§ 43, 44, 45), and has ever since remained a remedy for trying the title to, and recovering possession of, lands. It was in force at the time of the passage of the act of Congress of the 19th May, 1828 (4 Stat. at L., 278), and was therefore adopted by that act as a part of the "forms and modes of proceeding in suits" in the Circuit Court of the United States for the Southern District of Alabama. *Beers* v. *Haughton*, 9 Pet., 357; *Strachen* v. *Clyburn*, 3 McLean, 174. It is a remedy in constant use in Alabama, and has been before this court in *City of Mobile* v. *Eslava*, 16 Pet., 235; *Same* v. *Hallett*, Id., 261. The declaration may be in the usual form of *trespass quare clausum fregit*. *Carwile* v. *House*, 6 Ala., 710.

In *Hagan* v. *Lucas*, 10 Pet., 400, the Circuit Court of the United States at Mobile entertained a suit for the trial of the right of property under an act of Alabama of the 24th December, 1812, and its judgment was affirmed by this court.

2d. By the eleventh section of the Judiciary Act of 24th September, 1789 (1 Stat. at L., 78), "The Circuit Courts *189] *have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law and in equity," &c. Common law in this act must be taken in contradistinction to equity; and may well embrace the action of "trespass," applied by a state statute as a remedy for trying the title to land.

3d. It is a remedy in respect to real estate, and the general rule is, that such remedies are to be pursued according to the law of the place where the estate is situated. *Robinson* v. *Campbell*, 3 Wheat., 212, 219.

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

The point in this case is a narrow one, and concerns only

the practice in the Circuit Court of the United States for the Southern District of Alabama.

It appears that in 1821 an act was passed by the legislature of that state to abolish fictitious proceedings in ejectment; and to substitute in their place the action of trespass, for the purpose of trying the title to lands and recovering the possession.

In the case before us, an action of trespass was brought by the plaintiff in error against the defendant, for the purpose of recovering a certain parcel of land to which he claimed title. The writ was indorsed in the manner required by the statute of Alabama; and the declaration was in the usual form of an action of trespass. There does not appear to have been either plea or demurrer put in by the defendant, nor any issue of fact or law joined between the parties. But the defendant by his counsel moved the court to dismiss the suit, upon the ground that the law of the state was not in force in the Circuit Court of the United States; and the district judge then holding the Circuit Court, being of that opinion, dismissed the suit, and gave judgment in favor of the defendant for his costs.

This decision is evidently erroneous. The act of May, 1828, (4 Stat. at L., 278), in express terms, directs that the forms and modes of proceeding in the courts of the United States, in suits at common law in the states admitted into the Union since 1789, shall be the same with those of the highest court of original jurisdiction in the state. Alabama is one of the states admitted since 1789; and the act of Congress, therefore, makes it obligatory upon the courts of the United States to conform in their mode of proceeding to the law of the state. The law of the state of itself, undoubtedly, was not obligatory upon the courts of the United States. But it is made so by the act of Congress.

The judgment of the Circuit Court must therefore be reversed, with costs.

* *Order.* [*190

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 for further proceedings to be had therein, in conformity to the opinion of this court, and as to law and justice shall appertain.

WILLIAM E. WOODRUFF, PLAINTIFF IN ERROR, *v.* FREDERICK W. TRAPNALL.

In 1836, the legislature of Arkansas chartered a bank, the whole of the capital of which belonged to the state, and the president and directors of which were appointed by the General Assembly.

The twenty-eighth section provided, "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas."

In January, 1845, this twenty-eighth section was repealed.

The notes of the bank which were in circulation at the time of this repeal, were not affected by it.[1]

The undertaking of the state to receive the notes of the bank constituted a contract between the state and the holders of these notes, which the state was not at liberty to break, although notes issued by the bank after the repeal were not within the contract, and might be refused by the state.[2]

[1] See *Davis* v. *Gray*, 16 Wall., 221; *Sherman* v. *Smith*, 1 Black, 587.

It makes no difference in the inviolability of the franchise granted by the legislature, that the corporation was originally established and endowed by the state, especially where it has also received funds from private donors. *Allen* v. *McKean*, 1 Sumn., 276.

[2] FOLLOWED. *Hawthorne* v. *Calef*, 2 Wall., 21; *Furman* v. *Nichols*, 8 Id., 63, 64; *Hartman* v. *Greenhow*, 12 Otto, 679. RE-AFFIRMED. *Paup* v. *Drew*, 10 How., 222. See *Keith* v. *Clark*, 7 Otto, 455, 457.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature. But a bank, where the stock is owned by individuals, is a private corporation. Its charter is a legislative contract, and cannot be changed without its assent. *State Bank of Ohio* v. *Knoop*, 16 How., 369.

The state of Tennessee having, in 1838, organized the Bank of Tennessee, agreed, by a clause in the charter, to receive all its issues of circulating notes in payment of taxes; but, by a constitutional amendment, adopted in 1865, it declared the issues of the bank during the insurrectionary period void, and forbade their receipt for taxes. *Held*, that the amendment was in conflict with the provisions of the Constitution of the United States, against the impairing the obligations of contracts. *Keith* v. *Clark*, 7 Otto, 454.

A state constitution is a "law" within the meaning of that clause of the United States Constitution which ordains that "no state shall pass any law impairing the obligation of contracts." *Lehigh Valley R. R. Co.* v. *McFarlan*, 4 Stew. (N. J.), 706.

In *Wabash &c. Canal Co.* v. *Beers*, 1 Black, 448, it was held that where the legislature of a state authorized commissioners to borrow money to be used in making a canal, and for the redemption of the loan, pledged the canal itself, its tolls, rents and lands, the lien of a vendor under such an act cannot be divested or postponed by a subsequent act of the legislature.

All rights are held subject to the police power of the state, which extends to the protection of the lives, health, and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex;* and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself. *Boston Beer Co.* v. *Massachusetts*, 7 Otto, 33.

See also *Dartmouth College* v. *Woodward*, 4 Wheat., 518, and the cases cited in the note; *Curran* v. *State of Arkansas*, 15 How., 304; *Boyd* v. *Alabama*, 4 Otto, 645, and cases cited on page 650; *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall., 116; *The Binghamton Bridge*, 3 Id., 51; *Von Hoffman* v. *City of Quincy*, 4 Id., 535.

Therefore, a tender, made in 1847, of notes issued by the bank prior to the repealing law of 1845, was good to satisfy a judgment obtained against the debtor by the state; and it makes no difference whether or not the debtor had the notes in his possession at the time when the repealing act was passed.[3]

THIS case was brought up, by writ of error, from the Supreme Court of the state of Arkansas.

On the 2d of November, 1836, the state of Arkansas passed an act to incorporate the Bank of the State of Arkansas. The capital was one million of dollars, which was raised by a sale of the bonds of the state, or by loans founded upon those bonds. The president and directors were appointed by a joint vote of the General Assembly. All dividends upon the capital stock were declared to belong to the state, subject to the control and disposal of the legislature.

The twenty-eighth section was as follows, viz.:—"That the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." The other *sections of the act were in the usual form of conferring general banking powers. [*191

In 1836, William E. Woodruff was elected by the General Assembly of Arkansas Treasurer of the state, and on the 27th of October, 1836, executed a bond to James S. Conway, Governor of the state, in the penal sum of three hundred thousand dollars, conditioned for the faithful performance of his duties as treasurer. There were seven sureties, whose names it is not necessary to mention. The time for which Woodruff was to serve was two years, "and until his successor shall be elected and qualified." His term of office was thus from the 27th of October, 1836, to the 25th of December, 1838.

On the 23d of March, 1840, the state of Arkansas brought a suit upon this official bond against the principal and sureties in the Pulaski Circuit Court. The breach alleged was, that Woodruff had not paid over to his successor the sum of $2395.18. It is not necessary to trace the history of this suit; suffice it to say, that it eventuated in a judgment against Woodruff for $3359.22 and costs.

On the 10th of January, 1845, the legislature passed an act relating to the revenue of the state, the nineteenth section of which provided that, "from and after the 4th of March, 1845, nothing shall be received in payment of taxes or revenue due the state, but par funds."

In the progress of the suit, Frederick W. Trapnall had

Memphis v. *United States*, 7 Otto, 293; *Hall* v. *Wisconsin*, 13 Id., 5.

[3] FOLLOWED. *Merchants' Nat. Bank* v. *Jefferson County*, 1 McCrary, 364. CITED. *Louisiana* v. *Jumel*, 17 Otto, 745, 750.

become regularly substituted in place of the Attorney-General, to conduct the suit.

In 1847, Trapnall ordered an execution upon the judgment which the state had obtained against Woodruff, who, on the 24th of February, 1847, tendered and offered to pay to Trapnall the sum of $3755 in the notes issued by the Bank of the State of Arkansas, which Trapnall refused to receive.

On the 25th of February, 1847, Woodruff filed a petition in the Supreme Court of the state, praying for an alternative writ of mandamus, commanding Trapnall to "receive and accept, in payment of the judgment, the notes of the bank, or to show cause why he shall refuse to do so." The writ was issued accordingly.

To this writ the following answer was filed:—

"The answer of Frederick W. Trapnall, attorney for the state *pro tem.*, to an alternative mandamus hereto annexed, issued by the Supreme Court on the petition of William E. Woodruff.

"This respondent admits the judgment and tender as set out in the said petition, but alleges that he was not authorized *192] to *receive the said Arkansas State Bank notes; because the twenty-eighth section of the bank charter, under which alone the said Woodruff could claim a right so to satisfy the said judgment, was repealed by an act of the legislature of the state of Arkansas, approved January 10, 1845, and entitled, 'An Act making appropriations for the years 1845, 1846, and part of the year 1844, and for balances due from the state, and for other purposes,' and by the nineteenth section of the said act.

"And this respondent submits to the court, if the repeal of the said section does not deprive him of all authority to receive the said bank-notes from the said Woodruff in satisfaction of the said judgment in favor of the state of Arkansas against him and others. Respectfully,

"Frederick W. Trapnall."

To this answer Woodruff demurred, and there was a joinder in demurrer.

Before the argument, the following agreement was filed by the counsel of the respective parties.

"Be it remembered, that the following matters are agreed upon by the counsel for the petitioner and respondent in this cause, to the end that the same may be filed and become a part of the record herein.

"1st. The record and proceedings in the case of William

E. Woodruff, and the said persons named in said petition as his securities, against the state of Arkansas, upon the first and second writs of error remaining in this court, and which are referred to in said petition, shall form a part thereof by such reference, as fully as though the same were incorporated therein at full length.

"2d. That said respondent, as attorney of record for said state in the suit aforesaid, is the proper officer by law to receive and acknowledge satisfaction of said judgment.

"3d. That the notes of the Bank of the State of Arkansas, referred to in said petition and response, and tendered in this case, were issued by said bank, pursuant to the charter thereof, prior to the year 1840.

"4th. That after the creation of said bank, down to the year 1845, the notes of said bank were received and paid out by said state in discharge of all public dues to and from said state.

"5th. That said bank continues to exist, with all its corporate functions, and that in the consideration of this case all the acts of the General Assembly of said state, affecting said bank, shall be deemed to be public laws, as they have been heretofore decided by this court to be, and whereof this court will judicially *take notice; but to the end thereof, and for greater certainty, the act of said General [*193 Assembly, entitled 'An Act to incorporate the Bank of the State of Arkansas,' approved November 2d, 1836, is here inserted at full length, and made part of the record in this cause, and which act of incorporation is in the words following." (Then followed the charter of the bank *in extenso.*)

One of the grounds of the demurrer was the following:—

"1st. That the nineteenth section of said act, entitled 'An Act making appropriations for the years 1845, 1846, and part of the year 1844, and for balances due from the state, and for other purposes,' approved January 10th, 1845, is a law impairing the obligation of contracts, and is repugnant to the Constitution of this state and of the United States, and therefore void."

On the 28th of July, 1847, the Supreme Court of Arkansas overruled the demurrer, and on the 30th of July Woodruff sued out a writ of error to bring the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Reverdy Johnson*, for the plaintiff in error, and by *Mr. Sebastian*, for the defendant in error.

The following extract from the brief filed by *Mr. Lawrence*

shows the ground upon which he placed his argument. Of the argument of *Mr. Johnson*, the reporter has no notes.

The question presented is an important one. It is whether, under the Constitution of the United States, a state can violate her solemn pledges, break her plighted word, and annul her sacred and deliberate contracts and promises. One would think it not a difficult question; and surely we should have supposed the mere statement of it enough, without a word of argument, had not the highest tribunal of a state decided in favor of this monstrous power, and announced principles which, as it seems to us, are at variance with sound, well-settled, and universally admitted principles of constitutional and national morals.

We say the question is an important one. It is, whether states and sovereignties are governed by the rules of ordinary honesty; whether the provision in the Constitution, that the obligation of contracts shall by no law be impaired, is mere *brutum fulmen*. For there is no doubt that private honesty cannot long survive when public dishonesty is legalized; that private promises and obligations will not long be held sacred, when the judiciary, the guardian of the public morals, admits and argues that the state may, at pleasure, violate her pledges and promises; that public and private morals are intimately connected; and that a despotic government, that kept her faith *and held her pledge and promise sacred and inviolable, would be far preferable to a republic whose promises were but ropes of sand, her public faith a mockery, and her plighted honor the mere oath of a dicer.

*194]

The Supreme Court of Arkansas denies that the twenty-eighth section of the charter so incorporated itself into the contract as to become a part of it, and holds such a position fallacious. One would think, on the contrary, it was self-evident. That court says that the position is a fallacy, because "the act by which the State Bank was created was nothing more than a grant of power for certain purposes therein specified, which was exclusively under the control of the legislature, and consequently subject to be repealed at any time, whenever, in the wisdom of that body, it should seem expedient for the good of the country." That, so far as it means that the legislature could repeal the charter, and end the existence of the bank, we admit. But the court proceeds to say that, on such repeal, the notes of the bank would become valueless, and the debt evidenced by them extinguished. And they further assert, that the provision allowing the debtors of the state to pay in notes of the bank was a

mere *gratuity;* a privilege, on condition they should pay before the repeal of the law.

This is the whole argument, or rather series of assertions, used by the court. It assumes that a repeal of the act would repeal, and could constitutionally repeal, the promise and pledge contained in the twenty-eighth section; that, indeed, it is no pledge, but a privilege gratuitously conferred, on condition the law was not repealed. Now, is this true? At first blush, it would seem extraordinary that any such conclusion could ever have been arrived at. If an individual was about to issue his notes to serve as currency, would it be a *gratuity* if he promised to receive them in payment of debts due him? It might just as well be said that his promise to pay them was a gratuity. One would be just as much a gratuity as the other.

Suppose A wishes to induce me to loan money to B, and take for it his note, and, in order to do so, tells me that, if I will loan the money on B's giving me his note for the amount, he (A) will, at any time, receive it in payment of any debt I, or any holder of it, may owe him. Suppose he puts this in writing, and seals it. Is this promise a gratuity? On the contrary, it is a valid promise, for a good and valuable consideration. If it is not, in every case where a man becomes security for another, it is a gratuity. If we need an apology for quoting authorities to sustain a self-evident proposition, lying on the very surface of the law, it must be found in the fact that so *trite and common and fundamental a principle is actually denied by the Supreme Court of a [*195 State.

That such a promise is not a gratuity, but a valid contract, for good consideration, was established before cases were reported. It is repeated in a multitude of cases, and denied nowhere. *Bailey* v. *Croft*, 4 Taunt., 611; *Suffield* v. *Bruce*, 2 Stark., 175; *Brown* v. *Garbrey*, Gouldsb., 94; *Kirkby* v. *Coles*, Cro. Eliz., 137; *Stadt* v. *Dill*, 9 East, 348; *Leonard* v. *Vredenburgh*, 8 Johns. (N. Y.), 29; *Hunt* v. *Adams*, 5 Mass., 362; *Howe* v. *Ward*, 4 Greenl. (Me.), 195; *Minet's Case*, 14 Ves., 189; *Violett* v. *Patton*, 5 Cranch, 142, 152.

The twenty-eighth section of the charter of this bank is not a law, in any sense of the word. Municipal law is a rule of civil conduct prescribed by the supreme power of a state. (1 Kent Com., 446.) Statute law is the express written will of the legislature, rendered authentic by certain prescribed forms and solemnities. (Id.) The word *law*, in its most general and comprehensive sense, signifies a rule of action (1 Bl. Com., 38); a rule of action prescribed by some supreme being. (Id.)

Municipal law is a rule of civil conduct, prescribed by the supreme power in a state (1 Bl. Com., 46), commanding what is right, and prohibiting what is wrong. (Id., 53.) The operation of a law must be from the supreme power or state, upon the individuals or corporations, or some of them, composing it. It must be an exercise of the power of government. If I order a child to learn a task, that is a law; but if I, at the same time, promise him a reward for doing it, this is no law, but a promise. It is no exercise of the paternal power. An act of the legislature may be in part a law and in part a contract. So far as it is a contract or promise, founded on a valid consideration, it binds the state just as it does an individual; and the former can no more repeal such a contract than an individual can repeal his bond.

It is perfectly well settled in this court, that a legislative act may be a contract, and that whenever it is so, and absolute rights have vested under that contract, a repeal of the law cannot divest these rights; and that, if the act of annulling them is legitimate, it is rendered so by a power applicable to the case of every individual in the community. *Fletcher* v. *Peck*, 6 Cranch, 135.

It is too well settled, by too many cases in this court and elsewhere, that a legislative grant is a contract, to argue that; why it is a contract, is equally well settled. The *indicia* of a contract between a state and individuals are the same as between man and man. If a grant, which is a gratuity, is a contract, because it vests a right, *a fortiori* is the promise in
*196] *this case—for it is no gratuity, but a valuable promise—a good and valuable consideration. By this promise the state became the surety of the bank, as to all the paper that institution might issue. Certainly a suretyship, based on, and supported by, a consideration good in law, is a contract, and one of the highest obligation. It is not necessary to argue whether it is executed or executory. In either case it contains obligations binding on the parties. *Fletcher* v. *Peck*, 6 Cranch, 137.

It is far from being true, that every act which a state does, she does as sovereign. When she takes stock in a banking corporation, she assumes the character of an individual, and as such is subject to all the ordinary obligations which could be incurred by an individual under like circumstances.

Certainly no court will deny the capacity of a state to contract with other states, or with her citizens or citizens of other states. Sovereignty of course includes that power and capacity. If competent to contract, she may do it by a legislative enactment, or by a contract executed by her agents in pursu-

ance of a law, or by implication. And if she can contract at all, the twenty-eighth section of this charter is unquestionably a contract. The grant of a franchise to one corporation is an implied contract that the state will not confer the identical franchise on another corporation, and this implied contract is rendered irrevocable by the Constitution. *Dartmouth College* v. *Woodward*, 4 Wheat., 518.

Two parties are necessary to form a perfect contract, but the assent of both need not be given at the same time. Judge Story gives, as an instance to prove this, in *Dartmouth College* v. *Woodward*, an act declaring that all persons who should thereafter pay into the public treasury a stipulated sum, should be tenants in common of certain lands belonging to the state, and declares that to be clearly a contract with a person afterwards born, who should pay the stipulated sum into the treasury. Would he not have given quite as strong an instance, if he had said that a promise by a state to receive certain paper, about to be issued in payment of all debts due her, was a contract with every person who should afterwards take it, that she would receive it from them? Undeniably, this position would have needed as little argument as the other. Both are too plain to admit of argument.

That agreements between two states constitute a contract within the meaning of the Constitution, was expressly held in *Green* v. *Biddle*, 8 Wheat., 1. The definition there given of a contract is, that it is an agreement to do or not to do certain acts, and it is said expressly that the Constitution of the United States embraces all contracts, executed or executory, whether *between individuals or between a state and individuals; and that a state has no more power to impair [*197 an obligation into which she herself has entered, than to impair the contracts of individuals. The same principle was declared in *Briscoe* v. *Bank of Commonwealth of Kentucky*, 11 Pet., 257; *Providence Bank* v. *Billings*, 4 Id., 514.

In the *State of New Jersey* v. *Wilson*, 7 Cranch, 165, it was held that a legislative act, declaring that land which should be purchased for certain Indians should not thereafter be subject to any tax, was a contract, and could not be rescinded by a subsequent legislature. It was held that this privilege was annexed to the land, and not to the persons of the Indians, and was a contract in favor of their vendees. It might as well have been said that that privilege was a gratuity, as the one which is so called by the Supreme Court of Arkansas in this case.

The notes in these cases were given in May, 1842. At that time the twenty-eighth section of the charter stood unrepealed,

an act which attempted to repeal it not being passed until January, 1845. It is certainly neither denied nor deniable, that, when the notes were given, they were payable, at the option of the debtor, in notes of the bank. They are expressly made payable "in specie or its equivalent," to show that they might be paid otherwise than in specie. As the law then stood, at least, the notes of the state bank were, to our state herself, equivalent to specie. It is too well settled to need argument or authority, that a law which authorizes the discharge of a contract by the payment of a smaller sum, or at a different time, or in a different manner, than the parties have stipulated, impairs the obligation, by substituting for the contract of the parties one which they never entered into, and to the performance of which, of course, they have never consented. *Hinkley* v. *Marean*, 3 Mason, 88; *Sturges* v. *Crowninshield*, 4 Wheat., 122.

Surely a law which prevents the debtor from discharging a bond in the manner and with the funds with which it could have been discharged when made,—in which it was agreed, when it was made, it might be discharged,—is void for precisely the same reason. The wit of man can observe no difference.

It seems to us that this is a case in which it needs only to apply to the most trite and ordinary principles of law and honesty. *Fides observanda est*, is a maxim older than the law. Upon its observance depend all reverence for government, all respect for authority, all confidence in mankind, all law, and the whole system of morals. If the decision of the court below *is the law of the land, and a true application of the national Constitution, let *Punica fides* cease to be a proverb. That such a doctrine could be announced anywhere among us goes far to prove that America was first discovered and peopled by the Phœnicians.

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The conduct of nations is governed by the same rules of morality and honesty that govern individuals. The day has gone by, at least on this continent, when power can sanction and justify iniquity. Might no longer makes right. Thanks to our national Constitution, a new code of national morality has sprung into existence; and it is no longer possible for a state, even if she be *plenâ fide* a sovereignty, to violate her solemn pledges, and make her firmest faith as cheap as the empty wind.

One is grieved and ashamed to be compelled to argue a question like this in the nineteenth century, and under a free government. Perhaps it would have been better to say, with Judge Story, in *Thorndike* v. *The United States*, 2 Mason, 1:—

"By the statutes of the United States, under which treasury notes have from time to time been issued, it is enacted, that all such notes shall be receivable in payments to the United States, for duties, taxes, and sales of public lands, to the full amount of principal and interest accruing, due on such notes. It follows, of course, that they are a legal tender in payment of debts of this nature due to the United States, and by the very tenor of the act public officers are bound to receive them."

Mr. Sebastian, for the defendant in error, laid down the following propositions:—

That the twenty-eighth section of the charter was not a contract within the meaning of the prohibitory clause of the Constitution of the United States.

That it was simply a law, in its just and legitimate sense, and as such repealable by the legislature at any time.

The most important question which arises, and at the very threshold of the case, is whether the stipulation of the twenty-eighth section of the charter of the bank was a contract. That a law in form may in reality be a contract, is admitted; that it may partake of both features and perform both functions, is denied. It must be one or the other. Law is a rule, not compact. One is a command of the supreme power, and an exercise of authority; the other is the agreement of the parties, and the exercise of will. The one is supreme, because it emanates from the sovereign power; the other is obligatory, because of the assent of the parties. The contracts of the state *are valid, not because they are acts of the sovereign [*199
power, in a legislative form, but because they are its compacts for a consideration with others, as a corporate person. In this last respect, the state is not sovereign; not more than she is when a corporator, partner, stockholder, or trustee. No doubt, if a state in form of law make a grant, deemed an executed contract, she may not resume it. If she in the same form make a contract with individuals, when it is accepted it is equally obligatory, and under the protection of the Constitution. Such was the doctrine of this court in *Fletcher* v. *Peck*, 6 Cranch, 87. And in *New Jersey* v. *Wilson*, 7 Cranch, 164. These latter cases, however, quoted by appellants, have no bearing in this case, as they are instances in which the contract was express, conveyed property rights, and left no doubt from their nature that they were contracts. It is not believed that this court has ever in this class of cases gone beyond the protection of vested rights of property from resumption. No case has ever pushed this

doctrine any further. Rights of the character just mentioned never, indeed, needed the protection of the Constitution, and most probably never, in point of fact, entered into the intention of its framers. They exist not under the Constitution, but above it, and independent of it. Still, beyond this class, the courts have not construed laws to be contracts, except in the charters of private corporations, which stand upon a different footing, and of which I shall say more hereafter. The principle has been extended to its utmost tension, and cannot go further, without an undue and unnecessary restraint upon the rights of the states in the regulation of their civil institutions and policy adopted for their internal government. Such was not intended, as is admitted in *Dartmouth College* v. *Woodward*. It would be of most mischievous consequence, if every law which promised a general benefit or advantage, which indicated a particular policy, or ventured upon an untried experiment, should be deemed a compact with the citizen to adhere to it forever. The legislation of a state would be fettered by so many restraints, that it would become a mere register of its contracts, rather than a code of its laws. It would only be potent for mischief and impotent for good, possessing the strange faculty of perpetuating evil, without the power to arrest or correct it. To give stability to law, it is not necessary to perpetuate its mischief.

It is admitted that, when a contract is clearly expressed or necessarily implied, no considerations should induce its violation; but then the opposite extreme should be avoided, by which too sacred a regard is paid to private right, and too little to public necessity. This prohibition being in derogation and *restraint of the rights of legislation of the states over subjects peculiarly within their sphere, should be, if not strictly construed, at least warily watched, lest it go further than any necessity warrants. Much more so, when in this case the prohibition is sought to be extended to the almost utter annihilation of state sovereignty. Every state, of necessity, must be left undisturbed in the exercise of these powers, essential to its preservation and safety. Among these, the chief one is the power over its finances and credit, of laying and collecting taxes. So essential is this, that it is almost impossible to conceive of a government without a treasury. Upon the full enjoyment of this prerogative depends the faithful performance of all the functions which devolve upon a state. Without it, how can government be established or maintained, its credit preserved, its debts paid, its obligations discharged, its laws administered, and its trusts performed? How impotent for self-preservation is the state,

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when, under the pressure of an overruling necessity, she resorts to every resource and every power, calls upon every arm and every purse, if she must stay the last mighty struggle for existence until she redeems all the issues of a defunct and insolvent bank. There are periods in the history of every nation when laws and constitutions are inadequate and feeble for their task, when resort must be had to that brief code, "*Salus republicæ, suprema est lex.*" It is the law of necessity. Constitutions are built upon it. They may suspend, but can never subvert it. What state has never found a period when she did not resort to it? What nation that has not found the preservation of faith inconsistent with its necessities? In plainer terms, What nation has not suspended or repudiated her obligations? And where are the countless millions of Continental money, which the necessities of the Revolution forced into circulation, and which the poverty of its exchequer as quietly buried in oblivion? May not a nation legitimate its own bankruptcy, as well as that of the citizen?

When the prohibition of the Constitution is to be extended in restraint of a necessary and essential power of state sovereignty,—the control of its revenue and the performance of its trusts,—it may be justly expected that it should be to protect a clear and an undoubted right from violation. These principles were asserted in a most forcible manner by the Chief Justice in an analogous case of *Providence Bank* v. *Billings* and *Putnam*, 4 Pet., 514. Speaking of the taxing power, he says,—"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." *The power of collecting taxes and prescribing the manner in which they may be paid, is a most essential [*201 part of the taxing power. These principles were again distinctly approved in *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 547. A useful illustration of the mischief from such provisions being regarded as contracts, and the highest evidence that it was not so intended, are afforded in the very case before the court. The bank was authorized by its charter to issue $3,000,000 upon its $1,000,000 of capital. The state revenue ordinarily amounts to less than $100,000 per annum. In the event of a total insolvency of the bank (and it has nearly approached that), the revenues of the state would have been absorbed for years, besides the utter swallowing up of every trust fund with which the munificence of Congress had invested her. The Seminary, Five per Cent., Salt Springs, Common Schools, Distribution, and Internal Improvement

funds, all would have been swept away; potent evidence that the *trust* funds were not meant by "debts due the state."

It is difficult to conceive how any law, in the administration of which the citizens may be interested, may not as well be considered a contract as the twenty-eighth section of the charter. It certainly possesses the same *indicia* of contracts. We have but to say, that the law prescribing a thing to be done, is a pledge that it shall be done, and the conversion is complete. Such is the case with all the laws for the administration of justice, the collection of revenues, and the regulation of the internal police of the state. In all these, certain duties are imposed upon the public officers as the agents of the states. Yet these laws are subject to repeal, and often inflict inconvenience and disappointment. The law in question is but a direction of the state to the treasurer, prescribing the character of funds which he may receive for her revenues; and it would be strange, indeed, if any such law was not, from its very nature, repealable. In one sense, the twenty-eighth section was no part of the charter; it found a place among the enactments which constituted the law of the corporation. It formed no part of the law of its being; it was a part of the fiscal regulations and revenue laws of the state, and as such might well be altered, modified, or altogether repealed, whenever the public good required it. It contained no pledge to the bank; that was a public corporation in which the state was sole proprietor, and alone interested. It was none to the government of the bank, for they were public officers of a public "civil institution," employed in the administration of the government, who might, with the corporation which they governed, have been instantly, at any moment, annihilated by a total repeal. *It conferred no immunity, franchise, or privilege. It contained no pledge to the bondholders who advanced the capital of the bank. As to them, the seventeenth section of the charter gave them only a pledge of the faith of the state for the principal and interest of the capital alone. As to the holder of the notes, it was the pledge which every law contains, that it will be executed while in force, and no longer. That the provision thus enacted formed a contingent and auxiliary consideration, in giving currency and value to the notes of the bank, may be true. That it was the object and aim of the law, is not to be believed. It facilitated the collection and disbursement of the public revenue, while the bank remained the fiscal agent and depositary of the state. Had the bank been without a cash capital, it might be presumed that the state by this means sought to lend credit to its notes, and then they would have been within the

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meaning, if not the spirit, of "bills of credit." They derived their legal and permanent value from their being the bills of a specie-paying bank, with a cash capital, resources, and property of its own, amenable in court, and tangible to an execution. The Constitution only authorized the General Assembly to pledge "the faith of the state to raise the funds necessary to carry into operation the bank." This was done. Nothing beyond this was either done or intended to be done. It might with equal truth be asserted, that other provisions of the charter, which gave to the notes of the bank a contingent value, were also contracts with the note-holder, such as the deposit of the various trust funds of the state, the revenues of the state, the Internal Improvement fund afterwards acquired by the state, the duration of the charter, the franchises, powers, and privileges of the bank. These were all contingent and remote auxiliaries, which lent additional confidence to the public in the resources of the bank. Yet it is not denied that they were not contracts. These provisions were all subsequently repealed without question. But for the act of 1845, the revenues of the state would to this day have been collected, and the whole of the public creditors paid, as for years previously they had been, in the depreciated notes of this institution.

Again, this section had all the *indicia* of a law, none of a contract. Law, according to the most comprehensive and intelligible definition, "is a rule of civil action, prescribed by the supreme power of a state, commanding what is right, and prohibiting what is wrong;" or, according to a definition less technical, "commanding what shall be done, and prohibiting what shall not be done." It is a command from a superior to an inferior, to do or not to do. When addressed to the citizens at large, it forms the civil jurisprudence of a country; *when it is directed to the public officers of the state, it forms its public and political law. All laws creating [*203 public, municipal, or political corporations, are of this class, over which the legislative power of a state is not restrained by the Constitution. They, from their nature, must be repealable, without any other limitation than that property held by such corporations shall be still secured for the use of those for whom, and at whose expense, it has been acquired. *Dartmouth College* v. *Woodward*, 4 Wheat., 518. "The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes."

"The same institutions, though not incorporated, would be public institutions, and of course controllable by the legislature." Id., 638.

The distinction between public and private corporations was thus defined:—"If a charter be a mere grant of political power; if it create a civil institution, to be employed in the administration of the government; or if the funds be public property alone, and the government alone be interested in the management of them, the legislative power over them is not restrained by the Constitution." It thus possessed all the features of a law. The whole charter was but law. On the contrary, this provision contained no portion of a contract. Law only becomes compact when it requires and obtains the assent of the other parties to it. It has been shown that the only legal value of the notes of the bank was as obligations of the bank. The quality which they possessed from being receivable at the state treasury was incidental, and, like a legal quality or privilege imparted to any other estate or property, could be withdrawn at the pleasure of the state. As obligations of the bank, they could not be reached by a legislative repeal of the charter.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on a writ of error to the Supreme Court of Arkansas.

An action was brought by the state of Arkansas in the Pulaski Circuit Court, against the plaintiff in error, and his sureties, Chester Ashley and others, upon his official bond as late Treasurer of State, for the recovery of a certain sum of money alleged to have been received by him, as treasurer, between the 27th day of October, 1836, and the 26th day of December, 1838. And a judgment was recovered against him and his securities, on the 13th of June, 1845, for $3359.22

*204] *and costs. An execution having been issued on the judgment, on the 24th of February, 1847, the plaintiff tendered to the defendant in error, who prosecuted the suit as Attorney-General, the full amount of the judgment, interest, and costs, in the notes of the Bank of the State of Arkansas, which were refused.

The above facts being stated in a petition to the Supreme Court of Arkansas on the 25th of February, 1847, an alternative mandamus was issued to Trapnall, the defendant in error, to receive the bank-notes in satisfaction of the judgment, or show cause why he shall refuse to do so.

On the return of the mandamus, the defendant admitted the judgment and tender of the notes; but alleged that he

was not authorized to receive them in satisfaction of the judgment, because the twenty-eighth section of the bank charter, under which alone the plaintiff could claim a right so to satisfy the judgment, was repealed by an act of the legislature, approved January 10th, 1845.

It was agreed by the parties, that the record of the judgment should be made a part of the proceeding; that the defendant was the proper officer by law to receive satisfaction of the judgment; that the notes tendered were issued by the bank prior to the year 1840, and that down to the year 1845 the notes of the bank were received and paid out by the state, in discharge of all public dues; that the bank continues to exist with all its corporate functions.

The court were of opinion, that the return of the defendant showed a sufficient cause for a refusal to obey the mandate of the writ, and gave judgment accordingly.

The twenty-eighth section of the bank charter, which was repealed by the act of 1845, provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas." And the question raised for consideration and decision is, whether the repeal of this section brings the case within the Constitution of the United States, which prohibits a state from impairing the obligations of a contract.

The bank charter was passed on the 2d of November, 1836, "with a capital of one million of dollars, to be raised by a sale of the bonds of the state, loans, or negotiations, together with such other funds as may now or hereafter belong to, or be placed under the control and direction of, the state;" the principal bank to be located at the city of Little Rock, and its concerns to be conducted by a president and twelve directors, to be appointed by a joint vote of the General Assembly. Branches were required to be established, the presidents and directors whereof were to be elected in the same manner.

*The president and directors were to have a common seal, were authorized to deal in bullion, gold, silver, [*205 &c., purchase real property, erect buildings, &c., issue notes, make loans at eight per cent. on indorsed paper, or on mortgages, within the state; a general board was constituted, who were to make report of the condition of the bank annually, to the legislature, and perform other duties; and any debtor to the bank, "as maker or indorser of any note, bill, or bond, expressly made negotiable and payable at the bank, who delays payment," should have a judgment entered against him on a notice of thirty days.

Some doubt has been suggested, whether the notes of this

bank were not bills of credit within the prohibition of the Constitution. We think they cannot be so held, consistently with the view taken by this court in the case of *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, 11 Pet., 311. It was there said, that, "to constitute a bill of credit within the Constitution, it must be issued by a state, on the faith of the state, and be designed to circulate as money. It must be a paper which circulates on the credit of the state, and is so received and used in the ordinary business of life.[1]

The bills of this bank are not made payable by the state. A capital is provided for their redemption, and the general management of the bank, under the charter, is committed to the president and directors, as in ordinary banking associations. They may in a summary manner obtain judgments against their debtors. And although the directors are not expressly made liable to be sued, yet it is not doubted they may be held legally responsible for an abuse of the trust confided to them.

The entire stock of the bank is owned by the state. It furnished the capital and receives the profits. And, in addition to the credit given to the notes of the bank by the capital provided, the state declares in the charter, they shall be received in all payments of debts due to it. Is this a contract? A contract is defined to be an agreement between competent persons, to do or not to do a certain thing. The undertaking on the part of the state is, to receive the notes of the bank in payment from its debtors. This comes within the definition of a contract. It is a contract founded upon a good and valuable consideration; a consideration beneficial to the state, as its profits are increased by sustaining the credit, and consequently extending the circulation, of the paper of the bank.

With whom was this contract made? We answer, with the holders of the paper of the bank. The notes are made payable to bearer; consequently every *bonâ fide* holder has a right, under the twenty-eighth section, to pay to the state any debt he may owe it, in the paper of the bank. It is a continuing *206] *guaranty by the state, that the notes shall be so received. Such a contract would be binding on an individual, and it is not less so on a state.

That the state had the right to repeal the above section may be admitted. And the emissions of the bank subsequently are without the guaranty. But the notes in circulation at the time of the repeal are not affected by it. The holder may still claim the right, by the force of the contract, to discharge any debt he may owe to the state in the notes thus issued.

[1] Cited. *Veazie Bank* v. *Fenno*, 8 Wall., 553.

It is argued that there could have been violated or impaired no contract with the plaintiff in error, as it does not appear he had the notes tendered by him in his possession at the time the twenty-eighth section was repealed.

It is admitted that he had the notes in his possession at the time he made the tender, and that they were issued by the bank before the repeal of the section; and nothing more than this could be required.

The guaranty of the state, that the notes of the bank should be received in discharge of public dues, embraced all the bills issued by it; the repeal of the guaranty was intended, no doubt, to exclude all the notes of the bank then in circulation. Until the repeal of the twenty-eighth section, the state continued to receive and pay out these notes. Up to that time, no one doubted the obligation of the state to receive them. The law was absolute and imperative on the officers of the state. The holder of the paper claimed the benefit of this obligation, and it is supposed his right could never have been questioned. The notes were payable to bearer, and the bearer was the only person who had a right to demand payment of the bank, or to pay them into the state treasury in discharge of a debt. The guaranty included all the notes of the bank in circulation as clearly as if on the face of every note the words had been engraved, "This note shall be received by the state in payment of debts." And that the legislature could not withdraw this obligation from the notes in circulation at the time the guaranty was repealed, is a position which can require no argument. Any one had a right to receive them, and to test the constitutionality of the repeal.

Suppose a state legislature should pass a law authorizing the drawers of promissory notes, payable to bearer, to discharge the same by the payment of produce. Would such a law affect the rights of the bearer? The contract would stand, and the law would be declared void. A standing guaranty by a mercantile house, to receive in payment of its debts all notes drawn by a certain other house, is valid, on the ground that the notes were taken on the credit of such guaranty. It may *be terminated by a notice; but when so terminated, are [*207
not all the notes good against the guarantors, which were executed and circulated prior to the notice? Who could commend the justice of guarantors, who should endeavor to avoid responsibility, on so clear a principle? *Louisville Manuf. Co.* v. *Welch*, *post*, *461.

A state can no more impair, by legislation, the obligation of its own contracts, than it can impair the obligation of the con-

tracts of individuals.[1] We naturally look to the action of a sovereign state, to be characterized by a more scrupulous regard to justice, and a higher morality, than belong to the ordinary transactions of individuals. The obligation of the state of Arkansas to receive the notes of the bank, in payment of its debts, is much stronger than in the above case of individual guaranty.

The bank belonged to the state, and it realized the profits of its operations. It was conducted by the agents of the state, under the supervision of the legislature. By the guaranty, the notes of the bank, for the payment of debts to the state, were equal to gold and silver. This, to some extent, sustained their credit, and gave them currency. Loans were made by the bank on satisfactory security. The debts of the bank, or a large proportion of them, may fairly be presumed to have been collected. But the means of the bank, thus under the control of the state, became exhausted. Whether this was the result of withdrawing the capital from the bank, by the state, does not appear upon the record. We only know the fact, that its funds have disappeared, leaving, it is said, a large amount of its paper, issued before the repeal of the guaranty, worthless, in the hands of the citizens of the state.

The obligation of the state to receive these notes is denied, on the ground that the twenty-eighth section was a general provision, liable to be repealed, at any time, by the legislature. And it is compared to a general provision to receive, for public dues, the paper of banks generally, unconnected with the state. There is no analogy in the two cases. One is a question of public policy, influenced by considerations of general convenience, which every one knows may be changed at the discretion of the legislature. But the other arises out of a contract incorporated into the charter, imposing an obligation on the state to receive, in payment of all debts due to it, the paper of a bank owned by the state, and whose notes are circulated for its benefit. The power of the legislature to repeal the section, the stock of the bank being owned by the state, is not controverted; but that act cannot affect the notes in circulation at the time of the repeal.

It is objected, that this view trenches upon the sovereignty of the state, in the exercise of its taxing power and in the regulation *of its currency. We are not aware that a state has power over the currency farther than the right to establish banks, to regulate or prohibit the circulation,

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[1] QUOTED. *Antoni* v. *Greenhow*, 17 Otto, 803.

within the state, of foreign notes, and to determine in what the public dues shall be paid.

It is a principle controverted by no one, that, on general questions of policy, one legislature cannot bind those which shall succeed it; but it is equally true and undoubted, that a legislature may make a contract which shall bind those that shall come after it.

The notes of the bank in circulation at the repeal of the twenty-eighth section, if made receivable by the state in discharge of public dues, may so far resuscitate them, as that, in the course of time, they will find their way into the treasury of the state, where in justice and by contract they belong. It is presumed there will be no complaint, as there will be no ground for any, by the citizens of the state, if these notes, now dead and worthless, should be so far revived as to reach their appropriate destination. And if, as a consequence, some increase of taxation should be required by the state, it will be nothing more than is common to all other states that perform their contracts. It would be a most unwise policy for a state to improve its currency through a violation of its contracts. In such a course, the loss of the state would be incomparably greater than its gain. Any argument in commendation of such an action by a state cannot be otherwise considered than as exceedingly infelicitous and unjust.

If these notes be receivable in payment of public dues by the state, having been in circulation at the time of the repeal of the above section, as we think they clearly are, no doubt can exist as to the sufficiency of the tender. The law of tender which avoids future interest and costs, has no application in this case. The right to make payment to the state in this paper arises out of a continuing contract, which is limited in time by the circulation of the notes to be received. They may be offered in payment of debts due to the state, in its own right, before or after judgment, and without regard to the cause of indebtment.

Whatever may be the demerits of the plaintiff in error, they do not affect the nature and extent of the obligation of the state. And that obligation cannot be withdrawn from this paper. Into whosesoever hands it shall come, it carries with it the pledge of the state to receive it in payment of its debts. In this case the payment is made by the securities of Woodruff, and exacted by the state, to whose organization and management of the bank may be attributed its insolvency. In procuring the notes of the bank, these securities had a right to *rely, and no doubt did rely, upon the guaranty of [*209
the state to receive them in payment of debts.

In sustaining the application for a mandamus, the Supreme Court of the state exercised jurisdiction in the case. To that court exclusively belongs the question of its own jurisdiction. For the reasons stated, the judgment of the Supreme Court is reversed, and the cause is remanded for further proceedings to that court, as it may have jurisdiction, in conformity to the opinion of this court.

Mr. Justice CATRON, Mr. Justice DANIEL, Mr. Justice NELSON, and Mr. Justice GRIER dissented.

Mr. Justice GRIER.

With all respect for my brethren, I feel constrained to express my entire dissent from the opinion of the majority of the court, which has just been delivered.

There is no portion of the power and jurisdiction committed to this court which demands so much caution in its exercise, as that of declaring the legislation of a state to be null and void, because it comes in conflict with the Constitution of the United States. And more especially should this be the case where one of the states of this Union is really (though not nominally) the true party defendant, and is charged, not merely with legislation injuriously impairing contracts between her citizens, but with a direct and dishonest repudiation of her own solemn obligations. Such is the charge on which the state and people of Arkansas have been publicly arraigned before this court. But it is one I am unwilling to indorse or believe, without other evidence than the record before us contains. When a state is charged with a repudiation of her contracts, the party making it is bound to show, beyond dispute, that the state has made a contract; when, where, how, and with whom; and not leave it to surmise, strained inferences, or fanciful construction, as to the nature of the obligation, or the parties to it.

Assuming the state of Arkansas to be, for the purposes of this case, a private corporation, or an individual, and bound by the same principles of law and equity which affect other persons in their intercourse with the world, let us examine whether William E. Woodruff, the plaintiff below and in error, has shown a contract which entitled him to the remedy sought, in the Supreme Court of Arkansas, and which we are now called on to afford him. The record shows that his bond was given to the state of Arkansas on the 27th of October, 1836, before the act was passed which incorporated the Bank

of the State of Arkansas. His contract, as it appears on the face of his bond, is *to pay $300,000, "lawful money of the United States," subject to a condition which is [*210 forfeited. He was treasurer of the state, and between the date of his bond and the 21st of December, 1838, he received large sums of money, and among others, the sum of $286,757.49, in drafts from the Secretary of the Treasury of the United States. Of these moneys a balance remained in his hands, which he refused to pay over, and a suit was brought on his bond in 1840; and on the 23d of January, 1847, final judgment was recovered for the sum of $3359 and costs; and an execution having issued for the same, Woodruff, for the first time, in February, 1847, tendered to the attorney of the state, not lawful money of the United States, which he had contracted to pay, and for which judgment was given against him, but notes of the State Bank of Arkansas, then and now insolvent, and the notes almost worthless. Woodruff then petitioned the Supreme Court for a mandamus to compel the attorney of the state to receive these worthless notes, in place of the money he had contracted to pay, and which he was condemned by the judgment of the court to pay; and because of the refusal of the Supreme Court of Arkansas to issue a peremptory mandamus, he has appealed to this court to compel them, on the ground that the law of the state which forbade its officers to receive payment of taxes and debts in any thing but specie or par funds, impaired the obligation of contracts. The twenty-eighth section of the act of 1836, incorporating the bank, directed that the bills and notes of the bank should "be received in all payments of debts due to the state of Arkansas." But another statute, passed in 1845, enacted, that "from and after the 4th of March, 1845, nothing shall be received in payment of taxes or revenue due the state, but par funds or treasury warrants of the state."

Now, for seven years and upwards after the default of the plaintiff in paying over money which he had received, he was permitted to pay in notes of this bank, but in all this time he made no tender of payment in such notes. When sued on his bond, he makes no tender of notes, pleads no set-off, but, after judgment of the court that he shall pay money, he claims a right to satisfy the execution by handing over that which is not money. If this claim be not just, it has at least the merit of novelty, as it is certainly without precedent, either in the courts of England or America.

Let us assume, for argument's sake, that every enactment of the legislature of Arkansas is in the nature of a contract or promise with *some person*, and cannot be repealed, and that

the state had guaranteed or indorsed every note issued by the bank, or, what will make the case stronger for the plaintiff, that his bond was made payable in the notes of the State
*211] Bank *of Arkansas. Is he entitled to the extraordinary process now demanded, or had he a right to allege such contract on the part of the state at this stage of the proceedings? If he had not, and the court below were right in refusing to issue the mandamus, whether the act of 1845 was void or valid, he has no right to call upon this court to reverse their judgment, because they may have given a wrong reason for it, and unnecessarily passed their opinion on the validity of an act which did not affect the plaintiff's case, or deprive him of any right.

If a creditor gives public notice to his debtors that he will accept, in payment of his debts, wheat, tobacco, or Arkansas notes, and his debtor for a course of seven years refuses or neglects to accept of the offer, and tender payment in such articles, and is afterwards sued upon his bond or note; and even after suit brought makes no such tender, or pleads his readiness to pay in such articles, and judgment is obtained against him on his bond for money due; can he afterwards ask a court to allow him to tender payment in any thing else than money, or have a rule on the plaintiff's attorney or a mandamus, to compel him to accept notes of a broken bank, or other specific articles, in payment of an execution issued on the judgment? Again, if the obligation sued upon is payable in specific articles, and no tender of them is made before suit brought, or plea that the defendant is ready and willing to pay according to contract, and the court give judgment against the debtor for a certain sum of money, as damages for his breach of his contract, can he afterwards compel the sheriff or the plaintiff's attorney to accept specific articles in satisfaction of a judgment and execution for money? And again, if a defendant hold notes drawn or indorsed or guaranteed by the plaintiff, he may plead them as a set-off, and obtain judgment in his favor. But if he enter no such plea, or demand no such set-off, and judgment is entered against him for the money due, can he purchase the plaintiff's notes after judgment, and ask the court to compel the plaintiff's attorney to accept them in payment? It does not appear, nor have the learned counsel asserted, that such is the peculiar law of Arkansas, and it certainly is not the law anywhere else.

When suit is brought on a contract, it becomes merged in the judgment; if the defendant claims a right to pay it in any thing else than money, he must plead it and set it up on the trial; for the court, on an action for money, can give judg-

ment only for the payment of money. If, after trial, verdict, and judgment, the plaintiff on motion could raise a new question as to set-off, tender, or a right to satisfy his debt in some other way than by payment of money, the judgment of a court, instead of being the end of controversy, would be but the beginning of litigation. *Of this, the present case [*212
is a most flagrant instance. The plaintiffs in error were sued on their bond in 1840, on an obligation to pay "lawful money of the United States." They contested the claim in court for seven years, never alleged by plea or otherwise any contract on the part of the state by which they were entitled to pay in anything but money, never tendered notes of the Bank of Arkansas, never alleged that the state was liable as guarantor of the notes of the bank, and bound to accept them as a set-off or in payment, but after final judgment affirmed in a court of error, and execution issued, they commence a new litigation, which has now lasted for four years more.

If a citizen of Arkansas had sued the defendants on their bond, and thus had claimed the right to tender payment of it in anything else than money, owing to some promise or contract of the plaintiff to accept the paper of a particular bank in payment of his bond, no lawyer can pretend that the defendants were not bound to make their defence on the trial, or that, after judgment to pay money, any court has the power to compel the plaintiff to accept anything else. That a sovereign state has not the same rights in a court of justice that are granted to her humblest citizens, is a doctrine that I have not heard advanced, and do not feel bound to disprove. And yet, if the Supreme Court of Arkansas had issued the peremptory mandamus asked by plaintiff, they would have assumed a power over the sovereign state which the law would not allow them to exercise over any of her citizens. The Constitution of the United States forbids any state "to make anything but gold and silver a tender in payment of debts;" yet it is claimed that this court has the power to compel a state to accept payment of a judgment for $3000 lawful money of the United States, in worthless paper of a broken bank; or, in other words, in a collateral proceeding to set aside and reverse the judgment of the court condemning the defendants to pay money, and let them into a defence on some alleged contract of the defendant to guaranty the notes of a certain bank, or to accept payment in something else than money; and thus try the defence after judgment. If courts of justice have such a power, it would seem that this is the first instance

in which they have been called upon to exercise it, as the books of reports can furnish no precedent of such a proceeding.

Thus far I have considered this case on the assumption, that the state of Arkansas, by her direction to her officers to receive payment of debts due to her in the notes of the bank, have become the guarantors and indorsers of such notes, and have thereby divested themselves of all power to lay and collect taxes payable in any other medium or currency than notes *213] *of the bank, and irrevocably made them a sufficient tender to her for all debts due, and shown, as I think, that the court below were justifiable in refusing to the plaintiff the writ prayed for in his petition. Let us now inquire whether there is any such contract between the parties in this case, which has been impaired by the legislation of the state. For it is well settled, that the plaintiffs have no right to invoke the aid of this court, to exercise the high power intrusted to them, of deciding on the validity of state legislation, unless some rights vested in them by contract with the state, or some other person, have been impaired or destroyed thereby. I admit that if the defendant, as treasurer of the state, had received debts or taxes due the state in the notes of the bank before the repeal of this law directing him to receive them, it would be a gross violation of their contract to refuse to receive from him such currency or specific articles as he had received in pursuance of law. But that is not the case before us. On the contrary, the bond given by the plaintiff was antecedent to the incorporation of the bank; their contract with the state was to pay "lawful money of the United States," and the subsequent act cannot be said to be incorporated in it, or make a part of their contract. The treasurer received for the use of the state money, not notes of the bank, as the record shows. They do not pretend that after the passage of the act, or even after its repeal up to the time that judgment was obtained against them, they ever held a dollar of these bank-notes, or ever tendered a payment of their debt in them. Where, then, is the contract with these plaintiffs, or how has it been impaired? If other persons have received these notes on the faith of their guaranty by the state, and their value has been diminished or destroyed by the refusal of the state to receive them in payment of their dues, what right have the plaintiffs to complain, or to come to this court for aid? Who is attempting to commit a fraud, or deny the obligation of their contracts, the state of Arkansas, or the plaintiffs themselves? For seven years after this balance was due from the treasurer (from 1838 till 1845), he was permitted to pay it in notes of the bank; but he refused to accept the

offer. The bank becomes insolvent, the offer to receive payment in its worthless paper is withdrawn. And two years afterwards, and after the plaintiffs are condemned to pay their debt according to their covenant, in lawful money of the United States, after an execution has issued to compel a compliance with the judgment of the court, they ask this court to annul their contract and the judgment of the Supreme Court of Arkansas, that they may pay their debt in depreciated paper bought up for the purpose. It seems to me *that if the charge of fraudulent disregard of their contract [*214 be imputable to either of the parties in the argument, so far as it affects the contract between them, it is not the state which is justly liable to it, but the plaintiffs. The repeal of the twenty-eighth section of the act incorporating the bank, if it impaired the obligation of a contract with any person, certainly did not add to or change the obligation given by the plaintiffs, or impair it in any respect. If it was a contract at all, it was with the corporation. So far as it affected the plaintiffs, it was a gratuitous offer and direction or permission to the treasurer to receive, accept, and pay over debts due the state in a specific article not money, nor a legal tender as such. There is no complaint that the state ever refused to receive from the treasurer taxes or debts received by him in this currency, under this permission or direction of the act. For the seven years that he was permitted to pay his own debt in that medium, he refused to accept of the offer. If a wealthy creditor, for the purpose of sustaining the credit of a particular bank, publishes to the world that, if his debtors will pay him in notes of that bank, he will accept them, and after the bank fails gives notice that he will no longer receive them, can a debtor who for seven years has refused to accept this offer, and pay his debts in the manner proposed, allege that this is a contract binding on the creditor forever? Can he allege that this offer to receive payment in a specific article, unaccepted by him, has changed the nature of his bond, and that a demand of payment according to the letter of his obligation impairs any contract between them? Such a doctrine as regards the contracts of individuals has never been advanced in a court of justice. And why a different rule should be applied to contracts when a sovereign state is one of the parties, has certainly not been explained.

It needs no argument to demonstrate that a contract must have at least two parties, and that all laws made by a sovereign state are not necessarily contracts, and therefore irrevocable. The act of the legislature of Arkansas under consideration is entitled, "An Act to incorporate the Bank of

the State of Arkansas." It creates a corporation and confers certain powers and privileges upon it. So far as it does this, as has been decided by this court, the act may be considered in the nature of a contract, and that these powers and privileges cannot be annulled or withdrawn, without the consent of the artificial power thus created, or the individuals for whose benefit the franchise was granted. It is true, also, that when a law is in the nature of a contract or grant, and absolute rights have vested under that contract, a repeal of the law
*215] cannot divest *those rights. But the plaintiffs in this case are not corporators, or stockholders in the bank; they hold no franchise, powers, or privileges, under the act of incorporation; they are no parties to the contracts, nor have they any vested rights under it, which have been impaired by the repeal of the twenty-eighth section. If the corporation, or those who claim the franchises and powers granted to it, do not complain of an infringement of their contract, no other person can. As to them, it is a mere speculative question, which this court is not bound to decide. So far as it affected the plaintiffs, the twenty-eighth section was but a gratuitous offer to accept notes in place of gold and silver, if they would pay their debt, a mere license at the pleasure of the state if not accepted by them. To call it a grant, or vested right under a contract, seems to me a perversion and abuse of terms. But admitting that the directions given in this act to her public officers to deposit the funds of the state in this bank, and receive its paper in payment of its debts, constituted a part of the contract with the corporation, and could not be repealed, did it bind the state after the corporation ceased to perform the functions and duties imposed upon it? If a state creates a banking corporation with a certain capital, and requires it to pay its notes in specie on demand, and agrees to make it a depositary, and use and receive its notes as cash, is the state bound by its contract to do so, when the corporation fails or refuses to fulfil the duties and purposes of its creation? If such be the case, it is certainly a one-sided contract; there is no mutuality in it. Does it make any difference in the case, also, whether the stock of the corporation is furnished by the state or individuals? In neither case are the stockholders individually liable for the mismanagement or defaults of the corporation, unless previously made so by the act of incorporation. The state of Arkansas furnished one million of dollars as the stock upon which this banking corporation was to issue notes and discount paper. She has nowhere agreed to guaranty the solvency of the bank, or be liable for its issues. If individuals had furnished the stock, they would

not be personally liable for its debts. If the stockholders had all made deposits of their money in the bank, and received interest on long deposits, and received its notes as gold and silver, it would not have amounted to a contract with the public, or note-holders, or any body else, that they should continue to deposit their money or receive its notes in payment of debts after the bank became insolvent and its notes worthless. The most refined legal *astutia* has thus far been unable to discover in such conduct of individuals an implied promise to receive broken bank notes in payment of debts, or a liability to the *note-holders, because their conduct had given credit to the bank. But it seems there is a [*216 more stringent rule of morality with regard to sovereign states and their contracts. In their case, under some fiction of the law, without regard to the fact or their actual undertaking, there has been discovered an implied contract running with the paper, like a covenant running with land, which renders them liable for all the issues of the bank, into whosesoever hands it may come, and forever disables them to lay or collect a tax, or pay a debt, till they have lifted and paid every note of the broken bank in which they were stockholders, although they never directly pledged the faith of the state, or agreed to be liable for a single dollar issued by the bank. If individuals had furnished the one million of dollars capital under an act of incorporation which did not make the stockholders personally liable, every person who received the notes would do it on the credit of the capital paid in. Why it should not be the same case when a state furnished the capital, I am unable to perceive. Nor can I comprehend how a direction by a state to its officers to make deposits in a bank, and receive its notes in payment of debts, amounts *per se* to a contract running with the notes, which binds the state to receive them forever, whether the corporation be solvent or insolvent, dead or alive. But the liability of the state for these issues is argued and attempted to be proved by another legal fiction; to wit, that the state is the bank, and the bank is the state. And why? Because she created the corporation? No; for that would make her liable for the paper of every corporation created by the legislature.

It is, then, because she is owner of the stock, receives the profits, makes the bank her depositary, and gives credit to its notes by ordering them to be received in payment of her debts. And it is from this doctrine of identity, that this contract of guaranty, running with the paper, has been inferred, or rather imputed to the state. If the same identity exists when individuals stand in the same relation to a corporation, and the

same contract of guaranty be imputed to them (and I can see no reason why it should not), it is strange that no traces of the doctrine can be found in our books of reports.

But there are certain inferences which necessarily follow as corollaries from this decision in this case, and certain doctrines for which it may be quoted as a precedent (although not directly asserted), that confirm me in refusing my assent to it.

1st. That if the same rules of law for the interpretation of contracts, and the rights of the parties to them, affect all persons, whether natural or artificial, the individual and the sovereign state, it may fairly be inferred hereafter, that, when *217] a bond or *note, payable in specific articles, is sued upon, the defendant is not bound either to tender them, or plead a tender, but, after judgment for a sum of money, he may make payment to the sheriff of the execution in specific articles, and not in money.

2d. That, after a court has solemnly adjudged that the defendant shall pay to the plaintiff a certain sum of money, they can compel him to receive in lieu of it worthless rags.

3d. That a defendant, who has been condemned by the judgment of a court to pay to the plaintiff a sum of money, may buy up notes drawn or indorsed by the plaintiff, and by mandamus or rule of court compel the plaintiff's attorney to accept them in payment.

4th. If these consequences are not legitimately to be inferred from this judgment, then it necessarily follows, that this court exercise a controlling power over sovereign states, and judgments obtained by them, which they cannot exercise over the humblest individual or petty corporation.

5th. That this court has the power to compel any state of this Union, who repudiates her debts, to pay them, because such refusal or repudiation impairs the obligation of her contracts.

6th. That so long as any portion of the three millions of dollars of notes issued by this bank before 1845 remains unpaid, the state of Arkansas cannot collect a dollar of taxes from her citizens in lawful money.

7th. That the courts have a right to compel a state to pay bank notes guarantied by them, before and in preference of all other debts.

8th. That the collectors of taxes, so long as any of this issue of bank-notes can be found, may buy them up at the rate of one dollar for ten or a hundred, and have the assistance of the court to compel the state to receive them at par, even where the collector has received gold and silver.

9th. That when a state, a corporation, or an individual publish to the world their willingness to accept payment of their debts in the issues of a bank, it amounts to a contract, by implication, with the public, and each individual composing it, to guaranty the notes issued by said bank, and that this contract runs with, and is attached to, said notes, in the hands of the bearer, provided the notes were issued before such offer is withdrawn.

As I cannot assent to any one of these propositions, and as I believe they are legitimate deductions from the decision of the court, I beg leave to express my dissent from it.

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*Mr. Justice CATRON.

I concur in the dissenting opinion just delivered by my brother Grier.

Mr. Justice DANIEL.

I dissent from the decision of the court in this case, and entirely concur in the arguments and conclusions expressed in the opinion delivered by my brother Grier.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Arkansas, 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 for further proceedings to be had therein, in conformity to the opinion of this court.

JOHN W. PAUP, JAMES TRIGG, AND RICHARD PRYOR, PLAINTIFFS IN ERROR, *v.* THOMAS S. DREW, AS GOVERNOR OF THE STATE OF ARKANSAS, AND SUCCESSOR OF ARCHIBALD YELL, DECEASED.

The decision of the court in the preceding case of *Woodruff* v. *Trapnall* again affirmed.

But although the pledge of the state to receive the notes of the bank in payment of all debts due to it in its own right was a contract which it could not violate, yet where the state sold lands which were held by it in trust for the benefit of a seminary, and the terms of sale were, that the debtor should pay in specie or its equivalent, such debtor was not at liberty to tender the notes of the bank in payment.

And this was true, although the money to be received from the debtor was intended by the legislature to be put into the bank, and to constitute a part of its capital. The fund belonged to the state only as a trustee, and therefore was not, within the meaning of the charter, a debt due to the state.

By the terms of sale, also, to pay "in specie or its equivalent," the notes of the bank were excluded.[1]

THIS case was brought up, by writ of error, from the Supreme Court of the State of Arkansas.

The same question was involved which was raised in the preceding case of *Woodruff* v. *Trapnall;* namely, whether the state of Arkansas could refuse to receive the notes of the Bank of the State of Arkansas under the circumstances therein stated; and also the additional question, whether she could refuse to receive the notes in her character of trustee under the following circumstances.

*219] *On the 2d of March, 1827, Congress passed an act (4 Stat. at L., 235,) entitled "An Act concerning a seminary of learning in the Territory of Arkansas," by which two entire townships of land were directed to be set aside and reserved from sale, out of the public lands within said Territory, for the use and support of a university within said Territory.

On the 23d of June, 1836, Congress passed another act (5 Stat. at L., 38), entitled "An Act supplementary to the act entitled 'An Act for the admission of the state of Arkansas into the Union,' and to provide for the due execution of the laws of the United States within the same, and for other purposes," by which the lands so reserved were vested in the state of Arkansas.

On the 28th of December, 1840, the legislature of Arkansas passed an act entitled "An Act to authorize the Governor to dispose of the Seminary lands."

On the 13th of May, 1842, Archibald Yell, then Governor of Arkansas, sold to John W. Paup the right to enter and locate six hundred and forty acres of the above lands, and received from him five bonds, payable in one, two, three, four, and five years after date, in specie or its equivalent, with James Trigg and Richard Pryor as sureties. The amount of the bonds was $3920.

In October, 1847, Thomas Drew, as Governor of the state, and successor to Archibald Yell, brought a suit upon these bonds in the Pulaski Circuit Court.

On the 21st of October, 1847, the defendants brought into court the sum of $6050 in notes of the Bank of the State of Arkansas, and pleaded a tender of the same in discharge of

[1] See *Trebilcock* v. *Wilson*, 12 Wall., 695.

the debt. The plea further set forth the act incorporating the bank as it is stated in the report of the preceding case of *Woodruff* v. *Trapnall*.

On the 25th of October, 1847, the plaintiff's counsel demurred to this plea, setting forth, amongst other causes of demurrer, the following, viz.:—

"4th. That the proceeds of said bonds are part of a trust fund committed to the state by Congress for special purposes, over which the state has no power, except to collect and disburse the same in pursuance of the objects of the grant; and the said state has no power to apply said funds to the payment of her ordinary liabilities, nor is the state bound to accept in payment of such bonds any depreciated bills, bank paper, or issues, even though she may be ultimately liable to redeem such depreciated bills, bank paper, or issues.

"5th. The said bonds sued on never constituted any part of *the capital stock of said State Bank, nor were the issues of said bank ever made receivable in payment of [*220 debts due the state in a merely fiduciary capacity."

On the 23d of December, 1847, the Pulaski Circuit Court sustained this demurrer, and gave judgment for the plaintiff in the sum of $3920, together with $2199.44 damages, with interest on said debt and damages at the rate of ten per cent. per annum till paid.

The case was carried to the Supreme Court of the state of Arkansas, upon a bill of exceptions, which court, on the 24th of July, 1848, affirmed the judgment of the Pulaski Circuit Court, as follows:—

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Pulaski County, and was argued by counsel; on consideration whereof, this court doth adjudge and decide, that the act of the General Assembly of the state of Arkansas, approved January 10, 1845, repealing the twenty-eighth section of the act of said General Assembly of said state incorporating said bank of said state, is not a law impairing the obligation of any contract involved in this case, nor contrary, in any wise, in regard to this case, to the Constitution of the United States, which was one of the questions in issue, and necessary to be adjudicated in this case; and that said state is in no wise bound by law to receive the bills and notes of said bank, issued before the passage of said act of January 10, 1845, in payment of the debts due to said state, as laid in the declaration, which was one other question involved in, and necessary to, the adjudication of this case; wherefore there is no error in the proceedings and judgment of said Circuit Court in this cause.

"It is therefore considered by the court, that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, in all things, affirmed, with costs. It is further considered, that said defendant recover of said plaintiffs all his costs in this court in this cause expended, and have execution thereof.

From this judgment, a writ of error brought the case up to this court.

It was argued by *Mr. Lawrence* and *Mr. Reverdy Johnson*, for the plaintiffs in error, and by *Mr. Sebastian*, for the defendant in error.

Being argued in connection with the preceding case of *Woodruff* v. *Trapnall*, the arguments were necessarily blended together. So far as related to the peculiar circumstances of this case, the council for the plaintiff in error contended that *221] a *state could be a trustee, and cited 2 Atk., 223; 1 Vern., 419, 428, 437; Hard., 465; 1 Ves. Sr., 453; 3 Atk., 309; 2 Sch. & L., 617; 1 Eden, 176; 1 W. Bl., 121; 6 Price, 411; and to show that the notes of the bank ought to be received, 6 Gill & J. (Md.), 364; 7 Id., 460; 5 Pet., 641; 6 How., 329.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of Arkansas, under the twenty-fifth section of the Judiciary Act of 1789.

A judgment was rendered, in the Pulaski Circuit Court, against the plaintiffs in error, on the 23d of December, 1847, for six thousand one hundred and nineteen dollars and costs, on bonds payable at different times, given for the purchase of a part of certain lands granted to the state by Congress, for the support of a seminary, and which lands were sold by the Governor, as the agent of the state, under the authority of the General Assembly. The bonds were made payable and negotiable at the State Bank of Arkansas, "in specie or its equivalent."

The defendants pleaded a tender in the notes of the State Bank of Arkansas, and relied upon the twenty-eighth section of the charter of the bank, which provided "that the bills and notes of said institution shall be received in all payments of debts due to the state of Arkansas;" that the notes of the bank tendered were issued while this section was in full force, and which constituted a contract to receive them in payment of debts by the state, which the state could not repudiate, &c.

There was a demurrer to the plea, which was sustained by

the court. The case was submitted to a jury, whose verdict was for the plaintiff, on which a judgment was entered. A writ of error was prosecuted to the Supreme Court of Arkansas, on which the judgment of the Circuit Court was affirmed.

By the act of the 2d of March, 1827, the Secretary of the Treasury was authorized to set apart and reserve from sale of the public lands, within the territory of Arkansas, a quantity of land not exceeding two entire townships, for the use of a university, &c. And by the act of the 23d of June, 1836, it is provided, "that the two entire townships of land which have already been located, by virtue of the above act, are hereby vested in and confirmed to the General Assembly of the said state, to be appropriated solely to the use of such seminary by the General Assembly." Under the act of the state of the 28th of December, 1840, these lands were sold by the Governor of the state, and the bonds now in question were given on the purchase of a part of them, as above stated.

*The entire capital of the bank is owned by the state, and its concerns are managed by the agents of the state. [*222
The directors of the principal bank and of the branches are elected by the legislature of the state.

In the case of *Woodruff* v. *Trapnall*, decided at the present term, this court held that the twenty-eighth section in the charter constituted a contract between the state and the holder of the bills of the bank. That the pledge of the state to receive the notes of the bank, in payment of debts, was a standing guaranty, which embraced all the paper issued by the bank until the guaranty was repealed. And that this construction was founded upon the fact, that the bank belonged exclusively to the state, was conducted by its officers, and for its benefit. That the guaranty attached to the notes of the bank in circulation at the time of the repeal, and such notes the state was bound to receive in payment of its debts. That in this respect the obligation of the contract applied to a state equally as to an individual. And that as to the binding force of a similar guaranty by an individual, there would seem to be no ground for doubt. But that under this guaranty the state is bound to receive the notes of the bank only in payment of debts in its own right.

The lands sold did not belong to the state of Arkansas, but were held by it in trust "to be appropriated solely for the use of the seminary." The money, of course, secured to be paid by the purchaser, partook of the same character. The bonds were made payable to the Governor or his successor in office. And it appears, as stated in the plea, that the money to be received was intended, under the act of incorporation of the

bank, to constitute a part of its capital. The Governor acted as the agent of the state in making the sale of the land, and in collecting the money; but he could only represent a trust interest. The manner in which the money was intended to be appropriated can in no respect affect the question now under consideration. In law, the money did not belong to the state, in any other capacity than as trustee, and consequently the debt was not due to the state in its own right. No court can sanction the violation of a trust, but will always act on the presumption that it will be faithfully executed. And this is especially the case when the trust is vested in a state, which is not amenable to judicial process. To hold that the state of Arkansas is bound, under the provision in the charter of the bank, to receive its notes in payment for the Seminary lands, would violate the trust, as it would greatly reduce the fund. Should the money be invested by the state, and lost, it would be responsible for it. No hazard incurred in the appropriation *223] *or use of this money could exonerate the state from faithfully carrying out the object for which the fund was originally constituted.

The bonds were given payable "in specie or its equivalent." This shows that it was the understanding of both parties, that currency less valuable than specie should not be received in payment of the bonds. If by a contract the state was bound to receive the notes of the bank in payment of its debts, by a contract this obligation might be waived. And no waiver could be more express than an obligation by the debtor to pay in specie or its equivalent.

We are therefore of opinion, that, as this fund is a trust in the hands of the state, it cannot, within the twenty-eighth section of the charter of the bank, be considered a debt due to the state; and we think by the condition of the bonds to discharge them "in specie or its equivalent," the notes of the bank are also excluded. On both these grounds, the contract set up in the pleading not being impaired, we think the judgment of the state court must be affirmed.

Mr. Justice CATRON, Mr. Justice DANIEL, Mr. Justice NELSON, and Mr. Justice GRIER gave separate opinions, as follows:

Mr. Justice DANIEL.

I concur in the conclusion adopted by the court in these causes (*Paup et al.* v. *Drew*, and *Trigg et al.* v. *Drew*); but whilst I do this I cannot claim to myself the argument upon which that conclusion professes to be founded. The princi

ples and reasonings propounded in these cases, and in that of *Woodruff* v. *Trapnall*, appear to me to place all three of the cases essentially upon the same platform, and establish no valid or sound distinction between them, but should, if those principles and reasonings be correct, have led to the same conclusion in them all.

Mr. Justice CATRON.
I concur with my brother Daniel.

Mr. Justice NELSON.
I concur in the judgment of the court on the ground, first, that the act of the legislature of the state of Arkansas, repealing the provision of a previous act, by which the bills of the Bank of Arkansas were authorized to be taken in payment of the public dues and taxes, was constitutional and valid, and the defendant therefore bound to discharge his obligation *in the legal currency of the country; and, secondly, that, if otherwise, the obligor in this case has expressly [*224 stipulated to pay the debt in specie or its equivalent.

Mr. Justice GRIER.
I concur with my brother Nelson.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Arkansas, 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, affirmed, with costs and damages at the rate of six per centum per annum.

JAMES TRIGG, RICHARD PRYOR, AND JOHN W. PAUP, PLAINTIFFS IN ERROR, *v.* THOMAS S. DREW, AS GOVERNOR OF THE STATE OF ARKANSAS, AND SUCCESSOR OF ARCHIBALD YELL, DECEASED.

The decision in the preceding case of Paup et el. *v.* Drew again affirmed.

THIS case, like the two preceding, was brought up, by writ of error, from the Supreme Court of the state of Arkansas. It was similar to the case of *Paup et al.* v. *Drew*, except that

Trigg was here the principal instead of being the surety, and the amount of the bonds was greater, because Trigg purchased a larger amount of land. In every other respect, the cases were identical, and therefore neither the statement nor arguments of counsel need be repeated. Trigg's debt was $6860, and the judgment against him for that sum, with $3849.10 interest and costs, with interest on the debt and damages at the rate of ten per cent. per annum, from the 23d of December, 1847, till paid.

Mr. Justice McLEAN delivered the opinion of the court.

This case is here under the twenty-fifth section of the Judiciary Act of 1789, from the Supreme Court of Arkansas, on a writ of error.

An action was commenced in the Pulaski Circuit Court, on certain bonds given by the plaintiffs in error to Archibald Yell, Governor of the state of Arkansas, and his successors in office, to pay certain sums of money at the time specified, *225] which bonds *were negotiable at the principal bank of the state of Arkansas, and to be paid "in specie or its equivalent," &c., in payment for certain tracts of land, sold by the Governor under a law of the state, as a part of the Seminary lands given by Congress for the support of a seminary, under certain acts of Congress.

A plea was filed setting up in defence a tender of the notes of the State Bank of Arkansas, and that in the charter of said bank the state bound itself to receive said notes in payment of debts, &c.

A judgment was finally entered against the defendants below, for ten thousand seven hundred and nine dollars and ten cents, and costs. That judgment was taken to the Supreme Court of the state of Arkansas, and was there affirmed.

As this case is similar in principle to the above case of *Paup et al.*, it is unnecessary to repeat the reasons assigned in that case for the judgment of the court. The judgment of the state court is affirmed.

Note by the Reporter.—For the separate opinions of Mr. Justice CATRON, Mr. Justice DANIEL, Mr. Justice NELSON, and Mr. Justice GRIER, see the preceding case of *Paup et al.* v. *Drew.*

Order.

This cause came on to be heard on the transcript of the record of the Supreme Court of the state of Arkansas, 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, affirmed, with costs and damages at the rate of six per centum per annum.

PHILIP GREELY, JUNIOR, PLAINTIFF IN ERROR, *v.* WILLIAM THOMPSON AND WILLIAM HENRY FORMAN, MERCHANTS AND CO-PARTNERS, TRADING UNDER THE STYLE AND FIRM OF THOMPSON AND FORMAN, ALIENS AND RESIDENTS OF LONDON, DEFENDANTS.

In an action brought against a collector for the return of duties paid under protest, it was not competent for him to give in evidence a letter from the Secretary of the Treasury, to show that the removal of one of the merchant appraisers was done by his order.[1]

The legality of such removal as to third persons was valid or not, according as the collector possessed legal power to make it on the facts of the case. Courts must *look to the laws themselves, and not to the constructions placed upon them by the heads of Departments, although these are [*226 entitled to great respect, and will always be duly weighed by the court.

Under the various acts of Congress providing for the payment of duties, the time of procurement is the true time for fixing the value, when the goods are manufactured or procured otherwise than by purchase, and are not of an origin foreign to the country whence they are imported hither. The proviso in the fifth section of the act of 1823 (3 Stat. at L., 732), relates altogether to this latter class of goods.[2]

The penalty provided in the act of 1842 related only to goods purchased, and not to goods procured otherwise than by purchase.

The regular appraisers and the merchant appraisers who may be detailed for the duty must, each one, personally inspect and examine the goods. It will not do for one to report to the other that the goods are "merchantable," and then to fix the value according to a general knowledge of the value of merchantable goods of that description.

The removal, by the collector, of one of the merchant appraisers, because he wished time given to obtain more evidence from England, and the substitution of another, was irregular, and made the whole appraisement invalid. These appraisers are temporary umpires between the permanent appraisers and the importers, and after entering on their duties could not be removed, either by the collector or Secretary, without some grave public ground beyond a mere difference of opinion.[3]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Massachusetts.

Mr. Justice Catron did not sit at the trial in this court, being a stockholder and co-partner of a railroad company having a similar interest.

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[1] APPLIED. *Maxwell* v. *Griswold*, How., 578.

[2] CITED. *Sampson* v. *Peaslee*, 20 How., 254.

[3] See *Greely* v. *Burgess*, 18 How., 415; *Belcher* v. *Linn*, 24 Id., 525.

It was argued in conjunction with the ensuing case of *Maxwell* v. *Griswold et al.* *Mr. Crittenden* (Attorney-General) covered both cases in his opening argument; *Mr. Sherman* replied in this case, and *Mr. McCulloh* in *Maxwell* v. *Griswold*, when *Mr. Crittenden* concluded with a reply applicable to both cases. It is difficult, therefore, to separate the arguments, although each case will be stated separately.

It was an action of assumpsit brought by Thompson & Forman, merchants in London, to recover back from Greely, the collector of the port of Boston, an excess of duty and penalty paid to him as collector under protest.

The bill of exceptions stated all the material facts in the case, which were as follows:

Bill of Exceptions.

This was an action of assumpsit brought by the plaintiffs, merchants in London, England, against the defendant, the collector of the port of Boston, to recover back the sum of $6282.37, with interest thereon; said sum being the amount of the additional duty and penalty alleged by the plaintiffs to have been illegally exacted by the defendant, in his capacity aforesaid, upon a cargo of railroad iron imported by the plaintiffs into said port of Boston, in the manner and under the circumstances below stated, and which said sum was paid under protest.

*227] *Upon the trial of said cause before the jury, after issue joined, it was shown in evidence that the plaintiffs were manufacturers of railroad iron in Wales, and resided in London, England; that through their agents in Boston, Messrs. William F. Weld & Co., they contracted to sell certain railroad iron to the Fitchburg and Worcester Railroad Company, and to deliver it in Boston; that they made the rails ready for shipment in Newport, Wales, and chartered a vessel for the transportation of said iron to Boston, on the 24th of January, 1849; that the lading of the vessel was completed on the 24th of February following, on which day the bills of lading and invoices were dated, and the vessel sailed.

The invoice, duly made and authenticated, as the act of Congress requires, fixed the value of the iron at five pounds per ton, which was proved to be the fair market price at that date, to wit, on the said 24th day of January; that on the arrival of the vessel in Boston in April of the same year, the iron was entered, and the duties paid according to the invoice; that before the iron was removed, the appraisers at the cus-

tom-house, acting under general orders from the Treasury Department, appraised the iron at six pounds per ton, taking the date of the invoice and bill of lading as the time when the value should be fixed, to wit, the 24th of February, 1849, the price having materially advanced during the previous thirty days; that the plaintiffs appealed from this appraisement, and gave notice thereof to the defendant, who, in supposed pursuance of statute provisions in such cases, appointed two merchants, viz., Peter Harvey and Charles Thompson, to make a valuation of the iron according to the provisions of the laws of Congress, as construed by the Secretary of the Treasury, and they took the following oath.

"*Custom-House, Boston,*
Collector's Office, April 14, 1849.

"We, the undersigned, appointed by the collector of Boston and Charlestown to appraise a lot of railroad iron, imported per Abellino, from Newport, Wales, the said importer having requested a new appraisement thereof, in accordance with the provisions of the sixteenth and seventeenth sections of the act of the 30th of August, 1842, do hereby solemnly swear (or affirm) diligently and faithfully to examine and inspect said lot of railroad iron, and truly to report, to the best of our knowledge and belief, the true value thereof, in accordance with the provisions of the laws of Congress, as construed by the Secretary of the Treasury, in several instructions issued by him, in pursuance of the authority vested in the said Secretary of the *Treasury, by the twenty-third and twenty-fourth sections of said act of 30th August, 1842, by the act of 30th July, 1846, and the second section of the act of August 10th, 1846. [*228

PETER HARVEY,
CHARLES THOMPSON.

"April 14, 1849, before me,

MARCUS MORTON, *Collector.*

"A true copy. Attest:

I. O. BARNES, *Clerk.*"

One of these merchant appraisers, viz., Peter Harvey, doubting whether the invoice was too low, and thinking that it was due to the plaintiffs that they should have time and opportunity to furnish evidence from England, as to the true market value of the iron, reported this to the collector in order that time might be given; that thereupon this merchant

was removed by the collector, and another, viz., Flavel Mosely, was appointed by the collector in his place, who took the same oath which is mentioned above as having been taken by Harvey and Thompson; that these merchant appraisers, viz., Thompson and Mosely, thus constituted, valued the iron at five pounds and fifteen shillings per ton, taking, in obedience to instructions from the Treasury Department, the 24th of February as the time when the valuation should be made; that this value so appraised being more than ten per cent. above the invoice value of the iron, the defendant exacted a duty of thirty per cent. on the amount which had been added to the invoice, and, in addition, a penalty of twenty per cent. on the appraised value; that the additional duty and the penalty amounted to $6282.37, which sum, with interest so paid, the plaintiffs sought to recover back in this action; that this sum above mentioned was paid under protest by the plaintiffs; that the custom at the port of Boston was to fix the value of the imports at the date of the invoice or bill of lading; that one of the custom-house appraisers did not inspect or see the iron, as it did not fall in his division (i. e., the two appraisers divide the labor, one taking one class of goods, and the other another class, and it was not the work of that appraiser who did not examine the iron to appraise that class or kind of goods); that only one of the merchants who finally acted as merchant appraisers ever saw the iron; but that the said Mosely testified that the other appraiser, Thompson, and also Harvey, had seen it, and that the kind of iron was admitted, and that it was merchantable, without saying by whom; that it was not necessary for him to see the iron to give it its value, but that he could, when its quality was stated to him, fix its value; and that he could and did in this way fairly appraise the value of such iron.

*229] *The merchant appraisers made the following return, viz.:—

"*Boston*, *May* 18, 1849.

"Sir,—We have examined the following merchandise imported by William F. Weld & Co., in the Abellino, from Newport, valued in the invoice at £4,720 0*s.* 10*d.*, but which we are of opinion could not have been purchased at the time and place of exportation for less than £5,428 0*s.* 11*d.*

"In conformity, therefore, with the provisions of the sixteenth and seventeenth sections of the tariff act, approved August 30, 1842, we do appraise the said merchandise as follows, any invoice or affidavit thereto to the contrary notwithstanding:—

Marks.	Numbers.	Description of Merchandise.	Value.
		642 [3] bars railroad iron, weighing 920 tons 19 cwt. 2 qr. 23 lbs. at £5 15s per ton, . .	£5,295 13 1
		Commission 2½ per	132 7 10
			£5,428 0 11

CHARLES THOMPSON,
FLAVEL MOSELEY,
Merchant Appraisers.

"To the COLLECTOR *of the District of Boston and Charlestown.*

"A true copy. Attest:

ISAAC O. BARNES, *Clerk, C. C.*"

The regular custom-house appraisers had appraised it at £6 per ton, making, with the commission, the amount of the invoice to be £5,664 1*s.* 2*d.*

The defendant offered to introduce a letter of the Secretary of the Treasury to the defendant, to prove that the substitution of the merchant appraiser, upon the delay of the first one to report finally, was done by the orders of the Treasury Department, but the letter was ruled out by the court.

The court instructed the jury,—

1st. That the date of the procurement of the iron in England or Wales, to wit, the 24th of January, was the time at which the appraisers should have fixed the value of the iron, and not the date of invoice and bill of lading, to wit, the 24th of February, when materially different.

2d. That if both appraisers, in each set of appraisers, did not make some personal examination of the iron, their report or decision was not made in conformity to law, and did not justify the penalty.

3d. That the valuation of the merchant appraisers was *invalid, because one of the merchants who made the appraisal was wrongfully substituted for another, to [*230
wit, the merchant appraiser who was turned out of office, or attempted to be, without any legal authority to do it on the facts of the case.

The jury found that the defendant did promise in manner and form as the plaintiff had declared against him, and assessed damages in the sum of $6681.28.

To which ruling and instructions of the court, given as aforesaid, the said defendant at the trial excepted, and prayed this his bill of exceptions to be signed and sealed by the court.

All which being found true, the same is accordingly signed and sealed.

In testimony whereof I have hereunto set my hand and seal.

LEVI WOODBURY, [SEAL.]

Associate Justice of the Supreme Court, U. S.

Upon this exception the case came up to this court.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the plaintiff in error, and by *Mr. Sherman*, for the defendants in error.

Mr. Crittenden made the following points:—

I. That the period of exportation from the foreign country is the true date, in contemplation of law, at which the value of imported articles subject to an *ad valorem* duty is fixed.

This question depends on the construction of the following statutes:—Section 16 of Tariff Act of 1842 (5 Stat. at L., 563); section 8 of Tariff Act of 1846 (Session Laws, 43); section 2 of Appropriation Act of 1846; sections 8 and 10 of the Act of 1st March, 1823 (3 Stat. at L., 735).

By the twenty-third section of the act of 1842 (5 Stat. at L., 566) it is enacted, "That it shall be the duty of the Secretary of the Treasury from time to time to establish such rules and regulations, not inconsistent with the laws of the United States, to secure a just, faithful, and impartial appraisement of all goods, wares, and merchandise imported into the United States, and just and proper entries of such actual market value or wholesale price thereof." Secretary Walker's Circular of 1st July, 1847 (1 Mayo, 364); another of 7th August, 1848; and another of 26th December, 1848. *Tucker* v. *Kane*, decided in Circuit Court for Maryland District, in manuscript.

The act of 10th February, 1820, entitled, "An Act to provide for obtaining accurate statements of the foreign commerce of the United States," in its tenth section, enacts, "That all articles imported shall be valued at their actual cost, or the values which they may truly bear in the foreign ports from *231] *which they are exported for importation into the United States, at the time of such exportation." (3 Stat. at L., 542.)

II. That the dutiable valuation of goods is the market value or wholesale price at the period of the exportation from the foreign country is manifest from the eighth section of the act of 1846, which makes it "lawful for the owner, consignee, or agent of imports which have been actually purchased, on

entry of the same, to make such addition in the entry to the cost or value given in the invoice as in his opinion may raise the same to the true market value of such imports in the principal markets of the country whence the importation shall have been made, or in which the goods imported shall have been originally manufactured or produced, as the case may be."

III. That the invoice of the iron, dated 24th February, 1849, as follows: "Invoice of railway iron shipped at Newport, by Thompson and Forman, on board the Abellino, Captain C. H. Crozier, bound for Charlestown, Boston harbor, consigned to Messrs. W. F. Weld & Co., for account of the Fitchburg and Worcester Railroad Company," and the oath of Mr. Weld, made by him on making the entry, that the railroad company were the owners of the iron, show that the case came within the eighth section above mentioned, and that the provisions of that section were applicable to it.

IV. That the bill of lading and the invoice, in the latter of which the iron is valued at five pounds per ton, presented to the collector at the time of entry, are dated the 24th February, 1849, and that no evidence of the value of the iron on any other day is applicable, which shows that the value should be estimated at the time of exportation. Act of 1823, § 23 (3 Stat. at L., 737.)

V. That it is not necessary that all the official appraisers, or all the merchant appraisers, should have made a personal examination of the iron. Act of 1823, § 16 (3 Stat. at L. 735); Act of 28th May, 1830, §§ 1 and 2 (4 Stat at L. 409); Act of 14th July, 1832, § 8 (4 Stat. at L. 592); Act of 1842, §§ 16, 17, 21, and 22 (5 Stat. at L. 563 *et seq.*). The seventeenth section is applicable to merchant appraisers.

VI. That the appraisement of the merchant appraisers was final. Act of 1842, § 17 (5 Stat. at L. 564); *Tucker* v. *Kane*, above referred to.

VII. That the valuation was valid, being made by two merchants. Act of 1842, § 17; Treasury Circular of 26th December, 1848; Act of 1823, § 19 (3 Stat. at L., 736).

VIII. That the action cannot be maintained by Thompson and Forman. Act of 2d March, 1799, § 62 (1 Stat at L. 675); Act of 26th February, 1845, § 1 (5 Stat. at L., 727); *Independent Treasury Act of 1846, § 9; *Meredith* v. *United States*, 13 Pet., 486; *Knox* v. *Devens*, 5 Mason, [*232 397.

Mr. Sherman, for the defendants in error, contended,—

I. That the appraisement was illegal and void, and did not

justify the exaction of the additional duty and penalty imposed and paid, nor any portion thereof:—

1. Because the dutiable value of said iron, as fixed by law, was "the fair market value," or "actual value" thereof, "at the time and place when and where procured," or manufactured (with the dutiable charges added); and not its value at the time of exportation, as estimated by the appraisers; and that the proviso to the sixteenth section of the Duty Act of 30th August, 1842, under which the appraisers were directed, by circulars from the Secretary of the Treasury, to assume the date of exportation in fixing the value of all imports, applies only to goods, wares, and merchandise "imported into the United States, from a country in which the same have not been manufactured or produced;" and, therefore, did not apply to the iron in question, which was produced and manufactured in the country from which it was imported, and the actual value, or "fair market value" of which "when procured," is conceded to have been truly stated in the invoice and entry thereof.

2. Because both of the appraisers did not "examine and inspect" the iron, as the law and their oaths required, and as they alleged in their return they had done; and that to render an appraisement valid, either by public appraisers or merchant appraisers, both appraisers of either set of appraisers must have made some personal examination or inspection of the merchandise.

3. Because the merchant appraisers were not legally qualified, having taken an oath different from that prescribed by law, and one which bound them to make an appraisement in violation of law, by fixing the dutiable value of the iron at a period different from that prescribed by Congress; and because the merchant appraiser Moseley appears not to have been sworn at all.

4. Because the removal of the merchant appraiser Harvey, after he had been appointed, sworn, and entered upon the discharge of his duty, (and the substitution of another,) for having expressed doubts "whether the invoice was too low; and thinking that it was due to the plaintiffs that they should have time and opportunity to furnish evidence from England as to the true market value of the iron," and had "reported this to the collector, in order that such time might be given," was arbitrary and illegal.

*233] *Duty Act of 1st March, 1823, particularly §§ 4, 5, 7, 8, 16, 18 (3 Stat. at L., 729); Duty Act of July, 1832, particularly §§ 7, 15 (4 Stat. at L., 583); Duty Act of 30th August, 1842, particularly §§ 16, 17, 21 (5 Stat. at L.,

548); and Duty Act of 30th July, 1846, particularly § 11 (Schedule C) and § 8 (Session Laws, 1846, p. 68).

Reference will also be made, if necessary, to Duty Acts of 2d March, 1799 (1 Stat. at L., 644); of 20th April, 1818 (3 Stat. at L., 433); of May, 1828 (4 Stat. at L., 570); and of 28th May, 1830 (Id., 409).

Tracy and Balestier v. *Swartwout*, 10 Pet., 80; *Elliott* v. *Swartwout*, Id., 137; *United States* v. *Lyman*, 1 Mason, 504; *United States* v. 14 *Packages*, Gilp., 235; *United States* v. *Tappan*, 11 Wheat., 419; *United States* v. *Freeman*, 3 How., 564; *Kunckle* v. *Kunckle*, 1 Dall., 364; *United States* v. *Slade*, 2 Mason, 75; *Day* v. *Wilber*, 2 Cai. (N. Y.), 134; *United States* v. *Two Bales of Cloths*, 3 Hunt's Merch. Mag., 527; *Liverpool Hero*, 2 Gall., 183; Gilp., 239, 240, and 241; *United States* v. 16 *Packages*, 2 Mason, 48; *Moore* v. *Ewing et al.*, Coxe (N. J.), 144; *The King* v. *Wykes*, Andrews, 238; *Billings* v. *Prinn et al.*, 2 Black., 1017; *The King* v. *The Inhabitants of Hamstall Ridware*, 3 T. R., 380; *Dalling* v. *Matchett*, Barnes, 57; Jacob's Law Dict., tit. *Oath*, p. 425; 1 Mayo's Fiscal Department, 364.

II. The mere letter of the Secretary of the Treasury, offered by the defendant below to justify the removal of the merchant appraiser Harvey, and the substitution of another, because said Harvey had asked for, or suggested to the collector, the delay necessary to procure the evidence deemed proper for a fair and faithful performance of his duty, could not legally justify such arbitrary removal and substitution, and was therefore properly rejected by the court below. Duty Act of 2d March, 1823, § 18; Duty Act of 30th August, 1842, §§ 16, 17; *Tracy and Balestier* v. *Swartwout*, 10 Pet., 80; *Elliott* v. *Swartwout*, Id., 137; *United States* v. *Lyman*, 1 Mason, 504; *Alfonso* v. *United States*, 2 Story, 421; *Tucker* v. *Kane*, MS. decision of Chief Justice Taney, Maryland Circuit.

III. The eighth section of the Duty Act of July 30th, 1846, under which the additional duty and penalty were exacted, was only applicable to goods, wares, and merchandise which had been "actually purchased," and not to those which had been "procured otherwise than by purchase;" and therefore did not authorize such exaction. Duty Act of 30th July, 1846, § 8; *Whitney* v. *Emmett*, 1 Baldw., 316; *Barlow* v. *United States*, 7 Pet., 404.

*Mr. Justice WOODBURY delivered the opinion of [*234 the court.

This writ of error is brought by the collector of Boston to reverse a judgment rendered against him in favor of Thompson et. al., importers of a quantity of railroad iron.

The judgment was, that he should refund $6,681.28, which had been exacted of the importers, on the ground that the iron was appraised more than ten per cent. above the invoice. The first questions appearing on the record relate to rulings against the defendants, admitting certain evidence that the appraisers were duly sworn, to which the defendants objected.

But as the defendants do not bring a writ of error on that account, the final judgment being in their favor, we proceed to consider the rulings and instructions of which the collector, who is the plaintiff here, complains.

The first ground of objection by him is the refusal of the court below to allow in evidence a letter from the Secretary of the Treasury, to show that the removal of one of the merchant appraisers was made by his order.

We think, however, that the removal of that appraiser must be deemed valid or not, as to third persons, according as the collector possessed legal power to make it on the facts of the case. The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them, and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws, rather than by the views of the Department. (*Marriott* v. *Brune*, 9 How., 634, 635.) And though, as between the custom-house officers and the Department, the latter must by law control the course of proceeding (5 Stat. at L., 566), yet, as between them and the importer, it is well settled, that the legality of all their doings may be revised in the judicial tribunals. (*Tracy et al.* v. *Swartwout*, 10 Pet., 95; *United States* v. *Lyman*, 1 Mason, C. C., 504; Opinions of Attorneys-General, 1015.)

Besides this objection, there are specific exceptions, taken to these instructions below, which deserve a separate and more detailed examination. Those instructions, as set out in the record, were,—

"1st. That the date of the procurement of the iron in England or Wales, to wit, the 24th of January, was the time at which the appraisers should have fixed the value of the iron, and not the date of invoice and bill of lading, to wit, the 24th of February, when materially different.

"2d. That if both appraisers, in each set of appraisers,

*did not make some personal examination of the iron, their report or decision was not made in conformity to law, and did not justify the penalty.

"3d. That the valuation of the merchant appraisers was invalid, because one of the merchants who made the appraisal was wrongfully substituted for another, to wit, the merchant appraiser who was turned out of office, or attempted to be, without any legal authority to do it on the facts of the case."

The first of these instructions extends merely to the point of law, whether the date of the procurement of the iron abroad was, by the acts of Congress, the proper time at which to fix the value of it, or the date of the invoice and bill of lading.

This has become a highly important question to the government, as well as the commercial world, under facts such as exist in this case, because a month had intervened here between the procurement and the shipment, and in the meantime, under one of those extraordinary fluctuations in prices which occasionally happen in trade, iron had risen nearly one fifth in value.

Ordinarily, the time of the procurement of an article, as also the time of the purchase of it, when it is bought and not manufactured by the importer, is near the date of the invoice or exportation, and the price differing but little. Then, if selecting for the period of the appraisal the latter date, it is acquiesced in by the importer as immaterial. But where, as in this instance, the difference in time and value is great, the importer has a right to insist on the time as provided by the acts of Congress.

Which is the proper time is, therefore, all that is involved in this first instruction, and not another question beside, which has been urged by the plaintiff in error; whether the chartering of the vessel in England to transport the iron here, after it was ordered, made, and collected for shipment by the importers who manufactured it, should in point of law be deemed the time of its procurement. No charge below on that point is set out, none, therefore, can be revised here, however easily it could be settled.

After full consideration, we think that the time of procurement was the proper time for appraising the value, and it seems to us to have been stated in the instruction in conformity with both the express language of several acts of Congress, and the reason of the case.

The first leading act on this subject was passed March 1st, 1823. (3 Stat. at L., 732.) Officers to appraise the value existed before only in the case of goods with no invoice, or damaged, or fraud suspected. (1 Stat. at L., 41, 42, 166.)

The invoice, with the oath of the importer, was previously the chief guide.

*236] *But under an impression that goods were often undervalued in the invoice after the increased duties imposed in 1816, and that the revenue thus became diminished, it was provided by the sixteenth section of the act of 1823, that appraisers should be appointed to examine and estimate the true value of the merchandise imported. And to remove all doubt as to the time when the value was to be fixed, it was expressly enacted in the fifth section, "that the *ad valorem* rates of duty upon goods, wares, and merchandise shall be estimated in the manner following: to the actual cost, if the same shall have been actually purchased, or the actual value, if the same shall have been procured otherwise than by purchase, at the time and place when and where purchased, or otherwise procured, or to the appraised value, if appraised, except in cases where goods are subjected to the penalty provided for in the thirteenth section of this act, shall be added all charges, except insurance, and also twenty per centum on the said cost or value, and charges, if imported from the Cape of Good Hope, or any place beyond that, or from beyond Cape Horn, or ten per centum if from any other place or country; and the said rates of duty shall be estimated on such aggregate amount: Provided, that in all cases where any goods, wares, and merchandise, subject to *ad valorem* duty, shall have been imported from a country other than that in which the same were manufactured or produced, the appraisers shall value the same at the current value at the time of exportation in the country where the same may have been originally manufactured or produced." (3 Stat. at L., 732.)

These words seem too plain for doubt, that the time to fix the value, in a case like this, when the goods have been procured rather than purchased, is the time of procurement, and when purchased, is the time of the purchase; and in neither case should be the date of the invoice or bill of lading, if they are at a different time.

It has been urged, however, in pursuance of a treasury circular of November 26, 1846, that this act should receive a different construction, and that the true time is the time of exportation; because that is named in the proviso, and thus is supposed to annul or modify all which precedes it.

But it seems to be overlooked, that the proviso relates to another kind of merchandise than that regulated before in the body of the section, the former being expressly goods of an origin foreign to the country whence they are now to be imported, and the latter, goods not foreign, but of the growth

or manufacture of the country from which they are imported hither.

*As the time of the original procurement or purchase of the proviso goods in the country of their birth might [*237 have been years before, and difficult to fix, a new and different time is selected for them, namely, the period of their exportation to this country.

This distinction has been ever since preserved in our laws between these kinds of merchandise. See the sixteenth section of the Act of August 30, 1842 (4 Stat. at L., 564); see also *Alfonso* v. *United States*, 2 Story, 429, 430.

It would be very irrational to consider such a proviso as a repeal or a change of the body of a section where it does not contradict it, but merely purports to regulate the appraisal of a different species of goods in a different manner. (See on this, 1 Kent Com., 462, 463.)

The proviso does not pretend, in words or spirit, to interfere with goods situated like those contained in the shipment in the present case, and hence, instead of conflicting, it is in harmony and consistent. 23 Me., 360.

As further proof that the time of the procurement was to remain the guide in cases like this, notwithstanding the proviso, the fourth section of this act continues in full force and unmodified, and requires the manufacturer or owner, as was done here, when importing, to swear that "the goods were not actually bought by me in the ordinary mode of bargain and sale, but are of the value stated, including charges, &c., at the time or times, and place or places, when and where procured for my account." (3 Stat. at L., 732.) See on this oath, 2 Story, 430.

So the eighth section still exists, and positively requires the oath of the importer, when, as here, a foreigner, that "the invoice contains a true and faithful account of the said goods, wares, and merchandise, at their fair market value at the time and place when and where the same were procured or manufactured, as the case may be, and all charges thereon." 3 Stat. at L., 733.

Other similar illustrations of this might be cited, but are not necessary to support this obvious position, that the time of procurement is the true time for fixing the value, when the goods are manufactured or procured otherwise than by purchase, and are not of an origin foreign to the country whence they are imported hither. Indeed, it would seem reasonable, independent of the express language of the acts of Congress, that, if uncertainty remained about the true construction of the fifth section of the act of 1823, the proper time for fixing

the value of goods should be considered the time they were purchased or procured; because the idea of having the value and charges fixed, and *assessing the duty on them, is *238] to tax the importer on the amount or value he has expended. And what he has expended cannot be more than what he has thus paid; and the invoice itself, often prepared, as in the interior, days and weeks before the vessel sails, states the price or value as thus made up, and not at the time of the bill of lading, when the market value may be higher or lower.

We do not find that the value at the time of exportation of goods of the growth or manufacture of the country whence exported, has ever been selected by any act of Congress for the purpose of assessing the duty. Though in one instance it is adopted merely to compile statistical tables of the value of foreign imports (3 Stat. at L., 542), it is never done to regulate duties.

The value for statistical purposes it is reasonable to fix at the time of exportation, because it thus indicates the worth of all shipped hither, which is what is then desired; but the value on which to tax the importer is the capital or price he has invested in the goods, which is *primâ facie* the amount paid, if purchased, or the amount for which they were procured, if not purchased.

There is another objection in this case to the applicability of the act of 1842, if construed to affix this penalty to an under-valuation of goods, procured otherwise than by purchase. (See §§ 16, 17; 5 Stat. at L., 563, 564.)

That act applies expressly only to goods "purchased." So the act of 1846, July 30, applies only to goods "actually purchased." See § 8, page 43, Pamphlet Laws for 1846.

They thus appear to leave goods, procured other ways than by purchase, to the provisions of the acts of 1823 and 1830, which do not at all affix the penalty here exacted, looking to the value, whether when procured or when exported.

Especially in a penal provision, it could not seem judicious, any more than legal, to extend it beyond the clear language of the act. (See cases in *Maxwell* v. *Griswold*, *post*, *242.) But on this objection, growing out of the words of the act of 1842, it is hardly necessary to give a decisive opinion, as the instruction to the jury does not in form cover it; and on the other ground, the appraisal is palpably erroneous, on account of its being made as of the wrong time.

The second general instruction excepted to is, that the appraisal was invalid, because not made on a personal examination of any of the goods by all of those certifying to its correctness.

It is almost impossible to adopt any other construction of the acts of Congress, or of the analogies of the case. Those *acts expressly require, that the appraisers should [*239 inspect or examine a portion of the goods pointed out by the collector. 4 Stat. at L., 410; 3 Id., 736; 5 Id., 565.

The oaths administered to them are, "diligently and faithfully to examine the goods," &c. Act of 1823, § 16 (3 Stat. at L.,735).

So of the assistant appraisers, the oath is in like words. (4 Stat at L., 409).

In this very case the appraisers swore "diligently and faithfully to examine and inspect said lot of railroad iron," and reported that "we have examined" it, &c., when the record states, that one of the merchant appraisers "never saw the iron," and one of the permanent appraisers did not "examine," and "did not inspect or see the iron."

Besides this, it would be unreasonable to overturn the invoices and oaths of importers, unless by a personal inspection and examination; an insufficient value should clearly appear to have been affixed, considering the quality of the article first, and next the market value abroad of articles of that quality, at the time required by law.

But it has been urged, that if one examines and reports to the other that the article is "merchantable," the other can correctly fix the value, by knowing the value of what is merchantable.

The answer to this is, that the law requires the quality to be fixed by inspection or examination, and not alone by evidence or opinion of others.

Again, too, an article may be barely merchantable, and yet not be worth so much as one that is not only merchantable, but on the brink of being better than merchantable. A personal examination, therefore, is proper for making such discriminations in quality and value.

It is further urged against our construction, that a sufficient force does not exist in most custom-houses for all the appraisers to make personal examinations, or all the assistant appraisers to do it. There are two answers to this. If officers enough to perform these public duties do not exist, more should be authorized, or their duties to examine in person should be dispensed with by an act of Congress. Again, the collector need detail no more officers to make the appraisal than can be spared, or than the law imperatively demands. All we hold is, that such as are detailed in a particular case should do their duty, in the manner which their oaths require; and it would be a novelty for courts to countenance one or more per-

sons, if undertaking a duty in such a case, to be exonerated from it because it was burdensome or difficult.

*240] *There is, too, a sufficient answer to another objection, that, if a personal examination was required of every article, time enough would not exist for the purpose. For the acts of Congress do not require every article in a package to be examined. A fair selection of specimens or samples is made sufficient. (3 Stat. at L., 735, § 15.)

The instruction by the court below on this point is, therefore, the only one tolerated by the language of the acts of Congress and the oaths of the appraisers, though a different usage may have grown up at some ports, without intending anything negligent or wrong.

The only remaining question is, whether the removal of one of the merchant appraisers, and the substitution of another, who estimated the value, was not on the facts of this case irregular, so as to make their appraisal invalid.

The court below instructed the jury it was so. We feel constrained, by the law and reason of the case, to concur in that view. The person removed was one selected as a member of an appellate tribunal, to revise the value estimated by the regular appraisers, and he was removed and another appointed, as the record shows, not for any misconduct discovered, or any incompetency intervening, by act of God or otherwise, but merely because he wished time given to obtain more evidence from England, which might justify a lower estimate.

Now, without saying what might be proper in case of a strictly public officer, *quasi* judicial and misbehaving, as nothing was ruled on that point below, and indeed without holding what might be competent in case of an arbitrator or referee, public or private, becoming corrupted or incapable, as the ruling did not apply to that case, we are satisfied that the allowance of an appeal to merchant appraisers by the importer would be nugatory, or a mockery, if a member of the tribunal can be removed by the collector or Secretary whenever his opinion appears not likely to accord with theirs on the matter submitted. He is, as to that, a *quasi* judge, a "legislative referee." *Rankin* v. *Hoyt*, 4 How., 327.

And an interference with such a referee for such a cause would conflict with all just notions of judicial independence, or judicial purity, and when done and sanctioned as to a public referee, it might shake confidence abroad as well as at home in the administration of our revenue system, as connected with commercial imports. In all free countries, public sentiment is much shocked by any interference with judicial duties, tending to warp them. And more especially, if so

made as to be likely to influence a pending question in favor of those interfering, and actually ending in the removal of a judicial incumbent *merely for an opinion expressed [*241 in the course of the case which was not agreeable.

Again, the merchant appraisers here can hardly be considered public officers at all, in the ordinary acceptation of the term. One of them was formerly selected by the importer alone. Neither of them now holds a commission, nor are they selected to discharge generally public duties of a certain character.

But they are mere umpires between the permanent appraisers and the importers, when disagreeing as to the value in some particular case; and it is difficult to see how, when third persons are interested in their decision, the other side, whether represented by the collector or Secretary, could, without the consent of those third persons, or without some grave public ground beyond a mere difference of opinion, remove an umpire, and thus attempt to change the award about to be made.

Though some very culpable cases of removals of public judicial officers occurred in England before her revolution, during the arbitrary reign of the house of Stuart, and led for security to a change in the tenure of their offices from the pleasure of the king to good behavior, yet nothing of the kind seems since to be countenanced, here or there, for mere difference of opinion. And the course pursued in the present instance was probably the result of not adverting to the judicial character of a merchant appraiser, or of a misapprehension as to the duty and right to do the act, only for requesting delay to obtain more evidence, rather than arising from any intentional abuse of power.

The delay, asked for the benefit of the importers, was also to prevent a penalty; and in such a case, when doubts exist, the respondent is to be favored. (7 Pet., 453; 1 Baldw., 317). The removal, made to avoid this delay of further evidence against the forfeiture, was likewise in the case of merchants and manufacturers of apparently high respectability, and without a particle of evidence indicating any intent by them to defraud the government.

Almost the whole system of appraisals is founded on the idea, that fraud has been, or is likely to be, practised. And while this court has never been backward in ferreting out and punishing real frauds attempted on the revenue, yet, at the same time, where no dishonesty is pretended, but a disposition appears in the importer to conform to the laws, he is entitled to full legal protection, else fair commerce between

us and the rest of the world will be discouraged, and our national character tarnished.

The government, too, could not suffer by the delay asked here, as they, in the meantime, would hold the goods, unless *242] *the increased duties on the highest appraisal, and the penalty, were paid to them.

The judgment below is 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 Massachusetts, 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 and damages at the rate of six per centum per annum.

HUGH MAXWELL, PLAINTIFF IN ERROR, *v.* NATHANIEL L. GRISWOLD, GEORGE GRISWOLD, GEORGE W. GRAY, AND GEORGE GRISWOLD, JUNIOR.

The points ruled in the preceding case of *Greely* v. *Thompson and Forman* adopted and applied to this case also, so far as they are applicable.[1]

Where the collector insisted upon either having the goods appraised at the value at the time of shipment, the consequence of which would have been an addition of so much to the invoice price as to subject the importer to a penalty; or to allow the importer voluntarily to make the addition to the invoice price and so escape the penalty, and the importer chose the latter course, this was not such a voluntary payment of duties on his part as to debar him from bringing an action against the collector for the recovery of the excess thus illegally exacted.[2]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

Like the preceding case of *Greely* v. *Thompson and Forman*, it was an action brought by the defendants in error against Maxwell, the collector at the port of New York, for the return of duties paid under protest.

In January, 1850, the defendants in error imported into New York, in the ship Matilda, from Manilla, sundry bags of sugar and bales of hemp. The goods were purchased in

[1] CITED. *Greely* v. *Thompson*, 10 How., 238.

[2] CITED. *Sampson* v. *Peaslee*, 20 How., 578.

March and April, 1849, but not shipped until about the 24th of July, 1849, when the market prices had risen very considerably. The assistant appraiser reported upon the value of the articles, meaning by the word *value* "the actual market value at the time of shipment to the United States in the principal markets of the country of produce."

The importers paid the duties under protests, one of which was the following:

**Protest Notice.* [*243

"*New York, January 3d*, 1850.

"H. MAXWELL, ESQ., *Collector*:—

"We hereby protest against the duties demanded from us by the collector on this importation of plantain bark, or hemp.

"One objection is, that the duties, contrary to law and justice, are assessed upon a greater value than the cost of the same when purchased for us for shipment to the United States; the true costs and charges, being the value in the foreign market (Manilla), at the time when purchased for shipment, amount to $38,197.95, say thirty-eight thousand one hundred and ninety-seven $\frac{95}{100}$ dollars. We are required to pay duties upon an estimated and fictitious value, amounting, with charges, &c., to $47,662.95, and we are compelled to enter the goods at their estimated and fictitious value to save penalties and forfeitures, and to get possession of our property.

"We protest against being committed to any thing by the form of the entry, which we submit to upon compulsion, insisting that they are not according to the truths of the transactions. The sixteenth section of the tariff law of 1842 fixes the date of purchase for shipment as the time in reference to which the value is to be ascertained, except in the case of goods imported into the United States from some country other than that of the growth or manufacture of the imported articles. There is nothing in the eighth section, or any part of the tariff act of 1846, nor in any other law of the United States, inconsistent with the sixteenth section of the act of 1842.

"We give notice that we intend to seek redress by suit at law and otherwise, as we may be advised, for the wrong done to us in respect to the excessive duty imposed upon this importation.

"We rely upon the objection we have made, and upon such other objections founded in law and in fact as belong to the case, and we now offer to specify them to the collector, more particularly if requested so to do.

"The sum of money now illegally extorted from us, over and above the true and honest duties, is $2366.25, more or less, being 25 per cent. on the valuation over and above actual cost, as specified in the invoice herewith produced.

"True copy. S. P. R.

"Nath'l L. & Geo. Griswold."

W. G. B.

Upon the trial of the cause a bill of exceptions was taken, *244] *which it is not deemed advisable to set forth *in extenso*, because it contained all the invoices, entries, depositions, and circulars from the Secretary of the Treasury, the whole amounting to nearly thirty printed pages. The following summary of the bill will be sufficient:—

Southern District of New York, ss.

Be it remembered, that on the 13th day of June, in the year 1850, as yet of the stated term of the said court, commencing on the first Monday of April, in the year 1850, held at the City Hall, in the city of New York, in the Southern District of New York, before the Hon. Samuel Nelson, Associate Justice of the Supreme Court of the United States, sitting in the said Circuit Court, the issue within contained joined between the said Nathaniel L. Griswold, George Griswold, George W. Gray, and George Griswold, junior, plaintiffs, and Hugh Maxwell, defendant, came on to be tried, and the said parties, by their respective attorneys, before the said justice came; and the jurors of the jury in this behalf duly summoned also came; and to say the truth also in this behalf are elected, tried, and sworn.

And the counsel for the said plaintiffs, to maintain and prove the said issue in their behalf, produced and gave in evidence the invoices, entries, and protests, in the words and figures following:—

(Then followed the invoices, entries, and protests, the entries showing that the appraisers had added to the amount "to make value at time of shipment.")

And proved that said protests were made and delivered to the defendant at and before the payment of the duties on the goods in said invoice and entries contained, and that the sum of $12,493.50 was paid by the plaintiffs to the defendants on the 8th day of January, 1850, as duties on the plantain bark named in said foregoing entry thereof, of which amount $2425.50 was duty on the sum of $9702, added with commissions in said entry as therein expressed, "to make market value of bark;" and on the 15th day of the same month the

plaintiffs paid to the defendant the further sum of $5091, as duties on the sugar named in said foregoing entry thereof, of which amount $615 was duty on the sum of $2050, added with commissions in said last-mentioned entry as therein expressed, "to make value at time of shipment."

And further to maintain and prove said issue on their part, the counsel for said plaintiffs called the following witnesses, who, being severally duly sworn, testified as follows, that is to say:—

(Then followed the depositions of several witnesses, showing *the purchases at Manilla, and that the prices were the regular market prices at the time of purchase.) [*245

The plaintiff's counsel, further to maintain and prove said issue on their part, produced and gave in evidence certain circulars of the Secretary of the Treasury, in the words and figures following, viz.:—

(Then followed a series of circulars from the Secretaries of the Treasury, beginning with the year 1833, and coming down to October, 1849, being nineteen printed pages.)

The plaintiff's counsel, further to maintain and prove said issue on their part, called the following witnesses, who, being severally duly sworn, testified as follows:—

A. B. Mead testified that he was assistant appraiser from about the fall of 1846 to the fall of 1849, and during that time had the almost exclusive charge of appraising iron and other metals, "and that, under the instructions of the Secretary of the Treasury, the examiners and appraisers at the port of New York have in all cases been required, under the provisions of the tariffs of 1842 and 1846, to ascertain, and appraise, and report, the wholesale market values of all merchandise in the principal markets of the country of production or manufacture, at the period of the exportation of the merchandise to the United States, and not at the period of the purchase or production of the merchandise in the country whence imported, and that such has been the uniform practice up to this time, so far as known to the deponent."

G. F. Thompson testified that he was assistant appraiser of the port of New York from 1844 to June, 1848, and that, under the instructions of the Secretary of the Treasury, the examiners and appraisers at the port of New York have in all cases been required, under the provisions of the tariffs of 1842 and 1846, to ascertain, and appraise, and report, the wholesale market values of all merchandise in the principal markets of the country of production or manufacture, at the period of the exportation of the merchandise to the United States, and not at the period of the purchase or production of the merchan-

dise in the country whence imported, and that such has been the uniform practice up to this time, so far as known to the deponent.

Samuel J. Willis testified that he was one of the principal appraisers at the port of New York from the year 1844 to July, 1849, and that, under the instructions of the Secretary of the Treasury, the examiners and appraisers of the port of New York have in all cases been required, under the provisions of the tariffs of 1842 and 1846, to ascertain, and appraise, and report, the wholesale market values of all merchandise in
*246] the *principal markets of the country of production or manufacture, at the period of the exportation of the merchandise in the country whence imported, and that such has been the uniform practice up to this time, so far as known to the deponent.

The counsel for said plaintiffs then rested, and the counsel for said defendant thereupon insisted and prayed the court to charge and instruct the jury, as matter of law, as follows:—

1. That the payment made in this case by the plaintiffs to the defendant was a voluntary, and not a coercive payment; and so that the plaintiffs could not maintain their action; that the evidence showed that the collector had been entirely passive in this whole matter, and had done no act, and made no demand, which compelled the plaintiffs to pay the entire amount, which they did pay upon their own advisement; that the collector merely received the sum tendered to him by the plaintiffs, and never made the payment a condition precedent to the delivery of the goods, nor threatened to raise the valuation expressed on the face of the invoice; all that was done was done by the plaintiffs themselves voluntarily, without the least coercion or action on the part of the defendant, and that the verdict should therefore be in his favor.

2. That the acts done by the collector were all done in obedience to written instructions made by circulars addressed by the Secretary of the Treasury to the collector (which are set out in schedule Z, annexed to this case), and in compliance with the acts of Congress therein referred to.

That these instructions had all the authority of law, so far as the collector was concerned, and he could not disobey them. That all the money received by the collector in this case was collected by him in obedience to law, and paid immediately into the Treasury of the United States under a like compulsion, and that the collector could not be made liable to refund any part of this money to the plaintiffs, even although the construction put upon the revenue laws by the Secretary of the Treasury may have been erroneous.

That the act of Congress approved February 26th, 1845, entitled "An Act explanatory of an act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine," did not apply to this case, the defendant being compelled, by laws passed by Congress subsequently to that year, to pay over without delay into the Treasury of the United States all moneys received by him as collector, and that by authority of the case of *Carey* v. *Curtiss* (reported in 3 Ohio, 236) the defendant could not be made liable in this action.

3. That there was no error in the proceedings at the custom-house, *the valuation there made being the true valuation according to law, and hence this action could not be maintained. [*247

Whereupon the court then and there charged and instructed the jury, that by law duties were only to be assessed upon the actual market value of the said plantain bark, or hemp, and sugar, at the time of their purchase by the plaintiffs, and not upon such market value at the time of their shipment by them; and that the payment of duties by the plaintiffs upon the increased amount, being the difference between such market value at the time of shipment and at the time of purchase, was, on the part of the plaintiffs, a payment by coercion, and having been accompanied with the protest, the plaintiffs were entitled to a verdict for the sum paid as duties on such increased amount, with interest thereon from the date of its payment; that the fact that the defendant, in taking duties upon the market value of the merchandise at the time of shipment, had acted in obedience to the circular instructions to that effect from the Secretary of the Treasury, did not render such mode of assessment of duties legal, or preclude the plaintiffs from recovering the excess paid by them above the duties upon the market value of the merchandise at the time of its purchase. And the court further refused to charge or instruct the jury in conformity with the points insisted upon by the defendant's counsel, and in conformity with which he had prayed the court to charge and instruct the jury as aforesaid.

And the counsel for said defendant then and there excepted to the said charge of the court, and to the refusal of the court to charge the jury in conformity with which the said counsel had so prayed the court to charge the jury, as aforesaid.

And thereupon the jurors of the jury aforesaid, found a verdict for the plaintiffs for three thousand two hundred and six dollars and forty-four cents.

And because the said several matters so offered and given

in evidence, and the matters insisted upon by the said defendant, and the decision of the said court, and the charge of the said court, and the said exceptions taken to the same, do not appear by the record of the verdict aforesaid, the said defendant has caused the same to be written on this bill of exceptions, to be annexed to said record, and has prayed the said justice, holding the said court, to set his hand and seal to the same. Whereupon the said the honorable Samuel Nelson, the associate justice before whom the said issue was tried, and the said exceptions were taken, has hereto set his hand and seal, this 2d day of January, in the year 1851.

S. NELSON. [L. S.]

*248] *Upon this bill of exception, the case came up to this court.

It was argued by *Mr. Crittenden* (Attorney-General), for the plaintiff in error, and *Mr. J. S. McCulloh*, for the defendants in error.

For *Mr. Crittenden's* argument, see the preceding case of *Greely* v. *Thompson and Forman.*

Mr. McCulloh made the following points:—

I. The duties were exacted by coercion and duress, and were not a voluntary payment without condition or reserve.

II. The right to maintain this action under the act of 26th February, 1845, is not impaired or taken away by laws or circulars of a date prior or subsequent thereto.

III. The dutiable value of the merchandise was illegally estimated and appraised by the appraisers and collector, at the market prices of the period of shipment, and their acts, being illegal thereon, are not conclusive on the importer, but are null and void.

1. The payment was coercive and by duress, and not voluntary and without reserve.

The sovereignty of the United States has, as its incident, the power to prohibit imports and lay impost duties, and in the exercise thereof has appointed officers to execute its regulations.

Boarding officers are to search and seal boxes, &c. Act of 1799, c. 22, § 97. Masters and mates are fined $1000 for allowing merchandise to be landed without permit and in open day (1799, c. 22, § 27), and merchandise so landed is forfeited (1799, c. 22, §§ 27, 50).

The collector and naval officers are to estimate the duties in gross, and indorse the amount on entry (1799, c. 22, § § 21,

49), and no permit to land is granted until this amount is paid (1799, c. 22, § 62), and a bond for redelivery of the merchandise on demand of the collector is executed according to the act of 1830, c. 147, § 8 (4 Stat. at L., 411.)

The entry, which is to be made before the goods are landed (1799, c. 22, §§ 21, 27, &c.), is to be sworn to by the importer, and on it he has to make the additions, which, by § 8 of the tariff act of 1846, are authorized in the cases of purchased goods; and if the additions are not then made, the Secretary of the Treasury refuses to relieve under the act of 1797, March 3d, from any penalty that may be inflicted where the appraisers put up the value (see Circular of Secretary of the Treasury, 11th June, 1849), and in remitting the penalty, only the half of the United States would be returned, if the residue shall have *been distributed among the officers of the customs (Circular 25th May, 1845). [*249

The Circular of 6th July, 1847, had expressly directed all appraisements to be based on the market values at time of shipment, instead of the time of purchase, and under this and the subsequent circulars the importers would inevitably have suffered the penalty, had they not raised their invoice-purchase prices to the market values of shipment.

Upon suspicion by the collector of intended fraud in stating the value, or otherwise, the importer is liable, after entry, to have the goods seized (Act of 1842, c. 270, § 21, 5 Stat. at L., 565; 1799, c. 22, §§ 66, 67; *Rankin* v. *Hoyt*, 4 How., 333); and if the importer succeeds in establishing his good faith, he still cannot recover from the United States the costs expended by him. See 3 How., 252, opinion of Justice Story; *Shaw* v. *Woodcock*, 7 Barn. & C., 73, 84; *Irving* v. *Wilson*, 4 T. R., 485; *Snowdon* v. *Davis*, 1 Taunt., 358.

2. The right to maintain this action, under the act of 26th February, 1845, c. 22 (5 Stat. at L., 729), is not impaired or taken away by laws and circulars of a date prior or subsequent thereto.

The power given to the Secretary of the Treasury, under §§ 23, 24 of the tariff act of 1842, to establish "regulations not inconsistent with the laws of the United States," to secure just and impartial appraisals of goods, is a special and very guarded power, and is but a repetition of former similar provisions. Act of 1832, c. 227, § 9 (4 Stat. at L., 592).

The collector who exacts duties under instructions inconsistent with the law, cannot plead in defence an act of a superior, which in itself is null and void. See Opinions of Attorneys-General, 1015.

The personal inconvenience of the collector is not to be considered. *Tracey* v. *Swartwout*, 10 Pet., 98.

The act of 1839, March 3d, § 2, was in effect but the reiteration of former provisions of law (1799, c. 22, § 21, 1 Stat. at L., 644); nor is there any act subsequent to 1839 that overrules the act of February 26th, 1845.

The second clause of the act of 26th February, 1845, provides for the maintaining of actions and trials by jury for subsequent extortions, and any enactment to repeal this provision must be wholly repugnant to and inconsistent with it, or the two laws must consist together as part of an entire system; and the courts will jealously restrict the construction of laws exempting officers from responsibility for oppression in the exercise of powers which tend to produce fines and penalties *(*Jones* v. *Estis*, 2 Johns. (N. Y.), 379), which derogate *250] from the common law (19 Vin. Abr., 524, § 125; 4 Hill (N. Y.), 76, 92), which derogate from the rights of property (*Smith* v. *Spooner*, 3 Pick. (Mass.), 230), and the illegal exercise of which has always been held to subject officers to recompense the damages arising therefrom. *The Mariana Flora*, 11 Wheat., 1; *Ripley* v. *Gelston*, 9 Johns. (N. Y.), 302; *Gossly* v. *Barlow*, 1 Anstr., 23; *Bostock* v. *Saunders*, 2 Black., 912.

It is to be observed that this exaction is made under the general regulations issued by the Secretary of the Treasury, under § 23 of the tariff act of 1842, and not by a special decision, under the twenty-fourth section of said act.

3. In support of the point that the appraisement on the market value of shipment was illegal, and the acts of the officers based thereon were nullities, the following authorities are relied upon.

Under the revenue laws passed prior to 1823, the assessment of merchandise subject to *ad valorem* duties was based on its "actual cost, in labor and materials," and not on its actual market value. *Ninety-five Bales* v. *United States*, 1 Paine, 149; 1789, c. 5, § 22 (1 Stat. at L., 42); *Tappan* v. *United States*, 2 Mason, 402; 1790, c. 35, § 46 (Id., 169); *Tappan* v. *United States*, 11 Wheat., 419; 1799, c. 22, § 66 (Id., 677); Act of 1818, c. 79, § 79 (3 Stat. at L., 435).

By the subsequent laws the assessment was based on the actual wholesale market value of the goods. Acts of 1823, c. 21, §§ 4, 5, 8, 13, 15 (3 Stat. at L., 732, 733, 734, 735); 1828, c. 55, § 8 (4 Stat. at L., 273); 1830, c. 147, § 4 (Id., 410); 1832, c. 227, § 7 (Id., 591); 1842, c. 270, § 16 (5 Stat. at L., 503).

By the acts of 1823, c. 21, §§ 5, 13, 16 (3 Stat. at L., 733,

735), and 1842, c. 270, §§ 16, 17 (5 Stat. at L., 563, 564), the actual wholesale market values, in the chief markets of the country of production, are to be estimated and ascertained at the time of the purchase of the goods, except that, in case the importation is from a country other than that of the original production, then the values are to be found as of the time of the exportation to the United States; and by the act of 1846, c. 74, § 8 (Pamphlet Laws, 69), the rules prescribed by then existing laws are re-enacted in regard to merchandise subsequently imported.

The value so to be ascertained is the "net," "prime," "wholesale price," after deduction of discounts, bounties, and drawbacks; Act of 1823, c. 21, §§ 5, 16 (3 Stat. at L., 732, 735); Act of 1842, c. 270, § 16 (5 Stat. at L., 563); and after allowance for "depreciation" in the "foreign moneys" in *which these values are required to be expressed. [*251
Act of 1799, c. 22, §§ 36, 61 (1 Stat. at L., 655, 673); Act of 1789, c. 5, § 13 (1 Stat. at L., 39); Act of 1801, c. 28, § 2 (2 Stat. at L., 121).

The argument of the plaintiffs in error is, that the "proviso" of § 16 of the tariff act of 1842 (5 Stat. at L., 563) overrules or repeals the body of that section, as to the time of ascertaining the market values. (See Treasury Circular of 6th July, 1847.)

But this view has not been maintained even by the Treasury Department, (see Cir., 9th September, 1846,) and that it is erroneous is evident, because the proviso contemplates an importation from "a country other than that of production," whilst the purview of the section refers to an importation "from the country of original production."

The general object of a "proviso" is to qualify or restrain the generality of the "purview" of an act. *Minis* v. *United States*, 15 Pet., 445. And where the "proviso" may operate as a separate and substantive clause in itself, differently from the rest of the enactment, it must be so construed. *Rex* v. *Harris*, 4 T. R., 202; *Rex* v. *Robinson*, 2 Burr., 799; *The Emily & Caroline*, 9 Wheat., 381.

In *Churchill* v. *Crane*, 2 Moo. & P., 415, it was held that where a general intent is expressed, and then a special intent, the last is an exception.

To repeal the "body" of an enactment by the "proviso" requires that it be wholly repugnant to the "purview." 1 Kent Com., 462. The substitution of one enactment for another must be entire and repugnant, in order to repeal by implication. See *United States* v. *Heth*, 3 Cranch, 399; *Goodenow* v. *Butterick*, 7 Mass., 141. And clauses that are

repugnant to a law and the system are held to be null in order to sustain the general provisions. *Mendon* v. *County of Worcester*, 10 Pick. (Mass.), 235.

It has been adjudged by the Circuit Court of the United States for Massachusetts, in the case of *Thompson and Forman* v. *Greely*, decided in October, 1850, that by the acts of 1823, c. 21, §§ 5, 8, 13, 16, and 1842, c. 270, § 16, the appraisement of merchandise is to be made "if actually bought as of the time of purchase, and if imported for account of the producer or manufacturer, at the time when manufactured or produced." So held in *Grinnell* v. *Lawrence*, Ct. Ct. U. S. New York. The estimation and appraisal, therefore, to be final and conclusive on the importer, must have been made in strict compliance with the requirements of law.

In *Rankin* v. *Hoyt*, 4 How., 327, which was a case of suspicion of fraud, the court say that the appraisers are a sort of *legal referees under the act of 1830, c. 147, § 8, and are to be presumed, in the absence of evidence to the contrary, to have done their duty. But it is to be observed that the execution of a special power is not final and conclusive, whoever the actor may be, unless the requirements of law be accurately fulfilled.

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The exercise of a delegated discretion cannot exceed the power given (*Schell* v. *Bridgewater Manuf. Co.*, 24 Pick. (Mass.), 296), although the burden of showing this excess or departure from the trust delegated is thrown on the importer (see *Tappan* v. *United States*, 2 Mason, 406, 407; 11 Wheat., 419), the presumption of law being in favor of the validity of acts done until impeached. *Rankin* v. *Hoyt*, 4 How., 327.

By an appraisement as of the time of shipment, no other future steps can remedy the illegality, and the provisions of § 17 of the tariff act of 1842 (5 Stat. at L., 574) do not make any appraisement final and conclusive, unless the merchant neglects or refuses to furnish proof or answer interrogatories, or unless the collector having by writing notice of the dissatisfaction of the importer, has a merchant appraisement conformably to law. Such steps were taken by the collector in the cases reported in 2 Mason, and 4 How., 327.

The fluctuation of the markets in foreign countries makes the period when the value is estimated a matter of substance, and is of far more importance than the non-compliance with requirements of form alone, which have been adjudged sufficient to destroy the validity of acts, and subject the actors to damages in suits at law when executing specially delegated powers or summary proceedings, the performance of which must be strictly carried out, because they tend to produce

fines and penalties, to derogate from the common law, and from the rights of property, and to appropriate private property to public use, which, being contrary to natural right and justice, is only tolerated in cases of necessity, and upon full compensation. Const. U. S., Art. 5 of Amendments; *The Mariana Flora*, 11 Wheat., 1; *Bradshaw* v. *Rogers*, 20 Johns. (N. Y.), 103.

These principles have been recognized in cases of sales under the internal tax laws of the United States, of July 14, 1798 (*Parker* v. *Rule*, 9 Cranch, 44; *Williams* v. *Payton's Lessee*, 4 Wheat., 77);—in sales for taxes under state laws (*Sharp* v. *Spear*, 4 Hill (N. Y.), 76; *Thayer* v. *Stearns*, 1 Pick. (Mass.), 404; *McClung* v. *Ross*, 5 Wheat., 116);—in proceedings of courts of limited and summary powers (*Thatcher* v. *Powell et al.*, 6 Wheat., 119; *State* v. *Merryman*, 7 Har. & J. (Md.), 79; *Ellicott* v. *Levy Court*, 1 Id., 359);—in searching houses by excise officers, under 10 George I., c. 10, §§ 12, 13 (*Bostock* v. *Saunders*, *2 Black., 912);—in proceedings by collectors of customs, in seizures under [*253 slave-trade acts (Opinions of Attorneys-General, 227);—in refusing credits for duties under the Act of 1799, c. 22 (*Olney* v. *Arnold*, 3 Dall., 308);—in refusing clearance of vessels without payment of tonnage dues (*Ripley* v. *Gelston*, 9 Johns. (N. Y.), 202);—in summary powers of masters of vessels in forfeiting seamen's wages (*Cloutman* v. *Tennison*, 1 Sumn., 381);—in proceedings of the Secretary of the Treasury (Opinions of Attorneys-General, 1015);—in proceedings of navy officers (*Gossly* v. *Barlow*, 1 Anstr., 23);—and in proceedings by officers of the army (*Harmony* v. *Mitchell*, tried at Circuit Court of N. Y., Sept., 1850).

The power of the collector to make appraisements of foreign merchandise is a summary and special power, and it was extended from time to time, to apply to other and additional instances, until finally it was made applicable to all cases.

It was originally applied to cases of imports without an invoice; Acts of 1789, c. 5, § 16 (1 Stat. at L., 41); 1790, c. 35, § 37 (Id., 166); 1799, c. 22, §§ 52, 66 (Id., 665, 671); to imports suspected to be fraudulent, or invoiced in fraud; Acts of 1789, c. 5, § 22 (1 Stat. at L., 42); 1790, c. 35, § 66 (Id., 175); 1799, c. 22, §§ 66, 67 (Id., 677); to goods damaged on the voyage of importation; Acts of 1789, c. 5, § 16 (1 Stat. at L., 41); 1790, c. 35, § 37 (Id., 166); 1799, c. 22, § 52 (Id., 665).

These appraisements were made by two merchants, one chosen by the collector, the other by the importer; but afterwards, by the acts of 1818, c. 79, § 9 (3 Stat. at L. 435), and

1823, c. 21, § 16 (Id.), 735), the President was to appoint persons who should, "whenever directed by the collector," make the appraisements "he required."

By the acts of 1818, c. 79, § 11 (3 Stat. at L., 436), and 1823, c. 21, §§ 13, 15 (Id., 734, 735), penalties were imposed on "goods suspected to be fraudulently invoiced, and raised by the appraisers."

By the act of 1828, c. 55, § 9 (4 Stat. at L., 274), all goods were directed to be appraised, and by the acts of 1830, c. 147, § 3 (4 Stat. at L., 409), 1832, c. 227, § 7 (Id., 591), 1842, c. 270, § 16 (5 Stat. at L., 563), all goods were to be appraised by the collector.

The power to review appraisements was, under the act of 1823, c. 21, §§ 18, 19, 21 (3 Stat at L., 736), by two merchants acting with the two United States appraisers; under act of 1818, c. 79, § 9 (3 Stat. at L., 435), by two United States appraisers and one appointed by the importer; under acts of 1832, c. 227, § 8 (4 Stat. at L., 592), and 1830, c. 147, § 3 (Id., 409), by one appraiser appointed by the collector, and *254] *one by the importer, who was to make oath as prescribed, &c. *Rankin* v. *Hoyt*, 4 How., 327. And under the act of 1842, c. 270, § 17, by two merchant appraisers appointed by the collector.

The act of 1842 thus repeals the provision of 1830 and 1832, by prescribing a different mode of revision.

Giving power to one person expressly to do a thing, excludes all others. *Lyon* v. *Jerome*, 26 Wend. (N. Y.), 485. And substituting provisions on the same subject, is a virtual repeal of the former provisions. *United States* v. *Heth*, 2 Cranch, 399; *Gage* v. *Currier*, 4 Pick. (Mass.), 399; *Davis* v. *Fairburn*, 3 How., 636.

In addition to these enactments, there are others which answer any argument founded on supposed necessity to make the time of shipment the period of valuation of the merchandise. The importer must produce a sworn invoice of cost; Act of 1823, c. 21, § 4 (3 Stat. at L., 731); and must enter by it; Act of 1799, c. 22, § 36 (1 Stat. at L., 655). The Secretary of the Treasury can "require testimony" in such manner as he deems proper; Act of 1823, c. 21, § 18 (3 Stat at L., 736); "can establish rules to secure fair, impartial appraisals;" Acts of 1832, c. 227, § 9 (4 Stat. at L., 592), and 1842, c. 270, § 23 (5 Stat. at L., 566); can require a bond from the importer, to produce, in a specified time, such proof as the Secretary of the Treasury may demand. Act of 1830, c. 147, § 8 (4 Stat. at L., 411).

There is therefore no reason, under the present revenue

laws, for turning the power of appraisal into an engine of oppressive extortion against American merchants engaged in foreign commerce, whose transactions are open to the world.

Mr. Justice WOODBURY delivered the opinion of the court.

The case presents two points, similar to what have just been decided in *Greely* v. *Thompson et al.* In respect to the first one, which related to the proper time for fixing the value of goods imported from the country of their growth or manufacture, this court there held it was the time of their procurement when not purchased, and the time of their purchase when they had been actually purchased abroad, rather than the time of their exportation or shipment. The goods in this case were valued at the latter time, though they had been previously purchased, and at a lower price. For the reasons assigned in the other case, the instruction given that this time was wrong, must be considered legal.

Another point decided in *Greely* v. *Thompson et al.*, and which is a ground of exception here, was, that though the money was collected in obedience to orders from the Treasury *Department, which the collector, so far as regards the Department, was bound to follow, yet this did not justify him as to others, or bar a recovery by third persons if not liable in law to pay so high duties. For the reasons there assigned, this exception is likewise one which cannot be sustained. [*255

The other points in that case do not arise here, but one does arise which did not exist there, and which we now proceed to examine.

The importer had put in his invoice the price actually paid for the goods, with charges, and proposed to enter them at the value thus fixed. But the collector concluded in that event to have them appraised, and the value would then, by instructions and usage at New York, be ascertained as at the time of the shipment, which was considerably higher, and would probably subject the importer, not only to pay more duties, but to suffer a penalty.

The importer protested against this, but in order to avoid the penalty, under such a wrong appraisal, adopted the following course.

This being a case of purchase of goods abroad, and not procurement, it came clearly within the eighth section of the act of 1846, and therefore the importer, as that act permits, was allowed to make, and did make, an addition to his invoice, so as to escape the penalty, by means of the addition, and the

payment of the consequent increased duties. (Pamphlet Laws for 1846, p. 69.)

This increase of duties, thus obtained, the present action is instituted to recover back, they having been paid under protest and unwillingly. The government, however, insist that this excess of duties was caused and paid voluntarily, and hence, though illegal, cannot be recovered back. If they were paid voluntarily, some precedents would seem to countenance the inability to sustain this suit. *Elliot* v. *Swartwout*, 10 Pet., 137.

But the gist of the point is, were these increased duties in truth paid voluntarily, in the meaning of that term as applicable to the present subject? We have already seen, that the importer did not at first propose to enter his goods of such a value as to justify these increased duties. On the contrary, he insisted on entering them at only the price for which he purchased them, with charges, and thus agreeing with his original invoice, while the collector virtually insisted on having them appraised at their increased value as at the time of the shipment, such being the usage in the custom-house at New York, and such the requirement of the circular of the Secretary of the Treasury, November 24th, 1846. The importer, knowing
*256] that *this would subject him to a severe penalty, in order to avoid it, felt compelled to add to his invoice the amount which the price had risen between the purchase and the shipment.

But this addition and consequent payment of the higher duties were so far from voluntary in him, that he accompanied them with remonstrances against being thus coerced to do the act in order to escape a greater evil, and accompanied the payment with a protest against the legality of the course pursued towards him.

Now, it can hardly be meant in this class of cases, that, to make a payment involuntary, it should be by actual violence, or any physical duress. It suffices, if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment. (See cases cited hereafter.)

All these requisites existed here. We have already decided, that the demand for such an increased appraisal was illegal. The appraisal itself, as made, was illegal. The raising of the invoice was thus caused by these illegalities in order to escape a greater burden in the penalty. The payment of the increased duties thus caused was wrongfully imposed on the importer, and was submitted to merely as a choice of evils.

He was unwilling to pay either the excess of duties or the

penalty, and must be considered, therefore, as forced into one or the other by the collector, *colore officii*, through the invalid and illegal course pursued in having the appraisal made of the value at the wrong period, however well meant may have been the views of the collector.

The money was thus obtained by a moral duress, not justified by law, and which was not submitted to by the importer, except to regain possession of his property withheld from him on grounds manifestly wrong. Indeed, it seems sufficient to sustain the action, whether under the act of February 26th, 1845, or under principles of the common law, if the duties exacted were not legal, and were demanded and were paid under protest. 5 Stat. at L., 727; *Clinton* v. *Strong*, 9 Johns. (N. Y.), 370; 11 Wheat.; 1 Miller, 536; 1 Bos. & P., 139; *Irving* v. *Chitsowdt*, 4 T. R., 485, 553; Cowp., 69, 805.

All these circumstances existed here, and hence the judgment below must be 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 Southern District of New York, and was argued by counsel. On *consideration whereof, it is now here ordered and [*257 adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages, at the rate of six per centum per annum.

JAMES B. GILMER, PLAINTIFF IN ERROR, *v.* GEORGE POINDEXTER.

On the 30th of January, 1835, Poindexter purchased from Thomas a right of entry in certain lands in Louisiana, with authority to locate the lands in the name of Thomas, and they were so located. Subsequently to such location, viz., on the 27th of November, 1840, Thomas, by notarial act, transferred to Poindexter all the right which Thomas then had, or thereafter might have, to the land so located, and authorized Poindexter to obtain a patent in his own name. The patent, however, was issued to Thomas, and not to Poindexter. This did not vest in Poindexter a *legal title*, which would enable him to recover in a petitory action, which corresponds with an action of ejectment. Poindexter did not take a legal title, either by direct conveyance or by estoppel.[1]

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[1] Ejectment will not lie on an equitable title, in the Federal courts; nor can a state law confer the right to sue on such title in those courts. *Swayse* v. *Burke*, 12 Pet., 11; *Bagnell* v. *Broderick*, 13 Id., 436; *Fenn* v. *Holme*, 21 How., 481; *Hooper* v. *Scheimer*, 23 Id., 235; *Sheirburn* v. *Cordova*, 24 Id., 423,

On the 20th of November, 1835, Poindexter, by a conveyance of record, conveyed his right in the lands in question to Huston, and on the same day, by articles of copartnership with Huston, not of record, authorized Huston to apply these lands for the mutual benefit of Poindexter and Huston

A purchaser from Huston without notice is not affected by these articles.[2]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

On the 30th of June, 1834, Congress passed an "Act granting to General Philemon Thomas, of Louisiana, a tract of land, in consideration of the military services rendered by him in taking possession of that portion of West Florida included in the District of Baton Rouge." By this act, Thomas was authorized to enter, without payment, two sections of land on any of the lands of the United States in the state of Louisiana.

On the 30th of January, 1835, Thomas executed a deed to George Poindexter, in which, for the consideration of $7500, he "granted, bargained, and sold unto him, the said George Poindexter, his heirs and assigns, forever, all the right, title, interest, and claim whatsoever, which he, the said Philemon Thomas, may have, or might hereafter have, in and by virtue of the recited act of Congress; and the said Philemon Thomas doth hereby authorize and empower the said George Poindexter to make the location or locations of the said twelve hundred and eighty acres of land for his own proper use and benefit, or proper use and benefit of his heirs or assigns, in the same manner, and with the same effect, as he, the said

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Foster v. *Mora*, 8 Otto, 425; *Young* v. *Porter*, 3 Woods, 342. The same is the rule in Maryland. *Smith* v. *McCann*, 24 How., 398; and in Florida. *Jones* v. *Lofton*, 16 Fla., 189; so in Alabama. *Kelly* v. *Hendricks*, 57 Ala., 193; and in Wisconsin. *Brinkman* v. *Jones*, 44 Wis., 498.

[2] A purchaser of land at a sheriff's sale, in good faith and without notice, or his assignee, will be protected from secret trusts on unrecorded liens. *Rooker* v. *Rooker*, 75 Ind., 571; *Gifford* v. *Bennett*, Id., 528. But where a person purchases land with full notice of a valid agreement between his vendor and the original owner, concerning the manner in which the property is to be occupied, he will be bound to abide by the contract under which the land was conveyed. *Frye* v. *Partridge*, 82 Ill., 267.

A purchaser of land is not affected by knowledge of a prior oral contract between his grantor and another to convey, such other not being in possession under his contract. *Pickerell* v. *Morss*, 97 Ill., 220.

A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. *Stearns* v. *Gage*, 79 N. Y., 102.

One who has not actual notice ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. *Wilson* v. *Wall*, 6 Wall., 91.

Philemon Thomas, might have done in his own name if this conveyance had not been made."

*On the 20th of November, 1835, Poindexter entered [*258
into articles of copartnership with one Felix Huston, in which it was stipulated, that Poindexter conveyed to Huston the right of entry yet remaining unlocated, so that the said entry may be made in the name of Huston, and the said Huston agreed on his part to purchase eight thousand dollars' worth of floats, and hold the whole for the joint and equal benefit of Poindexter and Huston. The articles contained other stipulations, but they were not recorded and executed in the presence of William Burns, an attesting witness.

On the same day, viz., the 20th of November, 1835, Poindexter executed a deed to Huston, from which the following is an extract:—

"And by these presents doth grant, bargain, sell, convey, and confirm unto the said Felix Huston, his heirs and assigns forever, all the right, title, interest, and claim whatsoever, which he, the said George Poindexter, has, or heretofore may have had, or might hereafter have, in and by virtue of an act of Congress of the United States, approved June 30th, 1834, granting Philemon Thomas, without payment, the quantity of twelve hundred and eighty acres of land, to be located on any of the lands of the United States within the state of Louisiana, at the proper land office, with a proviso, that the same shall be located in tracts of not less than six hundred and forty acres, according to legal subdivisions; which said land was conveyed by the said Philemon Thomas to the said George Poindexter, by indenture entered into on the 30th day of January, A. D. 1835; which is of record in the District Court for the County of Washington, in the District of Columbia. And the said George Poindexter doth hereby authorize and empower the said Felix Huston to make the location or locations of the said twelve hundred and eighty acres for his own proper use and benefit, or the proper use and benefit of his heirs and assigns, in the same manner and with the same effect as he, the said George Poindexter, might have done in his own name, by virtue of the said act of indenture from the said Philemon Thomas to the said George Poindexter. And the said Felix Huston, being present, declares that he accepts this act with all its clauses."

This deed was recorded in the parish of Concordia.

On the 27th of November, 1840, Thomas and Poindexter executed the following instrument, viz.:—

"*State of Louisiana,*
Parish of East Baton Rouge.

"Whereas, on the 30th day of January, 1835, General Philemon Thomas, of this parish, for valuable consideration
*259] to him *in hand paid, sold and conveyed to me, George Poindexter, of the state of Mississippi, his right of entry, without payment, two sections of land on any of the lands of the United States, in the state of Louisiana, granted to the said Philemon Thomas by an act of Congress passed in the year 1834. And whereas, in order to complete the said location, the said Philemon Thomas executed to the said George Poindexter a power of attorney, with the right of substitution, authorizing the said location to be made in the name of him, the said Philemon Thomas; which location, according to the tenor and effect of the said power of attorney, was made on two sections of the lands of the United States in township eighteen north, range ten west, and in township nineteen north, range thirteen and fourteen west.

"Now, therefore, in order to enable the said George Poindexter to perfect his title by withdrawing from the land office at Natchitoches the final certificate of said location, he, the said Philemon Thomas, hereby, for himself, his heirs, executors, and administrators, transfers to the said George Poindexter, his heirs, executors, and administrators, all the right, title, interest, and claim which he, the said Philemon Thomas, has, or hereafter may have, in and to the two sections of land located as aforesaid in the name of said Philemon Thomas, and further does authorize the said George Poindexter to obtain a patent for the lands so located in his own name at the General Land Office of the United States at the city of Washington.

"And the said George Poindexter, being here present, accepts this transfer made in his favor.

"In witness whereof, the parties have hereto set their hands with me, Charles R. Tessier, a notary public, duly commissioned and sworn for said parish, and in presence of Raphael Legendre and Victor Allain, witnesses duly qualified at Baton Rouge, this 27th day of November, 1840.

(Signed,) PHILEMON THOMAS,
GEORGE POINDEXTER.

"RAPHAEL LEGENDRE,
VICTOR ALLAIN.

"CHARLES R. TESSIER, *Notary Public.*"

On the 26th of March, 1841, a patent, describing the lands,

was issued by the General Land Office to General Philemon Thomas, his heirs and assigns forever.

On the 10th of January, 1844, Huston executed a deed to James Washington Patten, residing in Buncombe County, North Carolina, reciting the origin of the title, and conveying 649 $\frac{36}{100}$ acres to Patten, his heirs and assigns, to their proper *use and behoof, forever. This deed was duly exe- [*260
cuted and recorded.

On the 15th of January, 1844, Patten executed to James Erwin a full power of attorney, authorizing him to sell the lands upon such terms as he might deem proper, execute deeds, &c.

On the 28th of March, 1844, Erwin executed a deed to Gilmer, conveying the lands to him for $6473.60, with a warranty of title.

On the 20th of February, 1847, Poindexter brought a petitory action in the Circuit Court of the United States for Louisiana, reciting the grant by Congress to Thomas, the deed from Thomas to himself, the location and the patent. By virtue of these documents, he claimed to be the legal owner and proprietor of the parcels of land therein described, and justly entitled to the possession thereof.

On the 31st of March, 1847, Gilmer answered. He referred to his deed from Patten, through Erwin, and cited him in warranty.

On the 10th of May, 1848, the judgment of the court was pronounced on the law and evidence in favor of the petitioner. The documentary evidence was ordered to be placed upon the record. The following bill of exceptions was taken, viz.:—

"Be it remembered, that, on the trial of this cause, plaintiff offered in evidence a paper purporting to be articles of agreement between plaintiff and one Felix Huston, and to have been signed and sealed by them, and purporting to bear date November 20th, 1835; said paper also purported to have been signed by one William Burns, as subscribing witness. No testimony was offered as to the sealing or delivery of said paper, or the time when it was made; the subscribing witness was not called to testify, but a witness was examined who testified that the names of said Poindexter and Huston, subscribed to said paper, were in the handwriting of said parties. Witness knew nothing of the execution of said instrument. Defendant, by his counsel, objected to the reception of said paper in evidence, on the ground that there was no proof whatever of the time when it was signed, nor of the sealing and delivery of the same. Defendant objected also to the

admissibility of said paper in evidence, even if the due execution thereof were duly proved, on the ground that it was a private act, not recorded, to which defendant was not a party, or of which he had notice; and on the further ground, that the effect of said paper in evidence would be to contradict, qualify, and explain the positive and direct admissions of plaintiff, made in his conveyance, by authentic act, to said
*261] Huston, on the 20th day of November, *1835; which said authentic act of conveyance had been offered in evidence by the defendant. The objections of defendant were overruled by the court, and the paper received in evidence; to which defendant, by his counsel, excepts.

"Be it further remembered, that, on the trial of this cause, defendant offered to introduce testimony to prove the value of the improvements made by him upon the land in controversy, in support of his answer and plea in reconvention; the court refused to receive or hear said testimony; to which refusal defendant, by his counsel, excepts, and tenders this, his bill of exceptions, and prays that the same may be signed.

"THEO. H. MCCALEB, [SEAL.]
U. S. Judge."

A writ of error, sued out by Gilmer, brought the case up to this court. It was argued by *Mr. Badger*, for the plaintiff in error, and by *Mr. Coxe* and *Mr. Crittenden* (Attorney-General), for the defendant in error.

The following points were raised by the counsel for the plaintiff in error.

First Point. The plaintiff has shown no title for the lands sued for. Those described in the petition, and those claimed by his deed of transfer from General Thomas, and those described in the patent to Thomas, are all different; and in this, a petitory action, the plaintiff must show title as in ejectment. 3 La., 134, 150; 14 Id., 16; 7 Id., 45; 8 Mart. (La.), N. S., 105.

Second Point. On the full disclosure of titles on both sides, as shown in the record, the defendant Gilmer has shown a complete legal title in himself. Freem. Ch., 203; 2 Wheat., 197, 198, 199, 205. Or if not a legal title, a perfect equity protected as a legal title by estoppel, and by enuring of the patent in Thomas's name, to the use and support of the equity sold by him. 2 How., 316, 317; 6 Id., 291; 12 La., 172, 173; C. C., art. 2451; 4 Yerg. (Tenn.), 96; 2 How. (Miss.), 915; Walk. (Miss.), 97; Freem. Ch., 181; 8 La., 109; 13 Id., 132.

Third Point. The partnership agreement between Poindex-

ter and Huston, referred to in defendant's bill of exceptions, was inadmissible evidence for the plaintiff Poindexter; because a mere secreted counter-letter, contradictory of Poindexter's recorded conveyance to Huston, under which Gilmer claims (13 La., 132); and because equally contradictory and inconsistent with the title which Poindexter sets forth in his petition, and wholly impertinent to the issue made in the pleadings. *And also because there was no evidence of the execution of the said agreement admissible in law,—the subscribing witness not being called, or his absence accounted for, or any acknowledgment of the instrument by the parties present, or evidence of the fact of sealing and delivery. 2 Phil. Ev., 202, 203; *McKinder* v. *Littlejohn*, 1 Tredw. (S. C.), 66. [*262

Fourth Point. It is a manifest and palpable error, that the court below refused to permit Gilmer, under his plea in reconvention, to prove the value of his improvements as a purchaser in good faith, and which good faith is a presumption of law in Louisiana. C. C., art. 3447; C. P., art. 375; 17 La., 183; 4 Id., 273; 8 Id., 119, 120.

Fifth Point. It is error patent upon the face of the record, and independent of the evidence in the cause, or of the bill of exception filed, that the court has given no judgment affecting the party cited in warranty. C. C., art. 2493, 2494; C. P., art. 378 to 384. And the court had no right or discretion to postpone or to pretermit this judgment. C. P., art. 385; 10 La., 120; 2 Rob. (La.), 199, 200.

Sixth Point. It is error patent on the pleadings and judgment, that the court has awarded a recovery of lands not sued for or demanded in the petition. 1 Poth. Oblig., part 4, ch. 3, art. 2, § 1, p. 425; 1 Partidas, part 3, tit. 22, laws 15, 16, pp. 278, 279.

Seventh Point. It is error patent on the judgment, that no sort of reason is assigned for its rendition. Constitution of La. of 1845, art. 70; 5 Mart. (La.), 687 to 689; 4 Id., 463, 464, 465; 11 La., 162.

Mr. Coxe and *Mr. Crittenden*, for the defendant in error, contended,—

1st. That the bill of exceptions was not taken in time. From the record it appears that it was not taken until after the trial had been concluded for some time, after motions for a new trial had been made, argued, and overruled.

The uniform practice upon this subject requires that the bill of exceptions must be tendered at the trial. 2 Tidd, 788; 4 Dall., 240; 1 Binn. (Pa.), 38; 10 Johns. (N. Y.), 312.

This proceeding, introduced into the English law by the Statute of Westminster, 13 Edw. I., is unknown to civil law, and to the courts which administer that system. It was introduced into the courts of Louisiana by special legislation, and, being thus borrowed from the English law, is taken with all its accompaniments and limitation.

There are several provisions in the Code of Practice relating to bills of exceptions.

*263] *Art. 487. If one of the parties calls upon the court to express an opinion on a point of law arising in the cause, such opinion may be excepted to.

Art. 488. The party excepting to the opinion of the court must draw a bill of exceptions, in which the question of fact or of law, on which such opinion has been demanded, may be concisely set forth, as well as the grounds of the exception so taken.

Art. 489. The bill of exceptions must be exhibited to the adverse party, &c.

In this case it does not appear that the adverse party knew anything of the matter.

The objection, as stated, is inferred from the language of the bill of exceptions, but is given, not in the form of an objection, but as a statement of facts. Now, as it does not appear what other evidence had been given, the bald question is raised whether, under any circumstances, a sealed instrument is admissible in evidence on proof of the handwriting of the parties. *Carroll* v. *Peake*, 1 Pet., 22, 23.

Upon the principle that the opinion of the court below must be regarded as sound until its incorrectness is made to appear, the plaintiff in error cannot prevail, unless he can show that no case could have existed in which the paper objected to could be considered in the light of an original document.

In that case, the court, to sustain the judgment, would suppose that a paper, confessedly a copy, had been proved to be equal in credit to an original. Here they will presume it necessary that evidence was given which showed that the subscribing witness was dead or beyond the reach of the court, and that his handwriting could not be proved. In such a case, proof of the handwriting of the parties was the only evidence which could be given, and the best the circumstances of the case permitted, and was therefore competent. *Long* v. *Ramsay*, 1 Serg. & R. (Pa.), 72.

It was held that a subscribing witness was not necessary to the validity of a deed, and that proof of the handwiting of the obligor was sufficient. 2 T. R., 41.

Where a deed has come out of the hands of the other party,

no proof of execution is necessary. 7 Taunt., 251; 8 Gill & J. (Md.), 511.

In Maryland, the execution of an instrument in writing, to which there is a subscribing witness, may be proved without calling said subscribing witness, though present in court (this by statute). The case here was in Louisiana, where the rigid rules of the common law are not recognized.

3. This does not, however, seem to have been made a ground *of objection; the specific objection is, that no proof is given of the time when the paper was signed, [*264 nor of the sealing and delivery.

The answer to this is, the paper being proved, it proves the time by its date, and the sealing and delivery. The objection would be equally applicable in a case where, the death of the subscribing witness being proved, his handwriting was proved.

The next distinct objection is, that it was a private act, not recorded, to which defendant was not a party, and of which he had notice.

How far these objections were sustained in point of fact must depend upon the evidence which had been given. As we are utterly uninformed upon that point, it is impossible for this court to say that any error has been committed. It is clear that such a paper needed no record to give it validity, as between the parties and those who, before they purchased and paid the purchase-money, were apprised of its existence. The language of the bill of exceptions is so ambiguous, that it is by no means clear that any notice had at any time been given to defendant, when such notice was given, or merely that he was not notified at the date of the execution of the paper.

Mr. Justice DANIEL delivered the opinion of the court.

This is a writ of error to a judgment of the Circuit Court of the United States for the District of Louisiana.

The defendant in error instituted a petitory action in the court just mentioned, to recover certain lands in Louisiana in the possession of James B. Gilmer, the plaintiff in error.

The petition of Poindexter sets forth, that by an act of Congress approved on the 30th day of May, 1834, entitled "An Act granting to General Philemon Thomas a tract of land in consideration of military services, &c.," the said Thomas was authorized to enter, without payment, two sections of land on any of the lands of the United States in Louisiana. That Thomas, on the 30th of January, 1835, sold to the petitioner this right of entry, and authorized him, or his substitute, to make the location in the name of Thomas. That the petitioner afterwards caused said location to be made on two sec-

tions of land in Louisiana, north of Red River, one of which (described in parcels) contained $619\frac{36}{100}$ acres, and is the land in controversy.

That after this location, viz., on the 27th of November, 1840, Thomas by notarial act transferred to the petitioner all the right, title, &c., which he, Thomas, then had, or thereafter might have, to the two sections so located, and authorized the petitioner to obtain a patent therefor in his own name. That *265] on *the 26th of March, 1841, a patent was issued for the lands to Thomas, by virtue of which, and of the sale and transfer of the 27th of November, 1840, the petitioner avers that he became the legal owner of the lands claimed, and is entitled to the possession thereof. That Gilmer has taken unlawful possession of one section of the land in township 19, range 14, and refused to surrender it to the petitioner, who therefore prays judgment for possession of the land, and for rents and profits. The agreements between Thomas and Poindexter of the 30th of January, 1835, and of the 27th day of November, 1840, and the patent to Thomas of the 26th day of March, 1841, referred to in the petition, were filed as exhibits therewith.

The tenant in possession, Gilmer, after a general denial in his answer of any right or title to the land in the petitioner, alleges that he is the possessor and true owner of the land claimed, by purchase in good faith for valuable consideration from James W. Patten, by a notarial act executed in New Orleans on the 28th of May, 1844; that Patten's conveyance to him was with general warranty, and he therefore avouches Patten in warranty; and prays that, in the event of his eviction, he may have a recovery over against his warrantor, Patten, for the value of the land and improvements made by the defendant. This cause, according to the practice in the state of Louisiana, was tried by the court, without the intervention of a jury, and the court, after hearing the parties, by its opinion expressed on the 10th day of May, but signed on the 28th of June, 1848, and considered as of the day last named, gave the following judgment, viz.:—"It is ordered, adjudged, and decreed, that judgment be rendered in favor of the plaintiff, George Poindexter, and against the defendant, James B. Gilmer, for the premises described in the plaintiff's petition, and that the said Gilmer surrender to the plaintiff the possession of the following described parcels of land, &c., and that the plaintiff have a writ of *habere facias possessionem* to place him in legal possession thereof. The right of the plaintiff for mesne profits, and of the defendants to sue for improvements, is reserved respectively."

In addition to the documents above mentioned, filed as exhibits with the plaintiff's petition, there was offered in evidence on the part of the petitioner, and admitted by the court, an instrument of writing executed on the 20th day of November, 1835, between Poindexter and one Felix Huston, in which it was amongst other things recited, that the parties to that instrument had formed a partnership for the purposes of purchasing lands of the United States, or pre-emption rights, or entries *of individuals, for the joint and mutual benefit of the parties; and that the said Poindexter, having [*266 purchased of General Philemon Thomas his right to locate the quantity of twelve hundred and eighty acres of land on any of the public lands in Louisiana, granted by an act of Congress passed on the 30th of June, 1834, and having obtained of the said Thomas, on the 30th of January, 1835, a conveyance of his said right of entry, which yet remains unlocated, the said Poindexter agreed to convey to the said Huston his right of entry derived under the said deed, in the same manner as he acquired the same from the said Philemon Thomas, so that the said entry may be made in the name of the said Felix Huston, to be held by him for the joint and equal benefit of him the said George Poindexter, &c. This instrument, being a private declaration of trust between Poindexter and Huston, not evidenced by any record or other public acknowledgment of the parties, was attested by a single witness, William Burns, who was not called at the trial to prove its execution, was received in evidence by the court without such proof, and its reception was excepted to for that cause. It does not appear, moreover, that a knowledge of this instrument was brought home either to Patten or to Irwin, his attorney in fact, from whom Patten purchased.

The plaintiff in error relied in the Circuit Court on the following proofs:—1st. On the act of Congress granting the right of entry to Thomas. 2dly. On the public act and conveyance from Thomas to Poindexter, as recited in the petition. 3dly. The plaintiff in error next adduced in proof a public and authentic act of sale and conveyance, on the 20th of November, 1835, to Huston, in absolute right, of all his, Poindexter's, title, interest, and estate in the grant to Thomas, then vested, or which might vest at any future period. 4thly. The public authentic act of Huston, conveying the land in controversy with general warranty, on the 20th of January, 1844, and reciting in its terms the conveyance from Thomas to Poindexter of the 30th of January, 1835, and that of Poindexter to Huston of the 20th of November, 1835, and describing the land so conveyed as that "which was located by said

Huston according to the provisions of the above-mentioned act of Congress." 5thly. The public authentic act of Patten, constituting Irwin his attorney in fact to sell and convey the lands purchased of Huston. And 6thly, and lastly, the conveyance by Patten, by his said attorney, Irwin, of the lands in controversy to Gilmer, the tenant in possession in March, 1844, with warranty.

In considering this case, it is proper to carry with us throughout, as a standard by which to test the proceedings in the Circuit *Court and the decision founded upon them, this controlling principle,—that the petitory action is a proceeding at law for the recovery of property, and can be maintained in the courts of the United States only where the right of possession can be shown, and, according to the principles and distinctions settled in this court, corresponds in character with the action of ejectment at common law.

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The petitioner or plaintiff, therefore, in a petitory action, must recover upon the strength of his title, and that must be a legal, as contradistinguished from an equitable title.[1] See *United States* v. *King et al.*, 7 How., 846, 847, and *Livingston* v. *Story*, 9 Pet., 632. Tried by this rule, we are unable to perceive how the claim of Poindexter, as set forth in his petition, even if unaffected by his transactions with Huston, can be maintained in this action. The petitioner alleges that he purchased of Thomas his right of entry in virtue of the act of Congress, and received from Thomas a power to make a location in the name of the latter.

By this transaction, no legal title to any certain or specific land was conveyed, for nothing specific or certain was then vested in Thomas, and the power of locating alleged in the petition was a power to locate, not in the name of Poindexter, but in that of Thomas. The petitioner proceeds to state, that, after these locations made by him, Thomas, by an authentic act before a notary public, on the 27th of November, 1840 (a copy of which is filed with the petition), transferred to the petitioner all the right, title, &c., which he then had, or thereafter might have, to the sections of land located in his name, and authorized the petitioner to obtain a patent therefor. He further alleges, that afterwards, viz., on the 26th day of March, 1841, a patent issued to Thomas for the lands located as aforesaid in his name, and that by virtue of these proceedings, viz., the transfer by Thomas in 1840, and the patent in 1841, the petitioner became invested with the legal title to the

[1] CITED. *Hogan* v. *Kurtz*, 4 Otto, 775.

land in dispute. This alleged investiture of the legal title must have been supposed to rest upon an estoppel operated by the transfer and patent before mentioned, for, independently of such an operation, and by the literal terms of the patent, the title would certainly be in Thomas, and not in Poindexter. But we are of opinion that in this instance no estoppel has been operated. This legal effect can occur only where a party has conveyed a precise or definite legal estate or right, by a solemn assurance, which he will not be permitted to vary or to deny. It can have no operation to prevent the denial of an equitable transfer of title, which is not identical with the legal title or muniment of title which it may be relied on either to establish *or protect. An [*268
estoppel, it is said, should be certain to every intent, and therefore, if a thing be not directly and precisely alleged, it shall not be estopped. Co. Lit., 303 *a*, 552 *b*. So, too, it is laid down, that to the success of an estoppel it is obviously necessary that the grantor's want of a present vested estate should not appear on the deed itself, which would else contain internal evidence of its invalidity. 2 Sim. & Stu., 519; 3 Ad. & Ell., 12. And with regard to the mode of using an estoppel, it is said that it must be pleaded if there be an opportunity; otherwise, the party omitting to plead it waives the estoppel. See 2 Smith's Lead. Cas., 457, and the authorities there cited. Again, it is ruled, that an equitable title cannot be estopped by a verdict at law, for there is no such thing as an estoppel in equity. See Com. Dig., *Estoppel* (§1). Even upon the hypothesis, then, that the title set up by Poindexter under his agreement with Thomas could be regarded as a legal title, still, upon a comparison of the description of the property contained in those agreements with that of the land granted by the patent to Thomas, there is not that certainty and identity that are required by an estoppel, or such as will cause the land granted by the patent to Thomas to enure to Poindexter. But the right set up by Poindexter under his contracts with Thomas remains strictly an equitable right, and therefore neither Thomas nor his alienee could be estopped from averring a right in the land contained in the patent, in opposition to such equitable claim.

But in another aspect of the question, supposing the interest transferred to Poindexter by the agreements with Thomas of January 30th, 1835, and May 14th, 1839, could be so construed as to have passed to the former a legal title; and admitting, too, that the description of the property contained in those agreements accorded in precise terms with that of the lands granted to Thomas by the patent of March 20th,

1841, it would still remain to be inquired, whether Poindexter has not parted with his title, and would not in this aspect of the case be estopped from setting it up against his alienee, and all claiming under such alienee.

It appears from the evidence which was before the court, and already adverted to in the statement of this case, that on the 20th day of November, 1835, Poindexter sold and conveyed, by his public authentic act, and in absolute right and estate, to Felix Huston, all the right, title, interest, and claim which he then had, or thereafter might have, in and by virtue of an act of Congress of the 30th of June, 1834, granting to Philemon Thomas the quantity of twelve hundred and eighty acres of land, to be located on any lands of the United States in Louisiana, *which said land was conveyed by the said Philemon Thomas to the said George Poindexter on the 30th day of January, 1835; it further appears, that from Houston a regular title, by public authentic acts and written assurances, is deduced down to the defendant in possession, Gilmer. It is true, that in order to countervail the force of this title, the petitioner offered in evidence the agreement between himself and Huston of the 20th of November, 1835, creating a partnership between themselves, and purporting to convey to Huston all the title of Poindexter to the right of entry granted by act of Congress to Thomas, to be disposed of and applied by Huston for the benefit of the partnership; but it is equally true, that this instrument, which was objected to by the plaintiff in error, was received without legal proof of its execution, and therefore should not have been admitted and considered by the court; and there being no proof in this record of any knowledge of the contents, or even of the existence, of this instrument on the part of the purchasers under the absolute and public deed from Poindexter to Huston, their title thus derived, for aught that appears, cannot be affected by the former instrument.

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Upon the whole case, the petitioner in the Circuit Court, having failed to establish a legal title in himself to the premises demanded, could not maintain his action, and the judgment of the court should have been for the defendant. It is therefore the opinion of this court, that the judgment of the Circuit Court be, and the same is hereby, 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 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, 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.

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*Charles Barnard, Abel Adams, George M. Barnard, and Charles Larkin, Plaintiffs in error, *v.* Joseph Adams, Andrew H. Bennet, and Joseph Fletcher.

It was a proper case for contribution in general average for the loss of a vessel where there was an imminent peril of being driven on a rocky and dangerous part of the coast, when the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured.[1]

The cases upon this subject examined.

Where the cargo was taken out of the stranded vessel, placed in another one, and the voyage thus continued to the home port, the contribution should be assessed on the value of the cargo at the home port.[2]

The crew were entitled to wages after the ship was stranded, while they were employed in the saving of the cargo.[3]

A commission of two and one half per cent. was properly allowed for collecting the general average. It rests upon the usage and custom of merchants and average brokers.

This was a writ of error to the Circuit Court of the United States for the Southern District of New York.

The defendants in error brought an action in the court below to recover contribution in general average, on account of the alleged voluntary stranding of the ship Brutus owned by them, from the plaintiffs in error, as owners of twenty bales

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[1] Cited. *McAndrews* v. *Thatcher*, 3 Wall., 370; *The Star of Hope*, 9 Id., 229; *Fowler* v. *Rathbones*, 12 Id., 117; *Hobson* v. *Lord*, 2 Otto, 405; *The Margarethe Blanca*, 12 Fed. Rep., 730.

It is well settled in the courts of the United States, that where a vessel and cargo are in common peril, and the master, for the purpose of avoiding the greater peril, selects another and less peril, he can recover compensation, in general average, from the cargo thereby saved. Thus, when a vessel if voluntarily stranded, with a view to promote the general safety, the damage to the vessel is a general average loss. *O'Connor* v. *The Ocean Star*, 1 Holmes, 248.

[2] Freight lightered away from a grounded vessel, in order to save the rest of the cargo, is not liable to contribute to the expense incurred in doing so. *Backus* v. *Coyne*, 45 Mich., 584.

When the underwriter must contribute to the expense of getting off a stranded vessel, and how his proportion of the expense is determined, see *Providence &c. Steamship Co.* v. *Phœnix Ins. Co.*, 22 Hun. (N. Y.), 517.

[3] Cited. *Hobson* v. *Lord*, 2 Otto, 411.

of nutria skins, which formed a part of her cargo at the time of the stranding.

The facts are minutely stated in the opinion of the court.

The cause was argued orally by *Mr. Boardman*, for the plaintiffs in error, and printed arguments were submitted by *Mr. Webster*, for the plaintiffs in error, and *Mr. Lord*, for the defendants in error.

Mr. Boardman, for the plaintiffs in error.

First Point. When the stranding of a vessel is inevitable, and her master, in the ordinary exercise of his duty as a navigator, directs her course to that part of the shore which he supposes to be the safest for the vessel, such act of the master does not render the stranding a voluntary sacrifice, or entitle the ship-owner to contribution from the owners of the cargo in general average.

I. The following authorities may be cited in support of the judgment below, but they do not sustain it. *Columbian Ins. Co.* v. *Ashby*, 13 Pet., 337; *Sims* v. *Gurney*, 4 Binn. (Pa.), 513; *Reynolds* v. *Ocean Ins. Co.*, 22 Pick. (Mass.), 191.

II. The following authorities fully sustain the plaintiffs in error on this point. *Taylor* v. *Curtis*, 1 Holt N. P. *Cas., *271] 192, *n.;* 3 Eng. Com. L., 69; *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 51; *Meech et al.* v. *Robinson*, 4 Whart. (Pa.), 360; *Scudder* v. *Bradford*, 14 Pick. (Mass.), 14; Abbott Shipp., Perkins's ed., 490 & *n.;* Id., 480; 2 Phillips Ins., 98.

III. The only voluntary sacrifice made was in the slipping of the ends of the chains. *Walker* v. *United States Ins. Co.*, 11 Serg. & R., (Pa.), 66; *Nickerson* v. *Tyson*, 8 Mass., 467.

Second Point. The cargo, if chargeable at all, should have contributed according to its value at Buenos Ayres. *Spafford* v. *Dodge*, 14 Mass., 79; *Mutual Safety Co.* v. *Cargo of the George*, 3 N. Y. Leg. Obs., 262, and 8 Law Rep., 361; *Tudor* v. *Macomber*, 14 Pick., (Mass.), 38; 3 Kent Com., 242; Abbott Shipp., Perkins's ed., 504 *n.*

I. The enterprise was terminated, and the affreightment dissolved, by the loss of the Brutus, before commencing the intended voyage. *Dunnet* v. *Tomhagen*, 3 Johns. (N. Y.), 156; *The Saratoga*, 2 Gall., 178, *n.* 23, cases cited; *Scott* v. *Libby*, 2 Johns. (N. Y.), 340; *Purvis* v. *Tunno*, 2 Bay, (S. C.), 492.

II. The power of the master to re-ship the cargo, and thus to continue the enterprise, extends only to cases where the ship is lost or disabled in the course of the voyage. *Shipton*

v. *Thornton*, 9 Ad. & E., 337; *Jordan* v. *Warren Ins. Co.*, 1 Story, 342; 3 Kent. Com., 210; *Searle* v. *Scovell*, 4 Johns. (N. Y.) Ch., 223; *Treadwell* v. *Union Ins. Co.*, 6 Cow. (N. Y.), 274; *Saltus* v. *Ocean Ins. Co.*, 12 Johns. (N. Y.), 112.

III. Buenos Ayres being the place of valuation, the jerked beef should have been included among the paying articles, according to its value at that place.

Third Point. The owners of the Brutus were not entitled to the wages and expenses of their master and crew for any time after it was ascertained that she could not be got afloat.

Fourth Point. The charge of two and one half per cent. as commissions or compensation to the plaintiffs, for collecting the contributions due to themselves, ought not to have been allowed.

First Point. The first question in this case is of the highest importance in point of principle. The error of the judgment under review seems self-evident. It is indeed a paradox. It amounts to this: that if a navigator, whose ship is inevitably doomed to loss by stranding, should consult his own judgment, and select, for his compulsory voyage to the shore, the route less perilous for himself and his vessel, such preference for the safer course is the incurring of a voluntary sacrifice, which entitles him to compensation.

*Or it may be stated in this way: a mariner, whose ship is thus inevitably doomed, cannot avoid becoming entitled to contribution in general average, unless he blindly forbears all action whatever, or navigates with an express view and purpose to effect the destruction of the adventure. Neither reason nor authority affords support to this extraordinary doctrine. [*272

"General average is founded on the simple principle of natural justice, that where two or more parties are concerned in a common sea risk, and one of them makes a sacrifice for the common safety, the loss shall be assessed upon all, in proportion to the share of each in the adventure; and the greater sacrifice of the first shall be compensated by the contribution of the others." *Taylor* v. *Curtis*, 1 Holt N. P., 192, *n.* 3 Eng. Com. Law 69. Its origin is commonly traced to the Rhodian law *de jactu*, which named only the case of a jettison; and, although the rule is not to be considered as thus limited, yet the case there put is an apt illustration, and no case essentially different from this illustration can fairly be considered within the rule. Goods cast overboard in a storm to lighten the vessel, masts, spars, or rigging cut away to prevent her being driven ashore, or carried away in an effort to avoid, by some unusual means, an impending calamity, running a ship on

shore to avoid capture, slipping a cable or an anchor for general safety, are the usual instances found in adjudged cases. Perkins's Abbott on Shipping, 480 notes. They are all within the illustration given in the Rhodian law; and upon principles of natural justice, are proper cases for contribution.

But when a ship does no more than pursue that course of navigation which, independently of the good or evil thence resulting to cargo, is most safe for herself, how can she be said to encounter a peril or incur a loss for the benefit of her cargo? This is not answered by the precedents of allowance for parts of the ship or her tackle jettisoned for common benefit; because, although it might be proper to make such sacrifice for the benefit of the ship alone, were she empty, yet the act is the separation and destruction of a part for the benefit of the community of interests which still remain as such contending against the common danger. Not so, when the ship is run ashore as the safest direction which can be given to her; then the whole community goes together, taking the same direction and encountering the same peril. It is a mere accidental result, that the ship suffers more than the cargo.

The Brutus was not voluntarily sacrificed. On the contrary, she was lost by the direct and unavoidable operation of a *vis major*, unaided by any volition of mind or agency of man. The gale commenced on the 8th of October, at 4 A. M., *273] and continued *through that day and until the evening of the next, when it blew a hurricane. At 9 o'clock the best bower chain broke, and at 10 the small bower gave way. The vessel was then at the mercy of the elements. There was no possibility of avoiding a stranding. The mate who had the command of the vessel says especially that it was impossible to avoid going ashore, and that all he did was to make sail for and reach a place where she could be stranded with the chance of the least damage. To say that there was a voluntary stranding is an absurdity; as well might it be said that a man who jumps overboard from a burning vessel, and is drowned in the attempt to reach the shore, voluntarily drowns himself. The case admitted of no alternative.

It is a rule, that the mind of man must concur in producing the injury which shall entitle a party to compensation in general average. Here the mind operated only to diminish the sacrifice as much as practicable, and not to produce it.

It is well remarked in the note to Holt's Nisi Prius Reports before referred to, that "there are some cases on the subject of general average in the reports, but there is not much to be collected from them. The safest guide is principle, well studied and understood." 3 Eng. Com. L., 70.

Some of the cases, however, may be looked into with advantage. The Supreme Court of New York, by Kent, Ch. J., in *Bradhurst* v. *The Columbian Ins. Co.*, 9 Johns. (N. Y.), 14, decided that, if the ship be wholly lost by the act of running her ashore, compensation in general average can never be due to the owners, or, as it has been technically expressed, that in all cases of stranding, the *salva navi* is indispensable to a recovery. 13 Pet., 334. This decision was made in 1812. It gave rise to much discussion. Mr. Justice Story, in his note to page 349 of the fourth American edition of Abbott on Shipping, took ground against the doctrine of Kent.

This *questio vexata*, with the great name of Kent upon one side and the equally great or greater authority of Story on the other, was not brought to a final test until the case of the *Hope* was decided in 1839. *Columbian Ins. Co.* v. *Ashby*, 13 Pet., 342. On that occasion Mr. Justice Story, in a very able and convincing judgment, definitively overruled the opinion of the great commentator upon American law. That judgment will be much relied upon as an authority for the plaintiff. Yet nothing was decided, except that neither the *salva navi*, nor a prior consultation by the master with his officers and crew, was necessary. Nothing else was discussed by counsel, or adjudged in the opinion. The Hope, though in imminent peril, and not securely moored, was still afloat, and held by her anchors, when the master, for the preservation of vessel and cargo, slipped his cables, and ran her on shore [*274 (p. 332). The court (p. 337) treat the voluntary stranding as expressly found by the special verdict, as indeed it was. Nor could it be doubted from the facts found; i. e., that she was still held by her anchors, and might possibly have survived the storm, when he voluntarily slipped her cables (thereby relinquishing her existing means of keeping afloat), and ran her on shore.

The case of the *Hope* being clearly irrelevant, there is to be found in the books but a single case which affords any support to the judgment below. That one case is *Sims* v. *Gurney*, 4 Binn. (Pa.), 513. It was as follows:—

The ship *Woodrop Sims* encountered a storm in Delaware Bay, and when she was driving before the storm toward Egg Island flats, where she would have soon stranded, her pilot changed her course, and ran her ashore on Cape May, as the most convenient place to save the ship, crew, and property (p. 514).

It will be seen that these facts were very similar to the facts proved in the present case. The suit was by the ship-owners for general average. Judge Yeates tried the case. His charge

is rather loosely stated. "He inclined to think it a case of general average throughout." (p. 516.)

The plaintiff had a verdict, and a motion was made for a new trial, upon the ground, among others, "that the verdict was against law, as the vessel's going ashore was not a voluntary act by the captain, pilot, or officers, but the inevitable consequence of the gale then blowing." And this point was most ably argued.

Chief Justice Tilghman said (p. 526),—"It seems, at first view, not very reasonable that contributions should be asked for damage occasioned by an act which, in fact, was for the benefit of the ship. But the law is certainly so, provided the act which occasioned the damage was conductive to the common safety."

For this "certainly," no authority is cited; and the remark is a little like Dr. Sangrado's candid acknowledgment, that the death of all who took his remedy would have raised in his mind a doubt of its efficacy, but that he *knew* it to be beneficial. "Upon the whole," says the learned judge, after a rambling and protracted argument, "it appears to me that it was a nice point on which the jury had to decide, but there is no sufficient cause for setting aside the verdict." (p. 627.)

Yeates, J., stated to the jury, "that, upon the facts as they were affected by the rule of law, his mind had been in a painful, dissatisfied state, during the trial;" and in reporting the *case to the court, he stated that "he could not say he was satisfied or dissatisfied with the verdict." (p. 516.)

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A Mr. Tilghman, who argued the case for the plaintiff, put it that it was a question of fact for the jury (p. 524), and his namesake, the judge, seems to have adopted the argument (p. 527).

Yeates, J. (p. 527) puts it strongly on the same ground, and Brackenridge, J., simply concurs.

The facts were certainly more complicated in that case than in the present; and it may be, under all the circumstances, that it was a question of fact proper for the decision of a jury. There was, indeed, no exception or complaint of any error in the charge. (p. 516).

1. In this view of the case, it may well be doubted whether any law point was decided in it, and it is certain Justices Yeates and Brackenridge so regarded it.

2. The singular opinion of Tilghman, Ch. J., is but slenderly sustained by its own reasoning, and is completely overruled by two cases in the same court, to which we will now refer.

In *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 61, A. D. 1824, the vessel was laboring in a storm, and wholly

ungovernable, when the master put her helm hard up, and ran her ashore, in order to get her into the best place for the preservation of the lives of the crew, the vessel and the cargo. (pp. 62, 65.)

The court, per Gibson, J., says,—"It is not enough that there be a deliberate intent to do an act which may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or, at the very least, to put it in a situation in which the danger of eventual destruction would be increased." Again, "Nor do I deem it of any importance that the master and crew thought their situation would, in any event, be bettered by the measures that were afterwards taken. Both are equally remote from a deliberate intention to sacrifice the ship, or to increase the risk of it; and without that there can be no claim to general average."

True it is that in this case the court say that they leave *Sims* v. *Gurney* untouched. But they certainly overrule Tilghman's opinion.

In *Meech* v. *Robinson*, 4 Whart. (Pa.), 361, A. D., 1839, the court, per Kennedy, J., after explaining *Gurney* v. *Sims* in a way which would divest it of all applicability to the present case, stating it to be a very questionable case, at best, and shaken, if not overruled, by *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 61, just referred to, says,—"The running of the vessel ashore cannot with propriety be said to have been voluntary, nor can it, indeed, be well said that *the loss of the vessel was occasioned thereby. For, according to the evidence of the master, which is all [*276 that we have, and all that the plaintiffs rely on to establish their claim, the vessel being on a lee shore where she could not carry sail, they found it necessary for the preservation of the lives of the crew, as the loss of the vessel was then certain beyond a doubt, being in four fathoms water and the land within a mile of her, to run her ashore, and accordingly they slipped the best bower anchor, put the vessel before the wind, and in a short time struck the land. In his cross-examination he further states that her situation was most desperate, that she would have gone to the shore at all events, but the mode in which the witness ran her ashore saved the lives of the crew, and tended to save a great proportion of the cargo. From this it is perfectly manifest, that the loss of the vessel had become inevitable as the consequence of a peril then present. And in such a case, says Mr. Phillips, in his Treatise on Insurance, Vol. II., p. 98, when the acts of the crew are intended to alleviate, instead of avoiding, such consequence, it seems hardly to be voluntarily incurring a loss."

Mr. Benecke, in his work on Insurance (ch. 5. p. 219), in which, says Chief Justice Abbott, in his work (p. 343,) "there is so much learning combined with practical experience, meets the present case in so many words, and declares, that if the situation of the vessel were such as to admit of no alternative, so that, without running her ashore, she would have been unavoidably lost, and that measure was resorted to for the purpose of saving the lives or liberty of the crew, no contribution can take place, because nothing was in fact sacrificed." "So here the plaintiffs suffered nothing; their vessel was doomed to inevitable destruction by the peril of the sea which surrounded her." After some further observations and citations of like import, he adds, "The loss of the ship in question, appearing to have been inevitable, must therefore be borne by the plaintiffs, who were owners of her." "This," says Mr. Stevens, "the Digest and all authors are agreed on; for you cannot in equity convert a loss which is inevitable into a claim for the preservation of property." Stevens and Benecke on Average, by Phillips, p. 84.

These cases not only overrule *Sims* v. *Gurney*, if it can be considered an authority against the defendants, but are directly adverse to the judgment now under review. See also *Scudder* v. *Bradford*, 14 Pick. (Mass.), 14; Perkins's ed. of Abbott on Shipping, 490 and notes.

If the Brutus had been held by her anchors, and the mate had slipped his cables and run her on shore for the common *277] *safety, a case of voluntary sacrifice might have been presented. There are several instances of such acts being held a ground for contribution. 13 Pet., 342; 22 Pick. (Mass.), 197.

But the Brutus, at the time of the alleged sacrifice, had been forced from her anchors by the elements, and was being driven towards the shore by an irresistible force. The pilot, it is true, remained at the helm; and, being there, he used his judgment in giving her the direction which not only was best for the whole adventure, but best for herself, which would have been best if she was empty. If this entitles the plaintiffs to recover, then, in every case of stranding, the owners of the vessel may be compensated in general average. Whenever the master is not asleep, insane, or, from some cause, grossly negligent of his duty, he will use his judgment, and control the helm, so as, in some degree, to modify the disaster which he cannot avert; and it will be strange if he cannot swear, as the mate did in the present case, that he did thus modify it for the common benefit. Under such a rule, the presence of the master and crew will be absolutely detrimental to the

cargo in most cases of stranding. Their being on board will only serve to lessen the injury of the ship, and to create in her favor a claim against the cargo.

The case of *Cutler* v. *Rae*, reported as dismissed for want of jurisdiction, in 7 How., 729, was very ably argued on the merits by counsel. We copy a part of the argument. "In *Sims* v. *Gurney*, 4 Binn. (Pa.), 524, Ch. J. Tilghman lost sight of the fact that the subject benefitted, i. e., the ship, was the very subject calling for compensation on the pretence that it was sacrificed. When a master finds that his vessel must go on shore, and merely exerts himself to go in a safe place rather than in a dangerous one, he no more makes a sacrifice than when, in navigating his vessel on the sea, he chooses a safe channel rather than a hazardous one, or changes his course to avoid a rock or a shoal; he does his plain duty for the benefit of the ship as well as of the cargo, and to avoid loss and sacrifice of the ship, and not to produce them."

If, at the moment of giving the vessel her direction to the shore, the mate had been asked whether he intended to sacrifice the vessel for the benefit of the cargo, he certainly would have replied in the negative, and assured the querist that he was doing with the ship the best that could be done for the ship herself.

The only thing like a voluntary sacrifice, in this case, is the slipping of the ends of the chains. They impeded the management of the vessel, and were voluntarily jettisoned for the purpose of relieving her. 11 Serg. & R. (Pa.), 66; 8 Mass., 467.

*Second Point. The defendants' nutria skins and the jerked beef should have been estimated, for the purpose of contribution, at their value at Buenos Ayres. [*278

1. The value of the nutria skins at Buenos Ayres was only $6317.27. At New York it was $11,000.

2. The value of the jerked beef at Buenos Ayres was $1125.18. At New York it was nothing.

It is admitted that, in ordinary cases of average, the rule of contributory value is the value at the port of destination.

This must necessarily be so; because it is there that the adventure is terminated, and the deliverance, which forms the ground-work of the claim for contribution, is consummated. Besides, it is rarely possible to refer to any other market for a rule of estimation. But if the vessel be wholly lost, and the adventure consequently terminated at a different place from the port of destination, the value of the goods at such different place is to be taken as the contributory value. Perkins's Abbott on Shipping, 504, *n.* 2. The Su-

preme Court of Massachusetts uses the following language, per Jackson, J., in *Spafford* v. *Dodge*, 14 Mass., 79:—"The contribution must be adjusted according to the value of the respective articles saved, at the time when the expenses were incurred, in like manner as if all parties had been present and each had originally paid his own proportion."

"If the contribution had been claimed for goods thrown overboard, or for a mast cut away, the adjustment of it would necessarily be postponed until the termination of the voyage; because, until that event, it could not be known whether any thing would be saved from which to claim a contribution, and also because each party would be held to contribute according to the value of what should come to his hands, at the termination of the voyage."

See also *Mutual Safety Co.* v. *Cargo of the George*, 3 N. Y. Leg. Obs., 262; s. c., 8 Law Rep., 361.

Tudor v. *Macomber*, 14 Pick. (Mass.), 38, was a case of average contribution for cargo jettisoned. The vessel was driven ashore near her port of departure. *Curia per* Putnam, J.:—"We think that, if the vessel arrives at the port of destination, the value should be the net price for which the cargo might have been sold there," citing Benecke and Abbott. "That is undoubtedly the rule in Great Britain, France, Spain, and Prussia. Benecke, 288. But, says the same author, should a jettison take place so near the port of departure that the vessel returns to the same or to a neighboring port, the actual price of replacing the goods thrown overboard should be allowed; or, if that could not be done, the *279] cost price, including shipping charges and *premium of insurance." The question in this case arose upon the rule as to the goods jettisoned; but all the law writers put the goods lost and the goods saved on the same footing, and strenuously maintain that the valuation of each should be made upon the same principles. See Kent and Abbott at the pages cited. Kent (Vol. III., p. 242) says, "The contributory value, if the vessel arrives at the port of destination, is the value of the goods there." Abbott (Perkins's ed., p. 504) lays down the rule of value at the port of destination with precisely the same qualification.

We do not mean to contend, that, in ascertaining the value of the goods, the arrival of the vessel at the place of valuation is the essential point. But we say, that these authorities point to the place where the adventure terminates, as being the port of deliverance, and the place where the compensation for effecting that deliverance first becomes due, and where, of course, it is to be measured. When goods saved from shipwreck and

chargeable for contribution first reach an intermediate port, and are there accepted by an agent of the shipper, as they may be, they must be valued at that place.

If they are not so accepted, the owner first becomes chargeable whenever, and, it may be safely affirmed, wherever, they so reach his hands. But when the voyage is strangled in its inception, there is no port referable to but the home port of the shipper. Destruction of the vessel there necessarily leads to a return of the cargo into the hands of the shipper. If, permissively, or by express retainer, the master of the disabled ship hires another vessel, transships the cargo, and carries it to the port of original destination, this is a new adventure, voyage, and agency. There is no pretence that an insurance upon these goods on board the Brutus, "at and from Buenos Ayres to New York," would have covered them during their voyage on board the Serene.

The voyage being prevented by the loss of the vessel, before her departure, the insurer would be responsible, under the first word, for the damage incurred by the wreck of the Brutus, but there his risk would end.

In the present case, the vessel was wholly lost. This terminated the enterprise, dissolved the contract between the freighters and the ship-owners, deprived the latter of all claim for freight, and entitled the former to receive their goods. All this occurred at Buenos Ayres. *Dunnett* v. *Tomhagen*, 3 Johns. (N. Y.), 156; *The Saratoga*, 2 Gall., 178, *n.* 23, and cases cited; *Scott* v. *Libby and others*, 2 Johns. (N. Y.), 340.

The claim to average was consequently perfect at Buenos Ayres. It was then and there recoverable. It was of course *then and there ascertainable. A libel *in rem* in the Admiralty Court of that country would have been an [*280 appropriate means of enforcing the claim.

Upon what ground, then, is it that the settlement is transferred to New York, and the goods made to contribute according to their value there? It is said that, if a vessel by misadventure is disabled from prosecuting her voyage, it is the duty of the master to transship the goods, and cause them to be carried to the port of destination.

That may be proper where the disaster occurs in the course of the voyage. But if it occurs before the sailing, and at the very port where the goods were received, the contract of affreightment is at once dissolved. *Purvis* v. *Tunno*, 2 Bay, 492.

In this latter case, which is the case before the court, there is no necessity of vesting the master with the extraordinary powers which, by the maritime law, he becomes clothed with,

when, at a distant intermediate port, in the absence of all concerned, he becomes, *ex necessitate rei*, agent for whomsoever it may concern, ship-owner, freighter, insurer, &c. *Shipton* v. *Thornton*, 9 Ad. & E., 337; *Jordan* v. *Warren Ins. Co.*, 1 Story, 342.

At the home port of the freighter, the choice of another vessel properly devolves upon the freighter. After the freighter has bargained for the carriage of his goods in a chosen vessel, the ship-owner cannot insist upon forwarding the goods by another vessel, merely because the first has become incapable of commencing the carriage. In that event, the freighter has the right of making a new choice for himself.

The cases on the authority of the master to transship all, expressly or impliedly, confine it to a port of necessity, after the ship, in the course of the voyage, has become disabled. 3 Kent Com., 210; *Searle* v. *Scoville*, 4 Johns. (N. Y.) Ch., 223; *Saltus* v. *Oeean Ins. Co.*, 12 Johns. (N. Y.), 112; *Treadwell* v. *Union Ins. Co.*, 6 Cow. (N. Y.), 274.

The rule of contributory value adopted below assumes New York to be the port of deliverance from the peril; it supposes that, if the goods had been lost in the Serene, the defendants would have been exonerated from all claim for contribution; yet most clearly that is not so.

When, at the port of reception, before the receiving ship has weighed anchor, or commenced her voyage, she is lost, we insist that the adventure, and all relations between the parties thereto, must, then and there, close. All accounts between them touching the intended voyage—attempted, but never even begun—must, then and there, be adjusted.

*281] *The rule for which we contend has a twofold operation for the relief of the defendants in the present case; the rule adopted below had a twofold operation against them. Their nutria skins have been made to contribute on a value increased 70 per cent. by the carriage to New York, in the Serene; the jerked beef, which was worth nearly $1200 at Buenos Ayres, is relieved from all claim for contribution.

This last proposition is clearly not maintainable. The jerked beef belonged to one of the plaintiffs. He received it from the Brutus in good order, at Buenos Ayres. We say in good order, because the judge in his charge assumes that there was no adequate proof of its having sustained any injury by the stranding of the vessel.

When the beef was thus returned to the shipper after the stranding, the judge assumes that it was uninjured, and of course worth about $1200. Still it is to contribute nothing, merely because the shipper was pleased to send it to New

York, and it was lost on that voyage. He might have sold it or consumed it at Buenos Ayres, sent it to China, or disposed of it as he saw fit. In his hands, when delivered from danger by the so-called sacrifice of the Brutus, it was worth $1200, yet it shall contribute nothing, because the voyage on which the owner was pleased to ship it turned out unfortunately!

It is impossible to sustain this branch of the charge upon any principle. The common law of rustic arbitrators alone furnishes a precedent for the rule adopted in relation to the jerked beef. The court below "split the difference."

The acceptance of the nutria skins at New York by the defendants can have no effect. They had a right to receive their own property whenever it was tendered to them. By receiving it, they perhaps adopted and ratified the whole agency of accepting it in their behalf at Buenos Ayres, and shipping it in the Serene for New York. This probably made them liable for freight by the Serene. This they have paid, or are willing to pay, on demand. The mere acceptance of their own property cannot change their relations to the owners of, and other shippers by, the Brutus.

To conclude, we insist that the nutria skins should have contributed at the Buenos Ayrean value, and that the jerked beef should have been included among the subjects of contribution.

Third Point. The owners of the ship Brutus claim contribution for the loss of their vessel. It will not be denied, that the contracts between them and their master and crew were dissolved and terminated by the destruction of the vessel. The whole doctrine of abandonment to underwriters would fall to the ground, if this were not so. The moment the vessel was *wrecked and found innavigable, the crew were at liberty to leave her. The master could neither [*282 detain them, nor profitably employ them. Charges are made for the wages and expenses of both master and crew, long "after it was ascertained that the vessel could not be got afloat, and her sale was determined upon." But the court refused to instruct the jury that these charges were not recoverable. The error was manifest.

Fourth Point. The allowance of two and a half per cent. to the plaintiffs, for collecting the contribution alleged to be due to them in general average, was erroneous.

The case assumes that the plaintiffs sacrificed their vessel for the common benefit. To ascertain the amount of their claim, and the proportions in which it is chargeable upon the freighters, an adjustment is made out at the cost of the contributors. Here it is supposed all expenses must cease, unless

the taxable costs of a legal tribunal should become recoverable. There is no such thing known in the law as a fee or commission to a party for receiving his own demand.

This action of collection or reception is not done for the common benefit, nor for the benefit of the defendants. Surely the defendants, as owners of the nutria skins, are not interested in the collection, though they were in the adjustment. If the plaintiffs choose to omit the collection, no one will suffer but themselves. Upon general principles, it is perfectly absurd and unjust to demand from one not interested in the collecting, compensation for collecting a demand. Governments, by positive enactment, charge their debtors and taxpayers with the cost of collection. Positive law sometimes imposes costs upon a delinquent debtor, but no such penalty is imposed by the common law. There was no evidence at the trial of any usage of trade, general or local, sanctioning this exaction. We submit that it cannot be sustained.

Mr. Lord, for defendants in error.

The question on which this judgment rests is, whether, when a ship is in a peril so imminent that her total loss is inevitable, to all appearance, a voluntary stranding, made with a view of saving the ship and her cargo from total destruction, is to be contributed for, in the event of any thing being thereby saved? The plaintiffs in error treat this as an open question. They also insist, that, as the destruction was inevitable, the stranding could not be voluntary, in the sense of the rule; that the ship claimed for, instead of being sacrificed by exposure to the greater peril, was in fact submitted to the less; and that this was done in the course of ordinary
*283] duty, and so not an act of *sacrificing at all. These are the views presented in their first point, amplified by the considerations in their written argument. They are in opposition to the first point of the defendants' brief, and will now be more fully considered.

The subject naturally divides itself into the inquiry, first, What is the nature of the peril, the avoiding of which by a voluntary damage gives rise to a contribution? and secondly, What is the character of the act of the master, which is to be deemed voluntary?

No question is made, and there is no difference pretended as to the right to contribution, whether the master's act has caused an absolute physical destruction of the ship, or a partial injury.

Then what is the nature of the general average peril? On the part of the plaintiffs in error, it is said that it must not be

of an inevitable kind. All their argument depends directly or indirectly on the loss in the present case being apparently inevitable when the stranding was determined on; and from that they argue that the voyage to the shore was compulsory; that all that man could do was to navigate the ship to a safer spot; that it is like jumping over from a burning ship; that the act of stranding saved the ship, rather than sacrificed her; and, from the loss being thus inevitable, he argues that in fact nothing was voluntarily lost, nothing is to be contributed for.

Let us then see what is a general average peril in the conceded instances of it. If the danger is not so great that loss is otherwise inevitable, where is the right of the master to anticipate or hasten the destruction of any part of the adventure? Does a master ever rightly make a jettison, cut away a mast, or run his ship ashore, unless the loss, at the time he resolves on the measure, is inevitable unless he resorts to it? Is the master to throw over cargo or mutilate his ship out of mere apprehension? Does he ever do it, unless all reasonable hope of otherwise saving the adventure is gone? He is not to be justified in a fear from slight causes, nor in anticipating that total destruction to a part which awaits the whole adventure, unless to all human judgment safety from any other measure is hopeless. When the ship has been overcome in her struggle with ocean and tempest, and is in danger of foundering, and when lightening her is the only measure to avert this otherwise certain peril, then first arises the right to throw over cargo. It is a right only born at the last degree of distress in his ship. If it can be shown that the vessel was not in such danger that she would in all human judgment sink unless relieved, the jettison would be unwarranted. So, too, in any case of voluntary stranding, if it could be shown that, by any *means in the master's power, by holding on to anchors, by making or pressing sail, he could avoid the danger, he is not warranted in beaching his ship. And so in fact is the practice of mariners. None of the cases of voluntary stranding which have occurred have been without inevitable danger. [*284

The peril, therefore, being in its nature inevitable, so far from being a reason to prevent a contribution, is, on the contrary, essential to it. And the argument for the cargo here goes to the extent, that, when a slighter danger exists, the contribution shall be made, but not when a greater. And in this uncertainty, what becomes of the rule as a rule of law? Is it to be left to a jury to say, in this case the danger was a little less, and there shall be a contribution; and in that case the danger left no hope, and therefore there shall be none?

The greater the danger, and the more inevitable, by any other means than by measures to anticipate its action, the more justifiable is the act of courage thus anticipating it, and the more rightful the demand of contribution.

It will appear, by reference to the cases of the *Woodrop Sims*, 4 Binn. (Pa.), 513; the *Apollo*, 2 Serg. & R. (Pa.), 229; the *Julia*, Id., 237, *n.;* 3 Wash. C. C. R., 298; the *Gem*, 22 Pick., 197; and the *Hope*, 13 Pet., 331, that in every case the loss was, to all human appearance, inevitable; and this is all which the strongest language of any witness can ever be rightly understood to mean.

As to this character of the peril, the acknowledged instances of general average contribution and the maritime authors alike unite. Thus, to save a ship from foundering, the jettison is contributed for; the loss was inevitable. To avoid capture, after flight or resistance has become desperate, a stranding is warranted and contributed for; the loss was inevitable. The ship is on her beam-ends and filling with water; her masts are cut away and contributed for; her loss was inevitable.

The language of Emerigon (Vol. I., p. 408) is very apposite to the case at bar:—"It sometimes happens that, to escape an enemy, or to avoid absolute wreck, the ship is stranded in the place which seems the least dangerous; the damage sustained on such occasion is general average, because it had for its object the common safety." And he adds: "The Acts of the Apostles (xxvii: 39) furnish a memorable example of a voluntary stranding." Showing, very clearly, his understanding that the loss to be averted was otherwise an inevitable loss. So, also, the ransom from pirates is to be contributed for; the loss is inevitable, and indeed actual.

Boulay Paty presents the same view:—"If, to avoid a total loss by wreck or capture, the captain adopts the measure of *285] *stranding his ship, the expenses to get her afloat are general average." (4 Boulay Paty, Droit. Marit., 454.) Again: "So that to constitute general average there must be a forced will (*il faut qu'il y ait volonté forcé*); that the act of man should concur with the accident (*cas fortuit*) * * There must, in the next place, be the avoiding of an imminent peril (*periculum imminentis evitandi causa*). A panic fear would not excuse the captain; the danger must be real." Id., 257, 258.

It would seem, that, in the face of these considerations, the inevitable character of the danger should not take away the right to the contribution.

There is, however, another view of this subject worthy of consideration. What is the peril to be avoided? Take, for an

instance, the case at bar. It was a total destruction of ship, cargo, and crew. Was this particular peril, the danger of this particular loss, inevitable? The result shows that it was not; for the ship, cargo, and crew did not thus perish. This fatal aspect of peril was capable of being averted, for it was in fact averted.

What was the new peril into which the disaster was shaped? It was a stranding on an easy beach, a saving of all the cargo undamaged, and the preservation of every life on board. Why, then, should the saved cargo insist that the peril was inevitable,—the peril from which, in fact, it has been delivered? What caused the substitution of the saving in place of the destroying peril? The coolness and deliberate courage of the officer in charge, advancing to attack the danger on the field chosen by himself, instead of awaiting its attack where it would have been irresistible.

It is proper to notice a result of this character of general average peril. Without the relief, the whole adventure must be looked upon as lost. It would be lost in case of the danger of foundering, of capture, of actual possession by pirates. All being thus viewed as lost, all is equally valueless; that is, the value of all the parts of the adventure is to be viewed as a value subject to the degree of danger, and diminished as that degree is great. And when a contribution is refused because the thing, whose loss is anticipated by the master's act, is already in danger of destruction, it is to be remembered that the things saved were in equal danger; that the contribution is not to be unfavorably viewed because of the value, in a place of safety, of what is not lost. The time of view for justice to take is when all was equally in danger. It therefore calls for a liberal construction in favor of the contribution. In this manner salvage awards are liberal, in proportion as the property saved was, previously to the saving, reduced in value *by the peril from which it was relieved. The contribution is said to be "the common law and justice of [*286 partnership." (1 Holt N. P., 192, note.) It is a partnership of peril merely, a partnership of danger, from which everything which escapes, by any anticipation of the danger, is a part of a stock treated as a common stock, and to be ratably divided.

What, then, is the character of the master's act which is to be deemed voluntary?

The expression of Boulay Paty above quoted is peculiarly accurate to describe it; it is "*volonté forcé*," a forced choice; that or none, to use a homely phrase. Again, he says, "the will of man must concur with the disaster," not be alone the

cause, but only a co-operating cause. The idea that any of the sacrifices at sea, in times of peril, are voluntary in any ordinary sense of the word is quite erroneous. It is an act of the will, under the sternest pressure of necessity; the alternatives are, total loss if nothing is done, a lighter loss if the danger is hastened. This is all the choice. It is the only choice presented. It is to aid in making this determination that consultation is to be had. It is in this that the degree of peril becomes important to be considered. The greatness of the danger makes the task of adopting some measure of escape more imperative; to relieve the whole adventure from the danger of vacillating resolves, arising from hesitation to sacrifice ship or cargo, or parts of cargo, in preference one to another, the policy of the law interposes the indemnity of a general contribution. Tilghman, C. J., says:—"The law of average is founded on policy and equity; on policy, because there are men who would risk the loss of life and fortune, rather than sacrifice their property without compensation. On equity, because nothing can be more reasonable than that the property saved should contribute to make good the loss which was the cause of safety." *Gray* v. *Waln*, 2 Serg. & R. (Pa.), 255.

The voluntary act, then, is not to determine whether anything shall be destroyed. Destruction is upon them already; all will be destroyed, as the circumstances stand, before the master acts to avert peril. Something must be destroyed at all events. The only volition to be exercised is, Shall the destruction be anticipated as to part, to procure the rescue of the rest? and when and how shall it be done? It is a mere election of time and selection of subject. There is no other volition, no other voluntary act. Refining criticism may waste itself in calling this a compulsory choice, a compulsory voyage to the shore, a selecting of a safer exposure,—in denying it to be a sacrifice. It is, nevertheless, all the voluntary act which remains to the master to perform. On its being performed with *coolness, courage, and discre- *287] tion, the whole property and the lives of all depend; that this small amount of volition may be exercised freely and without hesitation, the policy of the law tenders to the officer the indemnity of a general contribution. It puts him at ease as to the result of his decision. This selection of time and place of stranding was made in this case at bar; the time was anticipated, the place varied. The two important items of choice were acted on, and the result was a saving of the life of every one, the saving of the cargo almost entirely, and greatly lessening the injury to the ship.

The criticism made on this part of the argument by the plaintiffs in error is more striking than just. They say, that it is a paradox to call placing the ship in a safer place of stranding a sacrifice. The putting of a cargo into lighters to relieve a stranded ship does the same; but it is a case of average contribution. And moreover, the sacrifice, so called by a figure of speech, in general average, is merely the anticipation of the time of probable injury, and the selection of the subject. Suppose the loss to which the ship was exposed had not been inevitable, so that, upon the principles of the plaintiff's argument, it was a case of contribution; would it be less so in any degree, if the act done for general benefit at the same time rendered the invited and anticipated damage more inconsiderable?

Nor is the remark just, that there "always will be a general contribution, unless the master blindly forbears all action." There will never be a contribution unless the master does take action to select time and place of avoiding a general impending destruction; but whenever he does, there ought to be contribution upon the principles of the law, however numerous be the instances. It is not always that the selection of time and place can be made; but whenever it can, it is policy that it should be, and that under a judgment freed from hesitancy by the indemnity of a contribution. The apparent force of this consideration of the plaintiffs is overbalanced by that of there never being any contribution at all, if the principle be adopted that, if the loss be otherwise inevitable, there can be no contribution. That tears out the whole of this branch of the law.

It is therefore respectfully submitted, that a deliberate selection of the time and place of stranding was a voluntary act within the rule of law.

That the act of the master only diminished the danger to the ship has already been considered. The whole apparent force of this argument grows out of the figurative use of the term *sacrifice*. Its meaning, in this branch of the law, we submit, has reference only to doing an act intentionally damaging; *it has no reference to the danger that was impending being greater than is willingly, and at an earlier period, incurred. [*288

Again, to the argument that the ship, the subject benefited, was the very subject calling for compensation on the pretence that it was sacrificed, we answer, that it is no objection to a contribution that the ship is benefited as well as cargo. The contribution rests on the master's judgment in anticipating the effect of the danger by an earlier exposure to it.

It is said, too, that, in a case like the present, the master no more makes a sacrifice than when, in navigating his vessel on the sea, he chooses a safe channel rather than a hazardous one; the answer is, that the case of general average is not in the course of common navigation, but arises on conduct in circumstances of great danger, fear, and trial, calling for other considerations than the ordinary safe navigation; and that, in the case supposed of choosing a safer channel, no act of present and anticipated injury is incurred. Nothing but the strongest fancy can make an analogy between the cases.

A distinction is attempted between acts of jettison, cutting away parts, &c., on the ground that a separation of parts of a ship or cargo differs from an injury to the ship going as a whole community into a peril. This is not very easily to be understood; but if it means that there is any difference between a jettison and a voluntary stranding damaging the whole ship, on this ground alone, that an injury to a part differs from an injury to the whole, such difference is entirely denied, and is not supported by any authority nor acknowledged principle. In case of a voluntary stranding, it is not an accidental result that the ship suffers more than the cargo; but it is the very intent of the stranding.

One other view will be presented, on the principle of the judgment below. It has been suggested in a single case, that where the loss was inevitable, the thing sacrificed must be deemed of no value, and so there should be no contribution. The answer would be, the things saved at the time of the master's decision were equally of no value when the loss was inevitable. And when, having been redeemed from their peril by intentionally injuring that which was in the same and no more peril, an equal value should be restored to that. Under the peril impending, all were of no value; after the peril is removed, all stand of full value. The case referred to is *Crockett* v. *Dodge*, 3 Fairf. (Me.), 190. The schooner Rambler was taking in a cargo of lime at the wharf; it took fire; the hatches were closed, and thereby a part of the lime was saved; afterwards, the vessel was scuttled with a remnant of the lime on board, which was thus lost. For the loss
*289] of this remnant, a claim for *general contribution was made against the ship. The judge, before whom the trial was had, held that the lime in its endangered and damaged condition was of no value, and so no contribution should be recovered. The court above placed it more on the impossibility of its being saved. But, although decided in 1835, no reference was made to any of the cases on this ques-

tion but 9 Johnson, and the very case is put by the court, in 13 Pet., 340, as one of general average.

Besides, it is not true that property greatly endangered is to be deemed valueless. If, in the apparently instant wreck, in which everything is likely to be lost, a mariner should embezzle a box of jewels, would he be treated as appropriating a thing of no value? If the convict doomed to execution to-morrow on the gallows be stabbed to-night, will it cease to be murder, because he has but a short remnant of a doomed life?

Referring to the defendant's printed brief, as to the decision under review being supported by principle, this part of the argument will be closed by two quotations. Ch. J. Tilghman says, in his judgment in *Sims* v. *Gurney*, 4 Binn. (Pa.), 524: —"Nothing can be more equitable than that all should contribute towards the reparation of a loss which has been the cause of their safety; and nothing more politic, because it encourages the owner to throw away his property without hesitation in time of need." Judge Sewall, in *Whitteridge* v. *Norris*, 6 Mass., 131:—"General average is a contract by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who are, therefore, entitled to contribution from the rest, provided the benefit was intended as well as obtained by the destruction, or at the peculiar hazard, of the property lost."

But is this question an open question in this court? The elaborate argument for the plaintiffs in error forbade passing by a discussion of the principle; but it seems impossible now to treat this case as not covered by authority.

In the *Columbian Insurance Co.* v. *Ashby and Stribling*, 13 Pet., 331, the brig Hope, sailing on a voyage to the West Indies from Baltimore, was overtaken by a gale in the Chesapeake; she anchored, drifted from her moorings by force of the gale, broke her windlass, parted her chain cables, and about midnight brought up near Crany Island; "she thumped or struck on the shoals on a bank, and her head, swinging around to the westward, brought her broadside to the wind and heavy sea; the captain, in this situation, finding no possible means of saving the vessel or cargo, and preserving the crew, slipped his cables and ran her ashore for the safety of the crew and preservation of the vessel and cargo;" it was found *impracticable to get her off. All this was found by special verdict. The cause was heard in this court in January, 1839; and after an elaborate argument and very learned opinion, this stranding was adjudged to be a ground of general average contribution. [*290

The above description of the imminency of the peril and means of relief is copied literally from the special verdict. The jury found no other peril, and no other stranding. They applied not to the peril the term *inevitable*, nor to the stranding the word *voluntary*. But what could be more inevitable than the loss here described? The special verdict says, "the captain, finding no possible means of saving the vessel or cargo and preserving the crew," &c.; if this be not the description of a peril of inevitable loss, words cannot describe it. It is suggested in the plaintiff's argument, that she slipped her cables, and therefore must have been still held by her anchors, and might have survived the storm. But the jury had found "that there was no possible means of saving the vessel," &c.; they therefore found that the anchors and cables were not such means; and by reference to the previous parts of the special verdict, it appears that the anchors and cables, while all sound, had not held the ship; that she had ripped up the windlass, had parted the chain cable, had struck on a shoal, and lay broadside to the wind and heavy sea. It cannot be contended that the case of the brig Hope was not utterly hopeless. The act of the master was a voluntary stranding, only because he selected an easier bed for the ship to die on.

These facts found in the special verdict amounted, in the opinion of the court, to "a voluntary running on shore of the brig Hope; that there was no other possible means of preserving the crew, the ship, and the cargo; that the runing ashore was for this express object." Facts thus found, and a special verdict thus expounded, admit of no explanation, for they are already too plain. They admit of no distinction from any case of inevitable loss and voluntary stranding, where the ship must go ashore, and the captain merely selects the spot and varies the time. Both by the facts as found by the jury, and the exposition of them by the court, the question now argued was there presented. Why is it not to be deemed decided?

It is said that the points principally argued were, whether the doctrine *salva nave* applied to the mere saving of the ship, or to the successful result of the stranding. But that being decided for the ship, the question of inevitable danger still lay between the ship and her claim to contribution; nay, it was preliminary to it. Unless a contribution might be due for a voluntary stranding to avoid inevitable loss, the question of *291] *salva nave* did *not arise. There was, according to the present plaintiff's argument, no ship to be saved; her ruin was inevitable, and so she was really lost before the stranding.

Will it be said that the court did not argue the point?

The counsel for the cargo there did, indeed, take the point, in opposition to the counsel for the cargo here, that there must be shown an inevitable necessity for the stranding. The counsel for the ship there distinctly presented the fact, that the danger was inevitable. "There was no hope if he remained at anchor; certainly none, if he attempted to breast the fury of the storm." The judge who delivered the opinion quotes from Emerigon the passage above translated, as to running ashore in the less dangerous place; he examines the opinions in the cases, *Caze* v. *Reilly*, 3 Wash. C. C., 298; *Sims* v. *Gurney*, 4 Binn. (Pa.), 513; and *Gray* v. *Waln*, 2 Serg. & R. (Pa.), 229, and says, "We have examined the reasoning in these opinions, and are bound to say, it has our unqualified assent."

It is to be observed, in addition, that Judge Story puts the very case which occurred in Maine (3 Fairf., 190), and considers it a general average. The case of *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 69, was also cited by the counsel; the very case which Judge Kennedy, in 4 Wharton, deems to overrule *Sims* v. *Gurney*, in 4 Binney. Judge Story also remarks upon the opinions of Stevens; and with all these cases before the court, they adjudged this a case of voluntary stranding to avoid inevitable loss, and one calling for general average contribution. If this does not, as a decision, cover a case upon identically the same facts, certainly upon facts presenting the very same question, what decision can do it?

It adds to the weight of this decision, that in the case of *Sims* v. *Gurney* this very point was made, argued fully by counsel, and distinctly passed on by the court. Tilghman, C. J., says (p. 256), "It is said that the ship must have gone ashore somewhere, and it made no difference where that shore was. It is not necessary that the ship should be exposed to greater danger than she otherwise would have been, to make a case of general average." With this before them, the point then so clearly raised, so fully argued, so expressly decided, and the reasoning of *Sims* v. *Gurney* so fully adopted, there was no call for discussing it again in the opinion pronounced in the case of the *Hope* (13 Pet.).

The decision of this court in the case of the *Hope* has ever since been considered as settling the law on this point. It was decided in 1839. In the spring of the same year, the very same point of a voluntary stranding to avoid an inevitable loss arose in Massachusetts, in the case of the *Gem*, precisely like that *of the *Hope*, and this very point was made by Curtis, counsel; upon which Shaw, Ch. J., laid [*292

down, "that if the cable was voluntarily cut, and the vessel run on shore as the best expedient for saving life and property, although the vessel was in imminent peril, and although there was every probability that she would sink at her anchors, or part her cables and drive ashore if not cut, still the loss is to be considered as coming within the principle of general average," and cites the case in 13 Pet. (*Reynolds* v. *Ocean Ins. Co.*, 22 Pick. (Mass.), 197.)

Again, in 1845, in the case of the ship *George*, the District Court of New York considered this point covered by the decision in 13 Pet. (8 Law Rep., 361), and in the case now under review, the judges of the Circuit Court for the Southern District of New York considered the decision in 13 Pet. applicable and decisive. And although the decision appealed from is to be held open for consideration and suspended in effect, yet in a question of commercial law, to be carried out in the important, although rapid, operations of merchants, adjusters of losses, &c., the manner in which a decision is received by persons competent to understand it, and has been acted on for ten years, well deserves consideration as showing its plain meaning and extent. This decision has entered largely into the business of the country as thus understood, and should not, even if its original correctness had been dubious, be either disturbed or made useless by nice and refined distinctions. So far as the argument of the plaintiffs on authority is understood, it rests on the two cases 11 Serg. & R. (Pa.), and 4 Whart., cited on their points. The former was directly before this court, cited by Mr. Semmes *arguendo* in the case of the *Hope*, p. 337, and, if opposed to that decision, was silently rejected by this court. This court adopted the opposite conclusions given in the case of the *Woodrop Sims*, 4 Binn. (Pa.) The latter case, *Meech* v. *Robinson*, 4 Whart., 360, decided in 1839, is remarkable for its disregard of the decision in 4 Binn., and its opposition to 13 Pet. (the *Hope*), decided in the previous part of the same year, and not noticed by the judge. However the courts of Pennsylvania may make free with their own decisions, they cannot be permitted to unsettle the law decided in this court, and recognized and adopted in this extensively commercial country. The decision in 4 Binn. was after arguments the most creditable to the abilities and research of the eminent counsel engaged, and upon a discussion of the whole subject by Ch. J. Tilghman of unsurpassed learning and ability. It was distinctly approved and adopted by this court, and, with the judgment of this court, has stood too long and is too firm to be now shaken.

The second point of the plaintiffs in error, being in

opposition to the third point of the defendants, relates to the values of the parts of the cargo on which contribution is to be assessed; and this depends upon the place where the contribution is to be made. It is not necessary to examine or criticise the cases cited upon this point by the plaintiffs in error. It is supposed that the case rests on general principles, of a practical character, well settled. It will not and cannot be denied, that, by the reception of cargo on shipboard, the adventure was begun, nor that it was to terminate in New York. The shippers of the nutria skins at Buenos Ayres made no claims to them there after the disaster, but allowed their transshipment to New York, by the master of the stranded ship, without any new contract of affreightment. Now, where was the master, whose duty it was to collect the general contribution, entitled to demand the payment, and where the owner of the goods bound to pay it? The ship lost had been destined to New York with this cargo, there to be sold. Had the master a right to exact payment of the average in the place of shipment? Was the shipper, who had already advanced the price of purchasing the goods, bound to advance in addition the general average? He looks to the sales of the goods, or the consignee, in New York, to pay their freight and expenses. He is not even to be presumed the owner, but may as probably be a shipping agent merely, who has fully executed all his authority by making the shipment. He has no funds for the purpose of these charges. He does not demand back the goods, but lets them go forward to their original destination on the old freight contract; they arrive in safety at New York. There is the place of destination, reached by the cargo. There is the proper place, and only proper place, of valuing the vessel, an American registered ship. The freight being lost, is a freight to the home port of destination. Free, then, from all technical objections, the place of destination was the place proper for payment of the charge.

This becomes still more apparent if the rule of valuation for cargo lost be considered; and the rule of valuing cargo lost and cargo saved is always the same. By a general average sacrifice the owner is not merely indemnified in the cost of his goods. The freight on lost goods is paid in contribution, and is assessed in contribution. The goods are paid for at their value at the place of destination. The merchant recovers, not only first cost, but profits. The merchant and ship-owner, therefore, are both entitled to compensation as of the place of destination. It follows, that they must be assessed on the values at that place. (See Abbott on Shipp., 1 Perkins's ed.,

*607, [504,] ch. x., pl. 4, s. 13, 14.) The lading port spoken of in Abbott is to be understood as the home lading port, and not the lading port abroad.

The adjustment in the case of the *George* (8 Law Rep., 361) will be found to be a case where the value of the cargo was agreed; it was not a valuation at the home or foreign ports of the voyage, but at the port of distress; and as a large part of the cargo was sold there, and the proceeds of the wreck sold were received there, that rule was, by a sort of forced concession, adopted.

As to the jerked beef, although not injured in the stranding itself, yet it was in the transportation for re-shipment. This was a direct consequence of the stranding, resulting from the necessity, thereby occasioned, of transshipment by boats. The beef was bound for New York, and liable to pay on its increased value there, if it arrived safely. Consequently, if the value was diminished on arrival at New York, the same rule operated to diminish the value for assessment to the contribution.

The whole argument on this point, by the plaintiffs in error, proceeds on the supposition of the voyage being wholly broken up at Buenos Ayres. But in fact this was not so. None of the shippers claimed, or appeared willing to claim, or receive back, their goods. They were immediately and continuously forwarded in another vessel, then at Buenos Ayres, with the master of the Brutus as master. There was, therefore, an agreed continuance of the adventure until all the property reached the place of its destination. The ship could not have been properly valued at Buenos Ayres, being an American ship, not sent there for sale, but to be employed and returned to New York, her home port. There her only correct value, for assessment, could be ascertained. The place where the average shall be stated is always dependent, more or less, on accidental circumstances, affecting, not the technical termination of the voyage, but the actual and practicable closing up of the adventure. It admits of no very certain rule of law. And it is humbly submitted, that in this point there was no error in the court below.

The third point of the plaintiffs respects the precise time at which the wages and provisions of the ship's company cease to be a general charge. It does not raise any question that the wages and provisions are not a general charge for some time after the stranding. They are in the nature of salvage charges, and therefore general. The point of time at which the plaintiffs in error insist they shall cease, is that of its being

certain that the ship could not be got off, and of her sale being *determined. It is obvious that this may have been done long before the cargo was discharged, long before [*295 it was transshipped by the boats and crew of the ship. But these wages and provisions ought to be paid by the adventure, as long as the services of the crew, as mariners, laborers, or quasi-salvors, were bestowed upon the adventure. Immediately on the stranding, it could be determined that she could not be again floated; and the determination, of course, would be to sell the wreck. But until the entire saving of the cargo and of what could be saved from the ship, the services of the crew were essential to both.

There is no ground in law to say that the duties of the mariners ceased when the stranding became fatal. They still owed duties as mariners both to ship and cargo, and had a lien on the ship for wages, or salvage as a substitute for wages, until the cargo was fully and properly disposed of from the wreck. Being properly employed upon the ship and cargo, even if it were true, as it is not, that their obligation to the ship had ceased, still their services to vessel and cargo entitled them to wages and to their support as a general charge.

The fourth point respects the commissions for collecting the average.

The plaintiffs' argument rests on this not being a service ever allowed to a claimant or creditor, and on the allegation that it is not a service to the common adventure. The argument is the more plausible, because, in this instance, the ship-owners who collect the contribution are the parties to whom it is all payable. But this is not generally so, there being usually contributions to be paid out as well as received; and if among recipients the ship-owners were only one among a number, there would be no discrimination or deduction on that amount; that the rule must be a general one, applicable generally to the office of being the accounting party in the general average.

Taking this to be the true relation of the ship-owner, he is evidently an official agent and trustee, involved by the disaster causing the average in new and responsible duties, often very difficult and embarrassing.

They are duties not embraced in his obligation as a mere carrier. They are duties arising out of unforeseen disaster. They are duties which directly result from the disaster, as much so as the damage to cargo by water getting in when a jettison is made. On the general principles of law, therefore, the trouble of this compulsory agency and the compensation

for it arise from the disaster, form part of it, and ought to accompany it in the contribution. In the present case, the *296] services *were those of commission merchants, transacting the business for the owners. This, while it may not vary the principle, relieves its present application from the ostensible objection that the owners are themselves receiving a commission on collecting their own claim.

Mr. Webster, in conclusion, for the plaintiffs in error.

In considering the nature of "a general average peril in the conceded instances of it," the counsel for the defendants in error, for the purpose of identifying this case with those conceded cases, maintains the proposition that a master is never justified in making a jettison or other sacrifice, "unless the loss, at the time he resolves on the measure, is inevitable unless he resorts to it."

This proposition cannot be maintained either by reasoning or on authority. When the community of interest of which the master has charge is placed in circumstances of peril, it is not necessary that loss should be inevitable, in order to justify his deliberately sacrificing one interest to insure the safety of the rest; or putting one interest to greater risk in order that the risk of the remaining interests may be diminished. It is enough that the risk be real, but it may be more or less imminent. A slight risk would justify a trifling sacrifice. A more imminent risk a greater sacrifice. The terms risk, hazard, peril, and, indeed, the whole class of words used in describing general average cases, always include both the idea of danger and the possibility of escape. The only questions in judging of the propriety of the course of a master, in any given case of voluntary sacrifice, are, Was the peril real? and was his act the result of deliberate judgment, and not the consequence of mere panic? This answers the assertion of the defendants' counsel, that our principle "tears out the whole law of general average." So far is it from this, that it accompanies every voluntary sacrifice made in time of peril for the common benefit, and awards contribution.

The counsel for the defendants in error, throughout his points, brief, and argument, seeks to confound and confuse words and phrases which have distinct and well understood differences of meaning. Thus, on one page only of his printed argument, he uses the phrases "certain peril," "inevitable danger," "peril inevitable," and "loss inevitable," as though these were equivalent and convertible terms. A peril may be inevitable, and yet no loss accrue; but to say that loss is inevitable, and yet may not happen, is to do violence to

language. We should not notice this, if it were an inadvertent misapplication of a term; but there is an evident design to *dwarf the meaning of the term *inevitable*. Thus, on [*297 the same page, it is said, "The greater the danger and the more inevitable," as though inevitability admitted of degrees, and as if the word *inevitable* were a merely equivalent term to the word *peril*. Indeed, in the points, it is insisted that the term "inevitable loss" ought to be construed to mean merely "the highest degree of conjecture of loss;" in short, that the term "inevitable loss" is to be tortured from its meaning, and pronounced by this court to mean merely imminent risk; and it is only by thus conjuring with words that the judgment in this case can be sustained.

To constitute a case for general average contribution, two things must concur:—

1st. The existence of danger not inevitable, but capable of being avoided by the means resorted to.

2d. The evidence of a "deliberate purpose to sacrifice the thing claiming contribution at all events; or, at the very least, to put it into a situation in which the danger of eventual destruction would be increased." Gibson, J., in *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 61.

In this case both these elements were wanting.

This is substantially conceded by the defendants. They say,—"The voluntary act, then, is not to determine whether anything shall be destroyed. Destruction is upon them already; all will be destroyed (by stranding) as the circumstances stand." "Refining criticism may waste itself in calling this a compulsory choice, a compulsory voyage to the shore, a selecting a safer exposure,—in denying it to be a sacrifice. It is nevertheless all the voluntary act which remains to the master to perform." So much for the certainty of loss, according to the defendants' own showing. As to the fact that no sacrifice was made, no increased risk of loss to the ship run, they are equally explicit. The result of the mate's act was, it is conceded, the "greatly lessening the injury to the ship."

The defendants' counsel dwells on the seeming equity of the cargo saved by the act of the mate contributing to the loss of the ship. The answer to that is twofold.

1st. The ship was not lost, sacrificed, or injured by the act of the mate, but saved by that act, so far as it was saved at all. That this act was less beneficial to the owners of the ship than to the owners of the cargo, was a mere accident. Just such a case might happen near New York, and the ship be got off the beach with little injury; while a valuable

cargo, consisting of teas or other articles readily destructible by sea-water, might have been destroyed. The act of the mate was one done in the exercise of ordinary care and dili
*298] gence, for the benefit of *each and every thing and being under his care. Each and every thing and being under his charge was benefited, more or less. The degree of benefit varied, but not as the result of any design or attempt to sacrifice one thing to save another, but as a mere fortuitous, unintentional result.

2d. The several persons engaged in a sea risk are not mutual insurers; each runs the risk of his own adventure. A ship is struck by a squall, and the masts carried away; a wave carries the boats overboard, or breaks in the bulwarks; the loss must be borne by the ship-owner. So in repulsing an assault by an enemy, "neither the damage to the ship, nor the ammunition expended, nor the expense of healing the mariners wounded in an action against an assailing enemy, is a subject of average contribution." (Perkins's Abbott on Shipping, 501.) A heavy sea sweeps away deck freight, or finds its way into the hold and injures the cargo. Then the owner bears the loss. A wreck occurs, one man's property is saved slightly damaged, another's greatly damaged, the value of another's is entirely destroyed. Each man must bear his own loss. Out of this very equality and independence of the several owners arises the doctrine of general average. No man has the right to ask, in a case of common danger, that another's property shall be singled out and sacrificed, or put in greater jeopardy, for his benefit; and so the law gives to the owner of property thus selected for sacrifice a right of contribution against those whose property, with no greater right to protection than his, has been saved or less imperilled at his expense or risk; but it is this selection, this dedication of the thing to sacrifice or special hazard, which is the very foundation of the right to general average.

The cases cited by the counsel for the defendants are, when carefully examined, confirmations of this view.

The reasoning of Ch. J. Tilghman, quoted in the defendants' argument, is in exact accordance with our views of the law. The equity on which the right to contribution in general average is founded is the reasonableness "that the property saved should contribute to make good the loss which was the cause of safety." So the language of Judge Sewall:—"General average is a contract by which distinct properties of several persons become exposed to a common peril, and a relief from that peril at the expense of one or more of the concerned, who are therefore entitled to contribution from

the rest: provided, the benefit was intended, as well as obtained, by the destruction or at the peculiar hazard of the property lost."

The judgment of the court below being unsupported by principle, the case of the *Hope*, in 13 Pet., is urged upon the *court, with desperate pertinacity, as decisive of this case; but we have shown, in our opening argument, [*299 that that was a case in which the vessel was still held by her anchors, and in which, by the deliberate act of the master, the vessel was deprived of all the means that then held her; a case in which the court treats the voluntary stranding as expressly found by the special verdict, as indeed it was. The language of Mr. Justice Story is, "The special verdict finds that there was a voluntary running on shore of the brig Hope."

He at once proceeds to discuss the question which he deemed open for discussion, and decides that, in case of voluntary stranding, the *salva nave* is not necessary to constitute a claim for contribution. He neither discusses nor decides what facts constitute a case of voluntary stranding; and it cannot be supposed that that learned and most painstaking jurist, and this learned court, would decide so important and delicate a question by mere silence, and that against such a weight of reasoning and against the whole current of authority. We say by mere silence, for, notwithstanding what is said, an inspection of the case will show that the cases cited by the court are cited in relation to the necessity of the *salva nave* to entitle the party to contribution, and not in relation to the question of what constitutes voluntary stranding. It is clear that the case is still an open question in this court, and we emphatically dissent from, and deny the assertion of, the counsel for the defendant, that "the decision of this court in the case of the *Hope* has ever since been considered as settling the law on this point." On the contrary, it is, doubtless, well known to the learned judge who tried this cause, that the bar of New York do not consider the main point in this case as settled by the case of the *Hope*, and that they do consider this as the very case in which that question is to be settled, and that for the first time.

Driven by the difficulties of the case to avail themselves of every aspect of the case which even has a remote plausibility, the defendants urge that an anticipation of the time of destruction is a ground for considering the stranding voluntary; but there is no evidence that the time of stranding was hastened by the mate; but if it were, that surely cannot alter the character of the act done. Surely a moment

sooner or later cannot determine such important interests. *De minimis non curat lex.*

We rest the other points in this case on the arguments already presented.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs below, Joseph Adams and others, brought this *action against Charles Barnard and others, in the Circuit Court of New York, to recover contribution in general average for the loss of their vessel called the Brutus, on board of which certain goods were shipped, and consigned to the plaintiffs in error, and delivered to them on their promise to pay, provided contribution were justly due.

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On the trial, the Circuit Court gave certain instructions to the jury, which were the subjects of exceptions, on the correctness of which this court is now called upon to decide.

As the facts of the case were not disputed, it will be proper to state them, in connection with the instructions given by the court, in order to avoid any mistake or misconception which might arise in construing the terms of mere abstract propositions without relation to the facts on which they were based.

On the 8th of October, 1843, the ship Brutus was lying at anchor, at the usual place of mooring vessels in the outer roads at Buenos Ayres, about seven miles from the shore. The width of the river at that place, between Buenos Ayres and Colonia on the opposite shore, is about fifteen miles. The Brutus had taken her cargo on board for New York, consisting of nutria skins, dry hides, horns, and jerked beef. The master was on shore, and she was in charge of the first mate, with a crew consisting of twelve persons in all. On the 7th, a gale had commenced, which on the 8th had become dangerous. About four o'clock next morning the ship began to drag her anchors, and the small bower anchor was let go. About nine o'clock in the evening, the gale increasing, the best bower anchor parted with a loud report. About ten o'clock, the small bower parted, and the ship commenced drifting broadside with the wind and waves. Endeavors were then made to get the ship before the wind, which failed, on account of the chains keeping her broadside to the sea, which was making a breach over her fore and aft. The chains were then slipped, and the vessel got before the wind, two men were put to the wheel, and one to the lead, and it was determined "to run the ship ashore for the preservation of the cargo and the lives of the crew." It was now about eleven o'clock at night when the ship was got before the wind and under command of the

helm. The shore next to Buenos Ayres, towards which the ship had been drifting, had banks and shallows extending out some three or four miles. If the vessel had been driven on these by the tempest, she would have been wrecked and lost, together with the cargo and crew. On the Colonia side of the river were sunken rocks several miles from the shore. "For the purpose of saving the cargo and crew anyhow, and possibly the ship," she was steered up the river, inclining a little towards *the Buenos Ayres side, with the intention of running her on shore at a convenient place. After they [*301 had proceeded up the river about ten miles, the mate discovered from the flashes of lightning that the vessel was approaching a point called St. Isidro, off which he perceived something black which he supposed to be rocks, and "being afraid," or "thinking it impossible to get by" this point without being wrecked and lost, he directed the course of the vessel to be changed towards the shore, where he had seen what he supposed to be a house, but which turned out to be a large tree. About midnight the vessel struck the beach and the rudder was knocked away. The foresail was then hauled up, but the staysail was let remain to keep her head straight, and she continued to work herself up until daylight. The place where she was stranded was a level beach about two hundred yards above ordinary low-water-mark. The ship was not wrecked, or broken up, though somewhat damaged, and the cargo was not injured. The master chartered the bark Serene, and transferred the cargo to her. But it was found that, with the means to be obtained in that vicinity, it would have cost more than the ship was worth to get her off the beach. She was therefore sold. The Serene afterwards arrived safely at New York, under command of Captain Adams, former master of the Brutus. In transshipping the jerked beef from the Brutus to the Serene, a portion of it got wet, and when it arrived at the port of New York it was all found to be worthless.

On these facts the court instructed the jury as follows:—

1. "The evidence on the subject of the stranding consists in the uncontradicted and unimpeached testimony of a single witness. He was the acting master of the vessel at the time of the loss in question. He states that when the vessel was without any means of resisting the storm, and her going ashore upon a rocky and more dangerous part of the shore was, in his opinion, inevitable, he did intentionally and for the better security of the property and persons engaged in the adventure, give her a direction to what he supposed to be, and what proved to be, a part of the shore where she could lie more

safely. These facts, if credited by you, constitute in judgment of law a voluntary sacrifice of the vessel, and for such sacrifice the plaintiffs are entitled to recover in general average."

This instruction forms the subject of the first exception, and raises the most important question in the case.

The apparent contradiction in the terms of this instruction has evidently arisen from a desire of the court to give the plaintiffs in error, on the argument here, the benefit of the negation of their own proposition, viz., that if the loss of the *302] vessel *by the storm was inevitable, the stranding could not be a voluntary "sacrifice entitling the plaintiffs to contribution." It is because the form in which this proposition is stated is equivocal and vague, when applied to the case before us, that the negation of it appears to be contradictory in its terms. The court should, therefore, not be understood as saying, that, if the jury believed the peril which was avoided was "inevitable," or that if the jury believed that the imminent peril was *not* avoided, they should find for the plaintiffs. But rather, that if they believed there was an imminent peril of being driven "on a rocky and dangerous part of the coast," when the vessel would have been inevitably wrecked, with loss of ship, cargo, and crew, and that this immediate peril was avoided by voluntarily stranding the vessel on a less rocky and dangerous part of the coast, whereby the cargo and crew were saved uninjured, then they should find for the plaintiffs. Looking at the admitted facts of this case in connection with the instruction given, it is plain that the jury could not have understood the court to mean any thing else. And we may add, moreover, that, in the argument here, the learned counsel have not relied upon any verbal criticism of the instruction, but have encountered fairly the proposition which we now consider as maintained by the court below.

It cannot be denied by any one who will carefully compare this case with that of *The Hope*, 13 Pet., 331, unanimously decided by this court, and the cases of *Caze* v. *Reilly*, 3 Wash. C. C., 298, *Sims* v. *Gurney*, 4 Binn. (Pa.), 513, and *Gray* v. *Waln*, 2 Serg. & R. (Pa.), 229, which have received the "unqualified assent" of this court, that, whatever distinctions may be taken as to the accidents and circumstances of these cases, they do not materially or substantially differ from the present, so far as the point now under consideration is concerned; and that we are now called upon to reconsider and overrule the doctrine established by those cases. But however they may appear to be contrary to certain abstract propositions stated by some text-writers on this subject in Eng-

land, and a case or two in this country, the policy and propriety of overruling our own and the three other decisions which have received our "unanimous approval," even if we were not now satisfied with their correctness, may well be doubted. There are few cases to be found in the books which have been more thoroughly, laboriously, and ably investigated by the most learned counsel and eminent judges. In questions involving so much doubt and difficulty, it is of more importance to the mercantile community that the law be settled, and litigation ended, than how it is settled. No decision of a question depending on such nice and subtile *reasoning will [*303 meet the approbation of every mind; and if the cases we have mentioned have failed of this effect, it may well be doubted if any reasons which could be given for overruling them would prove more successful.

It is not necessary, in the examination of this case, again to repeat the history of this doctrine of general average, from the early date of the "*Lex Rhodia de jactu*," through the civil or Roman law, and the various ordinances and maritime codes of European states and cities, down to the present day. The learned opinions delivered in the cases to which we have alluded leave nothing further to be said on that portion of the subject. We shall therefore content ourselves with stating the leading and established principles of law bearing on the point in question, in order that we may have some precise data with which to compare the facts of the present case, and test the value of the arguments with which the instructions of the Circuit Court have been assailed.

The law of general average has its foundation in equity. The principle, that "what is given for the general benefit of all shall be made good by the contribution of all," is recommended, not only by its equity, but also by its policy, because it encourages the owner to throw away his property without hesitation in time of need.

In order to constitute a case for general average, three things must concur:—

1st. A common danger; a danger in which ship, cargo, and crew all participate; a danger imminent and apparently "inevitable," except by voluntarily incurring the loss of a portion of the whole to save the remainder.

2d. There must be a voluntary jettison, *jactus*, or casting away, of some portion of the joint concern for the purpose of avoiding this imminent peril, *pericula imminentis evitandi causa*, or, in other words, a transfer of the peril from the whole to a particular portion of the whole.

3d. This attempt to avoid the imminent common peril must be successful.

It is evident from these propositions, that the assertion so much relied on in the argument, namely, "that if the peril be inevitable there can be no contribution," is a mere truism, as the hypothesis of the case requires that the common peril, though imminent, shall be successfully avoided. Those who urge it must therefore mean something else. And it seems, when more carefully stated, to be this, "that if the common peril was of such a nature, that the "*jactus*," or thing cast away to save the rest, would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer *in place of the whole, there can be no contribution." If this be the meaning of this proposition, and we can discover no other, it is a denial of the whole doctrine upon which the claim for general average has its foundation. For the master of the ship would not be justified in casting a part of the cargo into the sea, or slipping his anchor, or cutting away his masts, or stranding his vessel, unless compelled to it by the necessity of the case, in order to save both ship and cargo, or one of them, from an imminent peril which threatened their common destruction. The necessity of the case must compel him to choose between the loss of the whole and part; but, however metaphysicians may stumble at the assertion, it is this forced choice which is necessary to justify the master in making a sacrifice (as it is called) of any part for the whole. Hence the answer of every master of a vessel, when examined, will be, "I considered the destruction of both ship and cargo 'inevitable,' unless I had thrown away what I did." "The goods thrown away would have gone to the bottom anyhow." If the case does not show that the jettison was "indispensable," in order to escape the common peril, the master would himself be liable for the loss consequent therefrom. It is for this reason, that the ordinances of Marseilles require that the master should have a consultation with the supercargo and crew as to the absolute necessity of the measure, and as evidence that it was not done through the vain fears, cowardice, or imprudence of the master. But the right to contribution is not made to depend on any real or presumed intention to destroy the thing cast away, but on the fact that it had been selected to suffer the peril in place of the whole, that the remainder may be saved. The anchor lost by voluntarily slipping the cable may be recovered, the goods jettisoned may float to the shore and be saved, and yet, if the anchor or goods had not been cast away, they would have been "inevitably" lost and there would have been a total loss

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of both ship and cargo. Take the case of *Caze* v. *Reilly*. A vessel is completely surrounded by the enemy's cruisers. It is impossible to save both ship and cargo from capture and a total loss. A part or the whole of the cargo is thrown overboard, and thus the vessel escapes. This is an admitted case for contribution. And it is no answer to the claim of the owners to say, "Your cargo was 'inevitably' lost; as it was situated it was worthless, and consequently you sacrificed nothing for the common benefit. Besides, a portion of it floated on shore and was saved from capture, or was fished from the bottom without sustaining much injury; the throwing it overboard was the best thing that could be done for it under the circumstances, as without that it would have been *'inevitably' lost." But suppose, as in the case referred to, the ship cannot be saved by casting the cargo [*305 into the sea, but the cargo, which is of far greater value, can be saved by casting the vessel on the land, or stranding her. Is it any answer to her claim for contribution to say, that "her loss was 'inevitable,' she was in a better situation on the beach than in the hands of the enemy, or at the bottom of the sea, or wrecked upon rocks, and therefore there was no such sacrifice as would entitle her to contribution?" We cannot comprehend why this argument should have no weight in the first case (which is an admitted case of contribution in all the books), and yet that it should be held as a conclusive obstacle to the recovery in the latter. The replication to this objection in the first instance, and the conclusive one, is, "the vessel and cargo were in a common peril, where both or all could not be saved; the vessel alone, or the vessel and part of the cargo, have been saved, by casting the loss upon the cargo, and this constitutes the very hypothesis on which the doctrine of general average rests." Why, then, should there be a difference in principle, where the cargo is damaged or lost by being cast into the sea, and the ship saved, and the case where the ship is damaged or lost by a voluntary stranding, or by being cast on the land and the cargo saved, is a question which has never yet been satisfactorily answered. In fact, we do not understand the counsel to contend for the doctrine of *salva navi*, or that the Brutus was not entitled to contribution because she could not be got afloat at a less cost than her value. The principle on which the counsel relied is that enunciated in the opinion of the court in *Walker* v. *United States Ins. Co.*, 11 Serg. & R. (Pa.), 61. "It is not enough," says the learned judge, "that there be a deliberate intent to do an act which may or may not lead to a loss; there must be a deliberate purpose to sacrifice the thing at all events, or

at the very least to put it in a situation in which the danger of eventual destruction would be increased."

But, as we have already seen, the intention to destroy the *jactus*, or thing exposed to loss or damage for the benefit of the whole, makes no part of the hypothesis upon which the right of contribution is founded. Indeed, the speciousness of this assertion seems to have its force from the use of the word "sacrifice" in its popular and tropical, instead of its strict or technical meaning. The offering of sacrifices was founded on the idea of vicarious suffering. And when it is said of the *jactus*, that it is sacrificed for the benefit of the whole, it means no more than that it is selected to undergo the peril, in place of the whole, and for the benefit of the whole. It is made (if we may use another theological phrase) the "scape-goat" *306] for *the remainder of the joint property exposed to common destruction. The "*jactus*" is said to be sacrificed, not because its chance of escape was separate, but because of its selection to suffer, be it more or less, instead of the whole, whose chances of safety, as a whole, had become desperate. The imminent destruction of the whole has been evaded as a whole, and part saved, by transferring the whole peril to another part.

If a cargo of cotton, about to be captured or sunk, be thrown overboard in part or in whole, and the ship thus saved, the fact that the cotton floated to the shore and was saved, and therefore was in a better condition by being cast away than if it had remained to be captured or sunk, cannot affect its right to contribution, though it may diminish its amount. The loss or damage arising from its assuming the peril, that the ship may escape, may be truly said to be the real "sacrifice," in the popular use of the phrase. Its value is not measured by its hopes of safety, for by the hypothesis it had none; but its right to contribution is founded on its voluntary assumption to run all the risk, or bear the brunt, that the remainder may be saved from the common peril.[1] The fact that goods thrown overboard are in no worse, or even in a better, condition as to chances of safety, than if they had remained on board, or that the stranded vessel is in a better condition than if she had been wrecked or sunk, cannot affect the right to contribution of that part which was selected to suffer in place of the whole.

Having made these remarks, by way of vindicating the cases referred to, and noticing the arguments by which they have been assailed, let us briefly compare the facts of this case with the principles we have stated, and inquire, first, What was

[1] ADOPTED. *The Margarethe Blanca*, 14 Fed. Rep., 60.

the common peril? and second, Was any portion of the joint adventure saved from it by the transfer of the risk or loss to another?

The common peril, which in this case was sought to be avoided, was shipwreck, or the destruction of vessel, cargo, and crew. The ship lay at anchor; she was assailed by a violent tempest, her cables broken, her anchors gone, and she was being driven by the force of the gale broadside upon the shallows extending three miles out from the shore at Buenos Ayres. In order to save the cargo and crew, it is determined to put on sail, and run up the river to find a safe place to strand the vessel. They proceed ten miles up the river, when they encounter another peril at Point St. Isidro. To avoid being wrecked on the rocks, the course of the vessel is immediately changed, and she is steered directly for the shore, and run upon a sandy beach, where she is left high and dry by the tide. The cargo is saved without injury, but the ship is on the land, where she *is comparatively valueless, on account of the expense which must be incurred to [*307 replace her in her element. By the will and directions of the master, she has become the victim, and borne the loss, that the cargo might escape from the common peril. It is true she has not been wrecked or lost, as she inevitably would, had she been driven on the flats at Buenos Ayres by the tempest, or been foundered on the rocks off Point St. Isidro, but she has voluntarily gone on shore, which was death to her, while it brought safety to the cargo. And we are of opinion she has the same right to demand contribution that the owners of the cargo would have had against her, had it been cast into the sea to insure her safety.

There is therefore no error in the instruction given by the court below on this point.

2. The second and third instructions excepted to have reference to the place at which the goods are to be valued for the purpose of adjusting the general average.

The reasons given by the learned judge in these instructions are amply sufficient to show their propriety. The adventure was continued, notwithstanding the disaster, and terminated at New York. The goods were not returned to the shippers, and consequently no contribution could be collected at Buenos Ayres. The fact that the *Brutus* was left on the strand, and the adventure continued till the cargo reached its destination in another vessel, cannot affect the case. The place where average shall be stated is always dependent, more or less, on accidental circumstances, affecting not the technical termination of the voyage, but the actual and practical closing of the

adventure. We see nothing in the circumstances to take this case out of the general rule, that contribution should be assessed on the value at the home port.

3. The third exception relates to the allowance of the wages of the crew after the ship was stranded.

But as they were employed as mariners and quasi-salvors of the cargo, laboring for the joint benefit of the adventure, we think the exception is not supported. Their services were essential to the entire saving of the cargo. Their duties did not cease with the stranding, and they were entitled to wages while their services were required for that purpose. If the same services had been rendered by strangers, the expense would have been properly charged as a result of the disaster, in stating the average. That the same services were rendered by the crew after the Brutus was stranded, and the voyage as to them technically broken up, cannot affect the case. Even if their obligation to the ship had ceased, still their services to vessel and cargo entitled them to their wages and support as a general charge.

*308] *4. The two and a half per cent. allowed for collecting the general average rests upon the usage and custom of merchants and average brokers. It is a duty arising out of the unforeseen disaster, and resulting directly from it. Usually there are contributions to be paid out, as well as received, by the ship-owner. It is a troublesome duty, not embraced in their obligation as mere carriers. The usage is therefore not unreasonable. The objection, that it is paying the owners for merely collecting their own debt, is founded on the accidents or peculiar circumstances of this case, and does not affect the general principle on which this usage is based.

The judgment of the Circuit Court is therefore affirmed.

Mr. Justice DANIEL dissenting.

The decision just pronounced, so far as it goes, must of course be regarded as settling the law of this court upon the subject of general average, that decision being in complete accordance with the decision of *The Columbian Assurance Co.* v. *Ashby and Stribling*, 4 Peters, 139; the single case from this court previously maintaining the doctrine announced by the court in the case before us. But, however the decision now made may control the question of general average in the courts of the United States, as it must do, being the revised and reaffirmed doctrine of this tribunal, still, with the sincerest respect entertained for the opinions of my brethren, and with unaffected diffidence as to the conclusions of my own mind, I have been unable to yield to this doctrine my assent. I cannot

but regard the doctrine here affirmed as opposed to the course of opinion (the settled and undisputed opinion) in the greatest maritime and commercial nation in the world, and as subversive of the fundamental principle in which the law of average has its origin. That principle, which is traced by all writers and courts to the Rhodian law, is thus propounded by Lord Tenterden, in his work on Shipping (p. 342): "Namely, the general contribution that is to be made by all parties towards a loss sustained by some for the benefit of all." The same writer (p. 344) says that goods must be thrown overboard; the mind and agency of man must be employed. If the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. The goods must be thrown overboard for the sake of all. The same writer remarks (p. 348), that, though the rule mentions goods only, its principle extends also to the ship and its furniture.

Mr. Benecke, in his Treatise on Average (p. 96), tells us that general average has been described in the English courts to *comprise "all loss which arises in consequence of [*309 extraordinary sacrifices or expenses incurred for the preservation of the ship and cargo." After speaking of the enumeration of instances of general average in some of the Continental nations of Europe, he continues: "Although these laws and the corresponding ones of other states do not make use of the term *sacrifice*, yet their definitions imply that nothing short of a sacrifice shall be deemed a general average. All these laws may therefore be said to establish the same general principle; namely, that a sacrifice made for the preservation of the ship and cargo is general average." Again he says (p. 97): "As to the term *sacrifice*, it is clear and generally admitted, that a damage, to deserve the appellation of a sacrifice, must have been purposely undergone, and by the agency of man, for the benefit of the whole, and that every damage not purposely undergone, although the ship and cargo may be benefited by it, gives no claim to restitution." Again, it is said with great force and propriety, that the special sacrifice must be something done and not suffered; there must be the will and agency of the party making it. That it should be for the purpose, and with the intent, *causa et mente*, of the preservation of the common concern. Although the examples of this sacrifice put are usually instances of *jactus*, the principle embraced applies equally to the ship as to the cargo; thus Benecke (p. 144) says: "The case of voluntary stranding being implied in the general rules, most of the foreign ordinances omit to mention it expressly. The Prussian

law is in this respect more explicit than the others. If the captain, say sections 1820 and 1821, in order to preserve the cargo, run the vessel intentionally ashore, the damage thereby occasioned to the ship and cargo, as well as all incidental charges, belong to the general average. But if it appear clearly from the circumstances, that the stranding was resorted to merely for the purpose of saving the lives or liberty of the crew, the damage, even if the whole cargo be saved, is held to be particular average. The ancient laws, says Benecke, as well as the opinions of the English and foreign lawyers, are also in favor of this distinction. And it is, as far as I have been able to learn, the practice of all countries." The same will, the same positive action, the same purpose, and, it may be added, the same predicament or position of the actors, must exist in each class of cases. There must be intent and act, prompted by, and tending to, a practicable, or at least a probable result, and not mere endurance or submission to uncontrollable necessity in either case.

Thus, says Benecke, "when a vessel is purposely run ashore (p. 143), and afterwards got off with damage; the question *310] *whether repairs of such damage belong to general or particular average depends entirely upon the circumstances of the case. If the situation of the vessel were such as to admit of no alternative; so that, without running her ashore she would have been unavoidably lost, and that measure were resorted to for the purpose of saving the lives or liberty of the crew, no contribution can take place, because nothing, in fact, was sacrificed. But if the vessel and cargo were in a perilous, but not a desperate situation, and the measure of running her ashore deliberately adopted, as best calculated to save the ship and cargo; in that case the damage sustained, according to the fundamental rules, constitutes a claim for restitution." And Mr. Phillips, in his work on Insurance (Vol. I., p. 338), and in a note to Stevens on Average (p. 81), lays down the law, both in England and in the United States, to be this: that "the voluntary stranding of the ship is general average; but not the mere steering her to a less dangerous place for stranding, when she is inevitably drifting to the shore." I am wholly unable to perceive how, in conformity with the rules and principles above cited as constituting the foundation of general average, contribution could justly be claimed in this instance for the loss of the ship. For there is not a scintilla of proof in this cause tending to show a design to sacrifice the ship, or anything else, nor tending to prove that the course pursued was one which, under any circumstances, could possibly have been

avoided. On the contrary, the testimony establishes, as far as it is possible to establish any facts, that the stranding was the effect of the *vis major*, of an inevitable necessity,—that every effort was made to avoid this necessity, and that the only act of the mind apparent in the case was the determination, to repeat the language of Mr. Phillips, already quoted, "merely to steer her to a less dangerous place for stranding, when she was inevitably drifting to the shore;"—a determination not less for the benefit of the ship than for that of the cargo, and one falling within the general scope of the duty and discretion of every master or seaman.

There is no contrariety in the testimony in this case. The single witness, the mate, who was examined, states most explicitly the hopeless and desperate condition of the vessel;—she had lost all her anchors, was in the midst of a hurricane, and drifting to the shore under a force which the witness explicitly says nothing could resist. He therefore did not elect to run her ashore, or to make her a sacrifice for the general good; he only sought to save her as far as possible from danger or injury. It appears to me to be no slight paradox to assert, that a man is the positive and controlling agent in the *accomplishment of an effect which he merely suffers, and which is forced upon him by a power that he is [*311 wholly unable to resist or influence, and that it is equally paradoxical to declare, that we elect and seek a sacrifice or a peril from which we are most anxiously fleeing. The cases at *nisi prius* in the federal courts, and in the courts of the states referred to, leave this matter pretty much in equipoise, if indeed they do not incline to the side of the question here maintained. We have Story and Washington and Tilghman opposed to Kent and Gibson and Kennedy; with this consideration attending the decisions of the Supreme Court of Pennsylvania, that they are the most recent, and have been made upon an examination and review of the cases which they have overruled. Repeating the assurance of entire deference entertained for the opinion of my brethren, and of the sincerest diffidence of the conclusions of my own mind, yet being unable to concur in those opinions, I have no claim to share in their merits if they are right, and if they are incorrect, my position with respect to them should be equally understood.

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 in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

THOMAS HENDERSON AND THOMAS CALLOWAY, PLAINTIFFS IN ERROR, *v.* THE STATE OF TENNESSEE.

If the defendant in an ejectment suit claims a right to the possession of land derived under a title which springs from a reservation in a treaty between the United States and an Indian tribe, and a state court decides against the validity of such title, this court has jurisdiction, under the twenty-fifth section of the Judiciary Act, to review that decision.

But if such defendant merely sets up the title of the reservee as an outstanding title, and thus prevents a recovery by the plaintiff, without showing in himself a connection with the title of the reservee, and then a state court decides against the defendant in the ejectment, this court has no jurisdiction to review that decision.[1]

In order to give jurisdiction to this court, the party must claim the right for himself, and not for a third person, in whose title he has no interest.[2]

IN error to the Supreme Court of Tennessee.

An action of ejectment was brought in the Circuit Court
*312] for *Monroe County by the lessee of the state of Tennessee, against Richard Fen, for a tract of land at Toqua, with notice to R. Stapp, W. F. Brown, John Beatty, and Solomon Aikin, as tenants in possession, indorsed, "*Den, Lessee of the State*, v. *Fen, &c.*, to Henderson and Calloway, issued 27th January, 1841." The declaration and notice being returned by the sheriff as served on the tenants in possession, Stapp, Brown, Beatty, Aikin, they appeared; and on the application of Thomas Henderson and Thomas H. Calloway, they were, "by leave of the court, admitted to defend in the room and stead of the tenants sued," entered into the common rule, and pleaded not guilty.

The material facts of the case are, that the land in controversy was a school section, and that the School Commissioners had taken possession of and held it until a law was passed by the legislature of Tennessee directing the school lands to be sold. About that time one John Lowry, professedly as attorney and agent of Toqua Will, obtained possession of the land,

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[1] CITED. *Miller* v. *Lancaster Bank*, 16 Otto, 544.

[2] APPLIED. *Verdin* v. *Coleman*, 1 Black, 474. FOLLOWED. *Long* v. *Converse*, 1 Otto, 114. QUOTED. *Hale* v. *Gaines*, 22 How., 160. CITED. *Wynn* v. *Morris*, 20 How., 5. See note to *Maney* v. *Porter*, 4 How., 55.

and retained it until about 1836, when the School Commissioners regained the possession, and retained the same until 1837 or 1838. Then Thomas Henderson, one of the plaintiffs in error, got possession of the tract for the heirs of one Andrew Miller, under which title it has since been held.

Andrew Miller, at the date of the Cherokee treaty of 1817, was the head of an Indian family, and resided in the Cherokee nation, east of the Mississippi; about the 1st of March, 1818, he settled and made improvements on the land in dispute; and on the 24th of May, 1818, registered his name in the office of the Cherokee agent for a reservation in right of his wife, and designated, on the books of said agent, this land as the location by him selected for reservation. From that time until he was killed (August, 1818), he, with his wife and part of his family, resided on the land, claiming it as a reservation, on which he said he intended to live and die. A few days after his death, his widow sent for John Black, and requested him to take possession of the land and hold it for her and her children. Black offered her $1000 for her claim, which was refused. Black was placed in possession in the fall of 1818 by Mrs. Miller and George Hicks and James Chisolen, two Cherokees who had taken charge of Miller's estate. Two of Miller's children lived with Black, were sent to school, and the expense paid out of the profits of the land. Black held possession for the children of Miller, who remained with him till put off by the School Commissioners in the spring of 1822. Afterwards, Thomas Henderson got possession for the children of Andrew Miller. The land was included in the cession made to the United States by the Cherokee treaty of 1819.

*The court instructed the jury, that "although the ancestor, Andrew Miller, registered his name for the [*313 place in dispute, and took possession thereof in the spring of 1818, and died upon the place in July or August of that year, and before the treaty of 1819, no title vested in him, and consequently none could vest or descend to his heirs."

Verdict for plaintiffs. On appeal to the Supreme Court of Tennessee, the judgment of the Circuit Court of Monroe was affirmed. Thereupon the case is brought before this court by writ of error, under the twenty-fifth section of the act of September 24, 1789.

The cause was argued by *Mr. Bibb* and *Mr. Eaton*, with whom was *Mr. Green.*, for the plaintiffs in error, and *Mr. Andrew Erving* and *Mr. Stanton*, for the defendants in error.

As the case was dismissed for want of jurisdiction, only so

much of the arguments of counsel will be inserted as is applicable to the point on which the case turned.

Mr. Bibb, for the plaintiffs in error.

That part of the judge's charge to the jury is relied on to defeat the jurisdiction, wherein he said, "that it was admitted that the defendants had not any title in themselves, but relied solely on an outstanding title in the heirs of Andrew Miller."

This part of the judge's charge to the jury is excepted to, and is as erroneous as the other member of his charge in exposition of the treaties. There is no such admission in the record; no such admission was given in evidence; it is an unwarrantable assumption; it is repelled by what had been done of record, by the court, and by the parties, and is contrary to the testimony.

Henderson and Calloway were not the tenants on whom the declaration was served, but were received and admitted by the court to defend "in the room and stead of the tenants sued." According to the principles which govern the action of ejectment, it was necessary that Henderson and Calloway should show that there was a privity between them and the tenants in possession, that there was a connection and coincidence between the possession held by the tenants and the rights and interests of those admitted in their stead, so that there should be no collusive change or shifting of the possession to the injury of a third party, who might thereby be put to an ejectment to recover the possession which his tenants had surrendered improperly; "because there is a great difference between being plaintiff or defendant in ejectment."

*314] Fairclaim on dem. *of *Fowler* v. *Shamtitle*, 3 Burr., 1290, 1294, 1295, 1300, 1301, 1302.

A mere stranger to the possession shall not be admitted. *Troublesome* v. *Estill*, 1 Bibb., (Ky.), 128; *Jackson* v. *McEvoy*, 1 Cai. (N. Y.), 151; *Jackson* v. *Stiles*, 10 Johns. (N. Y.), 69.

Under the term *landlord*, the courts include every one from whom the possession is derived, and who might sustain an injury by eviction; they will be admitted to defend. *Crockett* v. *Lashbrook*, 5 Mon. (Ky.), 539.

No person is admitted to defend in ejectment unless he be tenant, and is, or has been, in possession, or receives the rent; because it is an act of champerty for any person to interpose and cover the possession with his title; and to make any person a defendant, who was not concerned in the possession of the tenement, was a mischief at common law. Runnington on Ejectment, p. 70.

But, at common law, to admit a landlord to defend an ejectment is matter of right, for otherwise he might lose his possession by combination between the plaintiff and the tenant in possession. *Fenwick* v. *Gravenor*, 7 Mod., 70; *Underhill* v. *Durham*, 1 Salk., 256; *Fairclaim d. Fowler* v. *Shamtitle*, 3 Burr., 1301; Adams on Eject., 229, 230.

If a person should be admitted to defend, whose title is inconsistent with the possession of the tenant, the lessor of the plaintiff may apply to the court, or to a judge at chambers, and have the rule discharged, with costs. Adams on Ejectment, p. 232.

The objection should have been made when Henderson and Calloway applied to be admitted to defend, if they had no title in themselves and were strangers to the possession. The court admitted them; the lessor of the plaintiff, so far from denying their right to be admitted to defend, acquiesced, made an agreement with them that they should admit the land in the declaration described was "a school section in Monroe County;" and also an agreement that they should be admitted under the order made by the court, in room of the tenants in possession, upon giving security to abide the judgment, and pay all costs that should be awarded.

The declaration was indorsed for notice to Henderson and Calloway, showing that, at the institution of the action, they were known to the attorney of the lessor of the plaintiff as the landlords.

The charge of the judge to the jury, after the said Calloway and Henderson had been so admitted to defend, and so dealt with, was illegal and erroneous, a surprise to the defendants, an injustice and wrong at a time which left no remedy but by an *exception to the charge given to the jury, which remedy was pursued. [*315

The plaintiff in ejectment proved, that, in "1837 or 1838, Thomas Henderson got possession for the heirs of Andrew Miller, under which title it has since been held." The charge of the judge to the jury was in contradiction to the act of the court in admitting Henderson and Calloway to defend, instead of the tenants in possession; the plaintiff and the court were estopped by their own acts, by the record, by the evidence, from assuming the position that Calloway and Henderson had no title in themselves, but relied solely on an outstanding title in the heirs of Andrew Miller. If such had been their predicament, they could not, without violating the established principles of law relating to actions of ejectment, have been admitted by the court as defendants in the room and stead of the tenants in possession.

This *ipse dixit* of the judge in his charge to the jury, so excepted to, and so unwarranted, cannot be taken by this court as legal and veritable, so as to defeat a revision of the final judgment of the Supreme Court under the twenty-fifth section of the Judiciary Act of the United States.

A judge, by his charge to the jury, cannot make evidence, cannot create an admission for a party, so as to bind him contrary to the facts, contrary to the record, contrary to the law. *Williams* v. *Norris*, 12 Wheat., 119. When such a charge is excepted to, it is a proper subject for revision and reversal, equally with any other error or mistake of fact or law committed by the judge.

Putting this unwarranted dictum of the judge out of the way, we come to the question of the jurisdiction of this court to re-examine the final decision of the Supreme Court of Tennessee in this action of ejectment.

The twenty-fifth section of the act of Congress approved 24th September, 1789 (1 Stat. at L., 85), provides,—"That a final judgment or decree in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of said Constitution, treaty, statute, or commission,—may be re-examined, *and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error," &c. "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute."

*316]

In this ejectment the plaintiff claimed, under a law of the state, that the land was lawfully surveyed as of the public domain of the state, and that it was lawfully appropriated as a school section, according to the plan of the surveyor of the state for the Highwassee district; the defendants claimed under the treaties of the United States of 1817 and 1819, with the Cherokee nation of Indians, authorizing reservations of 640 acres to the heads of Indian families who elected to become citizens of the United States, and under a reservation

duly taken by Andrew Miller, for himself and his family, in accordance with the said treaties.

Upon the face of the record in this case it appears, that "the principal question raised was, whether from the above facts Miller's children had any interest in said land as a reservation by virtue of the registration and residence of their father at Toqua, the place in dispute;" and it farther appears that the court instructed the jury, "that although the ancestor, Andrew Miller, registered his name for the place in dispute, and took possession thereof in the spring of 1818, and died upon the place in July or August of the same year, and before the treaty of 1819, no title vested in him, Andrew Miller, and consequently none could vest or descend to his heirs."

The case, stripped of the fictions used in actions of ejectment, is substantially a question between the commissioners of the school fund of the state of Tennessee, claiming under a law of that state, and the admitted defendants, Calloway and Henderson, claiming and holding possession of the land under the treaties of the United States; and the court gave a construction of the treaties adverse to the right, title, privilege, and possession claimed under those treaties. It is a conflict of state law and state authority with the rights claimed under the authority and treaties of the United States, and so appears plainly and palpably upon the face of the record.

But to evade the jurisdiction of this court to re-examine and reverse or affirm the final decision of the Supreme Court of Tennessee, so plainly within the reason and exigencies of the twenty-fifth section of the Judiciary Act, in a case so palpably requiring the exercise of the jurisdiction of the Supreme Court of the United States, to give the true construction of *these treaties of 1817 and 1819, and to maintain the supremacy of the laws of the United States, it is here [*317 argued, that Henderson and Calloway are not in a predicament to prosecute this writ of error.

Do not the treaties protect a possessory right held under them equally with the rights in fee simple? Is a defendant in a possessory action bound to show that he is tenant in fee? Shall a defendant in a possessory action, against whom the plaintiff has obtained an erroneous judgment, be barred of a writ of error, because on the trial he did not deduce to himself a title in fee?

That the erroneous dictum, the unfounded assumption, the gratuitous *ipse dixit*, of the judge, in his charge to the jury, is no bar, cannot alter the fact or the law, need not be farther argued.

The action of ejectment is a possessory action, invented by the courts to try possessory titles, unembarrassed by the difficulties attendant upon real actions. The declaration is a fiction, the plaintiff's name is fictitious, the defendant's name is fictitious, the lease is a fiction, the casual ejector's name is fictitious; yet all these fictions have been regulated and moulded by courts and by legislation into a system, governed by known and established principles, well adapted to the purposes of substantial justice. The distinction between a real action founded upon a right of property, and a possessory action founded upon a right of possession, is well established, and the ejectment is confined to cases in which the claimant has a right to the possession. When the claimant has only a right of property, or a right of action remaining to him, his entry upon the land would be illegal, not sufficient to enable him to make a real valid lease, and he could not maintain an ejectment, for principles remain, although the forms of proceeding are changed.

Blackstone, in his Commentaries (book 2, ch. 30, pp. 195 to 199), tells us of four several degrees requisite to form a complete title to lands;—1st. The lowest and most imperfect degree of title consists in the mere naked possession of the estate, without any apparent right, or shadow of right, to continue that possession; which is, however, *primâ facie* evidence of a legal title in the possessor, and it may, by length of time (and negligence of him who hath the right), ripen into a perfect indefeasible title. 2d. The next step to a good and perfect title is the right of possession. 3d. The mere right of property, *jus proprietatis*, without either possession or even the right of possession, where the estate of the owner is divested and "put to a right." 4th. A complete title, "*jus duplicatum*," or "*droit droit*," where there is "*juris et seisinæ conjunctio*."

*318] *As the action of ejectment is a possessory action, founded on a right to the possession, and can be maintained by a right to the possession even for a term of years, so it can be defended by one having the actual possession. A tenant, under an unexpired lease from his landlord, may successfully defend an action of ejectment against him by his landlord.

In the action of ejectment, the right of possession only is tried, not the ultimate mere right of property; and the plaintiffs must show a right of entry. *Taylor* v. *Hord*, 1 Burr., 119; *Troublesome* v. *Estill*, 1 Bibb (Ky.), 128; Adams on Eject., 10, 33, 247; Runnington on Eject., 21, 42.

The party in possession is presumed to be the owner until

the contrary is proved. The possession of the defendant gives him a right against every person who cannot show a good right to possession,—a good right to change the possession. *Roe on dem. Haldane* v. *Harvey*, 4 Burr., 2487, 2488; 2 Bl. Com., ch. 13, p. 196.

The lessor of the plaintiff and the tenants in possession, or persons admitted to defend in place of the tenants in possession, "are parties, and the only parties, to an ejectment." *Aslin* v. *Parkin*, 2 Burr., 667, 668.

The possession of the tenants sued, and the possession of the defendants, Calloway and Henderson, admitted in place and stead of the tenants, is connected with, and knit to, the title of Miller's children, growing out of the treaties of the United States with the Cherokee nation of Indians; so the plaintiff himself proved by his own witnesses. The record states, that "the principal question raised was, whether, from the above facts, Miller's children had any interest in said land, as a reservation, by virtue of the registration and residence of their father at Toqua, the place in dispute;" and the court gave instruction to the jury containing a construction of the treaties adverse to the right, title, and interest of Miller's children, and of the defendants in possession under the title growing out of the treaty.

To the opinion of the court, in admitting Henderson and Calloway as defendants "in the room and stead of the tenants sued," "to defend in the room of the tenants in possession," the plaintiff took no bill of exception; he acquiesced and assented of record. It cannot now be alleged that the evidence adduced by Calloway and Henderson, of their being landlords to the tenants in possession, was insufficient to admit them to defend in the room and stead of the tenants upon whom the declaration was served.

That question cannot now be raised in this court. It is not now an open question. Henderson and Calloway are the defendants, against whom the plaintiff has taken his judgment *for the possession and for the costs of suit. They had [*319
the right to appeal, and did appeal, to the Supreme Court of Tennessee; they have the right, under the twenty-fifth section of the Judiciary Act, to have the construction of the treaties, as given in the Circuit Court of Monroe County, and as affirmed by the Supreme Court of Tennessee, re-examined and reversed or affirmed by the Supreme Court of the United States.

The Supreme Court of Tennessee, in affirming the judgment of the Circuit Court of Monroe County, affirmed the

construction of the treaties as set forth in the bill of exceptions.

The following cases, decided upon the jurisdiction of this court, under the twenty-fifth section of the Judiciary Act, will suffice to sustain the jurisdiction in this case. *Craig* v. *The State of Missouri*, 4 Pet., 229; *Worcester* v. *The State of Georgia*, 6 Id., 515, 582, 583, 597; *Crowell* v. *Randell*, 10 Id., 391–399.

In this case of *Crowell* v. *Randell*, fourteen previous decisions of this court upon this twenty-fifth section are reviewed, and the doctrine reaffirmed, "that it is not necessary that the question should appear on the record to have been raised, and the decision made, in direct and positive terms, '*ipsissimis verbis*,' but it is sufficient if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided, in order to have induced the judgment."

The case of *Owings* v. *Norwood's Lessee*, 5 Cranch, 344, has been relied on as being adverse to the jurisdiction of this court, in the case under consideration. *Norwood's lessee* claimed under a grant from the state of Maryland, dated in June, 1800, founded upon a confiscation of the land called Brown's Adventure. Owings, to defeat the action of Norwood's lessee, attempted to set up, as an outstanding title, a patent of the year 1695, to Thomas Brown, who conveyed to John Gadsby, who conveyed to Aaron Rawlins, in 1703, who mortgaged in fee to Jonathan Scarth, by deed of 1706, with a proviso to be void upon payment of £800, with interest, on the 13th of May, 1709. This mortgage to Scarth, Owings set up to show a title outstanding against Norwood's lessee, contending that the mortgage to Scarth was protected by the treaty of 1794, between the United States and Great Britain, from confiscation, and was still a security for the money to the representatives of Scarth, who were proved to be still living in England. But the Court of Appeals of Maryland decided, that, at the expiration of the time for payment limited in the deed to Scarth, a complete legal estate vested in the mortgagee, Scarth, liable to confiscation; and was confiscated by virtue of the act of Maryland of October session, 1780, ch. 45, and vested in the state; and that the British treaty did not affect the plaintiff's title.

*320] *Upon the writ of error to the Supreme Court of the United States, the court decided that the case of Scarth's representatives was not protected by the treaty, and that the right set up by the plaintiff in error did not grow out of the treaty. And most certainly that right, so set up by

Owings, originated more than fourscore years before the treaty. Surely that case has no similitude to this. The explanation of Chief Justice Marshall (5 Cranch, 348) maintains the jurisdiction of this court in the case now under consideration. A right in fee simple, growing out of a treaty, is protected in whole, and in all its parts and interests, which are holden or possessed, subordinate to the estate in fee; and the Judiciary Act will come in aid of the protection, when the lowest grade of such interest shall be drawn in question in the state courts, either directly or "incidentally." Such is the true effect of the decision in *Owings* v. *Norwood's Lessee;* such is the true construction of the Constitution and the twenty-fifth section of the Judiciary Act.

Mr. Ewing, contra.

This court cannot obtain jurisdiction by mere consent of parties. It was the policy of the law to commit to this court certain specified cases arising in the state courts. If the case is within the Judiciary Act, jurisdiction follows. If not, no matter what the parties may have agreed, or what they may be estopped from denying, or what the court below may have permitted, or what it may be estopped from denying, this court has no jurisdiction of the matter. It might be true, then, as it has been urged, that, after we had admitted the plaintiffs in error to defend in the court below, we might be estopped from denying that they had title in themselves, and did not rely solely on an outstanding title in the heirs of Andrew Miller; and yet neither the admission nor the estoppel would confer jurisdiction on this court. This court will take notice of its own jurisdiction. And no matter at what stage of the proceedings a want of jurisdiction may appear, or in what manner it may appear, the court will act upon it, notwithstanding any technical or other admissions of the parties to the record.

By the statute of Tennessee, children cannot be concluded unless they are brought before the court. Now here you would conclude the children of Miller, though the facts do not show any privity between the plaintiffs in error and the heirs of Miller. Henderson and Calloway set up an outstanding title in the heirs of Miller, under the treaty, and attempt thus to give jurisdiction to this court. And if this court entertain the case, it determines the rights of the heirs of Miller under the treaty, although they are not before the court. And if the rights of *the heirs of Miller should ever hereafter be brought before this court for adjudication, [*321

it would be held that, by the present decision, their rights are determined. 5 Cranch, 344.

Mr. Stanton, on the same side.

Is there any proper proof of any such privity between the plaintiffs in error and the heirs of Miller, as would enable the former to set up the title of Miller's heirs as their own, and thus bring it within the treaty? The bill of exceptions upon its face shows that it was put in by consent, and was undoubtedly drawn up by the attorney, and signed by the judge, as is the practice in Tennessee. The facts were not set down precisely in order as they were proven.

The argument on the other side would lead us to the conclusion that it is the duty of this court "*ampliare jurisdictionem.*" We maintain precisely the reverse; and in this case especially, that the mere fact of the defendants below setting up an outstanding title, out of themselves, without a claim in themselves under the treaty, cannot confer jurisdiction. The true construction of the statute is, that the persons intended to be benefited must have a direct interest under the statute or treaty, and specially set up that interest in the state court. Otherwise, the true holders of the title would have their rights adjudicated, when they were not parties to the suit. 5 Cranch, 344; 12 Wheat., 117.

Inasmuch as the plaintiffs in error are only entitled to come into this court, under the Judiciary Act, by virtue of the outstanding title in the heirs of Andrew Miller, they are entirely precluded from the forum for want of privity with those heirs.

Mr. Eaton, in reply and conclusion.

Under the twenty-fifth section of the Judiciary Act, the only question is, not one of *meum* and *tuum*, but whether the construction of a treaty or law of the United States is involved. The eighth article of the treaty of 1817 gave a life estate to the head of a family, dower to the widow, and remainder in fee to the children. Andrew Miller was the head of an Indian family, and was registered as such. The land claimed, it is true, was not within that ceded by the treaty of 1817, but by that of 1819. But we claim that the true construction of those treaties is, that the latter was but the continuation of the former. And it is this construction of those treaties which gives us a standing in this court. It is not a mere outstanding title which we set up. The bill of exceptions expressly states, that "Thomas Henderson (one of the plaintiffs in error) got possession for the heirs of Andrew Miller, under which title it has *since been held." We hold under that title, then. And it is our title under

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the heirs of Andrew Miller, and their title under the treaties of 1817 and 1819, which is in fact one and the same title, that is involved. The children of Miller were actually on the land enjoying the rents until put off by the School Commissioners. The statutes of the state of Tennessee override the treaties of the United States.

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

The first question to be decided in this case is, whether the court has jurisdiction.

The case is brought before us by a writ of error to the Supreme Court of the state of Tennessee. It appears by the record, that the decision turned upon the title of Andrew Miller to the lands in question, under the treaties of 1817 and 1819, with the Cherokee nation. Andrew Miller was the head of an Indian family when the first treaty was made, and it was insisted at the trial that the title to this land was in his heirs, by virtue of the reservations contained in these treaties. The decision was against the validity of this title, and the question is, whether the plaintiffs in error claimed under it. If they did not, this court has no power to revise the judgment of the state court.

It was an action of ejectment. The plaintiffs in error were permitted by the court to appear as defendants. They were not the tenants in possession when the suit was brought. The process was served on other persons named in the proceedings, and the record does not show in what character, or upon what ground, the plaintiffs in error were permitted to appear and defend the suit.

Andrew Miller died in 1818, and the land in dispute was held for his children until 1822, when the state took possession of it, claiming title. The widow of Miller removed to the Cherokee nation, in their new settlement on the west of the Mississippi, soon after his death, and the children followed her when the state took possession of the land; and they have all remained there ever since. The right to this property appears to have been continually in dispute since the treaties above mentioned, and after the removal of Miller's children the possession changed hands several times before this suit was brought.

The bill of exceptions states that Henderson, one of the plaintiffs in error, got possession for the heirs of Andrew Miller in 1837 or 1838, under which title it was held down to the commencement of this suit. But it is not stated that he or Calloway had any authority from the heirs of Andrew Miller.

*On the contrary, it is expressly stated that they set up no title in themselves, but relied for their defence on an outstanding title in the heirs of Andrew Miller.

Now, in the language of ejectment law, an outstanding title means a title in a third person, under which the tenant in possession does not claim. And as no one has a right to enter upon the land and eject the tenant but the person holding the legal title, if the tenant can show that the title was in a third person it defeats the action, although the tenant sets up no title in himself. This was the defence in the case before the court. If they had been in possession under the heirs of Miller, as tenants holding under their authority, then the title of the heirs would have been the title of the tenants, and they could have defended their possession, by showing title in themselves derived from the heirs. For although the landlord may appear and defend on account of his own interest, yet his appearance is not necessary for the protection of the tenant. The tenant may show the title of the landlord, and his own right derived from him. And if the plaintiffs in error had made this defence, they would evidently have claimed a right to the possession under a treaty of the United States; and as the decision was against the right, this court would have jurisdiction, and might reverse the judgment if they deemed it erroneous. But they claimed no right to the possession under this title. They set it up as a title in a third person, not to show a right in themselves, but that the lessor of the plaintiff had none, and therefore had no right to enter upon them. They might have been mere trespassers or intruders, without any authority from the legal owner, and yet this defence would have been a good one, if the outstanding title was superior to that produced by the lessor of the plaintiff.

The right to make this defence is not derived from the treaties, nor from any authority exercised under the general government. It is given by the laws of the state, which provide that the defendant in ejectment may set up title in a stranger in bar of the action. It is true, the title set up in this case was claimed under a treaty. But to give jurisdiction to this court, the party must claim the right for himself, and not for a third person in whose title he has no interest. The case in 5 Cranch, 344, *Owings* v. *Norwood's Lessee*, is in point. And the same doctrine was reaffirmed in *Montgomery* v. *Hernandez*, 12 Wheat., 129; *Fulton* v. *McAffee*, 16 Pet., 149; and *Udell* v. *Davidson*, 7 How., 769.

The heirs of Miller appear to have no interest in this suit, nor can their rights be affected by the decision. The judg

ment in this case is no obstacle to the assertion of their title in another *suit, brought by themselves or any person [*324
claiming a legal title under them. And in such a suit this court would have jurisdiction upon a writ of error, whether the judgment was in a Circuit Court of the United States or in a state court.

But this writ of error must be dismissed for want of jurisdiction.

Mr. Justice WOODBURY dissented from the opinion delivered by the court.

My view of the present case is, that this tribunal has jurisdiction over it, and, also, that the judgment below ought to be reversed.

In order to enable us to exercise jurisdiction in this class of causes, it need only appear, that in the state court some right or title set up under a treaty with the United States was drawn in question and overruled. The title set up below by the defendants seems very clearly to have been one of this character. The record states that "it was proved by sundry witnesses that Andrew Miller was the head of an Indian family; resided in the Cherokee nation east of the Mississippi at the date of the treaty of 1817, between the United States and the Cherokee nation; that from the spring of 1818 till his death in July or August of the same year, he resided on the land in dispute, claiming the same as a reservation, where he said he intended to live and die; and that the land in dispute was not ceded by the treaty of 1817, but was by that of 1819." Now, on such facts it is averred and admitted that the court instructed the jury, "that although the ancestor, Andrew Miller, registered his name for the place in dispute, and took possession thereof in the spring of 1818, and died upon the place in July or August of the same year, and before the treaty of 1819, no title vested in him, Andrew Miller, and consequently none could vest or descend to his heirs."

It is difficult to conceive how it is possible to say, that a title under a treaty was not thus set up or drawn in question, and was not overruled by the state court, so as to give to this court jurisdiction to revise any error committed. Such a title seems to have been the only one interposed against a recovery, and was the only one decided on below, and was there explicitly overruled.

The sole argument offered here to obviate this conclusion does not appear to have been there presented or relied on. It is, that, though Miller's title was there set up and overruled,

it was not set up as existing in the tenants, or as the title under which they entered or claimed.

*325] *But the Judiciary Act, in order to give to this court jurisdiction under the twenty-fifth section, does not in terms require that such title should have been entirely vested in the tenants. It seems sufficient if it was drawn in question, or was set up, and could legally be set up, in defence, and was overruled. (1 Stat. at L., 85.)

What is *drawn in question* in any case depends on the facts and the law applicable to that particular case. Here the title of Miller's heirs under the treaty, I have already shown, was certainly drawn in question, and as certainly was overruled by the judge.

But it is argued, that the defendant must have had a right under the United States to make the defence, or we have no jurisdiction. That, however, is begging the question on the merits. It seems quite sufficient to have him set up such a right and to have it overruled.

Here, too, the court below seemed to concede, that Henderson possessed such a right under Miller's heirs; but decided against him, on the ground that the right of Miller himself was defective.

Again, the question of right is not the guide, but the question of claim, and the claim being overruled. Nor need the claim be to the whole estate or interest. In such an action as this, the persons in possession may have, in themselves, no title in fee, nor for life, nor even for years. It is sufficient if a mere tenancy at will, for or in behalf of those possessing a larger estate, is claimed.

So it may be only a naked possession, if the legal estate is shown to be in other persons than the plaintiff, the latter not being authorized to disturb the possession of the tenant, unless he has the legal estate. 4 Burr., 2484; 9 Wheat., 515; *Greenleaf's Lessee* v. *Birth*, 6 Pet., 302.

Here, however, the defendants appear to have gone further, and to have made a claim in privity with the heirs, or set up a right under Miller and the treaty, though not to the whole interest. In a just view of the record, therefore, they seem to have brought themselves within what is now required, even by the opinion of this court. Because, though the original defendants claimed no title in themselves, unless it was a tenancy at will under Henderson and Calloway, and hence, probably, the latter were requested to defend, and did defend, yet it clearly appears on the record, that the latter set up rights for the heirs of Miller, and relied in defence on the title of those heirs, and the court did not overrule the propriety of

such a mode of defence, but the title itself of Miller's heirs set up under the Cherokee treaties.

*The title under the treaty was not only thus set up and overruled, but it was set up by Henderson and Calloway, claiming rights under it in privity under the heirs of Miller. [*326

The widow of Miller, as early as 1818, is proved to have put Black in actual possession of the land, "to hold it for her and the heirs of Andrew Miller." And he, with two of the children, remained in possession and cultivated the land till 1822. No question can exist, that, if Black was the defendant here, he could rightfully protect himself under the Miller title. But it is said that Henderson and Calloway were never, like him, put into possession by the widow or the heirs, and never held it for them with any privity by lease or otherwise. We think differently. Another portion of the record says expressly, after Black had been expelled by the plaintiffs, and the plaintiffs by others, between 1822 and 1837 or 1838, that "Thomas Henderson got possession for the heirs of Andrew Miller, under which title it has since been held."

During the three or four years which ensued before this action was instituted, it would therefore appear, not only that the present defendants were in possession, in person or by others, "for the heirs," which is the very expression used as to Black's possession, but would naturally mean in one case, no less than the other, with the privity or request of the heirs, and as agents for them. But to remove all doubt as to this in respect to Henderson, who entered for the heirs of Miller, the record adds, that under the Miller "title it has since been held."

Giving a fair construction to all the words in the record, and to all the other facts stated, it is difficult to misunderstand this language. The widow and heirs regarded the reservation as valuable. She refused to sell their rights in it for $1000 offered by Black. It was not abandoned as unworthy of attention; but Black was first put into possession with privity as agent or tenant to them. And after he was expelled, Henderson, as another agent, seems not only to have regained the possession for the heirs, but to have held it by their title since, and probably as their agent or tenant, with like privity. The notice to Henderson, likewise, to take on himself the defence in this case, and his admission by the court to defend, confirm this view. A third person, disconnected entirely with the title or right of possession, would not usually be admitted. 10 Johns. (N. Y.), 69; 1 Cai. (N. Y.), 151; *Fairclaim* v. *Shamtitle*, 3 Burr., 1299, 1301. He was doubtless

admitted, then, from his connection with Miller's title. Lord Holt says (Comb., 209), "No person is admitted to defend in ejectment unless he be tenant, and is or hath been in possession or receives the rent." Bac. Abr. *Ejectment*, B. 2. Runnington on Eject., 192, 199, 201, 209.

*327] *It is urged further in objection, that Miller's heirs are not parties here. Neither is the owner of the fee a party in ejectment in any case where a lessee or agent under him makes a sub-lease and is admitted to defend for his sub-lessee.

Looking to the whole record, then, these considerations seem to dispose of the question of jurisdiction in favor of the original defendants. But the plaintiffs below rely on some detached expressions in the record from which to infer a different result. Such as the judge speaking of "an outstanding title" in Miller's heirs. Probably, as already explained from the whole case, the judge meant, by the words "outstanding title," one which did not exist in the plaintiffs, and one which, though represented by, had not been conveyed to, the defendants by any formal deed. Under that aspect, all is natural, and our jurisdiction is unimpaired. Such a case would be entirely unlike that of *Owings* v. *Norwood's Lessee*, 5 Cranch, 344. But if he meant by *outstanding title* one which existed elsewhere, but which the defendants did not set up, nor mean to avail themselves of as a defence by their connection with it, he departs in all essentials from the rest of the record, and all the proof in it, that Henderson entered for the heirs of Miller, held it two or three years under their title, and set it up as his defence.

My dissent rests on this view of the case, though it is by no means certain, that, if a naked outstanding title were shown merely to defeat the plaintiff, and not held under nor relies on through any privity in defence, and it was examined by the court below, when set up to defeat the action, we should not exercise jurisdiction to revise the decision, if a treaty connected with that title is there overruled; because the treaty is a part of the defence there, as much as in other cases. It is relied on for exemption in the action as much as in other cases. The title under a treaty is called in question and decided against as fully as in other cases. The dangers from such a defence being overruled by a state court are as serious as in other cases.

So a judgment of a state court is reversible here at all only when in collision with defences offered under authority from the United States. And here the state court not only overruled an authority so set up, but did it in favor of their own state and of their own citizens, and against the validity of a

claim in behalf of an Indian widow and Indian orphans. On general principles, therefore, and with entire respect for the court of Tennessee, it would seem proper, that, if any case should be open to revision by another tribunal, it ought to be one of this character.

*As it would be of no use to sustain jurisdiction here, unless in favor of the validity of the title overruled, I would add a few words as to the merits being with the Miller title. It must be conceded, that the title of Miller's heirs ought to be upheld against the plaintiffs, if it became perfected before his death; or if it was so perfected afterwards as to operate or relate back to a time before his death. [*328

The judge below rested his ruling entirely on the position that Miller, dying before the treaty of 1819, though after that of 1817, had acquired no title to the land claimed. But he had fulfilled all the requisites of the treaty of 1817, not afterwards varied by that of 1819. He entered on the lands under the treaty of 1817, which extended to territory afterwards, as well as then, ceded. He improved them under it. He was the head of an Indian family. He registered them under it. See Treaty, art. 8 (7 Stat. at L., 159). He resided on them under it. And the only remaining requisite, the census, which had been provided for by the first treaty, was dispensed with by the treaty of 1819 (7 Stat. at L., 195). Though his death, then, had intervened, his rights had commenced under the treaty of 1817, and become perfected by it and by that of 1819, ceding the territory and dispensing with the census. All, then, should relate back to the period of his entry and registration.

It is very familiar law to have proceedings operate back to their commencement, and references need not be extended beyond the common cases of amendments in writs, records, and returns, as well as titles to land confirmed or ratified where before partly completed. Com. Dig. *Confirmation;* Vin. Abr. *Relation;* 4 Kent. Com., 450, *n.*; *Clary's Heirs* v. *Marshall's Heirs*, 5 B. Mon. (Ky.), 266; *Landes* v. *Brant*, *post*, *348; 12 Johns. (N. Y.), 141; 3 Cow. (N. Y.), 75; 12 Mo., 145.

As this court, in the opinion just delivered, has not gone into the consideration of the validity of the title of Miller's heirs, I forbear further remarks upon it until brought before us in some other action and form, more acceptable to a majority of the members of this tribunal.

Justices McLEAN, WAYNE, and McKINLEY concurred with Mr. Justice WOODBURY.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of the state of Tennessee, 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 the want of jurisdiction.

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*JAMES STIMPSON, PLAINTIFF IN ERROR, *v.* THE BALTIMORE AND SUSQUEHANNA RAILROAD COMPANY.

Stimpson's patent "for an improvement for the purpose of carrying railroads through the streets of towns, or in other situations where it may be desirable that the wheels of ordinary carriages should not be subjected to injury or obstruction," decided to be a combination or application of means already known and in use, and not to be original as to the invention or discovery of those means.

That the mode given by him for the application of those means, and the objects proposed thereby, differ materially from the apparatus used by the Baltimore and Susquehanna Railroad Company for turning the corners of streets. The latter, therefore, no infringement of Stimpson's patent.[1]

The practice of bringing cases up to this court upon an agreed state of facts has been sanctioned, and is now pronounced to be correct.[2]

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[1] CITED. *Gould* v. *Rees*, 15 Wall., 194; *Gill* v. *Wells*, 22 Id., 28; *Reedy* v. *Scott*, 23 Id., 367;

[2] FOLLOWED. *Pomeroy* v. *Bank of Indiana*, 1 Wall., 602. RECOGNIZED. *Graham* v. *Bayne*, 18 How., 62. CITED. *Suydam* v. *Williamson*, 20 How., 434; *Henderson's Distilled Spirits*, 14 Wall., 53; *Supervisors* v. *Kennicott*, 13 Otto, 556; s. c., 2 Morr. Tr., 491.

"The statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the function of the jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of facts on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon." *Burr* v. *Des Moines Co.*, 1 Wall., 102; *Pomeroy* v. *State Bank of Indiana*, Id., 592. S. P. *Crews* v. *Brewer*, 19 Id., 70.

A statement of facts, made and filed by the judge several days after the issue and service of the writ of error in the case, is a nullity. *Generes* v. *Bonnemer*, 7 Wall., 564; *Avendano* v. *Gay*, 8 Id., 376.

Under the act of March 3d, 1865, authorizing the trial of facts by Circuit Courts, the court must itself find the facts in order to authorize a writ of error to its judgment. A statement of facts signed by counsel and filed after judgment is insufficient. *Bethell* v. *Mathews*, 13 Wall., 1.

Where the record contains only an agreed statement of facts, it is not in conformity with the eleventh and thirty-first rules of the Supreme Court, and the case will be dismissed. *Curtis* v. *Petitpain*, 18 How., 109.

ERROR to the Circuit Court of the United States for the District of Maryland.

The plaintiff in error brought an action in the court below, for an alleged infringement of his patent right by the defendant in error.

The cause was not tried by a jury, but was submitted to the court upon the statement of facts hereinafter inserted. Judgment for the defendant, upon which the plaintiff sued out this writ of error.

Statement of Facts.

It is agreed that the privilege of the invention set forth or referred to in the declaration was intended to be secured to the plaintiff by letters patent, dated the 23d August, 1831; that said patent, for defectiveness of specification, was surrendered, and another instead thereof issued on 26th September, 1835; and that this last was, for like reason, surrendered, and another issued in place of it, bearing date the 27th day of August, A. D. 1840; and that said patent right was duly extended for the term of seven years from the 23d day of August, A. D. 1845, the period of the expiration of the term of said original letters patent. The invention is described in the specification in the words following, to wit:—

Specification.

"The schedule referred to in these letters patent, and making part of the same.

"To all whom it may concern:

"Be it known, that I, James Stimpson, of the city of Baltimore, in the state of Maryland, have invented a new and useful improvement in the mode of forming and using cast or wrought iron plates or rails for railroad carriage-wheels to run upon; more especially for those to be used on the streets of *cities, on wharves, and elsewhere; and I do hereby declare, that the following is a full and exact description of my said inventions or improvements: [*330

"For the purpose of carrying railroads through the streets of towns or cities, and in other situations where circumstances may render it desirable that the wheels of ordinary carriages should not be subjected to injury or obstruction, I so construct or form the rails, that the flanches of the wheels of railroad cars or carriages may be received and run within narrow grooves or channels, formed in or by said rails, said grooves not being sufficiently wide to admit the rims of the wheels of gigs or other ordinary carriages having wheels of the narrow-

est kind. These plates or rails may be varied in form, according to circumstances.

"In the accompanying drawing, figure 1 represents a railroad track, supposed to be formed in a street, a part of it being shown as straight and a part as curved. The other figures give sectional views of various forms in which I make my railway bars or plates, which are usually of cast-iron, and are laid down and secured upon rails of wood. Figure 2 is a section of the form of cast-iron rail plate which I most commonly use where the track is slightly curved; and figure 3, a plate nearly the same with figure 2, which I use where the track is nearly or quite straight. In these plates I make a groove or channel, as at *a*, which is to receive the flanch of the wheel. This channel should be about an inch and a half wide at the top, and about an inch and a quarter at bottom; it is sufficiently deep to admit the flanch of the wheel to run in it without touching its bottom. The lower corners of the interior of this channel I make rounding or curved, in order that any dirt or other foreign matter collected therein may be the more readily forced out by the action of the flanches. The cheek or jam, which is on the inside of the channel, should be about three fourths of an inch wider at top, and as high, or nearly so, as the face *c* of the plate upon which the tread of the wheel is to run. These plates I cast hollow at *d*, to save weight. They should be about two inches and a quarter deep, six inches and a half wide at the bottom, and about six inches and a quarter at the top; the taper at their sides, when thus formed, aiding in confining them in place by the wedging of the stones and earth of the pavement against them; they may be cast three or four feet in length; their ends should be bevelled, say at an angle of forty-five degrees; or they may be formed with a tenon and mortise. They have spike-holes through them, in order to fasten them down to the rails of wood or of stone upon which they are placed.

*331] *"Figure 3 is the same with figure 2, excepting that it has a slight chamfer or rounding off of the angle of the face, as shown at *e*, to admit the cone or curve on the tread of the wheel where it joins the flanch to run free, so that the general tread of the wheel may bear on the face *c* of the plate, which face I prefer to make a little crowning.

"Where the road is perfectly straight, as at A, on the track, this chamfered edge plate is to be preferred; but where it is slightly curved, as at B, on the track, I use on the outside of the curve the rails shown in figure 2, which are not chamfered, as the conical or larger part of the tread of the wheel close to the flanch will then bear upon the edge *e*, and this

being larger than the tread, will cause the wheels to roll round such curved parts of the road with little or no slipping.

"Where it is necessary to turn a curve of shorter radius than that which could be readily effected by the aid of the conical part of the wheel, as at C, on the track, I then resort to the plan, secured to me by letters patent, for 'turning short curves on railroads,' which letters patent bear the same date, having been granted on the same day with the letters patent of which this instrument makes a part, for railroad plates to be used on the streets of cities, &c.; that is to say, I apply 'the flanches of the wheels on one side of the railroad carriages, and the tread of the wheels on the other side, to turn curves on railways.' In this case, a railroad plate may be made, like that shown in figure 4, to form the channel for the wheel on the larger or outer curve. In this case, the groove or channel is not to be equal in depth to the rise or projection of the flanch, so that the flanch alone bears on the rail on this outer side, and takes the whole weight of the load, thus freeing the tread of the wheel on that side from the face of the plate, for the distance necessary to turn the curve; for a full exemplification of which plan, I refer to said letters patent for 'turning short curves.' Such curves, however, will rarely if ever occur, excepting in the turning of the corners of streets; and to this particular mode I make no claim in the present patent. When the wheels arrive at the straight part of a track, after having run upon a curved part, the rails shown in figure 3 are used, or others of a like nature.

"It is to be understood that the object had in view in varying the form of the rails by chamfering, as in figure 3, or by omitting the chamfer, as in figure 2, is to attain the same end, namely, the running with little friction or dragging around curves in the streets, which is attained, on the ordinary railroad tracks out of cities, by allowing the cars to vibrate from side to side, so that the varying diameter on the conical parts of the *treads of the wheels may cause them to adapt themselves to curvatures on the road. The narrow [*332 channel used by me, and so essential in cities, does not admit of this lateral vibration, but, by the devices above described, a similar result is attained.

"In most cases for passing along streets, and more especially when the iron rails are imbedded in rails or sills of stone, I prefer so to construct the said iron rails as that the wheels shall run altogether on the flanches. In this case, I use iron plates, such as are represented in figure 4. These plates may be made two inches and three quarters wide at top, and three inches at the bottom; the channel or groove may be about five

eighths of an inch in depth, and an inch and a quarter wide at the top, and an inch at the bottom; the corners, at the bottom of the groove, being curved as in figures 2 and 3. The thickness below the bottom of the groove or channel may be three fourths of an inch; the plates would then be one inch and three eighths in depth. These shallow-channelled plates present several advantages, among which are, that they will offer less resistance than others to the motion of the cars; they are much lighter than others; they will not require any cleaning out, the flanches effecting this perfectly, which may not always be the case in deeper channels. These shallow channels may be made narrower than the deeper ones, the flanches being much thinner at their outer edges than they are near to the treads of the wheels. The wheels will, undoubtedly, be as safely guided in the shallow as in the deeper channels, and the rails will be equally durable with those of greater weight. When rails of this description are sunk into a channel in a rail of stone or wood, the base being wider than their upper sides, the pressure of sand into the seams on each side of the iron, caused by the running of common carriage wheels over them, will effectually confine the iron plates between the jambs of the stone or wood. Figure 6 shows a rail plate resembling figure 4, but having a channel the whole depth of the flanch.

"Should it be preferred to use the ordinary flat wrought-iron rails, they may be laid double, at such a distance apart as to form the proper channel for the flanch between them; *f f*, figure 5, are sections of two such iron plates, and are shown as used at D on the track. Wrought plates may also be formed in the manner represented in figure 7. This plate is rolled so as to have a channel, *a*, in it, which may be one inch and a quarter wide at top, one inch at bottom, and five eighths of an inch deep. The plate, *g g*, on each side of the channel, may be two inches wide; the whole plate may be of uniform thickness, and furnished with spike-holes alternately on each side of the channels; these are supposed to be used
*333] at E on the track. Where *it is necessary to cross a water-gutter in the street, I use a cast-iron plate or plates to cross said gutter, the flanch channels being in such plate or plates. The whole surface between the channels is cast rough, to prevent the slipping of the feet of horses. The aforesaid cast-iron plate is best cast in one piece, as it will be stronger than if divided; although of the same thickness, it must, of course, be of a width sufficient for the particular gutter to which it is to be applied, and it should be strengthened by having ribs cast on its lower side; these should be

about an inch and a quarter deep, exclusive of the thickness of the plate. In some cases I cover the gutters the whole width of the street with such cast-iron plates, and extend them to some distance beyond the curbings. I thus make a great improvement in streets for the ordinary purposes of travel. Such a plate is shown in figure 8, *a a* being the grooved channels cast therein, and *h h* the upper face of the plate, cast rough or checkered.

"Having thus fully described the nature of my improvements, and pointed out various modes in which the same may be carried into effect, what I claim as constituting my invention, and desire to secure by letters patent, is the employment of plates or rails, either of cast or of wrought iron, constructed and operating upon the principle or in the manner herein described; having narrow grooves on each side of the track for the flanches of car-wheels to run in, by which they are adapted to the unobstructed passing over them of the various kinds of common carriages, and to the running of the wheels on slight curves without dragging. I also claim, in combination with such grooved rails or tracks, the employment of plates of cast-iron for the covering and crossing of gutters, such plates being constructed as described, and having the necessary flanch channels cast in them. And I do hereby declare, that I do not intend to confine myself to the precise forms and dimensions herein given, these being designed merely to exemplify, in a clear manner, the nature, object, and mode of carrying into effect of my said invention.

JAMES STIMPSON.

"Witnesses,—J. M. STIMPSON,
S. E. STIMPSON.

"Whereas, upon the petition of James Stimpson for an extension of the within patent, granted to the said Stimpson on the 25th day of August, 1831, the Board of Commissioners, under the eighteenth section of act of Congress approved the 4th day of July, 1836, entitled 'An act to promote the progress of the useful arts, and to repeal all acts and *parts of acts heretofore made for that purpose,' did, on the 21st [*334 day of August, 1845, certify that said patent ought to be extended: Now, therefore, I, Edmund Burke, Commissioner of Patents, by virtue of the power vested in me by said eighteenth section, do renew and extend said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, viz., the 23d day of August, 1845; which certificate of the said Board of Commissioners, together with this certificate of the Commis-

sioner of Patents, having been duly entered of record in the Patent-Office, the said patent now has the same effect in law as though the same had been originally granted for the term of twenty-one years.

"In testimony whereof, I have caused the seal of the Patent-Office to be hereunto affixed, this 21st day of August, [SEAL.] 1845.

"EDMUND BURKE, *Commissioner of Patents.*"

It is admitted, that, for the invention of the plaintiff referred to in the above-mentioned specification as being for "turning short corners," a patent, dated 23d August, 1831, duly issued to him, which, for defect in specification, was surrendered; and that another, in place of it, issued to him, dated the 26th of September, 1835, and that said patent was duly extended for the term of seven years from the 23d of August, 1845, when the term of said original patent ended.

It is admitted that the invention for "turning short corners," as described in the specification in the patent of the 26th of September, 1835, was as follows, to wit:—

Specification.

"The schedule referred to in these letters patent, and making part of the same, containing a description, in the words of the said James Stimpson himself, of his improvement in the mode of turning short curves on railroads, for which letters patent were granted, dated the 23d day of August, 1831, which letters patent are hereby cancelled on account of a defective specification.

"To all to whom these presents shall come:

"Be it known that I, James Stimpson, of the city and county of Baltimore and state of Maryland, have invented a new and useful improvement in the mode of turning short curves upon railroads with railroad carriages, particularly those round the corners of streets, wharves, &c., and that the following is a full and exact description of said invention or improvements as invented or improved by me, viz.:—

*335] *"I use or apply the common peripheries of the flanches of the wheels for the aforesaid purpose in the following manner:—

"I lay a flat rail, which, however, may be grooved, if preferred, at the commencement of the curvature, and in a position to be centrally under the flanches of the wheels upon the outer track of the circle, so that no other part of the wheels which run upon the outer circle of the track rails shall touch

or bear upon the rails but the peripheries of the flanches, they bearing the whole weight of the load and carriage, while the opposite wheels which run upon the inner track of the circle, are to be run and bear upon their treads in the usual way, and their flanches run freely in a groove or channel, which treads are ordinarily about three inches in diameter less than the peripheries of the flanches. Were the bearing surfaces of the wheels which are in contact with the rails while thus turning the curve to be connected by straight lines from every point, there would thus be formed the frustums of two cones (if there be four wheels and two axles to the carriage), or if but one axle and two wheels, then but one cone; which frustums, or the wheels representing their extremities, will, if the wheels are thirty inches in diameter, and are coupled about three feet six inches apart, turn a curve of about sixty feet radius of the inner track rail. The difference in diameter between the flanches and treads being as before stated, and the tracks of the usual width, the wheels coupled as stated would turn a curve of a somewhat smaller radius if the axles were not confined to the carriage, and in a parallel position with each other; but this generally deemed necessary, the wheels run upon lines of tangents, and those upon the inner track, being as wide apart in the coupling as the outer ones, keep constantly inclining the carriage outwards, and thus cause the carriage to tend to run upon a larger circle than the difference in diameter of the treads and flanches would otherwise give; but the depth of the flanches and the couplings may be so varied as to turn any other radius of a circle desired. What I claim as my invention or improvement is the application of the flanches of the wheels on one side of railroad carriages, and of the treads of the wheels on the other side, to turn curves upon railways, particularly such as turning the corners of streets, wharves, &c., in cities and elsewhere, operating upon the principle herein set forth.

JAMES STIMPSON.

"Witnesses,—JAMES H. STIMPSON,
GEO. C. PENNIMAN.

*"Whereas, upon the petition of James Stimpson for an extension of the within patent granted to the said Stimpson on the 23d day of August, 1831, the Board of Commissioners under the eighteenth section of act of Congress approved the 4th day of July, 1836, entitled 'An Act to promote the progress of the useful arts, and to repeal all acts and parts of acts heretofore made for that purpose,' did, on the [*336

21st day of August, 1845, certify that said patent ought to be extended:

"Now, therefore, I, Edmund Burke, Commissioner of Patents, by virtue of the power vested in me by said eighteenth section, do renew and extend said patent, and certify that the same is hereby extended for the term of seven years from and after the expiration of the first term, namely, the 23d day of August, 1845; which certificate of the said Board of Commissioners, together with this certificate of the Commissioner of Patents, having been duly entered of record in the Patent-Office, the said patent now has the same effect in law as though the same had been originally granted for the term of twenty-one years.

"In testimony whereof, I have caused the seal of the Patent-Office to be hereunto affixed, this 21st day of August, [SEAL.] 1845.

"EDMUND BURKE, *Commissioner of Patents.*"

It is further admitted, that, before and since the period of said extension of the first above-mentioned patent, the defendant, a corporation created by the General Assembly of Maryland for the business of, and engaged in, the transportation of passengers and goods by railways belonging to it, did, upon its railway, and as part thereof, in the city of Baltimore, and at the corner of two streets, to be turned in the course of said transportation, construct, and has ever since kept up and used, a curve furnished and fitted as follows, to wit: On the inner side of the curve is placed a double iron rail cast in one piece, with the interval between large enough to allow the admission of the flanch of the wheel, the rail on the outer side being the usual one throughout the curve, without difference of any kind, except that it is curved; and it is admitted that the passage of the cars round the curve is throughout, and always has been, upon the treads of the wheels; and these rails were intended and used for the purpose of enabling the cars to turn the curves of the streets above mentioned.

Upon this statement of facts, it is submitted to the court to determine whether the defendant, under a just construction of said patent declared upon, has been guilty of any violation thereof. And it is agreed, that if the court shall, in the prem-*337] *ises, be of opinion in favor of the plaintiff, judgment shall thereupon be rendered for the plaintiff for the damages laid in the declaration; to be released on payment of such sum as shall be found for actual damages by a jury, to be impanelled by consent for that purpose, subject to be increased

by the court, according to the act of Congress in such case made and provided.

The court to render an absolute judgment for the defendant if of opinion in the premises with the defendant; and either party having the right to sue out a writ of error from the judgment of the court.

It is further agreed, that the railway above mentioned used by the defendant is not sunk into the ground, so as to make the top of the rail on a level with the surface, but projects above the surface the height of the rail; and that the court shall have the power to draw all inferences from the facts herein stated which could be drawn by a jury.

CHARLES F. MAYER, *Plaintiff's Attorney.*
J. M. CAMPBELL, *Defendant's Attorney.*

The case was argued by *Mr. Mayer*, for the plaintiff in error, and by *Mr. Campbell*, for the defendant in error.

Mr. Mayer.

By referring to the defendant's brief, it is perceived that the right of this court to take cognizance of this cause is disputed. It is true, that the determination of the suit in the court below was upon a statement of facts, and under an agreement that the court might draw inferences from the facts as a jury might. The statement was for the purpose of bringing to the attention of the court what the invention of the plaintiff was, and in order that they might compare the contrivance of the defendant with it. The very agreement provides a reserved right of review. The mere circumstance, then, that the court were to draw inferences from the facts as a jury might do, does not make the judgment below irreversibly final, and nullify the agreement for assuring to either party the benefit of an appellate review.

But if the court should be of opinion that by the agreement they cannot consider the case, they will not therefore affirm the judgment below by dismissing it, but will send it back as in a case of mistrial.

The case of *Prentice* v. *Zane*, 8 How., 470, was disposed of in a manner not meeting the unanimous approbation of this court; and it will not be followed if even by discrimination any distinction can be taken between this or any other case *and that. But that was the case of a special verdict, [*338
in which the jury found, not the facts, but the *testimony*, and the counsel, not willing to hazard the mistakes of another blundering jury, submitted the case upon that testimony and the few facts which were found; and this court

thought that it would convert them into a jury to require them to find the facts from testimony presented to them. But if the court below could not within its powers find facts, this court will not presume that it did so; but, on the contrary, that it did not do so. A court does, however, in a metaphysical sense, in every case make inferences from facts; and it directs a jury to infer from facts. But here there is no room for inference. The facts are all agreed.

But is it true, as is assumed by the other side, that the court can in no case deal inferentially with facts? There is such a thing as a demurrer to evidence, which assumes all the facts asserted on the other side to be true, and the court infers from those facts as a jury would do. The facts are all admitted by the demurrer, and the court deals with those facts. An appellate court does the same. The facts must, however, be admitted, for there can be no such thing as a demurrer to evidence where the testimony is contradictory. 3 Pet., 36, 96; 4 Cranch, 219; 7 Id., 565; 11 Wheat., 171, 320. Now in the last case the court decided that it was not a proper case for demurrer. The question referred to the court was not one of law, but of fact; that is, the *facts* were not admitted from which the court were to make proper inferences, but they were to deduce from the *testimony* what the facts were. It is not, then, strictly true, that, in the demarcation of the line that separates the court and jury, it is not the province of the court to deal with facts inferentially. And why do you adopt the analogy to a special verdict rather than to a demurrer to evidence, when you come to assign a place to a "case stated" in the technical vocabulary? The court must look to the facts to determine whether the invention in the one case is the invention in the other case; but that is not finding facts. It is mere construction, which the judicial mind is always employed in making.

As to the merits. Has the defendant infringed our patent? Now what is the principle of our invention, not as gathered from a single expression judged by a meagre and carping criticism, but as taken from the whole context? The courts say that you are to look at the thing to be done, the object to be accomplished, and then to the agency by which it is accomplished. 1 Sumn., 482. The operative principle of our patent is the *groove*, by which the cars are kept in place, and it makes no difference whether you run them upon the flanch
*339] *or upon the tread. Now the defendant claims to have constructed a railway by the laying of two pieces of rail with an interval between them, which answers to our groove. And reliance is placed upon the using of one rail

only for a groove, the other rail being flat. This, however, only gives the defendant a less beneficial use of our invention. It is but a mere colorable variance from the arrangements of the invention, whilst the principle, the characteristic merit, is adopted, whether on one or both sides of the railway, and whether the wheel shall move on the flanch or the tread. The case from 3 Wash. C. C. R. applies with force, where you take part of an invention, or accomplish less than the patentee proposes.

Mr. Mayer cited 2 Mason, 115; 4 Eng. Com. L., 357; 6 Id., 512 (4 Barn. & A., 550); 4 Wash. C. C., 68, 703; 2 Brock., 298.

Mr. Campbell, contra.

The first question is whether this court can exercise jurisdiction in this case. Can this court go out of its province as a court of law, and deal with other than questions of law? The court below had the power to find other facts by inference than those stated, and can this court, in the absence of any statement by the court below as to such further facts, determine what additional facts, if any, were or were not before the Circuit Court? The counsel on the other side says that the court can examine questions of fact, and draw inferences from facts, and that it has been done in case of demurrers to evidence. The case of *Prentice* v. *Zane* may stand, however, with the previous decisions. In demurrers to evidence, the only question is one of law upon the facts admitted. And Judge Buller long ago decided, that there was no difference in principle between a demurrer to evidence and a special verdict. In either case the facts are found, and the court is called upon to determine the law. But in this case the court is to determine a mere question of fact. It is to deduce, from a comparison of the plaintiff's claim with the defendant's claim, the fact whether the one conflicts with the other. This case, then, presents no analogy to that of a demurrer to evidence where all the facts are admitted.

As to the merits. The reason that ordinary railway tracks are an obstruction to common travelling-carriages is, that it is necessary that the rails should be raised above the surface of the ground, because railroad wheels are constructed differently from ordinary wheels in having two circumferences of different diameters, the smaller circumference being intended to rest on the rail (and called the tread), and the larger circumference running on the side of the rail. Now the whole difference between the plaintiff's invention and the common railway

*track is, that the one is sunk beneath the surface of the ground, and the other not; the groove in this case answering the purpose of the elevation of the rails in the ordinary railway. Now he does not claim the groove alone, and it is no part of his invention; but the *combination* of the groove with the sunken rails. The object which he accomplishes is, the advantage of the present form of railroad wheels *without* the usual obstruction to common vehicles.

The plaintiff's invention is a combination of the usual rail with a groove on each side of the road for the flanch of the wheel to travel in, so laid as not to rise above the surface. He has patented grooves on *both* sides of the road in connection with the sunken rail. He has patented grooves in combination, and not a single groove. Now the defendant uses a rail with one groove only, that is, with a groove on one side of the road only, and the rails, instead of being sunk into the ground even with the surface, rise above the surface the height of the rail. The defendant's railway does not purport to do away, and does not in fact do away, the obstruction which it is the object of the plaintiff's invention to remove. The combination is not the same, and the result is different. How, then, can it be said that the one is an infringement of the other?

Now it is settled in the case of *Prouty* v. *Ruggles*, 16 Pet., 336, that, where three things are patented in combination, it is no infringement to use two of them in combination to produce the same result.

Mr. Mayer, in conclusion.

What we say is, that the using of one groove is a mere evasion, a mere colorable claim to invention. If the only object of our invention was the mere sinking of the railway in order to remove an obstacle from ordinary vehicles, why, we should have patented only the sinking of the railway. But it is not so. We claim the sinking of the road in connection with the grooves for the reception of the flanches, in order to accomplish the safety of the cars, and their being kept in their course, especially at turns and corners. It is too narrow a view which is taken by the other side, to consider the sinking of the rails as the whole of the invention, merely because it describes that as one of its advantages. We maintain that Mr. Stimpson has patented the grooves, because he could not effect the objects of street travel without grooves. It is true, he describes his railway as peculiarly advantageous
*341] in the streets of towns *and cities; still he does not confine it to that. The patent provides for the turning

of a curve or corner, and this is as much a part of the claim as the sinking of the rail. The arrangement by which this is attained, with entire safety to the car and without impeding the speed, is singularly beautiful.

But it is said that this is a combination, and if any of the parts are left out, the combination is not used. There is no claim here for a combination as such. We know what a groove is, and what a flanch is. Now perhaps the effect, namely, the groove operating to restrain and confine the flanch and thereby secure the safety of the car, may be produced as well by one groove as two. Still, the principle of the thing is the same. But this is not a combination. A combination is the union of distinct mechanical principles, not a mere duplication of the same principle. The case of *Prouty* v. *Ruggles* was that of a plough. The whole of the parts were patented as a combination; and by so doing the patentee informed the world that anything short of the union of all these parts is not his invention. The jogging part of the plough was considered by the court a material part of the plaintiff's invention. And the defendant having arrived at the same result without the jogging, had not taken the plaintiff's combination. But suppose there had been three joggings instead of one, and the defendant had taken two, would not that have been an infringement? The mere *quantum* of effect, whether greater or less, is not the point.

In regard to the jurisdiction, the court in 11 Wheaton says, that when the facts are found, the court will make inferences from them precisely as a jury would do. But in the case of *Prentice* v. *Zane* the facts were not found. The testimony was given, and the court was left to find out the facts from the testimony. Now here you have all the facts. You have the plaintiff's claim, the sum, substance, and gist of his invention. You have also the sum and substance of that which we consider an infringement. The one can be placed beside the other, and it is but a matter of simple comparison to determine whether the one is identical with the other in any of its material parts.

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us upon a writ of error to the Circuit Court of the United States for the District of Maryland.

The plaintiff in error instituted in the Circuit Court his action on the case to recover of the defendant damages for an alleged infringement of a patent granted to the plaintiff on the 23d of August, 1831, and subsequently, under the authority of the United States, renewed and extended to him for

*an additional space of seven years from the expiration of the first grant.

On the trial of this suit upon the plea of not guilty, the parties by agreement submitted their cause to the court upon a case stated. The court, on the case thus made and submitted, gave judgment in favor of the defendant; and to test the correctness of this judgment is the purpose of the investigation now before us.

The invention or improvement claimed by the plaintiff in error, and by him alleged to have been pirated by the defendant, is thus described in the schedule and specification filed with and made a part of the letters patent:—"A new and useful improvement in the mode of forming and using cast or wrought iron plates or rails for railroad carriage-wheels to run upon, more especially for those to be used on the streets of cities, on wharves, and elsewhere; and I do hereby declare, that the following is a full and exact description of my said inventions or improvements.

"For the purpose of carrying railroads through the streets of towns or cities, or in other situations where circumstances may render it desirable that the wheels of ordinary carriages should not be subjected to injury or obstruction, I so construct or form the rails, that the flanches of the wheels of railroad cars or carriages may be received and run within narrow grooves or channels, formed in or by said rails, said grooves not being sufficiently wide to admit the rims of the wheels of gigs or other ordinary carriages having wheels of the narrowest kind."

After some remarks descriptive of the shape and dimensions of the plates or rails, and of the grooves to be used, the specification thus proceeds:—"Should it be preferred to use the ordinary flat wrought-iron rails, they may be laid double, at such distance apart as to form the proper channel for the flanch between them. Wrought plates may also be formed in the manner represented in figure 7. This plate is rolled so as to have a channel in it, which may be one inch and a quarter wide at top, one inch at bottom, and five eighths of an inch deep. Where it is necessary to cross a water-gutter in the street, I use a cast-iron plate or plates to cross said gutter, the flanch channels being in such plate or plates. The whole surface between the channels is cast rough, to prevent the slipping of the feet of horses. The aforesaid cast-iron plate is best cast in one piece, as it will be stronger than if divided, although of the same thickness, it must of course be of a width sufficient for the particular gutter to which it is to be applied;

and it should be strengthened by ribs cast on the lower side. In some cases *I cover the gutters the whole width of the street with such cast-iron plates, and extend them [*343 to some distance beyond the curbings. I thus make a great improvement in streets for the ordinary purposes of travel." Such being substantially, and indeed literally, as far as it is set forth, the descriptive part of the plaintiff's specification, his *claim*, or the substance and effect of his alleged invention and improvement, is given in these words:—"What I claim as constituting my invention, and desire to secure by letters patent, is the employment of plates or rails, either of cast or of wrought iron, constructed and operating upon the principle or in the manner herein described; having narrow grooves on each side of the track for the flanches of car-wheels to run in, by which they are adapted to the unobstructed passing over them of the various kinds of common carriages, and to the running of the wheels on slight curves without dragging. I also claim, in combination with such grooved rails or tracks, the employment of plates of cast-iron for the covering and crossing of gutters, such plates being constructed as described, and having the necessary flanch channels cast in them."

It is manifest from the description of the plaintiff, as given both in his specification and claim, that the improvement he alleges to have been made by him, whether important or otherwise, consists essentially, if not formally, in a combination. His grooves for the admission of the flanches of car-wheels, whether cast in iron plates or produced by the juxtaposition of two flat iron rails, and the rails themselves, were all of them long previously known, and long familiar in use; and it was by an application or combination of these familiar means or agents that he was to accomplish the result proposed, namely, the unobstructed passage of carriages over railroad tracks when laid in streets or cities. The only idea or design in the plaintiff's description which wears the semblance of originality, is that of sinking or depressing these known agents or materials in combination to a level with the surface over which the passage of ordinary carriages was to take place. Still, these agents or materials were the same well-known grooves, the same car-wheels and flanches, and the same flat rails, which were to constitute the means of the plaintiff's operations. And the object of these operations, the essential improvement claimed, it should be constantly borne in mind, is the preventing of an inequality in the surface of streets, forming an obstruction to ordinary carriages,

by reducing the railroad track to the same plane with the surface of the streets themselves.

The acts of the defendant complained of as being an infringement of the plaintiff's patent are thus set out in the case *agreed by the parties, viz.:—"That, before and since the period of said extension of the first above-mentioned patent, the defendant, a corporation created by the General Assembly of Maryland for the business of, and engaged in, the transportation of passengers and goods by railways belonging to it, did, upon its railway, and as part thereof, in the city of Baltimore, and at the corner of two streets to be turned in the course of said transportation, construct, and has ever since kept up and used, a curve furnished and fitted as follows, to wit: On the inner side of the curve is placed a double iron rail cast in one piece, and with the interval between large enough to allow the admission of the flanch of the wheel, the rail on the outer side being the usual one throughout the curve, without difference of any kind, except that it is curved; and it is admitted that the passage of the cars round the curve is throughout, and always has been, upon the treads of the wheels; and these rails were intended and used for the purpose of enabling the cars to turn the curves of the streets above mentioned." The mechanism thus described as used by the defendant is, like that contained in the specification annexed to the patent of the plaintiff, evidently a combination, or an application of means or agencies previously known. If that mechanism can have any claim to originality, it must be in the *modus* or plan of that application, not in the invention of the several parts of the mechanism.

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It remains, then, by a comparison of these two combinations, to ascertain whether they are the same, either in form, or in the manner of their operation, or in the results they were designed to accomplish.

The combination claimed by the plaintiff as his improvement consists of the use of grooves on both sides of a railroad track, and either cast in iron plates, or made by the parallel position of double lines of flat rails, in which grooves the flanches only of car-wheels are to run, and which are likewise to be too narrow to admit the wheels of carriages having the most slender rims or felloes; and the whole of this combination or mechanism is to be depressed to a plane exactly corresponding with that of the street in which it may be introduced; as, without this arrangement, it is obvious that the unobstructed passage of ordinary carriages (the great object in view) could never be attained. The machinery of the defendant, complained of as an

infringement of the plaintiff's patent, consists of a double flat rail of cast iron placed on the inner side of a curve or corner intended to be passed, and an ordinary flat rail on the exterior line of the same curve to be passed; and the whole of this machinery is constructed on the same plane with *the general track of the road, elevated to whatever point that track may be raised, and without regard to [*345 the convenience of ordinary carriages making transverse passages through the streets; such facilities to ordinary carriages being no part of the end proposed by the defendant. From this comparison of the combinations in use by the plaintiff and the defendant respectively, and upon a just construction of the plaintiff's patent, the court, so far from regarding them as identical either in mode, in design, or in result, is in all their characteristics constrained to view them as wholly dissimilar, and as not conflicting with each other. The combination, therefore, used by the defendant, cannot be regarded as an infringement of the plaintiff's patent. This conclusion is in strictest accordance with the ruling of the late Justice Story at circuit in the case of *Prouty* v. *Ruggles*, afterwards confirmed by this court, as will be seen in 16 Pet., 341. In the case just cited, the law is thus propounded by the Chief Justice: "The patent is for a combination, and the improvement consists in arranging different portions of the plough, and combining them together in the manner stated in the specification, for the purpose of producing a certain effect. None of the parts referred to are new, and none are claimed as new; nor is any portion of the combination less than the whole claimed as new, or stated to produce any given result. The end in view is proposed to be accomplished by the union of all, arranged and combined together in the manner described; and this combination, composed of all the parts mentioned in the specification, and arranged with reference to each other, and to other parts of the plough in the manner therein described, is stated to be the improvement, and is the thing patented. The use of any two of these parts only, or of two combined with a third, which is substantially different in form or in the manner of its arrangement and connection with the others, is therefore not the thing patented. It is not the same combination, if it substantially differs from it in any of its parts." The same doctrine is ruled in the case of *Carver* v. *Hyde*, 16 Pet., 513.

A preliminary question was raised in the argument of this cause, which, as it is connected with the practice in this court and in the courts inferior to this, and has an important bearing on the convenience both of the courts and the bar, is

deserving of consideration. The question alluded to is this: Whether, as this case is not brought up either upon express or specific exceptions to the rulings of the Circuit Court, nor upon any decision of that court upon a special verdict found by the jury, but comes before us upon an agreed statement between the parties, this court can in this form take cogni-
*346] zance thereof? *And it is insisted for the defendant in error, that, under such circumstances, the writ of error could not be prosecuted. The objection thus urged is not one of the first impressions in this court; it has been urged upon, and considered by, them on a former occasion, and must be regarded as having been put at rest.

This objection to the jurisdiction of the appellate court upon a case agreed between the parties in the court below, had its origin, no doubt, in the practice in the English courts, by which we are told that the appellate tribunal will not take cognizance of such a case, as it will upon one standing on exceptions, or on a special verdict.

This refusal, however, so to take cognizance, will, upon examination, be found to grow out of the peculiar modes of proceeding in the English courts, as is shown by Mr. Justice Blackstone in the third volume of his Commentaries, p. 377, in his chapter on the trial by jury, in which we find the following account of the proceedings in those courts. "Another method," says this writer, "of finding a species of special verdict is, when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the court above, on a special case stated by the counsel on both sides, with regard to the matter of law, which has this advantage over a special verdict, that it is attended with much less expense, and obtains a speedier decision; the *postea* being stayed in the hands of the officer of *nisi prius* till the question is determined, and the verdict is then entered for the plaintiff or the defendant, as the case may happen. But as nothing appears on the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law, which makes it a thing to be wished, that a method could be devised of either lessening the expense of special verdicts, or else of entering the cause at length upon the *postea*." So, too, Mr. Stephen, in his Treatise on Pleading, p. 92, speaking of the practice in England of taking verdicts subject to a special case, remarks, "that a special case is not like a special verdict entered on record, and consequently a writ of error cannot be brought on this decision." The objection now urged, and the authorities bearing upon it, were pressed on

the attention of this court, and considered by them, in the case of the *United States against Eliason*, reported in 16 Pet., 291. In that case this court said: "It is manifest that the reason why, according to the practice in the English courts, a writ of error will not be allowed after a case agreed, is this, and this only, that in those courts the agreed case never appears upon, or is made a part of, the record, *and [*347 therefore there is no ground of error set forth, upon which an appellate and revising tribunal can act. In the language of Justice Blackstone, nothing appears upon the record but the general verdict, whereby the parties are precluded from the benefit of a writ of error." This court goes on further to remark, that, "by a note to p. 92 of Mr. Stephen's Treatise, it is said to have been enacted by the 3d and 4th of William the Fourth, ch. 42, that, where the parties on issue joined can agree on a statement of facts, they may, by order of a judge, draw up such statement in the form of a special case for the judgment of the court, without proceeding to trial. By the settled practice anterior to this statutory provision, it was in the power of the parties to agree upon a statement of the case; it would seem reasonable and probable, therefore, that the power given to the judge (as an exercise of his judicial functions), to regulate the statement, was designed to impart a greater solemnity and permanency to the preparation of the proceeding, and to place it in an attitude for the action of some revising power. But should a want of familiarity with the details of English practice induce the hazard of misapprehension of the rules, or of the reasons in which they have their origin, the decisions of our own courts, and the long-established practice of our own country, are regarded as having put the point under consideration entirely at rest." The court then, after adverting to several decisions deemed applicable to the point, came to the following conclusion:— "This court, therefore, has no hesitancy in declaring that the point of practice raised by the defendant's counsel presents no objection to the regularity in the mode of bringing this case before it." Regarding the above conclusion as promotive both of justice and convenience, we give it our entire concurrence; and upon the character, therefore, of the particular cause before us, as disclosed in the case agreed by the parties, we decide that the judgment of the Circuit Court be, and the same 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

District of Maryland, 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.

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*348] *ISAAC LANDES, PLAINTIFF IN ERROR, *v.* JOSHUA B. BRANT.

Where the Commissioners who acted under the act of Congress passed on the 3d of March, 1807, for the adjustment of land titles in Missouri, decided in favor of a claim, and issued a certificate accordingly, this decision settled two points; namely, first, that the claimant was the proper person to receive the certificate, and second, that the title so confirmed was better than any other Spanish title.[1]

But between the presentation and confirmation of the claim, the claimant had a property which was subject to seizure and sale under execution according to the then laws of Missouri; and the subsequent confirmation by the Commissioners will not destroy the title held under the sheriff's deed.[2]

Neither will a patent subsequently taken out under the title of the original claimant avoid the sheriff's deed.[3]

The claim was founded on a settlement for ten years prior to the 20th of December, 1803; and in such cases the decision of the Commissioners was final against the United States, and entitled the party to a patent, which gave a perfect legal title, and went back, by relation, to the original presentation of the petition. It consequently enured to the benefit of the alienee.[4]

A patent was required in cases of final confirmations, *founded on settlement rights;* before its issuance the title was still equitable.

The original claimant being dead, a patent was afterwards issued to his representatives. But an act of Congress, passed on the 20th of May, 1836, declared that, in such cases, the title should enure to the benefit of the assignee. Upon this ground, also, the sheriff's deed conveyed a valid title in preference to an heir or devisee. The patent, when issued, conveyed, by virtue of this law, the legal title to the person who held the equitable title.

The circumstance, that the sheriff's deed was not recorded, was of no consequence as between a party claiming under that deed and the devisees of the original claimant; nor was it of any consequence as between the party claiming under that deed and an assignee of those devisees, provided such assignee had notice of the existence of the deed from the sheriff. And an open and notorious possession under that deed was a circumstance from which the jury might presume that the assignee had notice, not only of the fact of possession, but of the title under which it was held.[5]

So, also, where the lands of the deceased debtor (the original claimant) were afterwards sold under a judgment against his executors (conformably to the laws of Missouri), and afterwards acquired by the same party who had purchased under the first sheriff's sale, a refusal of the court below to instruct the jury that this sale was void, was correct.

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[1] See *Tyler* v. *Maguire*, 17 Wall., 280.

[2] FOLLOWED. *Massey* v. *Papin*, 24 How., 364.

[3] *Morehouse* v. *Phelps*, 21 How., 305.

[4] FOLLOWED. *French* v. *Spencer*, 21 How., 239. CITED. *Henderson* v. *Tennessee*, 10 How., 328; *Lessieur* v. *Price*, 12 Id., 77; *Beard* v. *Federy*, 3 Wall., 491; *Grisar* v. *McDowell*, 6 Id., 380.

[5] CITED. *Lea* v. *Polk County Copper Co.*, 21 How., 498.

Open, notorious and exclusive possession of real property by parties claiming it is sufficient to put other persons upon inquiry as to the inter-

In error to the Circuit Court of the United States for the District of Missouri.

Isaac Landes, a citizen of Kentucky, brought an action of ejectment in the court below, at the October term of 1845, against Joshua B. Brant, a citizen of Missouri, to recover a lot of ground in the city of St. Louis. Plea, general issue.

At the trial of the cause, the plaintiff gave in evidence the following patent:—

Patent to Clamorgan.

"The United States of America, to all to whom these presents shall come, greeting:

"Know ye, that there has been deposited in the General Land Office a certificate numbered one thousand one hundred and ninety-three, of the recorder of land titles at St. Louis, *Missouri, whereby it appears that, in pursuance of the several acts of Congress for the adjustment of titles [*349 and claims to lands, Jacques Clamorgan, under Gabriel Dodier, was confirmed in his claim to a tract of land, containing thirty-four acres and sixty-eight hundredths of an acre, bounded and described in a survey dated October 4th, 1826, as follows, to wit: beginning at a stone, the northeast corner of survey number one thousand four hundred and seventy-three, of forty arpents, for Francis Bissonet; thence north twenty-five degrees and forty-five minutes east, two chains and ninety-

ests, legal or equitable, held by such parties; and if such other parties neglect to make the inquiry, they are not entitled to any greater consideration than if they had made it and had ascertained the actual facts of the case. *Hughes* v. *United States*, 4 Wall., 232. S. P. *Lea* v. *Polk Co. Copper Co.*, 21 How., 493: *Lonsdale* v. *Moies*, 11 Law Rep. N. S., 658; *Strickland* v. *Kirk*, 51 Miss., 795; *Johnson* v. *Clark*, 18 Kan.. 157: *Greer* v. *Higgins*, 20 Id., 420; *Tankard* v. *Tankard*, 79 N. C., 54; *Noyes* v. *Hall*, 7 Otto, 34; *Mullins* v. *Wimberly*, 50 Tex., 457; *Purcell* v. *Enright*, 4 Stew. (N. J.), 74; *Nolan* v. *Grant*, 51 Iowa, 519; *Wrede* v. *Cloud*, 52 Id., 371; *Hommel* v. *Devinney*, 39 Mich., 522; *New* v. *Wheaton*, 24 Minn., 406; *Siebert* v. *Rosser*, Id., 155; *Jamison* v. *Dimock*, 95 Pa. St., 52; *Bartling* v. *Brasuhn*, 102 Ill., 441.

The possession must be an actual, open and visible occupation, inconsistent with the title of the apparent owner by the record; not equivocal, occasional, or for a special or temporary purpose. *Brown* v. *Valkening*, 64 N. Y., 76; see also *Loughridge* v. *Borland*, 52 Miss., 546.

A mere naked possession in a vendor will not hold good against the true owner, and he may pursue his property, and recover it from a purchaser, without notice, unless his own conduct has been such as to estop him from setting up his title. *Klein* v. *Seibold*, 89 Ill., 540. Contra, *Wait* v. *Smith*, 92 Ill., 385.

Where a tenant in possession agrees to purchase the premises, his possession amounts to notice of his equitable title, to a subsequent grantee of his landlord. *Coari* v. *Olsen*, 91 Ill., 273.

The open and notorious possession of a party under an unrecorded lease. *Held* not to authorize a jury to infer that a purchaser of the land had actual notice of that party's possession under the lease. *Casey* v. *Steinmeyer*, 7 Mo. App., 556.

two links, to an old stone in a ravine on the east side of Third street, which stone, lying flat in said ravine, was re-inserted by the deputy surveyor, and from which stone the southwest corner of a three-story brick house (in block number sixty-six) bears north eighty-seven degrees east; the northwest corner of a brick house (in block number sixty-five, Barbee's tavern) bears south; the northwest corner of a stone house (in block number twenty-six, Eph. Town's Missouri hotel) bears north sixty-nine degrees thirty minutes east; and a black locust, eight inches in diameter, bears north seventy-three degrees west, distant forty-one links; thence north seventy-five degrees twenty minutes west at eighty-three chains an old stone; at one hundred chains an old stone; one hundred and twenty chains to an old stone, the northwest corner of the present survey, from which a white oak, four inches in diameter, bears north twenty-four degrees west, distant sixteen links; a white oak, three inches in diameter, bears north seventy-five degrees east, distant eleven links; and a red oak, five inches in diameter, bears south forty-two degrees east, distant twenty-two links; thence south twenty-five degrees forty-five minutes west, two chains and ninety-seven links, to a stone, the northwest corner of survey number one thousand four hundred and seventy-three, of Francis Bissonet; thence south seventy-five degrees twenty minutes east, one hundred and twenty chains, to the place of beginning, being in township forty-five north of range seven east of the fifth principal meridian, and being designated as survey number one thousand two hundred and seventy-eight in the state of Missouri. There is, therefore, granted by the United States unto the said Jacques Clamorgan, under Gabriel Dodier, and to his heirs, the tract of land above described. To have and to hold the said tract, with the appurtenances, unto the said Jacques Clamorgan, under Gabriel Dodier, and to his heirs and assigns for ever.

"In testimony whereof, I, James K. Polk, President of the United States, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

*350] *"Given under my hand, at the city of Washington, the 18th day of June, in the year of our

[L. S.] Lord 1845, and of the independence of the United States the sixty-ninth.

"By the President, JAMES K. POLK.

By J. KNOX WALKER, *Secretary.*

"Recorded Vol. X., pages 36, 37, 38.

"S. H. LAUGHLIN,

Recorder of the General Land Office."

Also an extract from the minutes of the Commissioners to decide land claims, &c., and a record of a confirmation to Jacques Clamorgan, as follows:—

"Wednesday, November 13th, 1811. Board met; present, John B. C. Lucas, Clement B. Penrose, and Frederic Bates, Commissioners.—Cer., 1278.

"Jacques Clamorgan, assignee of Esther, mulattress, assignee of Joseph Brazeau, assignee of Gabriel Dodier, claiming one by 40 arpents of land, situate [on] Little Prairie, adjoining the town of St. Louis, produces a concession from St. Ange and Piernas, L. G., dated 23d May, 1772; a transfer from Gabriel Dodier and Joseph Brazeau to Esther, dated 4th November, 1793; from Esther to claimant, dated 2d September, 1794.

"The Board grant to Jacques Clamorgan forty arpents of land, under the provisions of the second section of the act of Congress, entitled 'An Act respecting claims to land,' and passed 3d March, 1807, and order that the same be surveyed conformably to the metes and bounds contained in the report of a survey made for said Dodier, and found in Livre Terrien, No. 2, folio 15. Survey at expense of the United States.

"Board adjourned till to-morrow, nine o'clock, A. M. John B. C. Lucas, Clement B. Penrose, Frederic Bates.

"Recorder's Office, St. Louis, Missouri, December 1st, 1846. I do certify the above to have been truly transcribed from book No. 5, of the Commissioners' minutes, pages 398, 406, and 407, as the same remains of record in this office.

"LOREN SPENCER,
U. S. Recorder of Land Titles in the State of Missouri."

"*Louisiana.—Commissioners' Certificate, No.* 1278.

"We, the undersigned, Commissioners for adjusting the titles and claims to land in the territory of Louisiana, have decided that Jacques Clamorgan, claiming under Gabriel Dodier, original claimant, is entitled to a patent under the provisions of the second section of the act of Congress, entitled 'An Act respecting claims to land in the territories of Orleans and Louisiana,' *passed the 3d of March, 1807, for forty arpents, situate in the District of St. [*351
Louis, Little Prairie, adjoining the town of St. Louis, by virtue of ten consecutive years' possession, prior to the 20th December, 1803, and order that the same be surveyed conformably to the metes and bounds established in the report of a survey made for said Gabriel Dodier, and found in Livre

Terrien, No. 2, folio 15. John B. C. Lucas, Clement B. Penrose, Frederic Bates.

"Recorder's Office, St. Louis, 24th February, 1847. The above is a correct copy of original certificate No. 1278, on file in this office, issued by the board of United States Commissioners therein designated, for ascertaining and adjusting the titles and claims to land in the Territory of Louisiana.

"LOREN SPENCER,
U. S. Recorder of Land Titles in the State of Missouri."

Also a certified extract from the registry of patent certificates, containing the date (February 10th, 1845) and the number (1193) of the certificate issued to Clamorgan, together with a copy of survey made in October, 1826.

The plaintiff also gave in evidence the last will and testament of Jacques Clamorgan, dated 31st October, 1814, and admitted to probate on the 7th of November, 1814, in which, after the payment of his debts and the distribution of 150 piastres to the poor, he devised all his estate to his natural children, St. Eutrope, Apoline, Cyprien Martial, and Maximin, to be divided into five equal parts, of which Maximin was to have two parts and each of the others one part.

Also the last will and testament of Cyprien Martial Clamorgan, dated 27th February, 1827, and admitted to probate on the 27th of May, 1827, in which he devises two lots of ground, situate in block No. 25 in the city of St. Louis, to Henry Clamorgan, second natural son of his natural sister, Apoline Clamorgan, and a lot in the same block to Louis and Louisa, infant children of said Apoline, jointly; also all the interest or estate which he might be entitled to in any lands in the state of Missouri to his sister Apoline and her children, Louis, Henry, and Louisa, and the survivor of them.

Also the last will and testament of Apoline Clamorgan, dated the 11th day of April, 1830, and admitted to probate on the 12th day of May, 1830, wherein she devises to Louis and Louisa, and such other children as might be born to her, all her interest and estate in a lot one hundred and twenty feet front by three hundred feet in depth (conveyed to St. Eutrope, Cyprien Martial, and the testatrix, by Joseph Brazeau for Jacques Clamorgan), being in block No. 25 in the city of St. Louis; likewise *any interest or estate she might have in any other lands in the state of Missouri to her children.

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The plaintiff also gave in evidence a deed bearing date the 28th day of April, 1845, from Louis and Henry Clamorgan to the plaintiff and one Fidelio C. Sharp, conveying all the inter-

est (except an undivided fourth) which they might have under any patent to be issued by the United States upon the certificate of confirmation dated November 13th, 1811, to Jacques Clamorgan.

It was admitted, on behalf of the defendant, that, at the time of the institution of this suit, he was in possession of a part of the premises described and embraced in the plaintiff's declaration, to wit, a lot in the city of St. Louis, fronting one hundred and eleven feet six inches on Washington Avenue, and running back north one hundred and fifty-two feet in depth, bounded on the south by Washington Avenue and on the west by Fourth Street; and that the said lot is embraced in the confirmation, survey, and patent read in evidence by the plaintiff, being part of that forty arpent tract, which tract is bounded south by the centre of Washington Avenue.

It was proven, on the part of the plaintiff, that it was reported and believed by the near relatives and friends of St. Eutrope and Maximin, that they died many years ago, the former leaving a wife, but no children, the latter having never been married, and both having died intestate.

That Cyprien Martial died in the year 1826 or 1827, and that Apoline died in 1829 or 1830; that Apoline left four children at her death, to wit, Louis, Henry, Louisa, and Cyprien; that Louisa died in 1833 or 1834, being then only seven or eight years old; that Louis, Henry, and Cyprien, her remaining children, are yet living; that Apoline died a few days before the birth of her son Cyprien; that Apoline was never married, and her children were illegitimate; that Cyprien, Martial, and Apoline were mulattoes.

It was admitted on the part of plaintiff and defendant, that Jacques Clamorgan died between the date and probate of his will, as read in evidence by the plaintiff.

The defendant gave in evidence a transcript of a record of the General Court of the Territory of Louisiana, in the case of *Gregoire Sarpy, Executor of Antoine Reihl*, v. *Jacques Clamorgan*. In this transcript no return appeared upon the summons. The judgment was rendered 16th May, 1808, and commenced with the usual form, "And now at this day come the parties aforesaid, by their attorneys," &c. Execution was taken out and levied on the interest of Clamorgan in a certain lot of land one arpent front by forty arpents in depth (being that now in *controversy), and the same was sold at public [*353
auction by Jeremiah Connor, the sheriff, to Alexander McNair, and a sheriff's deed given therefor, bearing date the 8th day of July, 1808.

Also a transcript of a record of the Circuit Court of St.

Louis County, in the case of *Rufus Easton* v. *Jacques Clamorgan's Executors*, setting out a judgment against the defendants, and an execution thereon, and a sale and deed by John K. Walker, sheriff, to John O'Fallon and Jesse G. Lindell, after the following advertisement:—

"*Advertisement.—Sheriff's Sale.*

"By virtue of a writ of execution issued from the Clerk's office of the Circuit Court of St. Louis County, and to me directed, in favor of Rufus Easton, against Jacques Clamorgan's executors, I have levied upon, and will sell for cash to the highest bidder, at the court-house door in St. Louis, on Thursday, the 27th day of July instant, between the hours of nine and five, all the right, title, claim, interest, estate, and property, that was of said Clamorgan at the time of his death, in and to a piece or parcel of land, containing one arpent in front by forty arpents in depth, and bounded on the eastern end by a fence formerly made to defend the crops of the inhabitants of St. Louis against the animals or beasts; on the north by land of Tayon (Père); on the western end by the king's domain or vacant land; and on the south by the highway which leads to the village of St. Charles; it being the same lot of forty arpents acquired by said Clamorgan of Gabriel Dodier, by deed bearing date November 4th, 1793. The boundaries, as above set forth, are the same as given in said deed. Sold to satisfy said execution and costs. St. Louis, July 1st, 1826. "JOHN K. WALKER, *Sheriff*."

To the admission of both these records the plaintiff objected, and, upon the objection being overruled, excepted.

Defendant then read in evidence the following documents, to wit:—1st. A deed from Alexander McNair and wife to Jeremiah Connor. 2d. A copy made by the Spanish Lieutenant-Governor of a deed from Dodier to Esther, with a deed from Esther to William C. Carr indorsed thereon; and 3d. A deed from William C. Carr and wife to Jeremiah Connor, also indorsed on such Spanish copy. 4th. A deed from Jeremiah Connor to George F. Strother. 5th. A deed from George F. Strother to James D. Earl. 6th. A mortgage from James D. Earl to Sullivan Blood. 7th. A deed of release from James D. Earl to Sullivan Blood. 8th. A deed from George F. Strother and wife to Thomas H. Benton, and Thomas Biddle, *354] in *trust, &c. 9th. A deed from Thomas H. Benton and Thomas Biddle, and Luke E. Lawless and wife, to Sullivan Blood. 10th. A deed from Sullivan Blood and wife to the defendant.

It was in evidence that Jeremiah Connor had inclosed the Dodier lot soon after the change of government. That Clamorgan went to Mexico in 1806, and returned in 1808 or 1809. There were also in evidence three deeds of emancipation from Jacques Clamorgan to his four children, St. Eutrope, Cyprien Martial, Apoline, and Maximin, all dated 16th September, 1809, in which it was recited that St. Eutrope was born in April, 1799; Apoline on the 7th of February, 1803; Cyprien Martial on the 10th of June, 1803; and Maximin in the beginning of the year 1807.

The following instructions were asked for by the plaintiff:—

1. That the legal effect of the patent and confirmation read in evidence by the plaintiff was to vest the legal title to the premises therein mentioned in Jacques Clamorgan, the patentee, if living at the date of the patent, and if not living, then in his heirs, devisees, or assignees, in the same manner as if the patent had issued in the lifetime of said Clamorgan. Given.

2. That prior to the confirmation read in evidence by the plaintiff, the legal title to the premises embraced in said confirmation was in the government of the United States, and that the confirmation, survey, and patent read in evidence by the plaintiff were effectual to vest the legal title to said premises in Jacques Clamorgan, his heirs, devisees, or assignees. Given.

3. That the judgment read in evidence by the defendant in favor of Gregoire Sarpy, executor of Antoine Reihle, to the use of Mildrum and Parks, against Jacques Clamorgan, was null and void, and the sale made by the sheriff by virtue of the execution issued thereon, and the deed from said sheriff to Alexander McNair, are also null and void. Refused.

4. That the deed from Sheriff Connor to Alexander McNair, dated 8th July, 1808, and read in evidence by the defendant, is void for uncertainty, and should be disregarded by the jury. Refused.

5. That the deed from Sheriff Connor to Alexander McNair, read in evidence by the defendant, is void as to the plaintiff, unless he had notice of said deed at the date of the deed from Louis and Henry Clamorgan to him, as read in evidence by said plaintiff. Refused, and No. 5 (*post*, p. 357) given.

6. That the sale made by John K. Walker, sheriff, to O'Fallon and Lindell, on 27th July, 1826, and the deed made in pursuance of said sale, dated 10th August, 1826, as read in evidence by defendant, are fraudulent and void. Rejected.

*7. That if, at the date of the levy and sale by Sheriff Walker to O'Fallon and Lindell, the premises [*355

levied upon, or a considerable portion thereof, then constituted a part of the city of St. Louis, and had before then been laid off into blocks and squares, separated by streets and alleys, and distinctly marked out by stones set up at the corners, or other visible boundaries, and if some of said lots or blocks had before then been sold and conveyed by Jeremiah Connor, claiming to be the proprietor thereof, and if upon the said lots or blocks, so sold, buildings and other improvements had before then been erected, then the said levy and sale were null and void. Rejected.

8. That if the premises levied upon by Sheriff Walker, by virtue of the execution in favor of Rufus Easton, and sold by said sheriff to O'Fallon and Lindell for thirty-three dollars, were at the time of said levy and sale susceptible of division without injury to the property, and were at the date of said levy and sale worth five thousand dollars or more, then the said sale is fraudulent and void in law. Refused.

9. That the sale made by Sheriff Walker to O'Fallon and Lindell is void, unless the said sheriff in his levy or advertisement, or in the deed to said O'Fallon and Lindell, described the premises sold with reasonable certainty, so that the same could have been identified by the said description. Given.

10. That if the premises in controversy are embraced by the confirmation and patent read in evidence by the plaintiff, the sale and conveyance from Sheriff Connor to Alexander McNair, read in evidence by defendant, were not operative to convey the legal title to said McNair, and the said sale and conveyance cannot prevail as against the patent and confirmation in this action.

This instruction as asked for is refused, for the reason that it involves confusion; we are of opinion that the legal title to the premises embraced by the sheriff's deed was in the United States until the patent issued, provided the deed covers the land in dispute; but that the imperfect title owned by Clamorgan did pass by the sheriff's deed made by Connor to McNair, 8th July, 1808; and that neither the act of confirmation by the Board of Commissioners in 1811, nor the issuance of the patent in 1845, defeated the title made by Sheriff Connor in 1808; and so the jury are instructed.

11. That the deed from Gabriel Dodier to Esther, and the deed from Esther to William C. Carr, and the deed from William C. Carr to Jeremiah Connor, read in evidence by defendant, did not at the date of the said last-mentioned deed vest in the said Connor any title to the premises in dispute which *356] *can prevail in this action; provided the same premises had before then been confirmed to Jacques Clamorgan,

and have since been patented to him by the government of the United States. Given.

12. That the possession by the defendant, or those under whom he claims, of the premises in controversy, in order under any circumstances to constitute a valid bar to the plaintiff's recovery, must have been an actual, adverse, and uninterrupted possession for the space of twenty years next preceding the institution of this suit.

This instruction is given, although not strictly as asked.

13. That if, at the dates of the sale and conveyance from Sheriff Connor to Alexander McNair, read in evidence by defendant, the premises conveyed in said deed were susceptible of a description by which the same might have been identified with reasonable certainty, and if the same were not so described either in the levy or sheriff's deed, then the said deed is void, and vested no title in McNair.

This instruction involves one matter of law, appertaining to the decision of the court on a motion heretofore made to reject the sheriff's deed, and overruled; and therefore the instruction is refused; but the jury are instructed that it is their duty to find whether the land described in the sheriff's deed is the land in dispute in this action, and the same land that was confirmed to Jacques Clamorgan; and if the land in dispute is not the same land conveyed by the sheriff's deed and confirmed as aforesaid, then said deed cannot furnish a defence to this defendant.

14. That if, at the date of the levy and sale by Sheriff Connor to Alexander McNair, read in evidence by defendant, Jacques Clamorgan owned two tracts of land, each of them containing one arpent in front by forty in depth, both situated in the Little Prairie and adjoining the then town of St. Louis, then the deed from Sheriff Connor to Alexander McNair, read in evidence by defendant, is void for uncertainty.

This instruction is refused, because there was no legal evidence given to the jury, either proving, or tending to prove, that on the 8th of July, 1808, Jacques Clamorgan was the owner of two such tracts of land.

15. That the execution in favor of Rufus Easton against the executors of Jacques Clamorgan, dated the 3d day of April, 1826, and read in evidence by the defendant, and all the proceedings of the sheriff under and by virtue of that execution, are null and void. Refused.

16. If the jury find from the evidence that the boundaries described in the deed from John K. Walker, sheriff, to John *O'Fallon and Jesse G. Lindell, given in evidence by the defendant, were not, at the time of the sale by the [*357

said sheriff, the true boundaries of the tract of one by forty arpents that had been confirmed to Jacques Clamorgan, as mentioned in the certificate and record of confirmation given in evidence by the plaintiff, and that the same has not been bounded in the manner stated in said deed for a period of more than twenty years, and that the deed referred to in the said description contained in said sheriff's deed, as the one from which it was taken, had no existence in fact, then the said description is insufficient, and said sheriff's deed from Walker is void; unless the jury shall find from the evidence, that the said tract of one by forty arpents was generally known in the community at the date of said sale by the description given in said deed.

This instruction is refused, and the jury instructed instead thereof, that they must find the land in dispute was covered by Sheriff Walker's deed to O'Fallon and Lindell, before that deed can avail the defendant as an outstanding title.

17. That the deed, given in evidence by the defendant, from Jeremiah Connor, sheriff, to Alexander McNair, conveyed no title to said McNair to the tract of one by forty arpents mentioned in the confirmation of the Board of Commissioners of date November 13th, 1811, given in evidence by the plaintiff. Refused.

And thereupon the court gave the 1st, 2d, 9th, 11th, and 12th instructions, and refused to give the remainder, but in place of the 5th gave the following:—

5. The unregistered deed made by Sheriff Connor to McNair on the 8th of July, 1808, was valid, as between Clamorgan, the execution debtor, and McNair, the purchaser; and equally so as against the devisees of Clamorgan, without being recorded. But it was not valid as against a purchaser of the same premises from Clamorgan's devisees, who purchased for a valuable consideration, and without notice of the existence of the deed of 1808.

The deed on which the plaintiff relies was made in April, 1845, and if the plaintiff then had actual notice of the deed of 1808, it was valid also as to him, without having been recorded. And if the jury find that the defendant Brant was in the open and notorious possession and occupation of the premises when the deed of 1845 was made, and had been so for years before that time, continuously holding under the deed of 1808, then this is evidence from which, connected with other circumstances, the jury may find that the plaintiff had actual notice of the existence of the deed of 1808, when he took his deed in 1845. And so the jury are instructed.

And in place of the 10th, gave the following:—

*10. This instruction, as asked for, is refused, for the reason that it involves confusion; we are of opinion that the legal title to the premises embraced by the sheriff's deed was in the United States until the patent issued, provided the deed covers the land in dispute; but that the imperfect title owned by Clamorgan did pass by the sheriff's deed made by Connor to McNair, 8th July, 1808; and that neither the act of confirmation by the Board of Commissioners in 1811, nor the issuance of the patent in 1845, defeated the title made by Sheriff Connor in 1808, and so the jury are instructed.

And in place of the 13th, gave the following:—

13. This instruction involves one matter of law appertaining to the decision of the court, on a motion heretofore made to reject the sheriff's deed, and overruled, and therefore the instruction is refused; but the jury are instructed that it is their duty to find whether the land described in the sheriff's deed is the land in dispute in this action, and the same land that was confirmed to Jacques Clamorgan; and if the land in dispute is not the same land conveyed by the sheriff's deed, and confirmed as aforesaid, then said deed cannot furnish a defence to this defendant.

And in place of the 16th, gave the following:—

16. This instruction is refused, and the jury instructed instead thereof, that they must find the land in dispute was covered by Sheriff Walker's deed to O'Fallon and Lindell, and before that deed can avail the defendant as an outstanding title.

To the refusal of which several instructions as asked for, the plaintiff at the time excepted.

The defendant then moved the court for the following instructions:—

1. If the jury find from the evidence that the tract of land sold and conveyed by Jeremiah Connor, sheriff, to Alexander McNair, in 1808, as the property of Jacques Clamorgan, is the same tract of land which was claimed by said Clamorgan before the Board of Commissioners, and confirmed to him, then the confirmation to said Clamorgan enures to said Alexander McNair and those claiming under him. Given.

2. If the jury find from the evidence that the lot in dispute is embraced in the tract of land sold and conveyed by John K. Walker, sheriff, to Jesse G. Lindell and John O'Fallon, in 1826, by virtue of the judgment and execution in favor of Rufus Easton against the executors of Jacques Clamorgan, then the plaintiff is not entitled to recover. Given.

3. If the jury find from the evidence that the defendant, and *those under whom he claims, have been in possession of the lot in controversy for twenty years con- [*359

secutively, prior to the commencement of this suit, and since Apoline Clamorgan and Cyprien Martial Clamorgan, under whom the plaintiff claims, arrived at the age of twenty-one years, that such possession was under a claim of title adverse to the plaintiff and those under whom he claims, then the issue ought to be found for the defendant. Given.

To the giving of which the plaintiff objected, but the court overruled the objection, and gave each of said instructions, to which the plaintiff excepted at the time.

Verdict for plaintiff, and judgment thereon, upon which this writ of error was sued out.

The cause was argued by *Mr. Bradley*, for the plaintiff in error, and by *Mr. Gamble*, for the defendant in error.

Mr. Bradley, for the plaintiff in error.

First Point. The legal title being clearly in the plaintiff, the first question arises under the tenth instruction, in which it is submitted there is error.

1st. An exception was reserved to the admissibility of this deed in evidence; because the record of the cause is either imperfect, or, if perfect, it shows the judgment is void.

It is not an erroneous judgment. There could be no jurisdiction without an appearance. The recital in the judgment, "And now at this day come the parties aforesaid, by their attorney," &c., is simply surplusage. That could not give life to a void act. There was no service of process, no plea filed, no appearance in person or by attorney, no issue, no evidence. *Smith* v. *Ross*, 7 Miss., 463; *Hollingsworth* v. *Barbour and others*, 4 Pet., 466, 472; *Anderson* v. *Miller*, 4 Blackf. (Ind.), 417; *Shaefer* v. *Gates*, 2 B. Mon. (Ky.), 453; *Englehead* v. *Sutton*, 7 How. (Miss.), 99.

If the judgment is void, it may be objected to in a collateral proceeding. *Campbell* v. *Brown*, 6 How. (Miss.), 230.

It was not a judgment by confession, nor want of a plea.

Again, there is evidence to show that Jacques Clamorgan was not at St. Louis at the time the writ issued, or between that time and the time at which the judgment purports to have been entered. He left there in 1806, and returned in the winter of 1808, or spring of 1809. The writ issued 6th April, 1808; judgment, 16th May, 1808; execution, 6th June, sale, 8th July, 1808.

2d. If the judgment was valid, yet the deed was inoperative and void as to subsequent *bonâ fide* creditors and purchasers,

*360] *without actual notice, if it was not recorded within the time prescribed by law. This is admitted in the

instruction. Where there is no record, there must be actual notice. 1 Territorial Laws (Edward's Comp.), p. 47, § 8; *Frothingham* v. *Stocker*, 11 Mo., 3.

3d. But the court below say further, if the jury find the defendant Brant was in open and notorious possession and occupation of the premises, &c., "then this is evidence from which, connected with other circumstances, the jury may find the plaintiff had actual notice."

It is submitted that there is error in this last clause of the instruction. Undoubtedly there might be other circumstances which, taken in connection with the possession, would justify such finding, but it was an abstract proposition eminently fitted to mislead the jury.

Second Point. In the plaintiff's fifth and defendant's first instructions, there is error.

1st. The proposition there is, that the imperfect title held by Clamorgan before the confirmation was transferred by the sheriff's deed to McNair, and the subsequent confirmation and patent to Clamorgan enured to the benefit of McNair.

1. If the imperfect title passed by that deed, the purchaser could and ought to have perfected it before the Commissioners. 12 Pet., 454, 458.

2. It was property. *Soulard et al.* v. *U. States*, 4 Pet., 511.

3. The decision of the Commissioners, confirming the claim, is conclusive as to all parties having antecedent rights. *U. States* v. *Percheman*, 7 Pet., 86; *Strother* v. *Lucas*, 12 Id., 458; *Chouteau* v. *Eckhart*, 2 How., 357; *U. States* v. *King*, 3 Id., 787; *Hickey* v. *Stewart*, Id., 759, 760; *Newman* v. *Lawless*, 6 Mo., 290; *Mackay* v. *Dillon*, 7 Id., 13.

4. The deed is as to Clamorgan *in invitum*. It is without covenant of any kind, and but a conveyance, against his will, of such title as he then had. He was not bound to perfect it.

5. A deed operates by relation, or enures to the benefit of another, only where he who receives the deed has led the other into an interest in the property, and to avoid injury to that interest from events happening between the creation of that interest and the execution of the deed, or the first and second delivery of the deed. 4 Kent Com., 454, 555; 4 Johns. (N. Y.), 230; 15 Id., 316; 1 Cow. (N. Y.), 613.

6. If McNair had, under the sheriff's deed, an imperfect title, and was bound to have perfected it, and Clamorgan was under no obligation to have it confirmed, and afterwards procured *a confirmation to himself in his individual right, it vested in him the legal title and equitable [*361 interest, paramount to any intermediate equities created against his will.

But 2d. The court refused to instruct the jury that the deed from the sheriff was void for uncertainty in the description of the property. It is a sale under execution. *Hart* v. *Rrctor*, 7 Mo., 534, and cases there cited; *Evans* v. *Ashley*, 8 Id., 177; 1 J. J. Marsh. (Ky.), 33. See the cases cited.

Third Point. The plaintiff's ninth and defendant's second instructions relate to the second record, judgment, execution, and sheriff's sale. The plaintiff submits there is error in these instructions, as also in the refusal to give the instructions refused. An exception was reserved to this deed.

1st. It was a suit and judgment against an executor, "and that he have his execution against the goods and chattels, lands and tenements, which were of said Jacques Clamorgan," &c.

The execution follows the judgment.

Although the judgment may be simply erroneous, and therefore not now to be called in question, it cannot justify the execution. The Revised Code of Missouri, 1825, p. 112, §§ 49, 50, provides for the classification of debts, and p. 563, for the classification or marshalling of the assets.

The personal estate should have been first subjected. *Gantley's Lessee* v. *Ewing*, 3 How. 707; 1 Blackf. (Ind.), 210.

2d. If the execution was properly issued, the deed did not describe the property with reasonable certainty. No deed from Gabriel Dodier to Clamorgan is shown to help out the defective description, nor was there in fact any such deed. See cases above. Besides, the land had then been laid off, divided into blocks and squares, and lots, and streets and alleys, and the description was wholly delusive.

3d. The property sold for $33 to satisfy $27.88, leaving a surplus of $512. The property was worth $10,000, if free from encumbrance. It was capable of division, and was, in fact, divided. It was evidently taken in connection with the previous sale under another execution, intended to get up all the interests of all Clamorgan's heirs in all his property within the jurisdiction of the court. Taking all the circumstances together, it was strong evidence of fraud, and ought to have been left to the jury on that ground. *Tiernan* v. *Wilson*, 6 Johns. (N. Y.) Ch., 417; 4 Cranch, 403; 18 Johns. (N. Y.), 362; 6 Wend. (N. Y.), 522; 3 Blackf. (Ind.), 376.

Fourth Point. The instruction granted by the court, as to adverse possession, left to the jury a mixed question of law and fact. The plaintiff submits that it is erroneous.

*362] *1st. Because it submitted to the jury to find whether the possession was adverse, without qualification.

The defendant claimed under the two sheriff's deeds. If

those deeds were void, no length of time would create an adverse possession.

A sheriff's deed which is void for want of jurisdiction in the court under whose judgment the sale took place, is not such a conveyance as that a possession under it will be protected by the statute of limitations. *Walker* v. *Turner*, 9 Wheat 541–551; *Powell's Lessee* v. *Harman*, 2 Pet., 241; *Hoskins* v. *Helm*, 4 Litt. (Ky.), 310; *Brooks* v. *Marbury*, 11 Wheat., 90; 9 Johns. (N. Y.), 167; 1 Id., 157.

2d. The deed from Sheriff Walker to O'Fallon and Lindell is within twenty years of the bringing of the suit. By claiming under that deed, the defendant is estopped to deny that the title was then in the heirs of Clamorgan. 14 Johns. (N. Y.), 225, and note.

The court had previously ruled these deeds to be good. If they were void, no adverse possession could arise. Yet the whole question of adverse possession was left to the jury.

Adverse possession is a legal idea, admits of a legal definition, of legal distinctions, and is therefore correctly laid down to be a question of law. *Bradstead* v. *Huntington*, 5 Pet., 402, 438.

The judge did not define the legal properties necessary to constitute an adverse possession, and the facts stated in his instruction do not of themselves constitute such adverse possession.

3d. The statute of limitations of Missouri cannot avail the defendant.

1. The deed of 10th August, 1826, admits the title of plaintiff's ancestor, and there is no proof of actual adverse possession for twenty years before, and continuously down to suit brought.

2. Louis and Henry Clamorgan, under whom the plaintiff claims, are within the saving of the statute of 1818. Territorial Laws, 598.

Finally. The plaintiff maintains, that, although there may have been an equitable title in the defendant, and under the statutes of Missouri an action of ejectment may be maintained on an equitable title in that state, yet such title cannot prevail against the legal title. It is conceded that the legal title is in the plaintiff, and it is insisted by defendant that it is held in trust for him. This is an implied trust. If it exists at all, it arises from some wrongful act of the plaintiff, or those under whom he claims. But it is begging the question to say the *act was wrongful, and must enure to the benefit of [*363
defendant. It was the object of the commission to settle the rights of conflicting claimants. It was entirely

within the power of McNair or O'Connor to have brought this question before them. The transactions were then fresh, and no difficulty would have occurred in adjusting any controversy between them. On these grounds, effect is given to the confirmation to pass the legal title. A conclusive effect is necessarily given to such confirmation, unless it be in cases of fraud and wrong.

If there be an equity in those claiming under the said judgments, it cannot prevail in a court of law as against the legal title; and the substance of the instructions given by the court is, it is respectfully submitted, wrong in that particular. *Chouteau* v. *Eckhart*, 2 How., 375; *Hickey* v. *Stewart*, 3 Id., 750; *United States* v. *King*, 3 Id., 787; *Les Bois* v. *Bramell*, 4 Id., 449.

Mr. Gamble, contra.

Clamorgan had filed his claim with the Recorder of Land Titles, and the same was pending before the Board of Commissioners, prior to the year 1808. The fifth section of the act of Congress of the 3d of March, 1807 (2 Stat. at L., 440), had limited the time for the exhibition of claims to the 1st of July, 1808. There was no mode provided by law for substituting for the claimant an heir, devisee, or assignee, who had acquired the right of the claimant after his claim was filed. Clamorgan claimed to be the legal representative of Gabriel Dodier, by purchase from Esther, who purchased from Brazeau, who purchased from Dodier, the original grantee. In July, 1808, the sheriff, under execution, sold the interest of Clamorgan in the land, and executed his deed to McNair, the purchaser. The thing itself, so filed, in which Clamorgan claimed an interest, whilst it was *sub judice*, was sold; and his interest, as it then existed, was sold, namely, a Spanish claim which had been filed. The sheriff's deed is declared by the law under which it was made to be effectual "to pass to the purchaser all the estate and interest which the debtor had, or might lawfully part with, in the land, at the time the judgment was obtained." Edwards's Territorial Laws, p. 121, § 45. The purchaser at sheriff's sale held a conveyance which was as operative to pass Clamorgan's interest in the land, as any instrument which Clamorgan himself could have made. He was by that deed constituted the sole representative of Gabriel Dodier, the original grantee of the land.

As to the objection of want of an appearance, the Supreme Court of Missouri have decided that hardly any state of circumstances *would justify them to set aside a sheriff's sale, where possession had followed the deed. *Tindell*

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v. *Bank*, 4 Mo., 228; *Landis* v. *Perkins*, 12 Id., 254; *Day* v. *Kerr*, 7 Id., 426. It is then the settled law of Missouri, that, under the recital contained in this judgment, the defendant will be held to have appeared. No matter whether Clamorgan was in Mexico or not.

If we look to the practice under the Spanish authorities, and since, we shall find that these claims were not a contingent interest separate from the estate, (as was the case in *Blanchard* v. *Brooks*, 12 Pick. (Mass.), 52,) but were a present existing interest in the land, and were susceptible of transfer and every form of conveyance. And in whatever form the claimant's interest was conveyed, his claim to the confirmation was conveyed.

It is said that the purchaser should have filed his sheriff's deed with the Board, and claimed the confirmation to himself. But this could not be done. The law limited the time within which claims could be filed. That time had passed before this sale was made.

The patent which conveyed the legal title, being issued in the name of Clamorgan, who was then dead, passed the legal title to the person who was then the holder of the equitable title previously in Clamorgan, and the purchaser of that equitable title would take the legal title, under the patent, in preference to a devisee of Clamorgan. 5 Stat. at L., 31; Act of 3d March, 1807 (2 Stat. at L., 440).

The language of the Commissioners has probably induced misapprehension. They "grant," &c., although they had no power to grant. The acts of Congress makes the grant, and the Commissioners were only to ascertain, by rules of evidence, whether the claim was a valid one, according to the laws of Congress.

The language, then, which may be employed by the Board, does not, in any manner, affect the operation of the confirmation. If the words in this case had been, "the claim filed by Jacques Clamorgan is confirmed," or, "the Board are of opinion that the claim filed by Jacques Clamorgan is a valid claim," the effect would have been precisely the same as is produced by the language actually employed, "the Board grant to Jacques Clamorgan," &c.

The doctrine of relation applies here with all its force. The Commissioners act upon the claim as filed. They act upon it as it was when filed. The Commissioners in this case having to decide upon claims throughout what is now Missouri, Iowa, and Wisconsin, the adjudication would necessarily be long delayed, and would present just such a case as would make the doctrine of relation applicable.

*A judgment relates to the first day of the term at which it is rendered. A deed executed in pursuance of an agreement to convey may relate back to the time of the contract. *Jackson* v. *Bard*, 4 Johns. (N. Y.), 230. A sheriff's deed relates back to the day of sale. *Jackson* v. *Dickinson*, 15 Johns. (N. Y.), 309; *Boyd* v. *Longworth*, 11 Ohio, 235. An acknowledgment of a deed relates back to the time of its execution. 8 Ohio, 87. So the confirmation relates back to the filing of the claim.

As to the objection that the lands ought not to have been sold before the goods and chattels. How can that be inquired into collaterally in the case of a sheriff's sale? What has the purchaser to do with the question whether the sheriff has made proper search for goods and chattels before he sells the land? There is no *evidence* here that there was any personalty at all. The objection is raised merely from the form of the precept.

It was objected to the instruction as to possession, that the court ruled, that from open and notorious possession, "connected with other circumstances," the jury might infer that the plaintiff had notice, &c. In Missouri, circumstances are considered sufficient to prove actual notice. Before a jury it would be competent to contend that circumstances made out a case of notice. Possession is one circumstance. A list made out in Clamorgan's handwriting (this lot being omitted) is another. And so on. The gist of the instruction was, that the jury might find from circumstances that the plaintiff had actual notice; not that the circumstances detailed were proof of notice.

A question was made in the court below in relation to the sufficiency of the description contained in the sheriff's deed to McNair. The plaintiff contended that the deed was void for uncertainty, and objected to its being admitted in evidence, and afterwards moved for instructions to the jury to the same effect. In the fourth instruction, the court was asked to declare, as a matter of law, that the deed was void. This instruction the court very properly refused, as it required the court to pass upon all the facts in evidence before the jury, relating to the description contained in the deed. The thirteenth instruction, which applies to the same subject, was refused by the court in the form in which it was asked, but in lieu of it the court instructed the jury, "that it was their duty to find whether the land *described* in the sheriff's deed is the land in dispute in this action, and the same land that was confirmed to Clamorgan, and if the land in dispute is not the same land conveyed by the sheriff's deed, and confirmed as

aforesaid, then said deed cannot furnish a defence to this defendant."

This instruction refers the question to the jury, whether the *description in the sheriff's deed covers the land in dispute. They are to take the deed with its description, and all the evidence describing the land in dispute, and to determine whether the description in the deed embraces the land in controversy. The Supreme Court of Missouri, in the case of *Landis* v. *Perkins*, 12 Mo., 260, say:—"Whether the description of the premises sold was sufficient, would depend upon extrinsic circumstances. If the lot was known by the description given, the sale would be valid, according to the principles settled in the case of *Hart* v. *Rector*, 7 Mo., and parol evidence was admissible to establish that fact." [*366

The Circuit Court, undoubtedly, gave the proper instruction, to direct the attention of the jury to the question of fact upon which the validity of the deed depended, and very properly refused to instruct the jury that this deed was void for uncertainty.

If it were necessary to cite authorities to show that descriptions, as general as that used in this deed, have been held to be sufficient, I would refer the court to 4 Dev. & B. (N. C.), 414; 1 Humph. (Tenn.), 80; 3 Yerg. (Tenn.), 171; 7 Id., 490; 8 Gill & J. (Md.), 349; 2 N. H., 284.

Mr. Bradley, in reply and conclusion.

There is a wide difference, as to adverse possession, between a claim of title from the same stock under a defective deed, and a claim of title from another stock. In the former case, if the deed under which the claim is set up is void, it nevertheless admits the title of the other. That is the case here. If we show that the deeds of the sheriff are void, they purporting to convey Clamorgan's title, do we not thereby confirm as against them the title under which they claim? Is it not an admission that our title is good, unless it has been divested by the machinery on which they rely? The cases cited show that possession under a void deed is a possession consistent with, and subordinate to, the title of the true owner, and can never give rise to an adverse title.

Now as to what passed by the sheriff's deeds, I maintain that nothing passed but the naked possessory title:—"All the estate and interest which the debtor had, or might lawfully part with, in the land, at the time the judgment was obtained." See Edwards's Ter. Laws, p. 121, § 45. Now what had Clamorgan at that time which he "might lawfully part with" in this land? I do not ask to what he might by proper cove-

nants bind himself. But what had he which could have passed by a mere quitclaim deed?

He had then an equitable interest in the land, which is said *367] *to have been the subject of seizure and sale. He had, also, a claim pending before the Board of Commissioners, for a confirmation of that interest, so as to create in him a legal estate. Was that, also, the subject of seizure and sale? Would that pass by a quitclaim deed? The claim was before the Board. It is said the time for filing claims had passed. Was there anything to prevent the assignee, if he were such, from filing his assignment made subsequent to the filing of that claim? Clearly he might have done so. Clamorgan was there. His was a mere possessory title, with an inchoate right to the legal estate. His possessory right was the subject of seizure and sale. It was a valuable thing, and, unless some one else procured the legal estate, it might be perfected. The means of perfecting it were within his reach. The law of this court is, that however strong the possessory right, however clear the equity, a grant or confirmation to a stranger claiming the land would have passed the legal estate to such stranger. There was, then, every motive to induce him to present his claim to a confirmation, if he had one, and it might then have been decided, when every thing was fresh, and the parties on the spot. The law provided for legal representatives, and embraced as well those who were assignees before, as after, the claim filed. It was confirmed to Clamorgan.

It is supposed the legal title enured to the benefit of the intermediate assignee of Clamorgan, that is, to the forced assignee, after the claim filed. Upon what principle? Was Clamorgan bound by any legal or moral obligation to perfect the title? The sheriff had sold his possession; no more. Illustrations are drawn from the law of relation, which is supposed to be clearly expounded in the books, and cases are put forth to show its operation; a deed executed in performance of an agreement, a judgment, a sheriff's deed, the acknowledgment of a deed, are put; to which may be added the case of *Graham* v. *Graham*, 1 Ves., 275, and *Garnons* v. *Knight*, 8 Dowl. & Ry., 348. In these and like cases, where a man, by his own voluntary act, has passed an imperfect title to another for a full consideration, and afterwards seeks to transfer the property to another, or that interest is sought to be subjected by process to his debts, or he has, after a full consideration received, or under covenant, received a good title, in such case, the law, to prevent injustice, interposes, and by relation secures the title to the first vendee. But there is a wide dis-

tinction between voluntary and compulsory acts, between a naked quitclaim and a covenant for title, between a mere right to present possession and enjoyment and an absolute estate in fee. In the case of a naked quitclaim, an after-acquired title will never *relate back, so as to vest in the vendee of the quitclaim. 1 Cow., 613. Nor would [*368 any court tolerate for a moment, that a squatter who has the bare possession, and sells that, should be debarred from acquiring for himself the absolute estate in fee. And there is a substantial reason for this distinction. He who buys an imperfect title pays a proportionate price for it. He has no right to look to his vendor to complete it. He takes it for what it is worth; no more. I admit that the same rule of relation applies to sheriff's deeds, and to others acting in a fiduciary or executive capacity, where the title to the property has passed by the sale, and the deed is a mere formal execution of the power. In some states, Maryland for instance, the deed from the sheriff is not necessary, nor is it in cases of chancery sales; and when executed, it relates back to the time of the sale. But what does it convey? Has it ever been supposed to carry with it any thing more than the actual title or interest which the party had at the time of such sale? If this rule prevails as between vendor and vendee, where they deal together, and treat of the actual right or possession, the thing *in esse* not *in posse*, it should apply with still greater force to a case where the sale is wholly *in invitum*. The policy of the law and the rules of courts are much more stringent in such cases than in those where the parties act voluntarily.

Here the whole proceeding against Clamorgan was compulsory. He had an interest which could be taken in execution. The confirmation was most uncertain, at best. The claim was not appraised. It was not in any manner referred to. The purchaser was bound to know that he was buying but a naked possession, and he must, of course, have regulated his price by that. There was, then, no foundation even for equity to interpose to compel a deed from Clamorgan. And will it be pretended, that courts of law will make a deed enure by relation, when equity would not interpose to compel the party to make it?

The great questions in this case are as to the effect of the confirmation and patent; whether or not the confirmation and patent enure to the purchasers at the sheriff's sale, or, the deeds of the sheriff being void, whether the title does not subsist in the heirs and devisees of Clamorgan.

The cases cited from the fourth and sixth volumes of the Missouri Reports differ from this. In the first there was pro-

cess served and an appearance by attorney. In the last there was service of process on one of the defendants. Here there was no service of process, no appearance.

But it is thought the defects are cured by the entry, that "the parties come by their attorneys," &c., and the record is *not to be contradicted; it binds parties and privies, is a solemn judgment of a court of competent jurisdiction, final and conclusive until reversed. If it is a record, it must stand or fall by itself. It does not require the aid of the maxim cited for its support. But is it a record, and as such entitled to conclusive force? The judgment begins with "Therefore it is considered," &c. The rest is recital. No court can have jurisdiction except under certain statutes, unless the defendant is before it. On the return of process, an attorney may appear if the defendant is in court, but I know no case in which an attorney has been allowed to appear *suo motu*, unless the party was in court. There must be an authority, clear and explicit, naming the attorney, or there must be a party in court under process. Here there is neither. It is a mockery of justice, not error, but absolutely void, to allow a voluntary appearance by attorney without any authority of record, or the presence of the party in court. There is nothing in the whole proceedings from which it can be inferred that the defendant had notice, actual or constructive, of this proceeding, and without this the judgment is a nullity. See the cases on the brief, and also *Buckmaster* v. *Carlin*, 3 Scam. (Ill.), 104, and *Crane* v. *French*, 1 Wend. (N. Y.), 312. A case in 6 Miss., 50, and one in 7 Id., 426, are relied on to show that such a recital binds the parties. But these cases, if they are in conflict with, are clearly overruled by, 7 Miss., 465. If the rule is so inflexible, it would never be in the power of the defendant to show that he had no notice.

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Nor does the maxim, "*Ex diurnitate temporis omnia presumuntur, rite et solemniter esse acta*," apply to such a case. That can avail only where there is a defect in the proof, and to supply the imperfect record. But when the proof is itself a matter of record, and no suggestion is made of a defect in it, not evanescent, but fixed and public, courts must deal with it alone, and not with presumptions.

Nor is the ruling of the court sustained by the passage in Greenleaf, nor the case in Wendell, on which the defendant relies. It is not a case of an erroneous judgment; but of a judgment utterly void for want of jurisdiction over the person of the defendant, for want of an appearance under process, or by any voluntary authority. It is not sought to reverse or

vacate it, but to treat it as a nullity; and this may be done in a collateral proceeding as well as in any other mode.

Mr. Justice CATRON delivered the opinion of the court.

The first title paper offered in evidence by the plaintiff was a patent from the United States to Jacques Clamorgan, dated *June 18, 1845, which purports to grant "to said Clamorgan (under Gabriel Dodier), and to his heirs," [*370 the land in dispute.

The patent is founded on a certificate made by the first board of commissioners established at St. Louis, which declares, that Clamorgan, claiming under Dodier, original claimant, was entitled to a patent under the provisions of the second section of the act of Congress of 3d March, 1807; and it was ordered that the same should be surveyed conformably to the metes and bounds established in the report of a survey made for said Gabriel Dodier, "and found in Livre Terrien, No. 2, folio 15; by virtue of ten consecutive years' possession, prior to the 20th December, 1803." The confirmation and certificate bear date November 13th, 1811.

According to the former decisions of this court, all controversy was concluded by the confirmation as regarded two questions:—First, it settled that Clamorgan was the true and proper assignee under Dodier, through the various mesne conveyances by which Clamorgan claimed. *Bissell* v. *Penrose*, 8 How., 330. Secondly, that Clamorgan had the oldest and best claim to the land, as against every other claimant under the Spanish government. In explanation of our former decisions, it is proper to remark, it is held, that, as between two claimants under that government, setting up independent imperfect claims, the courts of justice had no jurisdiction; that in such cases it appertained to the political power to decide to whom the perfect title should issue; and when this was done, no controversy could be raised before the courts of justice impeaching the first confirmation.[1]

The only question decided in *Chouteau* v. *Eckhart*, 2 How., 345, and in *Les Bois* v. *Bramell*, 4 Id., 449, was, that when Congress confirmed and completed an imperfect claim, and then confirmed another and different claim for the same land, the older confirmation defeated the younger one; nor could a court of justice go behind the first confirmation, and ascertain from facts and title papers which claimant had the better original equity. That if this was allowed, then the first confirmation could be overthrown by the courts; and the action

[1] CITED. *Snyder* v. *Sickles*, 8 Otto., 212.

of the political department (in all cases of double confirmation) would have no conclusive force when the courts were resorted to.

In the present case, the plaintiff's right of recovery cannot be questioned on the face of his title; and the controversy depends on the defendant's claim of title. In 1808, Sarpy recovered a judgment against Clamorgan in the District Court at St. Louis, for $2,393. The objection to the judgment is, that no process seems to have been served on Clamorgan, *371] *and it is proved that he was absent in Mexico at the time; but the record of the judgment states, that "now at this day came the parties by their attorneys, and neither of said parties requiring a jury, but this case with all things relating to the same being submitted to the court, for that it appears to the court that said Sarpy has sustained damages," &c. And then a judgment follows.

A defendant's being beyond the jurisdiction of a court is not conclusive evidence that the judgment was void; he may have left behind counsel to defend suits brought against him in his absence, by which means his property could be reached by attaching it; and the proof shows it to be probable enough that such was Clamorgan's condition when the judgment was rendered. But the validity of the judgment does not depend on this consideration. If it was voidable for want of notice, and a false statement on its face, "that the parties appeared by their attorneys and dispensed with a jury, and submitted the facts to the court," then it should have been set aside by an *audita querela*, or on petition and motion; such being the familiar practice in similar cases.[1]

Furthermore: This suit in ejectment is collateral to the judgment; and it cannot be impeached collaterally. So the Supreme Court of Missouri held in 1848, in the case of *Landes* v. *Perkins* (12 Mo., 254), on the same title, and a similar record in all respects to that before us, and with the views on this point there expressed we entirely concur.

In the same case it is held that Clamorgan's interest in the land by virtue of his imperfect Spanish claim was subject to seizure and sale under execution, according to the then laws of Missouri; that the proceeding was not void, but passed to the purchaser at execution sale all the title that would have passed from Clamorgan, had he made a quitclaim deed to McNair, the purchaser.

That such was the force and effect of a regular sheriff's deed under the local laws of the then Missouri territory is not open

[1] CITED. *Thompson* v. *Whitman*, 18 Wall., 464.

to question; nor is it controverted. And the only remaining consideration on this branch of the case is, whether the sheriff's deed can be set up as a defence at law, notwithstanding the confirmation and patent, both of which are of subsequent date to the sheriff's sale and deed.

The court below held, that the title set up in defence under the sheriff's sale was a valid, legal title; and so charged the jury; which instruction was excepted to; and this presents the principal matter of controversy now before us.

Clamorgan's claim to the land sold had existed for many years before the United States acquired Louisiana. It had *been regularly surveyed, by order of the Spanish government, and the survey was filed with the recorder, [*372 according to the act of 1805; Clamorgan had held possession under the claim of Dodier, to the extent of his survey, for more than ten consecutive years, before the 20th of December, 1803; he was on that day in possession, and then a resident of Louisiana.

The second section of the act of March 3, 1807, declares, that any person thus claiming and holding land shall be confirmed in his title to the tract thus held. The confirmation was to be made by the commissioners; and by section fourth their decision was to be final against the United States in cases within the foregoing description. And section sixth provides that a patent shall issue on a certificate of the Board.

In the case of *Landes* v. *Perkins*, the Supreme Court of Missouri held that the conclusive legal title vested in Clamorgan by the confirmation of 1811; and that, being the date of the legal title, a court of law could not go behind it; nor did the confirmation, or patent, relate to any previous step taken to acquire title; and the sheriff's deed, being a mere quit-claim, did not estop Clamorgan or his devisees from setting up the legal title against such a deed. And it is intimated that a court of equity could be resorted to, and through its aid the sheriff's sale might be set up by decree.

How far a court of equity would interfere in such a case we are not disposed to inquire, as it is apprehended that the Supreme Court of Missouri was mistaken in the effect it attributed to the confirmation of 1811, and the patent founded on it. Clamorgan's petition asking a confirmation (under the act of 1805) was filed with his title papers with the recorder; and they were recorded (December 10, 1805).

The imperfect title as then filed was subject to seizure and sale by execution; the ultimate perfect title demanded and granted was a confirmation and sanction by the political power

of the imperfect title, and gave it complete legal validity; and to protect purchasers, the rule applies, "that where there are divers acts concurrent to make a conveyance estate, or other thing, the original act shall be preferred; and to this the other acts shall have relation,"—as stated in Viner's Abr., tit. *Relation*, 290. The doctrine of relation is well illustrated in *Jackson* v. *M'Michael*, by the Supreme Court of New York, 3 Cow., 75, and recognized by the Supreme Court of Missouri in the case of *Crowley* v. *Wallace*, 12 Mo., 145.

Cruise on Real Property (Vol. V., pp. 510, 511) lays down the doctrine with great distinctness. He says: "There is no rule better founded in law, reason, and convenience than this, *373] that *all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act, and operate from the substantial part by relation."[1]

For the purposes of this case, (without proposing to apply the rule to every other,) we may assume that the first act of Clamorgan was that of filing his title papers and claim with the recorder of land titles, according to the fourth section of the act of March 2, 1805; this was regularly done, and the papers recorded. He claimed under the second section of the act of 1805, which was amended by the act of April 21, 1806, and again by the act of March 3, 1807. As already stated, by the fourth section of this last act, the decision of the board of commissioners appointed to investigate such claims is made final against the United States, and he was entitled to a patent. His claim was fully within the provisions of the acts of 1805 and 1807.

Applying the doctrine of relation, and taking all the several parts and ceremonies necessary to complete the title together, "as one act," then the confirmation of 1811, and the patent of 1845 must be taken to relate to the first act; that of filing the claim in 1805. On this assumption, intermediate conveyances made by the confirmee, or by the sheriff on his behalf, of a date after the first substantial act, are covered by the legal title, and pass that title to the alienee. And on this ground the deed made by the sheriff to McNair is valid.

But there is another consideration equally conclusive in favor of the sheriff's deed in the present instance. Clamorgan died in 1814; and by his will devised his lands to his illegitimate children, under whom the plaintiff Landes claims title. In 1845, a patent issued purporting to convey to Clamorgan, in fee simple, the land in dispute; according to common law rules, the patent was void for want of a grantee; and to sup-

[1] CITED. *Yontz* v. *United States*, 23 How., 498.

ply this defect, Congress passed a general law (May 20, 1836), declaring, "That, in all cases where patents for public lands have been, or may hereafter be, issued, in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before the date of such patent, the title to the land designated therein shall enure to, and become vested in, the heirs, devisees, or assignees of such deceased patentee, as if the patent had issued to the deceased person during life."

Of course the assignee by a *bonâ fide* conveyance would come in before a volunteer, such as an heir or devisee. Here the assignee of the devisee is suing the alienee of the devisor. The patent issued in 1845 is the ultimate and conclusive evidence of title in this instance, as the board of commissioners had no power to grant and communicate the fee held by the *United States. Their decision was final, to this extent; the officers of government were bound to award [*374 the patent to Clamorgan, without any further action on the part of Congress. But this adjudication does not stand on the footing of cases where the commissioners were ordered to report, and Congress reserved the power to confirm the report, and thus to grant the fee by act of Congress; in such cases, this court has held that Congress had granted the fee, and that no patent was required as a further assurance of title. To what description of assignee, then, did the title enure according to the act of 1836? Necessarily to one claiming, not the legal, but the equitable title, existing when the patent issued; and in him the legal title is vested by the patent. The same rule was applied in the case of *Stoddard* v. *Chambers*, 2 How., 316. In 1800 a concession was made to Mordecai Bell; in 1804, Bell conveyed to James Mackay; and in 1805, Mackay conveyed to Amos Stoddard, whose heirs were the plaintiffs. The claim was filed with the board in 1808, and in 1836 it was confirmed to Mordecai Bell "and his legal representatives." This court held, on the foregoing state of facts, "that when, under the act of 1836, the report of the commissioners was confirmed to Bell and his legal representatives, the legal title vested in him, and enured by way of estoppel to his grantee, and those who claim by deed under him."[1] There was no covenant for title in either the assignment from Bell to Mackay, or in that from Mackay to Stoddard, each being quitclaim assignments.

So, again, in the case of *Bissell* v. *Penrose*, 8 How., 317, the same principle was maintained. In August, 1800, Tillier

[1] FOLLOWED. *French* v. *Spencer*, 21 How., 240. See *Berthold* v. *McDonald*, 22 How., 339.

filed his claim with the board, and asked a confirmation for 800 arpents; and it continued before the different boards sitting at St. Louis until 1836, when it was confirmed by Congress. In 1818, Tillier assigned his claim to Clement B. Penrose; and in 1820, Penrose assigned his claim, acquired from Tillier, to Mary B. and Anna Penrose, who were the plaintiffs in the ejectment suit, and who recovered the land, under their deed of 1820.

In every case when this court has been called on to investigate titles, where conveyances of lands had been made during the time that a claim was pending before a board of commissioners, and where the claim was ultimately confirmed in the name of the original claimant, the intermediate assignments have been upheld against the confirmee, and his heirs or devisees, in the same manner as if he had been vested with the legal title at the date of conveyance. We are therefore of opinion, that the sheriff's deed made to McNair in 1808 must be supported on this ground also.

*375] *The second objection to the sheriff's deed is, that it was not recorded when Landes purchased from Clamorgan's devisees. The Circuit Court instructed the jury, that, as between the devisees and those claiming under McNair, the deed was valid without recording, but that it was not valid to defeat a subsequent *bonâ fide* purchaser without notice of its existence; and further instructed the jury, that, "the deed on which the plaintiff relies was made in April, 1845, and if the plaintiff then had actual notice of the deed of 1808, it was valid also as to him, without having been recorded. And if the jury find that the defendant Brant was in the open and notorious possession and occupation of the premises when the deed of 1845 was made, and had been so for years before that time, continuously holding under the deed of 1808, then this is evidence from which, connected with other circumstances, the jury may find that the plaintiff had actual notice of the existence of the deed of 1808, when he took his deed in 1845."

The material objection to the charge is, that other circumstances taken in conection with the adverse holding were required to exist, in the opinion of the court, and that these circumstances are not enumerated. And our opinion is, that if more had been required than the open and notorious adverse possession and occupation of the premises, and the court had given an instruction in general terms as above set forth, it would be erroneous.[1] If, however, the possession alone was

[1] FOLLOWED. *Marsh* v. *Brooks*, 14 How., 524.

sufficient, then the general terms "connected with other circumstances" were prejudicial to the defendant, and fall within the general rule "that a man cannot reverse a judgment for error, unless he can show that the error was to his disadvantage." 3 Bac. Abr., *Error*, K., 105.

And this brings us to the question, whether open and notorious occupation and adverse holding by the first purchaser, when the second deed is taken, is in itself sufficient to warrant a jury or court in finding that a purchaser had evidence before him of a character to put him on inquiry as to what title the possession was held under; and that he, the subsequent purchaser, was bound by that title, aside from all other evidence than such possession and holding. It is conclusively settled in England, that open and notorious adverse possession is evidence of notice; not of the adverse holding only, but of the title under which the possession is held. *Hiern* v. *Mill*, 13 Ves., 120; *Daniels* v. *Davison*, 16 Id., 253; per Eldon, Lord Chancellor.

And in the United States we deem it to be equally settled. The cases in New York will be found in *Gouverneur* v. *Lynch*, 2 Paige (N. Y.), 300, and in *Grimstone* v. *Carter*, 3 Id., *436, per Walworth, Chancellor. In Kentucky, in [*376
Brown v. *Anderson*, 4 Litt. (Ky.), 201, and *Buck* v. *Holloway*, 2 J. J. Marsh. (Ky.), 180. Nor are we aware that a contrary doctrine is held in any state in the Union. We are therefore of opinion, that the charge given on this point was correct, so far as the plaintiff in error is allowed to call it in question.

The next inquiry arises on the refusal of the Circuit Court to charge the jury that the sheriff's sale made by John K. Walker (sheriff), in 1836, was void. The executors of Clamorgan were sued, and a recovery had against them, as executors, by Rufus Easton; and the premises in dispute were sold, and under this sale the defendant also claims title. That the lands of the deceased debtor could be seized and sold under the judgment according to the then laws of the state of Missouri, we hold to be free from doubt; so the Supreme Court of that state held in the case of *Landes* v. *Perkins*, (12 Mo.) above referred to, and in which case all the points in controversy on this branch of the title were discussed, and in our judgment properly decided; the opinion there given is in conformity to the instructions given and refused in the court below, in this case, and in which we hold there was no error.

There is no other question presented by the record requiring

examination, and it is therefore ordered that the judgment of the Circuit Court be 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 Missouri, 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, affirmed, with costs.

The Philadelphia, Wilmington and Baltimore Railroad Company, Plaintiff in error, *v.* The State of Maryland.

The Philadelphia, Wilmington, and Baltimore Railroad Company was formed by the union of several railroad companies which had been previously chartered by Maryland, Delaware, and Pennsylvania, two of which were the Baltimore and Port Deposit Railroad Company, whose road extended from Baltimore to the Susquehanna, lying altogether on the west side of the river, and the Delaware and Maryland Railroad Company, whose road extended from the Delaware line to the Susquehanna, and lying on the east side of the river.

The charter of the Baltimore and Port Deposit Railroad Company contained no exemption from taxation.

*377] *The charter of the Delaware and Maryland Railroad Company made the shares of stock therein personal estate, and exempted them from any tax "except upon that portion of the permanent and fixed works which might be in the state of Maryland."

Held, that under the Maryland law of 1841, imposing a tax for state purposes upon the real and personal property in the state, that part of the road of the plaintiff which belonged originally to the Baltimore and Port Deposit Railroad Company, was liable to be assessed in the hands of the company with which it became consolidated, just as it would have been in the hands of the original company.[1]

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[1] Applied. *The Delaware Railroad Tax*, 18 Wall., 228. Followed. *Tomlinson* v. *Branch*, 15 Wall., 465. In point. *Central R. R. &c. Co.* v. *Georgia*, 2 Otto, 675. Cited. *Chesapeake, &c. R. R. Co.* v. *Virginia*, 4 Otto, 726; *Boston, &c. R. R. Co.* v. *New York &c. R. R.*, 13 R. I., 274. See *County of Scotland* v. *Thomas*, 4 Otto, 693. See also note to *Gordon* v. *Appeal Tax Court*, 3 How., 133; *McGee* v. *Mathis*, 4 Otto, 143; *Home of the Friendless* v. *Rouse*, 8 Wall., 430; *Washington University* v. *Rouse*, Id., 439; *Tomlinson* v. *Jessup*, 15 Id., 454; *Tomlinson* v. *Branch*, Id., 460; *Atlantic &c. R. R. Co.* v. *Georgia*, 8 Otto, 359; *Northwestern University* v. *People*, 9 Id., 309.

In *Railroad Co.* v. *Maine*, 6 Otto, 499, it was held that where two or more corporations, subject to the payment of a certain tax—the amount to be determined by information furnished by the directors and other officers—are consolidated, with new officers who are under no obligation to furnish such information as required of the original companies, the new corporation is not entitled to the immunity from general taxation enjoyed by the original companies. "The consolidation of the original companies," said Mr. Justice Field,

Also, that there is no reason why the property of a corporation should be presumed to be exempted from its share of necessary public burdens, there being no express exemption.[2]

This court holds, as it has on several other occasions held, that the taxing power of a state should never be presumed to be relinquished, unless the intention is declared in clear and unambiguous terms.[3]

ERROR to the Court of Appeals for the Western Shore of Maryland.

This was an action of *indebitatus assumpsit*, brought by the defendant in error, in the Baltimore County Court, to recover certain state taxes assessed upon the real and personal property of the plaintiff in error, being in Harford County in the state of Maryland.

The suit was docketed by consent, with an agreement that a judgment *pro forma* should be entered for the plaintiff, now

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"was a voluntary proceeding on their part. * * * Having thus disabled themselves from complying with the conditions, upon the performance of which the amount to be paid as a tax to the state could be determined, they must be considered as having waived the exemption dependent upon such performance. Their exemption was qualified by their duties, and dependent upon them. They incapacitated themselves for the performance of such duties by a proceeding which they supposed would give them greater advantages than they possessed in their separate condition. * * * The provision in the act authorizing the consolidation, that the new company should have all the powers, privileges, and immunities of the original companies, must, therefore, be taken with the qualification that it should have them so far as they could be exercised or enjoyed by it, with its different officers and constitution. Where their exercise or enjoyment required other officers or a different constitution the grant was to that extent necessarily inoperative."

If two companies, each of which is entitled to certain exemptions from taxation, unite, but without forming a new corporation, but simply merge one into the other, the powers of the surviving one will be so enlarged as to include all the rights, privileges, and property of the merged corporation. The exemption from taxation which both enjoyed under their original charters cannot be withdrawn by the legislature. *Southwestern R. R. Co.* v. *Georgia*, 2 Otto, 676. S. P. *Central R. Co.* v. *Georgia*, Id., 665.

[2] The charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature has accepted with a declaration, that it is to be in lieu of all other taxation. *Jefferson Brancl. Bank* v. *Skelly*, 1 Black, 436.

Where the state of Ohio chartered a bank in 1845 in which charter was stipulated the amount of tax which the bank should pay in lieu of all taxes to which said company or the stockholders thereof, on account of stock owned therein, would otherwise be subject; and in 1852 the legislature passed an act levying taxes upon the bank to a greater amount and founded on a different principle, this act was in conflict with the Constitution of the United States, as impairing the obligation of a contract, and therefore void. *Dodge* v. *Woolsey*, 18 How., 331.

[3] FOLLOWED. *North Missouri R. R. Co.* v. *Maguire*, 20 Wall., 61. REITERATED. *Society for Savings* v. *Coite*, 6 Wall., 606. CITED. *Tucker* v. *Ferguson*, 22 Wall., 575; *Wiggins Ferry Co.* v. *East St. Louis*, 17 Otto, 371; *Redemptorist Fathers* v. *Boston*, 129 Mass., 180; *Phillips Academy* v. *Exeter*, 58 N. H., 307; *Salt Lake Nat. Bank* v. *Golding*, 2 Utah T., 9. S. P. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436; *Gilman* v. *City of Sheboygan*, 2 Id., 510. See also *New Jersey* v. *Yard*, 5 Otto, 104; *Meyer* v. *Johnston*, 64 Ala., 657.

defendant in error, upon a statement of facts. An appeal was taken from this judgment to the Court of Appeals, where it was affirmed *pro forma*, and the present writ of error was afterwards sued out. The statement of facts was as follows:

"The Philadelphia, Wilmington, and Baltimore Railroad Company" was formed by an agreement of union, duly made and entered into between the following corporations, to wit, the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehanna Railroad Company, and "the Philadelphia, Wilmington, and Baltimore Railroad Company," of Pennsylvania. This agreement of union was made on the day of its date, under the authority claimed under and in pursuance of the directions of the several acts of assembly therein recited, and was entered into after the primary meetings of stockholders, as required by said several acts. A copy of said agreement is herewith produced as a part of this statement, marked exhibit A. "The Baltimore and Port Deposit Railroad Company" was incorporated by the act of 1831, chap. 288, of the General Assembly of Maryland; "the Wilmington and Susquehanna Railroad Company" (one of the parties to said agreement marked exhibit A) was formed by an agreement of union duly made and entered into on the 18th day of April, 1835, between the Delaware and Maryland Railroad Company and the Wilmington and Susquehanna Railroad Company (of Delaware), in virtue and in strict pursuance of the several *acts in said agreement of union recited, to wit, an act of the General Assembly of the state of Delaware, passed on the 24th day of July, 1835, and an act of the General Assembly of the state of Maryland, passed at December session, 1835, chap. 93, and was certified and recorded as directed by said several acts. The said corporation, "the Delaware and Maryland Railroad Company," was incorporated by the act of 1831, chap. 296, of the General Assembly of Maryland; "the Wilmington and Susquehanna Railroad Company" (of Delaware) was incorporated by an act of the General Assembly of the state of Delaware, passed on the 18th day of January, 1832; "the Philadelphia, Wilmington, and Baltimore Railroad Company" (of Pennsylvania) was originally chartered by an act of the General Assembly of the commonwealth of Pennsylvania, approved on the 2d day of April, 1831, by the name of the "Philadelphia and Delaware County Railroad Company," which, by a supplement to said act, passed the 14th day of March, 1836, was changed to the corporate name of the Philadelphia, Wilmington, and Baltimore Railroad Company. The agreement of union by which the "Philadelphia, Wilmington, and Balti-

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more Railroad Company," the party to this suit, was formed, (of which said exhibit A is a copy,) was made by authority and in pursuance of the act of the General Assembly of Maryland, passed at December session, 1837, chap. 30, and other corresponding acts of the General Assembly of the state of Delaware and the commonwealth of Pennsylvania, recited in said agreement of union, marked exhibit A. All which said acts of assembly of the states of Maryland, Delaware, and Pennsylvania, above referred to, or referred to in said exhibit A, relating to the incorporation and charter of the defendant, are to be regarded as part of this statement, and, to save the trouble of transcribing them, either party may read them from the printed statutes; to have the same effect as if they were transcribed into this statement, or regularly certified copies of the same filed herewith.

The railroad of the defendant extends from the city of Baltimore, in Maryland, to the city of Philadelphia, in Pennsylvania, passing through the counties of Baltimore, Harford, and Cecil, in Maryland, and thence over a part of the states of Delaware and Pennsylvania. That portion of said railroad which lies west of the Susquehanna River, that is to say, between the city of Baltimore and the said river, lying partly in Baltimore County and partly in Harford County, was made and constructed (prior to the agreement of union of which exhibit A is a copy), and owned in severalty by "the Baltimore and Port Deposit Railroad Company." That portion of said railroad *which lies east of the Susquehanna, and between that river and the divisional line between the [*379 states of Delaware and Pennsylvania, was made by the Wilmington and Susquehanna Railroad Company, and (prior to the said agreement of union, of which exhibit A is a copy) was owned in severalty by said last-mentioned company. Previous to the consolidation of "the Delaware and Maryland Railroad Company" and "the Wilmington and Susquehanna Railroad Company" (of Delaware) into one company, the line of the road which the said corporation, "the Delaware and Maryland Railroad Company," was authorized to make, was that part of said road which lay east of the Susquehanna, and between that river and the divisional line between the states of Maryland and Delaware, and that part of said road which the said corporation, "the Wilmington and Susquehanna Railroad Company" (of Delaware), was authorized to make, is that part of said road which lies between the divisional lines of the states of Maryland and Delaware and the Commonwealth of Pennsylvania each of said last-mentioned corporations, prior to the consolidation, had commenced the

location and construction of their said several parts; but at the time of their consolidation under their agreement of union aforesaid, neither part was completed, but the whole was completed by the Wilmington and Susquehanna Railroad Company, after their agreement of union aforesaid. The River Susquehanna is passed over by the use of a steamboat belonging to the defendant, the said Philadelphia, Wilmington, and Baltimore Railroad Company, and used by said defendant for the sole and exclusive purpose of transporting persons and property across said river, from shore to shore, from the terminus of the railroad track on the other shore; said steamboat is especially constructed for its use in connection with said railroad, and has rails laid on its upper deck which are so constructed that the said rails are placed in juxtaposition with the railroad track of the railroad when the boat is in place for use, in connection with the terminus of the road on either shore; cars are received upon the said deck of said steamboat from the railroad track on one shore, and passed over the river by the said steamboat, and on to the railroad track on the other shore from off said boat, as the means of passing cars, &c., across the river; and prior to the agreement of union, of which exhibit A is a copy, was owned jointly, but in unequal parts, by the Baltimore and Port Deposit Railroad Company and the Wilmington and Susquehanna Railroad Company, and was managed and kept in repair at the joint expense, in the proportion of their respective interest therein, by the said last-mentioned two companies.

*380] *The said steamboat, before and since the said agreement of union of which exhibit A is a copy, usually remained, and still usually remains, in a dock constructed in the Susquehanna River by protecting piers projecting from the Harford shore, when not actually in use; which dock is on the west shore of the Susquehanna River, and within the limits of Harford County. That part of said road which lies east of the divisional line between the states of Delaware and Pennsylvania, and thence extending to the city of Philadelphia, was, prior to the said agreement of union of which exhibit A is a copy, constructed and owned in severalty by the said corporation, called the Philadelphia, Wilmington, and Baltimore Railroad Company (of Pennsylvania). The principal office of the defendant, (ever since the agreement of union of which exhibit A is a copy,) for the transaction of the business of said company, has been established and held in the city of Philadelphia, at the eastern terminus of said railroad.

The stated meetings of the board of directors, by the terms

of said agreement of union, are to be held alternately at Wilmington and Philadelphia. There are offices at Philadelphia, Wilmington, and Baltimore, at any one of which transfers of stock may be made; the stated meetings of the stockholders were to be held in the city of Wilmington. Prior to said agreement of union, the principal office of the Baltimore and Port Deposit Railroad Company was held in the city of Baltimore, and the principal office of the defendant within the state of Maryland has been, and is now, in said city, at which place one of the vice-presidents of the said corporation resides. All the corporate funds and capital stock of said defendant have been expended and contained in the location and construction of said road, and in the construction of such works and improvements as were necessary and expedient to the proper completion and use of said road, and in the purchase of cars and machinery of transportation, &c., necessary and indispensable to the completion and use of said road; and the said company has not, at any time, since the said agreement of union, owned or held, and does not now own or hold, any estate, real, personal, or mixed, other than what forms a part of, or necessarily appertains to, the construction and completion of said road, and its works and improvements, and in the purchase of cars and machinery of transportation, &c., necessary and indispensable to its use; and over and beyond its actual capital, it was found necessary to raise by loan a large additional amount for the purposes aforesaid, and which amount has been so applied. The defendant was assessed, under the act of the General Assembly of Maryland of March session, 1841, chap. *23, by the assessors, appointed under said act, for Harford County, with the sum of $127,000, as [*381 shown by a copy of said valuation and assessment, filed herewith as a part of this statement, marked exhibit B. The several parcels or tracts of land, valued for 200 acres at $10 per acre, as held and occupied by said company from the Gunpowder Falls to the Susquehanna River, lie within the limits of Harford County, and consist of the land held and occupied by said company for the bed of its railroad, water stations, depots, and ticket-offices of said company; portions of which said land were acquired under condemnations for the use of said company, under the provisions of the said act of the General Assembly of Maryland, of December session, 1831, chap. 233, and other portions of which were acquired by agreement with the owners thereof. The title acquired in each case of agreement with the owner being consummated by deed of bargain and sale to the president and directors of said company and their successors, in the ordinary terms of a conveyance in fee.

The houses and other improvements on the road, and at Havre de Grace, and the depots, ticket-offices, and water stations of said company, lie within the limits of Harford County. The railroad track iron, within the limits of Harford County, valued at $95,000, consists of the rails actually laid down and in use as the track of said railroad within the limit aforesaid. And the steam ferry-boat at Havre de Grace, valued at $15,000, is the steamboat hereinbefore mentioned, used as aforesaid for the sole and exclusive purpose of transporting persons and property across the River Susquehanna, from the terminus of the railroad track on one shore to the terminus of the railroad track on the other shore, in the manner hereinbefore mentioned; said steamboat is, and continually since its use as aforesaid has been, duly enrolled and licensed at the custom-house in Baltimore, according to the act of Congress. The capital stock of the defendant, under the agreement of union, (of which exhibit A is a copy.) is divided into 45,000 shares of $50 each, which stock is held by various persons, many of whom reside in the state of Maryland, and others of whom, and a large majority of whom, reside in other states, and in Europe, and was so held at the time of said union. The stockholders residing in the city of Baltimore, in Maryland, had actually been assessed to the extent of the stock by them respectively held, no objection being taken to said assessment, nor any appeal prosecuted therefrom; no assessment has been made on the stock of any of the stockholders residing in Harford County, or Cecil County, if any reside there, nor on the stock of non-resident stockholders. It is further admitted, that the taxes assessed and levied upon the

*382] *said property of the said defendant were for state purposes for the years 1842, 1843, 1844, and 1845, and that the same were assessed and levied by the commissioners of Harford County, under the act of the General Assembly of the state of Maryland, passed at March session, 1841, chap. 23, and that the said paper, marked exhibit B, filed as a part of this statement, is a correct statement of the rate and amount of taxes so assessed and levied, and that said rate of taxation is the same as that imposed for said years upon all real and personal property (not expressly exempted by said act of assembly) in said state. It is further agreed, that if the court shall be of opinion, on the aforegoing statement, that the said property of said defendant is liable to be assessed for taxes for general state purposes, under the act of assembly aforesaid, that then judgment be rendered for the plaintiff for $1455.19 and costs; but if the court shall be of opinion that the said property of the said defendant is not liable to be

assessed and taxed as aforesaid, but the same is exempt from such assessment and taxation under the charter of the defendant, or the said act of the General Assembly of Maryland of March session, 1841, chap. 23, then judgment to be given for defendant.

GEO. R. RICHARDSON, *Attorney for Plaintiff.*
REVERDY JOHNSON, *for Defendant.*

Exhibit A, referred to in the foregoing statement, is as follows, to wit:—

"Agreement between the Wilmington and Susquehanna Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington and Baltimore Railroad Company.

"Copy.—Articles of union made and concluded this 5th day of February, in the year of our Lord 1838, between the Wilmington and Susquehanna Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company, by virtue and in pursuance of an act of the General Assembly of the state of Delaware, entitled 'A further supplement to an Act entitled an Act to incorporate the Wilmington and Susquehanna Railroad Company,' and of an act of the General Assembly of Maryland, entitled 'An Act to authorize the union of the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehanna Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company,' and of an act of the General Assembly of Pennsylvania, entitled 'An Act supplementary to the Act incorporating the Philadelphia, Wilmington, and Baltimore Railroad Company.'

*"First. The said three corporations are hereby united, and from and after the first election of directors hereinafter provided for in the third article shall be merged into one body corporate, under the name and style of the Philadelphia, Wilmington, and Baltimore Railroad Company, and the stocks of the said three corporations so united shall form one common stock, and all the estate, real, personal, and mixed, and the rights, privileges, advantages, and immunities belonging to each of the said corporations, become and be vested in the said body corporate, and the debts and liabilities of each of the said corporations shall be deemed, and are hereby declared to be, the debts and liabilities of the said body corporate. [*383

"Second. The stock of the said body corporate is hereby divided into shares of fifty dollars each, of which the present

stockholders of the Wilmington and Susquehanna Railroad Company are hereby declared to be entitled, in all, to sixteen thousand shares, the present stockholders of the Baltimore and Port Deposit Railroad Company to nineteen thousand shares, the present stockholders of the Philadelphia, Wilmington, and Baltimore Railroad Company to ten thousand shares, including those forfeited heretofore, which are to be held for the use of this corporation; and certificates of stock, as may be regulated by the president and directors of the said body corporate, shall be granted and issued accordingly to each of the said stockholders so soon as the said stockholders shall have paid up all installments due upon the shares of stock held by them respectively, and shall have surrendered the certificates previously issued to them as stockholders in the respective companies hereby united; and the capital stock of the said corporation shall consist of such number of shares as aforesaid, subject to the right and privilege of increasing the same from time to time, according to the provisions of the respective charters of the said companies hereby united.

"Third. There shall be fifteen directors to manage the affairs and business of the said body corporate, and a meeting of the stockholders of the three corporations hereby united for the election of the first directors shall be held at Wilmington on Wednesday, the 14th day of February, instant, of the time and place of which meeting notice shall be given by the present president of the Wilmington and Susquehanna Railroad Company by advertisement in at least three newspapers, at which meeting fifteen directors shall be elected by the said stockholders, voting in person or by proxy, and each share being entitled to one vote; and the directors so elected shall hold their offices until the ensuing annual meeting of the stockholders, and until their successors are elected.

*384] *"Fourth. The stated meetings of the stockholders shall be held in the city of Wilmington, on the second Monday of January in each and every year hereafter, at which time and place an annual election of directors shall be made by the stockholders, and fifteen days' notice of the time and place of each stated meeting shall be given by advertisement in at least three newspapers; the election shall be by ballot, and each share of the stock shall entitle the holder thereof to one vote, to be given either in person or by proxy, provided it has been held for three calendar months before the time of voting; the directors shall, after the first and each subsequent election, choose by ballot one of their own number to be president of the said body corporate, who shall serve one year, or

until the election of a successor; the omission to hold an election for directors at the time prescribed shall in no wise affect the said body corporate, but such election may be had upon due notice from the said president and directors, published as aforesaid, at any time within three months after the time so prescribed as aforesaid.

"The directors shall hold their offices for one year, and until a new election shall take place, and the powers of the said president and directors shall be the same as are now vested in the president and directors of the Wilmington and Susquehanna Railroad Company; the president may be removed from his office by a vote of two thirds of all the directors. The directors may, in each year that they may deem it advisable, elect a vice-president from their own number, who, in the absence of the president, shall have all the powers of the president, and shall be liable to removal in like manner as the president. Five directors shall constitute a quorum for the transaction of business. The directors may, if they shall deem it advisable, appoint an executive committee, consisting of six members, from the states of Pennsylvania, Delaware, and Maryland, for such time, and for the performance of such duties, as any resolutions of the directors, or any by-law, may prescribe and assign; and the president, or vice-president, and any two members of said committee, shall constitute a quorum thereof. All officers and agents of the corporation, other than directors, shall be appointed by the directors, who may prescribe and exact such security as they may deem proper for the performance of their duties.

"Fifth. The stated meetings of the board of directors shall be held alternately at Wilmington and Philadelphia, and special meetings may be held either at Wilmington, Philadelphia, or Baltimore. The corporation shall have offices opened at Wilmington, Philadelphia, and Baltimore, at either of which transfers *of stock may be made, under such regulations as the board of directors may prescribe. [*385

"Sixth. All by-laws shall be made, altered, or repealed only by a majority, consisting of not less than two-thirds of all the directors; it being understood that no by-law shall contravene any of these terms or stipulations; and the existing by-laws of the Wilmington and Susquehanna Railroad Company shall, until altered or repealed as aforesaid, be the by-laws of this corporation; and all rules and regulations necessary for the management and conduct of the business of the company, not provided for in a by-law, may be made by the directors.

"In witness whereof, the said corporations, parties to this

agreement, have caused their respective corporate seals, attested by the signatures of their respective presidents, to be hereunto affixed, the day and year first hereinbefore written.

JAMES PRICE, [L. S.]
Pres. Wilm. and Susq'a Railroad Co.
J. I. COHEN, JR., [L. S.]
Pres. Balto. and Port Deposit Railroad Co.
M. NEWKIRK, [L. S.]
Pres. Philad., Wilm., and Balto. Railroad Co.

"In pursuance of the provisions of an act of the General Assembly of Maryland, entitled 'An Act to authorize the union of the Baltimore and Port Deposit Railroad Company, the Wilmington and Susquehanna Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company,' said corporations do hereby certify, under their respective corporate seals, attested by their respective presidents, that the within and foregoing instrument of writing is a true copy of an agreement for the union of the said company, made and concluded on the 5th day of February, A. D., 1838.

JAMES PRICE, [L. S.]
Pres. Wilm. and Susq'a Railroad Co.
J. I. COHEN, JR., [L. S.]
Pres. Balto. and Port Deposit Railroad Co.
M. NEWKIRK, [L. S.]
Pres. Philad., Wilm., and Balto. Railroad Co.

"Received to be recorded the 12th day of February, 1838, at 5 o'clock, P. M.; same day recorded and examined.

Per THOMAS KELL, *Clerk.*

"In testimony that the aforegoing is a true copy, taken from liber T K, No. 276, folio 392, &c., one of the [L. S.] land records of Baltimore County, I hereto subscribe my name and affix the seal of Baltimore County Court, this 3d day of December, 1846.

A. W. BRADFORD, *Clerk of Balto. Co. Court.*"

*386] *Exhibit B, referred to in said statement, is as follows, to wit:—

"A list of the real and personal property of the Philadelphia, Wilmington, and Baltimore Railroad Company, as per the assessors' books on file in the office of the Commissioners of Harford County, on which taxes are due for the years of 1842, 1843, 1844, and 1845, to wit:—

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Different tracts of land, from the Gunpowder Falls to the Susquehanna, containing 200 acres, at $10 per acre,	$ 2,000
Track iron, &c., &c.,	95,000
Houses and other improvements on the road, and at Havre de Grace,	15,000
Steamboat at Havre de Grace,	15,000
	$127,000

"I hereby certify, that the above is a true transcript of the property of the Railroad Company from the assessors' books.

"Given under my hand and seal of the Commissioners of Harford County, this

1842.	To state tax on $127,000, at 25 cents per $100,	$317.50
	Commission at 1½,	19.05
	Interest for three years,	60.57
1843.	To state tax on the same, at 25 cents per $100,	317.50
	Commission at 1¾,	22.22
	Interest for two years,	40.75
1843.	To state tax on the above, at 25 cents per $100,	317.50
	Commission at 1¾,	22.22
	Interest for one year,	20.38
1845.	State tax on the above, 25 cents in $100,	317.50
		$1,455.19

"JAMES SPICER, *Collector.*"

It is agreed that any errors in the foregoing statement may be corrected by counsel, at the trial of the cause, either in the County Court, Court of Appeals, or Supreme Court of the United States; and that said statement may be added to or amended, by agreement, at any time.

GEORGE R. RICHARDSON, *Attorney for Plaintiff.*
REVERDY JOHNSON, *for Defendant.*

The following is a summary of the act imposing the tax, as well as of the acts incorporating the different companies, so far as they bear upon the question before the court. [*387

The first section of the act of 1st April, 1841, imposing the tax sought to be recovered, after enumerating the several kinds of property which are to be the subject of taxation, including "all stocks or shares, owned by residents of this state, in any bank, institution, or company incorporated in

any other state or territory," also "all stocks or shares in any bank, institution, or company incorporated by this state," declares that such "and all other property of every description whatsoever shall be valued agreeably to the directions of this act, and shall be chargeable according to such valuation with the public assessment: provided," &c.

The ninth section makes it the duty of the assessor to inform himself of all property liable to assessment, and to make a return thereof under prescribed heads, the fifth of which was, "Bank stocks and other stocks particularly specified, with ther respective values."

The sixteenth section provided, that, for the valuing of stock in private corporations held by non-residents, the locality of such stock should be deemed to be at the place where the principal place of business of such corporation should be situate.

The seventeenth section enacted that the president or proper officers of corporations should make out and deliver to the assessors of the proper county an account of stock in such corporation.

The forty-fifth section made it the duty of the levy court or commissioners of the several counties to impose a tax of twenty cents in every $100 of assessable property, according to their valuation.

The fifty-third section provided that the tax imposed "shall be collectible and payable into the state treasury according to the provisions of this act, and be in all respects subject thereto."

The second section of the act of 1831, ch. 288, entitled "An Act to incorporate the Baltimore and Port Deposit Railroad Company," enacted that "the subscribers of the said stock, their successors and assigns, shall be, and they are hereby declared to be, incorporated into a company, by the name of the Baltimore and Port Deposit Railroad Company, and by that name shall be capable in law of purchasing, holding, selling, leasing, and conveying estates, real, personal, and mixed, so far as shall be necessary for the purposes hereinafter mentioned, and no further, and shall have perpetual succession, and by said corporate name may sue and be sued."

*388] *The twelfth section gave authority to construct a road one hundred feet wide from the City of Baltimore to Port Deposit, &c.

The twentieth section declared that "the shares of the capital stock of said company shall be deemed and considered personal estate."

The act of 1831, ch. 296, entitled "An Act to incorporate

the Delaware and Maryland Railroad Company," gave a perpetual charter, and authorized the construction of a road one hundred feet wide "from some point on the Delaware and Maryland line" "to Port Deposit, or any other point on the Susquehanna River."

The nineteenth section, after giving authority to purchase property, charge tolls, &c., and declaring that the property specified should be vested in said company and their successors for ever, proceeds: "And the shares of the capital stock of said company shall be deemed and considered personal estate, and shall be exempt from the imposition of any tax or burden by the state's assenting to this law, except upon that portion of the permanent and fixed works of said company which may lie within the state of Maryland; and that any tax which shall hereafter be levied upon said section shall not exceed the rate of any general tax which may at the same time be imposed upon similar real or personal property of this state for state purposes."

The act of 14th March, 1836, ratifies and adopts the act of the General Assembly of Delaware, passed 24th July, 1835, which provided for the union of the Wilmington and Susquehanna Railroad Company (incorporated by the General Assembly of Maryland) into one company, to be styled "the Wilmington and Susquehanna Railroad Company," and which also provided that "the holders of the stock of the said railroad companies, so united as aforesaid, shall hold, possess, and enjoy all the property, rights, and privileges, and exercise all the power granted to and vested in the said railroad companies, or either of them, by this or any other law or laws of this state, or of the state of Maryland."

The act of 1837, ch. 30, authorizes the union of the Baltimore and Port Deposit Railroad Company, and the Wilmington and Susquehanna Railroad Company, with the Philadelphia, Wilmington, and Baltimore Railroad Company, and provides that said "body corporate so formed shall be entitled within this state to all the powers and privileges and advantages now belonging to the two first above-named corporations."

The cause was argued by *Mr. Meredith*, for the defendant *in error, and submitted on printed points by *Mr. Reverdy Johnson*, for the plaintiff in error. [*389

Mr. Meredith, for defendant in error.

It will be contended by the defendants in error,—

1st. That the property assessed for the state taxes, for the recovery of which this suit was brought, was, at the time of

said assessment, liable to state taxation. Laws of Maryland, March Session, 1841, ch. 23; *McCulloch* v. *State of Maryland*, 4 Wheat., 436; *Providence Bank* v. *Billings*, 4 Pet., 563, 564; *Passenger Cases*, 7 How., 402; *Nathan* v. *State of Louisiana*, 8 How., 80; *Battle* v. *Corporation of Mobile*, 9 Ala., 234; *Howell* v. *State of Maryland*, 3 Gill (Md.), 14.

2dly. That the property so assessed was not exempted from taxation by any contract or agreement binding on the state of Maryland. Laws of Maryland, 1831, ch. 288; 1831, ch. 296; 1835, ch. 93; 1837, ch. 30; *Providence Bank* v. *Billings*, 4 Pet., 514; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *McCulloch* v. *State of Maryland*, 4 Wheat., 436; *Bulow* v. *City Council*, 1 Nott & M. (S. C.), 527; Angell & Ames on Corp., 435, 459, 462, 467, and cases referred to; *Blatchford* v. *Mayor of Plymouth*, 3 Bing. (N. C.), 691; Dwarris on Stat., 9 Law Lib., 50 *et seq.*; *Kirby* v. *Potter*, 4 Ves., 751; *Wildman* v. *Wildman*, 9 Id., 177; *Rawlins* v. *Jennings*, 13 Id., 45; *Page* v. *Leapingwell*, 18 Id., 467; *Reed* v. *McGrew*, 5 Ohio, 380; *Pembroke* v. *Duxbury*, 1 Pick. (Mass.), 199.

There are several questions which might be raised in the court below, but which would not be properly raised here. The only question is that which gives this court jurisdiction.

The Baltimore and Port Deposit Railroad Company had granted to them a perpetual charter, without any *bonus* to the state. But the charter contained no exemption from state taxation.

The act of 1831, ch. 296, gave to the Delaware and Maryland Railroad Company a perpetual charter. The nineteenth section declares that the shares of the capital stock shall be considered personal estate. There is obscurity in this section. The object would seem to have been to convert the *shares* into personal estate in order to subject them to execution, Maryland not having passed any law till after this charter subjecting stocks, &c., to execution. The same section also declares, that such shares shall be exempt from the imposition of any tax, &c. It would seem from this that the legislature meant to exempt stock in the hands of the stockholders. Then comes the exception, that the legislature reserves the
*390] right to *tax the permanent and fixed works of the company, which would indicate that everything else was exempted. And yet that would be a grant of an exemption by implication, there being no express words.

The plaintiffs claim an exemption which was not originally granted to them, but was granted to another company, which was subsequently merged in the present company. How was this exemption transferred?

The act of 1835, ch. 93, incorporates the legislation of Delaware on the same subject. That act *creates* a new corporation. In 1837, when the last union was asked for, Maryland provided that the three corporations should be merged in and form one body corporate, and that it should have all the powers, privileges, and advantages of the two former companies, namely, the Baltimore and Port Deposit Railroad Company, and the Wilmington and Susquehanna Railroad Company. Now the only exemption which could be transferred was that of the Delaware and Maryland Railroad Company, (because the other company had no exemption,) which had been merged in the Wilmington and Susquehanna Railroad Company. But the exemption of the former was gone necessarily, because it was only the *stock* of that company which was exempted. The moment, then, the stock was destroyed by the merger of that company in another, or the transfusion or intermingling of it with that of the other companies, its distinctive character was destroyed. *Reed* v. *McGrew* and *Pembroke* v. *Duxbury* are full to the point. And in the *Charles River Bridge* case this court held, that, by the charter to the Charles River Company, the franchise which had originally existed in Harvard College was extinguished. So here, by these new charters, the original exemption was extinguished.

But suppose it to have been transferred, how will it avail the present company? The property here assessed was not that which originally belonged to the Delaware and Maryland Company, but to the Baltimore and Port Deposit Company, which latter had, as I have shown, no exemption at all.

The only doubt is as to the steamboat. But it has been decided that a tax of this kind does not interfere with the regulations of commerce. It does not appear that this steamboat ever belonged to the exempted company. On the contrary, from the kinds of property authorized by the charter, it would seem otherwise. The charter was to construct a road from the divisional line *to the* Susquehanna River, and no farther. The property to be used was such as was required for this road, not for crossing the river. *Non constat*, then, that this steamboat ever belonged to the exempted company.

**Mr. Johnson*, for the plaintiff in error.

[*391 The only question is, whether, by contract between the plaintiff in error and the state, the plaintiff was not exempt from the taxation, the amount of which it was the purpose of the suit to exact. The judgment being against the plaintiff in error, who claimed the exemption under the alleged contract, and its protection under the Constitution

of the United States, it must be reversed if their ground can be maintained.

First, Was there a contract, and second, Is it impaired by the tax in question?

This is to be ascertained by referring to the several acts of Maryland, under which the plaintiff's franchise is held. If these contain the contract relied upon, the point is made out. That a state may contract in the form of a legislative act, and so as to deprive herself in a particular instance of the right to exercise her taxing power, are not now open questions. It is the settled doctrine. *Dartmouth College* v. *Woodward*, 4 Wheat., 518; *New Jersey* v. *Wilson*, 7 Cranch, 164.

Is there, then, such a contract in this case?

Before the present company existed, the right to make the road from Baltimore to Philadelphia was in various companies, chartered for certain portions of the road, by Maryland, Delaware, and Pennsylvania. These, by an agreement authorized by laws of the same state, were united into one on the 5th of February, 1838, under the name of the plaintiff in error; the agreement is in the record.

By the terms of this association, and the several acts legalizing it, it will be seen that *all the privileges and exemptions* possessed by any one of the companies under its own charter became vested in the united body, and co-extensive with the entire route of the road.

The act of Maryland of 1831, chap. 288, contains the exemption from taxation upon which reliance is placed. The tax levied is not on the real or fixed property only, owned by plaintiff in error, and being within the limits of Harford County, but upon the iron rail, &c., and the steamboat at Havre de Grace.

The land is taxed, and also three other items; this, it is submitted, is a clear violation of the exemption referred to. That the exemption, but for its qualification in the section making it, would have embraced the entire property, real and personal, of the company, is perfectly clear. The question then is, Was it the object of the qualification to take out of the exemption any thing else than the new land? It is submitted, that the rail-track, iron and wooden, and the steamboat, are the fixed property, within the meaning of the exemption. To give it
*392] *that interpretation, would be to make the exemption annul the entire section, and render the exemption altogether nugatory.

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

The plaintiff in error is a corporation composed of several railroad companies which had been previously chartered by the states of Maryland, Delaware, and Pennsylvania; and which, by corresponding laws of the respective states, were united together, and form one corporation under the name and style of the Philadelphia, Wilmington, and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore.[1]

One of the companies which now forms a part of this corporation was originally the Baltimore and Port Deposit Railroad Company, and was chartered by Maryland by an act passed in 1831, chap. 288. The road constructed by this company extended from Baltimore to the Susquehanna, lying altogether on the west side of the river.

The Delaware and Maryland Railroad Company was another of the original corporations, and was also chartered by Maryland by the act of 1831, chap. 296. It extended from the Delaware line to the Susquehanna, and lies on the east side of the river. This company was afterwards, by the act of 1835, chap. 93, and a corresponding law passed by the state of Delaware, united with the Wilmington and Susquehanna Railroad Company, which had been previously chartered by Delaware; the two companies when united taking the corporate name of the latter.

Afterwards, by an act of Assembly of Maryland, of 1837, chap. 30, and corresponding laws passed by Delaware and Pennsylvania, the last-mentioned company, together with the Baltimore and Port Deposit Railroad Company, was authorized to unite with the Philadelphia, Wilmington, and Baltimore Railroad Company, which had been previously chartered in the states where it was situated; and these united companies were incorporated into one, under the name and style of the last-mentioned company, and the corporation thus formed is the plaintiff in error.

In 1841, since the union of these companies, an act of Assembly of Maryland was passed, imposing a tax for state purposes upon the real and personal property in the state. Under this law, the portion of the road which belonged to the Baltimore and Port Deposit road, before the union last above mentioned, has been assessed as a part of the taxable property in the state, in the manner set forth in the schedule contained in the record. It is admitted that it has been assessed at the same rate with that of individuals, and as prescribed by the law.

[1] See *Philadelphia &c. R. R. Co.* v. *Harris*, 12 Wall., 82.

*The question submitted to this court is, whether this property of the plaintiff in error is liable to be so taxed, under the grants contained in the different charters above referred to.

The charter of the Baltimore and Port Deposit Railroad declared that the property in this road when constructed should be vested in the company, and that the shares of the company should be deemed and considered as personal property. But there is no provision in the law exempting its stocks or its property, real or personal, from taxation. And certainly there is no reason why the property of a corporation should be presumed to be exempted, or should not bear its share of the necessary public burdens, as well as the property of individuals. This court on several occasions has held, that the taxing power of a state is never presumed to be relinquished, unless the intention to relinquish is declared in clear and unambiguous terms. In the act incorporating this company, there is nothing from which such an inference could possibly be drawn; and, standing upon this charter alone, the tax was without doubt lawfully imposed.

Neither can such an inference be drawn from any thing contained in the subsequent law by which this company became finally consolidated with the plaintiff in error. It remained a separate corporation, without any alteration in its charter in this respect, until the union was formed by the act of 1837. It was situated altogether in the state of Maryland. The Wilmington and Susquehanna Railroad Company was partly in Maryland and partly in Delaware, and owed its existence to a separate charter. And the law which authorizes these two companies to unite themselves with the plaintiff in error declares that this new corporation, that is, the Philadelphia, Wilmington, and Baltimore Railroad Company, shall be entitled within this state to all the powers and privileges and advantages at that time belonging to these two companies. It grants it nothing more.

Now, as these companies held their corporate privileges under different charters, the evident meaning of this provision is, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them. And this intention is made still more evident by the fourth section of the law, which

*394] makes the new corporation *responsible for the contracts, debts, obligations, engagements, and liabilities

at law or in equity of the several companies, and declares that it shall hold and be entitled to all the estate, real, personal, and mixed, choses in action, &c., belonging to or due to the several companies. The plaintiff in error, therefore, took the property of the Baltimore and Port Deposit Railroad Company with all the liabilities to which it was subject in the hands of that company.

The act which incorporated the Delaware and Maryland Railroad provided that the shares in that company should be deemed and considered personal estate, and should be exempt from any tax or burden, "except upon that portion of the permanent and fixed works which might be in the state of Maryland." And the laws of 1835, which authorized the union of this company with the Wilmington and Susquehanna Railroad Company, secured to the united company the property, rights, and privileges which that law or other laws conferred on them or either of them. The original exemption, therefore, of the Delaware and Maryland Railroad Company, as far as it went, was extended to the Wilmington and Susquehanna Railroad Company, and has been continued to the plaintiffs in error. But as the right of taxation on that part of the road is not in question in this suit, we forbear to express an opinion upon it. For if this restriction could be supposed to exempt from taxation the description of property enumerated in the schedule, or any part of it, it could not affect the question before us. The provisions of this charter have never been extended to the portion of the road on the west side of the river, which was constructed under the charter of the Baltimore and Port Deposit Railroad. As that company held it, so it is now held by the plaintiff in error, with the same privileges, powers, and liabilities. And as the property assessed was liable to taxation in the hands of the original corporation, it is equally liable in the hands of the company with which it is now consolidated.

The judgment must therefore be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Court of Appeals for the Western Shore of Maryland, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Court of Appeals in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

*The Baltimore and Susquehanna Railroad Company, Plaintiff in error, *v.* Alexander Nesbit and Penelope D. Goodwin.

The state of Maryland granted a charter to a railroad company, in which provision was made for the condemnation of land to the following effect: namely, that a jury should be summoned to assess the damages, which award should be confirmed by the County Court, unless cause to the contrary was shown.

The charter further provided, that the payment, or tender of payment, of such valuation should entitle the company to the estate as fully as if it had been conveyed.

In 1836, there was an inquisition by a jury, condemning certain lands, which was ratified and confirmed by the County Court.

In 1841, the legislature passed an act directing the County Court to set aside the inquisition and order a new one.

On the 18th of April, 1844, the railroad company tendered the amount of the damages, with interest, to the owner of the land, which offer was refused; and on the 26th of April, 1844, the owner applied to the County Court to set aside the inquisition, and order a new one, which the court directed to be done.

The law of 1841 was not a law impairing the obligation of a contract. It neither changed the contract between the company and the state, nor did it divest the company of a vested title to the land.

The charter provided, that, upon tendering the damages to the owner, the title to the land should become vested in the company. There having been no such tender when the act of 1841 was passed, five years after the inquisition, that act only left the parties in the situation where the charter placed them, and no title was divested out of the company, because they had acquired none.[1]

The states have a right to direct a re-hearing of cases decided in their own courts. The only limit upon their power to pass retrospective laws is, that the Constitution of the United States forbids their passing *ex post facto* laws, which are retrospective penal laws. But a law merely divesting antecedent vested rights of property, where there is no contract, is not inconsistent with the Constitution of the United States.[2]

This case was brought up from Baltimore County Court by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The facts in the case are stated in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Campbell* and *Mr. Yellot*, for the plaintiff in error, and *Mr. Johnson*, for the defendants in error.

The counsel for the plaintiff in error made the following points :—

[1] Cited. *Beveridge* v. *West Chicago Park Comm'rs*, 7 Bradw. (Ill.), 467.

[2] Distinguished. *Forster* v. *Forster*, 129 Mass., 566. Cited. *State Bank of Ohio* v. *Knoop*, 16 How., 408; *Gelpecke* v. *City of Dubuque*, 1 Wall., 204; *Drehman* v. *Stifle*, 8 Id., 603; *State ex rel.* v. *New Orleans*, 32 La. Ann., 715; *Peerce* v. *Kitzmiller*, 19 W. Va., 573.

1st. That the charter was a contract between the state of Maryland and the railroad company, and that the act of 1841, which varies the terms of that contract without the company's assent, is a law impairing the obligation of the contract, and therefore unconstitutional and void. *Green* v. *Biddle*, 8 Wheat., 84; *Dartmouth College* v. *Woodward*, 4 Id., 647, 663, 668, 669, 699, 710, 711, 712.

2d. That the title to the land condemned having vested by the confirmation of the inquisition, and the tender of the money anterior to the action by the Baltimore County Court, under the *act of 1841, that act is unconstitutional, because it divests vested rights, and in this way impairs [*396 the obligations of contracts.

Mr. Johnson contended,—

That there is nothing of the character of a contract in the charter, that, by the Constitution of the United States, deprives the legislature of the state of the power to order a re-hearing of the case. *Satterlee* v. *Matthewson*, 2 Pet., 380; *Livingston's Lessee* v. *Moore et al.*, 7 Id., 469; *Wilkinson* v. *Leland*, 2 Id., 627; S. C., 10 Id., 294; *Watson* v. *Mercer*, 8 Id., 88; *Charles River Bridge* v. *Warren Bridge*, 11 Id., 420.

Mr. Justice DANIEL delivered the opinion of the court.

This case comes before us from the District of Maryland, upon a writ of error to the court of Baltimore County, prosecuted under the twenty-fifth section of the Judiciary Act.

The facts from which the questions to be adjudged arise are the following:—

The legislature of Maryland, by a law of the 18th of February, 1828, incorporated the plaintiff in error by the name and style of the Baltimore and Susquehanna Railroad Company, for the purpose of constructing a railroad from the city of Baltimore to some point or points on the Susquehanna River. To enable this company to acquire such land, earth, timber, or other materials as might be necessary for the construction and repairing of the road, the law above mentioned, by its fifteenth section, authorized the company to agree with the owners of the land and other materials wanted, for the purchase or use thereof; and in the event that the company could not agree with the owners, or that the owners were femes covert under age, insane, or out of the county, this section provided that a justice of the peace of the county, upon application, should thereupon issue his warrant to the sheriff to summon a jury, who, in accordance with the directions contained in the same section of the statute, should value the

damages which the owner or owners would sustain, and that the inquisition, signed and sealed by the jury, should be returned by the sheriff to the clerk or prothonotary of his county, to be filed in court, and that the same should be confirmed by said court at its next session, if no sufficient cause to the contrary be shown.

The section further provides, that "such valuation, when paid or tendered to the owner or owners of said property, or to his, her, or their legal representatives, shall entitle the company to the estate and interest in the same thus valued, as *397] *fully as if it had been conveyed by the owner or owners of the same; and the valuation, if not received when tendered, may at any time thereafter be recovered from the company without costs by the said owner or owners, his, her, or their legal representatives."

It appears that, under the authority of the statute above cited, an inquisition was (upon the application of the plaintiff in error) held by the sheriff of Baltimore County, on the 13th of December, 1836, upon the lands of the defendants in error as possessed by Alexander Nesbit in the character of *trustee*, and by Penelope D. Goodwin as *cestui que trust*, and the damages assessed by the jury upon that inquisition, for the land to be appropriated to the use of the plaintiff in error, were to the said Alexander Nesbit *nothing*, and to the said Penelope D. Goodwin *five hundred dollars;* that this inquisition having been returned to the court of Baltimore County, the following order in relation thereto was made on the 24th of April, 1837: "Ordered, That this inquisition be ratified and confirmed, no cause to the contrary having been shown." Subsequently to this order of confirmation, it appears that payment of the money assessed for damages to the lands of the defendants was not tendered by the plaintiff, nor any measure whatever in relation to this inquisition adopted by them, prior to the 18th day of April, 1844, on which last day the plaintiff by its agent tendered to the defendant Penelope D. Goodwin the sum of $500, the principal of the damages assessed, with $220.42 as interest for seven years four months and five days on the amount of that assessment, making an aggregate of $720.42. In the meantime, between the date of the inquisition and the tender just mentioned, viz., at their December session of 1841, the legislature of Maryland passed a statute, by which they directed, "that the Baltimore County Court should set aside the inquisition found for the Baltimore and Susquehanna Railroad Company condemning the lands of Penelope D. Goodwin of said county, and that the said court direct an inquisition *de novo* to be taken, and that such pro-

ceedings be had as in cases where inquisitions in similar cases are set aside." In obedience to the statute last cited, the court of Baltimore County, upon the petition of the defendants in error, presented to them on the 26th of April, 1844, entered a rule upon the plaintiff in error to show cause, on the 11th day of May succeeding, why the inquisition should not be set aside, and an inquisition *de novo* directed as prayed for, and, after hearing counsel for and against the application, did, on the 13th of May, 1847, order and adjudge, that the inquisition returned in that case be set aside, and that hereafter the *court will upon application of the petitioners provide for the taking of an inquisition *de novo*, according to law. [*398]

The court of Baltimore County is admitted to be the highest in the state in which a decision upon this matter could be had, there being no appeal allowed from its judgment.

The plaintiff in error insists,—

1st. That, its charter being a contract between itself and the state, the act of 1841, having varied that contract without the assent of the company, was a law impairing the obligation of a contract, and therefore unconstitutional and void.

2d. That the title to the land condemned having vested by the confirmation of the inquisition, and the tender of the money anterior to the judgment of the Baltimore County Court under the act of 1841, this act of the legislature is unconstitutional, because it divests vested rights, and in this way impairs the obligation of contracts.

In considering the two propositions here laid down by the plaintiff in error, the first criticism to which they would seem to be obnoxious is this, that they assume as the groundwork for the conclusions they present, that which remains to be demonstrated by a fair interpretation of the legislative action which it is sought to impugn. For instance, with respect to the first proposition, admitting the charter of the plaintiff to be a contract, the reality and character of any variation thereof by the legislature must be shown, before it can be brought within the inhibition of the Constitution. So, too, with respect to the second charge, it must certainly be shown that there was a perfect investment of property in the plaintiff in error by contract with the legislature, and a subsequent arbitrary divestiture of that property by the latter body, in order to constitute their proceeding an act impairing the obligation of a contract.

The mode of proceeding prescribed by the fifteenth section of the charter of incorporation, for the acquiring of land and other materials for constructing the road, has been already stated. Let us now inquire by what acts to be performed by

the company, and at what period of time, the investiture of such land and other property in them was to become complete,—what conditions or stipulations were imposed on the plaintiff in error as necessary to the completion of their contract. This will be indispensable in order to ascertain whether any variation of these conditions, amounting to an infraction of the contract, has been made by the Maryland legislature. After declaring that the inquisition, when returned, if no objection be made, shall be recorded, the fifteenth section pro-
*399] vides *that the *payment* or *tender* of the valuation to the owner of the land, &c., shall entitle the company to the estate and interest in the same as fully as if it had been conveyed by the owner or owners thereof. Thus it appears that it is the payment or tender of the value assessed by the inquisition which gives title to the company, and consequently, without such payment or tender, no title could, by the very terms of the law, have passed to them. Have the legislature by any subsequent arrangement abrogated or altered this condition, or the consequences which were to flow from its performance? From the period of the assessment to the 18th of April, 1844, this record discloses no evidence of any acceptance by the company of the proceedings under the inquisition, or such at least as could bind them. It can hardly be questioned, that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty before such acceptance wholly to renounce the inquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could up to this point be no mutuality, and hence no contract, even in the constrained and compulsory character in which it was created and imposed upon the proprietors by the authority of the statute. This view of the matter seems to accord with the opinion of the Chancellor of Maryland in his construction of this very charter, in the case of *Compton* v. *The Baltimore and Susquehanna Railroad Company*, where he uses this language: "In the taking of an inquisition under this and similar statutory provisions, it must appear that the authority given has been pursued; and as under a writ of *ad quod damnum* there should be no unreasonable delay, much less could any fraudulent practice be allowed to pass without check or rebuke." 3 Bland (Md.), 391. Five years after this inquisition, during all which interval this company neglects or omits the fulfilment of the essential condition on performance of which its

title depended, the legislature again interposes; and it may be asked in what respects this interposition amounted to an abrogation or variation of any contract which the legislative body itself, rather than the proprietors of the land, had been instrumental in making. We think this interposition in no respect impaired or contravened the contract alleged to have been previously existing; that it is perfectly consistent with all its conditions, and leaves the parties precisely as they stood from the passage of the charter, and at full liberty to insist upon whatever rights *or interests that law had granted. [*400
It divested no rights of property, because, as we have shown, none had been vested. This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment, after such new trial was allowed. This intervention, too, was the exercise of power by the legislature supposed by that body to belong legitimately to itself; whether this authority was strictly legislative or judicial, according to the distribution of power in the state government, was a question rather for that government than for this court to determine.

What exact partition of powers, legislative, executive, or judicial, the people of the several states in their domestic organization may or should apportion to the different departments of their respective governments, is an inquiry into which this court would enter with very great reluctance.

It might seem advantageous to some of the states that the judicial and legislative authorities or functions of the government should be blended in the same body; and that the legislature should in all cases exercise powers similar to those now vested in one branch of the British Parliament, and as in some specified instances in one of the houses of our own national legislature. Should such an organization be adopted by a state, whatever might be thought of its wisdom, where beyond the body politic of the state would exist any power to impugn its legitimacy? But in truth no such inquiry regularly arises upon this record. The only questions presented for our consideration, the only questions we have authority to consider here, are,—1st, Whether under their charter of incorporation and the proceedings therein directed, and which have been had in pursuance of that charter, the plaintiff in error has, by *contract with the state*, been invested with certain perfect absolute rights of property? And 2dly, Whether such contract, if any such existed, has been impaired by subsequent legislation of the state, by a divestiture of those rights? To each of these questions we reply in the negative; because, as has already been shown, the conditions of the charter,—con-

ditions indispensable to the vesting of a title in the plaintiff in error,—never were in due time and in good faith fulfilled; nor, until after the new trial had been ordered by the legislature, pretended to be complied with.

If it were necessary to sustain by precedent the authority or practice of the state legislature in awarding a new trial, or in ordering a proceeding in the nature of an appeal, after litigation actually commenced, or even after judgment, and as to which provision for new trial or appeal had not been *401] previously *made, a very striking example from this court might be adduced in the case of *Calder and Wife* v. *Bull and Wife*, decided as long since as 1798, and reported in the 3d of Dallas, p. 386. The facts of that case are thus stated by Chase, Justice, in delivering his opinion:—"The legislature of Connecticut, on the 2d of May, 1795, passed a resolution or law, which, for the reasons assigned, set aside a decree of the Court of Probate for Hartford on the 21st of March, 1794, which decree disapproved of the will of Norman Morrison, made the 21st of August, 1779, and refused to record said will; and granted a new hearing by the said Court of Probate, with liberty of appeal therefrom within six months. A new hearing was had in virtue of this resolution or law, before the said Court of Probate, who, on the 27th of July, 1795, approved the will, and ordered it to be recorded. In August, 1795, appeal was had to the Superior Court of Hartford, who, at February term, 1796, affirmed the decree of the Court of Probate. Appeal was had to the Supreme Court of Errors of Connecticut, who, in June, 1796, adjudged that there were no errors."

"The effect," says this same judge, "of the resolution or law of Connecticut above stated is to revise a decision of one of its inferior courts, and to direct a new hearing of the case by the same Court of Probate that passed the decree against the will of Norman Morrison. By the existing law of Connecticut, a right to recover certain property had vested in Calder and wife in consequence of a decision of a court of justice, but in virtue of a subsequent resolution or law, and the new hearing thereof, and the decision in consequence, this right to recover certain property was divested, and the right to the property declared to be in Bull and wife, the appellees." Upon a full examination of this case, the court being of the opinion that the resolution or law of Connecticut awarding the new trial, with right of appeal, did not fall within the technical definition of an *ex post facto* law, and there being no contract impaired or affected by that resolution, they by a

unanimous decision sustained the judgment founded upon that resolution.

That there exists a general power in the state governments to enact retrospective or retroactive laws, is a point too well settled to admit of question at this day. The only limit upon this power in the states by the Federal Constitution, and therefore the only source of cognizance or control with respect to that power existing in this court, is the provision that these retrospective laws shall not be such as are technically *ex post facto*, or such as impair the obligation of contracts. Thus, in the case of *Watson et al.* v. *Mercer*, 8 Pet., 110, the court say: "It is clear, that this court has no right to pronounce an *act of the state legislature void, as contrary to the Constitution of the United States, from the mere fact [*402 that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the states from passing retrospective laws generally, but only *ex post facto* laws. Now it has been solemnly settled by this court, that the phrase *ex post facto* is not applicable to civil laws, but to penal and criminal laws." For this position is cited the case of *Calder* v. *Bull*, already mentioned; of *Fletcher* v. *Peck*, 5 Cranch, 138; *Ogden* v. *Saunders*, 12 Wheat., 266; and *Satterlee* v. *Matthewson*, 2 Pet., 380. Now it must be apparent that the act of the Maryland legislature of December, 1841, simply ordering a new trial of the inquisition, does not fall within any definition given of an *ex post facto* law, and is not therefore assailable on that account. We have already shown that this law impaired the obligation of no contract, because at the time of its passage, and in virtue of any proceeding had under the charter of the company, no contract between the company on the one hand, and the state or the proprietors of the land on the other, in reality existed. We therefore adjudge the act of the legislature of Maryland of December, 1841, and the proceedings of the court of Baltimore County had in pursuance thereof, to be constitutional and valid, and order that the judgment of the said court be, and the same is hereby, affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Baltimore County Court, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Baltimore County Court in this cause be, and the same is hereby, affirmed, with costs.

JOHN B. BUTLER, LEVI REYNOLDS, JUNIOR, AND WILLIAM OVERFIELD, LATE BOARD OF CANAL COMMISSIONERS OF PENNSYLVANIA, PLAINTIFFS IN ERROR, *v.* THE COMMONWEALTH OF PENNSYLVANIA.

In 1836, the state of Pennsylvania passed a law directing Canal Commissioners to be appointed, annually, by the Governor, and that their term of office should commence on the 1st of February in every year. The pay was four dollars *per diem*.

In April, 1843, certain persons being then in office as Commissioners, the legislature passed another law, providing amongst other things that the *per diem* should be only three dollars, the reduction to take effect upon the passage of the law; and that, in the following October, Commissioners should be elected by the people.

The Commissioners claimed the full allowance during their entire year, upon
*403] the *ground that the state had no right to pass a law impairing the obligation of a contract.

There was no contract between the state and the Commissioners, within the meaning of the Constitution of the United States.[1]

THIS case was brought up from the Supreme Court of Pennsylvania, by a writ of error issued under the twenty-fifth section of the Judiciary Act.

The object was to test the constitutionality of an act passed by the legislature of Pennsylvania, on the 18th of April, 1843, entitled "An Act to reduce the expenses and provide for the election of the Board of Canal Commissioners." The allegation was, that the act was repugnant to the Constitution of the United States.

The plaintiffs in error were, on the 1st of February, 1843, severally appointed and commissioned by the Governor of Pennsylvania to be Canal Commissioners for one year, by separate commissions from the Governor, all of similar tenor and date, of one of which the following is a copy:—

"PENNSYLVANIA, ss.

"David R. Porter, Governor of the said Commonwealth, to John B. Butler sends greeting:

"Whereas, in and by an act of the General Assembly of this Commonwealth, passed the 28th day of January, 1836,

[1] APPROVED. *Rounds* v. *Smart*, 71 Me., 383. DISTINGUISHED. *McVeany* v. *Mayor, &c., of New York*, 80 N. Y., 190. FOLLOWED. *Wyandotte* v. *Drennan*, 46 Mich., 480; *State ex rel.* v. *Kalb*, 50 Wis., 183. CITED. *Newton* v. *Commissioners*, 10 Otto, 559; *Prince* v. *Skillin*, 71 Me., 365; *Knapper* v. *Barry County Supervisors*, 46 Mich., 24. See *Gross* v. *Rice*, 71 Me., 258.

But where a person holds an office during good behavior, with a fixed salary and certain fees annexed thereto, the tenure of office cannot be altered without impairing the obligation of a contract. *Allen* v. *McKean*, 1 Sumn., 278.

the Governor is empowered and required, on or after the first day of February, 1836, and annually thereafter, to appoint three Canal Commissioners, and, in case of vacancy, to supply the same by new appointments, whose powers, duties, and compensation shall be the same as those of the (then) present board, and shall commence on the first day of February, 1836, and on the first day of February annually thereafter, and whose term of service shall continue for one year:

"Now, therefore, be it known, that, having full confidence in your integrity and ability, I, the said David R. Porter, Governor of said Commonwealth, in pursuance of the power and authority to me by law given, have, and by these presents do, appoint you, the said John B. Butler, to be a Canal Commissioner for the term of one year from the day of the date of these presents, if you shall so long behave yourself well. Hereby giving and granting to you, in conjunction with the other Commissioners, all the rights, powers, and emoluments of the said office, and authorizing and requiring you to unite with the said Commissioners in the execution and performance of all the duties of a Canal Commissioner, agreeably to the several laws of this Commonwealth.

"Given under my hand and the great seal of the said Commonwealth &c., the first day of February, A. D. 1843."

*This appointment was made in pursuance of the [*404 act of Assembly passed 6th April, 1830 (Pamph. Laws, p. 218; Internal Improvement Laws, p. 65), and of the act of 28th January, 1836 (Pamph. Laws, 23; Int. Imp. Laws, 145).

The first of these acts (§ 1) provides, "That on or before the first Monday of June next, and annually thereafter, the Governor shall appoint three Canal Commissioners, and, in case of vacancy, supply the same by new appointments, whose powers and duties shall be the same as those of the present board, and shall commence on the first Monday in June, and shall continue in office for one year, and who shall receive, as a full compensation for their services and expenses, the sum of four dollars each per day," &c.

The second act provides, "That it shall be the duty of the Governor, on or after the first day of February next (1836) and annually thereafter, to appoint three Canal Commissioners, and in case of vacancy supply the same by new appointments, whose powers, duties, and compensation shall be the same as the present board, and shall commence on the 1st of February next, and whose term of service shall continue for one year," &c.

On the 18th day of April, 1843, the legislature of Pennsylvania passed an act in the following words, to wit:—

"An Act to reduce the expenses and provide for the election of the Board of Canal Commissioners.

"§ 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That, at the next annual election, the qualified voters of the several counties of this Commonwealth shall vote for three persons as Canal Commissioners, who shall perform all the duties now by law enjoined upon the Canal Commissioners of this Commonwealth; the persons so elected shall decide by drawing from a box ballots numbered one, two, and three, which of them shall hold his office one, which two, and which three years; the Commissioner who shall draw the ballot numbered three shall hold his office three years; he who shall draw the ballot numbered two shall hold his office two years; and the other shall hold his office one year; on the second Tuesday in October in each year thereafter, there shall be elected one person as Canal Commissioner, who shall hold his office for three years; the elections of Canal Commissioners shall be conducted by the officers authorized by law to conduct the general elections in the several election districts; a return of the votes given for said office shall be made to the
*405] Secretary *of the Commonwealth, in the manner now provided for the transmission of returns of elections of Representatives; the Secretary of the Commonwealth, on receipt of all the returns, shall notify the persons so elected, who shall enter upon the duties of their office on the second Tuesday in January succeeding their election; if any vacancy shall occur in the said Board of Canal Commissioners by death, resignation, or otherwise, the Governor shall appoint a suitable person to supply the vacancy until the next general election, when a person shall be elected for the unexpired term of him whose death, resignation, or removal shall have caused a vacancy; and that the pay of the said Canal Commissioners, as well as the present Canal Commissioners, from and after the passage of this act, shall each be three dollars per day."

The remaining sections are omitted, as relating to the subordinate officers.

At the annual election in October, 1843, three gentlemen were elected Canal Commissioners, who, on the 9th of January, 1844, assumed upon themselves the duties of the office to which they had been elected.

The plaintiffs in error continued in the exercise of the duties of the office until the said 9th day of January, 1844, and were ready and willing to serve out the balance of the term for which they were commissioned, but were then superseded by the persons elected in October, 1843, pursuant to the said statute of 18th April, 1843.

On the 22d of March, 1844, the Auditor-General and State Treasurer settled the accounts of the plaintiffs in error, as late Canal Commissioners, in which they allowed them each $4 per day from 1st February, 1843, to 18th April, 1843, inclusive, and $3 per day from 18th April, 1843, to 8th January, 1844, resulting in a balance due the Commonwealth of $1,071.

From this settlement the plaintiffs in error appealed to the Court of Common Pleas of Dauphin County, pursuant to the provisions of the act of Assembly.

The cause came on for trial in the Common Pleas of Dauphin County, on the 25th of October, 1847, when the foregoing facts were given in evidence, when the court charged the jury as follows:—

"The defendants were appointed Canal Commissioners for the term of one year, commencing on the first day of February, 1843, at which time their compensation was fixed by law at four dollars per day. On the 18th of April, 1843, the legislature, by an act entitled 'An Act to reduce the expenses, and provide for the election of Canal Commissioners' (Pamphlet *Laws of 1843, p. 337), reduced the pay of Canal Commissioners from four to three dollars per day. The [*406 Auditor-General and State Treasurer settled the accounts of the Canal Commissioners in pursuance of this act. The Canal Commissioners contend that this act is unconstitutional, so far as it relates to reducing their pay after their appointment to office; and this is the only question that is presented in this case. The court instruct the jury that the act in question is not unconstitutional; and, as there is no other dispute, they should find for the Commonwealth. To this charge the defendants' counsel excepts; and it is filed at their request.

"N. B. Eldred, *Pres. Judge.*"

The jury, under this charge, found a verdict in favor of the Commonwealth for $1,301.26, the amount stated to be due from the plaintiffs in error by the Auditor-General and State Treasurer, with interest accrued thereon.

The Commissioners carried the case to the Supreme Court of Pennsylvania, which, on the 30th of June, 1848, affirmed the judgment of the Court of Common Pleas.

A writ of error brought the case up to this court.

It was argued by *Mr. J. M. Porter*, for the plaintiffs in error, and *Mr. Alricks*, for the defendant in error.

Mr. Porter, for the plaintiffs in error, made the following points:—

That the Supreme Court of Pennsylvania erred in affirming the judgment of the Court of Common Pleas of Dauphin County, in that state, at the suit of the defendant in error against the plaintiffs in error, as the act of Assembly of the Commonwealth of Pennsylvania, passed upon the 18th day of April, 1843, entitled "An Act to reduce the expenses and provide for the election of the Board of Canal Commissioners," was unconstitutional and void; because,—

1. The plaintiffs in error were severally commissioned, according to the constitution and laws of Pennsylvania, to hold the office of Canal Commissioner for one year from 1st February, 1843, when their compensation was fixed at $4 per day, and they could not be legislated out of office, if at all, before 31st January, 1844, when their commissions and the tenures of their offices would expire, and therefore they continued legally in office until the last-mentioned day, and were entitled to be paid, at the rate of $4 per day, up to that time.

2. That if they could be legislated out of office before 31st January, 1844, their compensation, as fixed by law when they entered upon the duties of the office, could not be changed without their consent during their continuance in office.

*407] *3. That the said Act of Assembly, referred to in the charge of the president of the Court of Common Pleas, and which the Supreme Court of Pennsylvania held to be constitutional and binding on the plaintiffs, was a violation of the Constitution of the United States, and transcended the powers of legislation possessed by the legislature of Pennsylvania, in so far, at least, as regarded the pay and tenure of office of the plaintiffs in error, who were in office for a fixed term, and at a fixed compensation, at the time of its passage.

Mr. Porter contended that the acceptance, under the law of 1836, by the Commissioners, constituted a contract with the state, and quoted largely from Paine's Dissertation on Government, Vol. I., p. 365, to show what species of laws created contracts. He then cited and commented on the following cases: 7 Watts & S. (Pa.), 127; 4 Barr, 49; 6 Serg. & R. (Pa.), 322; 2 Rawle (Pa.), 369; 5 Serg. & R. (Pa.), 460; 3 Id., 145.

In *Marbury* v. *Madison*, 1 Cranch, 137, the Supreme Court

of the United States held, that, "where the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights, which cannot be resumed." "The discretion of the executive is to be exercised until the appointment has been made; but having once made the appointment, his power over the office is terminated in all cases, where by law the officer is not removable by him. The *right* to the office is then in the person appointed," &c.

"Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of the country."

Therefore, both on principle and precedent, we contend,—

1. That the tenure of the defendants in the office could not be determined before the expiration of the time limited in their commissions, to wit, 1st February, 1844, and that they were entitled to their pay up to that time.

2. That if their tenure could not be thus terminated, their compensation could not be changed until it was so terminated, without their consent; and hence,

3. The act of 1843, so far as it attempted to accomplish that object, was unconstitutional.

And in reference to these points, and to show that this construction of the Constitution and laws is reasonable, it may be remarked:—

These Commissioners are not local officers. They are taken *from various parts of the state. In the present instance, one is taken from Pittsburg, Alleghany County, at nearly the extreme west; one from Lewistown on the Juniata, about the center, and one from Monroe County, on the Delaware, at the extreme northeast of the Commonwealth. They are called from their homes and of course have made the arrangements for their private business for a year,—from their contracts in relation to which no law to be passed by the legislature could absolve them. Yet it is urged that the legislature can alter the contract, as to both tenure and compensation, into which the Commonwealth has entered with them, when an individual cannot do it. *Fareira* v. *Sayres*, 5 Watts & S. (Pa.), 210. [*408

Is this carrying out the idea, that a republic is *a government of justice*, in contradistinction to a despotism, which is said to be, and is, *a government of will?*

There is also a class of cases which bear upon this question,

of the faith which a government is bound to observe in its contracts. It is the case of private corporations, in regard to which it has been held, that the acts of assembly creating such corporations create, when accepted by the corporators, a contract, from the obligation of which the government cannot be absolved, and the terms of which the government cannot alter, but by consent. *Dartmouth College* v. *Woodward*, 4 Wheat., 627; *Lincoln and Kennebeck Bank* v. *Richardson*, 1 Me., 79; *Monongahela Nav. Co.* v. *Coon*, 6 Pa. Stat., 379; *Terrett* v. *Taylor*, 9 Cranch, 52; *Green* v. *Biddle*, 8 Wheat., 1; *Wales* v. *Stetson*, 2 Mass., 146; 2 Kent Com., 306; *State* v. *Tombeckbee Bank*, 2 Stew. (Ala.), 30; *Nichols* v. *Bertram*, 3 Pick. (Mass.), 342; *Derby Turnpike Co.* v. *Parks*, 10 Conn., 522; *Turnpike Co.* v. *Phillips*, 2 Pa., 184; *Pingry* v. *Washburn*, 1 Aik. (Vt.), 264; and *Ehrenzeller* v. *Union Canal Co.*, 1 Rawle (Pa.), 189.

And this rule applies as well to powers implied as those expressed. *People* v. *Manhattan Co.*, 9 Wend. (N. Y.), 351.

In *Fletcher* v. *Peck*, 6 Cranch, 87–148, the celebrated Yazoo case, C. J. Marshall, at page 132, says: "The legislature of Georgia was a party to the transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in a court of justice." S. P. *The People* v. *Platt*, 17 Johns. (N. Y.), 195; *Bowdoinham* v. *Richmond*, 6 Me., 112.

Is not the case of a person appointed to office, entering upon its duties, quitting his other pursuits, just as strong and powerful an illustration of the necessity of the state preserving its faith in its contracts and stipulations with him, as it would be in the case of a grant of land, or of corporate rights?

*409] *The case is one where the office is conferred for a fixed and definite period, one year; the compensation fixed by law. The attempt is to abridge the term and reduce the compensation. Every sense of justice and propriety seems shocked at this attempt to execute a "mere act of power."

Mr. Alricks, for the defendant in error, made the following points:—

1st. That the office of Canal Commissioner is the creature of the legislature, under the power given them as representatives of the people, in the eighth section of the sixth article of the amended constitution of Pennsylvania, and in the

absence of any constitutional restraint, it is defeasible and subordinate to the will of the legislature. "All officers whose election or appointment is not provided for in this constitution shall be *elected* or appointed as shall be directed by law." It is therefore respectfully contended, on behalf of the people, that the manner in which the appointments were to be made, the term of service and pay of the Canal Commissioners, were subjects left unconditionally with the legislature. The power to create and then abolish the office, to increase or diminish the salary, to enlarge or curtail the tenure, was placed absolutely and unreservedly in their province.

After illustrating this position at some length, *Mr. Alricks* proceeded to show that this was not a case of contract. The act of the legislature is a peremptory rule of action, prescribing *as law* the course in which the executive must proceed. In it we find the representatives of the people, in the due exercise of the law-making power, directing the chief magistrate of the Commonwealth to appoint Canal Commissioners, thus conferring on him the prerogative of appointment, subject to the implied reservation of all inherent power necessary to the administration of the government. In the words of the chief justice of this court in a like case, *State of Maryland* v. *Baltimore and Ohio Railroad Co.*, 3 How., 552, "The language of the law is not the language of contract, but is evidently mandatory and in the exercise of legislative power." "The statute is *pro tanto* a repealing one, which offers no express compact to any one, and such a compact is never to be implied." Per C. J. Gibson, *Monongahela Navigation Co.* v. *Coons*, 6 Watts & S. (Pa.), 113. "The state is not presumed to have surrendered a public franchise in the absence of an unequivocal intention so to do." *The Charles River Bridge* v. *The Warren Bridge*, 11 Pet., 420. The present plaintiffs were forced to assume the untenable position just combated; but look in vain to the statute for countenance.

*2d. Services rendered by public officers, in obedience to their appointments, have no affinity to contracts, nor do public laws, nor commissions authorizing citizens to exercise particular offices, amount to contracts. In affecting to treat them as such consists the great error of the late Canal Board. Commissions bear no analogy to contracts. There is no mutuality nor obligation on the appointees to accept, and if they do accept, they are not bound to serve out their time, but they may dissolve the relation *ad libitum*. [*410

A contract is defined to be "an agreement between two or more persons, upon a sufficient consideration, to do or not to do a particular thing." There was no agreement on the part

of the present plaintiffs to serve for a year, nor was there any law compelling them to serve longer than it was their pleasure, and no penalty was incurred if they refused to accept. This, we think, furnishes a triumphant answer to the labored and learned argument which has been drawn from the supposed inconvenience and hardship of the position of the present plaintiffs, whose official lives were placed at the mercy of the legislature. The premises are unsound. There was no hardship, because there was no obligation on the part of any citizen to accept, or, after accepting, to hold the office. They had power to take it up, and had "power to lay it down." Whoever did accept were bound or presumed to know that the law placed the office and the emoluments absolutely at the will of the legislature. There are certain penalties annexed to a refusal to serve in many of the subordinate offices in Pennsylvania, and yet it has never been supposed that the addition or annexation of a fine for not serving prevented the legislature from regulating the fees of those officers.—by the by, infinitely stronger cases for invoking the exercise of the rule relied upon than is this case.

In *The Commonwealth* v. *Bacon*, 6 Serg. & R. (Pa.), 322, this question is determined in an able opinion, delivered by the late Justice Duncan:—"These services, tendered by public officers, do not, in this particular, partake of the nature of contracts, nor have they the remotest affinity thereto. As to stipulated allowance, the allowance, whether annual, *per diem*, or particular fees for particular services, depends on the will of the law-makers. This has been the universal construction, and the constitution puts this question at rest in the provision for the salary of the Governor and judges. * * * These provisions are borrowed from the Constitution of the United States. It is apparent that the compensation of the governor and these judges is matter of constitutional provision; that of all other officers is left open to the legislature. The allowance, the compensation, the salary, the fees of all *411] other officers, and *members of the legislature, depend on the legislature, who can and who do change them, from time to time, as they conceive just and right."

Commonwealth v. *Mann*, 5 Watts & S. (Pa.), 418: "The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination."

Barker v. *City of Pittsburg*, 4 Pa. St., 51: "That there is no contract, express or implied, for the permanance of a salary, is shown by the constitutional provision for the permanence of the salaries of the Governor and judges as exceptions."

3d. All commissions (regardless of their form, or by whom

issued) contain, impliedly, the *constitutional* reservation, that the people at any time have the right, through their representatives, to alter, reform, or abolish the office, as they may alter, if they choose, the whole form of government. In our *magna charta* it is proclaimed (2d section of the Bill of Rights, under the 9th Article of the Constitution of Pennsylvania), that "all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of these ends they have at all times an unalienable and indefeasible right to alter, reform, or abolish their government, in such manner as they may think proper." It has been well said, by one of the ablest judges of the age, that "a constitution is not to receive a technical construction, like a common law instrument or a statute. It is to be interpreted so as to carry out the great principles of the government, not to defeat them." Per Gibson, C. J., in *Commonwealth* v. *Clark*, 7 Watts & S. (Pa.), 133.

The first section of the act of 1843, under which this controversy has arisen, entitled "An Act to reduce the expenses and provide for the election of the Board of Canal Commissioners," declares, "That, at the next annual election, the qualified voters of the several counties of this Commonwealth shall vote for three persons as Canal Commissioners, who shall perform all the duties now enjoined by law on the Canal Comsioners of this Commonwealth; * * * * who shall enter upon the duties of their office on the second Tuesday in January succeeding their election; * * * * and that the pay of the said Canal Commissioners, as well as the present Canal Commissioners, from and after the passage of this act, shall each be three dollars per day."

Whether this act was politic or impolitic, certainly the legislature neither transcended their power, nor violated any contract made or authorized by them.

Mr. Alricks then proceeded to comment on the Pennsylvania authorities of 6 Pa. St., 80; 10 Id., 442.

[*412 *The right to *graduate the emoluments of office* is an *element of sovereignty;* and the reasoning of the late Chief Justice Marshall, in the *Providence Bank* v. *Billings*, 4 Pet., 514, applies with equal force to the case under consideration.

The taxing power is of vital importance, and essential to the existence of the government. "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be pre-

sumed, in a case in which the deliberate purpose of the state to abandon it does not appear."

There is a numerous class of cases to the same effect. *The Portland Bank* v. *Apthorp*, 12 Mass., 252; 1 Hill (N. Y.), 616; 2 Id., 353; 25 Wend. (N. Y.), 686; *The State* v. *Franklin Bank*, 10 Ohio, 91; *State* v. *Mayhew*, 2 Gill (Md.), 487. "In grants by the public, nothing passes by implication." *United States* v. *Arredondo*, 6 Pet., 738; *Jackson* v. *Lamphire*, 3 Id., 289. The reasoning of his Honor, Mr. Chief Justice Taney, in the *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 547, I will adopt as the ablest argument that can be presented to your Honors:—"The object and end of all government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. A state ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished," &c.

The office of Canal Commissioner was "created for the purposes of government, and the officers clothed with certain defined and limited powers, to enable them to perform the public duties which were confided to them by law." (See opinion of the Hon. C. J. Taney, *State of Maryland* v. *Baltimore and Ohio Railroad Company*, 3 How., 550.) Whenever it ceased to be the public interest, or the policy of government, to confide the choice of Canal Commissioners to the executive, it was the duty, as it was the right, of the legislature, to change the mode of appointment, and there could be no cause for complaint when they recommitted the selection to the people. The law of 1843 is prospective in its operation, and leaves the plaintiffs in error without an apology for their claim. The legislature who passed it acted for the whole community, and if they committed an error, it was the duty of their successors, who assembled annually, and were clothed with ample power and presumed to be elected for the purpose of keeping the wheels of government in working order, to correct that error. The act of 1843 is the act of the people, who are the government, and must prevail.

*413] *The question raised in this case has been presented to the Supreme Court of Pennsylvania in several analogous cases, and decided, in every instance, against the officer who took exception to the reduction of his salary. Those cases remain in our books of reports as settled law. The constitutionality of the act of 1843 has also been directly ruled by the same court, in a case cited here by both sides, (*Com-*

monwealth v. *Mann*,) and which has not been questioned. The principle has been ruled in the following cases:—

Commonwealth v. *Bacon*, 6 Serg. & R. (Pa.), 322. "An ordinance of the Councils, reducing the salary of the Mayor of the city of Philadelphia, after the commencement of his term of service, is valid."

Barker v. *The City of Pittsburg*, 4 Pa. St., 49. "A joint resolution of the Select and Common Councils of the city of Pittsburg, abrogating the salary of a collector of tolls, before the expiration of the time for which he had been elected and given bond, was held, in an action by the collector for the balance of the annual salary, brought after the expiration of the term for which he had been elected, not to be unconstitutional, and that the plaintiff was without remedy."

Commonwealth v. *Mann*, 5 Watts & S. (Pa.), 418. The case of *Commonwealth* v. *Bacon* is referred to with approbation in the opinion of the court.

Commonwealth v. *Clark*, 7 Watts & S. (Pa.), 127. "The act of 18th April, 1843, authorizing the election of Canal Commissioners, is constitutional and valid."

Faithful legislation is often unavoidably harsh, but is not consequently illegal. It is occasionally ruinous; such is the case where private property is taken for public use; and yet the right of the state to take it is undoubted. The maxim of the law is, that a private mischief is to be endured, rather than a public inconvenience. The issue here is on a question of power; and by the force of great public necessity, the power to regulate the office and the salary of the officer is vested in the legislature and in the people. Examples are annually occurring of the exercise of this power, in every state government in the Union. It is a power which, if the Commonwealth can part with, it cannot be presumed to have parted with in the absence of conclusive proof of such an intention.

The exercise of this power is the axis on which the fabric of our free political institutions revolves, and you cannot impair it without jarring and overturning our republican form of government. It is an essential element of sovereignty, and I am at a loss to understand how our political organization can be maintained without it.

*In construing a statute like the one under consideration, involving high political powers and sovereignty, [*414 the construction should be most favorable to the public interests. It rests in the plaintiffs in error to show that the legislature had the right to surrender and that they did surrender their legislative power.

Mr. Justice DANIEL delivered the opinion of the court.

This is a writ of error to the Supreme Court of the state of Pennsylvania, under the twenty-fifth section of the Judiciary Act of 1789, for the purpose of revising a judgment rendered by the court above mentioned at the May term of that court, in the year 1848, against the plaintiffs in error, in a certain action of assumpsit instituted against those plaintiffs on behalf of the Commonwealth of Pennsylvania.

By authority of a statute of Pennsylvania of the 28th of January, 1836, the plaintiffs in error were by the Governor of the state appointed to the place of Canal Commissioners; and by the same statute, the appointment was directed to be made annually on the 1st day of February, and the compensation of the Commissioners regulated at four dollars *per diem* each. Under this law, the plaintiffs in error, in virtue of an appointment of the 1st of February, 1843, accepted and took upon themselves the office and duties of Canal Commissioners. By a subsequent statute, of the 18th of April, 1843, the appointment of Canal Commissioners was transferred from the Governor to the people upon election by the latter, and the *per diem* allowance to be made to all the Commissioners was by this law reduced from four to three dollars, this reduction to take effect from the passage of the act of April 18th, 1843, which as to the rest of its provisions went into operation on the second Tuesday of January following its passage, that is, on the second Tuesday of January in the year 1844. Upon a settlement of their account as Canal Commissioners, made before the Auditor-General of the state, the plaintiffs in error, out of money of the state then in their hands, claimed the right to retain compensation for their services at the rate of four dollars *per diem*, for the full term of twelve months from the date of their appointment by the Governor; whilst for the state, on the other hand, it was refused to allow that rate of compensation beyond the 18th of April, 1843, the period of time at which, by the new law, the emoluments of the appointment were changed. In consequence of this difference, and of the refusal of the plaintiffs in error to pay over the balance appearing against them on the account as stated by the Auditor-General, an action was instituted against them in the
*415] name of the state, in the Court of Common *Pleas of Dauphin County, and a judgment obtained for that balance. This judgment, having been carried by writ of error before the Supreme Court, was there affirmed, and from that tribunal, as the highest in the state, this cause is brought hither for revision.

The grounds on which this court is asked to interpose

between the judgment on behalf of the state and the plaintiffs in error are these. That the appointment of these plaintiffs by the Governor of Pennsylvania, under the law of January 28th, 1836, was a positive obligation or contract on the part of the state to employ the plaintiffs for the entire period of one year, at the stipulated rate of four dollars per diem; and that the change in the tenure of office and in the rate of compensation made by the law of April 18th, 1843 (within the space of one year from the first of February, 1843,) was a violation of this contract, and therefore an infraction of the tenth section of the first article of the Constitution of the United States. In order to determine with accuracy whether this case is within the just scope of the constitutional provision which has thus been invoked, it is proper carefully to consider the character and relative positions of the parties to this controversy, and the nature and objects of the transaction which it is sought to draw within the influence of that provision.

The high conservative power of the federal government here appealed to is one necessarily involving inquiries of the most delicate character. The states of this Union, consistently with their original sovereign capacity, could recognize no power to control either their rights or obligations, beyond their own sense of duty or the dictates of natural or national law. When, therefore, they have delegated to a common arbiter amongst them the power to question or to countervail their own acts or their own discretion in conceded instances, such instances should fall within the fair and unequivocal limits of the concession made. Accordingly it has been repeatedly said by this court, that to pronounce a law of one of the sovereign states of this Union to be a violation of the Constitution is a solemn function, demanding the gravest and most deliberate consideration; and that a law of one of the states should never be so denominated, if it can upon any other principle be correctly explained. Indeed, it would seem that, if there could be any course of proceeding more than all others calculated to excite dissatisfaction, to awaken a natural jealousy on the part of the states, and to estrange them from the federal government, it would be the practice, for slight and insufficient causes, of calling on those states to justify, before tribunals in some sense foreign to themselves, their acts of general legislation. And *the extreme of such an abuse would appear to exist in the [*416 arraignment of their control over officers and subordinates in the regulation of their internal and exclusive polity; and over the modes and extent in which that polity should be varied

to meet the exigencies of their peculiar condition. Such an abuse would prevent all action in the state governments, or refer the modes and details of their action to the tribunals and authorities of the federal government. These surely could never have been the legitimate purposes of the federal Constitution. The contracts designed to be protected by the tenth section of the first article of that instrument are contracts by which *perfect rights*, *certain definite*, *fixed private rights* of property, are vested. These are clearly distinguishable from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require. The selection of officers, who are nothing more than agents for the effectuating of such public purposes, is matter of public convenience or necessity, and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to re-appoint them, after the measures which brought them into being shall have been found useless, shall have been fulfilled, or shall have been abrogated as even detrimental to the well-being of the public. The promised compensation for services actually performed and accepted, during the continuance of the particular agency, may undoubtedly be claimed, both upon principles of compact and of equity; but to insist beyond this on the perpetuation of a public policy either useless or detrimental, and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense. The establishment of such a principle would arrest necessarily every thing like progress or improvement in government; or if changes should be ventured upon, the government would have to become one great pension establishment on which to quarter a host of sinecures. It would especially be difficult, if not impracticable, in this view, ever to remodel the organic law of a state, as constitutional ordinances must be of higher authority and more immutable than common legislative enactments, and there could not exist conflicting constitutional ordinances under one and the same system. It follows, then, upon principle, that, in every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of
*417] *those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. It is true, that this power,

or the extent of its exercise, may be controlled by the higher organic law or constitution of the state, as is the case in some instances in the state constitutions, and as is exemplified in the provision of the federal Constitution relied on in this case by the plaintiffs in error, and in some other clauses of the same instrument; but where no such restriction is imposed, the power must rest in the discretion of the government alone. The constitution of Pennsylvania contains no limit upon the discretion of the legislature, either in the augmentation or diminution of salaries, with the exceptions of those of the Governor, the judges of the Supreme Court, and the presidents of the several Courts of Common Pleas. The salaries of these officers cannot, under the constitution, be diminished during their continuance in office. Those of all other officers in the state are dependent upon legislative discretion. We have already shown that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon, to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can under any circumstances be justified in surrendering them. This doctrine is in strictest accordance with the rulings of this court in many instances, from amongst which may be cited its reasoning in the important and leading case of *The Charles River Bridge* v. *The Warren Bridge*, in 11 Pet., 420, and in the case of *The State of Maryland* v. *The Baltimore and Ohio Railroad Company*, in 3 Howard's Reports, 552, to which might be added other decisions upon claims to monopoly, as ferry privileges, in restraint of legislative action for public improvement and accommodation. In illustration of the doctrine here laid down, may also be cited the very elaborate opinion of the Supreme Court of New York in the case of *The People* v. *Morris*, reported in 13 Wend., 325. The precise question before us appears to have been one of familiar practice in the state of Pennsylvania, so familiar, indeed, and so long acquiesced in, as to render its agitation at this day somewhat a subject of surprise; and the reasoning of the Supreme Court upon it in the case of the *Commonwealth* *v. *Bacon*, 6 Serg. & R. (Pa.), p. 322, is at once so clear and compendious as to render it well worthy of quotation here. [*418

"These services," says Duncan, Justice, in delivering the opinion, "rendered by public officers, do not in this particular partake of the nature of contracts, nor have they the remotest affinity thereto. As to a stipulated allowance, that allowance, whether annual, *per diem*, or particular fees for particular services, depends on the will of the law-makers; and this, whether it be the legislature of the state, or a municipal body empowered to make laws for the government of a corporation. This has been the universal construction, and the constitution puts this question at rest in the provision for the salary of the Governor and judges of the Supreme Court, and of the presidents of the Courts of Common Pleas. The Governor is to receive at stated times, for his services, a compensation which shall neither be increased nor diminished during the period for which he shall have been elected. The judges and presidents shall at stated times receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office. These provisions are borrowed from the Constitution of the United States. It is apparent that the compensation of the Governor and judges is a matter of constitutional provision,—that of all other officers is left open to the legislature. The allowances, the compensation, the salary, the fees of all other officers and members of the legislature, depend on the legislature, who can and who do change them, from time to time, as they conceive just and right."

So in the case of the *Commonwealth* v. *Mann*, 5 Watts & S. (Pa.), p. 418, the court say, "that, if the salaries of judges and their title to office could be put on the ground of contract, then a most grievous wrong has been done them by the people, by the reduction of a tenure during good behavior to a tenure for a term of years. The point that it is a contract, or partakes of the nature of a contract, will not bear the test of examination." And again, in the case of *Barker* v. *The City of Pittsburg*, the court declare it as the law, "That there is no contract express or implied for the permanence of a salary, is shown by the constitutional provision for the permanence of the salaries of the Governor and judges as exceptions." 4 Pa. St., 51. We consider these decisions of the state court as having correctly expounded the law of the question involved in the case before us, as being concurrent with the doctrines heretofore ruled and still approved by this court,—concurrent, too, with the decision of the Supreme Court of Pennsylvania now under review, which decision we hereby adjudge and order to be affirmed.

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*Mr. Justice McLEAN.

In this case, I think we have no jurisdiction. There was no contract which could be impaired, within the provision of the Constitution of the United States. This is clearly shown in the opinion of the court. In such a case, I suppose the proper entry would be, to dismiss the writ of error. By the affirmance of the judgment of the Supreme Court of Pennsylvania, we take jurisdiction.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of Pennsylvania, 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, affirmed, with costs.

THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, PLAINTIFFS IN ERROR, *v.* FREDERICK E. SICKLES AND TRUMAN COOK.

Where the declaration contained two counts; viz., the first upon a special contract that the plaintiffs had placed a machine for saving fuel on board of the steamboat of the defendants, and were entitled to a certain portion of the savings; the second upon a *quantum meruit;* it was admissible to give in evidence by the plaintiffs the experiments of practical engineers to show the value of the machine. Evidence had previously been given, tending to prove the value in the mode pointed out in the contract, and the evidence in question tended not to contradict, but to corroborate it. It was therefore admissible under the first count, and clearly so under the second.

On the part of the defendants, the evidence of the president of the steamboat company was then given, denying the special contract alleged by the plaintiffs, and affirming a totally different one, namely, that, if the owners of the boat could not agree with the plaintiffs to purchase it, the latter were to take it away. The court should have instructed the jury, that, if they believed this evidence, they should find for the defendants.

The court below instructed the jury, that, if the president of the company, acting as its general agent, made the special contract with the plaintiffs, the company were bound by it, whether he communicated it to the company or not. This instruction was right. But the court erred in saying that the plaintiffs had a right to recover on their special count, if the machine was useful to the defendants, without regarding the stipulations of that contract as laid and proved, and the determination of the plaintiffs to adhere to it. Because, by the contract, the defendants are to use the machine during the continuance of the patent right; and as no time is pointed out for a settlement, a right of action did not accrue until the whole service had been performed.

Whether, if there had been a count in the declaration for the cost of the machine, and the jury had believed that the defendants had agreed to pay it as soon as it was earned, the plaintiffs might not recover to that amount, or whether such a construction could be put on the contract as proved, are

questions not before the court on this record, and upon which no opinion is expressed.

*This case was brought up, by writ of error, from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington.

It came up upon a bill of exceptions to the admission of certain evidence, and four bills of exceptions to refusals of the court below to grant certain prayers, all of which exceptions were taken by the defendants below (the plaintiffs in error here.) But as two of the last-named bills of exceptions were not pressed in this court, it is not necessary to state them, or to state more of the case than is sufficient to show the points argued and decided by this court.

In March, 1846, Sickles and Cook brought an action against the Steam Packet Company. The cause of action is thus stated in the declaration:—

"Whereupon the said plaintiffs, by Joseph H. Bradley, their attorney, complain, for that whereas heretofore, to wit, on the first day of July, 1844, the said defendants, at the county aforesaid, being the owners of a certain steamboat called the Columbia, and running in the Potomac River and Chesapeake Bay, in consideration that the said plaintiffs, being the proprietors of a certain machine called 'Sickles's cut-off,' designed to effect a saving in the consumption of fuel for steam engines, would place one of the said machines on the said steamboat Columbia, undertook and promised the said plaintiffs to apply the whole value of the saving of the fuel on board the said boat, which should be effected by the said machine, in the first place, to pay the cost and expenses of building the said machine, and putting the same on the said boat; and thereafter, and after having paid the said costs and expenses, that they, the said defendants, would, so long as the said steamboat should continue to be employed by the said defendants, if the patent-right for the said machine should continue so long, pay to the said plaintiffs three fourths of the saving in fuel caused by said machine. And that the saving caused by the said machine, called the cut-off, on board the said boat, should be ascertained at any time the said plaintiffs should desire it, in the following manner, to wit: by taking equal quantities of wood, and using the same first with one and then with the other cut-off, (the defendants then having in use on board their said boat a machine called the throttle,) to show with which the boat would run the longest under the same circumstances. And thereupon the said plaintiffs, confiding in the said promises and undertakings of the said defendants, at great cost, to wit, at the cost

of two hundred and fifty dollars, did erect and build, and place on the said steamboat Columbia, at the request of the defendants, *a machine called 'Sickles's cut-off;' which said machine, and the same hath ever since, to wit, from the [*421 20th day of August, 1844, continually, to the beginning of this action, been used by the said defendants in and upon the said boat; and that, on the 19th day of August, 1845, at the county aforesaid, the said plaintiffs gave notice to the said defendants that they would, on the next day, that is to say, on the 20th day of August, 1845, if they desired, make the said experiment in the said agreement mentioned, to test the relative value of the said machine; and, for that purpose, that one of the said plaintiffs would go from Washington to Baltimore, in the said boat, on the said 20th of August, 1845, and make the said experiment; and the said defendants, by their president, did then and there assent thereto, and did direct the officers of the said boat, or some of them, to aid in conducting the said experiment; and the said plaintiffs in fact further say, that one of the said plaintiffs, to wit, the said Truman Cook, did, on the said 20th day of August, 1845, proceed in the said boat from the said city of Washington to Baltimore, in the state of Maryland, and did, on the said voyage, with the assistance of the officers of the said boat, make the said experiment, and did take two piles of wood of equal dimensions and under like circumstances; the pile employed in the use of the throttle cut-off was burned in two hours and seven minutes; and the pile used by the cut-off of the plaintiffs lasted three hours and fifteen minutes, showing a saving in favor of the latter of 34 and $\frac{175}{190}$ per cent., of all which the said defendants had due notice; whereby a great amount and value of fuel has been saved by the said defendants, to wit, the amount of twenty-five hundred dollars; and the said plaintiffs in fact say, they were and are entitled to recover of and from the said defendants, out of the said sum of money, as well the said sum of two hundred and fifty dollars, as and for the costs and expenses of erecting and building the said machine and placing the same on the said steamboat, as also the further sum of sixteen hundred and eighty dollars and fifty cents, being three-fourths of the said savings within said period of time after the said machine was put in operation on the said boat, and while the same was used by the said defendants to the time of the bringing this suit; and being so entitled, the said plaintiffs, to wit, on the day and year aforesaid, and often afterwards, at the county aforesaid, demanded the whole of the said two sums of money, to wit, the sum of nineteen hundred and thirty-seven dollars and fifty cents, of

and from the said defendants, and the said defendants utterly neglected and refused to pay the same, or any part thereof, to
*422] the *said plaintiffs, and still refuse, to the damage of the plaintiffs four thousand dollars; and therefore they sue.

JOSEPH H. BRADLEY, *for Plaintiffs.*

"Add a count for putting the machine on the boat at the request of the defendants, with a *quantum meruit.*

"JOSEPH H. BRADLEY, *for Plaintiffs.*"

The defendants pleaded *non assumpsit*, upon which issue was joined, and in March, 1847, the cause came on for trial.

The following is the evidence offered by the plaintiffs, which, being objected to by the defendants but admitted by the court, formed the subject of the exception to evidence.

"On the trial of this cause, the plaintiffs, to maintain the issue on their part joined, offered and gave evidence tending to show that, on or about the 18th day of June, 1844, at the county aforesaid, the said plaintiffs being the owners of the patent right to a certain machine called a cut-off, of which the said Frederick E. Sickles was the inventor, and the said defendants being the owners of the steamboat called the Columbia, on which they had in use a certain machine called the throttle cut-off, the object of both of said machines being to save the consumption of fuel in the use of steam-engines, the said plaintiffs made and entered into a certain contract with William Gunton, the president of the steamboat company, and the general agent thereof, whereby it was agreed that the said plaintiffs should construct and place on board the said steamboat one of their said machines at their own cost and expense; that the same should be tried, and, if it produced any saving, that the cost of putting the said machine in operation on board the said boat, not to exceed two hundred and fifty dollars, should be first paid out of the savings of fuel effected by the said machine; that the said machine should be used by the defendants during the continance of the patent, if the said boat should last so long; and after the payment of the said costs and expenses of putting the said machine in operation on board the said boat, the savings caused thereby, in the consumption of fuel, should be divided between the said plaintiffs and defendants in the proportion of one fourth to the defendants and three fourths to the plaintiffs; and, in order to ascertain the amount of such savings, an experimental trial should be made at any time the plaintiffs should direct it, after the said machine was in successful

operation, in the following mode: Two piles of wood should be taken of equal dimensions; one pile should be used with one of the cut-offs, and the other pile with the other cut-off, under like circumstances, and the length of time required in the consumption of the said *piles of wood, respectively, should be taken as the evidence of the difference [*423 in the amount of savings in the one over the other; and if the said machine produced no saving, it was to be taken off, and the boat restored to its former condition, at the expense of the plaintiffs.

"That the said contract was wholly in parol, and, within three days after it was made, the plaintiffs entered into a contract in writing with T. W. and R. C. Smith, of Alexandria, by the said plaintiffs, as follows: (copied in record;) and the said defendants caused their said boat to lie at Alexandria to have the said machine fitted to her engine; that the said T. W. and R. C. Smith proceeded with all convenient despatch to make the said machine, and put the same on board the said boat, at the cost of $242; that the same was completed and placed on board the said boat, and in complete action, on the 9th day of November, 1844, with the knowledge of the defendants, and that the same was continually thereafter, to the bringing of this suit, used by the said defendants on board the said boat.

"That, on the 19th day of August, 1844, the said Truman Cook, one of the said plaintiffs, gave notice, on board the said boat, to the said defendants, by William Gunton, president as aforesaid, that they desired on the next day, the same being the regular day for the passage of the said boat from the city of Washington to Baltimore, to go on the said trip and make the experiment, provided by their said contract, to ascertain the saving caused by the said machine; and the said William Gunton, president as aforesaid, directed the officers of the said boat, or one of them, to take care that the said Cook did not throw sand in his eyes; and on the said 20th day of August, 1844, the said Cook, one of said plaintiffs, did in fact go from the city of Washington to Baltimore on board the said boat, and the said experiment was in fact made, under the superintendence of the officers of said boat on behalf of said defendants, and by the said Cook on behalf of said plaintiffs, and the whole was, at the request of plaintiffs, carefully observed and noted by Captain Job Carson, for many years mate and captain of a steamboat, and the result of the said experiment was, that the said machine of said plaintiffs caused a saving of fuel, over and above the said 'throttle cut-off,' of $34\frac{175}{190}$ per cent., and full, minute, and accurate minutes of the said ex-

periment, and of the result thereof, were taken and made in writing by the officers of the said boat, or one of them; that the average consumption of wood on her said trip to Baltimore was cords, and on her trip from Baltimore was cords, and the average price of wood, during the period she *424] ran, from the 9th of November, 1844, to the bringing *of this suit, was $, and, estimating the saving by the said machine at one third, it amounted to $ up to the impetration of the writ in this case.

"The plaintiffs further gave evidence to show, by practical and scientific engineers and builders of steam-engines, that the said experiment was the only mode by which the said savings could be ascertained with any degree of certainty; that it had been resorted to and tried by them; and one of them further proved, that, on the experiment conducted by him to test the difference between 'Sickles's cut-off' and the 'throttle cut-off,' in a large steamboat belonging to Baltimore, and having an engine of the same construction as that on board the Columbia, the saving of the former over the latter was 42 per cent.; and they further proved that they were acquainted with both of the said machines, both theoretically and practically, and that no engineer would hesitate to say that 'Sickles's cut-off' was far superior to the throttle, and to any other with which they were acquainted.

"They further gave evidence to show that the said machine had been applied by the plaintiffs to four other steamboats belonging to the port of the city of Washington, and the saving of fuel caused thereby ranged from 18 to 33 per cent. on board the said boats respectively, and that the saving could not be ascertained by the amount of wood actually consumed without knowing and estimating the condition of the hull, and engine, and machinery, the state of the weather, the water, the freight, and the speed of the boat; and the only test was the experiment aforesaid, or one conducted on scientific principles which would give a proximate result.

"To introduction of which said evidence by practical and scientific engineers and others, builders of steam-engines, tending to show the operation of the said cut-off, and the savings resulting therefrom on other boats, the defendants, by their counsel, objected, because the same was inapplicable to the issue on the first count in the plaintiffs' declaration, and that the same could not be offered on the general counts, unless the plaintiffs abandoned the first.

"Which objection the court overruled, and allowed the said evidence to go to the jury; to which ruling of the court the defendants, by their counsel, excepted, and prayed that this

their bill of exceptions may be signed and sealed; which is done this 25th day of March, 1847.

JAS. S. MORSELL, [SEAL.]
JAS. DUNLOP. [SEAL.]"

The defendants then offered evidence which is all incorporated *into the bill of exceptions; but the following is that part upon which the prayer to the court below rested, involving the point which was argued in this court. [*425

"The defendants, to support the issue on their part, called William Gunton, late president of the defendants' company, who being first sworn on his *voire dire*, stated that he had resigned the office of president of said company, and sold and transferred all the stock he held therein, and that he was in no way interested in the event of this suit between the said plaintiffs and the defendants; and the said witness, being sworn in chief, testified that he did not, as president of said company, or otherwise, make with the said plaintiffs the contract for the use of the cut-off called Sickles's cut-off, on board the defendants' steamboat called the Columbia, as the same is set forth in the first count in the plaintiffs' declaration; that some time in the spring of the year 1844 he first met with Truman Cook, one of the plaintiffs, and after having conversed several times with the said Cook on the subject of the application of the said cut-off to the engine on board the said boat, the said Cook stated that he was very desirous to bring the cut-off to the favorable notice of the officers of the government, with the view of introducing the same into use on board the national steamships, and other steam-vessels sailing on the waters of the River Potomac and the Chesapeake Bay; that he, as president of the defendants' company, agreed with the said Cook that he might place, at his own expense, the said cut-off on the engine of the said boat, and that if, on trial of the same on board the said boat, the said cut-off should be approved of, and the defendants should wish to purchase the same, the terms of such purchase should be afterwards determined on between the said parties; but if the said cut-off should not be approved of, or the terms proposed by said Cook for the use of the same by the said defendants on their said boat should be such that the said defendants could not accede thereto, the said Cook was to take the said cut-off from the said boat at his own expense, and restore the engine on the said boat to the same condition in which it was before the application of the said cut-off thereto; that the said cut-off was placed on the said engine pursuant to such last-mentioned agreement, and not in pursuance of any such agreement as is mentioned in the first

count of the plaintiffs' declaration; that afterwards, and when the witness, still being president of defendants' said company, had had an opportunity to form some idea of the value of the said cut-off, he conversed with said Cook respecting the terms on which the same might be purchased for the use of the defendants on board the said boat, and the said Cook informed *426] *the said witness that the defendants should have the use of the said machine on as favorable terms as the same had been disposed of to the owners of the steamboat Augusta, or any other steamboat, but did not then, or at any other time, inform the witness at what price the same had been sold to the said steamboat Augusta, or any other steamboat, or make any such definite proposition for the sale of the said machine to the defendants as would enable him to lay the same before the board of directors of the said company for their approval; and that the defendants have at no time refused the said Cook or the plaintiffs permission to remove the same from the engine on board the said boat, and restore the said engine to its former condition."

The prayer to the Circuit Court, founded on this evidence, was as follows:—

"Whereupon the defendants, by their counsel, prayed the court to instruct the jury, that if the jury believe, from the evidence, that the defendants agreed with the plaintiffs that they, the said plaintiffs, might, at their own expense, place the cut-off, called Sickles's cut-off, on the engine of the defendants' boat, called the Columbia, that they, the said plaintiffs, might exhibit the qualities and usefulness of the said machine to the public, and thereby facilitate the introduction of the same into use on board the national steam-ships, and other steam-vessels sailing on the waters of the Potomac River and the Chesapeake Bay; and that if, on the trial of the same on board the Columbia, the said cut-off should be approved of, and the defendants should wish to purchase the same, the terms of said purchase should be afterwards determined on between the said parties; but if the said cut-off should not be approved of, or the terms proposed by the plaintiffs to the defendants, for the use thereof, should be such that the said defendants could not accede thereto, the said plaintiffs were to take the said cut-off from the said boat at their own expense, and reinstate the boat and her engine in the same condition in which she was before the application of the said cut-off thereto; and that the said cut-off was placed on the said boat pursuant to said agreement

and permission as aforesaid, and not pursuant to any such contract as is set out in the first count in the plaintiffs' declaration; and that the said plaintiffs have made no definite proposition to the said defendants for the sale and use of the said cut-off, and have not been refused permission by the defendants to remove the same from their said boat, then the plaintiffs are not entitled to recover in this action, although the jury should believe from the evidence that the said machine was approved of, and *has been used by the said defendants; which [*427
instruction the court refused to give, there being only two judges on the bench, and they being divided in opinion on said instruction; to which refusal the defendants, by their counsel, excepted, and prayed the court that this their bill of exceptions may be signed and sealed, which is done, this 25th day of May, 1847.

"JAMES S. MORSELL, [SEAL.]
"JAMES DUNLOP. [SEAL.]"

Amongst the evidence brought forward by the defendants, were the two following letters, which are inserted here because they are remarked upon by the court in the decision of the remaining exception.

W. Gunton to Sickles & Cook.

"As I am, week after week, annoyed by warrants, under a pretended contract never entered into by me, respecting the cut-off placed under your direction on the steamer Columbia, and as I have repeatedly explained in writing, both to Messrs. T. W. & R. C. Smith, of Alexandria, and Mr. A. T. Smith, of this city, your agent, or attorney, what the understanding between Mr. Cook and myself was in relation to the subject, and have expressed my willingness to comply therewith, I hereby give you notice, that unless you, within ten days from this date, remove the aforesaid cut-off from the Columbia, and replace, agreeably to that understanding, her machinery in the same condition in which it was immediately before the cut-off was applied thereto, I shall promptly thereafter cause the work to be done at your expense, and hold you liable for the same, in addition to the amount of expense incurred and loss sustained, by reason of the detentions of the Columbia, mentioned in my letters to your agent, Mr. A. T. Smith, before alluded to.

W. GUNTON, *President.*

"*Washington City*, 14*th April*, 1841.
"MESSRS. SICKLES & COOK."

Reply to the above.

"DR. WILLIAM GUNTON, *President*:—

"We have received your note of the 14th instant, and hasten to reply to it, to avoid any future misapprehension on your part of the positions we respectively hold. You have chosen to make terms entirely different from those under which we contracted with you; have refused to execute your contract with us; have driven us to the necessity of a suit; and we are now resolved to bring the matter to an issue.

*428] *"You complain that you are annoyed by warrants. It is your own fault. You say that you have repeatedly [stated] to Messrs. T. W. and R. C. Smith, Alexandria, and Mr. A. T. Smith, of this city, what the understanding between Mr. Cook and yourself was in relation to this subject, and have expressed yourself willing to comply therewith. We have, as often as occasion and opportunity offered, stated to you, in the plainest terms, that your representations thus made were not the terms of our contract, and have as clearly and distinctly stated to you what that contract was. We now repeat it. We undertook to put Sickles's cut-off on the engine of the steamer Columbia, and offered to receive $1000 for the right to use it. You, seeming to doubt the importance of the invention, declined that offer; and we then offered to put the cut-off on, taking as a compensation for its use the value of three fourths of the fuel saved by its use, deducting from the first savings $250 for the construction of the machine, the savings to be ascertained by either of us by experiments with our cut-off and the old one attached to the engine of the Columbia, and you were to continue the use of our cut-off, provided we made it work well, so long as the boat continued to belong to your company. We employed the Messrs. Smith to construct the machine. These terms you accepted in the most unequivocal manner. This was all they had to do with it. They did make it, and it was applied, and has operated successfully. Persons were directed on board the boat to make accurate observations of the saving. It was found to be far greater than you had any idea of. We asked for compensation, and you denied the contract. Your own acts have compelled us to bring suit; and, in order to bring the matter to a close after that suit was brought, we took out a warrant against your company, so that either party might, by appeal, bring the question at once before the court for judicial decision. These are resisted on technical grounds, and now you give us notice to remove the cut-off. However much we might be disposed to avoid litigation, and to terminate all controversy by an amicable ad-

justment, the course you have taken has determined us, and we now give you notice that we will not only not interfere with the cut-off on board the Columbia, and hereby protest against your interfering with it, but we will every week bring an action to recover the amount of saving coming to us on the terms of our contract with you. Until we can get a judicial decision in the matter, you must choose for yourself.

"SICKLES & COOK.

"*Washington*, 15*th April*, 1846."

*The remaining prayer to the Circuit Court was as follows:— [*429

"The defendants, by their counsel, further prayed the court to instruct the jury, that if the jury believe, from the evidence, that the contract set out in the first count of the declaration, and alleged to have been made by the plaintiffs and William Gunton, the president of the defendants' said company, was never authorized by a board or quorum of the directors of said company, as provided by their charter of incorporation, and was never sanctioned or approved of by said board or quorum of the said directors, and that the said William Gunton, in making such contract with the plaintiffs, if the jury believe the same to have been made by him, did not act within the scope of his authority as such president, then the said contract is void as respects the said defendants, and the said plaintiffs are not entitled to recover under the said first count in their declaration; which instruction the court refused, but granted the same, with the following modification: but if, from the evidence, the jury shall find that William Gunton, the president of the defendants' company, and acting as their general agent, made with the plaintiffs the contract set out in the first count of the said declaration, and that the plaintiffs, under the said contract, put the said machine on the defendants' boat, and the same was used by the defendants at the time and times mentioned in the said count, and that the same was beneficial to the defendants, then the plaintiffs are entitled to recover on the said first count, notwithstanding the jury shall find that the terms of the said contract were not communicated to the defendants, and the said William Gunton reported to the said defendants a different contract; to which refusal of the said instruction, and modification thereof, the defendants, by their counsel, excepted, and prayed that this their bill of exceptions may be signed and sealed, which is done this 25th day of May, 1847.

"JAMES S. MORSELL, [SEAL.]
"JAMES DUNLOP. [SEAL.]"

The jury found a verdict for the plaintiffs, and assessed the damages at $1800, with interest from the 9th of November, 1845. A writ of error brought these several rulings of the Circuit Court before this court for revision.

It was argued by *Mr. Lawrence*, for the plaintiffs in error, and by *Mr. Lee* and *Mr. Bradley*, for the defendants in error.

The argument on behalf of the plaintiffs in error, with respect to the admissibility of the evidence, was as follows:—

*430] *1st. The same was inapplicable to the issue on the first count in the plaintiffs' declaration.

2d. That the same could not be offered on the general count unless the plaintiffs abandoned the first.

The plaintiffs in error insist that the court erred in allowing the evidence objected to by them to go to the jury:—

1st. Because it was in no way applicable to the issue on the special count in the plaintiffs' declaration; it did not tend to prove any one of the allegations contained in that count, and was therefore irrelevant and collateral.

The plaintiffs allege that a special mode of testing the value of their machine, in contrast with that previously used on board the defendants' boat, was agreed upon by the parties, and constituted part of their contract; the experiment was, as they allege, to be made on board the Columbia. It was therefore wholly immaterial to the point in issue on the first or special count what had been the result of experiments made on board steamboats in Baltimore or Washington; the defendants had no notice of such experiments, were not present at them, and ought not to be affected by them.

Neither was it proper to give in evidence the opinion of engineers or steamboat-builders, however well informed as to the relative value of the two machines, particularly as the plaintiffs allege a special mode of ascertaining the difference in value had been agreed on by the parties in their alleged contract.

It is a familiar rule of evidence, that it must correspond with the allegations in the pleadings of the party who offers it. 1 Greenleaf on Evidence, §§ 51 and 52.

This rule excludes all evidence of collateral facts; the admission of evidence of that character tends to divert the minds of the jury, to excite prejudice, and mislead them; the adverse party is taken by surprise, and cannot be prepared to rebut it.

Thus, where the issue between a landlord and his tenant was whether rent was payable quarterly or half-yearly, evi

dence of the mode in which other tenants of the same landlord paid their rent was held by Lord Kenyon inadmissible. Peake Cas., 95.

So the opinions of engineers, and the results of experiments on other boats, ought not to have been allowed.

2dly. This evidence was not admissible under the *quantum meruit* count.

Where there is an express contract, and a stipulated mode of compensation, the party rendering the services cannot waive the contract, and resort to an action on a *quantum meruit*, or an implied assumpsit. *Champlin* v. *Butler*, 18 Johns. (N. Y.), 169.

Where the special agreement subsists in full force, the plaintiff *cannot recover under the common counts, but the remedy is on the contract. Bull. N. P., 139; *Raymond* v. *Bearnard*, 12 Johns. (N. Y.), 274; *Jennings* v. *Camp*, 13 Id., 94; *Clarke* v. *Smith*, 14 Id., 326; *Wood* v. *Edwards*, 19 Id., 205; *Perkins* v. *Hart's Executor*, 11 Wheat., 237. [*431

In the case before the court, the contract was subsisting and continuing; it was to last as long as the defendants should continue to employ the boat Columbia, if the patent for the machine continued so long. The plaintiffs had declared upon it as a subsisting contract. The *quantum meruit* count was for the same subject-matter as the special contract.

In the case of *Cooke* v. *Munstone*, 1 Bos. & P. N. R., 354, the declaration contained a count on a special contract, and a count for money had and received to the use of the plaintiff; the plaintiff failed to prove the contract laid, but proved another variant from it; he claimed to recover on his common counts; the court decided that the plaintiff could not proceed on the common counts. The court said, "The cases in which the plaintiff has been allowed to proceed on these counts are those in which the special contract is put altogether out of the case; it would be very strange to allow the plaintiffs to recover on the general *indebitatus assumpsit*, and still leave him to his right to recover for non-performance of his special contract; it is said he has a right to proceed at the same time on the special and on the general count, but the cases only warrant a permission to resort to the latter when the former has failed altogether. In this case, if we were to allow the plaintiff to go into the evidence he offered, it would amount to saying that there was no evidence of a subsisting special agreement, when in truth there was such evidence."

In *Clarke* v. *Smith*, 14 Johns. (N. Y.), 326, the declaration contained a count on a special agreement, and the common counts relative to the same subject-matter. The plaintiff, at

the trial, proceeded to give evidence under the common counts the witness, on cross-examination, said there was a written contract between the parties, under which the work was done; objection was then made to the plaintiff's giving evidence under the common counts, which was overruled by the court.

On appeal, this was held to be error, and it was decided, that whenever the special contract is still subsisting, and no act done or omitted by the one party which would authorize the other to consider the contract rescinded, the remedy must be on the special contract, which principle will be found to run through all the cases.

While the contract is still subsisting, part performance will *432] *not entitle the plaintiff to resort to the common counts to recover the value of that which he has done in part fulfilment of the contract.

If the plaintiffs could not resort to the common count, they ought not to have been allowed, the defendants objecting, to give evidence applicable only to that count. There was conflicting testimony respecting the value of the machine, and the minds of the jury must have been affected by the testimony thus improperly offered.

With respect to the exception founded on the refusal of the court to grant the first prayer made by the defendants below, the error alleged was this.

If the plaintiffs acted under a special agreement with the defendants in putting the said machine on the defendants' boat, and there was any failure on the part of the defendants to comply therewith in any respect, the proper and only remedy for the plaintiffs was by action on that special agreement.

Whether the agreement was such as the plaintiffs pretended, or such as the defendants pretended, while such agreement was subsisting, there could be no remedy for the plaintiffs on the common counts.

If the agreement was such as the plaintiffs have set out in the first count in their declaration, and the jury believed the evidence introduced to prove the same by the plaintiffs, then they were entitled to recover on that count.

But if the jury gave greater credence and weight to the evidence offered by the defendants to sustain the issue on their part, and believed the contract to be proved to be such as the defendants set up, then the plaintiffs were not entitled to recover;—

1st. Because of their failure to prove the contract set out by them.

2d. Because a different contract was proved by the defen-

dants, of which there was no breach on their part alleged or proved, and which was still subsisting.

It is clear from the terms of the agreement, as shown by the defendants' evidence, that the machine was not put on the defendants' boat to be used by them under a contract of purchase, nor was the use thereof to be paid for by the defendants; it was put on board by permission of the defendants at the request of the plaintiffs, and for their advantage; the plaintiffs were at liberty to remove it at their pleasure. If the defendants should wish to acquire the right to use it permanently, it was to be made the subject of a future agreement.

If the jury believed this, and certainly the defendants' evidence tended to prove it, and no subsequent contract was alleged or *proved, and no offer by the plaintiffs to remove the machine from the boat, and refusal by the [*433 defendants to allow it, either alleged or proved, then the plaintiffs made out no case against the defendants; and, when asked by the defendants, it was the duty of the court so to tell the jury, and their refusal was an error.

The court seem to have been of opinion, that, notwithstanding the jury might believe, from the evidence, that the defendants did not contract with the plaintiffs, either for the purchase or use of the machine, and that the same was put on board the plaintiffs' boat for their own benefit and advantage with the public; yet, as the same had been used by the defendants, and they had derived benefit therefrom, they ought to pay for it; and, if they refused to do so, the plaintiffs had a right to recover for such use.

Respecting the last prayer, the plaintiffs in error contend that the court erred in refusing the instruction as originally asked for, and in giving the same with said modification.

In the third section of defendants' said charter it is provided that the affairs of the company shall be conducted by four directors and a president; that two directors and the president shall form a quorum for transacting all the business of the company.

In the fifth section it is provided that the president and directors shall have full power to use, employ, and dispose of the funds and property of the company for the interest and benefit of the stockholders, and agreeably to the objects of the said act of incorporation.

The president of the company has, as such, no power to bind the company by contract; he may be authorized to act as the *special agent* of the company in some particular case, or *generally* in the performance of some prescribed duties. His

power as agent of the company cannot be without scope or limit. An act of the board authorizing the president to act as *universal agent*, with unlimited authority to act for, and dispose of, the property of the company, would be a violation of the charter, and void.

If it be assumed that Mr. Gunton made with the plaintiffs the contract set out in the declaration, he acted in doing so as the president or agent of the company, and within some supposed limits. If the act done was within the scope of his authority, the company was bound by it. If, however, the act done was not within the scope of his authority, then the company was not bound by it.

It is not contended that third persons are to be affected by the private restrictions which a principal may impose on his *434] *agent; it is conceded that, whenever an act is within the scope of the agent's authority, the principal is bound. Story on Agency, § 127.

In the instruction which the court refused, they were asked to say to the jury that, if they believed from the evidence, that Mr. Gunton, in making the said contract, did not act within the scope of his authority as such president, and that the said contract was never authorized or sanctioned by the board of directors, then the same was void as respects the defendants.

In refusing this instruction the court left the jury to understand that the contract was binding on the defendants; notwithstanding it was not within the scope of Mr. Gunton's authority, as president, and so agent of the company, to make it; and the same had never been authorized or sanctioned by the board of directors.

This ruling on the part of the court, as the subsequent modification shows, had its basis in an opinion held by them that the defendants, having had the use of the machine, if they were benefited thereby, were, at all events, bound to pay for it.

The subsequent granting of this instruction, with the modification attached to it by the court, magnified the error of their first refusal.

The plain and fair construction of the whole is this: That if the jury believe Mr. Gunton, in making said contract, acted beyond the scope of his authority, as president of the company, and that the contract was never authorized or sanctioned by the board of directors, the contract was void; yet if he, being the president of the defendants' company, and acting as their general agent, did make the said contract, even if he did exceed his authority, and the plaintiffs, under said contract,

put their machine on the defendants' boat, and it was used by the defendants, and was beneficial to them, then the plaintiffs are entitled to recover under the special count in the declaration; that is, they are entitled to recover for the beneficial use on the first or special count in the declaration.

One of the terms of the contract, as set out in the declaration, is, that the whole of the value of the savings which should be effected by the plaintiffs' machine over the old throttle cut-off should be applied to pay for the cost of the machine, &c., and after that three fourths of the savings thus effected should be paid to the plaintiff, and the amount was to be ascertained in a certain way.

The instructions given by the court to the jury do not limit the right of the plaintiffs to recover according to the terms of their alleged agreement, but they affirm their right to recover if the jury believed the machine was used, and was beneficial *to the plaintiffs. The court say they may recover for [*435
the beneficial use, and that under the special contract. The jury are not told that the beneficial use of the plaintiffs' machine must, in their judgment, exceed that of the old throttle cut-off. It is sufficient, in the judgment of the court, that the defendants had used the machine, and that that use was beneficial, to authorize the plaintiffs to recover to the extent of the value of such use.

If the ruling of the court had been, that, if the jury believed that Mr. Gunton in making the contract exceeded his authority, and therefore that the contract was void as against the defendants, in the absence of any contract binding the defendants the plaintiffs might recover under the common count, if they believed the defendants used the plaintiffs' machine, and it was beneficial to them, there would have been no error in their instruction; but such is not the ruling of the court. They say, that if the machine was put on the boat under the special contract, and was used by the defendants and proved beneficial, the plaintiffs may recover the value of such use on the count on that contract.

The following authorities were relied on:—

Bank of Columbia v. *Patterson's Adm.*, 7 Cranch, 306; *Head and Amory* v. *Providence Ins. Co.*, 2 Id., 127; *Fleckner* v. *Bank of U. States*, 8 Wheat., 338; *Bank of U. States* v. *Dandridge*, 12 Id., 64.

The counsel for the defendants in error, with respect to the admissibility of the evidence, conceded that the evidence was not admissible under the first count in the declaration, and that it was not offered as applicable to that count, but con-

tended that it was clearly admissible under the second count. The propriety of joining a count on the special agreement with a common count cannot be doubted. It is the usual and proper course. Arch. Civ. Pl., 174.

Where there is a special agreement, the rules are,—

1st. So long as the contract is executory, to declare specially; when executed, and the payment is to be in money, the general counts may be used. *Streeter* v. *Horlock*, 1 Bing., 34, 37; *Study* v. *Sanders*, 5 Barn. & C., 628; *Tuttle* v. *Mayo*, 7 Johns. (N. Y.), 132; *Robertson* v. *Lynch*, 18 Id., 451.

2d. Where the contract has been partly performed, and has been abandoned by mutual consent, or rescinded by some act of defendant, plaintiff may use the common counts. *Robson* v. *Godfrey*, 1 Stark., 275.

3d. Where work has been done under a special agreement, but not in the time or manner stipulated, has been accepted by and is beneficial to defendant, the common counts may be *resorted to. *Keck's case*, Bull., N. P., 139; *Burn* v. *Miller*, 4 Taunt., 745; *Streeter* v. *Horlock*, 1 Bing., 34; *Jewell* v. *Schroeppel*, 4 Cow. (N. Y.), 564; *Taft* v. *Montague*, 14 Mass., 282.

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These are general principles now universally admitted.

But it is supposed the plaintiffs were bound to waive or abandon their first count before they could resort to the common count. Is this so?

It was contested, and they had a right to give evidence as to both. They were both good counts. It was competent for them to have the verdict entered on whichever count they pleased, or the court might have instructed the jury at the instance of either party. If the contract had been admitted, the case would have been different. Here the whole matter was *in pais*, and the court was right in admitting the evidence.

As to the first prayer.

The rules already presented furnish a conclusive answer to this. If the machine was placed on the boat under the agreement assumed by this prayer, it is still quite clear the plaintiffs were entitled to compensation for the time it was used by the defendants, if it was beneficial to them, although they should not have agreed on the terms.

It proceeds on the hypothesis, that the plaintiffs would place the machine on the boat at their own expense, and for their own benefit; and if, on trial, it should be approved of by the defendants, and they should desire to purchase it, the terms of such purchase should be afterwards determined on between the parties; but if it should not be approved, or the terms proposed by said Cook for the use of the same should be such

that defendants could not accede thereto, plaintiffs should remove it at their own expense, and replace the boat in as good condition as before. This is, however, but a partial statement of the evidence. It was approved of. The defendants conferred with Cook about the price, and he said they should have the use of the machine on as favorable terms as the same had been disposed of to the Augusta, or any other steamboat; but he did not state what those terms were.

The Augusta was a boat running in the same waters; the Osceola was another. The means of ascertaining the price were within the reach of defendants. The defendants understood this to be a distinct and binding offer. They did not reject it; but continued to use the machine after these terms were proposed.

It was a contract of sale or use. The plaintiffs had done their part, executed the contract, and the payment was to be made in money. They might resort to the common count. See cases under the first rule above. They gave evidence to *show the terms on which the Osceola had it. This was the measure of the sum which they could recover [*437 on the common count. It was competent for defendants to have proved that the terms with the Augusta were more favorable if they had chosen to do so. But the court was asked to say they could not recover at all in this action, rejecting the second count altogether.

As to the fourth exception.

The instruction assumes that the defendants' president must have been authorized by a board or quorum of the directors, or his act sanctioned and approved by such board or quorum, to make it binding on the company.

It admits the making of the contract. It was a contract eminently beneficial to the company, saving more than one third of the fuel. It was made by the general agent of the company in the ordinary discharge of his duties. They were bound to know its terms. If they chose to avail themselves of the benefits without inquiring into those terms, or if they believed, from the report of their said agent, that he had made a different contract, they are still bound by the contract which he did make. *Bank of Columbia* v. *Patterson's Adm.*, 7 Cranch, 299; *Mechanics' Bank* v. *Bank of Columbia*, 5 Wheat., 326; *Fleckner* v. *Bank of U. States*, 8 Id., 338; *Bank of U. States* v. *Dandridge*, 12 Id., 64; *Bank of Metropolis* v. *Guttschlick*, 14 Pet., 27.

Mr. Justice GRIER delivered the opinion of the court.

Sickles and Cook, plaintiffs below, filed their declaration in assumpsit, containing two counts.

The first set forth a parol contract made with William Gunton, president of the steamboat company and general agent thereof, in which it was agreed that the plaintiffs should construct and place on board the steamboat Columbia a certain machine invented by Sickles, called a "cut-off," at their own cost; that the machine should be tried, and, if it was found to produce any saving of fuel, that the cost of putting it in operation, not exceeding two hundred and fifty dollars, should be first paid out of the savings of fuel effected by the machine; that the machine should be used by the defendants during the continuance of the patent, if the boat should last so long; and after paying for its erection, the savings caused thereby in the consumption of fuel should be divided between the plaintiffs and defendants in the proportion of one fourth to defendants and three fourths to plaintiffs. The mode of ascertaining the amount of saving is specially set forth,—and the plaintiffs aver that they erected their cut-off on said steamboat at the *438] *cost of $242, on the 9th of November, 1844, and that it was afterwards ascertained in the mode agreed upon, that the saving of fuel caused by using plaintiffs' cut-off exceeded that of the "throttle cut-off," before used by defendants, by $34\frac{175}{190}$ per cent.; and that the amount saved over and above the price of erection when this suit was brought was $2,500. For the amount of the $242, and three fourths of the latter sum, this suit is brought.

There is a second count, for putting the machine on the boat at request of defendants, with a *quantum meruit*.

On the trial of the cause below, evidence was given tending to prove the special contract as laid in the first count, and that the experiment to test the value had been made in the manner agreed upon, with the result as stated in the declaration. The plaintiffs then offered to show experiments made by practical engineers on other boats, and the result thereof, with the opinion of the said engineers as to the value of their cut-off. This evidence was objected to, and its admission is the subject of the first bill of exceptions, sealed at request of defendants.

The objection to this evidence is, that the mode of ascertaining the value of plaintiffs' cut-off is specially stated in the declaration, and no other could be resorted to. But we think that, even if there were no other count in the declaration than that on the special contract, this objection cannot be sustained. The plaintiffs had given in evidence the experiment made in pursuance of their alleged agreement, and as this testimony tended only to corroborate it, and not to contradict

it, or enlarge the claim of the plaintiffs beyond that ascertained by the experiment made by the parties, it cannot be said to be irrelevant or incompetent; at most, it could only be said to be superfluous. But assuming that it was irrelevant on the first count, it is clearly not so as regards the common count on a *quantum meruit*. The plaintiffs had an undoubted right to give evidence which might enable them to recover on the latter count, in case the defendants should succeed in establishing their plea of non-assumpsit as to the first. In this view of the case, the competency and relevancy of the testimony cannot be doubted.

To support the issue on their part, the defendants then called William Gunton, the late president of the company, who wholly denied that he made such a contract as that declared on by plaintiffs, and stated that plaintiffs expressed to him a desire to bring their "cut-off" to the favorable notice of the government, with a view of introducing it on board the national steam-ships. That he gave them leave to erect their machine on the boat at their own expense, and agreed that, if, on trial, the machine should be approved by the defendants, they would *purchase it, on terms to be afterwards agreed upon; but if not approved, or the terms of purchase offered [*439 by plaintiffs should be such as defendants would not accept, then plaintiffs should have leave to take off their machine at their own expense. That afterwards, when the plaintiffs' terms were asked, they said defendants should have the machine on the same terms as the steamboat Augusta and other boats, but would not then or at any other time state definitely what those terms were, or what price the Augusta had given, or the plaintiffs would be willing to take, so that it could not be laid before the company for their approval. That defendants had never refused permission to plaintiffs to take away the machine from the boat, if they so desired to do. Certain letters were also given in evidence, the contents of which it is not necessary to state in order to understand the instructions given to the jury which are now the subject of exception.

Four several bills of exception have been taken to the refusal of the court to give four items of instruction to the jury. Two of these only are relied on here. The first may be briefly stated thus:—That if the jury believed the testimony of William Gunton, and that the contract between the parties was such as he stated, defendants were entitled to a verdict. This instruction was refused by a divided court.

We are of opinion that the defendants were clearly entitled to have this instruction given to the jury, as the testimony, if

believed by them, fully supported the defendants' plea, and showed that the plaintiffs were not entitled to recover on either count in their declaration. They could not recover on the first count, for this testimony showed that there was no such contract between the parties as that set forth in it; nor on the count on a *quantum meruit*, for the use of the machine, for that would be a repudiation of the contract as proved. If the plaintiffs put their machine on board of defendants' boat for the purpose of experiment, on an agreement that defendants should pay for it if on trial they approved it, and were willing to give the price asked, otherwise the plaintiffs should have leave to take it away,—it certainly needs no argument to show, that, without stating their terms, or offering to fulfil their contract by a sale of the machine, the plaintiffs cannot repudiate it and sue for the use of the machine. This would be a palpable fraud on the defendants.

The only other exception urged to the charge of the court below is in the answer given by the court to the fourth instruction prayed; which is as follows:—

"If, from the evidence, the jury shall find that William Gunton, the president of the defendants' company, and acting *440] as *their general agent, made with the plaintiffs the contract set out in the first count of the said declaration, and that the plaintiffs, under the said contract, put the said machine on the defendants' boat, and the same was used by the defendants at the time and times mentioned in the said count, and that the same was beneficial to the defendants, then the plaintiffs are entitled to recover on the said first count, notwithstanding the jury shall find that the terms of the said contract were not communicated to the defendants, and the said William Gunton reported to the said defendants a different contract."

We find no fault with this instruction, so far as it states the liability of defendants for the acts of Gunton as their general agent, whether he reported his agreement to the defendants or not. If he was their general agent, and had power to make such contract, his failure to communicate it to his principals cannot affect the case. But we are of opinion, that the court erred in stating that the plaintiffs had a right to recover on their special count, if the machine was useful to the defendants, without regarding the stipulations of said contract as laid and proved, and the fact that the plaintiffs had refused to rescind it, and had expressed their determination to adhere to it and "to bring an action *every week* to recover the amount of saving on the terms of the contract."

If the plaintiffs had complied with the request of the presi-

dent of the company, in a letter addressed to them on the 14th of April, 1841, after the dispute about the nature of the contract had arisen, and taken their cut-off from the boat, and thus put an end to the contract, the instructions given by the court would have been undoubtedly correct. But as the record shows that the plaintiffs have refused to annul the contract, a very important question arises,—whether this action and five hundred others, which the plaintiffs have expressed their determination to continue to institute, can be supported on this *one* contract. By the contract as proved and declared on, the defendants, after the machine has been erected on their boat, are to continue to use it "during the continuance of the patent," if the boat should last so long. The compensation to be paid by the defendants is to be measured by the amount of saving of fuel which the machine shall effect. The mode of ascertaining this saving is pointed out, and the ratio in which it is to be divided. The first $250 saved are all to go to the plaintiffs, and three fourths of all the balance. But the contract is wholly silent as to the time when any account shall be rendered or payments made. The defendants have not agreed to pay by the trip, or settle their account every day, or week, or year; or at the end of $27\frac{1}{2}$ weeks, the time for which this suit is *instituted. The agreement [*441
on the part of the plaintiffs is, that the defendants shall use their machine for a certain time, in consideration of which defendants are to pay a certain sum of money. It is true, the exact sum is not stated; but the mode of rendering it certain is fully set forth. It is one entire contract, which cannot be divided into a thousand, as the plaintiffs imagine. If the defendants had agreed to pay by instalments at the end of every week, or twenty-seven weeks, doubtless the plaintiffs could have sustained an action for the breach of each promise, as the breaches successively occurred. But it is a well-settled principle of law, that, "unless there be some express stipulation to the contrary, whenever an entire sum is to be paid for the entire work, the performance or service is a condition precedent; being one consideration and one debt, it cannot be divided." It was error, therefore, to instruct the jury that the plaintiffs were entitled to recover on the first count, if their machine was used by the defendants, and was beneficial to them, without regard to the fact of the rescission, or continuance, or fulfilment, of the contract on the part of the plaintiffs.

Whether, if there had been a count in the declaration for the $242, and the jury had believed that the defendants had agreed to pay it as soon as it was earned, the plaintiffs might not recover to that amount, or whether such a construction could

be put on the contract as proved, are questions not before us, and on which we therefore give no opinion.

The judgment of the Circuit Court must, therefore, be 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 District of Columbia, holden in and for the County of Washington, 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*.

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*THE UNITED STATES, PLAINTIFFS IN ERROR, *v.* JEHIEL BROOKS AND OTHERS, DEFENDANTS.

A supplementary article to a treaty between the United States and the Caddo Indians, providing that certain persons "shall have their right to the said four leagues of land reserved for them and their heirs and assigns for ever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles are supplementary. And the four leagues of land shall be laid off," &c.,—gave to the reservees a fee simple to all the rights which the Caddoes had in those lands, as fully as any patent from the government could make one. Nothing further was contemplated by the treaty to perfect the title.[1]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

The facts are very fully set forth in the opinion of the court, to which the reader is referred.

It was argued by *Mr. Crittenden* (Attorney-General), for the United States, and *Mr. Walker*, for the defendants.

Mr. Crittenden made the following points:—

I. That the first supplementary article of the treaty does not make a grant or reservation in favor of the Grappes of four leagues of land, but the true meaning and import is simply that the Grappes shall have *their right*, whatever it may be, to

[1] CITED. *Fellows* v. *Blacksmith*, 19 How., 372; *Holden* v. *Joy*, 17 Wall., 247; *United States* v. *Payne*, 8 Fed. Rep., 888; s. c. 2 McCrary, 295.

the four leagues of land stated as being reserved to them in 1801, in the preamble; and there was, therefore, error in the refusal of the court to give the first instruction prayed for.

This, it is contended, is the true construction. The language of the second supplementary article, relating to the donation to Edwards, is very different in its terms, and imports a present grant. "There *shall be reserved* to Larkin Edwards, &c., one section of land."

II. That the recital of the reservation to the Grappes, in 1801 does not relieve the defendants from producing the primordial title on which they must rely, and the court, therefore, erred in refusing to give the second instruction prayed for, and in charging as it did on this point under the second head of the charge as given.

The law of Louisiana, borrowed from the civil law, is against the court below. The 2251st article of the Code declares that "recognitive acts do not dispense with the exhibition of the primordial title, unless its tenor be there specially set forth." In this case its tenor is not set forth, and the primordial title must therefore be produced. The recognitive act is no proof of the contents of the primordial, even when the latter is fully set forth, unless it also be shown that the latter *is lost. 1 Evans's Pothier, §§ 742, 743, p. 443; *Brooks* v. *Norris*, 6 Rob. (La.), 181. [*443

But had the Spanish authorities in 1801 any power to authorize and sanction the reservation? That they had no such power has been decided many times in this court, in the case of the Perdido boundary. The country embraced within the limits of Louisiana, west of the Mississippi, stretched far beyond even the Sabine, and it was not until the treaty with Spain of 1819, that the United States relinquished their claim to it, and ceded what lay west of that river to Spain. The United States claimed it from the first. In the act of 20th February, 1811 (2 Stat. at L., 641), to authorize the people of the Territory of Orleans to form a state government, the Sabine is declared to be the western boundary of the new state. Besides, it is to be remembered, that the fourteenth section of the act of 26th March, 1804 (2 Stat. at L., 287), declares that all grants, and every act and proceeding subsequent to the treaty of St. Ildefonso, of whatsoever nature, towards the obtaining of any grant, title, or claim to land in Louisiana, under whatsoever authority transacted or presented, shall be null and void.

In addition to all this, it may here be mentioned that the Caddoes themselves never claimed Rush Island, or ever used it in any way. It was occupied by whites, and was never

intended by the Caddoes to be included in the treaty or given to the Grappes.

III. That by the law of Spain the Caddo Indians had no primitive title to any land, and had no power to alienate without consent of the Spanish authorities; and these authorities at Natchitoches had no right to sanction the donation mentioned in the preamble and supplementary article. *Mitchel et al.* v. *The United States*, 9 Pet., 714. The Spanish officers at Natchitoches had no control over the Caddoes, the territory they inhabited being within the jurisdiction of the post of Nacogdoches. See 2 Martin's History of Louisiana, 202, 203, 261, 262; see also House Doc. No. 49, 1st Session, 24th Congress.

IV. That there was error in the court refusing to give the fourth instruction prayed for, because the matters therein mentioned were part of the history and public archives of the country, on which it was the duty of the court to inform the jury. See the state papers above referred to.

V. That the court erred in refusing to give the fifth instruction prayed for, and in charging as in the third point of the charge given.

VI. That if there is no title in Brooks, there can be none in the purchasers under him.

*444] *VII. That the court erred in not admitting as evidence in the cause the letter of General Cass to Mr. Garland, of the 17th of March, 1836, and the memorial of the Caddoes to the Senate of the United States, of the 19th of September, 1837, and the report of the House and depositions therein, and in the case of *Brooks* v. *Norris*; and in admitting copies of the affidavits of David, Trichel, and D'Ortlont.

Mr. Walker's points were as follows:—

1. Defendants' title rests upon a grant by treaty to the Grappes, a *bonâ fide* sale by them to Jehiel Brooks, and a *bonâ fide* sale of part of the land by him to the other defendants. The treaty of 1st July, 1835, being ratified and confirmed by the President and Senate, becomes the supreme law, and cannot be set aside by the courts, on any ground whatever, not even upon an allegation of fraud. Const. U. S., art. 6, § 2; Story on Const., 684, 686; *Foster & Elam* v. *Neilson*, 2 Pet., 254, 306, 307; 6 Id., 711, 738; 3 Peters Dig., 654, 655, Nos. 1, 4, 6, 8, 11, and 12; 1 Kent, 286, 287; 6 Cranch, 136, 139.

2. The boundaries of the Indian lands ceded to the United States by the treaty are fixed therein, and cannot now be disputed by either party thereto, nor can they be altered but by the consent of both parties; the right of the Indians to the

lands ceded is admitted by the treaty, and by the general policy of the government in treating with them. Story on Const., 379 *et seq.*, §§ 532, 535; 12 Pet., 516, 725; 14 Id., 13, 14.

3. The boundaries cannot be varied by parol proof, because,—

1st. The United States are parties to the treaty, which is in writing, and cannot be varied or contradicted by them. 2 Peters Dig., 234 *et seq.*, Nos. 898, 903, 904, 909, 921, 922, 933.

2d. The treaty is part of the supreme law of the land, and cannot be varied or contradicted by parol proof. 2 Peters Dig., 153, No. 35; 161, No. 128; 172, No. 238.

4. The treaty, by its terms, declared that the Caddo Indians had previously donated the lands in dispute to the Grappes, the defendants' vendors, and confirmed that donation to them; which treaty having the force of a law, it is equal in dignity and effect to a complete grant by the United States, and they cannot go beyond that grant. 9 Pet., 746; *Johnson* v. *McIntosh*, 8 Wheat., 571; 6 Pet., 342; 2 How., 344.

5. The motives that induced the President and Senate to ratify the treaty containing this grant, or the reasons, if any, that should have influenced them to reject that part of the treaty, are not proper subjects of inquiry in any court, but all *such acts must be received as conclusive on all subjects within the scope of their power. 6 Cranch, 129, [*445 131; Story on Const., 567.

6. Congress cannot, by legislation in any form, divest a citizen of rights acquired under a treaty, or previous act of Congress. 6 Cranch, 132, 133, 135.

7. Brooks is a *bonâ fide* purchaser from the Grappes, who acquired a good legal title under the treaty, which title cannot be questioned by the grantors of his vendors. 6 Cranch, 133, 134; Story on Const., 567.

8. Fraud cannot be charged on Brooks, as United States commissioner, in negotiating the treaty, without charging the same on the President and Senate, for he was their agent, and they made his act their own by their confirmation of the treaty. Story on Const., 557.

9. Congress have not authorized the inquiry of *fraud* to be made, but expunged it from the House resolutions, 38. Resolution of Congress, 30th August, 1842 (5 Stat. at L., 584.)

10. The fact of Brooks having been commissioner to negotiate the treaty did not disqualify him from purchasing long afterwards, and when his functions had ceased, land reserved in said treaty, and such purchase is no evidence of fraud in negotiating the treaty. 2 Peters Dig., 357; 3 Wash. C. C., 556 *et seq.*

11. The question of fraud was, however, submitted by the court to the jury, and decided in favor of the defendants, as appears by the record.

12. Report of commissioners, Doc. 1035, and record of *Brooks* v. *Norris*, not admissible. 1st. The depositions not taken in any suit nor in any issue joined before any judicial tribunal, nor any other tribunal having power to try or decide title to property. 1 Phil. Ev., 14 (and note 42), 378, 394, and 395; Const. U. S., art. 1, § 1; art. 2, § 1; art. 3, §§ 1 and 2; 2 Peters Dig., 164, No. 153. 2d. Consent to read the testimony in *Brooks* v. *Norris* does not bind the parties to admit the testimony in this suit, which is between different parties, both plaintiff and defendants. 10 Mart. (La.), 91, 92; 6 Pet., 340, 341; 2 Peters Dig., 229, No. 837; Id., 230, No. 850.

Mr. Justice WAYNE delivered the opinion of the court.

This is another chapter in our dealings with Indians, and it illustrates our character and theirs in such transactions. The case will be better understood from its history, than by the discussion of points which it suggests. After the narrative, our conclusion will be brief.

*446] *The case is brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

It was a petition filed by the United States in consequence of the passage of the following joint resolution of both houses of Congress, on the 30th of August, 1842:—

"*Resolved*, &c., That the District Attorney of the United States for the Western District of Louisiana be, and is hereby, directed to institute such legal proceedings in the proper court as may be necessary to vindicate the right of the United States to Rush Island, which is alleged to have been improperly included in the limits of the lands ceded by the Caddo Indians to the United States, by the treaty of the 1st July, 1835, and reserved by said treaty in favor of certain persons by the name of Grappe." (5 Stat. at L., 584).

The facts in the case were these:

On the 28th of January, 1835, the President of the United States received the following letter from the Caddo Indians:—

"*To His Excellency the President of the United States.*

"The memorial of the undersigned, chiefs and head men of the Caddo nation of Indians, humbly represents:—

"That they are now the same nation of people they were,

and inhabit the same country and villages they did, when first invited to hold council with their new brothers, the Americans, thirty years (sixty Caddo years) ago; and our traditions inform us that our villages have been established where they now stand ever since the first Caddo was created, before the Americans owned Louisiana. The French, and afterwards the Spaniards, always treated us as friends and brothers. No white man ever settled on our lands, and we were assured they never should. We were told the same things by the Americans in our first council at Natchitoches, and that we could not sell our lands to any body but our great father the President. Our two last agents, Captain Grey and Colonel Brooks, have driven a great many bad white people off from our lands; but now our last-named agent tells us that he is no longer our agent, and that we no longer have a gunsmith or blacksmith, and says he does not know what will be done with us or for us.

"This heavy news has put us in great trouble. We have held a great council, and finally come to the sorrowful resolution of offering all our lands to you, which lie within the boundary of the United States, for sale, at such price as we can agree on in council one with the other. These lands are bounded on one side by the Red River, on another side by Bayou Pascagoula, Bayou and Lake Wallace, and the Bayou Cypress; and on the other side by Texas.

*"We have never consented to any reservation but one, to be taken out of these lands, and that was made [*447 a great many years ago. The Caddo nation then gave to their greatest and best friend, called by them Touline, but known to all the white people by the name of François Grappe, and to his three sons then born, one league of land each, which was to be laid off, commencing at the lowest corner of our lands on the Red River, (as above described,) and running up the river four leagues, and one league from that line back, so as to make four leagues of land. We went with our friend and brother Touline (otherwise Grappe) before the Spanish authority, and saw it put down in writing, and gave our consent in writing, and the Spanish authority ratified our gift in writing. But, before the Americans came, our brother's house was burned, and the writings we have mentioned were consumed in it. Touline (otherwise Grappe) was a half-blood Caddo; his father was a Frenchman, and had done good things for his son when a boy. When he grew to be a man, he returned among us, and continued near to us till he died. He was always our greatest counsellor for good.

He was our French, Spanish, and American interpreter, for a great many years; our brother now is dead, but his sons live.

"We, therefore, the chiefs and head men of the Caddo nation, pray that the United States will guarantee to the sons now living of our good brother, deceased, Touline (otherwise Grappe), the whole of our original gift,—four leagues to him and to them; and your memorialists further pray, that your Excellency will take speedy measures to treat with us for the purchase of the residue of our lands, as above described, so that we may obtain some relief from our pressing necessities; and your memorialists, as in duty bound, will ever pray," &c.

This letter was signed by twenty-four chiefs.

Upon the back of this memorial, the President made the following indorsement.

"The President incloses to the Secretary of War the memorial of the Caddo chiefs, for his consideration, whether it will not be proper to appoint a commissioner, to obtain a complete cession of their lands to the United States. There will be about half a million of acres, it is supposed. Care must be taken in the instructions that no reservations shall be made in the treaty; and, if the request [for one of their friends] in the memorial be adopted at all, it must be in a schedule, which may be confirmed or rejected by the Senate, without injury to the treaty.

"*January* 28*th*, 1835.

*448] *"P. S. Will it not be well to ask an appropriation to cover this expense? A. J."

On the 39th of May, 1835, Jehiel Brooks, the Indian agent, commenced a negotiation with the Caddo Indians for the cession of their land, which continued until the 1st of July, when the following treaty was made, which was ratified by the Senate on the 26th of January, 1836, and proclaimed by the President on the 2d of February, 1836.

"Andrew Jackson, President of the United States of America, to all and singular to whom these presents shall come, greeting:—

"Whereas a treaty was made at the agency-house in the Caddo nation and state of Louisiana, on the 1st day of July, 1835, between the United States, by their commissioner, Jehiel Brooks, and the chiefs, head men, and warriors of the Caddo nation of Indians; and whereas certain supplementary

articles were added thereto, at the same time and place; which treaty, and articles supplementary thereto, are in the words following, to wit:—

"Articles of a Treaty made at the Agency-House in the Caddo Nation and State of Louisiana, on the 1st day of July, in the year of our Lord 1835, between Jehiel Brooks, Commissioner on the part of the United States, and the Chiefs, Head Men, and Warriors of the Caddo Nation of Indians.

"Article 1st. The chiefs, head men, and warriors of the said nation agree to cede and relinquish to the United States all their land contained in the following boundaries, to wit:

"Bounded on the west by the north and south line which separates the said United States from the republic of Mexico, between the Sabine and Red Rivers, wheresoever the same shall be defined and acknowledged to be by the two governments; on the north and east by the Red River, from the point where the said north and south boundary line shall intersect the Red River, whether it be in the territory of Arkansas or the state of Louisiana, following the meanders of the said river down to the junction with the Pascagoula Bayou; on the south by the said Pascagoula Bayou to its junction with the Bayou Pierre; by said bayou to its junction with Bayou Wallace; by said bayou and Lake Wallace to the mouth of the Cypress Bayou; thence up said bayou to the point of its intersection with the first-mentioned north and south line, following the said watercourses; but if the said Cypress Bayou be not clearly definable so far, then from a point which shall be definable *by a line due west, till it intersects the said first-mentioned north and south [*449 boundary line, be the contents of land within said boundaries more or less.

"Article 2d. The said chiefs, head men, and warriors of the said nation do voluntarily relinquish their possession to the territory of land aforesaid, and promise to move, at their own expense, out of the boundaries of the United States, and the territories belonging and appertaining thereto, within the period of one year from and after the signing of this treaty, and never more return to live, settle, or establish themselves as a nation, tribe, or community of people within the same.

"Article 3d. In consideration of the aforesaid cession, relinquishment, and removal, it is agreed that the said United States shall pay to the said nation of Caddo Indians the sums in goods, horses, and money hereinafter mentioned, to wit: Thirty thousand dollars to be paid in goods and horses, as

agreed upon, to be delivered on the signing of this treaty; ten thousand dollars in money, to be paid within one year from the 1st day of September next; ten thousand dollars per annum, in money, for the four years next following, so as to make the whole sum paid and payable eighty thousand dollars.

"Article 4th. It is further agreed, that the said Caddo nation of Indians shall have authority to appoint an agent or attorney in fact, resident within the United States, for the purpose of receiving for them, from the said United States, all of the annuities stated in this treaty, as the same shall become due; to be paid to their said agent or attorney in fact, at such place or places within the said United States as shall be agreed on between him and the proper officer of the government of the United States.

"Article 5th. This treaty, after the same shall have been ratified and confirmed by the President and Senate of the United States, shall be binding on the contracting parties.

"In testimony whereof the said Jehiel Brooks, commissioner as aforesaid, and the chiefs, head men, and warriors of the said nation of Indians, have hereunto set their hands and affixed their seals at the place, and on the day and year above written.

(Signed,) J. Brooks."

The chiefs, head men, and warriors who signed this treaty were twenty-five in number, and it purported to be executed in presence of

"T. J. Harrison, Capt. 3d Regt. Inf. command'g detachm't.
J. Bonnell, 1st Lieut. 3d Regt. U. S. Infantry.
G. P. Frile, Brevet 2d Lieut. 3d Regt. U. S. Infantry.
*450] *D. M. Heard, M. D., Acting Assistant Surgeon, U. S. A.
Isaac C. Williamson.
Henry Queen.
John W. Edwards, Interpreter."

"Agreeably to the stipulations in the third article of the treaty, there have been purchased, at the request of the Caddo Indians, and delivered to them, goods and horses to the amount of thirty thousand dollars. As evidence of the purchase and delivery as aforesaid, under the direction of the commissoner, and that the whole of the same have been received by the said Indians, the said commissioner, Jehiel Brooks, and the undersigned, chiefs and head men of the whole Caddo nation of Indians, have set their hands and affixed their seals the third

day of July, in the year of our Lord one thousand eight hundred and thirty-five.

(Signed,) J. Brooks.

Tarshar,	his ⋈ mark	[seal].
Tsauninot,	his ⋈ mark	[seal].
Satiownhown,	his ⋈ mark	[seal].
Oat,	his ⋈ mark	[seal].
Ossinse,	his ⋈ mark	[seal].
Tiohtow,	his ⋈ mark	[seal].
Chowawanow,	his ⋈ mark	[seal].

"In presence of
Larkin Edwards.
Henry Queen.
John W. Edwards, Interpreter.
James Finnerty.

Supplement.

"Article supplementary to the Treaty made at the Agency-House, in the Caddo Nation and State of Louisiana, on the 1st day of July, 1835, between Jehiel Brooks, Commissioner on the part of the United States, and the Chiefs, Head Men, and Warriors of the Caddo Nation of Indians, concluded at the same place, and on the same day, between the said Commissioner on the part of the United States, and the Chiefs, Head Men, and Warriors of the said Nation of Indians, to wit:—

"Whereas the said nation of Indians did, in the year 1801, give to one François Grappe, and to his three sons then born and still living, named Jacques, Dominique, and Balthazar, for reasons stated at the time, and repeated in a memorial which the said nation addressed to the President of the United States in the month of January last, one league of land to each, in *accordance with the Spanish custom of granting land to individuals. That the chiefs and head men, with [*451 the knowledge and approbation of the whole Caddo people, did go with the said François Grappe, accompanied by a number of white men, who were invited by the said chiefs and head men to be present as witnesses, before the Spanish authority at Natchitoches, and then and there did declare their wishes touching the said donation of land to the said Grappe and his three sons, and did request the same to be written out in form, and ratified and confirmed by the proper authorities agreeably to law.

"And whereas Larkin Edwards has resided for many years, to the present time, in the Caddo nation, was a long time their

true and faithful interpreter, and, though poor, he has never sent the red man away from his door hungry; he is now old, and unable to support himself by manual labor, and, since his employment as their interpreter has ceased, possesses no adequate means by which to live: Now, therefore,—

"Article 1st. It is agreed, that the legal representatives of the said François Grappe, deceased, and his three sons, Jacques, Dominique, and Balthazar Grappe, shall have their right to the said four leagues of land reserved for them, and their heirs and assigns, for ever. The said lands to be taken out of the lands ceded to the United States by the said Caddo nation of Indians, as expressed in the treaty to which these articles are supplementary. And the said four leagues of land shall be laid off in one body in the southeast corner of their lands ceded as aforesaid, and bounded by the Red River four leagues, and by the Pascagoula Bayou one league, running back for quantity from each, so as to contain four square leagues of land, in conformity with the boundaries established and expressed in the original deed of gift made by the said Caddo nation of Indians to the said François Grappe and his three sons, Jacques, Dominique, and Balthazar Grappe.

"Article 2d. And it is further agreed, that there shall be reserved to Larkin Edwards, his heirs and assigns, for ever, one section of land; to be reserved out of the lands ceded to the United States by the said nation of Indians, as expressed in the treaty to which this article is supplementary, in any part thereof not otherwise appropriated by the provisions contained in these supplementary articles.

"Article 3d. These supplementary articles, or either of them, after the same shall have been ratified and confirmed by the President and Senate of the United States, shall be binding on the contracting parties, otherwise to be void and of no effect upon the validity of the original treaty to which they are supplementary.

*452] *"In testimony whereof, the said Jehiel Brooks, commissioner as aforesaid, and the chiefs, head men, and warriors, of the said nation of Indians, have hereunto set their hands and affixed their seals, at the place and on the day and year above written.

J. Brooks."

(Signed by the same chiefs and attested by the same witnesses.)

"Now, therefore, be it known that I, Andrew Jackson, President of the United States of America, having seen and considered the said treaty, do, by and with the advice and

consent of the Senate, as expressed in their resolution of the 26th of January, 1836, accept, ratify, and confirm the same, and every clause and article thereof.

"In testimony whereof, I have caused the seal of the United States to be hereunto affixed, having signed the same with my hand.

"Done at the city of Washington, this 2d day of February, in the year 1836, and of the independence of the [L. S.] United States the sixtieth.

ANDREW JACKSON.

"By the President:

JOHN FORSYTH, *Secretary of State.*"

At the ensuing session of Congress, memorials were presented by some of the persons who claimed land situated upon Rush Island, which was included within the boundaries of the above cession; and a correspondence was exhibited between Rice Garland, one of the members of Congress from Louisiana, and Lewis Cass, then Secretary of War. These circumstances are mentioned here, because they are referred to in the bills of exceptions. The memorialists alleged that Rush Island had never belonged to the Caddo Indians, and was fraudulently included in the treaty. On the 30th of December, 1836, a committee of the House of Representatives reported that the title to the reservation did not pass to the Grappes.

On the 18th of January, 1837, Jehiel Brooks, the commissioner, obtained deeds from the devisees of Grappe, he having devised all his property to his children, by a will duly executed and recorded. These deeds conveyed all the land included within the reservation.

On the 19th of September, 1837, the following memorial was presented to the Senate of the United States. It was signed by twenty-one chiefs, many of whom were parties to the treaty.

* "*To the Honorable the Senate of the United States:* [*453

"The undersigned chiefs, head men, and warriors of the Caddo tribe of Indians would most respectfully represent unto your honorable body, that they have, this 19th day of September, 1837, heard the treaty read and interpreted to them by a white man who understands and speaks their language well, by which treaty, (concluded between Jehiel Brooks, the Indian agent, on the one part, and the chiefs, head men, and warriors of the Caddo Indians on the other part,) the said chiefs, head men, and warriors sold to the United States their land; that they discover that the bounds

and limits of the treaty are not such as they understood at the time of the treaty; that they contain lands that the Indians never claimed, and never sold, which land the Indians believed belonged to the United States, or to the French or Spanish; that the land sold by them to the United States is contained within the following bounds, to wit: Bounded on the west by the north and south line which separates the United States and Mexico, between the Sabine and Red Rivers, wheresoever the same shall be defined and acknowledged to be by the two governments; on the north and east by the Red River, from the point where the said north and south boundary line shall intersect said Red River, following the western waters of said river down to where the Bayou Cypress empties into the same; thence up Bayou Cypress, following the meanders of the stream, to the western boundary line; that the said Indians never claimed any of the low lands between the Bayou Pierre (the western channel of Red River) and the main Red River, which is the eastern channel; that they know that the land between the Bayou Pierre and the main channel of Red River has, for a long time, been exclusively settled and claimed by the white people; that the Indians did not claim said land, and never requested the Indian agent to remove them; and further, that they, the said chiefs, head men, and warriors of the said Caddo Indians, never made any reserve to any person in the treaty aforesaid, except to Mr. Larkin Edwards, an old white man that lived among them a long time; that Mr. Brooks, the Indian agent, told them that they could give Larkin Edwards a small piece of land if they wished to do so; that they then told Mr. Edwards that they would give him a small piece of land anywhere he wanted it in their lands. The said chiefs, head men, and warriors would further represent unto your honorable body, that Jehiel Brooks told one of the chiefs that one Jacques Grappe requested him to ask the Indians for a piece of land on Red River, in the bottom and on the east side of the Bayou Pierre (the western water of Red River); that the
*454] said chief told Mr. Brooks that *it was not their land, and Mr. Brooks told him that it was their land. The chief then told Mr. Brooks that, if it was their land, he was willing to give Jacques Grappe a little piece; but that they never made any reserve to François Grappe, or any of his heirs or representatives, by the treaty, within the limits of land they claimed or sold to the United States.

"In witness of the truth of the above statement the said chiefs, head men, and warriors have hereunto set their hands, the day of the date above."

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On the 22d of May, 1838, a committee of the Senate reported that Rush Island never belonged to the Caddo Indians, and recommended a confirmation of the titles of certain settlers who were living on it anterior to the treaty between the United States and Caddoes.

In 1840, memorials were again presented to Congress by these last-mentioned settlers, and much testimony was taken by the authority of Mr. Bell, chairman of the committee to whom the memorials were referred.

In April, 1842, a committee of the House of Representatives reported in favor of confirming the titles of these settlers, and on the 6th of July, 1842, an act of Congress was passed confirming them. (5 Stat. at L., 491.)

On the 30th of August, 1842, the joint resolution was passed which is set forth in the commencement of this statement.

On the 24th of February, 1846, S. W. Downs, the District Attorney of the United States, filed a petition in the Circuit Court of the United States for the District of Louisiana against the parties named in this report, alleging that they had unlawfully and fraudulently taken possession of the land therein described. The claim of the United States is thus set forth in the petition:—

"Petitioners allege, that they are the true and lawful owners of the above-described land and premises, and that the pretended claim of the said possessors is illegal, invalid, and fraudulent; that by the treaty of cession of the province of Louisiana by the French Republic to the United States of America, and by the treaty between Spain and the United States of America in 1819, the United States succeeded to all the rights of France and Spain, as they then were in and over said province, including all lands which were not private property, and that the aforesaid tract of land, ever since the said treaties, remained vested in the said plaintiffs, who are now the true and legal owners of the same; that plaintiffs have suffered damage to the amount of twenty thousand dollars, by the disturbance and occupation of said land by said possessors."

On the 18th of March, 1846, Brooks answered the petition. *He set forth the treaty, its ratification and proclamation; alleged that the heirs of Grappe acquired a perfect title under the reservation which he had since purchased, and that under the joint resolution of Congress the District Attorney of the United States was not authorized to allege fraud against him as commissioner; that he had sold and delivered sundry parts of the land to other persons, who were also defendants. [*455

On the 13th of April, 1846, the District Attorney of the United States filed the following notice to the defendants of certain evidence which he proposed to offer upon the trial of the cause.

"UNITED STATES *v.* JEHIEL BROOKS, ET AL.

"The defendants in the above-entitled cause will take notice that the plaintiffs will offer, as evidence on the trial of this cause, so much of Report 1035 of the House of Representatives of the United States of the 27th Congress, second session, as is hereafter mentioned, to wit: The various reports of the committees embraced in this report, and the following depositions, that of Lewis Naville Rembin, Charles Rembin, Thomas Wallace, Jacob Irwin, Joseph Valentine, Sylvester Poissot, Cesair Lafitee, John Joseph Le Bars, Michel Lattier, Francis Lattier, Pierre Rublo, Manuel Lafitte, D. M. Heard, Athanase Poissot, and all the depositions which were taken on the part of the United States embraced in this report aforesaid; also, plaintiffs will offer in evidence the same depositions, embraced in a similar report and admitted by consent of parties in a suit between *Jehiel Brooks* v. *Samuel Norris*, in the District Court of the parish of Caddo, in said state, said Norris holding title under the United States, on Rush Island, in which the same issues were made as in this suit, and said Brooks, plaintiff in that suit and defendant in this. Defendants are hereby notified to make objection, if any they have, on Friday, the 17th instant, why the testimony aforesaid should not be admitted on the trial of this cause; said reports and depositions are herewith filed for reference," &c.

On the 28th of April, 1846, the court overruled so much of the above motion as proposed to introduce, as evidence, the report made by a committee of Congress, and disposed of the remaining part of the motion, viz.: that part of it which proposed to introduce certain testimony, by the following order, applicable to that part of the motion:—

"UNITED STATES *v.* JEHIEL BROOKS.

"*United States Circuit Court, District of Louisiana.*

"Be it remembered, that on the 13th of April, 1846, a rule
*456] *was taken in this cause by the plaintiffs, calling on the defendants to show cause on the 17th of the same month why the depositions of certain witnesses named in said rule, and taken as therein stated, should not be read in evidence in this cause, when the same shall come on to be tried, as appears in said rule, which is hereunto annexed, and made

a part of this bill of exceptions; and on the said 17th of April, 1846, Jehiel Brooks, by his counsel, Thomas H. Lewis, appeared and showed cause against the said rule, and contended that the said rule ought to be dismissed and discharged on the following grounds:—

"1st. The court cannot entertain this rule at the present stage of the suit, because the only law authorizing such a rule is an act of the legislature of the state of Louisiana, entitled 'An Act to amend the Code of Practice,' approved March 20, 1839, (see Acts 1839, page 168, section 17,) and said act does not apply to the present case, but is only applicable to depositions taken under commissions issued by the court, and in the suit in which such depositions are offered as evidence.

"2d. The court cannot be called upon to decide upon the admissibility of any evidence in a cause before the same shall come on for trial, except in the case pointed out in said act of 20th March, 1839, and these depositions do not fall within the exception provided for by that act.

"3d. These depositions were not taken in any action or suit pending before any judicial tribunal, or by authority of any tribunal having power to decide upon title to property, or to bind parties litigant by its decisions.

"4th. There is no evidence before the court of any such suit as that of *Jehiel Brooks* v. *Samuel Norris*, or that these depositions were read in evidence, by consent or otherwise, on the trial of such suit, and these facts are not admitted.

"5th. If such a suit as *Brooks* v. *Norris* did exist, and if said depositions were read in evidence on the trial thereof, still they are not admissible in this cause, because the parties to this suit are not the same as the parties to that of *Brooks* v. *Norris*.

"Which grounds of objection being sustained by the court, the counsel for plaintiffs tendered this bill of exceptions, which was signed and sealed.

(Signed,) THEO. H. MCCALEB, *U. S. Judge*."

On the 7th of April, 1847, the District Attorney of the United States (Thomas J. Durant) filed a petition that the case might be tried by a jury.

In the early part of the year 1848, the defendants, other than Brooks, named in statement, filed their answers, averring that *they were *bonâ fide* purchasers for a valuable consideration, without notice of any fraud. [*457

On the 2d of May, 1848, the cause came on to be heard, and a jury was impanelled, who, on the 5th of May, found a

verdict for the defendants, and judgment was entered accordingly.

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

"No. 1.

"THE UNITED STATES *v.* JEHIEL BROOKS ET AL.

"In the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, Honorable T. H. McCaleb, Judge of the District Court, alone presiding; April term, 1848.

"Be it remembered, that on the trial of this cause, on the 3d day of May, 1848, the attorney of the United States offered to read in evidence before the jury a letter from Lewis Cass, Secretary of War, to Rice Garland, Representative in Congress from Louisiana, dated 17th March, 1836, a copy of which is hereunto annexed.

"The counsel for defendants objected to the reading of said letter, which objection was sustained by the court; whereupon the attorney of the United States tenders this his bill of exceptions, praying that the same may be signed and made part of the record in this case.

(Signed,) THEO. H. MCCALEB, *U. S. Judge*."

"No. 2.

"THE UNITED STATES *v.* JEHIEL BROOKS ET AL.

"In the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, Honorable T. H. McCaleb, Judge of the District Court, alone presiding; April term, 1848.

"Be it remembered, that on the trial of this cause, on the 4th day of May, 1848, the counsel of defendants offered to read in evidence before the jury copies of affidavits of David, Trichel, and D'Ortlont, made *ex parte* in Louisiana, and attached to a copy of a memorial of Pelagie Grappe and others to the Senate of the United States, and contained in a certified copy of the proceedings of said Senate of 12th January, 1836, the attorney of the United States objected to the reading of said affidavits, but the court overruled his objections, and allowed them to be read, merely to prove the fact that such affidavits had been submitted to the Senate of the United States, but not as evidence of the contents of said affidavits, and the *jury were so especially instructed by the court; whereupon the attorney of the United

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States tendered this as his bill of exceptions, praying that the same may be signed and made part of the record.

(Signed,) THEO. H. MCCALEB, *U. S. Judge.*"

"No. 3.

"THE UNITED STATES *v.* JEHIEL BROOKS ET AL.

"In the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, Hon. T. H. McCaleb alone presiding; April term, 1848.

"Be it remembered, that on the trial of this case, on the 4th day of May, 1848, the attorney of the United States offered to read in evidence before the jury a memorial dated on the 19th of September, 1837, to the Senate of the United States, from the Caddo tribe of Indians, a copy of which is hereunto annexed.

"The counsel of defendants objected to the reading of said memorial, which objection was sustained by the court; whereupon the attorney of the United States tenders this his bill of exceptions, praying that the same may be signed and made part of the record in this case.

(Signed,) THEO. H. MCCALEB, *U. S. Judge.*"

No. 4.

"THE UNITED STATES *v.* JEHIEL BROOKS ET AL.

"In the Circuit Court of the United States for the Fifth Circuit and District of Louisiana, Hon. T. H. McCaleb, Judge of the District Court, alone presiding; April term, 1848.

"Be it remembered, that on the trial of this case, on the 5th day of May, 1848, after the arguments of counsel on both sides had been closed, and before the jury had retired to consider on their verdict, the attorney of the United States prayed the court to charge the jury as follows, to wit:—

"First. That the first of the supplementary articles to the treaty between the United States and the Caddo Indians, made at the agency-house of the Caddo nation on the 1st of July, 1835, does not amount in law to a grant of four leagues of land from the United States to François Grappe and his sons, nor does it amount in law to a reservation then made of said lands to the said Grappes, but it is simply a reservation of whatever right the said Grappes may have acquired to said land by the donation mentioned in the preamble to the supplementary articles to the said treaty.

"Second. That the recital in the said preamble and supplementary articles, of a donation to the Grappes in 1801, does

*not relieve the defendants from the necessity of producing the primordial title or donation of 1801, nor does said recital prove the existence of said donation.

"Third. That by the laws of Spain, which governed the *locus in quo* in 1801, the Indians had no primitive title to any land on this continent; and that in 1801 the Spanish authority at Natchitoches had no legal right to ratify and confirm the donation recited in the aforesaid preamble and supplementary articles.

"Fourth. That, by the laws and usages of the government of the United States, the Caddo Indians did not hold their land by the usual Indian title, but that they had been merely permitted to live upon it.

"Fifth. That the legal construction of the Caddo treaty of the 1st of July, 1838, is that those Indians merely relinquished to the United States their permissive possession of the lands.

"Sixth. That, as all the other defendants, besides Brooks, are his vendees, and hold title under him, if the jury think from the evidence that Brooks has no title to the land, then that the other defendants stand in the same category, and are also without title.

"But the court refused so to charge the jury, and did charge them as follows:—

"First. That the treaty between the United States and the Caddo Indians on the 1st of July, 1835, and the articles supplementary thereto, having been ratified by the President and Senate of the United States, is part of the supreme law of the land, and as such must be respected and enforced by the courts of the United States.

"Second. That the first supplementary article to the said treaty, and the preamble thereof, contain a recognition of title in François Grappe and his three sons to the land described in said preamble and article, and dispensed them, and those who hold under them, from producing any other title to said lands.

"Third. That the United States, by treating with the Caddo Indians for the purchase of their lands, recognized in said Indians a right to said lands, similar to the rights to lands generally recognized in Indian tribes with whom the United States have made treaties.

"Fourth. That the testimony offered on behalf of the United States, to prove the lands reserved by the treaty in question to the Grappes had been fraudulently included within the limits of the territory ceded to the United States by the Caddo Indians, by the defendant, Jehiel Brooks, while

acting as commissioner of the United States in making said treaty, was *properly admitted to be read to the jury, [*460
and they should consider the same; and if they found said Brooks guilty of fraud, they should find a verdict for plaintiffs against said Brooks.

"Fifth. That the other defendants stood in a different light before the court from Brooks, and the jury should inquire (if they found fraud in Brooks) whether said defendants had notice or knowledge of such fraud when they purchased the land held by them; and if the jury believed, from the evidence, that these other defendants (purchasers from Brooks) had notice or knowledge of such fraud, they should find also against them. But if, on the contrary, these purchasers had no such knowledge or notice, then the fraud in Brooks, their vendor, would not affect their title.

"Whereupon the attorney of the United States for the District of Louisiana excepted to the said refusal and charge, and tenders this as his bill of exceptions, which he prays may be signed and made part of the record.

(Signed,) THEO. H. MCCALEB, *U. S. Judge.*"

A writ of error, sued out on behalf of the United States, brought these several rulings before this court.

Such is the history of this transaction before and since it was brought into court by the United States.

All of us concur in opinion, that no exception was taken by the counsel of the United States to the rulings of the District Court in this cause, which can be sustained here.

We think that the treaty gave to the Grappes a fee simple title to all the rights which the Caddoes had in these lands, as fully as any patent from the government could make one. The reservation to the Grappes, "their heirs and assigns forever," creates as absolute a fee as any subsequent act upon the part of the United States could make. Nothing further was contemplated by the treaty to perfect the title.

Brooks being the alienee of the Grappes for the entire reservation, he may hold it against any claim of the United States, as his alienors would have done.

We have nothing to do, in our consideration of the case, with the conjectural intimations, which were made in the argument of it, concerning the influences which were used to secure the reservation, or the designs of the commissioner in having it done. The record shows that he became a purchaser for a valuable consideration. Whether for an adequate one is not for us to say. His right to the land against the claim of the United States, as that has been asserted in this case, we

think good, and we shall direct the judgment of the court below to be 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 adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

The Louisville Manufacturing Company, Plaintiff in error, v. Michael Welch.

The following guaranty, viz., "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next," extends the liability of the guarantor to purchases upon a reasonable credit, made anterior to the 1st of December, although the time of payment was not to arrive until after that day.[1]

The vendor was not bound to give immediate notice to the guarantor of the amount furnished, or the sum of money for which the guarantor was held responsible. It was sufficient to give this notice within a reasonable time after the transactions were closed, and the question what was a reasonable time was a question of fact for the jury.[2]

If the principal debtor be insolvent at the time when the payment becomes due, even this notice is not necessary, unless some damage or loss can be shown to have accrued to the guarantor in consequence of his not receiving such a notice. And in no instance, in case of a guaranty, will the guarantor be exempt from liability for want of the notice, unless loss or damage is shown to have accrued as a consequence.[3]

But when a party intends to avail himself of the guaranty by making sales on the faith of it to the person to whom it is given, such party must give notice, within a reasonable time, to the guarantor, of his acceptance and intention to act on it.[4]

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[1] Cited. *Woodruff* v. *Trapnall*, *ante*, *207. See note to *Bell* v. *Bruen*, 1 How., 169.

[2] See *Russell* v. *Clarke*, 7 Cranch, 69, and note (2).

[3] Cited. *Davis* v. *Wells*, 14 Otto, 170.

[4] See *Wilcox* v. *Draper*, 12 Neb., 142, and note to *Lawrence* v. *McCalmont*, 2 How., 426.

A guarantor is entitled to notice that his guaranty is accepted, unless such notice is implied by the transaction. But where G. at Louisville, wrote to T. at New York, "My brother B., having this day shipped to you for his account twenty-three hogsheads of tobacco, marked *xx and in view of his drawing for full costs of same, I hereby agree to secure you against any loss that this shipment may make, and, in the event of any loss, bind myself to pay it." *Held* that no notice was necessary. *Thompson* v. *Glover*, 78 Ky., 193; s. c. 39 Am. Rep., 220.

In case of a collateral guaranty of a debt to be created, or of an amount uncertain, variable, and unascertainable at the time, the guarantor is not liable without notice of acceptance within a reasonable time, nor without notice of the principal's default. *Milroy* v. *Quinn*, 69 Ind., 406; s. c 35 Am. Rep., 227.

Where the guarantor took defence upon the ground that he had before notice given up securities belonging to the receiver of the guaranty which would have made him whole, the time of his doing this should have been given to the jury as an essential ingredient for their judgment upon the question whether or not he had received reasonable notice of his liability.

The admission of the guarantor, when called upon for payment, did not conclusively bind him as a matter of law, because it may not have been made with a full knowledge of all the facts in the case. It was therefore properly left to the jury to decide whether so made or not.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Louisiana.

The Louisville Manufacturing Company was incorporated by an act of the legislature of Kentucky, and was domiciliated and transacting business in that state.

On the 3d of May, 1845, Michael Welch gave to one Thomas Barrett the following letter of credit, viz.:—

"I hereby guaranty the payment of any purchases of bagging *and rope which Thomas Barrett may have [*462
occasion to make between this and the 1st of December next.

M. WELCH.

"*New Orleans*, 3*d May*, 1845."

This letter of credit was deposited by Barrett with the house of Worsley, Forman & Kennedy, the factors of the Louisville Manufacturing Company, who made sundry sales of bagging and rope to Barrett upon the following credits, viz.:—

Up to the 22d July, 1845, and on that day, the sales of bagging and rope by plaintiffs to Barrett amounted to $891.32, for which, on that day, Thomas S. Forman, agent of plaintiffs, drew a bill on Barrett, to the order of the Louisville Manufacturing Company, due and demandable on the 20th of December, 1845, which bill was accepted by Barrett.

On 28th August, 1845, Barrett drew on himself, and accepted a bill for $605.07, to the order of the plaintiffs, due 10th January, 1846.

On the 18th September, 1845, Barrett drew on himself, and accepted a bill for $531.50, to the order of the plaintiffs, due 15th January, 1846.

On the 1st December, 1845, Barrett drew on himself, and

The defendant, by letters to plaintiffs, offered to indorse for certain third persons, desirous of purchasing goods from plaintiffs to a specified amount; and the latter sold goods on the faith of such letters. *Held*, that the defendant would not be liable thereon, unless the plaintiffs, within a reasonable time, gave him notice that they had accepted his offered guaranty, or had acted upon it. *Claflin* v. *Briant*, 58 Ga., 414. See also *Taylor* v. *Shouse*, 73 Mo., 361; *Platter* v. *Green*, 26 Kan., 252; *Wills* v. *Ross*, 77 Ind., 1; s. c. 40 Am. Rep., 279; *Wilcox* v. *Draper*, 12 Neb., 138; s. c. 39 Am. Rep., 222.

accepted a bill for $433.08, to the order of plaintiffs, due on the 20th January, 1846.

The first named bill for $891.32 was not protested, having been withheld from the protest, at the instance of Barrett. The other three bills were protested at maturity.

The circumstances which occurred, prior to the institution of the suit, are stated in the evidence given upon the trial, which was made a part of the bill of exceptions.

On the 1st of August, 1847, the Louisville Manufacturing Company brought an action, by filing a petition against Michael Welch, in the Circuit Court of the United States for the District of Louisiana, which came on for trial in May, 1848. The following is the evidence which was given.

"And afterwards, to wit, on the 11th day of May, 1848, the testimony of W. Chambers was offered in evidence.

"I was a clerk in the houses of Worsley & Forman, Worsley, Forman & Kennedy, and Forman & Kennedy, from the winter of 1842 to July, 1847. In the spring or summer of 1845, Thomas Barrett deposited with Worsley, Forman & Kennedy a letter of credit from Michael Welch, guarantying the payment of bagging and rope, which Barrett might purchase, to a certain amount, within a certain named period. On the said letter of credit, Worsley, Forman & Kennedy did, *463] *as factors of the Louisville Manufacturing Company, sell to Barrett, at various times, sundry invoices of bagging and rope belonging to said Louisville Manufacturing Company, for which they took his acceptances for account of said company as follows: viz., one dated 22d July, 1845, due 20–23 December, for $891.32; one dated 28th August, 1845, due 10–13 January, 1846, $605.07; one dated 18th September, 1845, due 15–18 January, 1846, $531.50; one dated 1st December, 1845, due 20–23 January, 1846, $433.08.

"Subsequently to taking the acceptance last named, they sold him bagging and rope to the amount of $78.86, which stands to his debt on open account.

Mr. Welch was not notified by Worsley, Forman & Kennedy that the letter of credit had been deposited with them at the time it was deposited, nor until after the maturity of the acceptance first named above. Shortly after the maturity of the said bill, in the latter part of December or early part of January, I think between the 5th and 10th of January, I saw Mr. Welch in person; informed him of the sales of bagging and rope made by Worsley, Forman, & Kennedy to Mr. Barrett on his letter of credit; told him that the acceptance of

Barrett for $891.32 was unpaid; that he would be looked to for the payment of it, and the other acceptances should they not be paid. He requested me to try and get all I could from Barrett.

"On the 7th of May, 1846, I addressed him a letter urging him to settle the claim. Saw him in person, don't recollect the date of the interview, and urged him to settle the business. He requested that he might not be pressed for payment, saying that it was a very hard case; that he did not wish to place any obstacle in the way of collecting the money; that he had not then at command the means of paying it conveniently; that he would have more ample means when the next cotton crop came into market.

"On the 26th of April, 1847, I had an interview with Mr. Welch. He remarked that he understood the letter of credit to restrict the time of the credit which might be given for goods purchased under it to the month of December; that, under the impression, to protect himself against the liability, he retained under his control certain valuable papers of Barrett's, until the expiration of the time to which he thought his liability extended, when, upon the assurance of Mr. Barrett that the debt was settled, he surrendered the papers.

"I remarked to him that, in the interview which I had with him in the spring of 1846, he assured me that it was not his intention to place any obstacle in the way of the collection *of the money; that he asked, as a favor, that he might not be pressed for its immediate payment, representing [*464 that he had not then the means at command to pay it, but that he would be able to pay it with less inconvenience when the next cotton crop came into market; that he had induced the belief that he would pay it as soon as he could do so. He replied that it was at that time his intention to pay it, and that he would have done so, but that he subsequently learned that he would lose a much larger sum by Mr. Barrett; that he would be unable to bear so heavy a loss, and had come to the determination not to pay this claim, or any other claim growing out of his liability for Barrett, unless compelled by law.

"The papers to which I refer as having been in the hands of Mr. Welch, and which he said he might have retained to indemnify him, I did not understand him as saying had been placed in his hands by Mr. Barrett for that purpose, but came into his hands without any reference whatever to this liability; but that, if he had known he was liable, he could and would have retained them.

"Mr. Welch did not, as well as I remember, make to me

any promise to pay the bills, except in the manner previously referred to.

"Worsley, Forman, & Kennedy, or Worsley & Forman, their predecessors in business, had previously sold to Mr. Barrett bagging and rope to a large amount, upon a letter of credit of Mr. Welch and Mr. Elgee, acting as the agent of Worsley, Forman, & Kennedy. I would not have sold goods to Mr. Barrett on time upon his individual responsibility alone.

"On the day of the maturity of the bill first maturing, the one for $891.32, due 20–23 December, Mr. Duff, a young man who had charge of Mr. Barrett's business, called on me and told me that Mr. Barrett was sick; that he would be unable to pay the bill on that day, and requested that Worsley, Forman, & Kennedy would take it up, representing that he would be in funds to pay it in a few days, and, as soon as he was able, would pay it. In consequence of which, the bill was taken up by Worsley, Forman, & Kennedy, as agent of the Louisville Manufacturing Company.

W. Chambers.

"*New Orleans*, *February* 23, 1818.

"To be admitted as evidence, as if sworn to and given in open court.

Wm. Dunbar, *for Welch.*
Stockton & Steele, *for Plaintiff.*

"*New Orleans*, *February* 23, 1848.

*465] *"And on the same day the testimony of W. W. Whitehead was offered in evidence.

"I am acquainted with the bagging and rope trade in New Orleans; have been several times, at different periods, in the commercial house of Worsley, Forman & Kennedy, and Forman & Kennedy; know that those articles are sometimes sold for cash, and sometimes on time. Time sales made about this period of the year are most frequently made payable about the beginning of the ensuing year, but vary as to the time; sometimes the bills are drawn payable as early as November and December, and sometimes the time is extended to January, February, and March. Time sales are also sometimes made on shorter time, to wit, thirty, sixty, ninety, and one hundred and twenty days.

W. W. Whitehead.

"*New Orleans*, *May*, 10, 1848."

"The above evidence is taken by consent of parties, and it is agreed that it may be read on the trial of the case of the *Louisville Manufacturing Company* v. *Welch*, as testimony, by either party.

STOCKTON & STEELE, *for Plaintiffs.*
WM. DUNBAR, *for Defendant.*

"*New Orleans*, *May* 10, 1848.

"And further on the same day, the testimony of D. Griffon was offered in evidence.

"I certify that the two accounts, A and B, are taken from the books of the late Thomas Barrett, and are a true copy of the same, and that they contain a full and correct statement of the accounts of Thomas Barrett and Michael Welch, Esq. I was a clerk in the house of Thomas Barrett during the period of the above two accounts, and know them to be correct, having compared them with the books. There were not, at any time, any funds or notes placed in the hands of Mr. Welch to secure him for his guaranty of the 3d May, 1845; if there had been, I should have known it. I have known that Captain Welch traded from Alexandria to New Orleans as captain of a steamboat, and was here every eight or ten days, from the 3d of May, 1845, up to this time.

D. GRIFFON.

"*New Orleans*, 23*d February*, 1848.

"We agree that the above evidence may be used as if the witness was sworn and examined in open court in the case of the *Louisville Manufacturing Company* v. *Mr. Welch*, and that *the accounts A and B be taken without requiring the production of the books of Barrett. [*466

STOCKTON & STEELE, *for Plaintiffs.*
WM. DUNBAR, *for Defendant.*"

"*New Orleans*, *February* 23, 1848."

(Then followed a transcript of long accounts between Welch and Barrett.)

The following bill of exceptions was taken upon the trial:—

"Be it remembered, that on the trial of this cause, and before the jury retired, the plaintiffs by their counsel, Stockton & Steele, requested the court to charge the jury as follows:—

"1. That the statement made by defendant to witness

Chambers, who had called on behalf of plaintiffs to demand payment, that on the assurance of Barrett that the debt had been paid, he, Welch, had given up papers and security, by which he could have secured himself from loss, was an acknowledgment that he had due notice of the fact that the plaintiffs had sold the goods to Barrett on the faith of the letter of credit.

"2. That if notice of the purchase of goods from plaintiffs on the letter of credit was given within a reasonable time by Barrett to defendant, it enured to the benefit of plaintiffs as effectually as if the notice had been given him directly from the plaintiffs.

"3. That the immediate and strict notice required to be given by the holder of a protested bill of exchange or promissory note is not requisite in cases of guaranty.

"4. That if there was no other notice, that given by plaintiffs at the time of the protest of the first bill, or shortly before or shortly after the date, was sufficient.

"5. That the statement made by Welch, the defendant, to witness, Chambers, while the latter was acting for plaintiffs in endeavoring to collect the debt, that he had not then the means to pay the debt, but after another cotton crop he would be able to pay, and that 'he did not wish to throw any obstacles in the way of the collection of the debt,' was a waiver of all objections to the payment thereof, was an acknowledgment of his legal liability, and a promise to plaintiffs to pay them the debt.

"6. That the failure to protest any of the bills of exchange was not a giving of further time to the debtor, Barrett, and the liability of the defendant was in no way affected thereby.

"7. That the giving a reasonable credit to Barrett on the sales was no violation of the rights of Welch, and that the credits in this case were reasonable.

*467] *"8. That the mistake of Welch as to the fact of the debt having been paid does not release his obligation.

"Whereupon the court instructed the jury as desired by the plaintiffs in their second, third, and sixth points of instruction, but refused to give any of the other instructions asked by the plaintiffs; to which ruling of the court, the plaintiffs by their said counsel excepted, tendered this their bill of exception, and prayed that it might be signed, which is done accordingly.

"And be it further remembered, that at the same time the defendant, by William Dunbar, his counsel, asked the court to charge the jury as follows:—

"1. That upon acceptance by the plaintiffs, or their agents,

of the letter of credit, notice should have been given in a reasonable time to the defendant that they had accepted the guaranty, and that they meant to furnish Thomas Barrett with bagging and rope upon the faith of defendant's guaranty.

"2. That after the bagging and rope had been furnished by them, they should have given immediate notice to the defendant of the amount furnished, and the sum of money for which they looked to the defendant for payment.

"3. That the credit to Thomas Barrett should not have been extended beyond the term mentioned in said letter of credit, viz., the 1st of December, 1845, the term mentioned in said guaranty.

"4. That if the defendant had been released or discharged by the failure of the plaintiffs or their agents to give the proper notices to the defendant as before charged, the obligation of the defendant on the guaranty could be revived, or the laches or neglect of the plaintiffs, or their agents, waived only by a promise of the defendant to pay with a full knowledge of all the circumstances; and that the promise must be explicit, and made out by the most clear and unequivocal evidence.

"5. That if the jury believe that time was given by the plaintiffs or their agents to Thomas Barrett, at the maturity of any of the drafts or notes sued on, without the consent of the defendant, the defendant is hereby relieved from the payment of any one of them upon which said time was given.

"Whereupon the plaintiffs objected to the court giving such instructions so asked by the defendant through his said counsel, but the court overruled said objections of the plaintiffs, and gave to the jury all the said instructions so asked as aforesaid by the defendant; to which ruling and instructions by the court the plaintiffs by their said counsel excepted, tendered this their bill of exceptions, and prayed the same might be signed, which is done accordingly. The court, in refusing to give the fifth instruction asked by the plaintiffs, stated to the jury that it was *a question of fact for their own determination, and that for that reason he refused to give [*468 that instruction.

"THEO. H. MCCALEB, *U. S. Judge*."

The jury found a verdict for the defendant, and the plaintiffs sued out a writ of error, under which the case was brought to this court.

It was argued by *Mr. Butterworth*, in a printed brief, for the plaintiffs in error, no counsel appearing for the defendant.

The points made by the counsel for the plaintiffs in error were the following, viz. :—

I. That the court erred in refusing to charge the jury as follows :—

1. "That the statement made by defendant to witness Chambers, who had called on behalf of the plaintiffs to demand payment, that on the assurance of Barrett, that the debt had been paid, he, Welch, had given up papers and security, by which he could have secured himself from loss, was an acknowledgment that he had due notice of the fact that the plaintiffs had sold the goods to Barrett on the faith of the letter of credit."

2. "That if there was no other notice, that given by the plaintiffs at the time of the protest of the first bill, or shortly before or after that date, was sufficient."

3. "That the statement made by Welch, the defendant, to the witness Chambers, while the latter was acting for the plaintiffs in endeavoring to collect the debt, that he had not then the means to pay the debt, but after another crop of cotton, he would be able to pay, and he did not wish to throw any obstacles in the way of the collection of the debt, was a waiver of all objections to the payment thereof, was an acknowledgment of his legal liability, and a promise to plaintiffs to pay them the debt."

4. "That the giving a reasonable credit to Barrett on the sales was no violation of the rights of Welch, and that the credits given in this case were reasonable."

5. "That the mistake of Welch as to the fact of the debt having been paid does not release his obligation."

II. The court erred in charging the jury as follows :

1. "That the credit of Thomas Barrett should not have been extended beyond the term mentioned in said letter of credit, viz., the 1st of December, 1845."

Upon this assignment of errors, we have only a few words of remark to offer to the court.

The conversation of Welch with Chambers, referred to in the first item of instructions to the jury asked by plaintiffs, *469] *shows conclusively that Welch had had securities, or means of indemnity, in his hands against loss on account of this guaranty; that he had intended to hold on to them; and that he gave up these securities to Barrett only on the assurance of Barrett that the debt had been paid to the plaintiffs.

It seems, then, that Welch not only had *notice*, but he had reaped the fruits which the law intends shall be gathered from notice, security against loss. If he afterwards gave up these

securities to Barrett, on his assurance that the debt had been paid, it was his own folly and misfortune; but the very reason which Welch assigned to Chambers for having given up the securities necessarily establishes the fact of due notice.

That Welch intended to hold on to these securities is established by the fact that he gave them up on the assurance of Barrett that the debt had been paid.

The court should have given the jury the instruction contained in the fourth item of instructions asked for by the plaintiffs. However, we do not deem it material, as what is said above is, in our opinion, conclusive on the matter of notice.

The same reason also relieves us from any necessity to remark upon the instructions given the jury at the instance of defendant, in regard to notice.

The conversation of Welch with Chambers, in our opinion, clearly establishes, also, that Welch acknowledged his indebtedness, and promised to pay the defendant; and, therefore, the fifth item of instruction to the jury, asked by the plaintiffs, should have been given by the court. Welch said that he had not then money to pay the debt; that after another crop of cotton he would be able to pay, and that he did not wish to throw any obstacles in the way of the collection of the debt.

This was certainly equivalent to a direct acknowledgment of, and promise to pay, the debt.

He did not wish to throw any obstacles in the way of the collection of the debt. Collection of the debt from whom? From a third person over whom he could have no control? From Barrett, who was assuredly bound, and the collection of the debt from whom, Welch could in no way whatever retard or obstruct? It would be unphilosophical to suppose, that Welch did not speak only in reference to his own liability, and to the collection of the debt from *himself*. It was tantamount to saying, I know I am liable for the debt; but I have no present means with which to pay; after another cotton crop, I shall be able to pay. I have no intention to dispute the debt. I do not dispute the debt.

The judge of the court of first instance assigned in the bill of exceptions, as a reason for refusing to give this instruction *to the jury, that it was matter of fact, and therefore to be judged of by the jury only. [*470

We answer, that it is the province of the court to determine what words and circumstances amount to a promise to pay, or a waiver of a right. This is made plain, when the supposed promise to pay, or waiver, has been reduced to writing. In such case, it is clear that the court must instruct the jury as

to the point of its being in law a promise or not, or a waiver or not. The court in such case instructs the jury, that if they believe the instrument of writing to have been executed by the party against whom it is adduced, then such instrument amounts in law, or does not amount in law (as the case may require), to a promise to pay, &c.

Now, we cannot conceive any reason which could give this power to the court in the case of a written instrument, and yet refuse it in case the obligation is evidenced only by parol; the question in each case is, Do the words, whether written or not, under the circumstances, amount, in law, to a promise, &c.?

The court should then, in our opinion, have instructed the jury, that, if they believed that Welch stated to Chambers that he had not then the means to pay the debt, but after another cotton crop he would be able to pay, and that he did not wish to throw any obstacles in the way of the collection of the debt, or spoke to him in words to that effect, then such words amounted to a waiver of all objections to the payment of the debt, to an acknowledgment of his legal liability therefor, and to a promise to the plaintiffs to pay them.

The rule attempted to be applied to this case, by the defendant, as to the necessity of knowledge on the part of Welch of all the circumstances, &c., is not applicable here, because that rule applies only when the party promising has done so without the knowledge of the fact, that notice had not been given according to law in order to bind him. But in the case at bar, the statement of Welch himself to Chambers show that he had had due notice; for Welch tells Chambers, that, on the assurance of Barrett that the debt had been paid, he had given up the securities, &c., which establishes that notice had been given, and that it came to his, Welch's, knowledge.

We think it fully established that this item of instruction should have been given the jury.

The seventh item of instruction asked for by the plaintiffs assumes that the giving a reasonable credit to Barrett on the sales was no violation of the rights of Welch.

The sales in this case were made to Barrett between the 3d May and 1st December, 1845; the four obligations of Barrett were taken, falling due on the 20th December, 1845; 10th January, 1846; 15th January, 1846; and 20th January, 1846.

*471] *The court refused to give the instruction; and on the contrary, at the instance of the defendant, instructed the jury that the credit given Thomas Barrett should not have been extended beyond the term mentioned in the letter of credit, viz.; the 1st of December, 1845.

The case of *Samuell* v. *Howarth*, mentioned in Fell on Guaranties, pages 165, 166, 167, is directly opposed to the ruling of the Circuit Court in this case.

The time within which sales were to be made under the guaranty in that case extended from 2d April, 1814, to 2d April, 1815. Goods were furnished *during that period* on certain credits, to be then paid for, with bills at three months, which bills were accordingly drawn and accepted, &c. These bills were again renewed from time to time; and the fresh bills again renewed, till June, 1816.

The Lord Chancellor said, as no stipulation was made as to the terms of credit, he would suppose them to be in the usual course of trade. In that case, in consequence of the frequent and unusual extension of the time of payment, by repeated renewals of the bills, the guarantor was held to have been discharged.

There is no necessity for a guaranty, when the terms of sale are cash; the very nature of the undertaking presupposes a credit; indeed, guaranty can exist only in cases in which credit is given.

Now, the guaranty in the case at bar extended to sales made at any time between its date, 3d May, 1845, and the 1st of December of the same year.

It is apparent, then, that the latter part of the term, according to the ruling of the Circuit Court, could have no effect at all. By the terms of the guaranty, the sales made on the 30th of November are as fully protected as those made on the 4th day of May; but the ruling of the court would confine the sales of the 30th of November to the short credit of twenty-four hours.

We have not a doubt this ruling of the Circuit Court is erroneous.

The eighth item of instruction asked for by plaintiffs assumes that the mistake of Welch as to the fact of the debt having been paid does not release his obligation.

The court refused to give this instruction. Welch, in conversation with Chambers, the agent of plaintiffs for collection of the debt, stated to Chambers, that on the assurance of Barrett that the debt had been paid, he, Welch, delivered up to Barrett securities, &c., by means of which he could have secured himself from loss.

*We are at a loss to conceive how the mistake of Welch as to a fact, to look to which was his duty, can [*472 in any degree affect the rights of the plaintiffs, who had neither any interest, nor any authority, to meddle with the

matter of indemnity against loss furnished by Barrett to Welch.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court held by the district judge in and for the District of Louisiana.

The suit was brought upon the following letter of credit signed by the defendant, and dated New Orleans, 3d May, 1845: "I hereby guaranty the payment of any purchases of bagging and rope which Thomas Barrett may have occasion to make between this and the 1st of December next."

It appeared that this letter of credit, soon after it was given, was deposited by Barrett with a house in New Orleans, who, as the factors of the plaintiffs, sold, at different periods, within the time prescribed, several parcels of bagging and rope, and delivered the same to Barrett on the faith of it, giving the usual credit on the sales of goods of this description, and taking his acceptances for the price, payable at the expiration of the credit to the order of the plaintiffs.

There were four different parcels sold at different times, and the usual credit given, on each of the sales, extended beyond the 1st of December, the time mentioned in the guaranty.

No notice was given to the defendant by the house in New Orleans, nor by the plaintiffs, of the acceptance of his letter of credit, or of the sales made to Barrett on the faith of it.

Shortly after the maturity of the first acceptance, which was in the latter part of December, the clerk of the New Orleans house called on the defendant, and gave him notice the acceptance was unpaid, and that he would be looked to for payment; and also for the payment of the acceptances then running to maturity, if unpaid when they fell due. The defendant desired the clerk to obtain all he could from Barrett towards the payment. Subsequently, and after all the acceptances had become due and were dishonored, the clerk had a second interview with him, when he expressed a wish that he might not be pressed for the payment immediately, observing that he did not wish to interpose any obstacle to the collection of the demand; that he had not the means of paying the amount then conveniently; but would have them at the coming in of the next cotton crop.

At a still later interview, the defendant expressed the opinion, that his letter restricted the time of credit to Barrett for the goods to be purchased to the 1st of December, stating that, *under this impression, he had delivered up to him certain securities at the expiration of the period of the

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credit given, which he held as an indemnity, Barrett assuring him at the time that the demand had been settled.

The evidence being closed, the following instructions were among others, prayed for, on the part of the plaintiff, and refused.

1. That the giving a reasonable credit to Barrett on the sales was no violation of the rights of the defendant; and that the credits in this case were reasonable.

2. That the mistake of the defendant as to the fact of the demand having been paid did not release his obligation.

And the court gave, among others, the following instructions:—

1. That after the bagging and rope had been furnished by the plaintiffs, they should have given immediate notice to the defendant of the amount furnished, and the sum of money for which they looked to him for payment.

2. That the credit to Barrett should not have extended beyond the term mentioned in the said letter of credit, to wit, the 1st of December.

The jury found a verdict for the defendant.

I. We are of opinion, that the court below erred in the construction given to the terms of the letter of credit. It guarantied the payment of any purchases of bagging and rope that Barrett might have occasion to make between its date and the 1st of December. The limitation is as to the time within which the purchases were to be made; not as to the time of the credit to be given to the purchaser. As credit was contemplated, indeed was the special object of the guaranty, that which was given upon the sales of goods of this description in the ordinary course of trade must have been intended. And, for aught that appears in the case, this was the credit given.

The time for which credit was to be given upon the purchases is left indefinite in the instrument, and must receive a reasonable interpretation; one within the contemplation of the parties; and that obviously is as we have stated. *Samuell* v. *Howarth*, 3 Meriv., 272.

There might be some doubt upon the language used by the court below on this point, whether, in charging that the credit to Barrett should not have been extended beyond the 1st of December, it was not intended to refer to the purchases of the goods, and not to the period of credit given.

But when taken in connection with the seventh instruction prayed for and refused, all ambiguity is removed.

Besides, no question appears to have been raised, that the *price was claimed for any goods sold beyond the limit of the guaranty. [*474

II. We are also of opinion, that the court erred in the instruction, that, after the bagging and rope had been furnished to Barrett, the plaintiffs should have given immediate notice to the defendant of the amount furnished, and of the sum of money for which they looked to him for payment.

The rule as laid down by this court in *Douglass and others* v. *Reynolds and others* (7 Pet., 126) is, that, in a letter of credit of this description, all that is required is that, when all the transactions between the parties under the guaranty are closed, notice of the amount for which the guarantor is held responsible should, within a reasonable time afterwards, be communicated to him.

What is a reasonable time must depend upon the circumstances of each particular case, and is generally a question of fact for the jury to determine. *Lawrence* v. *McCalmont et al.*, 2 How., 426.

It was also ruled in that case, that, when the debt fell due against the principal debtor, a demand of payment should be made, and in case of non-payment by him, that notice of such demand should be given in a reasonable time to the guarantor, and that otherwise he would be discharged from his liability.

When the case came before the court a second time, and which is reported in 12 Pet., 497, the principle here stated was somewhat qualified, the court holding that, in case of the insolvency of the principal debtors, and total inability to respond to the surety before the debt fell due, the demand and notice might be dispensed with.

The court refers to a class of cases both in England and in this country, drawing the distinction between the liability assumed by a guarantor, and that of the drawers or indorser of commercial papers; the former being held liable on his guaranty in the absence of any demand and notice, unless some damage or loss had been sustained by reason of the neglect; while, in order to charge the latter, strict demand and notice must be shown according to the law merchant.

The authorities are very full on this head, and are founded upon sound and substantial reasons. 8 East, 242; 2 Taunt., 206; 3 Barn. & C., 439, 447; 1 Id., 10; 5 Mau. & Sel., 62; 5 Man. & G., 559; 9 Serg. & R. (Pa.), 198; 1 Story, 22, 35, 36; Chit. on Bills, 324; Chitty, Jr., 733; 3 Kent. Com., 123.

When this case was before the court the second time, one of the grounds upon which a new trial was ordered was the refusal of the court below to instruct the jury, that, if they found the principal debtors, at or previous to the time the payment of *the debt fell due, insolvent, the omission to demand payment and give notice to the guarantor

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did not discharge him from his liability. The rule, therefore, above stated, was not only laid down very distinctly, but applied in that case in the final disposition of it by the court.

The same doctrine is very fully stated and enforced by Mr. Justice Story in *Wilder* v. *Savage*, already referred to; and also laid down in his work on Promissory Notes (§ 485), and by Chancellor Kent in his Commentaries (Vol. III., p. 123.)

The same course of reasoning and authority would seem to be equally applicable to the notice required of the goods furnished or credits given under the guaranty, and on the faith of it at the close of the transactions, and of the amount for which the party intended to look to the guarantor for payment, so as to advise him of the extent of his liabilities. We perceive no reason why the rule in respect to notice should be more strict in this stage of the dealings of the parties, than at the time when the debt becomes due; or that the guarantor should be discharged for the delay in giving this notice, when no loss or damage has resulted to him thereby. He has already had notice of the acceptance of the guaranty, and of the intention of the party to act under it. The rule requiring this notice within a reasonable time after the acceptance is absolute and imperative in this court, according to all the cases; it is deemed essential to an inception of the contract; he is, therefore, advised of his accruing liabilities upon the guaranty, and may very well anticipate, or be charged with notice of, an amount of indebtedness to the extent of the credit pledged.[1] Still, it may be reasonable that he should be advised of the actual amount of liability, when the transactions are closed; and, if any loss happens in consequence of the omission to give the notice within a reasonable time, the fault is attributable to the laches of the creditor, and must fall on him.

Upon this view, the doctrine governing the question of notice at the close of the dealings on the faith of the guaranty, and also at the subsequent period when the indebtedness under it becomes due, is consistent and reconcilable, and places the duty of the creditor on the one hand, and the obligation of the guarantor on the other, in both instances, upon those general principles which have always been applied to contracts of this description, and preserves and maintains throughout the settled distinction on the subject of notice between the liability assumed by the guarantor, and that of the drawer or indorser of commercial paper.

This intermediate notice required in this court does not

[1] QUOTED. *Davis* v. *Wills*, 14 Otto, 165.

appear to be a necessary step to charge the guarantor accord-
*476] ing *to the English cases, as notice of acceptance and intention to act upon the guaranty is regarded as sufficient, until the debt becomes due and payable; then reasonable notice of the default of the principal to pay must be given, as otherwise, if loss or damage should happen in consequence of the omission, it would operate as a discharge to that extent.

Returning, then, to the case in hand, we think the court erred in charging the jury in respect to this intermediate notice of the goods furnished, and of the sum for which the plaintiffs intended to look to the defendant for payment, in holding that it should be given immediately upon the closing of the dealings under the guaranty; as reasonable notice, in the cases in which it is required, is all the diligence that is essential in order to comply with the rule. According to the instruction, the jury must have understood that notice to charge the defendant should have been as strict as in the case of a drawer or indorser of a bill of exchange.

The eighth instruction refused, to wit, that the mistake of the defendant as to the fact of the debt having been paid did not discharge him, is not very intelligible; but, as a proposition standing alone, should have been given or explained. The refusal implied that the mistake operated to discharge the defendant, which we presume was not intended. The instruction is incautiously drawn, and was, doubtless, connected with some other matters that have not been brought into it. It was probably connected with the facts embodied in the first instruction, in which the court was requested to charge that the admission of the defendant to the clerk that he had given up certain papers to Barrett which would have indemnified him, on his assurance that the debt had been settled, was an acknowledgment of due notice that the plaintiffs had sold the goods on the faith of the letter of credit.

This instruction was properly refused, as the inference sought to be drawn from the statement was not a matter of law. At most, it could only be a question for the jury, accompanied with proper directions of the court as to the law. The admissions were made more than a year after the debt had become due, and the failure of Barrett to make payment. The time when the defendant possessed this knowledge was material in order to make out due notice, and this is not embraced in the proposition upon which the court was called upon to charge. If submitted to the jury, this must necessarily have entered into the instructions that should have been given to them.

The court was also right in refusing the fifth instruction, as it respected the promise of the defendant to the clerk to pay, as the effect of the promise, if made, depended upon the question *whether it was made with a full knowledge of all the facts going to discharge him from his obligation. [*477

This question was, therefore, properly submitted to the jury.

But, upon the grounds above stated, and principally the misconstruction of the terms of the letter of credit, which was fatal to the right of the plaintiffs, and the error in respect to the degree of diligence to be used in giving notice of the transactions under it, the judgment must be reversed, and the case remitted, and a *venire de novo* awarded for a new trial.

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 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*.

CHARLES J. GAYLER AND LEONARD BROWN, PLAINTIFFS IN ERROR, *v.* BENJAMIN G. WILDER.

An assignment of a patent right, made and recorded in the Patent-Office before the patent issued, which purported to convey to the assignee all the inchoate right which the assignor then possessed, as well as the legal title which he was about to obtain, was sufficient to transfer the right to the assignee, although a patent afterwards was issued to the assignor.[1]

When an assignment is made, under the fourteenth section of the act of 1836, of the exclusive right within a specified part of the country, the assignee may sue in his own name, provided the assignment be of the entire and unqualified monopoly. But any assignment short of this is a mere license, and will not carry with it a right to the assignee to sue in his own name.[2]

Therefore, an agreement that the assignee might make and vend the article within certain specified limits, upon paying to the assignor a cent per pound, reserving, however, to the assignor the right to establish a manufactory of the article upon paying to the assignee a cent per pound, was

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[1] FOLLOWED. *Philadelphia, &c., R. R. Co.* v. *Trimble*, 10 Wall., 379; *United States Stamping Co.* v. *Jewett*, 18 Blatchf., 477. CITED. *Hendrie* v. *Sayles*, 8 Otto, 549, 551–555; *Emmons* v. *Sladdin*, 2 Bann. & A., 204; *Wright* v. *Randel*, 8 Fed. Rep., 596, 599; *Gillette* v. *Bate*, 10 Abb. (N. Y.) N. C., 93.

[2] APPLIED. *Hill* v. *Whitcomb*, 1 Bann. & A., 36. FOLLOWED. *Hammond* v. *Hunt*, 4 Bann. & A., 113, 114; *Nelson* v. *McMann*, Id., 210. CITED. *Moore* v. *Marsh*, 7 Wall., 521.

only a license; and a suit for an infringement of the patent right must be conducted in the name of the assignor.[3]

Where a person had made and used an article similar to the one which was afterwards patented, but had not made his discovery public, using it simply for his own private purpose, and without having tested it so as to discover its usefulness, and it had then been finally forgotten or abandoned, such prior invention and use did not preclude a subsequent inventor from taking out a patent.[4]

THIS was a writ of error to the Circuit Court of the United States for the Southern District of New York.

The defendant in error (who was plaintiff in the court below) brought an action against Gayler and Brown (the *478] plaintiffs in *error), for an alleged infringement of a patent right for the use of plaster of Paris in the construction of fire-proof chests.

In the declaration, it was averred that one Daniel Fitzgerald was the original and first inventor of a new and useful improvement in fire-proof chests or safes, and that letters patent were granted him therefor, bearing date the 1st day of June, 1843. The patent was in the usual form, and was set out in the declaration, the specification annexed to which was as follows:—

"To all whom it may concern:

"Be it known that I, Daniel Fitzgerald, of the city, county, and state of New York, and a citizen of the United States, have discovered and made an improvement, new and useful, in the construction of iron chests, or safes, intended to resist the action of fire, and for the safe-keeping and preserving books and papers, and other valuables, from destruction by fire, which I call a Salamander safe or chest.

"The following is a full and exact description of the safe or chest, with my improvement combined therewith:—

"I make two iron chests, in the common and ordinary way of making iron chests, which is well known to those engaged in this branch of business, one smaller than the other, which, when the safe is put together, forms the inner chest, or inner

[3] APPLIED. *Thebareth* v. *Celluloid Manuf. Co.*, 5 Bann. & A., 580. FOLLOWED. *Gamewell Fire Alarm Tel. Co.* v. *City of Brooklyn*, 14 Fed. Rep., 256. CITED. *Ingalls* v. *Tice*, 14 Fed. Rep., 297; *Wilson* v. *Chickering*, Id., 918; *Springfield* v. *Drake*, 58 N. H., 21.

[4] APPLIED. *Bullock Printing Press Co.* v. *Jones*, 3 Bann. & A., 197; *Davis* v. *Brown*, 19 Blatchf., 275. DISTINGUISHED. *Northwestern Fire Extinguisher Co.* v. *Philadelphia Fire Extinguisher Co.*, 1 Bann. & A., 190. FOLLOWED. *Shoup* v. *Henrici*, 2 Bann. & A., 251; *Wilson* v. *Coon*, 6 Fed. Rep., 626; *United States Stamping Co.* v. *Jewett*, 7 Fed. Rep., 877; *Searles* v. *Bouton*, 12 Id., 142. CITED. *Seymour* v. *Osborne*, 11 Wall., 552; *Albright* v. *Celluloid Harness Trimming Co.*, 2 Bann. & A., 635; *Pickering* v. *McCullough*, 3 Id., 280.

part of the safe. The other chest is made about three inches larger than the inner one, and so as, when put together, it will form the outer part or crust of the safe, and leave a space between the inner and outer chests of the safe of about three inches; which space may vary a little, more or less, when the chests are put together, but should be the same all round, and in every direction. The inner and outer doors, where two doors are used, are prepared in the same way, leaving a space, as above, between the inner and outer crust of each door, which space is left for a like purpose with that left between the inner and outer chest of the safe. Where one door is used, it should be made in the same manner, leaving a like space between the inner and outer crust or face of the door, and for a like purpose, and should be fitted to the chest or safe with great accuracy. The edges and openings for the doors are to be neatly finished, as in other chests. I then take plaster of Paris or gypsum, and, having boiled it or baked it in an oven, and calcined it, and reduced it to a powder, I mix it with water till it is about the consistency of cream or thin paste, so fluid as that it may readily be poured into the space left as above to receive it, and I then fill all the space with the plaster of Paris, putting in some sheets of mica between the inner and outer chest, to aid, if necessary, in checking the progress of the heat.

"*But where pains are taken to have all the space [*479 left for the purpose properly filled with the plaster of Paris, as above, so that when set it will expand and adhere firmly to the surrounding parts, and completely fill the whole space, and all the cracks and joints, the mica may be dispensed with, and every other substance, and the plaster may be used alone. It may also be reduced to a powder, without being prepared as above, and used in that state; but I have not found it as good.

"The inner case or chest may be made of wood instead of iron, as for a bookcase, and if the space left between that and the outer chest be filled in the manner and with the materials above named, it will make a very durable safe, that will effectually resist the fire, as I have found by experience; but the safe may not be so strong or durable, though somewhat cheaper.

"The above composition or preparation of gypsum may be mixed with several other articles not contrary to its nature, with a view to increase its efficacy in resisting the action of fire; but from my experience I doubt if they have much effect. The gypsum alone, when properly prepared, and properly placed in the space left to receive it, and made to fill it com-

pletely, is quite sufficient to resist, for a long space of time, the most intense heat. The chemical properties of this article are such, that, by the application of intense heat, it imparts a vapor or gas, or some other properties, which effectually stay the progress of the fire, and arrest the influence and effects of the heat; this I have ascertained by various experiments; and I believe I am the first man that discovered the utility, and devised the method of applying gypsum, or plaster of Paris, to increase the safety of an iron chest. I am not aware that this article was ever used for the purposes above set forth, until I used it in the manner above described.

"I therefore claim, as my discovery and invention and improvement, the application and use of plaster of Paris, or gypsum, in its raw state, or prepared as above, either alone or with mica, in the construction of all iron chests or safes, in the manner above described, or in any other manner substantially the same.

DANIEL FITZGERALD.

"Witnesses:—G. H. PATTERSON,
BEVERLEY R. HENSON, Jr."

It was also averred in the declaration, that before the date of said letters patent, to wit, on the 7th day of April, 1839, the said Daniel Fitzgerald made an assignment, which was duly recorded in the Patent-Office of the United States, on the 1st day of June, 1839, as follows:—

*480] "*Whereas I, Daniel Fitzgerald, of the city, county, and state of New York, have invented certain improvements in safes, which invention I call the 'Salamander safe,' for which I am about to make application for letters patent of United States: And whereas E. Wilder, of New York aforesaid, has agreed to purchase from me all right and title, and interest which I have, or may have, in and to the said invention, in consequence of the grant of letters patent therefor, and has paid to me, the said Fitzgerald, the sum of five thousand dollars, the receipt whereof is hereby acknowledged:

"Now, this indenture witnesseth, that for and in consideration of the said sum to me paid, I have assigned and transferred to E. Wilder aforesaid the full and exclusive right to all the improvements made by me, as fully set forth and described in the specification which I have prepared and executed preparatory to obtaining letters patent therefor. And I hereby authorize and request the Commissioner of Patents to issue the said letters patent to the said E. Wilder and his legal representatives.

"In testimony whereof, I have hereunto set my hand, and affixed my seal, this 11th day of April, 1839.

DANIEL FITZGERALD. [SEAL.]

"Witnesses:—OWEN G. WARREN,
CHARLES H. FOSTER."

The declaration then proceeded as follows:—

"And the said plaintiff further saith, that the said Enos Wilder, in his lifetime, after the making of the said assignment by the said Daniel Fitzgerald to the said Enos Wilder, as afore mentioned, and before the committing of the several grievances hereinafter mentioned, to wit, on the first day of September, in the year of our Lord 1843, and within the Southern District of New York aforesaid, did execute a certain instrument or agreement to the said plaintiff, whereby the said Enos Wilder, in consideration of the agreement made with the said plaintiff, and of one dollar to him, the said Enos Wilder, in hand paid by the said plaintiff, bargained, sold, conveyed, and assigned to the said plaintiff all the right, title, and interest of him, the said Enos Wilder, in and unto the patent granted to the said Daniel Fitzgerald, for an improvement in fire-proof safes and chests, by the use of prepared gypsum, dated June 1, 1843; and of which patent he, the said Enos Wilder, was the sole owner and assignee, as will appear by the records of the Patent-Office; and which patent he, the said Enos Wilder, had good right to sell and convey to the said plaintiff, to be by him, the said plaintiff, held as his own property, free from all *claims from the said Enos [*481
Wilder, or any one claiming under him, the said Enos Wilder, as by the said instrument or agreement, sealed with the seal of the said Enos Wilder, ready in court to be produced, will, reference thereunto being had, fully and at large appear."

This last-mentioned instrument was averred to have been recorded in the Patent-Office of the United States on the 10th day of October, 1843.

It was then averred, that, by virtue of the last-mentioned instrument, plaintiff became, and ever since hath been, sole owner of said improvement, &c., yet, the defendants well knowing, &c.

The defendants pleaded the general issue, and gave notice that they would offer evidence that Daniel Fitzgerald was not the first and original inventor of the improvement patented.

The bill of exceptions was as follows:—

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Be it remembered that, on the trial of the aforesaid issue, the plaintiff, to maintain the same, after having read said patent in evidence as set forth in the declaration, read the following conveyance and agreement, which was duly recorded, and a copy of which was, at the date of said patent, indorsed on the same, viz.:—

[Here was inserted the conveyance from Fitzgerald to Enos Wilder of the 11th of April, 1839, already set out in full in the declaration.]

And thereupon the defendants insisted that said instrument did not convey the legal title of said patent to the said Enos Wilder, and that, upon such conveyance, he could not have brought a suit on the same; but said court decided that said instrument operated to convey the interest in said patent to said Enos Wilder, so that, during his life, he could have maintained an action at law on the same; to which opinion of said court the counsel for the defendants then and there excepted.

1*st Exception.*

And the plaintiff then read the conveyance from said Enos Wilder to him, as stated in his said declaration, which he insisted made out a right in him to sustain his aforesaid action; but the defendants, to show that, after the date of the conveyance to the plaintiff, and before he commenced this action, he made, executed, and delivered to Silas C. Herring, Esq., the following agreement and conveyance, namely:—

"Benjamin G. Wilder agrees with Silas C. Herring to grant to him the sole and exclusive right to make the safe, called the *Salamander safe, according to the terms and upon the plan pointed out and described in the patent and specification of Daniel Fitzgerald, which patent is dated June 1, 1843, and was assigned to Enos Wilder, and by him to Benjamin G. Wilder, who now owns the same; and this license is to be for the city, county, and state of New York; and said Herring is to have and enjoy the full and exclusive right to make and vend said safes in the city, county, and state of New York, and nowhere else; the said Herring is to have the same for the residue of the unexpired term of said patent, with all the improvements which may be made in the manufacture of said safes which said B. G. Wilder may have a right to use during said term; and said Herring agrees that said Wilder

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may use all the improvements which he may make, or have a right to use, during said term. In consideration whereof, said Herring agrees with said Benjamin G. Wilder to pay to him, for the use of the right aforesaid, one cent a pound for each and every pound said safes may weigh when finished and sold; which sum is to be paid monthly so long as said patent remains in full force, and until the same has been set aside by the highest court of the United States to which the same may be carried; but said Herring agrees to pay the one cent a pound for the space of two years, at all events, and whether said patent shall be declared good or not. If sustained, then said Herring is to pay as aforesaid for the full term as aforesaid. All the safes so made and sold by said Herring are to have said Wilder's patent marked thereon, the same as heretofore, in a plate, or cast in letters, 'Wilder's patent safe.' Said Herring agrees to keep an accurate account of all the safes by him made, or caused to be made, under said contract and patent, with the weight of each when sold, and the names of the persons to whom sold, and their places of abode, and to render said account monthly, if so often called on for it, and to pay accordingly. Said Herring is to manufacture all the safes he may sell, or offer to sell, under and according to said patent, with such improvements as he may have a right to use, and be marked as above with the words, in large, legible letters, 'Wilder's patent safe.' Said Wilder reserves to himself the right to manufacture, in this city and state of New York, or elsewhere, safes to sell out of this state and city; but if sold within this state or city, then said Wilder is to pay said Herring one cent a pound on each safe so made and sold within this city or state. Said Wilder is not himself to set up or establish, nor authorize any one else to set up and establish, any manufactory or works for making Salamander safes, or safes similar to said Salamander safes, at any place within fifty miles of this city. Said *Herring is to make all safes like Wilder's, and not vary in any substantial part therefrom, with such improvements as may be added. [*483

"In presence of

S. P. Staples, *Witness to both signatures.*

"*New York, January 6th*, 1844.

"If said patent should not be decided to be good till the end of three years, then for the time over the two years, till decided good, said Herring pays nothing. It is further understood and agreed, that all safes made by said Herring, or in the making of which, or the selling thereof, he shall in any

way be directly or indirectly concerned, consisting of a double case or box with the intermediate space filled with plaster or any non-conducting substance, shall be considered within this agreement, and be paid accordingly.

B. G. WILDER,
SILAS C. HERRING."

"(Received and recorded 30th January, 1844.)"

2d Exception.

And thereupon the defendants insisted that the plaintiff had parted with all his interest in said patent by virtue of said agreement, so that he could not sustain his aforesaid action. But said court decided that the plaintiff had not, in and by said agreement, so far parted with his interest in said patent as to deprive him of the right to sustain his aforesaid action; to which opinion of said court the defendants did then and there except.

3d Exception.

And the defendants then and there objected, that the invention and improvement, set forth and claimed in said patent as the invention of the patentee, was not the subject of a patent; that it was the mere application of an old, well-known material to a new purpose, which they insisted could not be the subject of a patent. But said court overruled said objection, and instructed the jury as herein set forth; to which, as well as to the said instructions to said jury, the defendants excepted.

And the plaintiff, to maintain his aforesaid issue, called sundry witnesses to prove, and claimed that he had proved, that he made the discovery which was the foundation of his invention and improvement as early as some time in the year 1830; that he made experiments in various ways, to test the utility of his discovery and improvement, at different times, in the different years from 1830 to 1836, when he applied for his *patent; and that he pursued with due diligence that application until he obtained his aforesaid patent; and that the delay which had arisen in obtaining said patent was not caused by the fault or negligence of the patentee, or his assignee, Enos Wilder, nor any one else, but arose from the burning of the Patent-Office, and other causes not under the control of the applicants for the patent; and that the defendants had infringed said patent, as set forth in said declaration.

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And the defendants introduced evidence to prove, and claimed that they had proved, that said Daniel Fitzgerald was not the first and original inventor of what he claimed in

said patent as his improvement. Among other witnesses, James Conner testified, that, between 1829 and 1832, he was engaged in business as a stereotype founder, and, knowing that plaster of Paris was a non-conductor of heat, he constructed a safe with a double chest, and filled the space between the inner and outer one with plaster of Paris,—the same, substantially, as testified to and claimed by Fitzgerald, except there was no plaster used on the top of the safe. It was made for his own private use in his establishment, and was used by him as a safe from the time it was made till 1838, when it passed into other hands. It was kept in his counting-room while he used it, and known to the persons working in the foundery.

This testimony was confirmed by his brother, John Conner, except that he fixes the time of constructing the safe in the year 1831 or 1832. But one safe was made by Conner, and since it passed out of his hands he has used others of a different construction.

The defendants also claimed that, if said Daniel Fitzgerald was the first and original inventor of said improvement, as he claimed, yet that he had made said iron safes, and sold them, under such circumstances as that he had thereby abandoned the same, and suffered the same to go into public use in such manner as to lose all right to said invention and improvement, if any he ever had.

And the court thereupon instructed the jury that, if they found that Daniel Fitzgerald, the patentee, was the first and original inventor of the said improvement claimed in said patent, and that the use of plaster of Paris, in combination with and in the construction of an iron safe, is new and useful, as in the specification of said patent is set forth and claimed, then they would find that the patent was valid, and protected the invention and improvement as claimed, unless the plaintiff, or those under whom he claimed, had abandoned said improvement to the public, and suffered the same to go into public use before the application for said patent, of which facts the jurors were the judges.

*And said court further instructed said jury, that if they found that the use made by James Conner of plaster of Paris was confined to a single iron chest, made for his own private use after said Fitzgerald's discovery and experiments, then it was not in the way of Fitzgerald's patent, and the same was valid; but if the jury found that said James Conner made his said safe, as claimed, and tested it by experiments before Fitzgerald's invention and improvement, and [*485

before he tested the same, then said Fitzgerald was not the first inventor, as claimed, and was not entitled to said patent.

The court further charged, that, independently of these considerations, there was another view of the case, as it respected the Conner safe: that it was a question whether the use of it by him had been such as would prevent another inventor from taking out a patent; that if Conner had not made his discovery public, but had used it simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use would be no obstacle to the taking out of a patent by Fitzgerald, or those claiming under him, if he be an original, though not the first, inventor or discoverer of the improvement.

4th Exception.

And said court, in summing up said case to said jury, further instructed them, that if they found that Daniel Fitzgerald was the first and original inventor of said improvement, as set forth in said patent, and had not abandoned or dedicated the same to the public, but had, with reasonable diligence, pursued his invention till he had perfected the same, and used due diligence in applying for, and in pursuing his application for a patent, until he obtained the same, and if they found the defendants had made and sold safes, as charged in the plaintiff's declaration, then they would find their verdict for the plaintiff for such actual damages as they judged just and reasonable; but if they found otherwise, then they would find for the defendants. To each and all of these instructions given to the jury, the counsel for the defendants excepted.

And forasmuch as the facts aforesaid, and the decisions of the court thereon, do not appear of record, the defendants pray that this their bill of exceptions may be allowed.

Filed 23d February, 1848.

S. Nelson. [seal.]

The cause was argued by *Mr. Cuyler*, for the plaintiffs in error, and by *Mr. Staples* and *Mr. Webster*, for the defendant in error.

*486] **Mr. Cuyler*, for plaintiffs in error.

1. The second error assigned is, that the learned judge erred in ruling that the conveyance of April 11th, 1839, by Fitzgerald to Enos Wilder, of the invention for which he was about to seek a patent, operated to convey said patent to Enos Wilder, so that in his lifetime he could have maintained thereon an action in his own name.

This conveyance is dated April 11th, 1839. The patent did not issue until 1843, and then it issued to Fitzgerald, the inventor, and not to Enos Wilder, the transferee.

It will be readily conceded that the right of an assignee to sue in his own name must, if it exist, be *statutory*. But no section of any patent law in force bestows this right upon the assignee of an improvement about to be patented, such as was Enos Wilder.

The act of 1793 says, every "*invention*" shall be assignable. The eleventh section of the act of 1836 provides that "every patent shall be assignable in law," etc. It speaks of the "exclusive right under any patent," and of "the thing patented." Yet here there was no patent. The assignment is of an improvement intended to be patented. The patent did not exist until four years afterwards, and then it issued to the inventor, and not to the assignee of the improvement.

The sixth section of the act of 1837 provides for this very case, by permitting the issuing of the patent in such cases directly to the assignee of the improvement. Which should have been, but was not, done in this instance.

As no statute, therefore, creates a right in the assignee of an unpatented improvement to sue in his own name, it is submitted that Enos Wilder was an equitable, but not a legal, holder of the title to this patent, and that the learned judge erred in his ruling on this point.

2. The third error assigned is, "that the learned judge erred in ruling that the agreement of B. G. Wilder and Silas C. Herring, dated January 6th, 1844, did not divest the said B. G. Wilder of all his interest in the patent, so far as the state of New York was concerned, and that the plaintiff could thereafter maintain his action."

By its terms, it expressly divests the plaintiff, for the remainder of the time of the patent, of all interest in said patent, so far as the city, county, and state of New York are concerned, and imposes upon the plaintiff a penalty to prevent the exercise of any rights by him under said patent in that state.

How, then, can damage be alleged, where the right said to be invaded has no existence? Or rather, how can the plaintiff *suffer damage by the invasion of a right, the whole property in which has been passed by him to another? [*487

The hardship of this doctrine will be more apparent when it is considered that, if the plaintiff recover, the defendants will not be thereby exonerated from liability to Herring, the local assignee, but may be held accountable to him, and thus be

compelled to pay these very damages a second time to another party.

There can be no damage without an injury done to some right possessed by the plaintiff. But here the plaintiff possesses no right. How, then, can he be damaged?

By this agreement, the advantages and profits of the patent in the city and state of New York are the property of Herring; and yet, if the plaintiff recover damages in this action, he will indirectly take to himself those profits, and thus contravene his own agreement. *Herbert* v. *Adams*, 4 Mason, 15; *Park* v. *Little*, 3 Wash. C. C., 196, 197.

3. The fifth and sixth errors assigned have relation to the instruction given by the learned judge with regard to the Conner safe.

It is submitted that, by the requirements of the patent law, the patentee must be not only *an* original inventor, but *the* original inventor, and that the patent will in all cases be defeated by proof of a prior invention.

It is especially urged that, even if the doctrine of the learned judge, in his charge, were correct, it is inapplicable to a case where the invention had been for eight years in open, notorious public use by the prior inventor at his counting-house, accessible to those in his employ, and then, at the expiration of eight years, and still before even an application for plaintiff's patent had been made, had passed into the possession of others.

It is submitted that this is not such a use as leaves it in any respect "a question whether the use made by Conner of the safe constructed by him had been such as would prevent another from taking out a patent."

The patent law of 1836, § 6, gives its privileges to an inventor whose invention was "not known or used by others before his discovery."

It exacts an oath from an inventor to this effect.

This safe, if Conner's invention be prior, was both known and used before, and nowhere in the act can there be found any qualifying words upon such knowledge or use, or any reservation of circumstances under which prior knowledge and use will not, if proven, defeat a patent.

The following authorities are in point, premising that the language of the patent act of 1793, in relation to the novelty *488] *of the invention, is the same as that employed in the act of 1836, namely, "not known or used before."

"The plaintiff cannot object to the originalty or priority and use of another machine, alleged to have been similar to his own, on the ground that it had gone into disuse, or was

not *notoriously* in use; since it is essential to his case to prove he was *the* original inventor of the machine for which he has a patent. *Evans* v. *Hettick*, 3 Wash. C. C., 408.

Under the sixth section of the patent law, if the thing secured by patent had been in use, or had been described in a public work anterior to the supposed discovery, the patent is void, whether the patentee had a knowledge of this previous use or not. *Evans* v. *Eaton*, 3 Wheat., 454.

If the original inventor of a machine abandons the use of it, and does not take out a patent for it, no other person can entitle himself to patent for it. *Evans* v. *Eaton*, 1 Pet. C. C., 323.

In an action for a violation of a patent granted by the United States for an alleged original invention, the plaintiff must satisfy the jury that he was the original inventor in relation to every part of the world.

Although no proof was made that the patentee knew that the discovery had been made prior to his, still he could not recover, if, in fact, he was not the original inventor. *Dawson* v. *Follen*, 2 Wash. C. C., 311; *Reutgen* v. *Kanowrs*, 1 Id., 168; *Whitney* v. *Emmett*, 1 Baldw., 303. Also, Curtis on Patents, § 40 *n*.

The same construction of the act of Congress is given by Judge Story, in *Reed* v. *Cutter*, 1 Story, 590.

After ruling that the applicant must be not only *an* original inventor, but *the* original inventor, he says: "And it is of no consequence whether the invention is extensively known and used, or whether the knowledge and use thereof is limited to a few persons, or even to the first inventor himself, or is kept a secret by him."

And again: "The language of the patent act of 1836, p. 357, § 6, *not known or used*, &c., does not require that the invention should be known or used by more than one person, but merely indicates that the use should be by some other person than the patentee."

And again: "The decision in *Dolland's case* may be a correct exposition of the English statute of monopolies (21 James I.), but is not applicable to the patent law of the United States."

4. But there is another view of the case from this point, which is entitled to consideration.

*It is submitted that, measured by the seventh section of the act of 1839, the construction and use of the Conner safe had been such as necessarily and absolutely to defeat the plaintiff's patent, and that the learned judge erred [*489

in not thus instructing the jury, (5th, 6th, and 7th exceptions).

That section provides,—

"That every person or corporation who has, or shall have, purchased or constructed any newly invented machine, manufacture, or composition of matter, prior to the application by the inventor or discoverer for a patent, shall be held to possess the right to use, and vend to others to be used, the specific machine, manufacture, or composition of matter so made or purchased, without liability therefor to the inventor, or to any other person interested in such invention; and no patent shall be held to be invalid by reason of such purchase, sale, or use prior to the application for a patent as aforesaid, except on proof of abandonment of such invention to the public; or that such purchase, sale, or prior use has been for more than two years prior to such application for a patent."

In this section the words "newly invented machine, manufacture, or composition of matter" have been decided by this court to be synonymous with "invention or thing patented." *McClurg* v. *Kingsland*, 1 How., 202.

Now it is the distinct and uncontradicted fact, that in this case the invention or thing patented had been "constructed," and was in use by another, at least eight years before the application for a patent. And yet, by the final clause of the section just quoted, if there is proved such use, "two years prior to the application for a patent," such "patent shall be held to be invalid."

It is stated by one witness, that between the years 1829 and 1832, and by another, that in the year 1831 or 1832, Conner made a safe constructed precisely as is the patented safe,—that it was used as the safe for his establishment,—was kept in his counting-room, and was known to the persons working in his foundery,—and so continued to be until 1838, when it passed from Conner's into other hands.

The plaintiff's application for a patent bears date April 11th, 1839.

It is submitted, therefore, that this patent cannot be sustained without flatly contravening the clear and express language of the seventh section of the act of 1839, just quoted.

This case is one in which a recovery by the plaintiff below cannot be sustained without imposing great hardships upon the defendants. The patent issued in 1843,—more than four years after application for it was made, and more than thirteen

*490] *years after the applicant had perfected his invention. The very same invention had been made by a stranger

at least thirteen, and perhaps fourteen, years before the date of the patent, and had been publicly used by him, with the knowledge of many, for eight years before plaintiff's application for a patent, and had then passed from him into the hands of others.

Such a use for two years, by the seventh section of the act of 1839, defeats a patent.

Added to this, it was in evidence that the plaintiff no longer possessed the right for the invasion of which this action was brought, and the recovery, if had, must be for an injury done, not to him, but to another,—in whom the very same cause of action will continue to exist.

Mr. Staples, contra.

1. The first question is, whether the conveyance from Fitzgerald to Enos Wilder, before the issuing of the patent, conveyed the patent itself when issued. The error on the other side is in considering an invention as a sort of chose in action. An invention, however, is as much property as a horse or a house, and when patented becomes the *exclusive* property of the patentee. It is consequently assignable as well before as after the granting of letters patent. The very terms employed in the 11th and 14th sections of the act of 1836 (5 Stat. at L., 121, 122), and which are relied on by the other side as showing that the *patent* only was assignable, show, on the contrary, that reference was not had to any thing in the nature of a chose in action, but that the *interest* of the inventor in the thing invented was the subject of assignment. *Herbert* v. *Adams*, 4 Mason, 15, is to the effect that a conveyance of an invention operates as a conveyance of the patent, whether dated before or after the patent. So also Curtis on Patents, §§ 189, 260.

2. The next assignment of error is, that the court did not decide that the agreement of the plaintiff with Silas C. Herring did not divest the former of all interest in the patent, so that he could not thereafter maintain an action thereon. We say not; because Wilder did not give up *all* his interest, he reserving one cent a pound on all safes made under the patent in the city and state of New York; because he reserved the right to manufacture in the city of New York on the terms named; because the agreement was a mere license; and because it is obvious, from the face of the agreement itself, that Wilder was to bring suits to sustain the patent. *Brooks* v. *Byam*, 2 Story, 541. The latter part of the agreement with Wilder was equivalent to this, viz.: Wilder sells to

Herring the right to manufacture and vend safes within the
*491] city, county, and state of *New York. But he reserves to himself the right to make *in* the city safes to be sold *out* of the city. He also reserves the right to make safes to be sold *within* the city, upon payment to Herring of one cent per pound. This shows that Wilder had not sold his entire right, and could therefore maintain this action.

3. As to the Connor safe. The object of the law was to protect genius and at the same time to invite something useful to the country. A prior experiment, locked up in a man's own bosom, not divulged to the public, not rendered useful to the public, is surely not such an invention as will exclude a *bonâ fide* inventor of the same thing from the benefits of the patent laws, if he has used diligence in embodying his invention and reducing it to practice. Such, on the contrary, was the very person intended to be benefited. It is not correct to say that an inventor must have been the first man who has ever thought of the subject, or that mere speculations are within the meaning of the act; but he is an inventor under the law who has first put the invention into such a shape as to be useful to the public.

Mr. Webster, on the same side.

It is agreed that, under the previously existing laws, the invention would have been assignable. But it is supposed that the act of 1836, which repeals all former laws, only makes the patent assignable, but says nothing of the invention. Now two things are to be considered. 1st. In a country where the principle of the patent laws is recognized, where an *invention* is regarded as property which may be set apart for a person's own exclusive use, is it not assignable, independent of any statute enactment? If not, *why* is it not? What is the *reason* that an invention which is recognized as *property* shall not be transferable, like other property, there being nothing in the statute to prohibit it? 2d. Does the language of the eleventh section of the act of 1836 restrict assignability to the patent? I think not. Every other portion of the act has a different aspect.

Wilder has clearly the right to maintain an action, for the reason that he has not parted with all his interest. He still has an interest to the value of one cent per pound. But the agreement itself was a mere license. It uses the term *license*, and does not run to the heirs and assignees.

With regard to the Conner safe, it could not be considered such a prior invention as would take away the right of Fitzgerald to a patent. There are *dicta* in Judge Story's decision

in the case of *Reed* v. *Cutter*, which, if not limited, would be *of dangerous tendency. Now the instruction objected [*492
to supposes an invention to be made, but kept within the inventor's own bosom. The question is, whether an original inventor (that is, one who did not derive his knowledge from another), who has put his invention into practice, shall be deprived of his patent by such a mere thought, gendered in another's brain, and to which he "gives no *tongue*." The object of the patent law, and of the Constitution under which the law was passed, was the public benefit. If this be so, how does a man bring himself within its provisions who locks his secret in his own breast? And why is he less a benefactor to the public who invents a machine which had been before invented and afterwards forgotten, than he who invents something never before known?

Mr. Cuyler, in reply and conclusion.

It is said that the invention would be assignable, independent of the patent law. It is submitted that this is not correct. Except by statute, the inventor has no right of property in his invention. The statute was intended to confer that very right. Now the act of 1793 gave the right of assigning an *invention*, and yet, with this before them, Congress, in the act of 1836, make only the *patent* assignable. If, then, the patent is made assignable only by the law, how can it be said that the invention does not stand in need of such a provision?

It is said that the plaintiff has reserved one cent per pound, and can therefore maintain this action. It will be seen, however, that this part of the agreement is a penalty. If he, Wilder, makes safes in New York to be sold in New York, he shall pay, &c. A license can maintain an action.

The facts as to the Conner safe should have been left to the jury. This was not a case where the invention had been lost or forgotten; but within a few years a man makes for his own use, and actually uses in his own counting-house, a safe constructed upon the same principles as that which is the foundation of this suit. The law requires that a patented article should not have been made or used before.

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

Three objections have been taken to the instructions given by the Circuit Court at the trial, and neither of them is, perhaps, entirely free from difficulty.

The first question arises upon the assignment of Fitzgerald to Enos Wilder. The assignment was made and recorded in

the Patent-Office before the patent issued. It afterwards issued to Fitzgerald. And the plaintiffs in error insist that this *assignment did not convey to Wilder the legal right to the monopoly subsequently conferred by the patent, and that the plaintiff who claims under him cannot therefore maintain this action.

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The inventor of a new and useful improvement certainly has no exclusive right to it, until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued. But the discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires. Fitzgerald possessed this inchoate right at the time of the assignment. The discovery had been made, and the specification prepared to obtain a patent. And it appears by the language of the assignment, that it was intended to operate upon the perfect legal title which Fitzgerald then had a lawful right to obtain, as well as upon the imperfect and inchoate interest which he actually possessed. The assignment requests that the patent may issue to the assignee. And there would seem to be no sound reason for defeating the intention of the parties by restraining the assignment to the latter interest, and compelling them to execute another transfer, unless the act of Congress makes it necessary. The court think it does not. The act of 1836 declares that every patent shall be assignable in law, and that the assignment must be in writing, and recorded within the time specified. But the thing to be assigned is not the mere parchment on which the grant is written. It is the monopoly which the grant confers: the right of property which it creates. And when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent issued, is equally within the provisions of the act of Congress.

And we are the less disposed to give it a different construction, because no purpose of justice would be answered by it, and the one we now give was the received construction of the act of 1793, in several of the circuits; and there is no material difference in this respect between the two acts. As long ago as 1825, it was held by Mr. Justice Story, that in a case of this kind an action could not be maintained in the name of the patentee, but must be brought by the assignee. 4 Mason, 15. We understand the same rule has prevailed in other circuits; and if it were now changed, it might pro-

duce much injustice to assignees who have relied on such assignments, and defeat pending suits brought upon the faith *of long established judicial practice and judicial [*494 decision. Fitzgerald sets up no claim against the assignment, and to require another to complete the transfer would be mere form. We do not think the act of Congress requires it; but that, when the patent issued to him, the legal right to the monopoly and property it created was, by operation of the assignment then on record, vested in Enos Wilder.

The next question is upon the agreement between the defendant in error and Herring. Is this instrument an assignment to Herring for the state or city of New York, upon which he might have sued in his own name? If it is, then this action cannot be maintained by the defendant in error.

Now the monopoly granted to the patentee is for one entire thing; it is the exclusive right of making, using, and vending to others to be used, the improvement he has invented, and for which the patent is granted. The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it cannot be regulated by the rules of the common law. It is created by the act of Congress; and no rights can be acquired in it unless authorized by statute, and in the manner the statute prescribes.

By the eleventh section of the act of 1836, the patentee may assign his whole interest, or an undivided part of it. But if he assigns a part under this section, it must be an undivided portion of his entire interest under the patent, placing the assignee upon an equal footing with himself for the part assigned. Upon such an assignment, the patentee and his assignees become joint owners of the whole interest secured by the patent, according to the respective proportions which the assignment creates.

By the fourteenth section, the patentee may assign his exclusive right within and throughout a specified part of the United States, and upon such an assignment the assignee may sue in his own name for an infringement of his rights. But in order to enable him to sue, the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified,—excluding the patentee himself, as well as others. And any assignment short of this is a mere license. For it was obviously not the intention of the legislature to permit several monopolies to be made out of one, and divided among different persons within the same limits. Such a division would inevitably lead to fraudulent impositions upon persons who desired to purchase the use of the improvement, and would subject a party who, under a mistake as to his

rights, used the invention without authority, to be harassed *by a multiplicity of suits instead of one, and to succes- *495]
sive recoveries of damages by different persons holding different portions of the patent right in the same place. Unquestionably, a contract for the purchase of any portion of the patent right may be good as between the parties as a license, and enforced as such in the courts of justice. But the legal right in the monopoly remains in the patentee, and he alone can maintain an action against a third party who commits an infringement upon it. This is the view taken of the subject in the case of *Blanchard* v. *Eldridge*, J. W. Wallace, 337, and we think it the true one.

Applying these principles to the case before us, the action was properly brought by the plaintiff below, and could not have been maintained by Herring.

The agreement is singularly confused and complicated. It purports to grant to Herring the exclusive right to make and vend the Salamander safe in the city, county, and state of New York; and Herring agrees to pay to the defendant in error a cent a pound for every pound the safes might weigh, to be paid monthly. But at the same time it reserves to Wilder the right to set up a manufactory or works for making these safes in the state of New York, provided it is not within fifty miles of the city, and to sell them in the state of New York, paying to Herring a cent a pound on each safe so sold within the state.

It is evident that this agreement is not an assignment of an undivided interest in the whole patent, nor the assignment of an exclusive right to the entire monopoly in the state or city of New York. It is therefore to be regarded as a license only, and under the act of Congress does not enable Herring to maintain an action for an infringement of the patent right. The defendant in error continues the legal owner of the monopoly created by the patent.

The remaining question is upon the validity of the patent on which the suit was brought.

It appears that James Conner, who carried on the business of a stereotype founder in the city of New York, made a safe for his own use between the years 1829 and 1832, for the protection of his papers against fire; and continued to use it until 1838, when it passed into other hands. It was kept in his counting-room and known to the persons engaged in the foundery; and after it passed out of his hands, he used others of a different construction.

It does not appear what became of this safe afterwards. And there is nothing in the testimony from which it can be

inferred that its mode of construction was known to the person into whose possession it fell, or that any value was attached *to it as a place of security for papers against fire; or [*496 that it was ever used for that purpose.

Upon these facts the court instructed the jury, "that if Connor had not made his discovery public, but had used it simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use would be no obstacle to the taking out of a patent by Fitzgerald or those claiming under him, if he be an original, though not the first, inventor or discoverer."

The instruction assumes that the jury might find from the evidence that Conner's safe was substantially the same with that of Fitzgerald, and also prior in time. And if the fact was so, the question then was whether the patentee was "the original and first inventor or discoverer," within the meaning of the act of Congress.

The act of 1836, ch. 357, § 6, authorizes a patent where the party has discovered or invented a new and useful improvement, "not known or used by others before his discovery or invention." And the 15th section provides that, if it appears on the trial of an action brought for the infringement of a patent that the patentee "was not the original and first inventor or discoverer of the thing patented," the verdict shall be for the defendant.

Upon a literal construction of these particular words, the patentee in this case certainly was not the original and first inventor or discoverer, if the Conner safe was the same with his, and preceded his discovery.

But we do not think that this construction would carry into effect the intention of the legislature. It is not by detached words and phrases that a statute ought to be expounded. The whole act must be taken together, and a fair interpretation given to it, neither extending nor restricting it beyond the legitimate import of its language, and its obvious policy and object. And in the 15th section, after making the provision above mentioned, there is a further provision, that, if it shall appear that the patentee at the time of his application for the patent believed himself to be the first inventor, the patent shall not be void on account of the invention or discovery having been known or used in any foreign country, it not appearing that it had been before patented or described in any printed publication.

In the case thus provided for, the party who invents is not strictly speaking the first and original inventor. The law assumes that the improvement may have been known and used

before his discovery. Yet his patent is valid if he discovered it by the efforts of his own genius, and believed himself to be
*497] *the original inventor. The clause in question qualifies the words before used, and shows that by knowledge and use the legislature meant knowledge and use existing in a manner accessible to the public. If the foreign invention had been printed or patented, it was already given to the world and open to the people of this country, as well as of others, upon reasonable inquiry. They would therefore derive no advantage from the invention here. It would confer no benefit upon the community, and the inventor therefore is not considered to be entitled to the reward. But if the foreign discovery is not patented, nor described in any printed publication, it might be known and used in remote places for ages, and the people of this country be unable to profit by it. The means of obtaining knowledge would not be within their reach; and, as far as their interest is concerned, it would be the same thing as if the improvement had never been discovered. It is the inventor here that brings it to them, and places it in their possession. And as he does this by the effort of his own genius, the law regards him as the first and original inventor, and protects his patent, although the improvement had in fact been invented before, and used by others.

So, too, as to the lost arts. It is well known that centuries ago discoveries were made in certain arts the fruits of which have come down to us, but the means by which the work was accomplished are at this day unknown. The knowledge has been lost for ages. Yet it would hardly be doubted, if any one now discovered an art thus lost, and it was a useful improvement, that, upon a fair construction of the act of Congress, he would be entitled to a patent. Yet he would not literally be the first and original inventor. But he would be the first to confer on the public the benefit of the invention. He would discover what is unknown, and communicate knowledge which the public had not the means of obtaining without his invention.

Upon the same principle and upon the same rule of construction, we think that Fitzgerald must be regarded as the first and original inventor of the safe in question. The case as to this point admits, that, although Conner's safe had been kept and used for years, yet no test had been applied to it, and its capacity for resisting heat was not known; there was no evidence to show that any particular value was attached to it after it passed from his possession, or that it was ever afterwards used as a place of security for papers; and it

appeared that he himself did not attempt to make another like the one he is supposed to have invented, but used a different one. And upon this state of the evidence the court put it to the jury to say, whether this safe *had been [*498 finally forgotten or abandoned before Fitzgerald's invention, and whether he was the original inventor of the safe for which he obtained the patent; directing them, if they found these two facts, that their verdict must be for the plaintiff. We think there is no error in this instruction. For if the Conner safe had passed away from the memory of Conner himself, and of those who had seen it, and the safe itself had disappeared, the knowledge of the improvement was as completely lost as if it had never been discovered. The public could derive no benefit from it until it was discovered by another inventor. And if Fitzgerald made his discovery by his own efforts, without any knowledge of Conner's, he invented an improvement that was then new, and at that time unknown; and it was not the less new and unknown because Conner's safe was recalled to his memory by the success of Fitzgerald's.

We do not understand the Circuit Court to have said that the omission of Conner to try the value of his safe by proper tests would deprive it of its priority; nor his omission to bring it into public use. He might have omitted both, and also abandoned its use, and been ignorant of the extent of its value; yet, if it was the same with Fitzgerald's, the latter would not upon such grounds be entitled to a patent, provided Conner's safe and its mode of construction were still in the memory of Conner before they were recalled by Fitzgerald's patent.[1]

The circumstances above mentioned, referred to in the opinion of the Circuit Court, appeared to have been introduced as evidence tending to prove that the Conner safe might have been finally forgotten, and upon which this hypothetical instruction was given. Whether this evidence was sufficient for that purpose or not, was a question for the jury, and the court left it to them. And if the jury found the fact to be so, and that Fitzgerald again discovered it, we regard him as standing upon the same ground with the discoverer of a lost art, or an unpatented and unpublished foreign invention, and like him entitled to a patent. For there was no existing and living knowledge of this improvement, or of its former use, at the time he made the discovery. And whatever benefit any individual may derive from it in the safety of his

[1] QUOTED. *Coffin* v. *Ogden*, 18 Wall., 125.

papers, he owes entirely to the genius and exertions of Fitzgerald.

Upon the whole, therefore, we think there is no error in the opinion of the Circuit Court, and the judgment is therefore affirmed.

Mr. Justice McLEAN.

I dissent from the opinion of a majority of the judges in this case. The point of difference, I think, is essential to the maintenance of the rights of the public and also of inventors.

*499] *It was proved by James Conner, as appears from the bill of exceptions, "that between 1829 and 1832 he was engaged in business as a stereotype founder, and knowing that plaster of Paris was a non-conductor of heat, he constructed a safe with a double chest, and filled the space between the inner and outer one with plaster of Paris; the same, substantially, as testified to and claimed by Fitzgerald, except there was no plaster used on the top of the safe. It was made for his own private use in his establishment, and was used by him as a safe from the time it was made till 1838, when it passed into other hands. It was kept in the counting-room while he used it, and was known to the persons working in the foundery." This evidence was confirmed by another witness.

By the sixth section of the patent act of 1836, it is provided, "that any person or persons having discovered or invented any new or useful art, machine, manufacture, or composition of matter, or any new or useful improvement on any art, machine, manufacture, or composition of matter, *not known or used by others before his or their discovery or invention thereof*," may apply for a patent, &c. The applicant is required to "*make oath or affirmation that he does verily believe that he is the original and first inventor*," &c., "*and that he does not know or believe that the same was ever before known or used.*"

The seventh section authorizes and requires the Commissioner of Patents "to make or cause to be made an examination of the alleged new invention or discovery; and if on such examination it shall not appear to the Commissioner that the same had been *invented or discovered by any other person in this country prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or any foreign country*," &c., the Commissioner may grant a patent.

In the fifteenth section it is provided, "that whenever it shall satisfactorily appear that the patentee, at the time of making his application for the patent, believed himself to be

the first inventor or discoverer of the thing patented, the same shall not be held to be void on account of the invention or discovery, or any part thereof, having before been known or used *in any foreign country*, it not appearing that the same or any substantial part thereof had before been patented or described in any printed publication."

From the above extracts, it is seen that the patentee must be the inventor of the machine, or the improvement of it, or he can have no right. If the thing was known or used by others, he cannot claim a patent. Or if it was patented in a foreign country, or described in any publication at home or in any *foreign country, he has no right to a patent. To this there is only the exception in the fifteenth section above cited. But this can have no influence in the present case. [*500

Let these provisions of the statute be compared with the last two paragraphs of the charge of the court, as stated in the third exception :—

"And said court further instructed the jury, that if they found that the use made by James Conner of plaster of Paris was confined to a single iron chest, made for his own private use after said Fitzgerald's discovery and experiments, then it was not in the way of Fitzgerald's patent, and the same was valid ; but if the jury found that said James Conner made his said safe, as claimed, *and tested it by experiments*, before Fitzgerald's invention and improvements, *and before he tested the same*, then said Fitzgerald was not the first inventor, as claimed, and was not entitled to said patent."

This charge stands disconnected with any other facts in the case, except those named, and, in my judgment, it is erroneous. If Conner's safe were identical with Fitzgerald's, and though it was of prior invention, *yet if it were not tested by experiments* before Fitzgerald's improvement, and before he tested the same, the jury under the instruction were bound to find for Fitzgerald. And the case was thus made to turn, not on the priority of invention only, but upon that *and the fact of its having been tested by experiments.* This introduces a new principle into the patent law. The right under the law depends upon the time of the invention. An experimental test may show the value of the thing invented, but it is no part of the invention.

"The court further charged, that, independently of these considerations, there was another view of the case, as it respected the Conner safe ; that it was a question whether the use of it by him had been such as would prevent another inventor from taking out a patent; that if Conner had not

made his discovery public, but had used it simply for his own private purpose, and it had been finally forgotten or abandoned, such a discovery and use would be no obstacle to the taking out of a patent by Fitzgerald, or those claiming under him, if he be an original, though not the first, inventor or discoverer of the improvement."

If there be anything clear in the patent law, it is that the original inventor means the first inventor, subject only to the provision tated in the fifteenth section. This instruction presupposes that the safes are the same in principle. Now, if the invention was patented abroad, or was described in a foreign publication, both of which were unknown to the inventor in *501] *this country, still his patent is void. So it is void, if such invention has been known to any person in this country. The instruction says, if Conner's invention "had been forgotten or abandoned," it was no obstacle to Fitzgerald's right. Can a thing be forgotten or abandoned that was never known? If known before Fitzgerald's invention, it is fatal to it. By whom must it have been forgotten? By the inventor, or the public, or both? And how must it have been abandoned? When an invention is abandoned, it is said to be given up to the public, and this is the sense in which the term *abandonment* is used in the patent law. Such an abandonment would be fatal to the right of Fitzgerald.

Conner's safe, as appears from the bill of exceptions, was used in his counting-house, being accessible to every one, some six or eight years. In 1838 it passed into other hands; but into whose hands it does not appear. In 1843, Fitzgerald obtained his patent. How long before that he made experiments to test the invention is not proved. At most, the time must have been less than five years. This is a short period on which to found a presumption of forgetfulness. The law authorizes no such presumption. It can never become the law. It is not founded on probability or reason. The question is, Was Conner's invention prior to that of Fitzgerald? That it was of older date by some ten or twelve years is proved. And the instruction, it must be observed, was founded on the supposition that both inventions were similar.

The instruction seems to attach great importance to the fact that Conner's safe was used only for his private purpose. This is of no importance. The invention is the question, and not the manner in which the inventor used it. The safe was constructed at the foundery, and must have been known to the hands there employed. How can it be ascertained that Fitzgerald was not informed by some of these hands of the structure of Conner's safe, or by some one of the many hun-

dreds who had seen it in his counting-house in the city of New York? It was to guard against this, which is rarely if ever susceptible of proof, that the act is express,—*if the thing patented was known before*, the patent is void. If the fact of this knowledge in any one be established, it is immaterial whether the patentee may have known it or not, it avoids his patent.

The law, on this subject, is not founded upon any supposed notions of equity. A foreign patent for the same thing, or a description of the thing in a foreign publication, is as effectual to avoid the patent as if the patentee had seen the prior invention. Notice to him is not important. The law is adopted on *a settled public policy, which, while it is just to inventors, protects the rights of the public. Any other basis [*502 would open the door for endless frauds, by pretended inventors, without the probability of detection. And especially does this new doctrine of forgetfulness, or abandonment, used in any other sense than as recognized in the patent law, leaving such matters to a jury, overturn what I consider to be the settled law on this subject. Of the same character is the fact, that the invention was used for private purposes. A thing may be used in that way, and at the same time be public, as was the case with the Conner safe, and yet the jury are necessarily misled by such an instruction.

Mr. Justice DANIEL, dissenting.

Differing from the majority in the decision just pronounced, I proceed to state the grounds on which my dissent from that decision is founded.

On two essential points in this cause, it seems to me that the learned justice who tried it at the Circuit has erred, and that the decision here should therefore have been for a reversal of his judgment. Those points involve, first, the right of the plaintiff below to maintain his action upon the title or right of action deduced from Fitzgerald through Enos and Benjamin Wilder; and secondly, a right to, or interest in the subject of the suit on the part of the plaintiff below, admitting to have been originally invented and used by some other person than Fitzgerald; a right founded upon an assumption that this subject had been used in *private only*, or had, in the language of the learned justice, been "finally forgotten or abandoned" by such first inventor. These points are presented by the first and third exceptions of the plaintiffs in error to the rulings at the trial below. The plaintiff in the Circuit Court claimed by assignment from B. G. Wilder, assignee of Enos Wilder, assignee of Daniel Fitzgerald,

alleged to have been the inventor of the Salamander safe. By the paper deduction of title, it appears that, on the 11th day of April, 1839, Fitzgerald, alleging that he had invented an improvement called the Salamander safe, for which he was about to apply for letters patent, for the consideration of five thousand dollars, sold the interest he then had, or might thereafter have, in this invention, to Enos Wilder; that Enos Wilder, on the 1st day of September, 1843, for the consideration of one dollar, assigned and transferred to the plaintiff all the right, title, and interest which he had derived from Fitzgerald, under the agreement of the 11th of April, 1839; that no patent issued for this Salamander safe until the year 1843, *503] when a patent was granted to *Daniel Fitzgerald*, *as the original inventor; that no patent for this invention has ever been granted either to Enos or B. G. Wilder, either as inventor or assignee of this safe; that the title, whatever it may be, rests upon the agreement between Fitzgerald and Enos Wilder, of the 11th of April, 1839, before the patent to the former.

It must be recollected, that this is an action *at law;* and in order to maintain it, the plaintiff was bound to set out and to prove *a legal title.* Has he done either? What was the character of the interest or title transferred from Fitzgerald to Enos Wilder? This could not transcend the interest or title possessed by Fitzgerald himself; and what was this? A title to any specific machine which he may have constructed, and of which no person could rightfully deprive him; and a claim upon the good-will and gratitude of the community, if in truth he should have conferred upon them a benefit by the discovery and construction of his machine. I speak now in reference to rights derivable from the common law; and independently of the Constitution or of statutory provisions. The mere circumstances of inventing and constructing a machine could no more inhibit its imitation, than would the structure or interior arrangement of a house of peculiar ingenuity or convenience prevent the like imitation by any one who could possess himself of its plan. The mere mental process of devising an invention enters not into the nature of property according to the common law; it forms no class or division in any of its enumerations or definitions of estates or property, and is a matter quite too shadowy for the practical character of that sturdy system.

A doctrine contrary to this, though with some discrepancy amongst the judges as to its extent, seems at one time to have obtained in the King's Bench, as propounded in the case of *Millar* v. *Taylor*, in 4 Burr., 2305, in opposition to the pro-

found and unanswerable reasoning of Mr. Justice Yates; but upon a review of the same question in the Lords, in the case of *Donaldsons* v. *Becket and others*, the doctrine of the King's Bench was repudiated, and that of the common law, as asserted by Yates, Justice, vindicated and restored. And, indeed, if, according to the opinions of some of the judges in the case of *Millar* v. *Taylor*, the mere mental process of invention constituted an estate or property at the common law, and property vested *in perpetuo*, except so far as it should be transferred by the owner, it is difficult to perceive the necessity of a cautious and complicated system for the investment and security of interests already perfect, and surrounded with every guard and protection which is inseparable under the *common law from every right it has created or recognized. But if the mere mental and invisible process [*504 of invention, apart from the specific, sensible, and individual structure, can be classed at all as property at law, it must partake of the character of a chose in action, much more so than an obligation or contract, the terms and conditions of which are defined and assented to by the contracting parties. To choses in action, it can scarcely be necessary here to remark, assignability is imparted by statutory enactment only, or by commercial usage. To hold that the single circumstance of invention creates an estate or property at law, and an estate and legal title transmissible by assignment, appears to me a doctrine not merely subversive of the common law, but one which contravenes the origin and course of legislation in England in relation to patent rights, and renders useless and futile both the constitutional provision and all the careful enactments of Congress for the security and transmissibility of the same rights. For why, as has been already remarked, should that provision and these enactments have been made for the establishment and security of that which was established and safe independently of both? I hold it, then, to be true, that the circumstance of *invention* invests no such perfect estate or right of property as can be claimed and enforced at law or in equity against the *user* of the same invention, either by subsequent inventors or imitators, and that any estate or property in the mere mental process of invention must be traced to and deducible from the Constitution and the acts of Congress alone. I cannot but regard as mischievous and alarming an attempt to introduce a *quasi* and indefinite, indefinable, and invisible estate, independently of the Constitution and acts of Congress, and unknown to the rules and principles of the common law.

It is the *patent alone* which creates an estate or interest in

the *invention* known to the law, and which can be enforced either at law or in equity, either by the inventor or by the person to whom, by *virtue of the statute*, he may assign his rights. Down to the act of Congress of 1837, nothing but the estate, interest, or property created or invested by *the patent itself*, was made assignable. The language of the law is, that "*every patent*," "*the exclusive right under any patent*," "*the thing patented*," may be assignable. The fact or existence of *a patent* is in every instance inseparable from the right given. It is this fact and this only which impresses the quality of assignability. Of course, under these provisions there could be no transfer of the legal title previously to a patent.

By section sixth of the act of Congress approved March *3d, 1837, it is provided that *thereafter* any patent *to be issued* may be made to the assignee of the inventor or discoverer, upon the conditions set forth in that section. Yet still it is presumed that, until the issuing of a patent, so far is it from being true that a legal estate or title existed in such assignee, it is clear, on the contrary, that no *legal title* existed before the patent in the inventor himself, for it is the patent which constitutes his title. Of course, then, the assignee can at most hold nothing but an equity under such an assignment, which he may insist upon under this assignment against the inventor or against the government; but he has no legal title by force merely of such an assignment, and *a fortiori* he has no legal title, if the patent, notwithstanding such an assignment, is in fact issued to the inventor, but is thereby entirely excluded from all pretension to a legal title. Thus, in the case before us, the patent under which the plaintiff claims was, subsequently to the agreement between Fitzgerald and Enos Wilder, issued to Fitzgerald, the inventor, and, according to the proofs in the cause, has never been renewed to Enos Wilder, nor to any claimant under him, nor been assigned to any such claimant, but remains still in the alleged inventor, Fitzgerald. It seems to me, then, indisputable, that the legal title indispensable for the maintenance of this suit *at law* never was in the plaintiff, and that he could not maintain the action.

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The second instance in which I hold the learned justice who tried this cause to have erred is that in which he instructed the jury as follows:—"That if Conner had not made his *discovery public*, but had used it simply for his own private purpose, and it had been *finally forgotten or abandoned*, such *discovery* and *use* would be no obstacle to the taking out of a patent by Fitzgerald, or those claiming under him, if he be an original, though not *the first*, *inventor or discoverer* of the improvement." In considering this instruction of the learned

judge, the first vice with which it appears to be affected is its violation of a rule thought to be universally applicable to instructions to juries in trials at law; and that rule is this, that instructions should always arise out of, and be limited to, the facts or the evidence in the cause to which the questions of law propounded from the bench should be strictly applicable; and that instructions which are general, abstract, or not springing from, and pertinent to, the facts of the case, are calculated to mislead the jury, and are therefore improper. Tried by this rule, the instruction of the learned judge, so far as it relates to Conner's not having made his discovery *public*, or having finally forgotten or abandoned it, is certainly irrelevant to, and unsustained by, any evidence in the record. So far is the *existence of such testimony from being shown, the converse is proved and is justly inferable throughout; for although it does not appear that Conner advertised his invention in the public papers, or claimed a patent for it, it is admitted that he used this safe in an extensive business establishment, to which it is certain from the nature of his business the public had access; and it is not pretended that he made any effort at concealment of what he had invented, and the record is entirely destitute of evidence of an abandonment of his invention. As to the assumption of his having forgotten it, there is neither a fact, an inquiry, nor conjecture in the testimony pointing to such a conclusion. The instruction appears to me to be wholly gratuitous and irrelevant. But supposing this instruction to have been founded upon testimony introduced before the jury, let us consider for a moment its correctness as a rule of law applicable to this cause. This charge, it must be recollected, admits that Conner was, or might have been, the first inventor; and, notwithstanding, asserts that Fitzgerald, though posterior in time, might, upon the conditions and considerations assumed by the judge, become the owner of the right. Are these conditions warranted, either by the rules of public policy, or by the terms and language of legislative provisions on such subjects? It is said that patent privileges are allowed as incitements to inventions and improvements by which the public may be benefited. This position, that may be conceded in general, should not be made a means of preventing the great and public purposes its legitimate enforcement is calculated to secure. The admission of this principle leaves entirely open the inquiries, whether he is more the benefactor of the public who makes a useful improvement which he generously shares with his fellow-citizens, or he who studies some device which he denies to all, and limits by every means in his power to a

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lucrative monopoly; and still more, whether the latter shall be permitted to seize upon that which had already (as is here admitted) been given to the public, thereby to levy contributions, not only on the community at large, but upon him even who had been its generous benefactor. It was doubtless to prevent consequences like those here presented, that the *priority* and *originality* of inventions are so uniformly and explicitly insisted upon in all the legislation of Congress, as will presently be shown. The tendency of the learned judge's charge to mislead the jury, from its want of precision, and its failure to define any certain predicament upon which the action of the jury should be founded, is of itself an insuperable objection to that charge. Thus it is said, if Connor "had not *made his discovery public.*" In what mode? it may
*507] be asked. What form of publicity did *the learned judge intend the jury should require? It is shown that Conner used his safe publicly; that is, he concealed it from no one; and if any mode or kind of publication or concealment was requisite, either to establish or conclude the right of Conner, or to conclude common right (a delinquency in the nature of a forfeiture), surely that mode, if found either in any statute, or in the rules of the common law, ought to have been clearly laid down, so as to guard the rights of all. In the next place, it is said by the learned judge, that, if Conner had *abandoned* this improvement which the charge admits him to have invented, this would justify a patent to another who had not known of the improvement, although a subsequent inventor. I have always understood it to be indisputable law, that wherever an inventor abandons or surrenders an invention or improvement which he has certainly made, and neither claims an exclusive right in himself nor transfers it to another, the invention or improvement is given to the public; but by the charge in this case, such an abandonment transfers *an exclusive right* to one who, by the case supposed, *is admitted not to be the first inventor.* So, too, with respect to the hypothesis of the learned judge that the invention had, or might have, been forgotten. To this the same objections of vagueness and uncertainty, and the graver objection of injustice to the real inventor or to the public, are applicable. By whom and for what interval of time must this improvement have been forgotten, in order to transfer it from the originator thereof? For a term of years? And if so, for how long a term? But suppose he forgets it for his lifetime, shall his executor or his posterity, upon the exhibition of indisputable proofs of the invention, yea, the very machine itself, perfect in all its parts and in its operation, be cut off? This surely cannot be; but,

at any rate, the jury should have been furnished with some rule or measure of obliviousness, if this was to be made the substantive cause of deprivation as to the original inventor, or the foundation of right and of exclusive right in one confessedly not the first inventor. An attempt has been made to compare the doctrine propounded by the court to what it might be thought is the law as applicable to the discovery, or rather *recovery*, of the processes employed in what have been called *the lost arts*. This illustration is in itself somewhat equivocal, and by no means satisfactory; for if that process could certainly be *shown* to be the same with one claimed by the modern inventor, his discovery could scarcely have the merit of originality, or be the foundation of exclusive right. But, in truth, the illustration attempted to be drawn from a revival of a lost art is not apposite to the present case. The term *lost art* is applicable peculiarly *to certain monuments of antiquity still remaining in the world, the [*508 process of whose accomplishment has been lost for centuries, has been irretrievably swept from the earth, with every vestige of the archives or records of the nations with whom those arts existed, and the origin or even the identity of which process none can certainly establish. And if a means of producing the effect we see and have amongst us be discovered, and none can either by history or tradition refer to a similar or to the identical process, the inventor of that means may so far claim the merit of originality, though the work itself may have been produced possibly by the same means. But not one principle drawn from such a state of things can be applied to a recent proceeding, which counts from its origin scarcely a period of fifteen years. In fine, this ruling of the learned judge is regarded as being at war not less with the policy and objects than it is with the express language of all the legislation by Congress upon the subject of patent rights, which legislation has uniformly constituted *priority of invention* to be the foundation and the test of all such rights. Thus in the act of April 10th, 1790, the first patent law, (1 Stat. at L., 109,) it is declared by the first section, "That upon the application of any person or persons, &c., setting forth that he, she, or they hath or have invented or discovered any useful art, &c., *not before known or used*," &c.; and the second section of the same statute, requiring a specification of any invention or discovery, declares that it shall be so described "as to distinguish it from all other things known or used."

The act of February 21st, 1793, (1 Stat. at L., 318), provides, that when any citizen or citizens of the United States

shall allege that he or they have invented any "*new and useful art*, &c., *not known or used before the application*," &c.

By the act of April 17th, 1800, (2 Stat. at L., 38,) which extends the privilege of patents to aliens, proof is required that the art, invention, or discovery hath not *been known or used* in that or any foreign country. It is true that this requisition has been so far relaxed as to admit of the patenting in this country inventions which had been invented and used abroad, but with respect to this country, the invention, &c., must still be original.

The act of July 4th, 1836, (5 Stat. at L., 117,) reorganizing the Patent-Office, the language of the sixth section is as follows: "That any person or persons having discovered or invented any new and useful art, &c., *not known or used by others before his or their discovery*," &c. The language and import of the laws here cited are too plain to require comment,

*509] *and I think that the production of a single instance from the statute-book may safely be challenged by which the requisites above mentioned have been dispensed with. Every law, on the contrary, has emphatically demanded originality and priority as indispensable pre-requisites to patent privileges, and every aspirant to such privileges is expressly required to swear to these pre-requisites, as well as to establish them. These tests ordained by the laws are not only founded upon the true reason for the privileges conferred, but they are simple and comprehensible; whereas the innovations permitted by the ruling of the learned judge not only conflict with the true reason and foundation of patent privileges, but tend to an uncertainty and confusion which cannot but invite litigation and mischief. I think that the judgment of the Circuit Court should be reversed, and the cause remanded for a *venire facias de novo*.

Mr. Justice GRIER also 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 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 in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

CHARLES J. GAYLER AND LEONARD BROWN, PLAINTIFFS IN ERROR, *v.* BENJAMIN G. WILDER.

After a case has been decided, and judgment pronounced by this court, it is too late to move to open the judgment for the purpose of amending the bill of exceptions, upon the ground that material evidence which might have influenced the judgment of this court was omitted in the bill.

If there was any error or mistake in framing the exception, it might have been corrected by a *certiorari*, if the application had been made in due time and upon sufficient cause. But after the parties have argued the case upon the exception, and judgment has been pronounced, it is too late to reopen it.

AT a subsequent day of the term a petition was filed by the plaintiffs in error, that the foregoing case might be reopened for the purpose of amending the bill of exceptions, and re-argued on such amended bill.

The petition recited certain portions of the opinion of this court in the case relating to the Conner safe, wherein the court, after recapitulating the evidence applicable thereto, as *well as the instruction given by the court below, [*510 decide that there was no error in such instruction, which "put it to the jury to say, whether this safe had been finally forgotten or abandoned before Fitzgerald's invention, and whether he was the original inventor of the safe for which he had obtained the patent; directing them, if they found these two facts, that their verdict must be for the plaintiff." The petition then avers, that the existence and use of the Conner safe, from the time of its construction to the time of the trial, was proved in the court below, and that it was so stated in a bill of exceptions prepared by the counsel of the petitioners and submitted to the court. That the original plaintiff did not make any specific objections to petitioners' statement of the evidence as to the Conner safe (as is alleged to be the practice settled by the Supreme Court of New York), but proposed a different bill of exceptions as a substitute therefor, which the court below adopted against the remonstrance of petitioners' counsel. The petition then insists that, if the facts stated in petitioners' bill of exceptions repecting the Conner safe had been set forth substantially in any bill of exceptions, this court, upon the principles contained in their opinion, must have determined this cause in favor of plaintiffs in error.

Mr. Coxe moved for a re-argument on the grounds stated in the petition.

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

This case was argued early in the present term, and the judgment of the Circuit Court affirmed.

A motion is now made to open the judgment for the purpose of amending the bill of exceptions and rehearing the case, upon the ground that material evidence offered by the plaintiffs in error, which might have influenced the judgment of this court, has been omitted in the bill of exceptions contained in the record.

If any error or mistake was committed in framing this exception, it might undoubtedly have been corrected by a *certiorari*, if the application had been made in due time and upon sufficient cause. But this application is too late, even if the evidence which the plaintiffs in error propose to introduce would have influenced the decision. We by no means intend to say that it would have done so. But they rested satisfied with the exception as it stood; made no objection to it here; and argued the case and awaited the judgment of the court upon the evidence as stated in the exception. After that judgment has been pronounced, it is too late to say that the statement was imperfect or erroneous, and to make a new case by the introduction of new evidence, and a new exception.

The motion is therefore overruled.

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*The Town of East Hartford, Plaintiff in error, *v.* The Hartford Bridge Company.

From the year 1681 to 1783, a franchise in the ferry over the Connecticut River belonged to the town of Hartford, situated on the west bank of the river.

In 1783, the legislature incorporated the town of East Hartford, and granted to it one half of the ferry during the pleasure of the General Assembly.

In 1808, a company was incorporated to build a bridge across the river, which, being erected, was injured and rebuilt in 1818, when the legislature resolved that the ferry should be discontinued.

This act, discontinuing the ferry, is not inconsistent with that part of the Constitution of the United States which forbids the states from passing any law impairing the obligation of contracts.[1]

There was no contract between the state and the town of East Hartford, by which the latter could claim a permanent right to the ferry. The nature of the subject-matter of the grant, and the character of the parties to it, both show that it is not such a contract as is beyond the interference of the legislature.[2]

Besides, the town of East Hartford only held the ferry right during the plea-

[1] See *Dodge* v. *Woolsey*, 18 How., 379.

[2] Followed. *Newton* v. *Commissioners*, 10 Otto, 558.

sure of the General Assembly, and in 1818 the latter expressed its pleasure that the ferry should cease.

After the year 1818, the legislature passed several acts contradictory to each other, alternately restoring and discontinuing the ferry. Those which restored the ferry were declared to be unconstitutional by the state courts, upon the ground that the act of 1818 had been passed to encourage the bridge company to rebuild their bridge, which had been washed away. But these decisions are not properly before this court in this case for revision.

The town of East Hartford, having no right to exercise the ferry privilege, may have been correctly restrained, by injunction, from doing so, by the state court.

THIS was a writ of error to the Supreme Court of Errors for the state of Connecticut.

The defendant in error filed its petition in the Superior Court, holden at Hartford, for an injunction restraining the town of East Hartford (plaintiff in error), its servants, agents, &c., from the use of a certain ferry over the Connecticut River, and from receiving tolls, &c. Upon the hearing of the cause on petition, answer, and the report of a committee appointed to inquire into the facts, the injunction was granted; and upon being carried to the Supreme Court of Errors, the decree of the court below was affirmed. Whereupon the case was brought here by writ of error, under the twenty-fifth section of the Judiciary Act.

The report of the committee was as follows, omitting the documents referred to therein, and which were appended to the report:—

"To the Honorable Superior Court, to be holden by adjournment at Hartford, in and for the County of Hartford, on the second Tuesday of June, A. D. 1843:

"At an adjourned term of said court, holden at said Hartford on the 1st day of May, 1843, upon a bill in equity then and there pending before said court, in which bill the Hartford *Bridge Company is complainant, and the town of East Hartford and Samuel Brewer, of said town of East Hartford, are respondents, the subscribers were appointed a committee to find and report to said court, at an adjourned session thereof, to be holden at Hartford aforesaid, on the second Tuesday of June, 1843, the facts in said bill, and the answer thereto. And having duly notified the parties of the time when, and the place where, we would meet and hear them in relation to the facts in said bill and answer contained, we, in conformity with said notice, met the parties on the 6th day of June instant, at the city court-room in the said town of Hartford, and, having been first sworn according to law, fully heard them, from day to day, by their counsel and with their testimony and witnesses, and now find and report the

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facts following, viz.: That in the month of December, 1681, the town of Hartford passed a vote regulating the tolls to be taken at the ferry over Connecticut River, between said town of Hartford and what is now the town of East Hartford; which appears by a copy of said vote hereunto attached, and marked A. That on the 31st day of March, 1682, said ferry was, by said town of Hartford, leased to Thomas Cadwell for the term of seven years; a copy of which lease is attached hereunto, marked B. That on the 13th day of December, 1687, said lease was renewed to the same Thomas Cadwell for the further term of seven years; a copy of which renewal is attached hereunto, and marked C. That on the 27th day of December, 1694, said town of Hartford chose a committee to contract with some person to take the ferry upon the best terms in their power; of which vote a copy is attached hereunto, marked D. That on the 15th day of January, 1695–6, said committee engaged the said Thomas Cadwell to take the ferry aforesaid for seven years; of which lease a copy is hereunto attached, marked E. That at the session of the legislature in October, 1695, the tolls to be taken, both at the Hartford and Windsor ferries, were regulated by law, as will appear by an act in the edition of statutes, 1695. That the tolls or fares to be taken at the Hartford ferry were regulated by legislative enactments, as appears in the edition of statutes, 1808. That from the year 1681 until October, 1783, said ferry continued to be the franchise of said town of Hartford, and during that period was used and enjoyed as such by the town of Hartford alone; but that the legislature, at their session in October, 1783, incorporated the town of East Hartford, granting to said town of East Hartford one half of said ferry during the pleasure of the General Assembly; a copy of which act is hereunto attached, marked F. That said town of Hartford, on the 1st day of February, 1810, for the considera-

*513] *tion of an annual rent of forty-five dollars, leased its moiety of said ferry to Daniel Buck and Elisha Williams for the term of five years, and that the payment of the rent reserved in said lease was duly made by said lessees up to the year 1814, when, in consequence of the reduced travel across said ferry, said town of Hartford exacted of said Buck and Williams no rent thereafter; but that certain individuals interested in the business and real estate on Ferry Street, in said town of Hartford, and others, at their own expense, procured a ferry-boat, which was run across said ferry, and from which they received no toll whatever, and no compensation, other than an allowance made by the ferryman for the use of the boat, the town of Hartford making no opposition to this

use of their right, which continued until the year 1818. That at the session of the General Assembly in October, 1808, upon the petition of John Watson and others, an act or resolve was passed incorporating the said John Watson and others by the name of the Hartford Bridge Company, and granting them liberty to erect a bridge across Connecticut River, and to raise and build a causeway through the meadows of East Hartford; which act or resolve is made a part of this report, and is contained in the volume of Private Acts of the state of Connecticut, at the 254th page. That the petitioners, in pursuance of said charter or act of incorporation, erected a bridge across said Connecticut River, and built said causeway through the meadows of East Hartford, and in all things pursued the provisions contained in said act of incorporation, except that said bridge was not so erected that the travel was on a horizontal line in the chord of the arch, nor were the piers as high as contemplated by the act of incorporation; but said bridge and causeway, after the same were completed, were accepted by John Cadwell, Jonathan Brace, and Andrew Kingsbury, Esquires, a standing committee by the General Assembly appointed in said act of incorporation, for all the purposes mentioned in said act, whose certificate, marked G, is hereunto attached; and that no objection to the mode or manner of the erection of said bridge in not having the travel thereon on a horizontal line in the chord of the arch, nor to the height of said piers, has been made known until after the petition which the petitioners preferred to the October session of the General Assembly in the year 1817; but that the General Assembly has once and again acted upon the subject of the tolls of said bridge, and other interests appertaining thereto, and granted the petitioners a new charter in the year 1818, without claiming that the charter of 1808 was forfeited by a noncompliance with any of the conditions thereof. That the petitioners, on the 3d day of October, 1817, made application *to the General Assembly for a discontinuance of said ferry between the towns of Hartford and East Hartford; which petition is hereunto attached, marked H; upon which petition the General Assembly passed a resolve or act; which resolve or act is copied, and is hereunto attached, marked I. That under said resolve the petitioners expended large sums in the repairs of said bridge and causeway, under the inspection of the said John Cadwell, Jonathan Brace, and Anthony Kingsbury, Esquires, who, by said act or resolve, were by said General Assembly constituted a committee or commissioners to superintend the repairs on said bridge and causeway. That in erecting or repairing said bridge, the peti-

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tioners, from time to time, received directions from said committee or commissioners, which directions were followed and obeyed, and said causeway and bridge were repaired and ready for the accommodation of the public on the 1st day of December, 1818, as appears by the certificate of said committee or commissioners hereunto attached, marked K; but in the erection of said bridge by the petitioners, that part of the wood-work or floor of said bridge which is opened or unfolded for the passage of vessels, was constructed only 24 feet 7 inches wide, while the space underneath, between the abutment and pier of said bridge on the west side, through which the hull of vessels must pass, is more than 30 feet wide. That no delay has ever been occasioned to any vessel in passing through said bridge for want of space or room through which to pass; nor does it appear that any objection against the width of the passage through said bridge was ever raised by the public, or by those who are in the habit of passing with their vessels through said bridge, until after the year 1836. And this committee are of opinion, and do find, that, notwithstanding the opening in the wood-work of said bridge, through which vessels are to pass, does not exceed 24 feet 7 inches in width, yet there is adequate room for the accommodation of all who have occasion to pass through said bridge with their vessels, and no inconvenience is suffered by the public in consequence of the narrowness of the passage through the wood-work of said bridge. And although the rights of the petitioners in relation to said bridge, and their compliance with or violation of the terms and provisions of their several charters, have been frequently, both incidentally and directly, the subjects of discussion and debate before the General Assembly, and their decision upon said points been had, yet has no real or apparent noncompliance on the part of the petitioners with the terms or provisions of the charter of 1818, in neglecting to make the opening in the wood-work of said bridge for the passage of vessels wider than 24 feet 7 inches, ever been deemed or adjudged by *said General Assembly a violation of said charter, or a forfeiture thereof, notwithstanding they have once and again been urged to come to such a conclusion. That on the 21st day of April, 1837, S. W. Mills and others preferred their petition to the General Assembly of said state, to be holden at Hartford on the first Wednesday of May of the same year, complaining, among other things, of the width of the draw of said bridge; a copy of which petition is hereunto attached, marked L; upon which petition, at the same session of the General Assembly, a report of the joint standing com-

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mittee on roads and bridges was made and accepted; a copy of which is hereunto attached, marked M. That when the town of Manchester, by an act of the General Assembly, passed at their session in May, 1823, was incorporated into a town, and set off from said town of East Hartford, no notice was taken in said act of the interest of said town of East Hartford in said ferry; which act incorporating said town of Manchester may be found on the 1155th page of the private acts or laws of the state of Connecticut, and is made a part of this report. That after the passage of the act of the year 1818 by the General Assembly, and the discontinuance of the ferry between the towns of Hartford and East Hartford, the town of Hartford, at an adjourned town-meeting, holden in said town on the first Monday of December, 1835, passed several votes; copies of which votes are hereunto attached, marked N; and that prior to the year 1818, and the passage of the act of the General Assembly granting to the petitioners permission to erect a new bridge; the inhabitants of said town of Hartford, at an adjourned town-meeting by them holden on the 29th day of December, 1817, passed a vote, a copy of which, marked O, is hereunto attached. That at the session of the General Assembly in May, 1836, an act was passed, repealing so much of the act of 1818 as abolished or discontinued the ferry between the towns of Hartford and East Hartford; which act is made a part of this report, and is on the 565th page of the private acts or laws of the state of Connecticut; which act or resolve was passed upon the petition of Caleb Stockbridge and others; to which petition the towns of Hartford and East Hartford were made respondents. That said General Assembly, at their session in May, 1842, passed a resolve, which is made a part of this report, and is found on the 21st page of the resolutions of the General Assembly, passed May session, 1842. That on the 14th day of May, 1842, application was made by the agent and attorney of the petitioners to several of the selectmen of said town of Hartford, for the purchase of the right of said town of Hartford in and to said ferry. That several of *said [*516
selectmen, to whom said application was made, did not suppose that said town of Hartford had an interest in more than a moiety of said ferry, although they had been from time to time conversant with all the facts in relation to said ferry, and the various claims concerning the same, made before the legislature when the rights of the petitioners and of said town of East Hartford were discussed, and the petitioners claimed that neither the town of Hartford nor East Hartford had any right to said ferry, but that said selectmen subscribed

an instrument or indenture, a copy of which, marked R, is hereunto attached, subject, however, to the approval of the inhabitants of said town of Hartford, to be expressed at a town-meeting to be subsequently held; and that on the 18th day of May, 1842, said town of Hartford, at a special town-meeting on that day held, by virtue of warning which is hereunto attached, marked S, approved of said indenture or instrument thus executed previously by said selectmen of said town of Hartford; and we find that the agent and attorney of the petitioners, when negotiating with said selectmen in relation to the purchase by the petitioners of the right of said town of Hartford in and to said ferry, distinctly stated to said selectmen that the object of the petitioners, in purchasing the right of the said town of Hartford in and to said ferry, was to enable the petitioners to commence some process before a court of law or equity, by which the questions at issue between the petitioners and the town of East Hartford might be finally decided. That the whole negotiation between the agent and attorney of the petitioners, and said selectmen and town of Hartford, was fairly and honestly conducted. That the petitioners paid to said town of Hartford the first annual payment due on said instrument, in the month of September, 1842. That from time immemorial, until the year 1818, no boats, other than flat-bottomed scow-boats, moved by oars, had been used on said ferry, but that, from the year 1836 until this time, said town of East Hartford, when using said ferry, has run a horse-boat at said ferry. That with the exception of the time when the bridge of the petitioners has been impassable, and said town of Hartford has by law been compelled to keep up said ferry, the said town of Hartford has not made any use of said ferry as a franchise, or derived any benefit or emolument therefrom, since the year 1814. That from the time when the bridge of the petitioners was completed, in the year 1818, until after the passage of the resolve of the General Assembly in May, 1836, said ferry between the towns of Hartford and East Hartford was not used as a public ferry, and no boats during said time were kept thereat by said towns of
*517] *Hartford and East Hartford, or either of them, to transport and convey passengers, freight, &c. That from the time when said ferry between the towns of Hartford and East Hartford was restored by the General Assembly, in 1836, until it was discontinued, in 1841, the town of East Hartford has received for ferriages and tolls collected at said ferry, which during said time has been carried on solely by said town of East Hartford, a large sum of money, viz., more than ten thousand dollars. That, after the year 1814, the

ferry between said towns of Hartford and East Hartford was not kept up by both or either of said towns, but that individuals, upon their own responsibility and at their own cost and charges, managed said ferry, and collected toll thereon, until the bridge first erected by the petitioners was partially or wholly destroyed, in the year 1818, when by law said towns of Hartford and East Hartford were compelled to keep boats at said ferry for the accommodation of the public travel, which the said town of Hartford relinquished and abandoned as soon as the petitioners rebuilt or repaired their said bridge, the erection of which relieved the said towns of Hartford and East Hartford from the necessity and expense of maintaining boats suitable for crossing the meadows in time of flood. That since the completion of the first bridge of the petitioners, in 1811, the petitioners have ever been accustomed to take toll according to law of all who have made use of their said bridge, nor has any person disputed or resisted their right upon the pretence that either the first or the second bridge was not constructed according to the provisions of their several charters or grants. That the petitioners, since the purchase by them of the right of the town of Hartford in and to said ferry, have not run any boat across said ferry, nor made any provision for the accommodation of the public travel at said ferry, nor commenced, until the date of this petition, any suit at law or bill in equity against the respondents, or either of them. The committee further find, that the petitioners have invested in said bridge and causeway a large sum of money; that the bridge and causeway erected by them under the grant or charter of 1808, and which was accepted and approved by the commissioners or standing committee appointed by the General Assembly, cost more than ninety-six thousand dollars; that to reconstruct said bridge under the grant or charter of 1818, and to rebuild said causeway, and make therein and in said bridge such alterations and improvements as were directed by the act of the legislature, the petitioners expended about thirty thousand dollars; and that, for various other repairs and expenditures on said bridge and causeway, the petitioners have disbursed a further *sum [*518
of forty-seven thousand dollars and upwards; so that the standing committee or commissioners on said bridge, when settling the accounts of said Hartford Bridge Company, on the 12th day of April, 1842, found and reported to the General Assembly, that on said 12th day of April, 1842, there was due to the petitioners, for arrears of interest on the capital by them invested, at the rate of twelve per cent. annum, the sum of $227,270.89; that the annual receipts for toll, so far as the

same can be ascertained from the treasury-office, are contained in a schedule hereunto attached, marked T. The committee find that Samuel Brewer, one of the respondents, at the time of commencing this petition, was one of the selectmen of said town of East Hartford, and, as agent of said town of East Hartford, had charge of said ferry and of the ferry-boat. And we further find, that although some of the inhabitants of East Hartford, Glastenbury, and other towns, are personally accommodated by a continuance of the ferry, especially when their business in the town of Hartford calls them into State street, or parts of the town of Hartford lying south of State street, inasmuch as the distance which they are under the necessity of travelling is considerably diminished, and the toll or fare which they are compelled to pay is less at the ferry than at the bridge, still it is only when the river is low in the summer season, and the weather not windy and boisterous, that the ferry is preferable to the bridge, even to these individuals. But the committee are of opinion, and do find, that said ferry is not of public convenience and necessity, nor do the interests of the community require its continuance. The committee further find, that the bridge of the Hartford Bridge Company, over Connecticut River, is not only highly advantageous to the prosperity and increasing growth of both the towns of Hartford and East Hartford, but is of great public convenience to all who have occasion to cross Connecticut River at this place. That the value of real estate, both in the towns of Hartford and East Hartford, has been greatly enhanced since the erection of said bridge, and in consequence of the facilities of intercourse with the city of Hartford and places contiguous, thereby furnished; and that said bridge is of great public convenience and necessity, and is abundantly adequate to accommodate all who may wish to come to or depart from Hartford across Connecticut River, between the towns of Hartford and East Hartford; neither can the inhabitants of Hartford or East Hartford, nor the community at large, dispense with said bridge. The committee is of opinion, that the real estate in the towns of Hartford and East Hartford, since the erection of said bridge, and by reason of the facilities thereby furnished to travellers and *others, has been increased in value to an amount greater than all that has been expended by the petitioners in the erection and support of said bridge and causeway since the year 1808, and that, were said ferry of public convenience and necessity, it could not be made at all seasons of the year, both by night and by day, so safe and so commodious as the bridge of the petitioners now is and has ever been. That at the time of the passage of the act of 1818, the tolls which the

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petitioners were before that time authorized to receive were much reduced. That the legislature have from time to time taken into consideration said bridge and ferry, and the interests and rights of the public in relation thereto will appear by several resolves and acts of said legislature, all of which are part of this report, two of which acts are found on the 260th and two on the 261st page of the private laws of the state of Connecticut, and one on the 55th page of the resolves passed by the General Assembly in the year 1839, and two of said resolves are to be found on the 564th and 565th pages of the private acts of the state of Connecticut. That the resolve or act passed by the General Assembly, at their session in May, 1842, restoring to the towns of Hartford and East Hartford the ferry between said towns, was founded upon a report of the joint select committee of the legislature, a copy of which report, marked X, is hereunto attached; to the admission of which report as evidence on the part of the respondents the petitioners objected, and the same was admitted, subject to such objection. That, at a session of the General Assembly in May, 1841, a resolve was passed discontinuing or suppressing said ferry, which act or resolve is hereunto attached, marked Y; which act or resolve was passed upon the report of a committee of said Assembly, a copy of which report is hereunto attached, marked Z; to the admission of which report on the part of the petitioners an objection was made by the respondents, and the same was admitted, subject to said objection. That, at the time when said instrument or indenture between the town of Hartford and the petitioners was executed, a petition in favor of the town of East Hartford was pending before the legislature, to which petition the said town of Hartford and the petitioners in this bill were respondents.

"All which is respectfully submitted by

EB. LEARNED, } *Committee.*
JOHN STEWART, }

"*Hartford, June* 10, 1843.

The following summary of the legislation of Connecticut on the subject-matter of this controversy will be sufficient to indicate the constitutional question growing out of it.

*The act of 1783 divided the ancient town of Hartford (which lay on both sides of the river) into the towns of Hartford and East Hartford, and at the same time the property of the ancient town was also divided; "and the privilege of keeping one half of the ferry," &c., was declared [*520

to "belong to East Hartford during the pleasure of this Assembly."

The act of 1806 established the boundaries of the two ferries between the towns of Hartford and East Hartford, and provided "that the occupiers of such ferry, south of said boundaries, shall have the exclusive privilege of taking passengers south of said boundaries, and the occupiers of said ferry north of such boundary shall have the exclusive privilege of taking passengers north of said boundaries."

The act of 1808, which incorporated the Hartford Bridge Company, contained the following proviso, viz.: "Provided, that nothing in this grant shall now, or at any future time, in any way lessen, impair, injure, or obstruct the right to keep up and maintain the ferries established by law between the towns of Hartford and East Hartford," &c.

The act of 1818 provided that, whenever the bridge company should have repaired their bridge, &c., "the ferries by law established between the towns of Hartford and East Hartford shall be discontinued, and said towns shall thereafter never be permitted to transport passengers across said river, unless on the happening of the contingency hereinafter mentioned." The contingency was the non-repair of the bridge, in which case the towns of Hartford and East Hartford were to resume their rights "to occupy and improve said ferries."

The act of 1836 repealed the act of 1818 so far as it interdicted the ferry.

The act of 1841 repealed that of 1836, and the act of 1842 repealed that of 1841, and in the second section provided, that the right of the town of East Hartford to keep and use the ferry, "as possessed by said town of East Hartford prior to said act of 1841, is hereby restored and confirmed," &c.

The cause was argued by *Mr. Chapman* and *Mr. Toucey*, for the plaintiff in error, and by *Mr. Parsons* and *Mr. Baldwin*, for the defendant in error.

Mr. Chapman, for the plaintiff in error.

1. The right to the ferry was an absolute title by legislative grant. It is expressly recognized as such in the act of incorporation, and has been held as such ever since 1680. It is averred in the complainant's bill, admitted in the answer, and was found by the committee appointed to inquire into the facts. It must therefore stand as a fact in the case which admits of no question.

*521] *2. The act of 1818 was passed for the purpose of suspending the ferry. It is entirely unconstitutional.

It was the suspension of the exercise or enjoyment of a franchise in one corporation for the benefit of another.

3. A moiety of the ferry title, after 1783, has always been in the plaintiff in error, and it has therefore the right to interpose this constitutional objection. The ancient ferry title was in the corporators of the ancient town of Hartford; when the town was divided, their corporate property was divided. The legislature had the mere power of partition. And the act of 1818, even if it was the exercise of a reserved power of partition, could not give the title to the ferry to the bridge company. But the act of 1818 does not purport any such intention; nor did it transfer any title to the corporators of Hartford. It expressly provides for the continuance of the title in the corporators of East Hartford. The right of ferry was admitted in the court below, and that it could not be taken away without compensation. The *principle*, then, is admitted, though its application is denied.

The act of 1836 re-establishes the ferry right in both towns. This act repeals that of 1818, and the town of Hartford itself, by its vote, aided in procuring this very act. Even, then, if by any legerdemain the title had been entirely in the town of Hartford, here by their own concurrence an act is passed which gives a moiety to East Hartford.

But the consent of Hartford was not necessary to the repeal of the act of 1818. The act of 1836 was constitutional. It sustained the original grant, and stood upon the same footing as the original grant, and could no more be repealed than the original grant.

The act of 1842 establishes the title of East Hartford. The lease of 1842 makes no difference, because it only conveyed that which belonged to East Hartford, which was a moiety. The act of 1806 was an absolute and unqualified grant. Nothing could be stronger or more direct.

The bridge company were incorporated as a bridge company, and could not exercise the ferry franchise. But it is said that there was *non-user* of this franchise for eighteen years, and that this amounted to an abandonment. If, however, the ferry title was abandoned, it was abandoned by both towns. If it was forfeited, it was forfeited to the state. But there was an express prohibition by the state to use this franchise. This would justify the *non-user*.

Mr. Parsons, for defendant in error, maintained,—

1. That the ferry franchise, being acquired by user, is only commensurate with the use which has always been enjoyed,

subject to the control, and dependent upon the will, of the General Assembly.

That from 1695 the General Assembly had prescribed and regulated the tolls to be taken at the ferry, and, in common with the other ferries in the state, had prescribed the size and strength of boats, how they should be manned, the hours of attendance, and every thing connected with the public accommodation.

2. That the ferry had been voluntarily relinquished by the plaintiff from the time the first bridge was opened for travel, in 1811, and by the town of Hartford from 1814, and when so relinquished was purchased by the bridge company by the acceptance of their amended charter in 1818, and being once relinquished, the right was gone for ever. *Corning* v. *Gould*, 16 Wend. (N. Y.), 531, and cases there cited.

3. That if not *voluntarily* relinquished, the ferry was abandoned by non-user, previous to 1836, when it was revived by the General Assembly. A non-user merely for fifteen years, in analogy to the statute limiting the right of entry on lands in Connecticut, creates a perfect presumption of abandonment. *Taylor* v. *Hampton*, 4 McCord (S. C.), 96; *Lawrence* v. *Obee*, 3 Campb., 514; and the above case in 16 Wendell.

4. It is an inherent right of every state government, subject only to the limitations of its own constitution, to appropriate the private property of its citizens for public use at its discretion; and whether it be land, a franchise, or an easement, is wholly immaterial. A contract or grant is subject to the right of eminent domain, and in resuming a grant the state only claims of the grantee the fulfilment of the implied condition on which it was made; and whether compensation is or is not made, it is not within the tenth section of the first article of the Constitution. *West River Bridge Co.* v. *Dix*, 6 How., 507; *Mills* v. *St. Clair County*, 8 How., 569; *Enfield Bridge Co.* v. *Hartford and New Haven Railroad Co.*, 17 Conn., 60.

5. But the charter of 1818 was previous to the adoption of the constitution of Connecticut, and the powers of the state in the premises, under the charter of Charles the Second, were unlimited. *Gov., &c., of Cast Plate Manufacturing Co.*, v. *Meredith*, 4 T. R., 794.

The right of eminent domain belongs to all countries and all states, and is either limited or unrestricted, according to the fundamental rules by which the people have chosen to bind themselves by their state constitution.

6. The town of East Hartford had no right in the ferry except what it derived from its act of incorporation, which

might *be determined at the will of the Assembly, and, being determined in 1818, is not a subject-matter of complaint by the plaintiff in error.

On the division of towns, all the corporate property belongs to the old town, unless expressly granted to the new one. *Hartford Bridge Co.* v. *East Hartford*, 16 Conn., 172, and cases cited.

That the legislature regarded the rights of the plaintiff in error as temporary, is clear from the facts,—

1st. That the ferry is never spoken of as the East Hartford ferry, but in the regulation of tolls, and in all acts from 1783 to 1818, it is called the Hartford ferry.

2d. In an act passed in 1805, it is enacted that the town of East Hartford, so long as it shall receive any profit from the *Hartford ferries*, shall keep boats to transport passengers across East Hartford meadows, &c.

That both towns regarded the right of the ferry as depending upon the will of the General Assembly, is evident;—

1st. Because no one ever attempted to exercise a ferry right between the towns after 1818, except by first obtaining liberty of the General Assembly to exercise such right, which was first granted in 1818.

2d. Neither of said towns ever commenced any process before a judicial tribunal to test its rights during the eighteen years the ferry was suppressed.

3d. The town of Manchester was incorporated in 1823, being taken from said town of East Hartford, but no notice was taken in the act of incorporation of any interest in the ferry. This would not have escaped the attention of the new town, had they supposed that the legislature had exceeded its powers in suppressing the ferry.

Mr. Baldwin, on the same side.

What were the rights of the town of Hartford, as against the state?

The town of Hartford was a local and public corporation, established for public purposes pertaining to the internal police and government of the state. Its functions are entirely of a public and municipal character, and are such as from time to time the legislature deem it proper to impose. Its property is holden, not for the private interest of the members of the community, but for the public purposes for which the corporation itself is established.

Towns in Connecticut are charged with the duty of making and maintaining all necessary highways and bridges within

their limits, which it is not the special duty of some other cor-
*524] poration *or person to support; with the maintenance of the poor, and with certain specified duties of local legislation. They are also represented in General Assembly,—a corporate representation.

They act in the performance of all their public duties as the agents of the government by whom these duties are imposed, upon such terms as the sovereign power deems just and reasonable; as, for instance, in maintaining the town and state poor.

They are necessarily, as parts of the machinery of government, subject from time to time to the regulation of the sovereign power, which is charged with the promotion of the general weal.

Ferries over navigable waters can only be established by authority of the sovereign power. Being established, when necessary, for the general convenience, the charge of maintaining them may be imposed upon the local communities, in the same manner as the support of the highways and bridges, which are deemed properly to devolve on towns whose inhabitants have most occasion for their use, and whose general interests are promoted by the facilities they afford, equal to the burden of their support.

Or, if deemed reasonable by the state, these charges may be shared by all who participate in the benefits, by the authorized imposition of reasonable tolls. If this latter mode be preferred, the government has the option either to *impose the duty* with the privilege of such regulated rates of toll as from time to time justice may seem to require; or to contract with individuals or private corporations to perform the duty for such stipulated mode of compensation as shall be agreed upon by the parties. Or it may divide the burden between such public and private corporations, as is frequently done when towns are required to purchase the right of way, and a private corporation is established to construct a road for the stipulated tolls.

The ferry across Connecticut River appears, from the finding of the committee, to have been maintained by the town of Hartford from its commencement, subject to the regulation of its tolls at the pleasure of the General Assembly.

It was obviously in its origin regarded as a public establishment, the charge of which was imposed as a duty on the town within whose limits it was included, but the expenses of which were to be borne by a tax levied in the shape of tolls by those who had occasion for its use,—like a public office for the fees—not as a privilege for the pecuniary advantage of

the town. It was not the case of a risk voluntarily assumed by the investment of capital in a bridge or road, in consideration of expected reimbursement from specified and permanent rates of toll.

*As the town extended across the river, it was competent for the legislature to impose the duty of maintaining the ferry without other remuneration than the local benefit, as in the case of roads and bridges; or from time to time to regulate the tolls so as barely to defray the expense. It rested in the discretion and judgment of the legislature, justs as it rests in their judgment, in the progress of population, intercourse, and wealth, to determine whether the public necessity requires a bridge or a ferry, and which shall be suppressed or abandoned, if both cannot exist together. [*525

A ferry may not only be suppressed for the purpose of securing a mode of passage more convenient to the public; but its suppression may be ordered from a regard solely to its insecurity as compared to a bridge.

At the time of the suppression of the ferry, in 1818, it was, and had been for years, practically abandoned by the town, and was conducted at their own charge, by individuals who paid no rent. The bridge having been carried away, there was a *public* necessity that it should be rebuilt, and none for the continuance of the ferry, which yet was an obstacle to the rebuilding of the bridge.

What rights, then, had the town of Hartford to its continuance, or to demand compensation for its suppression?

It was established because required by public convenience. It was now a nuisance, depriving the public of the greater benefit of a bridge.

Is the original grant to the town of Hartford to be presumed from the user, by which alone it is proved, to have been made for any longer period than the public convenience might require? Is it to be presumed that a public corporation, itself created for the promotion of the public interest, subject to be divided or dissolved at the pleasure of the General Assembly, was vested with a power of perpetuating a ferry after it had become prejudicial to the public, and against the will of the supreme power of the state?

Towns are not established by contract with the inhabitants. They are public institutions,—political organizations performing functions ancillary to, and in lieu of, the government of the state. Hence, being created without regard to private emolument, whatever functions they are permitted to exercise are necessarily subject to the control of the sovereign power.

4 Wheat., 518; 4 Pet. Cond., 540; 9 Cranch, 43; 4 Pet. Cond., 562; 6 How., 548.

To apply these principles to the facts in this case.

The public necessity required a bridge. The bridge corporation had expended $96,000, and their bridge was carried *away. It could not in the opinion of the legislature be rebuilt if the ferry was continued. The inhabitants of the town of Hartford would derive a benefit from the erection of the bridge in the enhanced value of their land, to an amount exceeding its cost.

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It was the duty of the sovereign power to cause a bridge to be erected, because the public convenience and necessity required it. And it was desirable that the tolls allowed by the old charter should be reduced.

The state might cause it to be erected at its own expense, by a general tax; or make it the duty of the county, or the town of Hartford, or the two towns, to build it at their own expense, wholly or in part (in the case of New York canals, people taxed twenty-five miles each side); or charter a private corporation to build it wholly at its own charge for the specified tolls; or partly at the charge of the towns most benefited, so that the tolls on the people of the state generally might be diminished. That would seem to be equitable.

This is almost always done in the laying out of turnpike roads. It was done in the case in 6 Howard; the town of Brattleboro being required to pay for the West River Bridge $4000 in order to make it a free bridge.

Upon what principle is this required? The property of the inhabitants of the town is taken for public use to the amount of $4000. Why? Because the improvement is one from which the inhabitants of the local community derive a special benefit. It takes so much of their property for public use, without other compensation than the benefits it supposes they will derive from the improvement. The legislature judges in regard to the sufficiency of the compensation, as it always does when it taxes or authorizes a local community to tax its inhabitants for a local improvement.

The sovereign power may levy its tax on the inhabitants of the town, or it may require the town to pay it from its treasury, leaving them to replenish their treasury by taxation as they may think fit.

If, instead of requiring the payment of money from the town treasury, the legislature deems it better to take other property of the town, the continued use of which would be incompatible with the enjoyment by the inhabitants of the

benefit of the improvement, what is the objection? The principle is the same; the mode of payment only differs.

Suppose the legislature had said, If the bridge company will rebuild the bridge in the manner we prescribe, and will consent to a reduction of the tolls, the towns of Hartford and East Hartford shall pay towards the cost $10,000; will any *body pretend that that would be any violation of the Constitution of the United States? Is it not a matter [*527 about which the state legislature are the proper and exclusive judges? Surely, if they could require a payment in money, they can, if important for the accomplishment of the object, require the abandonment of a public franchise which interferes with the bridge.

It would seem to be very clear, that it could never have been the intention of the framers of the Constitution to interpose the power of this government between the sovereign power of a state and one of its public corporations. All questions relating to the local corporations of a state are questions which are exclusively addressed to the power of the state which establishes them, and which can alone judge intelligently, in view of all its domestic policy and interests, of the propriety of the regulations it may adopt.

Even as to the property of individuals, the legislature of Connecticut, prior to the adoption of the constitution of September, 1818,—much more as to that of its public corporations,—was governed only by its own sense of justice. The people of the state had confided the sovereign power without limit to the legislature. (See charter.)

But I apprehend, that, when there is a constitutional provision that private property shall not be taken for public use without compensation, it is to the state tribunals, and to them alone, that an individual, whose property has been taken in the exercise of the power of eminent domain, must look for redress. The constitution of the state, and not that of the United States, is violated.

This, I take it, has been explicitly decided by this court, in 6 How., 507, and 8 Id., 584. In the last case, the complainants exhibited a grant to land, vesting the fee-simple title. The state authorized three hundred feet of their land to be taken, when only one hundred were necessary. The bill charges it as oppressively taken. The demurrer admits it. The Supreme Court say it was illegal, and void if so.

But that does not give this court jurisdiction. "It is not an invasion and illegal seizure of private property, on pretence of exercising the right of eminent domain, that gives this court jurisdiction. Such a law, &c., is not a violation of a

contract in the sense of the Constitution." It rests with the state legislature and state courts to protect their citizens from injustice of this description. "The framers of the Constitution never intended that the legislative and judicial powers of the general government should extend to municipal regulations *necessary to the well-being and existence of the states." 8 Howard, 584.

*528]

The right of eminent domain is the right of civil government over all the territory and persons within the limits of a state, notwithstanding its grant of the property to individuals. It is a right paramount to, and unaffected by, the grant. It forms no part of the contract. It is a right inherent in the sovereignty of the state, to be exercised in cases of necessity. Until the necessity arises, the grantee's right of property is absolute. It is a power of government,—not an interest in the property,—a latent power called into activity by reason of the necessity that exists for its exercise, and not of any pre-existing contract. It exists to the same extent over property derived from another, as from the state itself. Thus, for example, when a state is admitted to be formed out of a territory, the property in the land is in the United States and its grantees, the eminent domain is in the state; or, in other words, the right of civil government. The right is as absolute as the necessity which calls for its exercise. The duty to make compensation is to be regulated by the sense of justice of the sovereign power, or by the constitution of the state.

It is no part of the contract or grant of the title, that the government will make compensation, if a public necessity should require the taking of the land for public use. It is to be presumed it will do so in all cases proper for compensation, where there is no constitutional requirement; and where there is, the party wronged has recourse to the judicial tribunals of the state for redress for a violation of the constitution of the state, not of the United States.

There is no necessity to presume a contract to entitle the party to redress. But it is necessary that there should be a contract violated to give this court jurisdiction.

If it has been shown that the town of Hartford would have no right to complain of the act of 1818 as unconstitutional, *a fortiori* East Hartford has none.

But suppose the town of Hartford might complain, no rights of East Hartford were violated. That corporation had no rights except such as were granted during the pleasure of the General Assembly.

Why were they so granted? For some purpose,—what? It could be only for one of two purposes;—1st. To enable

the General Assembly to do justice to the town of Hartford by restoring it after a reasonable time; or 2d. To manifest its own power to regulate and control it. East Hartford, taking the grant with a reservation, cannot repudiate the limitation of her right, and claim the grant as absolute.

*But it is said by the plaintiff in error, that the people of East Hartford always had an undivided interest as corporators, which the legislature could only assert. Not so. The inhabitants had no private interests in this ferry. The town as a corporation held it, and the use was wholly public. [*529

The legislature, on dividing the two towns in 1783, if they had deemed it best, might have left the ferry wholly to the management of the old town, as better qualified to serve the public. If they had made no direction, it would have remained in Hartford.

East Hartford had, then, just what interest the legislature thought proper to grant it.

What was the nature and extent of that grant? Who shall interpret it? Who but the courts of the state? They have interpreted it to be simply a grant *determinable at the pleasure of the General Assembly.* How can this court say that a just apportionment of the property and burdens of the old town required any thing more?

If not, no matter whether the charter of 1818 was a suspension or an abrogation of the right. So long as the use of it is inhibited, it becomes an illegal disturbance of our right.

The act of the legislature for the suppression of the ferry, in the day and time of it, was acquiesced in by both towns, for a period long enough to warrant a presumption of abandonment. The Supreme Court say that it was so acquiesced in and abandoned. It would not be necessary, therefore, for the court in Connecticut to have decided any thing else. They might have admitted the invalidity of the act of 1818 as to both towns, and yet held the decision of the court below right, on the ground of waiver and abandonment.

Mr. Toucey, in reply.

1. The first question is, whether there is a contract under which the plaintiff may claim.

2. Whether that contract has been impaired in its obligation by legislative act, as enforced by the judgment or decree.

The ancient ferry title was an absolute title by legislative grant, alleged in the bill, admitted in the answer, found by the committee, upheld by all the legislation of the Colony and the state (except the suspension) by the acts of 1680, 1783, 1806, 1808, 1818, 1836, 1842, admitted by the bridge company's lease

from Hartford, and admitted by the Supreme Court of Connecticut as to Hartford. 17 Conn., 91; *Baldwin* v. *Norton*, 2 Id., 161; *Gaylord* v. *Couch*, 5 Day (Conn.), 223.

It has been urged and relied on by the other side, being what the committee have found, though not put in issue, "that the *530] *tolls or fares to be taken at the Hartford ferry were regulated by legislative enactments, as appears in the Ed. of Stat. 1808." Now the only instance shown in the Statutes of 1808 is where the fares are enlarged. And has it ever been doubted that the legislature may enlarge the liberties of a franchise? How, then, could acts of the legislature enlarging the ferry rights be construed as exercises of the restraining power of the legislature contended for in this case?

The acts of May and October, 1806, permanently and finally fixed the boundaries between Hartford and East Hartford. Before that time the boundaries had been settled only during the pleasure of the Assembly, by giving for the present an undivided moiety to each. But the acts of 1808 purport to fix and establish the boundaries as they shall remain. The only power of the legislature was to make a partition of the property, upon a division of the town. They divide it for the time being by giving a moiety to each. But the acts of 1808 fixed the boundaries for ever. The very act incorporating the bridge company recognized the rights of the ferry-owners, by enacting that nothing in that grant should lessen, impair, &c., the ferries established by law. And even the act of 1818, of which we complain, recognizes the same title, so that, if the bridge were destroyed, the ferry rights would be reserved. Then comes the act of 1836, which sets the ferries up again, and the act of 1842 further establishes and confirms the ferry rights.

Next as to the interest of the plaintiff in error. The corporators of East Hartford were part owners from 1680 to the present time, not excepting the suspension. They were joint tenants to 1783,—103 years; owners of an undivided moiety from 1783 to 1806; and owners of one ferry in severalty from 1806 to 1841. The legislature had the power of division, and the power of division only. If that was exercised, it was exhausted. If it was divided, it was divided for ever. That which was given to each, was given to it for ever. No power of partition remained after the act of 1806. The act of 1818 does not purport to divide the ferry right. There was no intent to terminate the title of East Hartford, or transfer it to Hartford, in that act. Its transfer was effectually interdicted. Then there is an express provision for continuance of title in East Hartford. The act itself is not a termination of title, but a partial, conditional suspension only.

But we are told that the act of 1836 has been decided by the state court to be unconstitutional, and that therefore it cannot be brought here for revision. Well, it is true that, where the state court has decided one of the state laws to be unconstitutional, that decision cannot be brought here for reversal. But *in a collateral way this court may determine the same law to be constitutional. For if this court should [*531 be of opinion that the act of 1818 was unconstitutional, they could hardly be bound by the decision of the state court upon the unconstitutionality of the act of 1836, founded entirely upon its interference with the right growing out of the act of 1818. *Williamson* v. *Berry*, 8 How., 495.

The act of 1836 was constitutional, for the reason that the act of 1818, with which it conflicts, was unconstitutional; and this confirmation is as irrepealable as the original grant. The act of 1841 purports to repeal that of 1836 and reëstablish that of 1818. Certainly no new right could be acquired under this act.

Was the suspension of the ferry right constitutional? The act of 1818 was not a grant of the old ferries to the bridge company. It was not a grant of an exclusive franchise within certain limits, including the old ferries. The legislature might cover the river with bridges or ferries without infringing the act of 1818. It was not the grant of a line of travel. *Warren and Charles River Bridge case*, 11 Pet., 420. It was not an express grant of the ferry tolls, or any part of them. It was a mere naked suspension of two existing franchises. It was direct legislative action on the contract. It was the interpolation of a new and most important exception into the contract. As interpreted and enforced, it is a transfer of the ferry tolls by implication from the ferry owners to the bridge owners. And this by inference from the assumed legal existence of the suspension. Suppose two competing railroads. Can one be suspended?

It is not done in the exercise of the right of eminent domain. The ferry franchises are not taken. The ferry-ways and ferry-boats are not taken, but remain idle and untouched. No bridge is granted within the exclusive limits of the ferry franchises.

Nothing is taken for public use. The bridge franchise and the ferry franchises had existed side by side for ten years. The bridge company were bound to maintain their bridge under a pledge not to interfere with the ferry.

The avowed object was, not to open a new way by land or by water, but to increase the dividend of the bridge company by the suspension of its rival.

It was a mere act of party legislation, which was in effect an act of plunder, repented of and afterward repealed as inhibited by the Constitution of the United States.

There was no intention to exercise the right of eminent domain. Not only were neither the franchises nor the visible property taken, nor anything else for public use, but no compensation was provided. Provision for compensation makes *532] *the difference between public plunder and the exercise of the right of eminent domain. One is rapine, the other is justice. In every case of a franchise (which is necessarily founded in contract) the one is inhibited, the other excepted in the Constitution. No government in the civilized world can make the exercise of this right equivalent to public plunder, without shaking it to its foundations. This was the doctrine of this court in the *Warren Bridge case*, 11 Pet., 420, and in the *West River Bridge case*, 6 How., 507. In the latter case, the road, abutments, bridge, and franchise were taken for public use *with* compensation. But here the legislature suspends the ferries for the benefit of the bridge company. If I enter into a contract with a man, can the legislature take away that contract? If it be an executed contract, can the sovereign take away the fruits of it? Here, however, the legislature does not pretend to take away the grant, but to alter its provisions, and to alter them not for its own benefit, but for that of another.

Mr. Justice WOODBURY delivered the opinion of the court.

This is a writ of error, under the twenty-fifth section of the Judiciary Act, brought to reverse a judgment rendered by the Supreme Court of the state of Connecticut.

It is claimed by the plaintiff, that the clause in the Constitution of the United States against impairing the obligation of contracts was set up there in defence to certain proceedings which had been instituted against that corporation by virtue of rights derived from legislative acts of that state, which acts the plaintiff insisted had impaired the obligation of a contract existing in behalf of East Hartford.

It being manifest from the record that such a defence was set up, and that the court overruled the objection, so that jurisdiction exists here to revise the case, we proceed to examine whether, on the facts of the case, any such contract appears to have existed, and to have been violated by the state legislation, which was drawn in question.

It will be seen that the point before us is one of naked constitutional law, depending on no equities between the parties,

but on the broad principle in our jurisprudence, whether power existed in the legislature of Connecticut to pass the acts in 1818 and 1841, which are complained of in this writ of error.

The supposed contract claimed to have been impaired related to certain rights in a ferry, which were alleged to have been granted by the state, across the Connecticut River. This grant is believed to have been made to Hartford as early as the year 1680, and half of it transferred to East Hartford in 1783. But no copy of the first grant being produced, nor any original *referred to or found, it is difficult to fix the [*533 terms or character of it, except from the nature of the subject and the subsequent conduct of the parties, including the various acts of the legislature afterwards passed regulating this matter.

From these it is manifest, that two leading considerations arise in deciding, in the first place, whether by this grant a contract like that contemplated in the Constitution can be deemed to exist. They are, first, the nature of the subject-matter of the grant, and next, the character of the parties to it.

As to the former, it is certain that Connecticut passed laws regulating ferries in 1695; and Massachusetts began to grant ferries as early as 1644 (Col. Charter, p. 110), and to exercise jurisdiction over some even in 1630 (*Charles River Bridge* v. *Warren Bridge*, 11 Pet., 430). In 1691 she provided that no one should keep a ferry without license from the Quarter Sessions, and under bonds to comply with the duties and regulations imposed (p. 280).

In the rest of New England, it is probable that a similar course was pursued by the legislatures, making, as a general rule, the tolls and exercise of the franchise entirely dependent on their discretion. But in some instances the owners of the lands on the banks of small rivers opened ferries upon them, and claimed private interests therein. And in still other cases of public grants to private corporations or individuals, a similar interest has been claimed.

It is highly probable, too, that in some instances public corporations, like the plaintiff in this case, may have set up a like interest, claiming that the subject-matter granted was one proper for a contract, or incident to some other rights, like private interests owned on the bank of a river.

Supposing, then, that a ferry may in some cases be private property, and be held by individuals or corporations under grants in the nature of contracts, it is still insisted here, that the ferry across a large navigable river, and whose use and

control were entirely within the regulation of the colonial legislature, and came from it, would be a mere public privilege or public license, and a grant of it not within the protection of the Constitution of the United States as a matter of contract.

But it is not found necessary for us to decide finally on this first and more doubtful question, as our opinion is clearly in favor of the defendant in error on the other question; viz., that the parties to this grant did not by their charter stand in the attitude towards each other of making a contract by it, such as is contemplated in the Constitution, and as could not be modified by subsequent legislation. The legislature was *534] acting *here on the one part, and public municipal and political corporations on the other. They were acting, too, in relation to a public object, being virtually a highway across the river, over another highway up and down the river. From this standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded. The grantees, likewise, the towns being mere organizations for public purposes, were liable to have their public powers, rights, and duties modified or abolished at any moment by the legislature.

They are incorporated for public, and not private objects. They are allowed to hold privileges or property only for public purposes. The members are not shareholders, nor joint partners in any corporate estate, which they can sell or devise to others, or which can be attached and levied on for their debts.

Hence, generally, the doings between them and the legislature are in the nature of legislation rather than compact, and subject to all the legislative conditions just named, and therefore to be considered as not violated by subsequent legislative changes.

It is hardly possible to conceive the grounds on which a different result could be vindicated, without destroying all legislative sovereignty, and checking most legislative improvements and amendments, as well as supervision over its subordinate public bodies.

Thus, to go a little into details, one of the highest attributes and duties of a legislature is to regulate public matters with all public bodies, no less than the community, from time to time, in the manner which the public welfare may appear to demand.

It can neither devolve these duties permanently on other public bodies, nor permanently suspend or abandon them itself, without being usually regarded as unfaithful, and, indeed, attempting what is wholly beyond its constitutional competency.

It is bound, also, to continue to regulate such public matters and bodies, as much as to organize them at first. Where not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possess as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it. (See Taney, C. J., in 11 Pet., 547, 548.)

*In *Goszler* v. *The Corporation of Georgetown*, 6 Wheat., 596–598, it was held that a city with some [*535 legislative power as to by-laws, streets, &c., could, after establishing a graduation for its streets, and after individuals had built in conformity to it, change materially its height. This case appears to settle the principle that a legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require. And though private interests may intervene, and then should not be injured except on terms allowed by the Constitution; yet public interests in one place or corporation may be affected injuriously by laws, without any redress, as legislation on public matters looks to the whole and not a part, and may, for the benefit of the whole to the injury of a part, change what is held under it by public bodies for public purposes. The legislature, therefore, could not properly divest itself of such control, nor devolve it on towns or counties, nor cease from any cause to exercise it on all suitable occasions. (*Clark* v. *Corporation of Washington*, 12 Wheat., 54.)

Its members are made by the people agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others.[1] *Presbyterian Church* v. *City of New York*, 5 Cow. (N. Y.), 542; *Fairtitle* v. *Gilbert*, 2 T. R., 169.

Nor can the public be estopped by such attempts, since the acts of their agents are to be for the public, and for its benefit, and not for themselves individually, and are under a limited authority or jurisdiction, so as to be void if exceeding it.

[1] Quoted. *State Bank of Ohio* v. *Knoop*, 16 How., 403.

Looking to the subject, when, as here, the grantees as well as the grantors are public bodies, and created solely for municipal and political objects, the continued right of the legislature to make regulations and changes is still clearer. Perhaps a stronger illustration of this principle than any yet cited exists in another of our own decisions.

In the *State of Maryland* v. *Baltimore and Ohio Railroad*, 3 How., 551, this court held, that a grant by the legislature to a county of a sum forfeited could be dispensed with by the legislature afterwards, as it was made for public, not private purposes, and to a public body.

There is no private interest or property affected by this course, but only public corporations and public privileges. It may be otherwise in case of private bodies, or individuals, or of private property granted or acquired. The legislature might not be justified to revoke, transfer, or abolish them on account of the private character of the party or the subject.

*536] *(*Pawlet* v. *Clark*, 9 Cranch, 292; *Terrett* v. *Taylor*, Id., 48–50.) But every thing here is public.

While maintaining the exemption of private corporations from legislative interference, Justice Washington, in 4 Wheat., 659, in the *Dartmouth College case*, still admits that corporations for "public government," such as a "town or city," are under the control of legislation; whereas private corporations are governed by the statutes of their founders, or by their charters (pp. 660, 661). He remarks further, that the members of such a public corporation "accepted the charter for the public benefit alone, and there would seem to be no reason why the government, under proper limitations, should not alter or modify such a grant at pleasure" (pp. 661, 663). And Justice Story concurs with him by saying: "It may also be admitted, that corporations for mere public government, such as towns, cities, and counties, may, in many respects, be subject to legislative contract." 4 Wheat., 694.

When they are wished to be in some respects not so subject, but to act exclusively, it should be so expressed in the constitutions of their states. What is exclusive in them would there appear expressly, and when it is not, a legislative provision, if made for the purpose of rendering it exclusive, is, for the reasons before stated, doubtful in its validity.

The public character of all the parties to this grant, no less than its subject-matter, seems, therefore, to show, that nothing in the nature of a contract, with terms to be fulfilled or impaired like private stipulations, existed in this case so as to prevent subsequent interference with the matter by the legislature, as the public interests should appear to require.

But in order to justify the plaintiff in what it set up below, there must not only have been a contract, or *quasi* contract, but a violation of its obligation. It will therefore be useful to follow out farther the nature and conditions of this supposed contract, in order to throw more light on both the questions whether this grant was such a contract as the Constitution contemplates, and whether it has been at all impaired. The authority of a legislature may probably supersede such a ferry as is public, and across a great public highway of a navigable river, by allowing a bridge over the same place, as has before been virtually held by this court (11 Pet., 422; 6 How., 507). It could also alter or abolish wholly the public political corporation to which the grant was made, as this is yearly done in dividing towns and counties, and discontinuing old ones. It is therefore clear, that, whatever in the nature of a contract could be considered to exist in such a case, by a grant to a town of some public privilege, there must be implied in it *a condition, that the power still remained or was [*537 reserved in the legislature to modify or discontinue the privilege in future, as the public interests from time to time appear to require. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 421; *West River Bridge* v. *Dix et al.*, 6 How., 507.

Accordingly, it is admitted in this case, that the legislature, as early as 1695, in fact regulated the tolls of this ferry, and continued to do it until 1783, when it granted to East Hartford one half of the privilege, and that only "during the pleasure of the Assembly." All concerned in the privilege, therefore, became thus estopped to deny that this ferry was to be used by the town as a mere public license, and to be used in conformity with the views of the legislature as to what in future might be deemed most useful to the community at large.

Because the old town of Hartford acquiesced in this regulation of tolls, and in this transfer of half to East Hartford in this limited or conditional manner, and the latter acquiesced in the acceptance of it on the terms expressed, to hold it during "the pleasure of the Assembly."

Such being, then, the public character of the subject and parties of the grant, and such the terms and conditions of it, —rather than being one of private property, for private purposes, to private corporations or individuals, and absolutely rather than conditionally,—in what respect has it been violated by the legislature?

No pretence is made that it has been, unless by the discontinuance of the ferry in 1818 and in 1841. The former act of the legislature was passed under the following circumstances:

a bridge had been authorized over the river near the ferry as early as 1808, and no provision was then made as to the ferry, probably from a belief that it would, after the bridge was finished, fall into disuse, and be of no importance to any body.

No objection was made or could be sustained to the constitutionality of this incorporation in this way (11 Pet., 420; 4 Pick. (Mass.), 463). But when the bridge became damaged greatly in 1818, and the company was subjected to large expenses in rebuilding, the legislature deemed it proper to provide, in its behalf, that the ferry should not be kept up afterwards, except when the bridge became impassable.

The words were, that, "after the company shall have repaired the bridge, &c., the ferries by law established between the towns of Hartford and East Hartford shall be discontinued, and said towns shall never thereafter be permitted to transport passengers across said river," &c.

This bridge corporation, being the present defendant in error, proceeded therefore to rebuild and keep up their bridge *538] in *a more costly manner, and beneficially and safely to the community. They were a private, pecuniary body, and were aided much by the suspension or discontinuance of the ferry in their additional charter.

The legislature, in making the discontinuance, did only what it supposed was advantageous to the public, by securing a better, quicker, and surer method of passing the river on the bridge; and it thus appears to have violated no condition or terms of any contract or *quasi* contract, if it had made any with the plaintiff. 11 Pet., 542.

On the contrary, as before suggested, the legislature merely acted within its reserved rights, and only passed a new law on a public subject, and affecting only a public body. But beside the implied powers continuing in the legislature, as heretofore explained, and which warrant all it did in 1818, and the exercise of which cannot be regarded as impairing any contract, we have seen that there was an express provision in the grant to East Hartford, limiting the half of the ferry transferred to it "during the pleasure of the Assembly."

The legislative pleasure expressed in 1818, that the ferry should cease, came then directly within this condition; and the permission to exercise that pleasure in this way was not only acquiesced in from 1818 to 1836, but was treated as the deliberate understanding on both sides from 1783 to 1836.

The statute-books of Connecticut are full of acts regulating ferries, including this, and modifying their tolls from 1783 downwards, and in many instances imposing new and onerous duties. See 1 Stat. of Conn., 314 to 327.

And to show how closely the power of the legislature was exercised to regulate this matter, without being regarded as impairing in that way any contract or obligation, it appears that when Hartford was incorporated into a city, about 1820 (Rev. Stat., 110), it was expressly provided: "But said city shall have no power to regulate or affect the fisheries in, or the ferry upon, said river" (Connecticut).

Well, too, might East Hartford, in 1783, be not unwilling to take her charter and half the ferry, subject to this suspension; as her own existence at all, then and thereafter, depended on legislative pleasure; and as all the property or privileges of the old town would remain with the old one, when a new was carved out of it, unless otherwise expressly provided. 4 Mass., 384; 2 N. H., 20.

Our inquiries would terminate here, as this legislation, in 1818, is the supposed violation of a contract that was chiefly relied on below, had there not been several other acts of legislation as to this ferry in 1836, 1841, and 1842, some of which *are claimed to have impaired contracts made with the plaintiff, either then or in 1783. [*539

But the act of 1836, about which much has been said in the argument here, and much was very properly urged in the court below, simply repealed that part of the act of 1818, discontinuing the ferry. It thus affected the bridge company deeply and injuriously, but did not impair any supposed contract with East Hartford, was not hostile to its rights, and is not, therefore complained of by that town, nor open to be considered as a ground for revising the judgment below under this writ of error.

On this see *Satterlee* v. *Mathewson*, 2 Pet., 413; *Jackson* v. *Lamphire*, 1 Id., 289; 7 Id., 243; 11 Id., 540; *Strader* v. *Graham*, *ante*, *82.

The state court, however, pronounced it unconstitutional, and had jurisdiction to do it, and if they had not arrived at such a result, they could not have sustained some of their other conclusions.

This decision of theirs being founded on their own constitution and statutes, must be respected by us, and in this inquiry must be considered *primâ facie* final. *Luther* v. *Borden*, 7 Howard, 1, and cases there collected.

We shall, therefore not revise the legal correctness of that decision, but refer only to a few of the facts connected with the repeal of 1836, and with the decision on it below, so far as is necessary to explain the legislation subsequent to it, and which is yet to be examined.

The legislature does not appear to have proceeded at that

time on any allegation of wrong or neglect on the part of the bridge company; nor did they make any compensation to the latter for thus taking from it the benefits of a discontinuance of the ferry, and attempting to revive half the privileges again in East Hartford. The state court appears to have considered such a repeal, under all the circumstances, as contrary at least to the vested rights of the bridge company, and to certain provisions in the state constitution. See, also, *The Enfield Bridge* v. *The Hartford and New Haven Railroad Co.*, 17 Conn., 464.

But, without going farther into the history of this proceeding in 1836, and the decision on it by the state court, it is manifest that the dissatisfaction and complaints growing out of it, or some other important reason, induced the legislature in 1841, to repeal the repealing act of 1836, and thus to leave the bridge company once more in the full enjoyment of its former privileges after the ferry had been discontinued in 1818.

*540] *To this conduct of the legislature the plaintiff in error objected, and under this writ asks our decision, whether it does not impair contracts which had before been made with it by the legislature. In reply, it need only be stated that we think it does not, and this for the reasons already assigned why it was competent for the legislature to pass the discontinuing part of the act of 1818, if it thought proper, and in this did not violate the Constitution of the United States, as to contracts.

But matters were not permitted to remain long in this position. In 1842 the legislature proceeded to repeal the act of 1841, and thus sought virtually to restore the ferry to Hartford and East Hartford, as it stood before 1818. It appears to have done this on the complaint of East Hartford, that half of the ferry had been taken away from her without making "any compensation."

It is unnecessary, in relation to this last repeal, to say more than that, like the repeal of 1836, and for like reasons, the state court pronounced it void; and, on the ground before explained, we are not called on by this writ to reconsider or reverse that decision.

It follows, then, finally, that East Hartford, in proceeding to exercise the ferry privilege again since 1842, and to the special injury of the bridge company, has done it without legal authority, and should therefore be restrained by injunction from exercising it longer.

The judgment below must be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of Errors within and for the state of Connecticut, and was argued by counsel; on consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Supreme Court of Errors in this cause be, and the same is hereby, affirmed, with costs.

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*The Town of East Hartford, Plaintiff in error, *v.* The Hartford Bridge Company.

The decision in the preceding case, between the same parties, affirmed.

In error to the Supreme Court of Errors for the state of Connecticut.

The facts in this case are the same as in the preceding. It was argued by the same counsel and at the same time.

Mr. Justice WOODBURY delivered the opinion of the court.

This case has been settled by the opinion just delivered in the writ of error on the bill in chancery.

This action was at law, for damages caused by the town of East Hartford in continuing to use the ferry to the injury of the bridge company, after it had been twice discontinued by the legislature. Having no legal right to do this, as has been already decided, East Hartford is liable for those damages on the ground explained in the other case, and the judgment below must therefore be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Supreme Court of Errors within and for the state of Connecticut, 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, affirmed, with costs and damages at the rate of six per centum per annum.

JOSÉ ARGOTE VILLALOBOS, MARIE ROSE, AND FRANCOIS FELIX, MARQUIS DE FOUGERES, APPELLANTS, *v.* THE UNITED STATES.

In October, 1817, Coppinger, the Governor of Florida, issued a grant giving the grantee permission to "build a water saw-mill on the creek of the River St. John's named Trout Creek, and also to make use of the pine-trees which are comprehended in a square of five miles, which is granted to him," &c.

The deputy surveyor surveyed 16,000 acres of land in three different tracts, the nearest of which to Trout Creek was thirty miles off; and this change of location never received the sanction of the Governor.

The decisions of this court have uniformly been, that the survey must be in reasonable conformity to the grant, whereas the one in question is not.

The surveyor-general had no authority to change the location of the grant, and split up the surveys, as there was no authority in the grant to go elsewhere in case there should be a deficiency of vacant land at the place indicated by the grant.

The lands on Trout Creek were poor, and those which were surveyed were of the *best quality. The surveys, therefore, have neither merit in fact, nor the sanction of law to uphold them.

*542]

THIS was an appeal from the Superior Court of East Florida. It was argued at the December term, 1847, and dismissed for want of jurisdiction, and is reported in 6 Howard, 81. It was afterwards reinstated on the docket of this court by act of Congress, approved 20th July, 1848.

The appellants, who were the petitioners in the court below, on the 28th day of May, 1829, filed their petition in the Superior Court for the Eastern District of Florida, under the act of Congress dated the 28th of May, 1828, which gave authority to that court to adjudicate claims to land embraced by the treaty of the 22d of February, 1819, between the United States and Spain.

The petition set forth, that, on the 29th day of October, 1817, a grant for 16,000 acres of land was made by the Spanish Governor, Coppinger, to José Argote Villalobos, for the purpose of erecting thereon a water saw-mill; that the location thereof was to be on Trout Creek, in the Province of East Florida; but not being able to find an eligible situation for said mill and a sufficient quantity of land ungranted on Trout Creek, the Surveyor-General, George J. F. Clarke, in virtue of the power with which he was invested by the Spanish government, located and surveyed 6000 acres of said grant on Black Creek, within the same district; also 6000 acres on Indian River, and the remaining 4000 acres in Alachua. The petition further sets forth, that one moiety of the two tracts of 6000 acres was, on the 14th day of March, 1821, conveyed to the Marquis de Fougeres, one of the petitioners, and that a water saw-mill was built by the petitioners on the tract located on Black Creek:

that the said claim for the two tracts of land was presented to the Board of Land Commissioners for East Florida, who reported unfavorably to the petitioners, on the 12th of December, 1827, though not on the ground that said grant was either ante-dated or forged.

The attorney for the United States, without admitting any of the facts stated in the petition, and calling for proof thereof, averred in his answer to the petition, that, if any such grant had been made by the Spanish authorities during the administration of Governor Coppinger, it was made contrary to the laws, ordinances, and royal regulations of the government of Spain, then in force in said Province of East Florida, and that it was never approved by the king of Spain. That no power was ever conferred on said Governor Coppinger to make grants of the magnitude and description of the one set forth in the petition. That, if said grant were otherwise valid, it gave no right to locate on other lands than those at Trout Creek. That the *tract on Indian River was more than one hundred miles distant from Black Creek, where the [*543 mill, if built at all, was erected; and that neither of said tracts was vacant land, but they were in possession of the Seminole Indians. That at the time of the alleged grant Villalobos was a Spaniard, and under the laws of Spain could not locate said lands in prejudice of the rights of the Indians. That said grant, if made at all, was made since the 24th day of January, 1818, and is void by the eighth article of the treaty. That the sale to the Marquis de Fougeres was void, and that the petitioners have forfeited all right to said land, if any they had, by failure to improve and cultivate, or perform the conditions of said grant.

There was subsequently an amended answer, setting forth certain reports made by the "Señor Auditor of War," relative to grants and concessions of land made upon condition of the establishment of factories, saw-mills, &c., which had not been complied with, and recommending the term of six months from that date as the time limited for the performance of such condition; and that grants upon condition unperformed after that time should be null and void. Which report was averred to have been confirmed by Governor Coppinger. And it was averred that the petitioners had not brought themselves within such limit.

There was a general replication.

The memorial and decree were as follows:—

Memorial.

"Señor Governor:—Don José Argote Villalobos, with great

respect, presents himself to your Excellency, and says, that he has fixed his intentions to establish a mill for sawing timber on a creek of the River St. John's, named Trout Creek, which affords a site fit for the purpose; and as such an undertaking promises great advantages to the royal revenue in the exportation of this product of the Province, and also the supply of the timber necessary for the inhabitants, he supplicates your Excellency to be pleased to grant him your superior permission that he may accomplish the said mill, with a corresponding right to five square miles of land, or an equivalent for a competent supply of timber, a favor which he hopes to obtain from the goodness of your Excellency.

"José Argote Villalobos.

"*River St. Mary's*, 27*th October*, 1817."

Decree.

"*St. Augustine of Florida*, 29*th October*, 1817.

"Taking into consideration the benefit and utility which
*544] *would result to the Province in its improvement, if what Don José Argote Villalobos proposes should be accomplished, it is granted to him, without prejudice to a third person, that he may build a water saw-mill on the creek of the River St. John's, named Trout Creek; and also to make use of the pine-trees which are comprehended in a square of five miles, which is granted to him, which advantage he shall enjoy for the said water saw-mill without any other person having the right to diminish it in any respect. And for his security, let the corresponding certificate be dispatched to him from the secretary's office.

Coppinger."

"Don Thomas De Aguilar, Sub-Lieutenant of Infantry, and Secretary of this Government for his Majesty.

"I certify that the foregoing copy is faithfully taken from the original, which exists in the Secretary's office in my charge, and in obedience to orders, I give these presents in St. Augustine of Florida, the 29th of October, 1817.

"Thomas de Aguilar."

The act of sale by Villalobos to the Marquis de Fougeres was as follows:—

Protocol.

"In the city of St. Augustine of Florida, on the 12th of May, 1821, I, the subscribed notary of the government, in virtue of the disposition made by his Excellency, Don José Cop

pinger, colonel of the national armies, military governor, and civil authority of this place, and of the province thereof, by a decree of the 10th instant, issued at the instance presented by Marquis de Fougeres, consul of his most Christain Majesty in Charleston, and resident of this place, do proceed to register, in continuation of said instance, the document annexed to it, and it is a contract entered into under date of the 15th of March last, between the said Marquis and Don José Argote Villalobos, relating to the sale and transfer, which the second part has made in favor of the first part, of one moiety of a tract of land, comprehending six thousand acres on the Indian River, and another moiety of another tract of equal extent, in the place called Black Creek, which tracts are part of a square of five miles, which this government granted to the said Villalobos on the 29th of October, 1817; the said document containing divers articles of agreement between both parties.

"In testimony thereof, and of the said contract been registered, translated in the Spanish language by Don Bernardo Sequi, appointed by the tribunal for the purpose, in the presence *of Don Pedro Miranda, Don Francisco José Fatio, and Don Domingo Reyes, witnesses. [*545

"JUAN DE ENTRALGO,
Notary of the Government.

Translation.

"South Carolina:

"Be it known by these presents, that we, José Argote Villalobos on one part, and Marie Rose, François Felix, Marquis de Fougeres on the other part, have entered into the following agreement: Whereas, the said José possesses two tracts of land in East Florida, which tracts are part of a grant of a square of five miles, comprehending sixteen thousand acres, granted to him, the said José, by the Spanish government, on the 29th of October, 1817, as it is registered at large in the office of said government in the said East Florida, the condition of the grant being that the said José shall erect, or cause to be erected, on the tract, a water saw-mill; and whereas a parcel of said grant, comprehending six thousand acres, is situated on Indian River, in the said East Florida, and another parcel, also containing six thousand acres, is situated on Black Creek, the said José has agreed to transfer one half, or an equal part of each of the two parcels aforesaid, to the said Marquis de Fougeres, his heirs and assigns, under the terms and conditions which shall be expressed in continuation.

"Now this contract witnesseth, that the said José, in virtue

of the conditions and motives which will be mentioned, sells and transfers to the said Marquis, his heirs and assigns, one half of the six thousand acres situated on Indian River, which half will be settled and indicated by a line drawn from the point on said river which divides the tract into two parts, running parallel with the boundaries which divide it from the lands of Juan H. McIntosh, and terminating at the extremity of the pine land corresponding to the said tract, as it is shown more at large in the plot thereof hereunto annexed, which parallel line will divide the said tract into two equal parts, and that part shall belong to the said Marquis which is bounded by the lands of the said McIntosh; and if at any time the Marquis would wish, within two years from this date, to sell his share of the said tract, he shall give previous notice thereof to the said José, his agent or attorney, who, or any of them, shall be entitled to the preference in regard to the mentioned share, on paying the same price which might be offered by any other person, if it were their wish to purchase; and in the same case will be placed José with respect to the Marquis, his agent or attorney, if the said José should think proper to dispose of *546] *his moiety. At the same time, the said José agrees to sell and transfer to the said Marquis, his heirs and assigns, one half, or an equal part, of six thousand acres of land mentioned above, situated on Black Creek in the said East Florida, which tract will be divided by the contracting parties themselves, and the division will not be made until the construction of a water saw-mill be made and erected on the said place; and neither of the said contracting parties, without their mutual consent, will have the faculty to sell, alienate, or in any manner dispose of any part of the said tract, until after the division takes place. It is likewise agreed, that the parties will give to each other notice of their intention to sell; each of them having in themselves, or in their attorneys, the same right and privilege which has been specified in regard to the Indian River tract. And the said Marquis, in consideration of the said sale and transfer made by said José, obligates himself to construct and erect, at his own charge and expense, on the said Black Creek, all its necessary machinery, dams and houses, which ought to be built in such a manner that the conditions of the grant be fulfilled; and for the intent and purpose of this agreement, the works for the said mill shall have to be commenced on or before the 20th day of next April, the Marquis supplying all the means and funds necessary to obtain its perfection, in order that it may be in operation and in activity as soon as possible. The mill being completely finished will be considered as the common prop-

erty of both parties in an equal share; consequently they shall be equally subject to all the expenses, repairs, and management which may take place, and they will equally participate in the profits.

"And the said Marquis also obligates himself to pay to the said José the sum of one dollar, before the execution and delivery of this instrument, and he obligates himself also, that in case he should fail in any manner to fulfil the conditions of this agreement, to pay, himself, or through his assigns or attorney, by way of penalty, to the said José, his heirs and assigns, the sum of one thousand dollars, recoverable before any tribunal; it being understood, nevertheless, that the said Marquis will be in no wise responsible, in case of prohibitions or impediments preventing him to fulfil his said engagements, if said prohibitions or impediments proceed from the Indians of that territory, or from the Spanish or American laws or governments, or if impeded by any other cause not originating in himself; but in case the said work be not carried into effect, for default or negligence of the said Marquis, or in case of his demise before the said mill is commenced, then said José, or his assigns, will no longer be subjected to this transfer *or agreement, which will remain null and void. And [*547 the said José likewise obligates himself, his heirs, executors, and assigns, at any time, that is to say, after the construction of the said mill in the terms and manner specified, to execute or cause to be executed, in favor of the Marquis, his heirs and assigns, the corresponding title and transfer of the two mentioned parcels of land, in conformity to the present or future laws and regulations of the Territory of Florida.

"In testimony whereof, the two mentioned parties respectively sign and seal the present, this day, the 15th of March of the year of our Lord 1821.

"José Argote Villalobos. [seal.]
Marquis de Fougeres. [seal.]

"Witness:—Boudoin.
Thomas Leager."

Petition.

"His Excellency the Governor:—I, the Marquis de Fougeres, consul of his most Christian Majesty in Charleston, with due respect, state to your Excellency, that, for the purposes and effects which may be convenient to me, I have to solicit from the justice of your Excellency, that you may be pleased to order the protocol of the English document annexed, and the translation thereof, which document is ar

agreement which I have entered into with Don José Argote Villalobos, under date of the 15th of March last past, relative to the sale and transfer, which he has executed to me, of one half of a parcel of land, containing six thousand acres of land situated on Indian River, and another half of another parcel of the same extent on Black Creek; which parcels are part of a square of five miles, which was granted by this government to the said Villalobos, on the 29th day of October, 1817. Therefore, I supplicate your Excellency to be pleased to provide, as I have at first solicited, and that afterwards such certified copies as I may want be given me, which favor I hope to receive from the justice of your Excellency.

"St. Augustine, on the 10th of May, 1821.

"As the party solicits.

"COPPINGER.

JUAN DE ENTRALGO,
Notary of the Government.

"In St. Augustine, on the same day, month, and year, I notified the preceding decree to the Marquis de Fougeres, which I certify.

"ENTRALGO.

*548] * "It is conformable to the originals thereof, which remain in the archives under my charge, to which I refer, and in obedience to superior order, and at the request of the party, I sign and seal the present certificate, in six leaves of common paper, as stamps are not used.

"St. Augustine of Florida, on the 14th of May, 1821.

"JUAN DE ENTRALGO,
Notary of the Government."

The record contained certificates of survey by George F. Clarke, accompanied with plats, one of which was as follows:—

"Don George Clarke, Lieutenant of the Militia of St. Augustine of Florida, Captain of the District of St. Mary's, and Surveyor-General of the Province, by appointment of the Government.

"I certify that I have measured and marked the boundaries for Don José Argote, of six thousand acres of land on the south branch of the creek named Black Creek, which discharges itself into the River St. John's, on the west side, in part of a larger quantity which was granted to him by the

government for the construction of a mill to saw timber, which land agrees in its local circumstances with the annexed plat, and its copy kept in the book of surveys in my charge. District of St. Mary's, the 1st December, 1817.

G. J. F. CLARKE."

The others were of the same tenor.

There was evidence that a saw-mill was built by Fougeres on Black Creek in 1822 or 1823, and Clarke, the surveyor, testified that he had always acted upon the rule, when requested, of changing the location of grants, and that it was the practice of his predecessor.

There was a large mass of documents in the record, consisting of grants, decrees, certificates of surveys relating to other land and other persons than those concerned in this case, and which were introduced for the purpose of showing the practice of departing from the calls of the concession in certain cases. There was evidence that the land on Trout Creek was poor, whilst the tracts surveyed in lieu thereof were of the best quality. It was in proof that Black Creek was some thirty miles from Trout Creek, and Indian Creek about one hundred miles from Black Creek, and still further from Trout Creek, and the survey in Alachua still more remote.

The court decreed that the claim of the petitioners was not valid, and that it be rejected, from which decree this appeal was taken.

*The cause was argued by *Mr. Yulee* and *Mr. Berrien*, for the appellants, and by *Mr. Crittenden*, Attorney-General, for the appellees. [*549

Mr. Yulee, for appellants.

This was not strictly what is known as a mill-grant, but was absolute and without condition. In all cases of mill-grants, strictly so called, there was an express and distinct condition, without a compliance with which the grant was to be void. Such was the case of *Percheman*, and also of *Sibbald*. It will be found in all cases that have come before the court, that an express condition was contained in the grant itself. In this case it was not so. The grant in this case is equally strong with that in the case of *Arredondo*. The words are simple, "I grant," "*concedo*." *U. States* v. *Richard*, 8 Pet., 470; *U. States* v. *Kingsley*, 12 Id., 476; *U. States* v. *Drummond*, 13 Id., 84; *U. States* v. *Burgevin*, Id., 85; *U. States* v. *Breward*, 16 Id., 143; *U. States* v. *Low*, Id., 162; *U. States* v. *Sibbald*, 10 Id., 313; *U. States* v. *Seton*, Id., 309.

There being no condition in the grant itself, the only other condition that can be made is that created by some law or ordinance of Spain. But this court has decided that no condition can be implied, in the case of the *United States* v. *Hanson*, 16 Pet., 199. The Governor had absolute power to make grants in absolute terms, and so this court has held.

But if there is any condition to be implied, it must be subsequent and not precedent, as in the case of *Arredondo*. The grant was of a present title, and could only be defeated by proceedings instituted for that purpose, if it was a condition subsequent.

In the *Arredondo case*, the court announced its intention to treat liberally all the rights protected by the eighth article of the treaty with Spain. Now the court will construe more strictly a grant with condition as against the United States, and more liberally as respects the grantor, because the condition tends to defeat an estate already vested and in use.

The eighth article of the treaty refers to those grants as annulled which had a condition limited in its terms within a certain time in which it was to be performed.

But in this case a mill was built, and therefore it is immaterial whether there was a condition precedent or subsequent. *Sibbald's* and *Kingsley's cases*. It is said that the mill was not built on the spot required by the grant. In reply it may be said, that the grant did not require any mill to be built, but that was regulated in a separate clause. But the site of the mill, as laid down in the grant, was occupied, and therefore *550] it *was built on Trout Creek. It was, however, a compliance with the policy of Spain that the mill should be built anywhere. Although a legal compliance with the condition could not be performed, a compliance *cy pres* is sufficient. *Sibbald's case; U. States* v. *Arredondo*, 6 Pet., 691.

The rule of the common law is not the same as the rule of the civil law in the construction of grants. Under the civil law, they are construed liberally rather than strictly. Domat, page 13, introductory chapter; also, page 39, section 12.

As to surveys. The grant is assumed to be at Trout Creek, and the survey was not. This case is parallel to that of *Sibbald*. The petition in this case is for five miles square of land, or an equivalent (should be *its* equivalent; see *equivalente*).

In *Sibbald's case* the petition is for a square of five miles, or its equivalent. The grant was for the land, without any reference to the equivalent. And the court say, "The treaty grant conferred lands to those in possession of them, and of course the confirmation refers to lands of which they were then in possession."

The practice was to change the location of grants when necessary, and such changes were always recognized by the Spanish governors, provided the quantity were conformed to. This is the testimony of the Surveyor-General.

(*Mr. Yulee* referred to several instances in which changes of location were confirmed.)

This, according to the rule laid down by the court in the *Arredondo case*, is a legislative ratification of the principles on which the reports were founded.

At any rate, it is a custom. It is not under the Spanish, as in the common law, that universal usage is required. Ten years are enough. White, p. 360.

It is to be presumed that the Surveyor-General did not exceed his powers.

There was not vacant land enough at Trout Creek, for the location of the five miles square. In *Sibbald's case*, the location was to be made at Little Trout Creek, and the court sanctioned the change of location.

The brief of the Attorney-General imputes fraud.

The survey was made before 1818, before any negotiations were opened for the transfer of the country.

Again, the party immediately proceeded to build the mill, which they would not have hazarded if there had been fraud in the grant.

Again, it is presumed that the Governor acted in good faith. Yet the parties went boldly to him to state all that had been done.

Also, the continued practice shows there was no fraud.

Mr. Crittenden, contra. [*551

The grant shall always suppose defined the thing granted. Now in this case the grant is for five miles square on Trout Creek. But it is attempted to get rid of the precision of this grant by referring to the petition. In Sibbald's case there is a reference in the grant to the petition, and it becomes a part of the grant. Here there is no such reference. There the petitioner asked for two and a half miles square or its equivalent, and the grant was according to the petition. In this case he asked for the same, but the grant gives him the right to five miles on Trout Creek. The petitioners have not so located it. They have proved that this is very poor land, and they have searched about for other land, and the nearest that they have hit upon is thirty miles distant.

The title here is derived from the surveyor rather than from the Governor. The instructions to the surveyor directed him to make the survey according to the grant. If he made it

differently, it was then a grant from the surveyor. It is said that such had been the practice, and an instance is cited where a survey had been made differently from the grant and afterwards confirmed by the Governor. This was a new grant. It proves nothing more than the liberality of the Governor.

This survey was just one month before the time after which all these grants are condemned.

Mr. Clarke, the surveyor, being called as a witness, stated that he did not make the survey, nor know who did.

But the ground I rely on is, that the surveyor had no authority to make this new grant. I do not question the power of the prince to make a grant of land surveyed differently from the original grant. But is any thing of the kind shown here? On the contrary, the papers in this case show a direction to survey a particular grant, in a particular place, and the surveyor makes it in another place and another manner; and no subsequent grant of these surveyed premises is shown. It rests, therefore, entirely in the action of the surveyor. By the same right that the surveyor changed the location, could he not have changed the quantity?

It is said that Spanish law makes ten years a custom; and the doctrine of the other side is, that any officer who should adopt any practice, and should continue it for ten years, however great the malfeasance or misfeasance, still, if he can succeed in continuing it for ten years, it stands up at the end of that time in all the purity of legitimacy and law. But such is not the practice under the Spanish law. It must be done in good faith.

Mr. Crittenden cited *U. States* v. *Hanson*, 16 Pet., 201; **552] *U. States* v. *Seaton*, 10 Id., 311; *U. States* v. *Forbes*, 15 Id., 182; *U. States* v. *Breward*, 16 Id., 146; *U. States* v. *Kinsley*, 12 Id., 485, 486; *U. States* v. *Mills's Heirs*, Ib., 215; *U. States* v. *Burgiven*, 13 Id., 86; *U. States* v. *Wiggins*, 14 Id., 351; *U. States* v. *Delespine*, 15 Id., 333; White's Recopilacion, 250–258.

Mr. Berrien, in reply.

1. The petition and decree gave a valid title to 16,000 acres of land, without reference to location. It was inchoate in one sense, that petitioners might, on application to the Spanish government, if it had continued, have obtained a perfect title; but it gave a right of property protected by the treaty, and recognized by this court. It is then equal to an absolute title. *Delassus* v. *U. States*, 9 Pet., 117, 132. See the treaty of 1819, more express than that of 1803.

2. The transfer of a moiety to Fougeres, under the sanction

of Governor Coppinger, vested that moiety in him, and was a recognition of the title. This was conformable to the usages of the Province. *Mitchel* v. *U. States*, 9 Pet., 741. The treaty only restricts the power of the Governor in making grants after the 24th of January, 1818. All his other powers remain intact. This location was after the 24th of January, 1818, and this court has decided that he could not change a location after that date, because that would be to make a new grant. But the Governor could recognize a transfer of an already existing grant. He could make a decree allowing a sale, as in the case of Fougeres. He could decide a question of *meum* and *tuum* between two Spanish subjects. Otherwise, the most serious injury would result to the Marquis de Fougeres.

3. It was a grant of the land, and not merely of the trees growing on it. *U. States* v. *Richards*, 8 Pet., 470; *U. States* v. *Seton*, 10 Id., 309.

4. It was an absolute, unconditional grant. It is not in the form used in grants conditioned to take effect on the building of a mill. In *Bethune's case* the grant was "on the express condition, that he is to set up said machine within the time which I grant him." And in *Kingsley's case*, "but upon the express condition that, until he builds said machine, this concession will be considered as not made, and of no value nor effect, until the happening of that event." In this case the grant is without condition. It gives authority to build a mill, and it grants 16,000 acres of land, but does not require the mill to be built, nor make the one dependent on the other. The building of a mill is not a condition precedent or subsequent. The court cannot annex such a condition to the grant from the authority to build a mill (10 Pet., 306). The Governor judged *of the consideration on which he issued his grant, and, exercising like authority, could make a gratuitous concession. This court has repeatedly said, that the Governor would be presumed to have acted within the scope of his authority in making grants. [*553

5. No specific location of the 16,000 acres was designated. The petition asked for "the right to build a mill," and a grant of five miles square or its equivalent." The concession gives the right to build the mill at the place designated; and also the use of the pine-trees in a square of five miles, "which is granted to him," without designating any particular location. In construing the grant, the court must give effect to the words "or its equivalent." It was five miles square at Trout Creek, or its equivalent elsewhere. The authority to build a mill

was limited to a particular place, Trout Creek. But the grant of the 16,000 acres of land was not so limited.

6. The mill was built in sufficient time. There was no limitation of time in the concession. Governor Coppinger had no power to alter the terms of the concession after the 24th of January, 1818. The right of the grantee was protected by the treaty, and could not be disturbed by the Spanish authorities after that time. If he had the power to limit, he must have had the correlative power to enlarge, the time, and thus in effect to make a new grant. But the grant was absolute, not on condition of building a mill. If there had been a condition unlimited as to time, the utmost that could be done would be, to require that it should be done in a reasonable time. The treaty must take effect, either from the ratification by both parties in 1821, or from the exchange of flags in 1822. The mill was commenced in the winter of 1822. A treaty, as between the contracting parties, operates from its date; but as respects individual rights, it can only take effect from the ratification by both parties. *U. States* v. *Arredondo*, 6 Pet., 748.

This court has disclaimed the power to enforce a forfeiture for a condition broken. *U. States* v. *Sibbald*, 10 Pet., 322.

7. If there was a change of location, it was warranted by the Spanish usages and customs, to which this court has always given effect. The court is to carry into effect the treaty, and to protect property protected by the treaty, whether complete or inchoate, if property by the Spanish laws and usages. What are the laws and usages? In the language of this court (6 Pet., 714), "the laws of an absolute monarchy are the will and pleasure of the monarch, expressed in any way," &c. We are not swearing away the law, as the Attorney-General supposes, by the introduction of evidence of usages and customs; but by showing what the usages and customs were, we *show what the law was. This court has said, that, in the examination of these claims, it will look into the Spanish customs and usages. The question here is, What was the usage of the Spanish executive officer, in regard to the acts of his subordinates?

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Mr. Justice CATRON delivered the opinion of the court.

In October, 1817, Coppinger, Governor of Florida, was applied to by Villalobos for leave to build a saw-mill on Trout Creek, at a proper site for a mill there existing; with a corresponding right to five miles square of land, or an equivalent, for a competent supply of timber; on which application the Governor decreed as follows:—

"Taking into consideration the benefit and utility which would result to the Province in its improvement, if what Don José Argote Villalobos proposes should be accomplished, it is granted to him, without prejudice to a third person, that he may build a water saw-mill on the creek of the River St. John's, named Trout Creek; and also to make use of the pine-trees which are comprehended in a square of five miles, which is granted to him, which advantages he shall enjoy for the said water saw-mill, without any other person having the right to diminish it in any respect. And for his security, let the corresponding certificate be despatched to him from the secretary's office."

1. No mill was built on Trout Creek, nor any attempt made to do so; but sixteen thousand acres of land were surveyed for Villalobos by some deputy surveyor of the Surveyor-General, George F. Clarke, and certified by the latter, in three separate parcels; one on Black Creek, for six thousand acres; one on Indian River, for six thousand acres; and the third in Alachua, for four thousand acres. The nearest of said surveys to Trout Creek is about thirty miles off, and the farthest is more than one hundred miles distant. The lands as surveyed are claimed by Villalobos and the Marquis de Fougeres, to whom Villalobos conveyed a moiety of his claim in March, 1821. This latter survey lies within territory then held by the Seminole Indians. A mill was built by the Marquis on Black Creek, on the survey there made for six thousand acres, say in 1822 and 1823. Whether the surveys were regularly returned to the office of the public archives, or to the government secretary's office, does not appear; there is no evidence that they were returned to either by the Surveyor-General, the proof being, that they were filed in the office of the public archives as part of the evidences of claims that had been submitted to the register and receiver when acting as commissioners on Florida claims.

*One thing, however, is certain, that the change of location never received any direct sanction from the [*555 Governor of the Spanish province during the time his powers existed to act in the matter. On this state of facts, the question is, whether the Surveyor-General had any authority to make the change, and thereby bind the Spanish government to complete the title; if he had such power, then the American government is equally bound.

By the eighth article of the treaty of 1819 it is stipulated, that "all grants of land made before the 24th day of January, 1818, by his Catholic Majesty, or by his lawful authorities, shall be ratified and confirmed to the persons in possession of

the lands, to the same extent that the same would be valid if the territories had remained under the dominion of his Catholic Majesty."

This court has uniformly held, that where the land was granted by a concession, and a survey had been made of it by the Surveyor-General, in reasonable conformity to the grant, before the 24th of January, 1818, that such survey should be recognized as valid, and deemed to have severed the land from the public domain.

That the surveys made for Villalobos were not in reasonable conformity to the grant made for 16,000 acres on Trout Creek, is not assumed on part of the claimants; they rest their right to a confirmation for the three tracts surveyed on the ground, that the Surveyor-General had power, by force of the grant, to change the location, and to locate the land granted in as many parcels as he saw proper to designate. To show the existence of this power in the Surveyor-General, he was examined as a witness in the present controversy, and proved that he had, in various instances, made similar changes, and that none of them had been rejected, or objected to, by the Spanish governors. Antonio Alvarez, the keeper of the archives, was also examined on this point; he testifies, that there exist in the archives a few instances where changes of location had been made by the surveyor-General without an order of the Governor for the change; but this was done under peculiar circumstances, as where the land granted had been taken by a previous concession.

From the long experience this court has had in the investigation of Spanish titles, as claimed in Florida, as well as from the practice in regard to which the witnesses depose, we are of opinion, that the Surveyor-General had no authority to change the location of the grant, and to split up the surveys, as was done in this instance. The question has been settled by this court in the cases of *United States* v. *Huertas* (9 Pet., *171) and *United States* v. *Levy*, (13 Pet., 83). The
*556] surveys in this instance abandoned the grant; no aid is asked from it, but the sole act of the Surveyor-General is relied on for a decree completing the title, and, if confirmed by us, must be sanctioned as the origin of Villalobos's title; and that no such power can be exercised by this court was held in the *Case of Forbes* (15 Pet., 172).

The grant was for a tract comprehended in a square of five miles; and although an equivalent was solicited, none was granted except in case vacant land enough could not be found at Trout Creek to satisfy the grant in one body, and a square form; nor is there any evidence that such deficiency existed.

It is proved that the lands on Trout Creek are poor, and of little or no value, and that those surveyed are of the best quality known in Florida; and manifestly, that the change of survey had in view the acquisition of valuable lands for the purposes of speculation, and not to secure pine-trees, out of which to saw lumber; so that these surveys have neither merit in fact nor the sanction of law to uphold them.

2. As the want of a survey does not defeat the grant, as this court held in the *Cases of Arredondo* (13 Pet., 133) *and of Buyck* (15 Pet., 224), the next and remaining question is, whether the grant itself can be located. For although the petition proceeds on the surveys, yet this court having the case before it as on bill in chancery, we would be disinclined to bar the claim on a technical ground. If it had merits, and these could not be reached on the pleadings as they stand, the court on hearing could order amendments, so that the merits could be reached; and to this end the cause could be remanded to the court below; nor do we apprehend even this to be necessary in a case like the present.

The surveys being rejected, the grant may be resorted to, and a survey ordered, if the land granted can be identified. It is therefore necessary to examine the claim on the face of the grant. For a description of the place where the land was solicited, and which is adopted by the Governor's decree, we must look to the memorial of Villalobos. He says, "that he has fixed his intentions to establish a mill for sawing timber, on a creek of the River St. John's named Trout Creek, which affords a site fit for the purpose;" and he supplicates the Governor to grant permission to build the mill at that place, with a corresponding right to five miles square of land for a competent supply of timber.

The grant refers to no one part of Trout Creek more than another, at which the site for the mill is, and where the land *should be surveyed; there is no identity of place, nor a possibility to locate the grant by survey. No claim has ever been before this court that is more vague. [*557

In cases of a vague description, this court has uniformly held that no particular land was severed from the public domain by the grant, and that no survey could be ordered by the courts of justice. *Buyck* v. *United States*, 15 Pet., 224; *United States* v. *Delespine*, 15 Id., 333; *United States* v. *Miranda*, 16 Id., 156, 157.

On all the grounds presented, we are of opinion that the court below decided correctly in rejecting this claim; and it is therefore ordered, that the decree of the District Court be affirmed.

Order.

This cause came on to be heard on the transcript of the record from the Superior Court for the District of East Florida, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Superior Court in this cause be, and the same is hereby, affirmed.

EDWARD B. ST. JOHN, CLAIMANT OF THE STEAMBOAT NEPTUNE, APPELLANT, *v.* ZEBULON A. PAINE, SARAH NORWOOD, JOHN BUCKNAM, ANDREW BRADFORD, AND AUGUSTUS NORTON, LIBELLANTS.

The following are the rules which ought to govern vessels when approaching each other:—

1. *Of Sailing Vessels.*—A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences.

So, when two vessels are approaching each other, both having the wind free, and consequently the power of readily controlling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind, and approaching each other, when it is doubtful which is to windward.

But if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side, abaft the beam or near the stern, in that case the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of time and distance than the other.

When vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on the larboard tack should bear up or keep away before the wind.

These rules have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be
*558] laid down *or applied. Either vessel may find herself in a position at the time when it would be impossible to conform to them, without certain peril to herself or a collision with the approaching vessel. Under such circumstances, the master must necessarily be thrown upon the resources of his own judgment and skill in extricating his own vessel, as well as the vessel approaching, from the impending peril. These cases cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise.[1]

2. *Of Steam-Vessels meeting Sailing Vessels.*—Steam-vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Their obligation extends

[1] CITED. *The Ann Caroline*, 2 Wall., 545; *Bentley* v. *Coyne*, 4 Id., 511; *The Maria & Elizabeth*, 7 Fed. Rep., 254. See *The Fairbanks*, 9 Wall., 422.

still farther, because they possess a power to avoid the collision not belonging to sailing vessels, even with a free wind, the master having the steamer under his command, both by altering the helm and by stopping the engines. As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her.[2]

3. *Of Steamers meeting each other.*—It is the duty of each vessel to put the helm a-port.[3]

4. *Of keeping Watch.*—The pilot-house of a steamer is not the proper place at which to station a watch at night. A competent and vigilant look-out stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steamboat from blame, in case of accident in the night-time, while navigating waters on which it is accustomed to meet other craft.[4]

The owner is responsible for damage resulting not only from want of care and attention on the part of the persons in charge of the vessel, but also from the want of proper knowledge and skill to enable them to manage her according to established nautical rules.

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[2] FOLLOWED. *Steamer Oregon* v. *Rocca*, 18 How., 572. INAPPLICABLE. *Propeller Monticello* v. *Mollison*, 17 How., 154. CITED. *New York &c. U. S. Mail S. S. Co.* v. *Rumball*, 21 How., 385; *New York &c. Transp. Co.* v. *Philadelphia &c. Steam. Nav. Co.*, 22 Id., 472; *The Johnson*, 9 Wall., 153; *McWilliams* v. *The Vim*, 12 Fed. Rep., 914; *The Golden Grove*, 13 Id., 688, 691; *The City of New York*, 15 Id., 629.

In *St. John* v. *Paine* "there is a *dictum* of Mr. Justice Nelson to the effect that a steamer is always to avoid a sailing vessel, whether close-hauled or with the wind free. For this several English cases are cited, but none of them support that branch of the proposition relating to vessels with the wind free. This *dictum* is cited with approbation in the case of the *Northern Indiana*, and is supported by an article in 18 Law Rep., 181." 1 Pars. Mar. L., 200 *n*.

"Rules of navigation are ordained, and required to be observed, to save life and property employed in maritime pursuits, and not to promote collisions, or to justify the wrong-doer where such a disaster has occurred. [*The Sunnyside*, 1 Otto, 210."] *The John L. Hasbrouck*, 3 Otto, 406. Thus, the requiring a vessel to keep her course when approaching a steamer in such direction as to involve the risk of collision does not forbid such necessary variations in her course as will enable her to avoid immediate danger arising from natural obstructions to navigation. *The John L. Hasbrouck*, 3 Otto, 405. But where the collision is rendered unavoidable by the act of the sailing vessel in unnecessarily changing her course, the steamer is not liable. *The Illinois*, 13 Otto, 298.

[3] Where two vessels under steam, meeting end on, or nearly end on, neglect, until it is too late to avoid a collision, to comply with the rule each to port her helm, it is no defence for either to prove that she ported her helm before the collision actually occurred. The act of compliance must be seasonable; otherwise it is without substantial merit. *The America*, 2 Otto, 432.

[4] FOLLOWED. *The Ant*, 10 Fed Rep., 297. CITED. *Steamboat New York* v. *Rea*, 18 How., 225; *The Ottawa*, 3 Wall., 273; *The Excelsior*, 12 Fed. Rep., 200. See *Chamberlain* v. *Ward*, 21 How., 570; *New York & Baltimore Transp. Co.* v. *Philadelphia &c. Steam Nav. Co.*, 22 Id., 461; *The Tillie*, 13 Blatchf., 514; *Newton* v. *Stebbins*, *post* *586; *Ward* v. *The Ogdensburgh*, 5 McLean, 622; s. c. 1 Newb., 139; *Haney* v. *Baltimore Steam Packet Co.*, 23 How., 287.

"It is the duty of every steamboat traversing waters where sailing vessels are often met with, to have a trustworthy and constant look-out besides the helmsman. It is impossible for him to steer and keep a proper watch in his wheel house. His position is unfavorable to it, and he cannot safely leave the wheel to give notice when it becomes necessary to check suddenly the speed of the boat. And whenever a collision happens with a sailing vessel, and it appears that there was no other look-out on board the steamboat but the helmsman, or that such look-

THIS was an appeal from the Circuit Court of the United States for the Southern District of New York.

The circumstances of the case will be best explained by inserting the libel and answer, which were as follows:

"To the Honorable Samuel R. Betts, Judge of the District Court of the United States for the Southern District of New York.

"The libel and complaint of Zebulon A. Paine of Eastport, in the state of Maine, owner of one half part of the schooner Iole, and owner of part of the cargo lately shipped on board thereof; Sarah Norwood of Eastport, in the state of Maine, aforesaid, owner of the other half part of the said schooner; John Bucknam, owner of part of the cargo lately shipped on board thereof; Andrew Bradford, owner of part of the cargo also lately shipped on board thereof; Joseph Sumner, master of the said schooner; James McCollar, mate thereof; Ambrose Tucker, James Woorster, seamen, and Henry Cuff, cook, all of said schooner; and Augustus Norton of Eastport, a passenger on board of the said schooner, against the steamboat Neptune, all parties intervening for their interest in the same, in a cause of civil and maritime jurisdiction.

*559] *"And thereupon the libellants allege and propound respectively upon and according to their respective best knowledge, information, and belief, as follows:—

"1st. That the said schooner Iole, belonging and owned in Eastport, aforesaid, whereof the said Joseph Sumner was master, on or about the 7th of July, 1846, set sail and departed from the port of Eastport, in the state of Maine, aforesaid, with the said Joseph Sumner as master, having on board of said schooner a cargo consisting of laths, pickets, plaster, fish in barrels, thirty empty barrels, and two barrels of beer, and two packages of money, bound for the port of New York; and that the said schooner was then tight, staunch, and strong, and well manned, tackled, apparelled, and appointed, and was, in every respect, fit for the voyage she so undertook.

"2d. That in the evening of the 14th day of July, aforesaid, the said schooner, with three passengers, and with the said cargo on board, had successfully proceeded in and upon her

out was not stationed in a proper place, or not actually and vigilantly employed in his duty, it must be regarded as *prima facie* evidence that it was occasioned by her fault." *Propeller Genessee Chief* v. *Fitzhugh*, 12 How., 463. S. P. *Goslee* v. *Shute*, 18 How., 463.

It is just as incumbent upon a steamer to keep a look-out well aft when backing, as to keep one well forward when going ahead. *The Kirkland*, 3 Hughes, 641.

said voyage past and about one mile to the south of the light-boat stationed off the Middle Ground, a shoal nearly opposite to Stratford Point, and that the said schooner passed the light-boat, being about one mile to the southward thereof.

"That the said schooner was then steering about a west course, the wind being nearly from the north; that the night was clear, and the said vessel could be easily discerned at a considerable distance; that whilst sailing upon her course, about west, with a fresh wind, going at from six to eight knots per hour, and a short time after the said schooner had passed the said light-boat, and between the hours of nine and ten o'clock at night, on the high seas, and within the admiralty and maritime jurisdiction of this court, she was negligently run against and into, by the said steamboat Neptune, which steamboat was then and there proceeding down the Sound from the city of New York; and the said steamboat then and there run and struck against the hull of the said schooner, between the fore and main rigging, on her larboard side, with such great force and violence as to break and tear open the hull of the said schooner, and cut her nearly in two, so that she filled and sunk almost immediately; and the said vessel and her cargo, and the clothes, money, and personal effects of the crew and passengers were totally lost; and two of the passengers, viz., a female named Murphy, and her child, were drowned.

"3d. That the crew of said schooner and one of the passengers, viz., the libellant Augustus Norton, saved their lives by jumping from the said schooner on to the deck of the said steamboat; that they made inquiries for the captain of the *said steamboat, but could find no captain on board; that they asked those on board of said steamboat to [*560 despatch a boat with assistance, to endeavor to save the lives of the woman and child aforesaid; but that, no assistance being offered or given, two of the crew of the said schooner, with two of the passengers of the steamboat, took the small boat of the said steamboat, and went in search of the said female and child, but that their efforts were unavailing, the said schooner having sunk, and the said female and child having disappeared.

"4th. That the said steamboat was at the time aforesaid carelessly, improperly, and unskilfully navigated, and that the loss of the said schooner, with the cargo on board thereof, and the clothes, money, and effects of the crew and passengers, and the lives of the said female and child, was occasioned solely by the fault, carelessness, and unskilful management of the said steamboat. That the crew, and those having the

control and management of the said steamboat, as your libellants are informed and believe, were inexperienced in the command of the said steamboat, and were incompetent, unskilful, and insufficient, or else were careless and negligent, and by their want of skill, or carelessness and negligence, occasioned the said disaster, without the fault of the said schooner and her crew. That Long Island Sound, where the disaster occurred, is very wide, and there was ample room for the said steamboat to have passed and avoided the said schooner without any difficulty whatever.

"5th. That the said schooner or vessel, called the Iole, her tackle, apparel, and furniture, at the time of the said collision, was of the value of three thousand dollars or thereabouts, and was owned and possessed as follows; that is to say, the libellant Zebulon A. Paine was the owner of one equal half part thereof, and the libellant Sarah Norwood was the owner of the other half part thereof.

"6th. That the libellant Zebulon A. Paine was at the time of the said collision the owner of two hundred thousand laths, 4900 pickets, and 1725 S pickets, thirty-five tons of plaster, and thirty-nine barrels of fish, shipped by him on board of the said schooner upon the said voyage, which were of the value of five hundred and fifty dollars, or thereabouts, and which cargo so shipped by him was totally lost by the said collision.

"7th. That the libellant John Bucknam was at the time of the said collision the owner of thirty-six barrels of pickled fish, which he had shipped at Eastport aforesaid, on board of the said schooner, and which was totally lost by the said collision, and which last-mentioned cargo was of the value of one hundred and seventeen dollars or thereabouts.

*561] * "8th. That the libellant Andrew Bradford was at the time of the said collision owner of thirty empty beer-barrels, and two barrels containing beer, which he had shipped on board of the said schooner at Eastport aforesaid, to be carried to New York, and which last-mentioned cargo was totally lost by the said collision.

"9th. That the libellants Zebulon A. Paine and Sarah Norwood have also lost, in consequence of the said collision, the freight and passage money which the said schooner would have earned upon the delivery of said cargo in New York, and have been deprived of the use and employment of the said schooner, and have been interrupted in their business and mercantile pursuits, to their great loss and damage.

"10th. That the libellant Joseph Sumner saith, that he was the owner of, and had on board of the said schooner at the time of the collision aforesaid, and totally lost, the articles,

property, and effects enumerated and specified in the schedule hereto annexed, marked A, which he prays may be taken as a part thereof; which articles, property, and effects are truly valued in the said schedule.

"That the libellant James McCollar saith, that he had on board, and was the owner of, at the time of the said collision, and totally lost, the articles, property, and effects specified in schedule B, hereto annexed, and which he prays may be taken as a part of this libel, and that the value of said several articles is truly set forth therein. That the libellant Ambrose Tucker saith, that he was the owner of, and had on board of the said schooner at the time aforesaid, and totally lost, the property and effects specified, and being of the value stated, in schedule C, hereto annexed, and which he prays may be taken as a part of this libel. That the libellant James Woorster saith, that he was at the time of the said collision the owner of, and had on board the said schooner, and totally lost by the said collision, the property and effects specified and being of the value stated in the schedule hereto annexed, marked D, and which he prays may be taken as a part of this libel. That the libellant Henry Cuff saith, that he was the owner of, and had on board of the said schooner at the time of the collision aforesaid, and totally lost, the articles mentioned in the schedule hereto annexed, marked E, being of the value therein stated, and which schedule he prays may be taken as a part of this libel. That the libellants Joseph Sumner, James McCollar, Ambrose Tucker, James Woorster, and Henry Cuff, were sailing in and on board of the said schooner, on monthly wages, and that they have been thrown out of employ and put to much expense and loss.

*"That the libellant Augustus Norton saith, that he [*562 was a passenger on board of said schooner, and that he was the owner of, and had on board at the time of the said collision, the property and effects specified in schedule F, hereto annexed, and which he prays may be taken as a part of this libel; and that the said property and effects are truly valued in the said schedule, and they were wholly lost to him, and that in consequence he is now destitute, having saved nothing but one shirt, and that he has suffered great inconvenience, anxiety, and delay by reason of the said loss.

"11th. That after information of the loss of the said schooner and her cargo, as aforesaid, was received in New York, the libellants' agents in said city caused application to be made to George Law, who, as they are informed and believe, was at the time of the said collision the owner of the said steamboat, to pay the damages which the steamboat had

improperly, carelessly, and negligently occasioned as aforesaid, but that he refused to comply with such request.

"12th. That all and singular the matters aforesaid are true, and within the admiralty and maritime jurisdiction of this honorable court, and that the said vessel, her tackle, apparel, &c., is within the district, and in verification thereof, if denied, the libellants crave leave to refer to the depositions and other proofs to be by them exhibited in this cause.

"Wherefore the libellants pray, that process in due form of law, according to the course and practice of courts of admiralty, and of this honorable court in causes of admiralty and maritime jurisdiction, may issue against the said steamboat Neptune, her tackle, apparel, and furniture, and that all persons having or pretending to have any right, title, or interest therein may be cited to appear and answer upon oath all and singular the premises. And that this honorable court will be pleased to pronounce for the damages aforesaid, and to decree such other relief to the libellants as shall to law and justice appertain.

"Also to condemn the said steamboat, her tackle, apparel, and furniture, and all persons intervening for their interest therein, in costs and expenses.

"Joseph Sumner,
E. H. Owen."

After a stipulation had been entered into for costs by the libellants, a monition and attachment were issued, under which the marshal attached the vessel; a stipulation being entered into on behalf of the vessel in the sum of five thousand dollars, she was discharged.

In September, 1846, the following answer was filed:—

*563] * "To the Honorable Samuel R. Betts, Judge of the District Court of the United States for the Southern District of New York.

"And now Edward B. St. John, of the city of New York, in the district aforesaid, intervening for his interest in the steamboat Neptune, appears before the honorable court, and for answer to the libel and complaint of Zebulon A. Paine of Eastport, in the state of Maine, Sarah Norwood of same place, and John Bucknam, Andrew Bradford, Joseph Sumner, James McCollar, Ambrose Tucker, James Woorster, Henry Cuff, Augustus Norton, against the steamboat Neptune, and all parties intervening for their interest in the same, propounds as follows:—

"1st. That the respondent, at the time in the said libel set

forth, to wit, on the 14th day of July aforesaid, and before and afterwards, was the lawful owner of the said steamboat Neptune, a vessel of 720 tons, or thereabouts, now in the service of the United States, and having sailed for Texas or Mexico.

"2d. And the respondent, as to the allegations of the said libellants, and each of them, in the first, fifth, sixth, seventh, eighth, ninth, and tenth articles of the said libel contained, says that he is ignorant of and not informed concerning the same save by the said libel, and cannot therefore admit or deny the same to be true, but leaves the same to be proved according to the custom and practice of this court. And the said respondent further alleges and propounds, that the matters in the second, third, and fourth articles of the said libel are in great part falsely alleged, and that the truth is, as this respondent is informed and believes, as is hereinafter particularly propounded.

"3d. That the said steamboat Neptune, being in good order and well and sufficiently equipped and manned, sailed from the port of New York, in the state of New York, at five o'clock in the afternoon of the 14th day of July, 1846, bound for Newport and Providence, in the state of Rhode Island; and, in prosecution of her voyage, proceeded on her passage, at her regular rate, until about one mile from Stratford lightboat, when, at or about eight or ten o'clock in the evening, a vessel was seen about half a quarter of a mile ahead, which vessel the respondent understood to have been the schooner Iole, as is alleged in said libel.

"4th. That, immediately on seeing the said schooner Iole, the course of the said Steamboat Neptune was changed to windward of the said schooner, for the purpose of giving said schooner the course she was then running. That when the said steamboat was about ten or twelve lengths from the said schooner, it was observed that the latter had changed her *course, and was luffing up so as to cross the bows of [*564
the said steamboat. That, when first seen, said schooner was running west by south, from which she changed suddenly to about northwest. That, on seeing that said schooner had changed her course, the bell of the steamboat was immediately rung to stop her, and all efforts made to avoid the collision; but the said schooner came directly across the bows of the said steamboat, and, the latter having some headway, a collision could not be avoided. That the said schooner was struck about midships, and her crew at once jumped from the rigging on board the said steamboat. That the first report was, that no one was left on board the schoo-

ner; the next was, that a female and child were left on board, upon hearing which a small boat was immediately lowered from the Neptune, and sufficiently manned, and every other possible effort was made for the purpose of saving the persons on board of the said schooner; but that, before or about the time the boat could be lowered, the said schooner disappeared; but whether any person or persons were in her at the time she sunk, this respondent is not informed, save by the said libel, and cannot state. That the captain of the said steamboat, and the men with him who manned the said small boat, continued to row about the place of the disappearance of the said schooner for more than half an hour; but, finding no person or persons needing their aid, they returned to the Neptune. That, at the urgent request of the said passengers on board the said steamboat, who feared she might have become leaky by the collision, the said boat returned to New York; and, on being examined, was found to be in safe condition, only injured a little at the bows, and fully able to have continued her voyage in safety.

"5th. That Thomas J. Davis was, at the time of the occurrence aforesaid, master and captain of said steamboat, and had been on board of her for a year or more preceding; and that Nathan Child, former captain of said boat, a pilot accustomed to conduct and manage steamboats in the harbor of New York and on the route said boat was then proceeding, and John Driver, a wheelsman familiar and experienced in the management of said boat, and who had been employed on board of her the preceding seven years, were in the pilot-house, at the wheel, at the time of the said occurrence; and that all and every of said persons were skilful and sufficient in the management of said boat, and were in no way, nor were the crew employed in said boat, inexperienced, incompetent, unskilful, insufficient, careless, or negligent in the management of said steamboat, as is falsely alleged in the fourth article of the libel aforesaid; nor was the said steamboat, at the said
*565] time carelessly, *improperly, or unskilfully navigated; nor was the loss of the said schooner and cargo and other effects in the said libel named, nor the lives of the said woman and child, if any such loss took place, occasioned by the fault, carelessness, or unskilful management of the steamboat, as is also falsely alleged in the said fourth article of the said libel aforesaid.

"6th. That the reason why the said schooner was not seen earlier than at the distance of one quarter of a mile was, that a heavy black cloud shut her out from view, and she had no lights visible on board which could enable the captain, or

pilot, or the other wheelsman, or any of the crew of the said steamboat, to discover the said schooner sooner.

"7th. That, as soon as the said schooner was seen, the course of the said steamboat was immediately changed, according to the rule customary in such cases, so as to give the schooner the course she was pursuing. That this threw the broadside of the Neptune to view from the schooner, so that the man at the wheel on board the schooner saw the head and stern lights of the steamboat more distinctly, and her course was plainly seen by him.

"8th. That the wind was blowing fresh, and the luffing up of the schooner so as to cross the bows of the steamboat, when the position and course of the latter were so evident to those on board the schooner, could not have been expected by any person on board the steamboat, and was contrary to all proper and lawful rules of navigation.

"9th. That the said captain, pilot, wheelsman, and crew of the said steamboat Neptune used the greatest skill and care in the management of the same on the night aforesaid, and took every possible precaution to prevent the occurrence of any accident; and that the said steamboat did not in any manner negligently run against the said schooner, as is falsely alleged in the second article of the said libel.

"10th. That, on the occurrence of the said accident, the captain of the said steamboat, with a sufficient number of his crew, manned the small boat, and went in her, so as to afford every possible assistance to the persons or property on board the said schooner; and the allegations in the third article of the said libel, that no captain could be found on board of said steamboat, and that no assistance was offered or given to save the lives of those on board of the said schooner, are false.

"11th. That the accident aforesaid was occasioned by the great negligence and want of care of the officers and crew of the schooner Iole, in not providing powerful lights on deck, so that the said schooner could be discerned at a distance, and in changing the course of said schooner right across the bows of *the said steamboat when the latter was in full view of the said officers and crew, and that it was not occasioned [*566 by the fault, carelessness, or unskilful management, or by any malice or evil design on the part of the said captain, pilot, or any of the crew on board the said steamboat Neptune, as is falsely alleged in the fourth article of said libel, and that the owner of the said steamboat Neptune is not therefore liable to pay the damages by the libellant sustained.

"12th. That as to the allegations in the said tenth article of said libel contained, this respondent says, that some person

or persons on behalf or in the name of the libellants, or one of them, informed the said Law of the occurrence and accident, and stated who was the counsel employed therein; that said Law immediately called on said counsel of libellants, and on behalf of the owner of said steamboat offered to leave the whole matter to the decision of any two disinterested persons, who might choose a third as umpire; that said counsel of libellants promised to see his clients, and acquaint said Law with their answer to said proposition; that the only reply or answer made was the sending of an officer of this court to take possession of said boat by virtue of the said libel in this cause.

"13th. That all and singular the premises are true; in verification whereof, if denied, the respondent craves leave to refer to the deposition and other proofs by him exhibited in this cause.

"Wherefore, the respondent prays that this honorable court would please to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

"E. B. ST. JOHN, *Respondent.*

"WOODRUFF & GOODMAN, *Proctors.*"

To this answer the libellants filed a general replication.

At December term, 1846, the libel was amended, by leave of the court, by striking out the names of Joseph Sumner, master, James McCollar, mate, Andrew Tucker and James Woorster, seamen, and Henry Cuff, cook, wherever the same occur as parties to the suit.

Much testimony was taken on both sides, of which it is impossible to make an abstract; but the evidence of the master of the Iole and of the pilot of the Neptune will show the representations of the respective parties.

The following is the evidence of the master of the Iole.

"Joseph Sumner, sworn. Objected to by claimant as incompetent; master of brig Olive, trading between Eastport and New York; sixteen years mariner; five or six years master of vessel; been fifteen to twenty times through Sound.

*567] *"Master of Iole, 14th July last; his watch below at eight, P. M.; went below half past eight; night was clear, starlight; could see across the Sound both sides; did not observe any heavy clouds in any part of horizon; first notice of danger was, mate came to companion-way and called out that a steamboat was coming into them; when he went below, wind was north; steered west, at rate of seven knots; ordered them to keep west; that course would have taken them to

Captain's Island, or near that, off Sawpits, making allowance for half a point variation of compass; kept up so high in order to be at windward, if wind hauled westward, which had appearance of doing; when called, got to gangway as quick as could do so; first looked ahead and saw schooner was heading up the Sound by land on northern side; looked astern, and saw Stratford Point and light-boat, latter about two points on starboard quarter, that would make course of schooner about west; then asked where steamboat was; received no answer; then looked under main boom, and saw steamboat coming head on to his broadside; she was bearing about south of him, as he judged from Old Field Point light, which was about two points on starboard quarter of steamboat; steamboat appeared fifteen to thirty feet from him, but cannot judge distances accurately at night; her wheels were then going. Could at time see the land very plain on Long Island side; struck almost immediately, about midships; schooner then had about three points of sheet off, and sails were full when he came on deck; that must have been about a west course of schooner; steamer struck to leeward; was dead to leeward of schooner when he saw her; cut in twelve feet with bow, and within four feet of through the schooner; bow pressed through the galley and stove it to pieces; she remained fastened in to schooner a minute or two; witness made to bows of steamer as soon as could, called for a rope from her, received none, and got hold of bolt-rope of schooner, and got up part way on bows of steamboat, and then thought of woman passenger on board, and got down on lumber to try to save the woman; found he could get no footing, as lumber was afloat, the schooner having sunk under it; then climbed again by rope of sail to bows of steamer; as soon as he got on bows, asked for captain of steamer; two or three voices repeated there was no captain on board; same as to mate.

"Witness then went aft to find small boat; searched four or five minutes for it, and when he found it, she was lowered, and two of schooner's men and two others in her; it was shoving off as he got there; went to search for passengers, Mrs. Murphy and child.

*"Witness then returned to bow of steamer, and saw small boat row up to where schooner sunk; saw no more of her till her return. [*568

"Did not hear bell of steamboat ring to stop her. Schooner was in good order; about eighty tons; had cargo on board. (Proves bill of lading of part; deposition to this fact to put in.) The sky continued clear; saw several vessels both sides

of schooner, one ahead and one to leeward; before collision, one to leeward was bearing about southeast; should judge could see vessels, before and after collision, two miles in all directions; never saw vessels carry lights in Sound such a night.

"If steamer had been running her true course when he came on deck, would have cleared schooner, for she was dead to leeward; spoke with some one on board the steamer; don't know who; heard no one called captain; was told there was none on board. Witness talked with John Driver (defendant objects, and ruled out); had conversation with Harris after arrival at New York; he said he had turned in at time of collision; did not explain cause of accident.

"Witness never said or admitted to Childs or Harris that he ought to have carried lights, or that accident was owing to his not doing so.

"Brought the woman and child from Eastport; child about three years old; knew her in Eastport; was a very short time getting from his berth to deck; did not call for woman and child, because his whole mind was on saving his vessel, and did not think of them; after got on deck, had not time to think of woman and child; thought of his own life and to save schooner; thinks tide was about slack and low water."

The evidence of the pilot of the steamboat was as follows:—

"*Defence.*—Captain Nathan Childs, sworn. Resides at Providence; is forty-seven years old; mariner thirty-five years, in all capacities,—principally on the Sound, on all kinds of craft; been about twenty years pilot or master of steamboats.

"Was on board Neptune, 14th July, 1846, as pilot. Left New York about five, P. M. Captain Henry Harris was also pilot on board. Thomas Davis was Captain of the boat, and she had her full complement of men, as he believes; was not on board the trip before. Witness had watch fore part of the night. Weather was clear, except black cloud at east. Between nine and ten the cloud was about two hours high, or at height of sun at two hours above horizon, and closed down to horizon, and spread northeast and southeast. Neptune was *569] *running east by north. Witness stood in front part of wheel-house, midships, on the look-out. Driver had the wheel. Witness was at middle window of wheel-house, about the middle of the boat. Wheelsman was under his directions. Could then see ahead from one fourth to three eighths of a mile, so as to discern an object; should not think

could see any thing, except a light, farther off. Neptune was going at about ten miles the hour. About twenty-five minutes before ten, first saw schooner (Iole), north; was then about one mile and a half from light-boat, Stratford shore light bearing east by north one half north. Schooner was then directly ahead; could just discern her by side of flag-pole. Wind was about north; quite a strong breeze. Could not tell what course of schooner was; could not see her plain enough. She was trimmed close aft, or nearly so; might have had her sheets a little eased off, that brought her sails edgewise towards him, and could not tell whether she was a sloop or schooner.

"Witness ordered the wheel hove hard a-starboard immediately; and in less than half a minute ordered bell rung to stop the engine, seeing we were coming very near; and then rang the back engine, and by that time were close to schooner, and soon struck.

"The effect of heaving wheel a-starboard was to bring boat up to northward, and altered course of boat to about northeast.

"Thinks schooner was heading about northwest. She was square across bow of Neptune when they came together. Schooner had no lights; customary for sailing vessels on Sound to show lights when steamboats are near. Thinks schooner could have easily fallen off with the wind, if she saw the steamboat. If she had altered her course a very trifle, by falling off at any time within a mile, she could have easily cleared the Neptune. As soon as struck, crew of schooner got on board Neptune. Boat of Neptune was immediately lowered, and sent out to see if could find any body. It returned without finding any person; and captain took it himself, with lantern, and went out again, and was out with it about twenty-five minutes. Came back without finding any person. She was then hoisted up, and Neptune started, first northward, and directly across the Sound; from collision three quarters to one hour Neptune lay by before going on; found Neptune leaking some; and, after consultation, it was thought more prudent to return to New York. Got back to New York at half-past three to four, A. M.

"Schooner ought to have set a light or altered her course. Pretty much all vessels set a light, in dark nights, when steamboats *are near. It is impossible to see sail-vessels any distance such nights without. [*570

"Neptune had two large, bright lights, which could easily have been seen four or five miles off.

"If schooner had altered her course half a point within fifteen or twenty minutes of collision, would easily have avoided it.

"Schooner could very easily have gone to leeward, not so easily to windward, of Neptune.

"Witness changed his course to about northeast to windward, and considered that the prudent and safe course to take; changed it only to escape schooner.

"According to his experience in meeting sail-vessels in that way, it is the proper course for steamer to go to windward of steamer.

"Thinks there were from two hundred to two hundred and fifty passengers on board the Neptune; not a great many ladies.

"Collision was caused by schooner not setting a light, and not altering her course when she saw the Neptune.

"Not aware of any thing that could have been done on Neptune that was omitted to avoid the collision, according to his judgment and experience; and every thing was afterwards done in their power to save life and property on schooner. Schooner sunk in about eight minutes after collision.

"Houghton (clerk of boat) and Davis (a passenger) were in wheel-house at the time, with witness and man at wheel. Witness first discovered schooner. Captain Davis had turned in, at back part of wheel-house, twenty or twenty-five minutes before collision. Masters usually retire after boat gets well into the Sound.

"Witness had sailed the boat before that as master, but came on board that day as pilot; was appointed by Mr. Law. No time was specified nor wages. Witness was at that time employed on board Massachusetts, and it was understood that both boats belonged to same concern. Witness was transferred to the Neptune. Both boats had been running to same places. Does not know that they had been in opposition. Does not know that Harris, second pilot, had been on this boat before. He was also transferred from Massachusetts. Thinks that was Captain Davis's first trip at that period. Captain Rollins had been master before; understood that he and his pilots had been transferred to the Oregon that day; thinks it was about first of flood when he left New York, but does not recollect about it. Did not notice that particularly. Light-boat about fifty-five miles from New York. Thinks collision was a mile or a mile and a half from light-boat.

*"A drunken man fell into dock fifteen or twenty minutes before leaving New York, and was drowned.

"Did not know or hear on board that the Neptune leaked when she left New York.

"Sound eight or nine miles wide at place of collision. Thinks the Neptune was a very little nearest south side of Sound, and on usual course he has been in the habit of taking on board steamboats. Judges his position from what had observed days going through the Sound. Did not at time see the shores. Thinks discerned Connecticut shore, but not plainly. No recollection of looking at Long Island side. Connecticut shore about five miles off; could see it plainest above.

"Could see light-boat, probably three or four miles off, and Stratford light about five miles. When he first saw schooner, she bore east by north from the Neptune, directly ahead. Could not tell how she was steering, or whether going up or down the Sound. Did not look at her with his night-glass; had no time; his whole attention was directed to attempting to clear her; and took what he thought proper measure, by throwing wheel starboard. Judged she was going up or down the Sound, and that was the precaution always taken to clear them; probably one hundred to one hundred and fifty yards off when discovered how she was heading, but could not tell distance with any certainty. Put his wheel hard a-starboard, and thinks that altered his course four to four and a half points, and got his wheel so before saw how schooner was heading. As wind was, judged she must be going up or down the Sound; and besides, if running across Sound, sails would have shown differently. Steamer struck stem on, supposes starboard side of her stem, as that was more indented than the other.

"Thinks schooner would be running six or seven miles per hour. Hit her on larboard side, nearly between her two masts.

"Should judge schooner was heading about northwest when they struck. Her boom was not thrown off much. She would lie up to about northwest on that wind; and struck her nearly midships, about at right angles.

"Can't say what would have been the effect if he had not altered his course, vessels were so near to each other.

"If schooner had not altered her course, steamer would have cleared her. Saw schooner alter her course a minute or a minute and a half before striking. Presumes she was previously heading west, or within half a point of that.

"Discovered she was going up the Sound two or three minutes after he saw her; not over three or four minutes, he

should think, from time he saw her till they struck. If he
*572] had thrown *his wheel larboard, should have escaped her; but that would have been contrary to usage of passing vessels.

"If the schooner had kept her course just as she was struck, the steamer would probably have cleared her, if she had not altered her own course; and thinks would have cleared her fifteen feet.

"Thinks rang bell to stop in one minute after saw how schooner was, perhaps one hundred to one hundred and fifty yards off; rang bell to back as soon as he supposed engineer had time to stop. Knew by motion of boat that engine had stopped. Can always tell in wheel-house whether engine is in motion. Had not left wheel-house, except to take supper; had not laid down, or sat down.

"It is usual for sailing vessels to alter their course, or set a light, when they see a steamer coming.

"Was not requested by passengers to go into Stratford Point after accident. Did not tell any of them that he knew little of the coast. Did not tell any one that he was not a regular pilot. Had nothing to say to passengers. Did not say he could not put into New Haven.

"Watch was set about eight o'clock. Did not notice black cloud after put back for New York.

"Did not consider collision a severe one. Captain reported stern leaked some. Weight of steamboat, not going very fast, would break in an old vessel, without steamer feeling the blow much.

"It is usual for sailing vessels to set lights in passing steamboats, or coming up to them; commonly set in shrouds or rigging. Considers it duty of vessels to show lights, according to practice in Sound.

"If he had known the course of schooner, should have thrown his wheel as he did, because schooner might have hauled off on wind. Stern of steamboat injured very little; put on a small piece to repair her.

"Vessels on wind can keep away quicker than luff.

"With the wind that night, schooner could hold about a west course; would probably fall off a little south; so would naturally waive a little, as wind was more or less fresh."

In February, 1847, the cause was argued in the District Court, when the court adjudged that the libellants recover their damages sustained by the collision, and that it should be referred to a commissioner to ascertain and report the amount of damages sustained by the libellants.

In April, 1847, the commissioner made the following report in the case:—

** Commissioner's Report.*

[*573 "In pursuance of a decretal order made in the above-entitled cause, by which, among other things, it was referred to the undersigned, one of the commissioners of this court, to ascertain and report the amount of damages sustained by the libellants by means of the collision in the pleadings mentioned:

"I, George W. Morton, the commissioner to whom the above matter was referred, do report, that I have been attended by the proctors for the libellants and claimant, and have taken and examined the testimony offered by the respective parties, and do find that the damages sustained by the libellants, exclusive of interest, amount to the sum of $3,547.67, which sum is made up of the following items:—

The value of the vessel at the time she was lost, .	$2,500 00
75 barrels of codfish, at $3 per barrel, . .	225 00
200,000 laths, at $1.50 per 1000, ...	300 00
6625 pickets, at $6.25 per 1000, . . .	41 40
35 tons plaster, at $2.25 per ton, ...	78 75
30 empty beer-barrels, at $2 each, . . .	60 00
2 beer-barrels partly full, at $2 each, . . .	4 00
Value of the stores on board, ...	33 00
Freight on 75 barrels codfish, at 2s. per barrel, .	18 75
	$3,260 90
	$3,260 90
Freight on 200,000 laths, at 40 cents per 1000, .	80 00
" 6625 pickets, at $2 per 1000, .	13 27
" 35 tons plaster, at $2.50 per ton,	52 50
" 32 beer-barrels, at 25 cents, .	8 00
	$3,414 67
Articles on board belonging to Augustus Norton, estimating the quadrant at $16, . . .	123 00
Cash in his trunk, ...	10 00
	$3,547 67

$3,547 67
45 57

$3,593 24

"Amounting in the whole, without interest, to $3,547.67. All which is respectfully submitted.

"GEORGE W. MORTON, *U. S. Commissioner.*

"*April* 30, 1847."

*574] *In May, 1847, the District Court confirmed the report of the commissioner, with interest from the 7th of February, 1847, and costs.

The claimant appealed to the Circuit Court, which, in November, 1847, affirmed the decree of the District Court.

The claimant then appealed to this court.

It was argued by *Mr. Wood*, for the appellant, and *Mr. Gillet*, for the appellees.

Mr. Wood contended that, from the evidence (which he examined), the following facts were shown to exist in the case:—

The schooner Iole was sailing towards New York, in Long Island Sound, steering her course west; but her actual course, by reason of lee-way, &c., west by south. The wind fresh from the north. Sailing at rate of seven miles an hour.

Under these circumstances, the wind was fair for the schooner, that is, she had what is technically called "a free wind," or "had the wind free."

The steamboat Neptune, with from 200 to 300 passengers, was going "down Sound" from New York, on her proper course, east or east by north. Her speed about ten miles an hour.

The collision was about ten o'clock. The two vessels were therefore approaching each other at a combined rate of seventeen miles per hour.

The night was clear towards the west, north, and south, but dark towards the east by reason of a "bank" or cloud in that direction, which, at or about the time of collision, rendered objects invisible.

Libellants' witnesses do not contradict this.

The direction of the wind and course of the schooner were such as to present her sails edgewise to the officers of the steamboat, so as to increase the difficulty of seeing her.

The position of her sails, however, indicated to the officers of the steamboat, when they did see her, that the schooner was sailing nearly towards them, or nearly from them, and not across the Sound.

The courses of the two vessels were nearly on the same line (in opposite directions), that is, on lines which, when the schooner was first discovered by the officers of the steamboat,

converged very nearly to each other; so that the schooner was at first seen directly ahead of the steamboat, or a little on her starboard bow.

The steamboat was discovered by the crew of the schooner when several miles distant.

The officers and crew of the steamboat did not and could *not see the schooner until within a distance not greater than from one quarter to three eighths of a mile. [*575

At the instant the schooner was discovered, the course of the steamboat was changed to windward (that is, to north-east), to avoid the schooner.

Under the circumstances, this was the prudent and proper course.

The steamboat did prudently all that was possible to avoid the collision, and to save life and property after the collision.

The steamboat was properly officered and manned.

The schooner did nothing to avoid the collision; but either kept her course (notwithstanding she saw the steamboat approaching for nearly half an hour), or she designedly luffed, or was suffered to luff, so as to cross the steamboat's bows.

The schooner neither carried lights nor showed one, when she saw the steamboat approaching.

She ought at least to have showed a light, when her crew witnessed the approach of the boat for nearly half an hour.

Upon this state of facts, *Mr. Wood* arranged his argument under the following points, viz.:—

I. To enable the owners of the Iole to recover in this case, there must have been wilful misconduct on the part of the Neptune, or negligence on her part, accompanied with freedom from blame on the part of the Iole.

There is no pretence for a charge of wilful misconduct.

II. No blame or negligence can be imputed to the Neptune.

1. She was sufficiently manned with skilful and experienced seamen.

2. She was well and sufficiently lighted, and in the proper place.

The court erred in assuming that the atmosphere was thick, as well as cloudy, ahead.

3. The Neptune had a good look-out. The night not being foggy or hazy, a look-out on her deck below was unnecessary. The look-out in the pilot-house was proper and sufficient. The court erred in supposing a closed window intervened on the said 14th of July.

4. She was properly navigated as to speed.

Though she went faster at daylight, and in the early part of her voyage, at the period in question she was going at the

rate of ten miles the hour; which was not too fast, taking into view the general well-known usage in this country, and the character of the evening, which enabled the Iole or any other vessel approaching her to see her at a great distance, and on their showing a light would enable her to see them. *The Perth*, 3 Hagg. Adm., 417.

*576] *5. The Neptune was properly navigated, as to course, which was east by north, by the compass, and continued so until she discovered the Iole.

The Iole was approaching her on a west course, by the compass.

Allowance being made for lee-way of both vessels, which amounted to about half a point, they were going the same course reversed, with a variation of about half a point.

III. The Neptune first perceived the Iole at a distance from her of one quarter to three eighths of a mile, and could not see her at a greater distance, by reason of the cloud in the east.

IV. At this time the Iole appeared to the Neptune to be approaching or receding in nearly the same line, her sails being seen edgewise, and the Neptune appeared to be in the act of crossing her line to the northward, she being seen over the starboard bow of the Neptune, which is fully established by the specific observations of the witnesses.

V. The evidence that the Neptune, at the distance of six miles from the Iole, was on a line south of that of the Iole, and so as to pass the Iole to the south of her, is too weak to overcome the clear and decisive evidence on the last point, even assuming them to be competent witnesses.

These witnesses were interested and incompetent.

To hit the Iole as she did, (the Iole keeping her course,) and to come up directly towards her, the Neptune must have changed her course to due north, or north by west, which is not only improbable, but contradicted decidedly by the evidence.

VI. Assuming it to be true, and that the Neptune changed her course to the northward, some five or six minutes prior to the collision, it was so changed as to bring her in the position stated in the fourth point; and she was in that position when the Iole was first discovered by her, as the evidence decisively shows.

VII. If the Neptune changed her course five or six minutes before the collision, so as to bring her in the position stated in the fourth point, she was not in fault in making the change, because she did not (and could not) then see the Iole.

VIII. And it was the duty of the Neptune, when she first

perceived the Iole, to endeavor to pass her, and not to stop or slack her speed.

1. By stopping her course, she would have been in danger of being run into while at rest by a moving body, thereby endangering the lives of her passengers; it being the duty of passenger vessels to use every precaution of diligence, industry, and skill to save the lives of their passengers. 2 Kent Com., 601, 602; *Cristie* v. *Griggs*, 2 Campb., N. P., 79.

*2. By slackening her course she would have been less able to avoid collision than by continuing, or even accelerating, her speed. [*577

IX. The Neptune, when in the position stated in the fourth point, was correct in putting her helm a-starboard.

1. It was highly expedient that both vessels, on account of the proximity, should be active in endeavoring to avoid collision, and that neither should keep her course, and the Neptune was bound to act on that supposition. *The Friends*, 1 Wm. Rob., 482.

2. It was proper that the Neptune should go to the windward; the deviation in that direction on her part was easier, as she was crossing the line of the Iole in that direction, and the Iole could bear away to the leeward more readily than she could luff towards the wind. *The Shannon*, 1 Wm. Rob., 469, 470.

3. This movement was not only more convenient, but conformable to the general practice of the Sound, which is a wide sea, and rules are modified by practice in particular localities. The Trinity House regulation is applicable only to narrow channels. 1 Wm. Rob., 489.

4. The general rule that a vessel should pass to the right is not imperative, but a rule of convenience, which yields to circumstances, when both should be active. Abbott on Ship., 476; 3 Car. & P., 529; *The Friends*, 1 Wm. Rob., 482; *The Woodrop Sims*, 2 Dods., 86; *The Cynosure*, 7 Law. Rep., 222.

X. The Neptune would have avoided the Iole, if the Iole had even kept her course; more especially, if she had borne away to the leeward, when she saw the change of course of the steamboat towards the north, by her lights. And it was her duty to bear away, as she could easily perceive the change of the Neptune's course. *The Cynosure*, 3 Car. & P., 529.

XI. The Iole, according to the preponderating weight of the evidence, neither kept her course nor bore away from the wind, but, from the agitation of her helmsman, or some other cause, she luffed into the wind, across the course then pursued by the Neptune. The blow was received by the steamboat on the starboard side of her bows.

XII. The Iole was in fault,—

1. In not keeping a look-out, and discovering the clouds in the east; and in not forthwith showing a light when she discovered the Neptune, it being her duty, and the practice of the Sound, in such circumstances, to show a light. And it was more important for her to exhibit a light to the steamboat, than for the latter to show a light to her.

*578] *2. In not bearing away when the Neptune changed her course; which change she perceived, or might have perceived, with a proper look-out.

3. In neglecting her helm, bringing her to the wind, and crossing the track of the Neptune. See eleventh point.

XIII. The Iole being in default, cannot recover, even assuming there is fault on the part of the Neptune; it not appearing there was any wilful design on the part of the Neptune to injure. *Rathbun* v. *Payne*, 19 Wend. (N. Y.), 399; *Barnes* v. *Cole*, 21 Id., 188; *Simpson* v. *Hand*, 6 Whart. (Pa.), 311; *Reeves* v. *Constitution*, Gilp., 579; *Broadwell* v. *Swigert*, 7 B. Mon. (Ky.), 39; *The Celt*, 3 Hagg. Adm., 322, 323; *The Cynosure*, 7 Law Rep., 222; *Cook* v. *Champlain Transp. Co.*, 1 Den. (N. Y.), 99; *Brown* v. *Maxwell*, 6 Hill (N. Y.), 592; *Hartfield* v. *Roper*, 21 Wend. (N. Y.), 618; *Brownell* v. *Flagler*, 5 Hill (N. Y.), 282; *Spencer* v. *Utica and Schenectady Railroad Co.*, 5 Barb. (N. Y.), 337.

XIV. If the damage is the result of accident, there can be no recovery; and accident is to be presumed, till the contrary is shown.

Mr. Gillet contended that, according to the evidence, the following was the state of facts:—

1. The collision took place in Long Island Sound, on the 14th of July, 1846, between nine and ten o'clock, P. M., the Neptune cutting the Iole nearly in two between the fore and main rigging, and sinking her immediately, with her cargo and two passengers. The crew saved themselves by climbing upon the Neptune. This position is not disputed.

2. The Iole, at the time of the collision, had passed about one mile south of the Middle Ground light-boat, and was west of her. The Iole was steering directly west.

3. The wind was blowing fresh from the north, and the Iole was running close on the wind.

4. The Iole did not change her course or luff before the collision, but her sails were full when it took place.

5. The steamboat changed her course to the windward by putting her wheel hard a-starboard when within a quarter to three eighths of a mile from the schooner.

6. The steamer would have cleared the schooner, if the former had not changed her course.

7. There is no custom requiring a schooner in the Sound to carry lights when sailing.

8. The night was not so dark as to render lights at all necessary.

9. It is the duty of a steamboat, when a schooner is sailing on the wind, if necessary to avoid collision, to change her *course so as to avoid the latter, and it is not the duty of a schooner to change to the leeward. [*579

10. Claimant's witnesses state, that, when they first saw the Iole, she was a quarter to three eighths of a mile off, dead ahead.

If this evidence is true, the steamer ought to have ported her helm and gone to the south.

Upon this state of facts, *Mr. Gillet* made the following points:—

1. The schooner performed her duty in every respect, and had a right to keep her course to the west. Story on Bailm., § 611; The Thames, 5 Rob., 345; The Jupiter, 3 Hagg. Adm., 320; *Handaysyde* v. *Wilson*, 3 Carr. & P., 528.

2. It is incumbent on the steamboat to account for her situation, and to satisfy the court that there was no mismanagement, or mistake, or blame that can be reasonably imputed to her. *The Perth*, 3 Hagg. Adm., 414, 417.

3. The steamboat did not perform her duty, but was in fault in not keeping a better look-out, in changing her course to the windward, and in not turning to the leeward, (that is, to the south,) and in not earlier stopping her engine and backing when she saw the danger. *The Iron Duke*, 9 Jur., Abbott on Shipp., 234; Story on Bailm., § 611; 3 Kent, Com., 230, 5th ed.; *The Cynosure*, 7 Law Rep., 222; *The Jupiter*, 3 Hagg., 330; 2 Wend. (N. Y.), 452; *The Friends*, 1 Wm. Rob., 481, 483; *The Shannon*, 1 Wm. Rob., 467; 1 Law Rep., 313, 318; *The Gazelle*, 1 Wm. Rob., 475; *Lowrey* v. *Steamboat Portland*, 1 Law Rep., 313, 318; *The Gazelle*, 1 Wm. Rob., 475; Conkling's Adm., 305–311.

4. The witnesses for the steamboat state, that, when they first discovered the schooner, she was dead ahead, from a quarter to three eighths of a mile off. If so, it was the steamer's duty to have ported her helm and gone to the larboard of the schooner. She was bound to take the utmost care. *The Gazelle*, 1 Wm. Rob., 475; *The Perth*, 3 Hagg. Adm., 414.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York.

The suit was commenced in the District Court in admiralty against the steamboat Neptune by the appellees, who were the owners of the schooner Iole, for damages done by a collision on Long Island Sound, off Stratford Point, on the evening of the 14th of July, 1846.

The Iole was laden with a cargo of lumber, plaster, and fish in barrels, and was of about eighty tons burden.

*580] *The Neptune had on board from 200 to 250 passengers. The schooner was struck near midships, on the larboard side, and immediately sunk, carrying with her a woman and child, who were lost.

The libel charges that the schooner was on her voyage up the Sound to New York; and that about a mile south of the light-boat stationed off the Middle Ground, a shoal at that place, and nearly opposite Stratford Point, some sixty miles from New York, she was steering about a west course, the wind being from the north, and the night clear, so that a vessel could be descried at a considerable distance; and that while sailing upon this course with a fresh wind, going at from six to eight knots an hour, and a short time after the schooner had passed the light-boat, between the hours of nine and ten o'clock at night, she was negligently run down by the Neptune, which vessel was proceeding down the Sound from New York, and struck against her hull, head on, between the fore and main rigging on the larboard side, with such force and violence as to break open her hull, and cut her nearly in two, so that she filled and sunk immediately.

The allegations of the answer are, that the Neptune had sailed from New York at five o'clock of the afternoon of that day, bound for Newport and Providence (R. I.), and had proceeded on her voyage until within about a mile from Stratford light-boat, when, at or about eight or ten o'clock in the evening, a vessel was descried about a quarter of a mile ahead, which turned out to be the Iole in question. That immediately on seeing the vessel, the course of the Neptune was changed to windward for the purpose of giving her the course she was running. That when the Neptune was about ten or twelve lengths from the schooner, it was seen that she had changed her course, and was luffing up into the wind so as to cross the bows of the steamboat. That when first seen, the Iole was running west by south, from which she changed suddenly to about northwest; that, on seeing she had changed her course, the bell of the Neptune was immediately rung to stop her, and all efforts made to avoid the collision; but that

the schooner came directly across the bows of the steamboat, and, the latter having still some headway, a collision could not be avoided.

It will be seen from these allegations of the respective parties, that the issue between them, and upon which the case must turn in favor of the one or the other, is a very simple one, whether we have regard to the law or to the facts.

The statement of the Iole is, that she was proceeding on a west course up the Sound, nearly close-hauled to the wind, with her starboard tacks on board, at the rate of about seven knots *an hour; and that, while keeping on this course, [*581 the Neptune, in an improper manœuvre to cross her trail, and pass to the windward, struck her near midships on the larboard side, and sunk her.

The allegation of the Neptune does not vary substantially from this statement, except that it charges the collision to the fault of the Iole in not keeping on her course, but suddenly changing it by throwing her head into the wind, and thereby placing her athwart the track of the steamboat as she was in the act of passing to the windward.

The general question involved in the case is, which of these vessels has been in fault; and this will depend upon the evidence produced by each in the court below, together with the application of the rules of navigation to be observed by them at the time of the collision, and with a view to avoid it, having regard to their relative position and course; and, more especially, the application of these rules under the facts and circumstances, in a case where the colliding vessel is propelled by steam, and the other by sails.

Among the nautical rules applicable to the navigation of sailing vessels are the following, viz.:—A vessel that has the wind free, or sailing before or with the wind, must get out of the way of the vessel that is close-hauled, or sailing by or against it; and the vessel on the starboard tack has a right to keep her course, and the one on the larboard tack must give way, or be answerable for the consequences. So, when two vessels are approaching each other, both having the wind free, and consequently the power of readily controling their movements, the vessel on the larboard tack must give way, and each pass to the right. The same rule governs vessels sailing on the wind and approaching each other, when it is doubtful which is to windward. But if the vessel on the larboard tack is so far to windward that, if both persist in their course, the other will strike her on the lee side abaft the beam or near the stern, in that case the vessel on the starboard tack should give way, as she can do so with greater facility and less loss of

time and distance than the other. Again, when vessels are crossing each other in opposite directions, and there is the least doubt of their going clear, the vessel on the starboard tack should persevere in her course, while that on the larboard tack should bear up, or keep away before the wind. *The Friends*, 1 Wm. Rob., 483; *The Traveller*, 2 Id., 197; *The Ann* and *Mary*, Id., 189; *The Chester*, 3 Hagg. Adm., 316; *The Jupiter*, Id., 320; *The Celt*, Id., 327; *The Woodrop Sims*, 2 Dod., 86; *The Thames*, 5 Rob., 345; 3 Car. & P., 528; 9 Id., 601; 12 Moo., 148; 3 Kent Com., 230.

*582] *These rules have their exceptions in extreme cases, depending upon the special circumstances of the case, and in respect to which no general rule can be laid down or applied. Either vessel may find herself in a position at the time when it would be impossible to conform to them without certain peril to herself, or a collision with the approaching vessel. Under such circumstances, the master must necessarily be thrown upon the resources of his own judgment and skill in extricating his own vessel, as well as the vessel approaching, from the impending peril. These cases cannot be anticipated, and therefore cannot be provided for by any fixed regulation. They can only be examined, and the management of the vessel approved or condemned, as the case may arise.

But no one can look through the reports in admiralty in England without being struck with the steadiness and rigor with which these general nautical rules have been enforced in cases of collision, under the advice of the Trinity masters of that court, or fail to be impressed with the justice and propriety of such application, and the salutary results flowing from it.

In the case of the *Traveller*, an exception was set up by the colliding vessel, on the ground that the other, when first descried, was about two points on her lee bow. This was denied. But the court declined to enter into a minute examination as to which of the statements was correct, observing that it had been distinctly laid down, over and over again, that when two vessels on opposite tacks are approaching each other, and there is a probability of collision, it is the duty of the vessel on the larboard to give way at once, without considering whether the other vessel be one or more points to leeward. And, in the case of the *Friends*, the court, where an exception was attempted to be engrafted on the Trinity rules, in submitting the case to the Trinity masters, recommended that, for the sake of the safe navigation of the Thames and the great interests which are daily and hourly there at stake,

the exception, if any were to be made, should be clear, definite, and intelligible, in order that it might, at the first glance, be known to the mercantile and maritime world; that unless it were so, it was obvious that persons in all cases would endeavor to form exceptions for themselves, and instead of certainty they would have uncertainty; instead of security, danger. And in the case of the *Ann* and *Mary*, decided in 1843, the Trinity masters observed to the court, speaking of the rule that the vessel on the larboard tack must give way, and where they had applied it with great rigor, that the golden rule so long established must be strictly adhered to, which was, that the vessel *on the larboard tack is to give way and [*583
the vessel on the starboard tack to hold on; and that the new rule which had been lately made for steam-vessels, namely, each to put the helm a-port, under all doubtful circumstances, assimilated with it. The vessel on the starboard tack puts her helm a-port to keep the wind, and the vessel on the larboard tack does the same to bear away. That the same rule applied to sailing, as well as steam vessels, and if it should be strictly adhered to, there would not be one thousandth part of the accidents which had occurred.

These rules, which are the results of the practical experience and wisdom of navigators, cannot be too strongly impressed upon the observance of those engaged in the management of vessels on our rivers, or other waters where the course of business and trade naturally confines the navigation to a particular tract or route; and it is the obvious duty of the courts to apply them strictly in all cases of collision, unless where a clear exception is established by the party seeking to excuse himself for a departure.

Our examination thus far has been confined to the nautical rules governing the navigation of sailing vessels. We have thus confined it, because it will be found that they are generally applicable as rules regulating the navigation in cases where one of the vessels is propelled by steam.

The striking difference is, that steam-vessels are regarded in the light of vessels navigating with a fair wind, and are always under obligations to do whatever a sailing vessel going free or with a fair wind would be required to do under similar circumstances. Their obligation extends still further, because they possess a power to avoid the collision not belonging to sailing vessels even with a free wind, the master having the steamer under his command, both by altering the helm and by stopping the engines. They are also of vast power and speed compared with craft on our rivers and internal seas propelled by sails, exposing the latter to inevitable destruction in case

of collision, and rendering it at all times difficult, and not unfrequently impossible, to get out of their way. Greater caution and vigilance are therefore naturally to be exacted of those in charge of them, to avoid the dangers of the navigation. This justly results from the superior power to direct and control the course and speed of the vessel, and the serious damage consequent upon a failure to avoid the dangers. As a general rule, therefore, when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. *The Shannon*, *584] 2 Hagg. Adm., 173; *The Perth*, *3 Id., 414; *The Rose*, 2 W. Rob., 1; *Hawkins* v. *The Duchess and Orange Steamboat Co.*, 2 Wend. (N. Y.), 452; 3 Kent Com., 230; Abbott on Shipping, p. 228 (Boston ed., 1836).

By an adherence to this rule on the part of the sailing vessel, the steamer with a proper look-out will be enabled, when approaching in an opposite direction, to adopt the necessary measures to avoid the danger, as she will have a right to assume that the sailing vessel will keep her course. If the latter fails to do this, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision under the unexpected change of the course of the other vessel, and the circumstances of the case.

Recurring now to the facts attending the collision, as disclosed in the court below, and applying the rules of navigation as above stated, and which should have been observed by the respective vessels, we shall be enabled to determine without much difficulty which of them has been in fault.

The Iole had on board her starboard tacks, and was nearly close-hauled to the wind, and, as we have seen, had a right, and indeed was bound, to keep on her course; and it was the duty of the Neptune to adopt the proper measures to avoid her. There is some discrepancy in the evidence, but the clear weight of it is, that she kept her course till the collision occurred. She was not descried by the hands on board the Neptune till the two vessels were from one fourth to three eighths of a mile apart, with a combined speed of sixteen or seventeen miles the hour. She was then, as they supposed, directly ahead. The wheel of the Neptune was immediately put hard a-starboard, with a view to pass the schooner to the windward; and it is supposed by the hands on board that this manœuvre would have cleared her, had she not at the same time changed her course by heading more into the wind. As we have already said, this allegation is not borne out by the

evidence. On the contrary, the strong probability is, according to the testimony, that the hands on board the Neptune at the time they first descried the schooner mistook her position, and, instead of being on a line with her, that the Neptune was to the leeward, and that, in changing her course and coming up to pass to the windward, they naturally supposed the schooner had changed her course also.

Besides, she was in fault in attempting to pass the Iole to the windward. Even admitting that she was not mistaken in the position of this vessel, and that she was dead ahead, it was the duty of the Neptune to bear away; and to pass on the larboard side. As we have seen, the observance of no *one of the rules of navigation is more strongly recommended, or more steadily enforced, in the admiralty, [*585 than this one, where two vessels are approaching in opposite directions, and there is danger of a collision.

It is observable in this connection, that the pilot in charge of the Neptune seems not to have been properly instructed in his duty in the emergency after the schooner had been discovered ahead, or if he had, that he neglected it; for we find him testifying that, if he had known her course, (which he did not when he gave the order,) he should have thrown his wheel as he did, because the schooner might have hauled off on the wind. And the other pilot on board expressed the opinion, that there was no difficulty whatever in her keeping away and avoiding the Neptune, after seeing her two or three miles off. They seem to have entertained the opinion that, according to the rules of navigation, it was the duty of the sailing vessel to give way when meeting a vessel propelled by steam; and this even when she was on the starboard tack and nearly closehauled to the wind. Now, the owner is responsible for damage resulting not only from want of care and attention on the part of those in charge of the vessel, but also from the want of proper knowledge and skill to enable them to manage her according to established nautical rules. Error of judgment will be no defence, especially if resulting from incompetency. And erroneous opinions of duty on the part of those in the immediate management and control of the vessel naturally turn a doubt, arising from conflicting evidence upon a question whether or not a proper direction was given in the emergency, against them.

We are also satisfied, that the steamboat was in fault in not keeping at the time a proper look-out on the forward part of the deck; and that the failure to descry the schooner at a greater distance than half a mile ahead is attributable to this neglect. The pilot-house, in the night, especially if dark,

and the view obscured by clouds in the distance, was not the proper place, whether the windows were up or down. The view of a look-out stationed there must necessarily have been partially obstructed. A competent and vigilant look-out stationed at the forward part of the vessel, and in a position best adapted to descry vessels approaching at the earliest moment, is indispensable to exempt the steamboat from blame in case of accident in the night time, while navigating waters on which it is accustomed to meet other water craft.

There is nothing harsh or unreasonable in this rule; and its strict observance and enforcement will be found as beneficial to the interest of the owners as to the safety of navigation;

*586] *a remark equally true in respect to every other nautical rule, which the results of experience have shown enter so materially into the proper management of the vessel.

It has been insisted, that the schooner was in fault in not carrying a light, so as to enable the vessels approaching to see her at a greater distance. But all agree that it was a clear, starlight night, and hence there could be no difficulty, with a proper look-out, in seeing to a sufficient distance to enable the steamer to make the proper movement to avoid her. It is not usual for sailing vessels to carry lights on such a night.

It is true, some of the witnesses on the part of the Neptune speak of a black cloud in the eastern horizon, which obscured the view from vessels going in that direction. But the allegation is not maintained by the evidence to an extent that would justify us in attributing to it any material importance.

Upon the whole, we are satisfied the decree below is right, and must be affirmed.

Mr. Justice DANIEL dissented from the opinion of the court in this case, and also in that of *Newton* v. *Stebbins*. For his opinion, see the conclusion of the last-mentioned case, which follows the present.

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 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 and damages at the rate of six per centum per annum.

Isaac Newton, Claimant of Steamboat New Jersey, Appellant, *v.* John H. Stebbins.

Where a sailing vessel was descending the Hudson River with but a trifling wind, and chiefly by the force of the current, and came into collision with a steamer ascending the river, the question in the case was, whether or not the accident happened, notwithstanding every proper precautionary measure had been taken on the part of the steamboat to pass the sloop in safety, in consequence of an improper movement of that vessel by the mismanagement and unskilfulness of the persons in charge of her. If the sailing vessel kept her course, it was the duty of the steamboat to avoid her. The evidence showing that the steamer did not take *proper precautionary measures to avoid the sloop while endeavoring to pass her, the responsibility of the collision must rest upon the steamer. [*587

The steamer was in fault for not slackening her speed, on meeting a fleet of sailing vessels in a narrow channel of the river, she then going at the rate of from eight to ten knots the hour. She was also in fault, in not having a proper look-out at the forward part of the vessel, there being no one but the man at the wheel on deck.[1]

This was an appeal from the Circuit Court of the United States for the Southern District of New York.

Like the preceding case, it arose from a collision which took place between a steamboat and a sailing vessel.

The circumstances under which the collision took place, as claimed to exist by the respective parties, are thus set forth in the libel and answer. The libel was filed in November, 1845.

"To the Honorable Samuel R. Betts, Judge of the District Court of the United States for the Southern District of New York.

"The libel and complaint of John H. Stebbins, of Coeymans, mariner, owner of the sloop Hamlet, whereof the libellant was master, her tackle, apparel, and furniture, against the steamboat New Jersey, whereof one Beebe now is or late was master, her engine, boiler, tackle, apparel, and furniture, now within this district, and also against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime; and thereupon the said John H. Stebbins alleges and articulately propounds as follows:—

"1st. That some time in the month of October last the said sloop Hamlet (whereof the said libellant was master) was at the port of Bristol on the Hudson River, and destined on a voyage thence to the port of New York, with a cargo of flagging and other stone on board; and was at the time a tight, stanch, and well-built vessel, of the burden of ninety tons, or

[1] Followed. *The Ant*, 10 Fed. Rep., 297.

thereabouts, and was then completely rigged and sufficiently provided, and then had on board, and in her service, a full and competent crew for the navigation of said sloop on the voyage above mentioned.

"2d. That in the said month of October the said sloop, provided and manned as aforesaid, sailed from the port of Bristol on her aforesaid voyage to the port of New York, and in the prosecution of the said voyage, as he is informed and believes, the said sloop proceeded at the rate of about four or five miles per hour, until she arrived at a point on the Hudson River called Blue Point; that at that point the wind failed, and the said sloop then proceeded with the force of the current and very little wind about one or two miles an hour; that on her arrival at said point, and while the said vessel was *588] within the jurisdiction *of this court, the person in charge of the said sloop observed the said steamboat coming up the river at the rate of about twelve or fifteen miles per hour, and nearer to the east shore of said river than the said sloop, and directed the man at the helm to head the said sloop more to the west shore of said river, which was done; that when said steamboat New Jersey arrived within a short distance of the said sloop, she altered her course to the westward, and negligently and carelessly headed across the bows of said vessel, and attempted to pass to the westward of said sloop; in consequence of which negligent conduct of those in charge of said steamboat, the said steamboat struck the end of the said sloop's bowsprit, carrying away about ten or twelve feet of the said bowsprit and the stays attached thereto, forcing the bows of the said sloop round so that she struck the sloop on the larboard bow, doing such injury to the said sloop by said collision, that the sloop immediately sunk, with her said cargo.

"3d. That at the time the damage mentioned in the preceding article happened, it was impossible for the said sloop Hamlet to get out of the way of the said steamboat New Jersey, the said sloop having little comparative way on, and being at the time to the westward, and out of the course of the said steamboat, and there being room enough for the said steamboat to have passed to the eastward of said sloop, as she might and ought to have done. That if the persons having charge of the said steamboat New Jersey had taken proper precaution to keep clear of the said sloop, which it was their duty to have done, the damage in the next preceding article set forth would not have happened.

"4th. That the said sloop, at the time of the receiving of the damage above mentioned, was a tight, stanch, and strong

vessel, and that the libellant then was, and now is, the true and lawful owner of said sloop, her tackle, apparel, and furniture.

"5th. That by the collision aforesaid, and the consequent sinking of said sloop, with her cargo, the libellant has sustained damage to the amount of three thousand five hundred dollars.

"6th. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court; in verification whereof, if denied, the libellant prays leave to refer to pleadings and other proofs to be by him exhibited in this cause.

"Wherefore, the libellant prays, that process in due form of law, according to the course of courts of admiralty, and of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said steamboat New Jersey, her *engine, boilers, tackle, apparel, and furniture, wheresoever the same may be found; and that all persons [*589 having, or pretending to have, any right, title, or interest therein may be cited to appear and answer all and singular the matters so articulately propounded; and that this honorable court would be pleased to pronounce for the damages aforesaid, or for such other and different relief to the libellant in the premises as shall to law and justice appertain, and also to condemn the said steamboat, her engine, tackle, apparel, and furniture, and the persons intervening for their interest therein, in costs.

"JOHN H. STEBBINS."

To this libel, Isaac Newton filed the following answer:—

"January Term, 1846.

"To the Honorable Samuel R. Betts, Judge of the District Court of the United States within and for the Southern District of New York:

"And now Isaac Newton, intervening for his interest in the steamboat New Jersey, appears before this honorable court, and for answer to the libel and complaint of John H. Stebbins against the said steamboat New Jersey, her engine, boilers, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, alleges and articulately propounds as follows:—

"1st. That this respondent was the owner of said steamboat, her boiler, engine, &c., in October last, at the time of the alleged collision of said sloop Hamlet, in the libel men-

tioned, and the New Jersey, and before that time, and afterwards until the sale of said steamboat to William B. Dodge and John S. Moore, on or about the 19th day of November last; and that since such sale by this respondent to said Dodge and Moore, this respondent has been and still is bound to indemnify and save the said Dodge and Moore harmless against any claim or demand which the said libellant, or any other person, may have against said steamboat, her boiler, engine, &c., by reason of any such collision, and has been ever since such sale, and still is, interested in said steamboat, her engine, tackle, apparel, and furniture, as mortgagee for the purchase money.

"2d. This respondent also admits that the libellant was the master of the said sloop Hamlet; but he says, on information and belief, that said libellant was not in command on board said sloop at the time of the collision in question, nor at any time during her said trip or voyage. This respondent also admits that said sloop was at Bristol, on the Hudson, as alleged in the first article of said libel, and destined on a trip
*590] or voyage *thence to New York, with a cargo of some sort on board, but he is not informed, save from the libel, and therefore will leave the said libellant to prove, of what her cargo consisted; and this respondent denies, on information and belief, that said sloop was, as alleged in said libel, tight, stanch, and well built; and he also denies, on information and belief, that said sloop was completely rigged and sufficiently provided; and especially does he deny that she had on board, and in her service, a full and complete crew for the navigation of said sloop on her destined voyage; and he avers, as he is informed and believes, that she was not sufficiently manned, that the master was not on board of her, and no competent person in charge of said sloop on said voyage.

"3d. This respondent further says, that, as he is informed and believes, on the afternoon previous to the collision in question, the New Jersey started from New York at or about five o'clock, with a tow-boat of about two hundred tons burden, bound for Hudson, and at the time of said collision, which arose from running the sloop into the said steamboat, as hereinafter mentioned, the said steamboat was within about half a mile from a point on the Hudson known as Blue Point, a distance of about eighty miles from New York; that the time of the collision in question was about two o'clock in the morning; that at the time of collision, and a short time previous to the collision, and for three or four miles before the sloop struck the steamboat, the steamboat was on the west side of the river, and westward of the course of the sloop, with her tow-boat on

her west side; that said steamboat had had a fair tide until a little before the collision happened, but at the time of the collision it was slack water; that a short time previous to the collision, and that at the time thereof, the wind was from the westward and blowing a stiff breeze; that the steamer, a short time previous to the collision, was slowed, and was stopped about the time of the collision; that the steamboat did not cross the bow of the sloop, nor the course the sloop was running at the time the sloop came in sight, and that the collision arose from the short luffing of the sloop, through the fault and wilfulness, carelessness, mismanagement, or misdirection of the person or persons in charge of the sloop, which the persons in charge of the steamboat could not have foreseen nor guarded against, whereby the said sloop was run into the said steamboat by the person in charge of said sloop, and with so much force and violence as to drive the bowsprit of the sloop into the steamboat, and do a great damage to said steamboat; or that the said collision arose otherwise from the fault, mismanagement, misdirection, or incompetency of the person or persons *in charge of the said sloop, and that the said collision [*591
happened without any fault, misdirection, or mismanagement of the persons in charge of said steamboat. And this respondent further answering says, that he is not informed of the rate at which the said sloop was proceeding before and after their arrival off Blue point, but he has reason to believe, and does believe, that the said sloop was proceeding much more rapidly through the water, both before and after their arrival off Blue Point, than as aforesaid is stated in said libel; and he denies, on information and belief, that the wind failed as said sloop arrived at the point. And this respondent denies, on information and belief, that the said steamboat, with her tow-boat, at the time she came in sight of the sloop, or at any time on her said trip or voyage from New York, either did or could have proceeded at the rate of near twelve or fifteen miles per hour, but she was moving at a much slower rate, and very slow; and he likewise denies, as he is informed and believes, that said steamboat was at any time after her coming in sight of said sloop nearer to the east shore of said river than said sloop; but whether or not the person or any persons having charge of said sloop directed the man at the helm thereof to head the sloop more to the west shore of said river, and whether the same was done in manner and form as alleged in said libel, this respondent is ignorant, and would leave said libellant to prove the same; but he is informed and believes that as said steamboat, going up the river, was passing said sloop to the west of said

sloop, and said sloop, going down the river, was passing to the east of said steamboat, the course of said sloop was suddenly altered, through the manifest fault and carelessness, mismanagement, or misdirection of the persons in charge of said sloop, and so directed to the westward as to run her into said steamboat; and this respondent further says, as he is informed and believes, that as the said steamboat was passing said sloop to the westward, with her tow-boat in tow on her west side as aforesaid, the said sloop being headed toward the eastward, before the sudden change of direction of said sloop as aforesaid, he is informed and believes that said steamboat was directed farther, and as far as possible, to the westward to keep clear of said sloop, and that she was not directed westward so as to cross the bow of said sloop; and that the said steamboat was not negligently or carelessly, or otherwise, headed across the bows of said vessel, nor was it attempted to pass said steamboat to the westward across the bow of the sloop, or the course of the sloop; and this respondent denies, on information and belief, that it was in consequence of any negligent conduct or fault of those in charge of said steamboat that said steamboat struck *the end of said sloop's bow-
*592] sprit, and says, as he is informed and believes, that the allegation is more correct, as it is in accordance with the fact, to say, that the end of the bowsprit of the sloop struck the steamboat, than that the steamboat struck the end of the bowsprit of the sloop, which is not true, as this respondent is informed and believes. And this respondent admits that said sloop sunk at or soon after the collision; but he says, as he is informed and believes, it was through the weakness and insufficiency of the said sloop, and through the carelessness and mismanagement and insufficiency of those who had charge of her.

"4th. This respondent further says, that, as he is informed and believes, it is not true, as alleged in the third article of said libel, that it was impossible for said sloop Hamlet to get out of the way of the said steamboat, for the reasons supposed in that article, nor for any reason whatever; but, on the contrary thereof, this respondent is informed and believes that said steamboat was pursuing her course, on the westerly side of the river, as aforesaid, and that said collision was occasioned entirely by the fault, misdirection, mismanagement, or incompetency of the persons having charge of the sloop, in suddenly altering and varying her course as aforesaid, and in not keeping on her course as the said sloop ought and might have done, and for which she had sufficient headway; or otherwise through the fault, misconduct, mismanagement, or

incompetency of the person having charge of said sloop. And he further says, that if the person or persons in charge of said sloop had used proper precaution or reasonable skill or care, as in duty bound to do, to avoid said collision, said collision might and would not have happened. And this respondent further says, as he is informed and believes, that every precaution was taken and effort made, and all reasonable care, skill, and diligence used, by the persons having charge of said steamboat, to avoid such collision.

"5th. This respondent, on information and belief, denies that said sloop, at the time of said collision, was tight, stanch, or strong, but, on the contrary thereof, was old, weak. and insufficient; and this respondent says that he is not informed, except from the libel, whether the said libellant was, at the time of said collision, or since has been, the owner of the said sloop, her tackle, apparel, and furniture, and therefore does not admit the same, but leaves him to prove the same as he may be advised.

"6th. Whether the said libellant has sustained damages to the amount of $3,500, or to any amount, by the collision aforesaid, and the sinking of said sloop with her cargo, this *respondent is not informed, save by said libel, and does not admit the same, and leaves him to prove the same [*593 as he may be advised; but this respondent insists, that neither said steamboat New Jersey, nor this respondent, is liable for any part of such damage, if any there be.

"7th. That the said collision, as this respondent is informed and believes, occurred within the body of the county of Ulster or of Duchess, in the state of New York, and not within the admiralty and maritime jurisdiction of this maritime court, and that therefore this honorable court has not jurisdiction, and ought not to proceed to enforce the claim alleged in the libel aforesaid against said steamboat, or against this respondent intervening for his interest therein; and this respondent claims the same benefit of this exception as if he had demurred to said libel, or pleaded specially to the jurisdiction of this court.

"8th. That all and singular the premises are true; in verification whereof, if denied, the said respondent craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

"Wherefore this respondent prays, that this honorable court would be pleased to pronouce against the libel aforesaid, and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

"J. Newton."

To this answer the libellant filed a general replication.

Twenty-five witnesses were examined, some of them being persons who were on board of vessels very near the Hamlet at the time of the collision, and others persons who were on board of the steamboat. In order to show the contradictory nature of the evidence, the following depositions are inserted:

For the libellant:—

"William Hallarbeck, sworn. Was pilot of Eliza Wright; first saw steamboat when a little below Blue Point, at about Barnegat, close in to east shore, and kept right along up east shore to opposite Sands's Dock, and then sheered over northwest. Witness about one third across river from west shore when steamboat came towards him heading about for him; came within three lengths of sloop. Witness shook his light, and she took a sheer west, cleared witness about as far off. Hamlet was then half way between witness and shore, a little astern of witness; steamboat kept her course west, and tried to pass Hamlet's bow; saw them strike steamboat. Hit bowsprit of Hamlet, and slewed her right round to westward; saw her sink within a minute or two; wind was very light and baffling, northeast and northwest, and every way. Witness's
*594] boom *at time, off east; was going three to four miles through water. Witness a little above the White House, nearly opposite to it.

"*Cross-examined.*—Not quite a mile from White House, to Blue Point three quarters mile. Witness about length ahead of Hamlet, and she about half way between White House and Blue Point, and about one third of a mile from witness; she had no lights in her rigging; saw her bowsprit; night was then lit up a good deal. Witness's sloop steered well, about abeam; was going four miles to Hamlet's three, per hour; steamboat had tow-boat on west side; did not stop for collision; did not observe vessels particularly after they struck and got clear; could see hull of steamboat a mile; a small flat between White House and Blue Point, not extending one half length of sloop into river.

"Thinks steamboat passed him at rate of ten or eleven miles; does not know that she stopped her wheels before striking Hamlet; did not seem more than a minute after passing before she struck Hamlet; was room for steamboat to pass Eliza Wright on east side.

"Robert F. Osborn, sworn. Master of sloop Van Buren; was coming down river night of collision; about half across river from Blue Point, when first saw steamboat; she was then on east shore, near Barnegat, one third from shore; was then coming directly up the river, as he judged; very soon

she altered so as to run more to west, and then again to about northwest; was astern of Hamlet, and a little east of her, about to end of her boom.

"Steamboat passed witness's bow; did not then know Hamlet.

"Steamboat was steering well into west when she struck sloop; saw her strike; was then thirty or forty rods off; did not, to witness's knowledge, stop her wheels before striking; judged she was going nine or ten knots; blow slewed Hamlet west; witness jibed over to clear steamboat, and kept away; was about abreast of sloop when she sunk; steamboat was close along side of her; mast was over steamboat. Sloop went down, head first. Witness thinks he was running about two miles; wind north, directly down river, and light; had kept close with Hamlet from Crumelbow.

"*Cross-examined.*—Thinks course of river about north and south at that place. Witness's sloop minded her helm when he kept away; believes steamboat backed her wheels after collision; sloop sunk within two or three minutes; steamboat lay some time after; barge of steamboat on larboard side; did not see any light in rigging of Hamlet.

"Jonathan Reeve, sworn. Was pilot of Van Buren. Witness *was at helm; at time of collision, one quarter to one third from western shore, across river, right after [*595 Hamlet thirty or forty rods, perhaps, off; saw two vessels come together; should think steamboat was going eight or ten knots, steering west-northwest to northwest course.

"Hamlet heading directly down river; wind unsteady at time; witness going about two knots; saw steamboat a mile and a half off, and thought she was on east side, and going up that side, as witness's sail shut her in; boom off east. Captain Osborn called to witness she was crossing river, and she soon opened to witness's view; did not observe that steamboat stopped her wheels till she struck; turned sloop round: head same way with steamboat; then thought she backed her wheels, and that started sloop a little backward, which rolled over to windward; then rolled back her mast towards steamboat, and sunk immediately; did not know sloop at time; had to keep away to get from steamboat.

"*Cross-examined.*—Does not think was length of sloop from steamboat when passed her; witness did not alter course of sloop before collision."

For the claimant:—

"George Dobson, sworn. Second pilot of Buffalo; was pilot of New Jersey night of collision; was at wheel at time

of collison, and from New York, except time of taking his tea; saw Hamlet a mile or more ahead, she being most to west of all the vessels; great many vessels coming down; made course to clear her, as he had all the rest from Clinton's Point up; had plenty of room, as if she had kept her course he should have had nearly one-third of river; first she luffed, and witness hauled more west to avoid her; she had been running straight down the river, and was perhaps one-third of a mile off when she changed her direction; when she luffed she bore more for steamboat; should have gone clear had she kept her course; fearing she would not clear steamboat, slowed her, and hallowed to sloop to keep away; then stopped steamboat, and hailed again to keep away, and saw man shove his helm down (which would luff her up); it luffed her directly round; the instant witness saw him put his helm down, rang the bell twice to back, and sloop came head into her, as nearly head on as he could judge, might be a little glancing, and she ran against steamboat; hailed with loud voice; thinks would have cleared without trouble if sloop had not luffed last time; after helm was put down, nothing more could be done on New Jersey than was done; her direction could not be changed, and could aid in avoiding sloop only by backing.

*596] *"*Cross-examined.*—That night went on board New Jersey; been three or four years in People's line; Mr. Van Santvoord sent witness to boat; does not know whether he is owner in line or not; he is one of the principal managers; Drew another, and then chief director; heard he was owner; witness hired to him as runner, but good deal of time has been pilot; has also been captain; passed more vessels that night than he ever before saw on river; first part of night very dark and bad, but had become more clear at time of collision; nothing to call witness's attention particularly to Hamlet; does not recollect passing any vessels in immediate vicinity of Hamlet; passed some below; did not pass any vessel close to eastern shore of Sands's Dock; was then one-third river off west shore; began at Clinton Point to lay his course gradually across river, so as to get on west side; wanted to get to windward of vessels which had generally jibed; could in such state generally run over to west shore; sloop nearer the shore when she struck than when she sunk; thinks she sunk nearly one-third of river off shore; she was dragged off by backing of New Jersey, he thinks all of 200 feet or more, before she went down; sloop luffed twice; second time came dead up and direct into New Jersey; New Jersey backed twice, once when sloop was sinking.

"Been on river seventeen or eighteen years pretty steady, in all twenty-five years.

"Has run season as pilot, sometimes not on same boat."

In July, 1846, the cause came on to be tried in the District Court, when the following decree was pronounced:—

"This cause having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises,—

"It is now ordered, adjudged, and decreed by the court, that the libellant recover, in this action against the steamboat New Jersey, her tackle, &c., the damages sustained by the sloop Hamlet, and the cargo on board.

"And it is further ordered, that it be referred to one of the commissioners of this court, to ascertain and compute the amount of such damages, and to report thereon to this court with all convenient speed. "SAMUEL R. BETTS."

On the 25th of September, 1846, the commissioner made the following report:—

"In pursuance of a decretal order, made in the above-entitled case, on the first day of August instant, by which, among other things, it was referred to the undersigned, one of the *commissioners of this court, to ascertain and compute the amount of damage sustained by the sloop Hamlet, in her collision with the steamboat New Jersey, and the value of the cargo on board: [*597

"I, George W. Morton, the commissioner to whom the above matter was referred, do report that I have been attended by the proctors of the libellant and claimant, and have taken and examined the testimony offered in support of the libellant's claim, and the testimony offered by the claimant in opposition thereto, and do find that the sloop Hamlet, at the time of the collision with the steamboat New Jersey, was worth the sum of $2,800, and the cargo on board the sum of $528.35, amounting in the whole to the sum of $3,328.35, being the damages sustained by the sloop Hamlet and cargo, in her collision with the steamboat New Jersey.

"All which is respectfully submitted.

"GEORGE W. MORTON, *U. S. Commissioner.*

"*September 25th*, 1846."

Exceptions were filed to this report, and on the 14th of October, 1846, a final decree was entered in the District

Court, reducing the damages to $2,403.70, which amount it was adjudged that the libellant should recover, with costs.

The claimant and libellant both entered an appeal from this decree; but the libellant not perfecting his appeal, the cause went up to the Circuit Court upon the appeal of the claimant alone.

On the 10th of September, 1847, the cause was tried upon this appeal in the Circuit Court, and on the 11th of November, 1847, the decree of the District Court was affirmed, with costs.

The claimant appealed to this court.

It was argued by *Mr. Van Santvoord*, for the appellant, and *Mr. Benedict*, for the appellee.

The points made by *Mr. Van Santvoord*, for the appellant, were the following:—

I. To succeed, the libellant must establish to the satisfaction of the court, not only that the collision happened through some negligence of the persons in charge of the steamboat, but also that it happened without any fault of the persons in charge of the sloop. *Bulloch* v. *Steamboat Lamar*, Circ. Ct. U. S., Georgia, 8 Law Rep., 275; Abbott on Shipping, Story & Perkins's ed., p. 228, note (2); *Parker* v. *Adams*, 12 Metc. (Mass.), 415, 417; *Spencer* v. *The Utica and Schenectady Railroad Co.*, 5 Barb. (N. Y.), 337, and cases cited therein.

And to establish the fact to the satisfaction of the court, *598] that *the fault was not on the part of the persons intrusted with the navigation of the sloop, the libellant must show it by evidence leaving no reasonable doubt, as the burden of proof is upon him. *The Catherine*, 2 Hagg., 145, 154; *The Ligo*, 2 Hagg., 356; *Lane* v. *Crombie*, 12 Pick. (Mass.), 177.

II. Section 1 of Title 10 of the Revised Statutes of New York does not apply to the case of a sailing vessel and a steamboat.

The fact of the omission by the legislature to provide for the case of a sailing vessel and steamboat, approaching from opposite directions, is the highest evidence of their intention to leave such a case to be regulated by the ordinary rules and usages of navigation in such cases.

III. The case of *The Friends*, 1 Wm. Rob., 478, cited by the libellant below, does not apply to the case of a sailing vessel and steamboat approaching from opposite directions on the Hudson River,—for the reason, that the decision of that case rests wholly upon the view taken by the judge who

decided it, of the construction and application to the case of the Trinity rules, which are of no force here.

The case was one of great obstinacy and sharp practice; both parties persisting in their course,—the steamer Menai hailing the schooner to starboard her helm, and the schooner hailing the steamer to port her helm, while either might have avoided the collision by a change of direction. The true question therefore was, Which was most to blame? and the court, on the application of the Trinity rules, considering the schooner technically right, pronounced against the claim of the steamboat.

IV. But if the rule requiring each vessel to keep to the right (which would seem to be the most usual practice on our coast, unless there is some good reason to the contrary, as in the case on appeal, *Lowry* v. *Steamboat Portland*, 1 Law Rep., 312) is applicable to the case of a sailing vessel and a steamboat, it is applicable only to the case of two vessels approaching each other in a direct line, from opposite directions, when so near that it becomes the duty of each to take proper measures to avoid a collision.

See the opinion of the court, in the case of *The Friends*, 1 Wm. Rob., 482, showing that the case goes on the assumption that both vessels were approaching on a *direct line*, and so near that it was the duty of each to take proper measures to avoid a collision.

V. Nor does the rule insisted on apply to the case where the vessel on the larboard tack (the steamer) is on a course so far to windward, as the vessels are nearing each other, that, *if both persist in their course, the other will strike her on the leeward side abaft the beam, or near [*599 the stern,—in which case the vessel on the starboard tack should keep off. Report of Benjamin Rich and others to the District Court of Massachusetts, 1 Law Rep., 318.

Nor (*a fortiori*) to the case where the vessel on the starboard tack, if kept on her course, would pass at a safe distance to the windward of the other vessel.

VI. The rule of navigation specially applicable to the case of a steamboat approaching a sailing vessel, which requires a steamboat to pass the sailing vessel either on the larboard or starboard side of the sailing vessel, whichever is the best method of proceeding to avoid a collision, under any given circumstances, necessarily imposes upon the sailing vessel a corresponding obligation to keep her course, and not to change her direction as the steamboat approaches near her, across the line of direction of the steamboat.

A little arithmetic will show, that a sailing vessel, proceed-

ing at the rate of three miles or two miles an hour through the water, or even less, can change her position from a point so far out of the line of the direction of a steamer approaching her, proceeding at an ordinary rate of speed, as to render a collision inevitable; and a collision thus occasioned would be justly chargeable to the fault of the sailing vessel.

Three miles an hour is at the rate of 176 yards, or 528 feet, in two minutes; and two miles an hour, at the rate of 117 yards, or 351 feet, in two minutes.

As to the law and rules of navigation applicable to the case, see the opinion of the District Judge in the case on appeal, of which a copy is herewith furnished.

For further illustration, see also the opinion of the District Judge of New York in the case of *Stout* v. *The Steamboat Isaac Newton*, decided Dec. 23, 1848.

VII. In reference to the pleadings, the rule of pleading in cases of tort is, that it is sufficient if part only of the allegations stated in the declaration or answer be proved, provided that what is proved affords a ground for maintaining the action or defence, supposing it to have been correctly stated as proved: it is quite enough in cases of tort, if the same ground of action or defence is proved as laid in the declaration or answer, although not to the extent there stated. 1 Phillips on Evidence, 200, 205.

In this view, the allegation in the answer, that the steamboat was on the west side of the river for three or four miles before the collision, is not required to be proved in its full extent. It is requisite to show only that the steamboat was *600] on *the west side of the river, and on a course to the westward of the sloop, a sufficient time to give the sloop reasonable notice of her direction to westward.

Nor, in this view, is it necessary to prove that a stiff breeze was blowing, provided there was sufficient wind to enable the sloop to control her movements and change her direction.

Besides, the defence is not confined in the answer to the precise statement of the manner in which the collision happened.

VIII. In reference to the evidence, the appellant will insist,—

1. That the testimony of a competent witness is to be believed, until his statement is contradicted by other testimony or evidence, from controlling facts, entitled to greater confidence.

2. That the evident misapprehensions of witnesses are not entitled to be considered as evidence. In connection with this, see Penny Cyclopædia, art. *Motion*.

3. That when it shall be shown that witnesses from the sloops, in applying the terms "north" or "northwest," "round to westward," &c., have reference to the direction of the sloop upon which the witness is placed (upon the assumption that its direction is due south), and not to the true point of the compass or the course of the river, allowance should be made for the deviation of the direction of the sloop, to ascertain the effect of the testimony.

IX. It is shown by a decided preponderance of testimony, that the New Jersey, going up the river, hauled gradually across the river, from a point on the east side, at or below Barnegat, three miles and upwards below the sloop Hamlet, coming down the river before the wind; that she had hauled over on to the west side of the river, and within a third of the width of the river from the west shore, at or about Sands's Dock, at least a mile and a quarter below the place of the collision, and from that point, proceeding up the river, made and kept a course well into the westward, to clear the sloop to the westward of the sloop, and on which she would have cleared the sloop to the westward, at a safe distance, but for the change of the position and direction of the sloop, from her place to the eastward of the line of direction of the steamboat across the line of direction of the steamboat, after seasonable notice to the sloop of the direction of the steamboat and so shortly before the collision as to render the collision, by reason of the misdirection of the sloop, inevitable, by the exercise of all ordinary and reasonable means to avoid the collision, which were made by the persons in charge of the steamboat.

This statement involves all that is essential for the claimant to establish, and something more.

X. There is no just ground for the imputation of negligence *in the navigation of the steamboat to be found in the testimony of the witnesses, of whom it can be affirmed with any certainty that they saw the steamboat, either from her rate of speed or her course in reference to other vessels, or from any sudden and unusual course in crossing the river, or from any attempt to cross the track of the sloop or run under her bows, from any point to the eastward of the sloop, within any short distance below the sloop, nor after the sloop came in sight, a mile and upwards below the place of collision; all of which errors are clearly to be traced to the mistake of the learned District Judge in confounding two points of the river, which led him to strike out part of the river in the reach in which the collision happened, of a mile in extent, and to the reliance of the learned District and Circuit Judges upon the statements of witnesses (Worden of [*601

the Illinois, and Betts of the Exertion), of whom it cannot be affirmed with any certainty that the steamboat whose course they describe was the New Jersey.

XI. No blame is imputable to the steamboat in not having a look-out down and forward on the steamboat (which at best would have been a useless precaution under the circumstances), in reference to the collision, who could only have furnished the pilot with information as to the position and course of the sloop, which he had from his own observation, in good season. *The Woodrop Sims*, 2 Dods., 86.

XII. In any view of the case, there was negligence in the navigation of the sloop,—after notice of the intended course of the steamboat, as far below as Sands's Dock, to the westward,—in heading the sloop first southwest, and then hard in west, within a quarter of a mile of the steamboat, as stated by Bird, the look-out on the sloop, and in not keeping away, which ought to be a bar to a recovery. In this connection, see the case of *Hurley* v. *The Steamboat New Champion*, decided in the District Court of New York, 3d April, 1848, 6 N. Y. Leg. Obs., 202, as to the respective liabilities and privileges of steamboats and sailing vessels.

XIII. If, contrary to the views of the appellant's counsel, the court should conclude, after examining the evidence, that there was blamable conduct on the part of the steamboat as well as on the part of the sloop, conducing to the collision; or if, after a strict scrutiny, it is left by the evidence uncertain on which side the blame lies, in the most unfavorable aspect of the law of the case for the steamboat, the damages should be apportioned, and each side left to bear his own costs, *Goldsmith, Wells, and others, owners of the Schooner Oriana*, v. *The Bay State*, 6 N. Y. Leg. Obs., 198, and cases and author-
*602] ities *cited therein; Story on Bailm., ed. 1846, §§ 608, 609, and note.

XIV. In reference to the amount of damages. (This point depended upon the evidence, which is not stated, and therefore the point itself is omitted.)

The counsel for the libellant made the following points:—

I. Steamers being of vast power and speed, and liable to inflict great injury if not carefully managed, and being also propelled against wind and tide by an overwhelming internal agency, controllable by man, are bound to take every possible precaution in favor of vessels propelled by the uncertain and uncontrollable external winds, tides, and currents. *The Perth*, 3 Hagg., 415, 416; *The Leopard*, Daveis, 197; *The Scioto*,

Id., 361; *The Shannon*, 2 Hagg., 175; *The Friends*, 1 Wm. Rob., 478.

II. It is also the duty of the owners of steamers to make the most safe and reliable preliminary arrangements, with a view to the safety of other vessels, and especially are they bound to employ skilful, discreet, and self-possessed pilots, and the want of such is always negligence.

III. Sailing vessels are bound to presume that steamers approaching them have competent pilots, and that they will in due time change their course, and a sailing vessel is therefore not bound to take any measures of escape; but if a steamer neglects or violates her duty till the danger becomes imminent, she will be liable for the consequences, even though the sailing vessel may make any manœuvre which, in the distraction of such a moment, may seem to her (no matter how falsely) calculated to prevent or mitigate the accident. *The Leopard*, Daveis, 198.

IV. In this case, it is not disputed that the sloop Hamlet, heavily laden with stone, with a light and baffling wind, at slack water, was coming down the river in the night, on the west side of the river, close in shore; and that the steamboat New Jersey was at the same time going up the river, at quick speed, on the east side of the river, and that in eight minutes thereafter the Hamlet was sunk by a collision with the steamer, on the west shore, the Hamlet bearing all the time farther and farther west, the steamer having in the mean time crossed the river, there more than half a mile wide.

V. The steamer was in charge of a pilot, who was a mere runner on the docks, a less than half-price pilot, picked up and put in charge of the boat for the occasion, without skill, without experience, constitutionally destitute of presence of mind, and unable to cope with circumstances of complication and difficulty suddenly arising.

*VI. In endeavoring to reconcile the testimony, and in considering all circumstances calculated to affect the [*603 weight of evidence, it will be perceived that the libellant's account of the transaction substantially reconciles all the testimony, and is established by the concurring testimony of eleven independent and impartial witnesses, who were on deck, awake, and observing the circumstances from different points, while the only testimony which can be called conflicting is from six witnesses, who were all abed below and out of sight, except one, the awkward pilot, who was the cause of the accident, and one other, who was occupied with the wheel of another boat.

VII. The whole evidence shows that, nearly opposite Sands's

Dock, only a mile and a quarter from the place of collision, the steamer, without any sufficient reason, commenced crossing gradually to the western shore, directing her course for Blue Point, till she passed the sloops Illinois and Exertion, when she bore further westward, till she came to the Temperance, where she straightened up the river till she passed the White House, when she bore rapidly to the west, endeavoring to cross the bows of the Hamlet, and in doing so ran on to the bowsprit and sunk her. Crossing the bow nearly at right angles, the upward motion of her tow on the left side, and the downward force of the sloop on the right side, turned the head of the steamer north, and carried the sloop partly round, so that she lay across the river. See Libellant's Map.

VIII. During all this time the sloop was where she had a right to be, and doing what she had a right to do,—on a course which, *primâ facie*, it was her right and her duty to keep; and the manœuvre (luffing) which she is said to have made was one which she should make if she made any.

IX. The nearest and best course for the steamer was to continue up the eastern side of the river. This was safe for all parties; it was her probable course, and there was no reason for her crossing over, and her doing so with the river full of vessels was a neglect of that attention and vigilance which are due to the security of other vessels, and she did it at the peril of all the consequences.

X. Before the steamer passed the White House, and made the last and fatal sheer westward, there was no prospect of danger to the Hamlet. All the previous courses of the steamer gave her room enough under the sloop's stern, but when she sheered under her bows, the danger was imminent, and the collision inevitable. With a light and baffling wind, and slack water, she had no power in a minute and a half to do any thing for her safety.

XI. On questions of fact in cases of damage, where the *District and Circuit Courts, after full hearing of the witnesses and solemn argument, concur in a decree, the Supreme Court will not reverse it on the mere notes of the same testimony, unless a clear mistake or error be shown. *The Sybil*, 4 Wheat., 98; *Cushman* v. *Ryan*, 1 Story, 96, 97; *Hobart* v. *Drogan*, 10 Pet., 119; *U. States* v. 112 *Casks of Sugar*, 8 Id., 278.

*604]

XII. This cause was decided in favor of the libellant in 1846, on a full and very expensive hearing and argument in the District Court. That decree was affirmed in 1847, after another expensive hearing in the Circuit Court, and in this court no new light has been thrown on the subject. It is a

gross case of dilatory and litigious resistance to a just claim, and this court should affirm the decree of the Circuit Court, with costs in the District Court, the Circuit Court, and the Supreme Court, and with ten per cent. damages, under the seventeenth and twentieth rules, from the time of the decree in the District Court, and reasonable counsel fees. Rule 17, Rule 20; *The Appollon*, 9 Wheat., 362; *Canter* v. *American Ins. Co.*, 3 Pet., 307; *The Dundee*, 2 Hagg., 140.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York.

The suit was commenced in the District Court in admiralty against the steamboat New Jersey, to recover damages arising from a collision on the North River, in which the sloop Hamlet was run down and sunk, in October, 1846.

The libel charges that the Hamlet, a vessel laden with a cargo of flagging stones, and of ninety tons burden, was proceeding down the river for the port of New York, and had reached a place called Blue Point, on said river; that after passing that point the wind failed, and the sloop proceeded with the force of the current, and a trifling wind, at the rate of from one to two miles the hour. That on her arrival at that point, the person in charge of the sloop descried the New Jersey coming up the river at the rate of twelve or fifteen miles the hour, and nearer the eastern shore of said river than the sloop; upon which he directed the man at the helm to head her more to the west shore, which was done. That when the steamboat arrived within a short distance of the said sloop, she altered her course to the westward, and attempted to cross the bows of the sloop so as to pass between her and the western shore, and in the act of passing, struck her bowsprit, carrying away some twelve feet of the forward part of the vessel, in consequence of which she immediately filled and sunk. That at the time of the collision it was impossible for the *Hamlet to get out of the way of the steamboat, having comparatively little headway, and being near to [*605 the western shore; and that there was room enough for the steamboat to have passed east of her, along the eastern shore of the river.

The answer of the respondent is, that, for three or four miles below the point where the collision happened, the New Jersey was coming up the river along the western shore, and westward of the course of the sloop, with a tow on her larboard of some two hundred tons burden; that it was slack water, and the wind fresh from the west; that she did not

cross the bows of the sloop, nor the course she was pursuing at the time the Hamlet first appeared in sight. But that the collision arose in consequence of the sudden luffing of the sloop, by the mismanagement of the persons in charge of her; and that by reason of said improper manœuvres she ran her bowsprit into the steamboat, thereby doing great damage to her.

These are the allegations of the respective parties in the libel and answer, as to the collision complained of. And the first observation we have to make is, that, assuming the position and course of the New Jersey to be according to the statement in the answer, it by no means exonerates her from responsibility, unless the other part of it is also maintained, namely, that it happened in consequence of the false movement of the Hamlet at the time. For assuming that the steamboat was coming up along the western shore, and was pursuing that course from the time she was first descried by the hands on board the sloop, still the latter had a right to persevere in her course down the river, notwithstanding the position and course of the New Jersey; and the duty devolved upon her, according to the established nautical rule, to take the proper precautionary measures to avoid the danger.

The fact, therefore, that the New Jersey was ascending the river on the western shore for some distance below, and had not suddenly taken a sheer across from the eastern side after having pursued it till within a short distance from the point where the Hamlet was descending, is a matter of no great importance.

The real question in the case is, whether or not the accident happened, notwithstanding every proper precautionary measure had been taken on the part of the steamboat to pass the sloop in safety, in consequence of an improper movement of that vessel by the mismanagement and unskilfulness of the person in charge of her. If it did, then the damage is attributable to her own inattention and want of skill, and not to the steamboat. This must of course depend upon the evidence.

*606] *And on looking carefully through it on this point, on which, it must be admitted, it is not entirely reconcilable, and after the best consideration we have been able to give it, we feel bound to say, that this allegation in the answer is not maintained. On the contrary, the weight of the evidence is, that no substantial change in the course of the sloop, in descending the river, took place, after the precautionary one of heading more towards the western shore, when the New Jersey was first descried, some three or four miles below.

This is the testimony of the two hands in charge of her at the time, confirmed by that of the masters of vessels in the vicinity, and who witnessed the collision. The only contradictory evidence is to be found in the testimony of the pilot of the New Jersey, and in some loose conversations of the two hands after the accident had occurred, which, as detailed, is very general and indefinite, and not entitled to much consideration. This conclusion is also strengthened by the concomitant circumstances. The sloop was heavily laden, and under little headway, the wind being light and baffling, and it is difficult, under such a state of facts, to believe that her course could have been suddenly changed, by the action of the helm, to the extent, and within the time, supposed by the pilot.

We think, therefore, that the collision arose from the fault of the person in charge of the New Jersey, in not taking proper precautionary measures to avoid the sloop while endeavoring to pass her.

We cannot omit to remark, before leaving the case, that the pilot of this vessel was greatly to blame in not having slackened her speed as he approached the fleet of river-craft which was slowly descending this stretch of the river at the time it opened to his view. The channel is about half a mile wide at this point, and there were some seven or eight vessels coming down, all within a reach of less than two miles, and, from the state of the wind, not in a condition to make effectual manœuvres with a view to avoid immediate danger. And yet the clear weight of the evidence is, that the steamboat continued her speed, passing several of them, which narrowly escaped the danger, until she reached the sloop in question, at a rate of from eight to ten knots the hour.

It is manifest to common sense, that this rate of speed, under the circumstances stated, exposed these vessels to unreasonable and unnecessary peril; and we adopt the remark of the court in the case of the *Rose* (2 Wm. Rob., 3), "that it may be a matter of convenience that steam-vessels should proceed with great rapidity, but the law will not justify them in proceeding with such rapidity, if the property and lives of other persons are thereby endangered."[1]

*It is a mistake to suppose that a rigorous enforcement of the necessity of adopting precautionary measures, by the persons in charge of steamboats, to avoid damage to sailing vessels on our rivers and internal waters, [*607

[1] Reiterated. *McCready* v. *Goldsmith*, 18 How., 91. Cited. *The Colorado*, 1 Otto, 701.

will have the effect to produce carelessness and neglect on the part of the persons in charge of the latter. The vast speed and power of the former, and consequent serious damage to the latter in case of a collision, will always be found a sufficient admonition to care and vigilance on their part. A collision usually results in the destruction of the sailing vessel, and, not unfrequently, in the loss of the lives of persons on board.

We think, also, that the New Jersey was in fault for not having a proper look-out at the time of the collision. The pilot at the wheel was the only one, as no other person appears to have been above or on deck. It is apparent from the evidence, that, with a competent look-out, and slackened speed of the steamboat, there could have been no great difficulty in passing this fleet of river-craft in safety. The disaster, in all probability, happened from a neglect to observe these proper precautionary measures.

We think the decree below right, and that it must be affirmed.

Mr. Justice DANIEL, dissenting,[1]

Had the cases just decided been, according to my view, regularly within the cognizance of the District and Circuit Courts, and therefore properly before this tribunal, upon the appeals taken, I could have no objection to the disposition made of those cases. The evidence appears to place the delinquency, or the wrong done, where this court has pronounced it to be; and it can scarcely be doubted, that the rules which have been prescribed for the government of vessels, propelled either by sails or by steam, when crossing each other's tracks, will conduce to the preservation of both life and property. My dissent from the decision in these cases results from considerations much higher than any that connect themselves with the mere adjustment of private controversies. It is a deduction from my understanding of the constitutional power of this court, and of the courts whose decisions we have under review, to adjudicate upon the rights of the parties, in the exercise of that species of jurisdiction which has been, as to these cases, asserted and sanctioned. That jurisdiction I feel constrained to deny. I know that my opinions, relatively to the sources and the extent of the admiralty jurisdiction of the federal courts, have not accorded with those of the majority of this court; but on these, as on all other subjects involving the

[1] See *The Genessee Chief* v. *Fitzhugh*, 12 How., 464; *Jackson* v. *The Magnolia*, 20 Id., 308.

integrity of the Constitution (the only true foundation of every *power in the federal government), I hold myself [*608
bound, with respect to differences of opinion, not to yield an acquiescence which, in matters of minor importance, would be cheerfully conceded. My own opinions relative to the admiralty jurisdiction vested by the Constitution in the courts of the United States have been heretofore too fully declared to render their repetition here in detail either proper or necessary. I content myself with a reference to them as expressed in the case of *The New Jersey Steam Nav. Co.* v. *The Merchant's Bank*, 6 How., 395, and in my concurrence with the opinion of Justice Woodbury in the case of *Waring* v. *Clarke*, 5 How., 467, and with reasserting the positions there maintained; viz., that the civil jurisdiction in admiralty of the courts of the United States, in tort or in contract, (with the anomalous exceptions of seamen's wages and hypothecations,) is limited to transactions occurring on the high seas, and embraces no transaction occurring either on the land, or within the bays, rivers, havens, ports, harbors, or other places within the body or jurisdiction of any county, and that cases of seizure under the revenue laws do not spring from any regular class or head of admiralty powers. My conclusions, thus stated, are fortified by the strong desire to preserve in fullest vigor that admirable institution of our Anglo-Saxon ancestors, —whose elevating influence on the character even of the humblest man is perceived in his consciousness that he forms a part, an important, nay, an indispensable part, in the administration of the laws,—the venerable trial by jury; and, in the next place, by my conviction of the duty incumbent on all to maintain, with directness and in good faith, those distinctions and distributions with respect to the judicial power which the Constitution and laws of the United States have ordained,—distributions which the power now claimed and exerted appears to confound and overthrow. Thus, in the second section of the third article of the Constitution, in a definition of the judicial power of the government, in which definition the admiralty jurisdiction is explicitly comprised, it is declared that the judicial power shall extend "to controversies between citizens of different states." This distribution of judicial power by the Constitution, Congress have carried into execution by the eleventh section of the Judiciary Act, and this court in a series of decisions has maintained. Can it, then, comport with a just interpretation, either of the Constitution or of the act of Congress, or with the decisions of this court made in conformity with both, that they should all be annulled

by a seeming evasion? Can it possibly be right thus summarily to abrogate the jurisdiction of the state courts over their own territory and their own citizens? If these things can *609] *be done, it follows, of course, that the trial by jury, and the requisite as to citizenship of parties, ordained both by the Constitution and laws, may be abolished by the mere will of persons interested, or by the fiat of a tribunal by which neither citizenship nor trial by jury is held in regard. It would be difficult to adduce a more striking example of the irregularities here pointed out, than is furnished by one of the cases now before us,—that of *Newton* v. *Stebbins*. This is a case which the evidence shows to have occurred between citizens of the same state, upon the narrow waters, and far within the interior of the state; and necessarily, therefore, within the body of a county of the state. It presents within that locality an instance of *simple tort*, the proper subject of trespass or case at common law; yet this case, without regard to locality or citizenship, is wrested from the tribunals of the state and the common law modes of trial, and transferred to a tribunal whose peculiar and appropriate jurisdiction, we are told by the English authorities, attaches only where there is no vicinage from which the *pais* can be summoned. I am compelled, therefore, to deny to the admiralty the constitutional authority to take cognizance of these cases.

Orde

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 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 and damages at the rate of six per centum per annum.

THE UNITED STATES, APPELLANTS, *v.* JEAN BAPTISTE D'AUTERIVE AND OTHERS, HEIRS AND REPRESENTATIVES OF THE LATE JEAN ANTOINE BERNARD D'AUTERIVE.

Following out the principles applied to the construction of treaties in the cases of *United States* v. *Reynes*, and *Davis* v. *The Police Jury of Concordia*, in 8 Howard, this court now decides that a grant of land in Louisiana, issued by the representative of the king of France in 1765, was

void; the Province of Louisiana having been ceded by the king of France to the king of Spain in 1762.[1]

The title to the land described in this void grant was vested, therefore, in the king of Spain, and remained in him until the treaty of St. Ildefonso. It then passed to France, and by the treaty of Paris became vested in the United States.[2]

None of the acts of Congress have confirmed this grant.

The act of 1805 (2 Stat. at L., 324) required three things in order to effect a confirmation. *1st. That the parties should be residents. 2d. That the Indian title should have been extinguished. 3d. That the land should have been actually inhabited and cultivated by the grantees, or for their use. In the present case these conditions were not complied with.[3] [*610

The act of May 26, 1824, in part re-enacted by the act of June 17, 1844 (5 Stat. at L., 676), did not create any new rights, or enlarge those previously existing; but only allowed claims to be presented to the court which would otherwise have been barred.

THIS was an appeal from the District Court of the United States for the District of Louisiana.

It was a petition presented to the District Court under the act of 1824, relating to land titles in Missouri, as revived and made applicable to Louisiana by the act of 1844.

The history of the title claimed by the heirs of D'Auterive, so far as it may be necessary to explain the opinion of the court, was as follows.

A copy of the following grant, issued in 1765, was certified by the register of the land-office at New Orleans to be found upon the records in his possession, and forming part of the archives of the office.

"Charles Philippe Aubry, Chevalier of the Royal and Military Order of St. Louis, commanding for the King in Louisiana, and Denis Nicholas Foucault, being the Intendant Commissary of this Province of Louisiana.

"Upon the demand made by Messrs. D'Auterive and Masse, partners, to grant to them a parcel of land named La Prairie du Vermilion, bounded east by the River Des Tortues and the Lake Du Tasse, north by the Mauvais Bois, west by the River Vermilion, and south by a muddy prairie, considering their petition above, and in other part, and for consideration of the cession made by them to the Acadian families, recently arrived in this Province, of the land occupied by them during a long period, in the Attakapas, and in consideration also of the advantages which may result for this capital of the great establishment in vacheries that they propose themselves to do

[1] APPLIED. *Montault* v. *United States*, 12 How., 51. FOLLOWED. *United States* v. *Pillerin*, 13 Id., 9; *United States* v. *Ducros*, 15 Id., 41.

[2] CITED. *United States* v. *Lynde*, 11 Wall., 643.

[3] FOLLOWED. *United States* v. *Castaut*, 12 How., 437, 441.

on the said land named La Prairie du Vermilion, by the quantity of cattle they may bring to market in a short period, we have conceded, and do concede, to them, by these presents, the said land, for them and their heirs, to enjoy and dispose of the same in full ownership and usufruct, as a thing belonging to them, except against titles or possession anterior to these to the contrary; provided that said land lies on this side of the limits which have been established of the French and Spanish possessions in this part of the country; and provided, also, that they do deliver to us the titles of the land which they have ceded to the Acadian families, and also under the
*611] conditions *that one year from this date they shall establish the said vacherie; in default whereof the said land shall become part of the king's domain, who may dispose of the same as if the said concession had never been granted, and also with the burden by them to support and pay the seigneurial rights, if any hereafter be established in this colony. We also reserve for his Majesty all the timber necessary for the construction of forts, stores, and other public works that he has ordered to be done, or may order in the future, even for the refitting and careening of his men-of-war, whenever the same will be necessary; and also the necessary ground for the royal highways and fortifications.

"Given in New Orleans, under the seals of our arms and the countersign of our secretaries, the 2d of March, 1765.

(Signed,) AUBRY AND FOUCAULT.

"Countersigned,—SOUBIE & DUVERGE."

The decision of the court being that this grant was invalid when made, it is not necessary to trace out the assignment of his share from Masse to D'Auterive, by which it was alleged that the latter became the sole proprietor.

On the 6th of February, 1835, Congress passed an act (4 Stat. at L., 749,) entitled "An Act for the final adjustment of claims to lands in the state of Louisiana."

By this act, claims recognized by former laws as valid, but which had not been confirmed, were to be presented to the register and receiver of the land-office where the lands lie, with the evidence in support of the same, who were to report the same to the Secretary of the Treasury, with their opinion of the validity of each claim, and which report was to be laid before Congress, with the opinion of the Commissioner of the General Land-Office touching the validity of the respective claims.

This claim was presented to the register and receiver, together with a great mass of evidence in its support, which

it is not necessary here to state. On account of the voluminous nature of the papers, the claim was not included in a report made by the commissioner on the 15th of May, 1840. But in February, 1842, the then register and receiver took up the subject and made a report thereon to the Secretary of the Treasury, from which the following is an extract:—

"The peculiar circumstances which seem to involve this claim, its unwarrantable neglect, firstly by the heirs themselves, and lastly by the former boards of this office, and the unsuccessful efforts of the Honorable Edward Livingston to obtain any action of Congress upon it, and the very heavy *charges and expenses which the heirs have been at in [*612 the protection and prosecution of their rights, have induced us to examine with the greatest circumspection and attention all the documents of title filed in this claim. We have given it throughout a mature and deliberate investigation, and, seeing the pacific views of the claimants in their renouncement of their rights to any part of the said land, to which a title has been obtained, either by French or Spanish grant, private entry, or otherwise, that may fall within the limits of their grant, and from the fact that the patent mentioned in this claim corresponds with one on the abstract of patents certified by the register of New Orleans, for the use of this office, consequently making it a complete title in form, with no act of the sovereign remaining to be done that the title of the land might be fully vested in D'Auterive, think that a confirmation of such a title is scarcely necessary, though it may be useful. Congress never asserted the right to annul, restrict, or question any genuine complete grant which has been made by the former governments; they were regarded as sacred documents, and respected by the treaty of cession; it was not obligatory on the holders of complete patents to file them with the registers and the receivers. By the fifth section of the act of the 2d of March, 1805, the registers and receivers were requested to make a report on all complete French and Spanish grants, the evidence of which, though not thus filed, may be found on record in the public records of such grants; it was evident the reports on such titles were required for the purpose of ascertaining what lands had ceased to belong to the public domain.

"If the intention of Congress had been to subject these claims to their scrutiny, they would have required of the owners to file them; if the board, on finding in the public records the evidence of a complete grant, would have made any other than a favorable report on it, Congress would never have permitted such a decision; the boards were only to

decide on the simple recorded proof, that is, the official copy of the grant, and were to consider it as conclusive evidence; it has accordingly been decided by the Supreme Court of this state, as well as the United States court, that a complete grant is complete evidence of title without any confirmation; and viewing the grant of the claimants, in this report, as of a similar character, and perfectly satisfied as regards the sale from Masse to D'Auterive, the testimony in proof thereof being ample and complete, we cannot do otherwise than recommend this claim for confirmation to the full extent of land that may be found comprised within the boundaries laid down in the concession."

*613] *These proceedings were referred, in pursuance of the law, to the Commissioner of the General Land-Office, who gave his opinion that the claim was not valid. A report was then made to Congress, but no action was there had upon the subject.

Under the act of Congress passed on the 17th of June, 1844, entitled "An Act to provide for the adjustment of land claims in the states of Missouri, Arkansas, and Louisiana," the heirs of D'Auterive filed a petition in the District Court of the United States for the District of Louisiana, on the 16th of June, 1846. Attached to the petition was a copy of the report of the commissioners above mentioned. The petition concluded as follows:—

"The petitioners show, that it appears from said statement that the said Bernard D'Auterive occupied said land as a stockfarm, for which purpose it had been granted, up to the time of his death, which occurred in 1776; that the said D'Auterive left a widow and four small children; that in 1779 his widow married Jean Baptiste Degruy; that the said Degruy and his wife continued to occupy said land as a stock-farm, and to cultivate a small part thereof, until 1784, when they removed to the Mississippi; that thereafter the said land, and even the stock kept thereon, were utterly neglected by said Degruy; that in consequence thereof, and on account of their ignorance of said claim, the Spanish authorities in Louisiana granted a considerable, and the most valuable, part of said land to other persons; and that the petitioners, considering the good faith with which said titles were acquired, and to prevent the delays and expenses of litigation, claimed the confirmation of so much only of the aforesaid grant as was not held by titles emanating from the Spanish government and confirmed by the United States, and had not been sold or otherwise disposed of by the United States.

"And the petitioners show, that they now again claim the confirmation of said grant with the same restrictions; that as the petitioners do not intend to interfere with the rights of any persons holding portions of said grant under confirmed Spanish titles, or under purchases from the United States, it is unnecessary to cite said persons; and that, besides them, there are no other persons in possession of portions of said grant except certain settlers, who occupy small parts thereof with the written consent of the petitioners.

"Wherefore the petitioners pray, that the United States of America, by their District Attorney for the District of Louisiana, be cited; that the aforesaid grant be declared valid and confirmed to the petitioners; that thereafter the Surveyor-General *of the United States for the state of Louisiana be ordered to survey said lands; that he be further ordered to certify, on the plats and certificates of said survey, what parts of said grant are held under confirmed Spanish titles, and what part, if any, of said grant has been sold by the United States, together with the quantity thereof. And the petitioners further pray, that it may be decreed that they, their heirs and legal representatives, shall have the right to enter the quantity of land so certified to have been sold or disposed of by the United States in any land-office in the state of Louisiana. [*614

(Signed,) L. JANIN, *of Counsel.*"

On the 10th of November, 1846, Thomas J. Durant, the District Attorney of the United States, filed an answer, denying all the allegations of the petition.

In April, 1847, the depositions of sundry witnesses were taken by the plaintiffs before N. R. Jennings, Commissioner, and in December, 1847, the cause came on for trial before the District Court.

On the 13th of June, 1848, the District Court gave the following judgment:—

"The court having taken this cause as above entitled under consideration, and having maturely considered the same, doth now, for reasons set forth at length and on file, order, adjudge, and decree, that the petitioners recover the land claimed in their petition, and described in the original grant or concession to them, as exhibited on pages 180 and 181 of the record of French grants; the same having been delivered at the cession of Louisiana to the government of the United States, and deposited in the United States land-office in the city of New Orleans.

"And the court doth further order and decree, that the Surveyor-General of the state of Louisiana do survey the land so decreed to petitioners as aforesaid, and certify on the plats and certificates of survey all such parts of the said grant as may have been sold or otherwise disposed of by the United States.

"And the court doth further order and decree, that the petitioners, or their heirs or legal representatives, shall have the right to enter the quantity of land that may be so certified to have been sold or otherwise disposed of by the United States, in any land-office of the state of Louisiana, according to the provisions of the eleventh section of the act of the 26th of May, 1824.

"Judgment rendered June 13th, 1848. Judgment signed June 17th, 1848.

(Signed,) THEO. H. MCCALEB, [SEAL.]
U. S. Judge."

*615] *From this decree the United States appealed to this court.

It was argued by *Mr. Crittenden* (Attorney-General), for the United States, and *Mr. Janin*, for the appellees.

Mr. Crittenden made the following points.

I. That the said alleged grant is void, having been made by the French authorities after the Province of Louisiana had been ceded by France to Spain.

By the secret treaty of Fontainbleau, of the 3d of November, 1762, the Province of Louisiana was ceded by France to Spain, and on the 21st of April, 1764, Louis the Fifteenth communicated what had been done to D'Abadie, the director-general and commandant of the Province, ordering him to deliver it up to his Catholic Majesty. The treaty has never been published, but the letter to D'Abadie will be found in the Appendix to 1 Clarke's Land Laws, 976. This letter was printed in New Orleans, in October, 1764, and the intelligence of the cession of the Province caused great commotion and dissatisfaction among the people. D'Abadie having died, Aubrey, who had been commandant of the troops and one of the council, assumed the administration of the government, and, it is alleged, made this grant to the ancestor of the petitioners on the 2d of March, 1765. Ulloa, the first Spanish governor, arrived at a subsequent period, but was compelled to retire from the country, and was succeeded by O'Rielly, under whose administration Spanish authority was secured.

The history of the events of this period will be found in the fourteenth chapter of the first volume of Martin's Louisiana.

II. That Spain never acknowledged nor recognized as valid the alleged grant thus made in derogation of her rights and authority.

This is sufficiently evidenced by the fact, that her authorities granted the greatest part of the same land to other persons. That such grants had been made is admitted by the petitioners, but the force of the conclusion thence arising is sought to be evaded by saying that they were made in ignorance of this claim. There is, however, no pretence for such a supposition, for the very book of records on which the petitioners rely to establish the making of their grant must have been in the hands of the Spanish authorities, and come from them into the possession of the United States. The making of so large a grant could not be concealed. The fact is further corroborated by D'Auterive having afterwards, in October, 1775, received a grant of a league of land from Governor Unzaga, in the neighborhood of the alleged grant. Besides, the acts of the parties show that all claim was abandoned.

*III. But if the alleged grant was made by competent authority, it is void for uncertainty in the description of the land granted. [*616

IV. That there is no sufficient evidence of the making of the alleged grant, or of the conveyance by Masse to D'Auterive.

V. That the court below had no jurisdiction in this case.

Mr. Janin, for the appellees, made the following points:

I. It is contended that the copy of the grant which is in evidence is not sufficient proof of its genuineness. This copy was taken from the record of French grants in the land-office at New Orleans, and is attested by the Register of that office.

The appellees could not expect this objection, since this copy was admitted in evidence by consent of parties, whereby they were relieved from the necessity either of producing the original or of proving its loss. But were the point open for discussion, it would be easily met by the evidence. The copy was taken from the only record of French grants known to exist in the land-office. This record was always considered as genuine by the successive registers of the land-office, and referred to by them in making their reports on claims to Congress. We have the testimony of an old citizen of New Orleans, who, under the Spanish government, was the private secretary of Governor Gayoso, and occasionally was employed in the Spanish land-office, which was under the control of the

Secretary of the government. He recognizes the signature of Governor Gayoso, at the end of this and the other French and Spanish records in the land-office, and presumes, with reason, that they were signed by the Governor when he delivered the land-office to the Intendant Morales, in obedience to the royal order of October 22, 1798 (2 White's Rec., 497). This is beyond doubt one of the records referred to in Morales's letters of October 16, 1797, and March 2, 1799 (2 Land Laws, 541, 550); in the letter of the Secretary of the Treasury of 1805 (2 Laws, Institutions, Opinions, &c., 669); and in the fifth section of the act of Congress of March 2, 1805 (1 Land Laws, 520); and the authenticity of this record was fully recognized by the Supreme Court of Louisiana in the case of *Lavergne's Heirs* v. *Elkins*, 17 La., 231.

II. It is not objected that the description of the land in the grant is not sufficiently clear and definite. The land is described as follows:—A tract of land called the prairie of the Vermilion, bounded on the east by the River (now called Bayou) Tortue and Lake Tasse; at the north by the "*mauvais bois*" (low woodland); on the west by the River (now called Bayou) Vermilion; and at the south by a soft prairie. *617] These *are all natural, well-known boundaries. Bayou Tortue and Bayou Vermilion are considerable watercourses, and are still known by the same names; so is Lake Tasse. The land granted is a prairie; its northern boundary is the first woodland—a low swamp—to the north of the prairie, and its southern boundary is the soft or salt marsh which skirts the whole sea-shore of Western Louisiana. The inspection of any Map of Louisiana can leave no doubt that a surveyor would not experience the least difficulty in locating the grant.

III. The third objection is, that, the grant being complete and perfect, it requires no confirmation, and could not be made the subject of a suit against the United States under the act of June 17, 1844, and the revived act of May 26, 1824.

The act of 1824 refers in terms to lands claimed "by virtue of any French or Spanish grant, concession, warrant, or order of survey, * * * which might have been perfected into a complete title, under and in conformity to the laws, usages, and customs of the government under which the same originated, had not the sovereignty of the country been transferred to the United States." This last phrase contemplates evidently incomplete titles only, and refers therefore only to that part of the first phrase which speaks of incomplete titles, that is, "warrants and orders of survey." It could not refer to the owners of grants, whose title was already complete. And

yet in the beginning of the section the holders of grants are permitted to file their claims for adjudication, though they might not be compelled to do so. This is not the only instance in the legislation of Congress which afforded to persons claiming under complete grants an opportunity of having their titles and possessions quieted by a decision of the officers of the federal government. The fourth section of the act of March 2, 1805 (1 Land Laws, 519), declares that persons claiming under complete grants *may*, and those claiming under incomplete grants *shall*, file them, &c., &c. Nor was this a work of supererogation. By the cession, the United States acquired the dominium, all lands not previously granted were considered and treated as public property, and the grantees were put upon proof of their titles. It is true, that, by the fifth section of the same act, the boards of commissioners were directed to "decide in a summary way * * * on all complete French or Spanish grants, the evidence of which, though not thus filed (by the claimants), may be found of record on the public records of such grants." Had this law been obeyed, the claimants under complete grants would have been spared infinite losses and suffering. But it remained a dead letter in practice. The commissioners and their successors acted upon no claim, *though found in these records, if it was not formally filed with a claim for [*618 adjudication, and of claims exceeding a league square they were expressly prohibited to take cognizance. Holders of large grants were in reality remediless, until the later acts of Congress, reopening the land-offices for the adjudication of claims, without restriction as to quantity. And as the commissioners could only recommend their confirmation, and as Congress always discarded large claims in Louisiana in their confirmatory acts, the hopes of the claimants were still deferred. It is thus that large grants of land in Louisiana have uniformly proved a fatal inheritance to the descendants of the old colonists, consuming their lives and fortunes in unceasing and fruitless efforts to obtain a hearing, while the best portions of their lands fell a prey to the squatter. The only remedy left to them, a remedy worse than the evil, was to allow a portion of the land to be sold by the United States, and then to bring suit for it, a process which had to be repeated in the case of each sale, and which yet did not protect the portion of the claim not immediately included in the decision. The officers of the land department uniformly treated as public land whatever had not been recovered by a judgment. This crying evil could not be unknown to Congress, and we submit that the acts of 1824 and 1844 were

destined to remedy it, and that it could not be the intention of Congress to treat complete grants less favorably than incomplete ones.

And again, may it not be said that this grant requires a survey to perfect at least the possession of the grantee? And the government surveyors would not make or sanction a survey, unless the claim was recognized by the government.

This grant again required the grantees to abandon the lands they had previously owned; in compensation of which they obtained the new grant, and to establish a stock-farm. Was it then not incumbent upon them to show that they claimed nothing under the older grants, a negative proof, which they could only make by asserting the abandonment and challenging the contrary proof, and that they had established a large stock-farm?

It is obvious that the object of the appellees would be attained by a decision of this court, disclaiming jurisdiction, on the ground that the grant is complete, and not embraced in the act of 1824. A decision of the federal courts, and nothing less, would be respected by the surveying department.

IV. It is finally contended that this grant is invalid because it is dated the 2d of March, 1765, when Louisiana had been ceded to Spain in 1763. It is well known that Spain did not *619] *desire or attempt to take possession until 1769, up to which time all the functions of the government were carried on by the French authorities. The French was the government *de facto*. "Grants made by a government *de facto* are valid against the state which had the right." 12 Pet., 748. The validity of the acts of a government *de facto* has been acknowledged in many decisions of this court. *Delacroix* v. *Chamberlain*, 12 Wheat., 600; *Pollock's Lessee* v. *Kibbe*, 14 Pet., 364; *Keene* v. *McDonough*, 8 Id., 310; *The Fama*, 5 Rob. Adm., 113; 1 Kent Com., Lect. VIII. To these familiar authorities a striking instance may be added, drawn from modern history. We quote from Lieber's Manual of Political Ethics, Vol. I., p. 324: "When the Elector of Hesse returned in 1813 to his country, he declared the king of Westphalia, having been a usurper, to have possessed no right of selling the domains, and therefore took possession of them without any restitution of the sums for which they had been purchased. Prussia acknowledged the sales which the same kingdom of Westphalia had made of her domains. The Germanic Diet decided against the Elector and for the purchasers, and when that prince for years declined to yield to the Diet and all the endeavors even of Austria were in vain,

the Diet ordered the troops of the neighboring members of the confederacy to make the Elector comply with its decision."

History affords, probably, no instance of acts of a government *de facto* less questionable than those of the French government in Louisiana between 1763 and 1769. The French were ready to deliver the colony, the Spaniards were not ready to receive it; the French were not usurpers, nor the antagonists of Spain, but depositaries of the power of Spain; the wheels of government could not be arrested, and it was one of its ordinary and legitimate functions to promote the settlement of the Province, to develop her industry and to secure her peace, by exchanging D'Auterive's lands on the Upper Teche, where his stock had become troublesome to the new colonists from Acadia, for pasture lands in a more remote and still unsettled district. Neither this nor any other grant made by the French after 1763 resembled the questionable policy of the Spanish Intendant, who after 1803 sold lands in the disputed territory to replenish a suffering treasury. The history of the courts and of the land department offers no instance of a grant made by the French after 1763 that was rejected for want of authority. The question was discussed by the Supreme Court in the case of *Devall* v. *Chopin*, 15 La., 575, and decided in favor of the power. Spain, after she took possession, never questioned any of these grants; France held *the sovereignty between 1800 and 1803, and could not, if she had taken possession, have contested the validity [*620 of the grants of her former governors; the United States succeeded only to the rights of France, and the United States at an early period, in the important act of March 2d, 1805, distinctly recognized the validity of the grants anterior to the 1st of October, 1809, made by France and Spain, during the time those respective governments had the actual possession of the colony. Possession, and not the bare right of sovereignty, was made the test of authority.

We quote from the act of March 2d, 1805, 1 Land Laws, 518.

Sec. 1st. "Any person or persons, or the legal representatives of any person or persons, who, on the 1st of October, in the year 1800, were resident within the territories ceded by the French Republic to the United States, by the treaty of the 30th of April, 1803, and who had prior to the said 1st day of October, 1800, obtained from the French and Spanish governments, respectively, during the time either of said governments had the actual possession of said territories, any duly regis tered warrant or order of survey," &c.

Sec. 4th. "Every person claiming lands in the above

mentioned territories, by virtue of any legal French and Spanish grants, made and completed before the 1st of October, 1800, and during the time the government which made such grant had the actual possession of the territories," &c.

Mr. Justice DANIEL delivered the opinion of the court.

The appellees, as heirs of Jean Antoine Bernard D'Auterive, claimed in the court below an extensive tract of land in the county of Attakapas, the quantity of which land is not given, though certain boundaries thereof are set forth in the instrument upon which these appellees prefer their claim. This instrument purports to be a grant from Charles Philippe Aubry, Knight of the Royal and Military Order of St. Louis, Commandant of the King in Louisiana, and Dionysius Nicholas Foucault, filling the functions of director in that province, to Messrs. D'Auterive and Masse, and bearing date at New Orleans on the 2d day of March, 1765.

The proceedings for the establishment of this claim in the court below were instituted under the authority of an act of Congress of May 26th, 1824, entitled "An Act to enable claimants to land within the state of Missouri and territory of Arkansas, to institute proceedings to try the validity of their claims;" which law was in part re-enacted on the 17th of June, 1844, and extended in its operation to the state of Louisiana. (*Vide* 5 Stat. at L., 676.) The purposes and the
*621] effect of the *law of 1824, with reference both to the claims and the proceedings embraced within its provisions, have been heretofore examined by this court. They were especially considered at the last term, in the case of the *United States* v. *Reynes*, 9 How., 127, and the following conclusions were then distinctly enunciated as implied necessarily in a just interpretation of that statute. Thus (pp. 146, 147), in speaking of the statute of 1824, revived by the act of 1844, this court explicitly declare, that, "with respect to that interpretation of these acts of Congress which would expound them as conferring on applicants new rights not previously existing, we would remark, that such an interpretation accords neither with the language nor the obvious spirit of these laws; for if we look to the language of the act of 1824, we find that the grants, surveys, &c., which are authorized to be brought before the courts, are those only which had been *legally* made, granted, or issued, and which were also protected by treaty. The legal integrity of these claims (involving necessarily the competency of the authority which conferred them) was a qualification inseparably associated by the law with that of their being protected by treaty. And as to the spirit and intention of

the law, had it designed to create new rights, or to enlarge others previously existing, the natural and obvious means of so doing would have been a direct declaration to that effect; certainly not a provision placing these alleged rights in an adversary position to the government, to be vindicated by mere dint of evidence not to be resisted. The provision of the second section of the act of 1824, declaring that petitions presented under that act shall be conducted according to the rules of a court of equity; should be understood rather as excluding the technicalities of proceedings in courts, than as varying in any degree the rights of parties litigant; as designed to prevent delays in adjudicating upon titles, as is farther shown in another part of the same sentence, where it is declared, that these petitions shall be tried without continuance, unless for cause shown. The limitation, too, maintained as to the character of claims, and that imposed upon the courts in adjudicating upon them, is farther evinced in that part of the same section which says, that the court shall hear and determine all questions relative to the title of the claimants, the extent, locality, and boundaries of the claim, and by final decree shall settle and determine the question of the validity of the title according to the law of nations, the stipulations of any treaty, and proceedings under the same, the several acts of Congress, and the laws and ordinances of the government from which it is alleged to have been derived."

*By the meaning and directions of the statute of 1824, as thus expounded, the claim before us must be judged; and the next step in our investigation leads us to consider it as controlled by the law of nations, and the force of treaty stipulations construed in conformity with that law. [*622

The land which is the subject of this controversy was, according to the terms of the instrument adduced by the appellees in the court below as the foundation of their title, granted to their ancestor on the 2d day of March, in the year 1765.

On the 3d day of November, 1762, by a treaty, or, as it is termed in the language of the king, by "a special act" done at Fontainebleau, Louis the Fifteenth ceded to the king of Spain the entire province of Louisiana, including the island and city of New Orleans. The character and extent of this act of cession, as evinced by the instructions from the French king, dated at Versailles, April 21st, 1764, should be noted in this place, as they are decisive of the relative positions of the parties to that act, and of the extent of their powers posterior thereto, over the territories or persons comprised within its

provisions. Nothing surely can be more comprehensive or absolute than the transfer announced by the king of France, or the declaration of his relinquishment of all power or rights in the subject transferred. The language of the French king to D'Abadie, Director-General and Commandant of Louisiana, is as follows:—"Having ceded to my very dear and best beloved cousin, the king of Spain, and to his successors, in full property, purely and simply and without exceptions, the whole country known by the name of Louisiana;" he proceeds to command his Director-General, that, on the receipt of his instructions, "whether they come to your hands by the officers of his Catholic Majesty, or directly by such French vessels as may be charged with the same, you are to deliver up to the governor or officer appointed for that purpose by the king of Spain, the said country and colony of Louisiana, and the posts thereon depending, likewise the city and island of New Orleans, in such state and condition as they shall be found to be in on the day of the said cession; being willing in all time to come that they shall belong to his Catholic Majesty, to be governed and administered by his governors and officers, and be possessed by him in full property, and without exceptions."

The cases of the *United States* v. *Reynes*, and of *Davis* v. *The Police Jury of Concordia*, decided at the last term of this court, devolved upon it the necessity for a particular examination of the rules and principles applicable to the construction of treaties; and in the adjudication of the cases above mentioned, the following rules are either explicitly affirmed or *623] *necessarily implied:—That compacts between governments or nations, like those between individuals, should be interpreted according to the natural, fair, and received acceptation of the terms in which they are expressed. That the obligation of such compacts, unless suspended by some condition or stipulation therein contained, commences with their execution, by the authorized agents of the contracting parties; and that their subsequent ratification by the principals themselves has relation to the period of signature. That any act or proceeding, therefore, between the signing and the ratification of a treaty, by either of the contracting parties, in contravention of the stipulations of the compact, would be a fraud upon the other party, and could have no validity consistently with a recognition of the compact itself. As a regular corollary from these principles, and as deducible from the law of reason and the law of nations, it was ruled in the cases just mentioned, that a nation which has ceded away her sovereignty and dominion over a territory could with

respect to that territory rightfully exert no power by which the dominion and sovereignty so ceded would be impaired or diminished. *Vide* 9 How., 148, 149, and 289, 290, 291.

In the cases just cited, and particularly in that of the *United States* v. *Reynes*, it became proper to examine the rights of a ceding and retiring government as a government *de facto* over the territory ceded. This examination was induced by the circumstance, that the claimant against the United States rested his pretensions in a great degree upon the position, that after the treaty of St. Ildefonso, and anterior to an actual delivery to the French authorities, the government of Spain as a government *de facto* retained the rights of sovereignty and dominion over the Territory of Louisiana, and, as incident thereto, the power of granting away the public domain. But this court distinguished between the proceedings of an adversary government, acting in the character and capacity of an independent perfect sovereignty, unaffected by any stipulation, and acts done in fraud or in violation of express concessions or compacts. It said that the former, as the acts of a government *de facto*, might be respected and sanctioned by a succeeding power; the latter could impose no obligation to respect them, because they would have been performed in bad faith, and in violation of acknowledged rights existing in others. Admitting the absolute verity of the document under which the appellees deduce their title, and about which no serious question appears to have been raised, can the validity of this title be sustained consistently with the rules and principles propounded above, and in the cases to which reference has been made? The grant *from Aubry and Foucault, the commandant and the director of the Province [*624
of Louisiana, to the ancestor of the appellees, bears date on the 2d of March, 1765, between two and three years posterior in time to the cession of the Province by France to Spain, and rather more than ten months after the order from the French monarch for the actual delivery of the territory to the Spanish authorities. Under these circumstances, then, the act of the French officers must be regarded as wholly unauthorized and inoperative to vest any title in the ancestor of the appellees, those acts being inconsistent with the existing relations between the kingdoms of France and Spain. It is true that Spain, during the continuance of her sovereignty and possession in Louisiana, might have adopted and confirmed this grant, but no such recognition thereof by Spain is shown or pretended; so far from there being proof of such recognition, it appears that a large portion of the lands comprised within this grant was bestowed by the Spanish government

upon other grantees. Neither is there in the record proof or allegation, that, during the short reign of the French republic under the treaty of retrocession, the claim of D'Auterive was sanctioned, or even brought to the notice of that republic.

It follows, then, from the view of this case here taken, that the claim of the appellees cannot be sustained upon any general and controlling principle of the law of nations, nor upon any stipulation between the powers holding the Territory of Louisiana prior to its transfer to the United States. The fate of this claim must depend exclusively upon the authority and the acts of the government of this country, and we will now consider how far it is affected by those acts and that authority. It has been heretofore repeatedly ruled by this court, that the control and recognition of claims like that now before us were subjects belonging peculiarly to the political power of the government; and that, in the adjudication of those claims, the courts of the United States expound and enforce the ordinances of the political power. Guided by these rules, and looking to the acts of the legislature, we find it declared by the act of Congress of March 26, 1804, § 14 (2 Stat at L., 287), "that all grants for lands within the territories ceded by the French republic to the United States by the treaty of the 30th of April, 1803, the title whereof was, at the date of the treaty of St. Ildefonso, in the crown or government of Spain, and every act and proceeding subsequent thereto, of whatsoever nature, towards the obtaining any grant, title, or claim to such lands, and under whatsoever authority transacted or pretended, be, and the same are hereby declared to be, and from the beginning to have been, null, void, and of no effect in law or in *equity." Within the comprehensive language of this provision the case before us necessarily falls; as the inefficiency of the French concession, after the treaty of Fontainebleau, to convey *any* title, left the title in the government of Spain, where it remained up to, and at the date of, the treaty of St. Ildefonso. The reservation in the proviso to the section just quoted, in favor of actual settlers under the laws, customs, and usages of Spain, cannot include the case under consideration, as this is not an instance of a title asserted upon any such laws or usages, or founded on mere settlement; but one professing to be founded upon the grant made by the French commandant, independently of the authority of Spain, and exceeding in extent the quantity of land awarded to settlers by the proviso above mentioned. But it has been contended in the argument filed on behalf of the appellees, that, if any defect could have been alleged against their title by reason of the absence of power in either the French or

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Spanish governments to make the grant, such defect has been cured by the legislation of Congress; and in support of this provision we have been referred to the act of March 2, 1805 (2 Stat. at L., 324). The first and fourth sections of that act have not been fully quoted in the argument of the appellees, and it may be that an omission to examine them throughout has produced the strange misapprehension of those provisions which seems to have existed with those who rely upon their operation. Thus from the first section of the act of 1805 the following portion is quoted: "Any person or persons, or the legal representatives of any person or persons, who, on the 1st of October in the year 1800, were resident within the territories ceded by the French republic to the United States, by the treaty of the 30th of April, 1803, and who had, prior to the said 1st day of October, 1800, obtained from the French and Spanish governments, respectively, during the time either of said governments had the actual possession of said territories, any duly registered warrant or order of survey," &c.; but this quotation omits the following terms, which essentially control every part of the section that precedes them; viz., "for lands lying within the said territories to which the Indian title had been extinguished, and which were on that day actually inhabited and cultivated by such person or persons, or for his or their use."

The first requisite prescribed by this section of the law as necessary to give validity to titles resting upon the actual territorial occupation of the French or Spanish authorities is, that the grantees or their representatives should, on the 1st day of October, 1800, be residents within the territories ceded by the French republic to the United States. The next condition imposed *by this statute is, that the Indian title to such lands should have been extinguished. And [*626
thirdly, that the lands thus granted should have been, on the 1st day of October, 1800, actually inhabited and cultivated by the grantees, or for their use. Without inquiring into the fulfilment of the second of these conditions, or into the necessity for its fulfilment, it will be seen that the first and the third, made essential by the statute, have been entirely unperformed. Thus it is stated in the petition of the appellees, that as early as 1784 the family of D'Auterive removed from the state of Louisiana. It is nowhere proved, or even alleged, that at any subsequent period they returned to this land, much less that in 1800, or at any other time posterior to 1784, they resided upon the same, or by themselves or by their agents, or through any instrumentality of theirs, cultivated this land. On the contrary, either of these inferences is irre-

sistibly excluded by the statement in the petition, that, after the removal of the family of D'Auterive, much of this land was, by the Spanish government, during its possession of the country, granted to other persons. The alleged infancy of the children of D'Auterive in the year 1784, even if there had been a saving for the benefit of infants against the requisites of the statute, could scarcely authorize a presumption in their favor, after a lapse of more than half a century, viz.: from 1784 to 1837, during which period this claim has been permitted to sleep.

The fourth section of the act of Congress, also quoted in the argument for the appellees, if applicable in any sense to their pretensions, certainly adds nothing to their intrinsic force. This section is a simple requisition, that persons claiming lands within the Territory of Louisiana, by virtue of any *legal* French or Spanish grant made prior to the 1st day of October, 1800, may, and persons claiming lands in the said territories by virtue of any grant or incomplete title bearing date subsequently to the 1st day of October, 1800, shall, before the 1st day of March, 1806, deliver to the register of the land-office or recorder of land-titles within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts so claimed; and shall, also, on or before that day, deliver to the register or recorder, for the purpose of being recorded, every grant, order or survey, deed of conveyance, or other written evidence of his claim. This section then proceeds to declare, as a penalty for noncompliance with its directions, that all the rights of the claimant derived from the first two sections of the act (embracing all grants founded upon mere territorial occupation by France or Spain), shall become void, and for ever after be barred; and that no incomplete

*627] *grant, warrant, order of survey, deed of conveyance, or other written evidence, which shall not be so recorded, shall ever be considered or admitted as evidence in any court of the United States, against any grant derived from the United States. But for the act of Congress of the 6th of February, 1835, entitled "An Act for the final adjustment of claims to lands in the state of Louisiana," the fourth section of the act of 1805 would have operated as a complete bar to the claim of the appellees from the 1st day of March, 1806. The act of 1835 removes that bar so far as to permit, within the space of two years from its date, the prosecution of claims similar to that of the appellees, but this act accomplishes nothing beyond this permission. It imparts no merit or strength to any claim which such claim did not previously

possess. Upon a view of this case, then, we think that the decision of the District Court should be reversed, and the petition of the appellees dismissed, and that decree is accordingly hereby reversed.

Order.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Louisiana, and was argued by counsel. On consideration whereof, it is the opinion of this court, that the title of the petitioners is null and void. Whereupon, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District 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 District Court, with directions to dismiss the petition of the claimants in this cause.

MERRITT M. ROBINSON AND MARGUERITE HIS WIFE, AURORE GAYOSO, FERNANDO GAYOSO, AND FELICITE GAYOSO, APPELLANTS, *v.* WM. J. MINOR, JAMES C. WILKINS, AND HENRY CHOTARD, EXECUTORS OF THE LAST WILL AND TESTAMENT OF KATHARINE MINOR, DECEASED, FRANCES CHOTARD, KATHARINE L. WILKINS, AND WM. J. MINOR.

By the treaty of 1795, between the United States and Spain, Spain admitted that she had no title to land north of the thirty-first degree of north latitude, and her previous grants of land so situated were of course void. The country, thus belonging to Georgia, was ceded to the United States in 1802, with a reservation that all persons who were actual settlers on the 27th of October, 1795, should have their grants confirmed. (See also 3 How., 750.)

On the 3d of March, 1803, Congress passed an act (2 Stat. at L., 229) establishing *a board of commissioners to examine these grants, whose certificate in favor of the claimant should amount to a relinquish- [*628
ment, for ever, on the part of the United States.

Without such confirmation by the United States, a grant of land situated on the north side of the thirty-first degree of latitude, issued by the Governor-General of Louisiana in 1794, would have been void. But it was confirmed by the board of commissioners, and is therefore valid.

The original grantee indorsed upon the grant that he had conveyed it to a woman, whom he afterwards married, and referred to another instrument of conveyance; and in all subsequent transfers there was a reference to that same instrument, reciting its date, and that it accompanied the deeds executed. The confirmation of the commissioners followed and adopted this chain of title.

That instrument of conveyance being lost, it may be presumed, under the circumstances, that the original grantee intended to convey to his wife a greater estate than the law would have endowed her with upon the marriage.

Even supposing that the confirmation of the commissioners was not conclusive, yet the facts of the case show a superior equity in the title of the wife over that of the child of the original grantee; viz., the motive which led to the conveyance; the fact that the widow sold the property for its full value, saw the premises occupied by persons claiming them in fee for thirty years, and never informed her son that he had a right to the property after her decease.

THIS was an appeal from the Circuit Court of the United States for the Southern District of Mississippi, sitting as a court of equity.

The circumstances of the case were these.

On the 1st of July, 1794, Gayoso de Lemos presented the following petition to the Governor-General of Louisiana:—

"To the Governor-General: — Col. Manuel Gayoso de Lemos, governor of the town and district of Natchez, to your honor sayeth, that he owns at half a league from this town a tract of land which he has bought to build thereupon a house, and to raise the commodities that will do to his family; but being also in want of pasture for his horses and other quadrupeds, or animals, petitioner therefore begs of your honor to give order to the deputy-surveyor of this district to extend the boundaries of the said land to increase it to contain one thousand arpents; and petitioner will ever pray.

(Signed,) MANUEL GAYOSO DE LEMOS.

"*Natchez*, *July* 1*st*, 1794—*say* 1794."

On the 8th of August following the governor issued the following order to Carlos Trudeau, the surveyor:—

"*New Orleans*, 8*th July*, 1794.

"Granted.—The surveyor having to designate the limits in the notes of survey, which shall be exhibited to me, so that a title in a due form may be extended to the party.

(Signed) EL BARON DE CARONDELET."

A plat was accordingly made out, and returned on the 3d
*629] *of September, upon which a grant was issued. No translation of the old grant being in the record, the original is not inserted.

On the 12th of February, 1797, the following indorsement was made upon the grant.

"Recorded. Natchez, 12th day of February, 1795. This grant is transferred to Mrs. Margaretta Watts by a written instrument made on this day.

"MANUEL GAYOSO DE LEMOS."

Soon after this, either in the year 1795 or the early part of 1796, a private marriage took place between Gayoso and Margaret Watts. The reasons for its being private are thus explained in the deposition of Judge King, and in the letters of Gayoso himself to Mr. Wikoff, the brother of Mrs. Watts.

Judge King's Testimony.

"To the first interrogatory he saith, he believes that Fernando Gayoso was born at Natchez, in the year 1796 or 1797, and that he was the legitimate son of Don Manuel Gayoso de Lemos and Margaret Watts; and witness will proceed to state, as he is requested in the interrogatory, some of the circumstances which induce his belief. Some time in the year 1797 or 1798, Don Manuel Gayoso was made governor of the Province of Louisiana, and arrived at New Orleans in one of those years to take charge of his government. He came to the city in a barge, and landed immediately opposite the store of witness. Witness, being acquainted with the governor, went on board the barge with others to welcome his arrival. Mrs. Gayoso (Margaret Watts) was with the governor, and had her son, the said Fernando Gayoso, then an infant, in her arms; witness, to the best of his recollection, took the child from his mother's arms, and carried him on shore. Witness had known the said Mrs. Gayoso as Miss Margaret Watts, previous to her first marriage. Having been the bearer of a letter of introduction from General Wilkinson in 1793 to Governor Gayoso, then Governor of Natchez, witness was invited to his house, where he became acquainted with his family, then consisting of Mrs. Watts, the mother-in-law, and Miss Margaret Watts, his sister-in-law.

"In the year 1796 or 1797 it was currently reported and believed in the city of New Orleans, where witness then resided, that Governor Gayoso had been privately married to Margaret Watts at Natchez, which marriage could not be publicly acknowledged, because it had been contracted without the permission of the king of Spain, or perhaps the dispensation of the *Pope was needed, as the former wife of Governor Gayoso had been a sister of Margaret [*630 Watts, or perhaps for both these reasons. Some time after the arrival of Governor Gayoso at New Orleans, the Bishop of Havana happening to be there, and the impediments to the marriage, whatever they were, having been removed, the nuptial ceremony was publicly solemnized by the bishop. Witness was not present at the marriage, but the fact that it was celebrated was one of general notoriety, and universally believed in the city of New Orleans. Witness was frequently

at the house of Governor Gayoso in the city of New Orleans, where he saw Mrs. Gayoso (Margaret Watts) and Fernando Gayoso, and on all occasions the former was treated as the wife of the governor, and the latter as the child of their marriage. Mrs. Gayoso, as witness always understood, was, after the death of Governor Gayoso, treated by the Spanish government as his widow, and as such allowed during her widowhood a pension equal to half the annual salary of her deceased husband. Fernando Gayoso lived with his mother during his minority, except when at school, and was always spoken of by her as the issue of her marriage with Don Manuel Gayoso de Lemos. Margaret Watts left at her death several other children, issue of a second marriage. At the settlement of her succession, Fernando Gayoso was treated as one of her legitimate heirs, and as such received his portion. From all these circumstances, witness, who knew the parties from the dates already stated to those of their respective deaths, has always believed that Fernando Gayoso was the legitimate son of Don Manuel Gayoso de Lemos and Margaret Watts, his wife.

Letters of Gayoso to Mr. Wikoff.

(These letters were produced and proved by Eliza Parrott, the daughter of Mr. Wikoff.)

"*New Orleans*, 21*st February*, 1796.

"My dear friend,—I suppose that by this you and my dear sister are acquainted with my return from my long campaign, by a letter that our mamma wrote, as I arrived at the Natchez. Now this is to inform you that by the last packet I received my promotion as brigadier-general for my former services, and I still hope that the ensuing packet will bring me some other good news, in recompense of the successful campaign that I have finished. The last was a general promotion, in which the Governor-General of this province was made major-general, and several others promoted.

"A neighbor of yours is just going away, so this is just to repeat to you my affection, to give my love to my dear sister, *631] *and to embrace your sweet children. Tell Manuel that he must come to see his godfather. Indeed, my friend, we must continue to make ourselves happy with an interview of our families; our dear mamma will look upon such an event as the greatest blessing she could experience: therefore you must begin to think how to bring it about.

"As I am assured that you have been puzzled by the news mamma wrote of our connection being brought to an issue, I

must explain it; that very day our contract was signed before many witnesses, and likewise an elegant country-house, with one hundred acres bordering the town that I settle on my dear Peggy, besides a very considerable allowance of my estate; however, for the public, I must wait for the king's permission, which is important to Peggy to secure her the military pension; but this will be had by the latter end of this year, and perhaps by that time some considerable alteration in my public station, which I hope may enable me to serve you.

I repeat my affectionate love to my dear sister and children, and I remain, sincerely, your truest friend and humble servant.

MANUEL GAYOSO DE LEMOS."

"*Natchez, March 6th*, 1797.

"My dear friend,—The American commissioner, Mr. Elicot, arrived here, and in a few days I shall set off with him to have the first conference with the Baron near Clark's. Perhaps we may fix the first point immediately, but it will be some time yet before we proceed any further; therefore, I shall return to this place. In this situation I am overpowered with business.

"I wait with impatience for the necessary permission to publish my marriage, which, however, is as binding now; but the public sanction is necessary; I am in hopes that it will arrive by the first packet. General Former is lately arrived here with his daughter, married to Dr. Longstreet, whom I suppose you know, though he is very young—(I mean Mr. Longstreet). He thinks of paying you a visit; it seems that he is related to you.

"My kind, affectionate regard to my sister and children; and I remain, sincerely, your most humble, obedient servant and friend. MANUEL GAYOSO DE LEMOS."

"*New Orleans, 18th August*, 1797.

"My dear friend,—Though as busy as you may suppose at my arrival here, I do not wish to let this opportunity pass without renewing to you and to my dear sister the sincere assurances of my affection and attachment for you. I left our *friends well at Concord, with the addition of a fine boy that four days hence will be one month old. At [*632 the beginning of October, I shall send my galiot for your sister, whom I did not bring down on account of the excessive heat, and because she would find the house not conveniently furnished at our first arrival. The retard of the packet from Europe was the cause of the delay of the king's permission, as likewise of my promotion to the command of the province,

signed by the king the 20th of October last; however, they both arrived at the same time, and restored tranquillity to our friends.

"When we are fixed at home, I shall insist on a visit from my dear sister, &c., &c., one of these days. I shall prepare a summons, which I shall send up to Concord, to be signed by Lady Governante, as belonging to her department, to obtain the desirable end. The new governor of Texas is a friend of mine. I have already wrote to him an account of your negroes, but it would be necessary to have names and description, which, if you send to me, I'll have circulated in all the outposts, &c.

"If I can be of any service to you, I need not add here complimentary expressions, I shall do it cheerfully. My love to my dear sister and all the little cohort. I hope she has been happily delivered, and that you all enjoy good health.

"I am, sincerely, your most humble servant and friend,

MANUEL GAYOSO DE LEMOS."

On the 14th of July, 1797, Fernando was born, as appears from the following certificate:—

"Manuel Gayoso de Lemos, brigadier of the royal armies, military and civil governor of the town and district of Natchez, &c., on this Friday, 14th July, 1797, at seven minutes to one o'clock in the morning, my wife, Margaret Watts Gayoso, was delivered of a robust and healthy child, to whom I determined to give the name of Fernando.

MANUEL GAYOSO DE LEMOS."

On the 10th of December, 1797, the official ceremony of marriage was performed, as shown by the following certificate:

"No. 422.—On Sunday, 10th of December, of the year 1797, the most Christian Don Luis Tenalver y Cardenas, most worthy prime bishop of this Diocese of Louisiana and Floridas, of the Council of his Majesty, married and imparted the nuptial benediction to Don Manuel Gayoso de Lemos, brigadier of the royal armies of his Catholic Majesty, civil and military governor of the *aforesaid province, a native of the kingdom of Galicia, and Margaret Watts, his legitimate wife, native of Baton Rouge, district of this same government. They performed confession and communion, and to certify the above, I sign.

Marriage of Don Manuel Gayoso de Lemos and Miss Margaret Watts.

*633]

"FR. ANTONIO DE SEDELLA.

"The above is a true copy from the original, kept in the archives of the above church for reference. New Orleans, 23d August, 1844.

"ANT. DULUC,
Secretary of the Vestry of the St. Louis Church."

In July, 1799, Gayoso died, and was buried in New Orleans, being then civil and military governor of the Province of Louisiana.

On the 10th of August, 1799, Margaret Watts Gayoso conveyed to Daniel Clark, Jr., for the consideration of $5,000, a certain plantation or tract of land, "known by the name of Concordia, situated, lying, and being in the Mississippi Territory, in the United States of America, about half a league northeast of the fort of Natchez, containing one thousand acres, or arpents, be the same more or less, as is fully expressed in the grant and plan of said land, No. 632, accompanying this bill of sale;" and accompanied the sale with a general warranty.

On the 15th of August, 1800, Daniel Clark conveyed the property to William Lintot for ten thousand dollars. The deed contained the following recital:—

"This indenture, made this 15th day of August, in the year 1800, between Daniel Clark, of the Mississippi Territory, of the one part, and William Lintot, of the Territory aforesaid, witnesseth: That whereas, on the 10th day of September, in the year 1794, there was granted by the Baron de Carondelet, Governor of Louisiana, unto Don Manuel Gayoso de Lemos, a tract or parcel of land, called Concord, containing by estimation, one thousand acres, with the appurtenances, situated in the district aforesaid, as per plat and grant accompanying this will more fully appear. And whereas, by an instrument of writing, which also accompanies this, dated the 12th day of February, in the year 1795, the said Don Manuel Gayoso de Lemos did, for certain considerations therein recited, convey the said land, with all the appurtenances, to Margaret Watts; and whereas the said Margaret Watts, now the widow of the said Don Manuel Gayoso de Lemos, by her deed dated the 10th day of August, 1799, which also accompanies this, did convey the said land with the appurtenances to Daniel Clark, then junior, for the valuable consideration of five thousand dollars," &c.

*On the 15th of November, 1800, Lintot conveyed [*634 to Stephen Minor, the ancestor of the appellees.

In 1802, a contract was made between the United States and the state of Georgia, by which Georgia ceded to the

United States all the territory in which the granted land was. But it was stipulated in the deed of cession, that "all persons who, on the 27th of October, 1795, were actual settlers within the territory thus ceded, should be confirmed in all the grants legally and fully executed prior to that day, by the former British government or the government of Spain." This agreement between the United States and Georgia will be found in 1 Land Laws, 588.

On the 3d of March, 1803, Congress passed an act (2 Stat. at L., 229), entitled, "An Act for regulating the grants of land and providing for the disposal of lands of the United States, south of the state of Tennessee." This act established a board, before which all claims were to be brought, and the sixth section provided that, where it shall appear to the board that the claimant is entitled to a tract of land under the articles of agreement and cession with Georgia aforesaid, in virtue of a British "or Spanish grant legally and fully executed, they shall give a certificate thereof, describing the tract of land and the grant, and stating that the claimant is confirmed in his title thereto by virtue of the said articles; which certificate, being recorded by the register of the land-office, shall amount to a relinquishment for ever on the part of the United States."

In 1804, the following proceedings took place before the board:—

"Monday, the 10th of September, 1804, the board met.

"No. 1220. Stephen Minor claims one thousand arpents, Spanish patent to Manuel Gayoso, dated the 12th of September, 1794, who assigned and transferred the same to Margaret Watts, afterwards Margaret Watts Gayoso, the 12th of February, 1795, who conveyed the same to Daniel Clark by deed dated the 10th of August, 1799, who conveyed the same to William Lintot, the 15th of August, 1800, who conveyed the same to the present claimant on the 15th of September, 1800; the patent to Gayoso, assignment to Margaret Watts, deed from Margaret to Clark, deed from Clark to Lintot, and deed from Lintot to Stephen Minor, were produced in evidence, filed with the register.

"Witness William Barland on oath says, that Margaret Watts Gayoso was an actual settler in the Mississippi Territory on the 27th of October, 1795."

And on the 18th of September, 1805, the following certificate was issued:—

"A. No. 610. *Mississippi Territory.* Register 1220.

"Board of Commissioners west of Pearl River, established

by a law of Congress regulating the grants of land, and providing for the disposal of lands of the United States south of the state of Tennessee.

*"Stephen Minor claims a tract of seven hundred and fifty-six arpents of land, situated in Adams County, [*635 near the city of Natchez, by virtue of a grant under the authority of the Spanish government, to Manuel Gayoso de Lemos, for one thousand arpents, bearing date the 12th day of September, in the year 1794, having such shape, form, and marks, both natural and artificial, as are represented in the plat annexed to said grant, and legally conveyed to the claimant.

"We do certify, that the said Stephen Minor is confirmed in his title thereto by virtue of the articles of agreement and cession between the United States and Georgia.

"Given under our hands, at the town of Washington, in the county of Adams, this 18th day of September, in the year 1805, and in the thirtieth year of the independence of the United States.

"ROBERT WILLIAMS,
THOMAS H. WILLIAMS,
Commissioners."

It was admitted that those who claimed under Minor had been in possession since the issuance of the certificate of confirmation.

In December, 1805, Margaret Watts Gayoso married Captain Stelle of the United States Army.

Stelle died in 1819, and Margaret in 1829.

On the 9th of May, 1832, Fernando Gayoso de Lemos, a citizen of Louisiana, filed a bill in the Circuit Court of the United States for the Southern District of Mississippi, against Job Routh, Katharine Minor, John Minor, executor of Stephen Minor, and John William Minor, of Mississippi.

The bill charges that the complainant is the lawful son and only heir of Manuel Gayoso de Lemos, deceased, and that the said Manuel was, on the 27th of October, 1795, an actual settler within the territory, now the state, of Mississippi, ceded by Georgia to the United States on the 14th of April, 1802; that he then held a grant legally and fully executed prior to the 27th of October, 1795, by the government of Spain for 1000 arpents of land, now situated in Adams County, Mississippi; that he or his legal representatives were entitled to a confirmation of that grant by the articles of cession between the United States and Georgia, and that the

said Manuel's wife, Margaret, *the complainant's mother, survived her husband, married James Stelle in 1804 or 1805, and died in 1829, and that Stelle died in 1819.

The bill further states, that Stephen Minor, deceased, late of Adams County, Mississippi, became possessed of the evidences of the said Manuel's said title, and after the death of the said Manuel, and during the infancy of the complainant, and while he resided in Louisiana, procured from the board of commissioners west of Pearl River, the issual to him, in his own name, of a certificate for 760 arpents of said land, which certificate was so unlawfully, falsely, and by imposition procured to the said Minor in fraud of the complainant's rights, and of right belonged and ought to have issued to the complainant as sole legal heir of the said Manuel; that Stephen Minor died in 1815 or 1816, leaving his wife Katharine (one of the defendants) devisee and trustee of all his estate, and making her and John Minor (also a defendant), his executors; and that the executors on the 25th of January, 1829, conveyed the land to the defendant William J. Minor, the son of Katharine Minor, who, on the same day, reconveyed to his mother, in whose possession it now is, with the Spanish grant, as it was before in her husband's possession, and that before these last mentioned conveyances the parties to them were aware of the complainant's claim.

The bill further states, that Job Routh, then and now a citizen of Adams County, Mississippi, procured from the same board of commissioners, in like manner as Minor, a certificate for 244 arpents of said tract, under and by virtue of the said evidence of the said title of the complainant's father, and has long been in possession, and that said certificate belonged and ought to have issued to the complainant.

The bill prays that Katharine Minor and Job Routh may be decreed to convey the land to the complainant, and deliver him the evidence of the title to it, and to account for the rents and profits, and for general relief.

After sundry proceedings of demurrers, which were overruled, and bills of revivor, which it is not necessary to state, the defendants answered, in November, 1845.

The answer sets out the title at law of the appellees, beginning with the Spanish grant which lies at its foundation, tracing the assignment of that grant through its several successive holders to Stephen Minor, showing Minor's application under it to the board of commissioners, west of Pearl River, appointed by virtue of the act of Congress of 3d March, 1803, "for regulating the grants of land, and providing for the dis-

posal of lands of the United States south of the state of Tennessee," *and the certificate of the board in his favor, and thence deducing their title regularly from him. It [*637 denies that the certificate was issued to Stephen Minor unlawfully, falsely, or by imposition or fraud; and avers that the Concord plantation has been in the possession of them, and those under whom they claim, since the 10th of August, 1799.

The answer does not admit Fernando Gayoso to be the lawful son and heir of Manuel Gayoso, or that said Manuel married Margaret Watts, or that she left children, or the date of the death of the said Manuel or Margaret, or the age of the said Fernando at the time of the death of the said Manuel, and requires proof of the averment of the bill on these heads.

The answer further denies that the said Manuel Gayoso was an actual settler, within the meaning of the act of Congress of 27th October, 1795, and that the appellees had any notice of the claim of the appellants prior to the commencement of the suit; and, in addition, relies on the failure of the appellants to file their bill within twenty years after the accrual of the right in virtue of which they claim.

To this a general replication was filed, and a large mass of evidence was taken.

In November, 1847, the cause was discontinued as to the heirs of Job Routh, and abated as to Austin Williams, Archibald Williams, and Elias Ogden. It then came up for argument on the bill, answers, exhibits, and proof, when the Circuit Court dismissed the bill, with costs.

The complainants appealed to this court.

It was argued by *Mr. Bullard*, for the appellants, and *Mr. J. Mason Campbell*, for the appellees.

Mr. Bullard, for the appellant, said, that, before stating the points of law in the case, it was proper to say, that the judge of the District of Mississippi gave as a reason for dismissing the bill, although no written opinion was delivered, the decision of this court in the case of the *Lessee of Hickey and others* v. *Stewart and others*, 3 How., 761. That case appears to be totally different from this. Starke claimed under an order of survey which had never been presented to the board of commissioners for confirmation, under the act of 1803, and this court held that the court of chancery, in taking cognizance of Starke's claim, and establishing it by its own judgment and decree, transcended its jurisdiction. The Gayoso title, as exhibited in this case, was complete and fully executed,

as contemplated by the compact with Georgia in 1802, and was presented to the commissioners and confirmed; but con-
*638] firmed not *in favor of the heir-at-law to whom the fee had descended, but to Minor, under a pretended right of Margaret Watts Gayoso, and we charge Minor as the trustee of the infant heir of Don Manuel Gayoso de Lemos. There is no analogy between the two cases.

He then stated the following points:—

The first, and indeed the principal, question in the case is, What degree of estate or interest did Clark, Lintot, and Minor acquire under the conveyance of Mrs. Margaret Gayoso after the death of her first husband? or, in other words, what was the extent of her right to or in the land?

I am willing to test this question either by the Spanish law, which was, at least to a certain extent, in force in the district of Natchez, or by the common law, supposed to prevail in Georgia at that time. I say to a certain extent, because I freely admit that Spain, not being the sovereign *de jure*, had no right to dispose of any of the public domain; but being, until 1798, the sovereign *de facto*, having its governor, its tribunals of justice, and a body of laws or usages in reference to which all contracts and donations were made, and which regulated all the civil transactions of the people and the mutual relations and capacities of individuals, the Spanish law was the living law of the people; by it were regulated the transfers of all property once severed from the domain, whether by contract, or last will, or *ab intestato;* every question of marriage, of legitimacy, of donations, either *mortis causâ* or *inter vivos*, which arose during the sovereignty *de facto* of Spain, ought to be tested by the Spanish law.

I. What, then, was the Spanish law applicable to this case, as it relates to the degree of estate acquired by Madame Gayoso? And here I assume, what is most favorable to the pretensions of the defendants, and rendered most probable by the evidence, that the land in question was settled on Miss Watts as a donation in consideration of marriage, or a *donatio propter nuptias.*

Upon that supposition she acquired the land in full property, defeasible on her second marriage; in which event her right would be reduced at once to a usufruct during her natural life on a life estate, and on her decease the land would descend to the heir of the donor or first husband exclusively. I rely on the following authorities: 5 Partida, law 26, title 13; Commentary of Gregorio Lopes; 15 Law of Toro; Gomez ad Leges Tauri, (commentary,) note 1st. Original Roman

law:—Justinian, Code, lib. 5, tit. 9, § 3; 2 Pothier's Traité du Mariage, Nos. 605, 613, 614; Fibrero, part 1, chap. 3.

II. But supposing that the common law, or the law of Georgia, *is to govern, as was contended by the defendants, what interest or estate did Madame Gayoso acquire in the tract of land according to the evidence in the record? It will be conceded that, according to both systems of law, the only son is the heir of the father; and leaving out of view the transfer to Margaret Watts, Fernando Gayoso would have inherited the fee simple; and the title was perfect, according to the compact with the state of Georgia. I contend, then, that according to the common law, Margaret Watts acquired at most a life estate, with remainder over in fee to the heir-at-law of Don Manuel Gayoso de Lemos, to wit, Fernando Gayoso, and that her vendee acquired no greater interest or estate. [*639

The indorsement of Gayoso on the patent is not a deed conveying the fee simple. It conveyed no interest which would go to her heirs; it contains no words or expressions to that effect. Standing alone, it gave her a mere life estate, with remainder over to the heirs of Gayoso.

Nor is it cured by any other part of the evidence. On the contrary, it being admitted that some conveyance from Gayoso to his future wife accompanied the several mesne conveyances, and it not being produced as the highest evidence, the presumption is, it conveyed no higher interest than the indorsement itself. The recital in those deeds points to higher evidence than this mere indorsement on the patent, and cannot avail the party until he accounts for the original. Notes to Phillips on Ev., Part 2, 1236; 1 Greenl. on Ev., 93.

III. The compact with Georgia confirms the title of Gayoso, without the necessity of any act on the part of the United States, except a mere certificate requiring no patent. See Act of 1803, § 6 (2 Stat. at L., 231).

This certificate adds nothing to the validity of the original patent. See *Hickie et al.* v. *Starke et al.*, 1 Pet., 94.

IV. Fernando Gayoso was the infant heir of Don Manuel Gayoso at the time Minor, having possessed himself of the patent, obtained the confirmation to himself, without showing any conveyance from the original grantee, which cut off his heir at law. He will then be held to be the trustee of the legal title of the infant heir, and condemned to convey the land, and account for the rents and profits. See *Gaines et ux.* v. *Chew et al.*, 2 How., 650–655; *Dormer* v. *Fortescue*, 3 Atk., 130; *Roberdeau* v. *Rous*, 1 Id., 543; *Hutton* v. *Simpson*, 2

Vern., 724; *Townsend* v. *Ash*, 3 Atk., 336; *Mundy* v. *Mundy*, 2 Ves., 122.

If it should be contended that Minor was an innocent purchaser without notice, and to be protected, then we invoke the principle settled in the case of *Biscoe* v. *The Earl of Danbury*, *640] *1 Ch. Cas., 287, and in *Willis* v. *Butcher*, 2 Binn. (Pa.), 466; to wit, that it was *crassa negligentia* in him not to have examined into the extent of interest owned by Madame Gayoso, for he had at least fair notice that there was some conveyance to her, and it was in his power to ascertain the extent of her interests. Minor kept the patent safe, and exhibited it to the commissioners; but he carefully kept back, and yet keeps back, the deed or instrument of writing which accompanied the patent, and by which Gayoso is pretended to have divested himself of title in favor of Margaret Watts.

V. Whether this be a proper case for chancery jurisdiction, or whether the demurrer ought to have been sustained, is a question which I could wish some other person, more conversant with the doctrines and practice of courts of equity than I am, could present to the court. But it does appear to me, that, although the plaintiff exhibits a legal title, on which he might recover in an action of ejectment, yet the proceedings of Minor during the infancy of Fernando were such, in procuring a certificate in his own name, as to raise an implied trust; and that the show of title thus acquired by him throws such a shade over the title of the complainant, as on both grounds to authorize his appeal to a court of equity, and that a court of law could not give him full and complete remedy. I rely on the principles settled in the case of *Gaines et ux.* v. *Chew et al.*, 2 How., cited above.

Mr. Campbell, for the appellees, relied upon the following points:—

1st. That the appellants' claim, as the heirs of Manuel Gayoso through Fernando Gayoso, fails because Fernando was not born in wedlock. His birth took place on the 14th of July, 1797, in Natchez, and his parents were not married till the 10th of December following, in another territory.

2d. That even if Fernando be legitimate, his father, Manuel, was an alien, and could not transmit aught to his son by descent. *Orr* v. *Hodgson*, 4 Wheat., 460; *Inglis* v. *The Trustees*, &c., 3 Pet., 121.

3d. That even if legitimate, and capable to take by descent from his father, he is barred by limitations. Statute of Mississippi, 1818; *Peyton* v. *Stith*, 5 Pet., 494.

4th. That even conceding all the foregoing points in favor of the appellants, the certificate of confirmation concludes all legal and equitable rights existing anterior to its date, and vests an indefeasible title at law and in equity in the appellees, which has since been recognized by Congress. *Grand Gulf Bank* v. *Bryan*, 8 Sm. & M. (Miss.), 234; *Ross* v. *Barland*, 1 Pet., 667; **Hickey* v. *Stewart*, 3 How., 760; *United States* v. *King*, Id., 787; Act of 1803, ch. 27, § 5 (2 Stat. at L., 229); 9 How., 170. [*641

5th. That even if the certificate be not conclusive, and be impeachable for fraud, there is no proof of any fraud in obtaining it, or otherwise.

Mr. Justice McLEAN delivered the opinion of the court.

This case involves the title to a tract of one thousand arpents of land adjoining the city of Natchez.

On the 10th of September, 1794, a grant was obtained for this land from the Baron de Carondelet, Governor-General of Louisiana, by Manuel Gayoso de Lemos, who resided in Natchez. He settled on Margaret Watts, his future wife, the same tract of land, and indorsed upon the grant that it was transferred to her. They were afterwards married, and, with the view to secure to his wife a military pension, the permission of the king of Spain was subsequently obtained. In 1797, some time after the marriage, the nuptial benediction was pronounced by the Bishop of Havana, in New Orleans. In 1797 Madame Gayoso had a son, who was named Fernando. In 1798 Gayoso succeeded the Baron de Carondelet as Governor-General of Louisiana, and removed to New Orleans, where he died in 1799, his wife and son surviving him.

On the 10th of August, 1799, for the consideration of five thousand dollars, Madame Gayoso conveyed the premises, with all the improvements thereon, to Daniel Clark, junior. And on the 15th of August, 1800, Daniel Clark, for the consideration of ten thousand dollars, conveyed the same to William Lintot. In this deed the original grant is referred to, and the plat. And it states, "whereas by an instrument of writing which accompanies this, dated the 12th of February, 1795, the said Don Manuel Gayoso de Lemos did, for certain considerations therein recited, convey the said land, with all the appurtenances, to Margaret Watts; and whereas the said Margaret Watts, now the widow of the said Don Manuel Gayoso de Lemos, by her deed dated the 10th of August, 1799, which accompanies this, did convey the said land to Daniel Clark," &c. On the 15th of November, 1800, William

Lintot, for the consideration of the sum of ten thousand dollars, conveyed the same land, with the same recitals, to Stephen Minor, the ancestor of the defendants.

In 1805, this title having been presented to the board of commissioners west of Pearl River, by Minor, under the act of Congress of 1803, regulating the grants of land, &c., south of the state of Tennessee, was confirmed for seven hundred *642] *and fifty-six arpents. The possession of the land is shown from the original grant to Gayoso under the titles stated.

The complainant, Fernando Gayoso de Lemos, claims the land as the son and only heir of Don Manuel Gayoso de Lemos. In his bill he represents that, after the death of his father, his mother intermarried with one James Stelle, in 1805, and that she died in the year 1829. That the defendant Minor, being in possession of the evidences of title, in fraud of his rights, he being an infant, procured from the board of commissioners a certificate for the land. That in 1815 Stephen Minor departed this life, and left Katharine Minor, his wife, a devisee and trustee of all his estate, and also executrix, and John Minor executor of his last will and testament. That conveyances were executed to the defendants, all of whom had notice of the claim of the complainant. A decree for a conveyance of the land is prayed for, &c. Fernando Gayoso having died, his heirs were made parties.

On the part of the complainant, it is contended that, the original grant for the land under the Spanish government being unconditional, no confirmation of it was required by the United States. That the treaty protected such a title, and that Congress by the act of 1803 could not have intended to interfere with absolute grants, but such claims only as required confirmation by the Spanish authority. And it is urged that Spain, being in possession of the country, and exercising a government *de facto* over it, had the power to grant lands. That the civil law applies as well to the transfer of the land alleged to have been made by Don Manuel Gayoso to Margaret Watts, as to the original grant.

These positions were sustained in the argument by much research and ability, but we are precluded from taking this view by the political action of the government, and the decisions heretofore pronounced by this tribunal.

On the 27th of October, 1795, a treaty was made with Spain, which acknowledged the southern limits of the United States to extend to the thirty-first degree of north latitude. The territory belonged to the State of Georgia, but by deed bearing date the 24th of April, 1802, she ceded it to the

United States. In the deed of cession it was stipulated "that all persons who, on the 27th of October, 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants legally and fully executed prior to that day, by the former British government, or the government of Spain," &c. The land was in possession of Gayoso at the time specified, and the grant having been "legally and fully executed," under the government of Spain, it was included in the deed of cession. *By the fifth section of the act of the 3d of March, 1803, above referred to, it is provided, "that every person claiming lands by virtue of any British grant," &c., "or of the articles of agreement and cession between the United States and the State of Georgia, shall, before the last day of March, 1804, deliver to the register of the land-office, within whose district the land may be, a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed, and shall also, on or before that day, deliver to the said register, for the purpose of being recorded, every grant," &c.; and on failure to do so, "all his right, so far as the same is derived from the above-mentioned articles of agreement," &c., "shall become void, and for ever thereafter be barred;" and it is declared that such deed, &c., which shall not be recorded, shall not be evidence in any court of the United States against any grant under the same. [*643

The sixth section provides, "that, when it shall appear to the board that the claimant is entitled to a tract of land under the articles of agreement and cession with Georgia aforesaid, in virtue of a British or Spanish grant legally and fully executed, they shall give a certificate thereof, describing the tract of land and the grant, and stating that the claimant is confirmed in his title thereto by virtue of the said articles; which certificate, being recorded by the register of the land-office," who shall record it, "shall amount to a relinquishment for ever on the part of the United States." An act supplementary to the above was passed on the 27th of March, 1804, providing for the survey of lands claimed by Spanish grants, but it has no direct bearing on the questions before us.

The treaty with Spain established a disputed boundary; there was no cession of territory. The jurisdiction exercised by Spain over the country north of the thirty-first degree of north latitude was not claimed or occupied by force of arms, against an adversary power; but it was a naked possession, under a misapprehension of right. In such a case, Georgia, within whose sovereignty the country was situated, was not

bound to recognize the grants or other evidence of title by the Spanish government.

In the case of *Pool* v. *Fleeger*, 11 Pet., 210, where North Carolina and Tennessee made grants for lands within the territory of Virginia, through a mistake of the boundary line, the court say, "It is perfectly clear that the grants under which the defendants claim, being beyond the boundary of Tennessee, were inoperative." The same doctrine has been held in relation to the Spanish grants north of the thirty-first degree of north latitude, in *Henderson* v. *Poindexter*, 12 Wheat., 530; *Lessee *of Hickey et al.* v. *Stewart et al.*, 3 How., 756; *La Roche et al.* v. *Jones*, 9 Id., 170.

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The title in question belongs to a class which was recognized and made valid in the cession of the territory by Georgia to the United States. This act of Georgia, though voluntary, was just. It secured to the Spanish claimant a title, which, so far as he was concerned, had been acquired in good faith, but which was void for want of authority in the granting power. In requiring the holders of complete grants to present them and the plats of survey before commissioners, under the act of 1803, Congress carried out the compact with Georgia. In reference to such titles the words of the cession were, "they shall be confirmed." And although the forfeiture of the title, if not presented and recorded, was a rigorous provision, yet it was within the power of Congress. Until these titles were examined, and their boundaries ascertained, the government could not make a survey and sale of the lands to which there were no valid claims. It was therefore important, that all titles to which validity was given by the cession and by acts of Congress should be placed upon the public records, under the sanction or rejection of a competent board of commissioners.

The ground on which the complainants chiefly rely for a decree is a presumed defect in the conveyance from the widow of Gayoso to Clark.

The indorsement upon the original grant by Don Manuel Gayoso, that he had conveyed the property to Margaret Watts, referred to an instrument other than that indorsed on the grant. And we find in the deed from Clark to Lintot, and also in the deed from Lintot to Minor, there is a reference to that instrument, reciting its date and that it accompanied the deeds executed. And these conveyances were sanctioned by the solemn act of the commissioners when they confirmed the title to Minor. Under this title there has been a continuous possession of fifty years. The consideration paid by Clark satisfactorily shows that he supposed himself to have

acquired a complete title to the land. Under these circumstances, if the decision of the case turned upon the legal title, such title might well be presumed, whether the conveyances were executed under the laws of Spain or of Georgia.

It may be presumed that in the conveyance to Miss Watts, which has by some means been lost, the forms of the civil law were pursued, as the common law was not adopted in any part of the Spanish dominions. But validity was imparted to such conveyance by the compact with Georgia, the act of 1803, and the proceedings under that act, the same as to the *original grant. There is no probability that Gayoso [*645
by the conveyance vested no higher interest than might have been claimed by Miss Watts after her marriage with him under the civil law. The fact of his having executed to her a conveyance, of which there is proof, may well justify the inference, that he gave her an absolute title to the land.

But there is another and a more conclusive view of the case. If it be admitted that the complainants may go behind the confirmation of the title by the commissioners, there is nothing on which they can rest but a paramount equity. And what is the nature of that equity as made out in the proof? The heirship of the complainants may be admitted as proved, but there is no other proof of equity than a supposition unsustained by facts, and contradicted by strong circumstances, that a life estate only in the premises was vested in Madame Gayoso. This supposition is refuted by the only rational motive which can be presumed to have induced Don Manuel Gayoso to make the conveyance to his intended wife; by the fact, that, after his death, the widow sold the premises for a full consideration, and saw them occupied by persons claiming them in fee for thirty years, until her death, without setting up any claim thereto in behalf of her son, or informing him that he had a right to the premises after her decease. Under such circumstances, equity can give no relief to the complainants. The decree of the Circuit Court dismissing the bill is 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 Southern District of Mississippi and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, 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.

*JOHN MCNULTY, PLAINTIFF IN ERROR, *v.* JOHN BATTY AND OTHERS.

(See p. 72.)

MR. WALKER, of counsel for the defendants in error, moved the court to direct the clerk to what court the mandate, or other process prescribed by the forty-third rule of court, should be addressed. On consideration whereof, it is now here ordered by the court, that the clerk do not issue any mandate or other process in this case, but only a certified copy of the judgment this day rendered in this cause.

SYLVESTER B. PRESTON AND OTHERS, PLAINTIFFS IN ERROR, *v.* CHARLES BRACKEN.

(See p. 81.)

MR. WALKER, of counsel for the defendant in error, moved the court to direct the clerk to what court the mandate, or other process prescribed by the forty-third rule of court, should be addressed. On consideration whereof, it is now here ordered by this court, that the clerk do not issue any mandate or other process in this case, but only a certified copy of the judgment this day rendered in this cause.

JESSE HOYT, PLAINTIFF IN ERROR, *v.* THE UNITED STATES.

(See p. 109.)

MR. ATTORNEY-GENERAL CRITTENDEN moved the court to dismiss this cause for irregularity in the bill of exceptions, which was opposed by Messrs. Evans and Walker, of counsel for the plaintiff in error. Whereupon this court, not being now here sufficiently advised of and concerning what order to render in the premises, took time to consider.

On consideration of the motion made in this cause by Mr. Attorney-General on the 6th instant, and of the arguments of counsel thereupon had, it is now here ordered by the court, that the whole case be argued upon the bill of exceptions.

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TO THE

MATTERS CONTAINED IN THIS VOLUME.

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