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REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES,

DECEMBER TERM, 1851.

By BENJAMIN C. HOWARD,

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

VOL. XIII.

SECOND EDITION.

EDITED, WITH NOTES AND REFERENCES TO LATER DECISIONS,

BY

STEWART RAPALJE,

AUTHOR OF THE "FEDERAL REFERENCE DIGEST," ETC.

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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. ROBERT C. GRIER, Associate Justice.
HON. BENJAMIN R. CURTIS, Associate Justice.

JOHN J. CRITTENDEN, ESQ., Attorney-General.
WILLIAM THOMAS CARROLL, ESQ., Clerk.
BENJAMIN C. HOWARD, ESQ., Reporter.
RICHARD WALLACH, ESQ., Marshal.

LIST OF ATTORNEYS AND COUNSELLORS

ADMITTED AT THE ADJOURNED DECEMBER TERM, 1851.

Walter Brooke,	Mississippi.
John A. Wilcox,	Mississippi.
William A. Graham,	North Carolina.
William C. Dawson,	Georgia.
Richard McAllister,	Pennsylvania.
F. B. Cutting,	New York.
James S. Rowe,	Maine.
William Fessenden,	Maine.
Tully R. Cormick,	Missouri.
James Lockhart,	Indiana.
J. Sidney Smith,	Missouri.
John L. Heylin,	Pennsylvania.
James F. Joy,	Michigan.
Francis H. Cone,	Georgia.
John B. Niles,	Indiana.
Richard Busteed,	New York.
Maunsel B. Field,	New York.
D. C. Goddard,	Ohio.
Ethelbert C. Hibben,	Ohio.
Charles Sumner,	Massachusetts.
William Stewart,	Indiana.

RULES OF COURT.

RULE No. 61.

WHEN the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term, next succeeding the suggestion, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

This rule shall apply to cases now on the docket, as well as to cases hereafter brought. And those now on the docket, and falling within the rule, shall abate on the tenth day of December Term, 1852, unless, upon special cause shown, the court shall direct otherwise.

RULE No. 62.

IN cases where a writ of error is prosecuted to the Supreme Court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered.

The same rule shall be applied to decrees for the payment of money, in cases in chancery, unless otherwise ordered by this court.

This rule to take effect on the first day of December Term, 1852.

ADMIRALTY RULES.

[NOTE BY THE REPORTER. The first forty-seven rules in Admiralty are printed in 3 Howard, and four additional ones in 10 Howard. The following were added at December Term, 1851.]

Ordered, that further proof, taken in a Circuit Court upon an admiralty appeal, shall be by deposition, taken before some commissioner appointed by a Circuit Court, pursuant to the acts of Congress in that behalf, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion, allow a commission to issue to take such deposition upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel.

Provided, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

Ordered, that, when oral evidence shall be taken down by the clerk of the District Court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the Circuit Court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

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.]

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THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

DECEMBER TERM, 1851.

THE UNITED STATES, Appellants, *v.* JOSEPH HUGHES.

Where a grant of land, in Louisiana, was made by the Spanish governor, in February, 1799, but no possession was ever taken by the grantee, during the existence of the Spanish government, or since the cession to the United States; and no proof of the existence of the grant until 1835, when the grantee sold his interest to a third person; the presumption arising from this neglect is, that the grant, if made, had been abandoned.[1]

The regulations of Gayoso, who made the grant, were, that the settler should forfeit the land, if he failed to establish himself upon it within one year, and put under labor ten arpents in every hundred within three years.[2]

THIS was a land case, arising under the acts of 1824 and 1844, and brought up by appeal from the District Court of the United States, for the Eastern District of Louisiana.

The petition in this case was filed in the District Court of the United States, for the Eastern District of Louisiana, on the 16th day of June, 1846.

Hughes, the petitioner, represented therein that, on the petition of Joseph Guidry, the Spanish governor of Louisiana, Gayoso granted to him, (said Guidry,) on the 1st of February, 1799, a tract of land, having a front of 40 arpents on the Atchafalaya, with a depth of 40 arpents, adjoining the land of Andrè Martin, on the west bank of the said river, near where the Point Coupée trace from Opelousas, crosses said river. Petitioner further alleges that the said claim was presented to the board of commissioners, under the act of Congress of 6th of February, 1835, and reported on favorably, but never acted on by Congress; that the United States have sold none of said land, except a small part to John L. Daniel; and that he, Hughes, has *become owner of one thousand [*2

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[1] S. P. *United States* v. *Moore*, 12 How., 209; *United States* v. *Simon*, Id., 433; *United States* v. *D'Auterive*, 15 Id., 14.

[2] FOLLOWED. *United States* v. *Hughes*, 13 How., 5.

arpents of said grant by a chain of conveyances, &c.; he therefore prays for a decree confirming his title, &c.

The answer of the United States denies all the allegations of the petition.

Depositions to prove the genuineness of Gayoso's signature were given in evidence.

The chain of title to the petition was a conveyance from Guidry to Andrè Martin, on the 19th of April, 1837, and conveyance by Martin to Hughes, on the 1st of March, 1846.

The District Court confirmed the claim, and the United States appealed.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Janin* and *Taylor*, for the appellee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the decree of the District Court of the Eastern District of Louisiana.

The plaintiff, Hughes, in the court below, filed a petition, founded upon a Spanish claim, under the act of 17th of June, 1844, which revived the act of 26th of May, 1824, for the purpose of recovering a tract of sixteen hundred arpents of land, situate in Louisiana, on the Atchafalaya river, near where the Point Coupée road crosses the said river.

The petition states that the concession was made to one Joseph Guidry, on the 1st of February, 1799, by Governor Gayoso, under whom the plaintiff derives title.

The proofs in the case show, that the grant was made on the application of Guidry at the date mentioned; that he sold and assigned his interest in the same to one Andrè Martin, at the risk of the purchaser, 19th of April, 1835, who assigned the same to the plaintiff, 1st of March, 1846, in pursuance of a contract made with his agent in 1840. The latter purchase was also made at the risk of the purchaser.

This concession was an incomplete grant, and did not vest a perfect title to the property in the grantee, according to the Spanish usages and regulations, until a survey was made by the proper official authority, and the party thus put in possession, together, also, with a compliance with other conditions, if contained in the grant, or in any general regulations respecting the disposition of the public domain. Possession, with definite and fixed boundaries, was essential to enable him to procure from the proper Spanish authority a complete title. If, however, the concession itself contained a descrip-

tion of the land sufficient to enable *the grantee to locate the same without the aid of a survey, the incipient grant, and possession thus taken, have always been regarded as such a severance of the tract from the public domain, as to entitle the grantee to a confirmation of the grant within the provisions of the act of 1824. [*3

In such a case, there would be no discretion to be exercised by the public surveyor in putting the party in possession, which, under the Spanish usages, in disposing of the public land, was regarded as essential, in case of grants indefinite as to the location. The survey would be rather matter of form, than of substance, and might, therefore, very well be dispensed with.

In this case, the description in the grant is, perhaps, sufficiently specific to have enabled the grantee to take possession without the necessity of a survey; and, if possession had been taken in pursuance of the grant, he, or those claiming under him, would have presented a proper case confirming the title under the act; and the decree of the court below in favor of the claim might well be sustained.

But no possession of the land was ever taken under this imperfect and incomplete grant, either during the existence of the Spanish government, or since the cession to the United States. Not only has no possession been taken, but, for aught that appears in the record, no action has been had, or claim set up, under the grant, during the whole of the period, from its date down to the institution of the suit, 16th of May, 1847.

Nor have we any proof of the actual existence of the grant, at all, until the 19th of April, 1835, when the grantee sold and quitclaimed his interest to Martin, under whom the plaintiff claims. No account has been given of it for the period of some thirty-six years. The plaintiff rests his claim exclusively upon the evidence of the signature of the governor to the concession, under date of 1st of February, 1779, and its production, 16th of May, 1846, before the court when the suit was commenced, together with the transfer from Guidry, the grantee, to Martin, in 1835, and from the latter to himself, in 1846; and this unconnected with any possession of the premises, or claim of right of possession to the same, in the mean time.

In view of this state of facts, it is impossible to deny, but that the claim comes before us under circumstances of very great suspicion; or to resist the conclusion that the grant, if made, had been abandoned. It is difficult to account for the neglect to take possession, or to set up any right or claim to

the land for so long a period, upon any other supposition; especially, when we see that the description of the premises in the concession is sufficiently specific to have enabled the grantee to take possession under it without the aid of a previous survey.

*4] *This conclusion is strengthened, when we take into view the regulations of Governor Gayoso himself, who made the grant in question, respecting the disposition of public lands, published at New Orleans, 9th of September, 1797, about a year and a half before it was made. According to the 14th article, it is declared, that the settler shall forfeit the lands, if he fails to establish himself upon them within one year; and shall have put under labor ten arpents in every hundred, within three years. And in the regulations of the Intendant, Morales, published at the same place, July 17, 1799, some six months after the date of this grant, possession and cultivation, within a limited time after the concession, are expressely enjoined, under the penalty of forfeiture.

The neglect to comply with these regulations, thus positively enjoined, within the three years that the Spanish government continued after the date of the grant, together with the absence of claim or assertion of right to the land, and absence even of any proof of the actual existence of the grant for the period of more than thirty-six years, we are of opinion, lay a foundation for the inference or presumption of abandonment of the original concession made by Gayoso, too strong to be resisted; at least, a presumption of abandonment that called for explanation on the part of the plaintiff, accounting for the neglect to take the possession, for the great delay in the assertion of the claim, and for the absence of any evidence of even the existence of the grant itself for so long a period of time.

On these grounds, we think, the decree of the court below erroneous, and should be reversed, proceedings remitted to the court below, and petition be dismissed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, 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 District Court in this cause be, and the same is hereby, reversed and annulled; and that this cause be, and the same is hereby, re-

manded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, APPELLANTS, *v.* JOSEPH HUGHES.

The court again decides, as in the preceding case, that where a Spanish grant was made in 1798, and no evidence was offered that possession was taken under the *grant, nor any claim of right or title made under it until 1837, nor any evidence given to account for the neglect, the presumption is that the claim had been abandoned. [*5

In this case, also, there was no proof that the persons who purported to convey as heirs, were actually the heirs of the party whom they professed to represent.

THIS was a land case, arising under the acts of 1824 and 1844, and came up by appeal from the District Court of the United States for Louisiana.

The parties were the same as in the preceding case.

The petition in this case was filed in the District Court, for the Eastern District of Louisiana, on the 16th of June, 1846.

The petitioner, Hughes, claims under a grant alleged to have been made by Governor Gayoso to Andrè Martin, on the 10th of October, 1798, of a tract of land of twenty-eight arpents front, with a depth of one hundred arpents, situated on the west bank of the Atchafalaya, about one league above where the trace or road from Opelousas to Point Coupée crosses the said river. The petitioner alleges further, that said Martin took immediate possession, &c., and that the board of commissioners made a favorable report on the claim in the year 1840, but that Congress never acted on it, and that he holds a title to one thousand arpents thereof, &c. He thereupon prays that his title may be decreed to be good.

The answer of the United States is a general denial of the allegations of the petition.

The evidence of the original title is the petition of Andrè Martin to the governor for the said tract of land, and the governor's decree thereon, signed by him in these words: "Granted forever, that he may establish it," and dated "New Orleans, October 10th, 1798."

Hughes claimed title under a deed from certain persons who represented themselves to be the heirs of Martin, dated 14th of July, 1848.

The District Court decided in favor of the petitioner, and the United States appealed.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Janin* and *Taylor* for the appellee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the District Court for the Eastern District of Louisiana.

The plaintiff, Hughes, claimed in the court below 3800 arpents of land situate in Louisiana, on the west bank of the Atchafalaya river, about one league above where the road from Opelousas to Point Coupée crosses said river under a
*6] concession from *Governor Gayoso to one Andrè Martin, 10th of October, 1798.

The petition was presented to the District Court on the 16th of June, 1846, under the act of 17th June, 1844, reviving the act of 26th May, 1824, praying for a confirmation of the grant in pursuance of the provisions of the act.

Evidence was given of the handwriting of Martin to the application to the governor for the grant of the tract in question; and of the handwriting of the governor to the grant.

The plaintiff, also, gave in evidence a conveyance by notarial act under date of 14th of July, 1848, purporting to be made by the heirs of Andrè Martin, the original grantee, to himself, conveying one thousand arpents, part of the tract of 3800 arpents, to be taken off the front part of the tract.

Evidence was also given of a notice to the registers and receivers of the land-office at Opelousas, in Louisiana, of a claim on behalf of the heirs of Martin by their attorney, for confirmation of the claim under date 1st of February, 1837. What action took place before these officers on the application, if any, does not appear on the record, nor have we been referred to any proceedings therein.

There is no evidence that possession was ever taken of the land by the grantee, or any person claiming under him; nor of any claim of right to the possession; or of any right or title under the concession, or of the actual existence even of the concession itself, until the application to the register and receiver in 1837, a period of over thirty-eight years from its date.

Nor is there any evidence in the record accounting for the neglect to take possession, or for the absence of evidence of an assertion of right under the grant, or of even the existence of the grant itself for so long a period of time.

The plaintiff rests his claim exclusively upon the production, and proof of this incomplete grant by Governor Gayoso

in 1798, of his title as derived from the grantee in 1848, and of the application to the officers of the land-office at Opelousas in 1837.

We have already held, in a previous case of this plaintiff and the United States, that the neglect to take possession, and the absence of any claim under the grant, and of any evidence of the existence of the grant itself, for so long a period of time, afford such a violent presumption of abandonment of the claim, that unless explained to the satisfaction of the court, it is impossible, consistent with any sound principles of law or of equity, to uphold it. We refer to the opinion given in that case on this point as decisive of the present one.

There is also an additional objection to a recovery in this case, that did not exist in the one referred to. The plaintiff *shows no title to the land in question. There is no proof in the record that the persons joining in the [*7 conveyance to him of the premises in July, 1848, were the heirs of Martin, the original grantee. The recital in the instrument is no evidence of the fact. The proper proof should have been furnished of the heirship.

For these reasons we are of opinion that the decree of the court below is erroneous, and should be reversed, and remit the proceedings to the court below, with directions to dismiss the petition.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Louisiana, 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 District Court in this cause be, and the same is hereby reversed and annulled; and that this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, APPELLANTS, *v* JOSEPH HUGHES.

The decision in the two preceding cases again affirmed.

THIS was a land case arising under the acts of 1824 and 1844, and came up by appeal from the District Court of the United States for Louisiana.

The parties were the same as in the two preceding cases.

Joseph Hughes filed his petition on the 16th June, 1846, claiming 3200 arpents of land, as having been granted by the governor of Louisiana, Gayoso, on the 26th April, 1798, to Andrè Martin. He alleges that said Martin took immediate possession, and held it till his death. That in the year 1840, the board of commissioners reported favorably on said claim, but that Congress had never acted upon it; and that he will, on the trial produce good and legal sales and transfers of the said tract of land from the heirs of the said Martin to himself.

The answer put in, on the part of the United States, consists of a general denial of the statements in the petition.

The evidences of title exhibited on the part of the petitioner were,

1st. The petition of Andrè Martin to the governor for a grant of 3200 arpents, &c., dated March 28, 1798.

*8] *2d. The concession and order of survey made by Governor Gayoso, and dated 26th April, 1798.

3d. The sales and deeds of conveyance by the heirs of Andrè Martin, under which the petitioner, Hughes, claims, dated respectively the 13th and 14th of July, 1848.

Testimony was offered to prove the genuineness of Gayoso's signature to the order of survey.

The District Court decided in favor of the petitioner and the United States appealed.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Janin* and *Taylor* for the appellee.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the District Court of the Eastern District of Louisiana.

The plaintiff claimed three thousand arpents of land situate in Louisiana, and fronting on the back part of lands of Oliver Thibodeaux, Theodore Thibodeaux, and Claude Martin, under a concession to Andrè Martin from Governor Gayoso, 26 April, 1798. The proceedings were under the act of 17th June, 1844, reviving the act of 26th May, 1824.

Evidence was given of the handwriting of Martin to the application for the land, and of Governor Gayoso to the concession.

The plaintiff also produced evidence of a conveyance of the premises to himself by an instrument bearing date 14th July, 1848, purporting to have been executed by the heirs of

André Martin the original grantee. And, also, notice to the register and receiver of the land-office at Opelousas, Louisiana, of an application on behalf of the heirs, by their attorney, for confirmation of the grant under date of 23d December, 1836.

The concession was an inchoate and incomplete grant; and there is no evidence that any possession was ever taken of the land, nor of any claim set up under the grant to the same, from its date down to 1836, when notice was given to the officers of the land-office; nor any evidence of the existence of the grant during the whole of this period. The case falls directly within the principles of the two previous cases just decided.

There is, also, no proof of any title in the plaintiff derived from the original grantee. The conveyance purporting to be executed by the heirs notwithstanding the recitals to that effect, furnishes no evidence of the fact of heirship.

We think the decree of the court below erroneous, and should be reversed; and that the proceedings be remitted to the court below, and the petition be dismissed.

*ORDER. [*9

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Louisiana, 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 District Court in this cause, be, and the same is hereby reversed and annulled, and this cause be, and the same is hereby, remanded to the said District Court, with directions to dismiss the petition of the claimant.

THE UNITED STATES, APPELLANTS, *v.* ARMAND PILLERIN AND OTHERS; THE UNITED STATES, APPELLANTS, *v.* A. B. ROMAN; THE UNITED STATES, APPELLANTS, *v.* CARLOS DE VILLEMONT'S HEIRS AND OTHERS; THE UNITED STATES, APPELLANTS, *v.* JEAN B. LABRANCHE'S HEIRS.

This court again decides, as in 9 How., 127, and 10 How., 609, that French grants of land in Louisiana, made after the treaty of Fontainbleau, by which Louisiana was ceded to Spain, are void, unless confirmed by the Spanish authorities before the cession to the United States.[1]

[1] See notes to these two cases.

But if there has been continued possession under the grants so as to lay the foundation for presuming a confirmation by Spain, then the cases are not included within the acts of 1824 and 1844, which look only to inchoate and equitable titles. The District Court of the United States has therefore no jurisdiction.[2]

THESE four cases were land cases, arising under the acts of 1824 and 1844, and were appeals from the District Court of the United States, for Louisiana.

They were cases of French grants made after the treaty of Fontainbleau by which Louisiana was ceded to Spain.

They were argued by *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Janin* and *Taylor*, for the appellees, except the second which was argued by *Mr. Soulé*.

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

These four cases are all French grants made after the treaty of Fontainbleau by which Louisiana was ceded to Spain. We have already decided in the cases of *The United States* v. *Reynes*, 9 How., 127, and *The United States* v. *D'Auterive*, 10 How., 607, that grants of this description are void, unless confirmed by the Spanish authorities before the cession to the United States. In some of these cases evidence has been offered *of continued possession by the grantees of those claiming under them, ever since the grants were made. But if there has been such a continued possession, and acts of ownership over the land as would lay the foundation for presuming a confirmation by Spain of these grants, or of either of them or any portion of either of them, such confirmation would amount to an absolute title, and not an inchoate or imperfect one. For all of the grants are absolute, or upon conditions subsequent; and if they had been originally made by competent authority, would have passed the legal title at the time, subject only to be divested by a breach of the condition, in the cases where a condition subsequent is annexed. Such a title, if afterwards recognized by the Spanish authorities, is protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity.

*10]

Titles of this description were not therefore embraced in the acts of 1824 and 1844, under which these proceedings were had. These laws were passed to enable persons who

[2] FOLLOWED. *United States* v. *Roselius*, 15 How., 37.

had only an inchoate and equitable title, to obtain an absolute and legal one, by proceeding in the District Court in the manner prescribed. And when the title under which the party claims, would be a complete and absolute one, if granted by competent authority or established by proof, the District Courts have no jurisdiction under the acts of Congress above mentioned to decide upon its validity. The act of 1824 is very clear upon this point; and it has always been so construed by this court.

Upon this ground the decree of the District Court in each of these cases is erroneous and must be reversed and a mandate issued directing the petitions to be dismissed for want of jurisdiction.

But this decision is not to prejudice the rights of the respective petitioners or either of them in any suit where the absolute and legal title to these lands or any portion of them may be in question, or prevent them from showing if they can that the French grant was recognized as valid or confirmed by the Spanish authorities before the treaty of St. Ildefonso.

ORDER.

These causes came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Louisiana, and were argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in these causes, be, and the same is hereby reversed and annulled, and that these causes be, and the same are hereby remanded to the said District Court with directions to dismiss the petitions of the claimants for want of jurisdiction.

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*Alexander Crawford, Appellant, *v.* James Points, Assignee in Bankruptcy of Henry Hottle. [*11

An appeal does not lie to this court, from the decision of a District Court in a case of bankruptcy.

Even if it would, the decree of the District Court in this case is not a final decree.[1]

[1] Followed. *Humiston* v. *Stainthorp*, 2 Wall., 110. Cited. *Grant* v. *Phœnix Ins. Co.*, 16 Otto, 431.

THIS was an appeal from the District Court of the United States for the Western District of Virginia.

The facts in the case are stated in the opinion of the court so far as they bear upon the question of jurisdiction; and it is unnecessary to state the other facts.

It was argued in this court by *Mr. Fultz* for the appellant, and by *Mr. Stuart* for the appellee.

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

This case may be disposed of in a few words.

James Points, the appellee, was appointed assignee of Henry Hottle who had been declared a bankrupt, by the District Court of the United States for the Western District of Virginia. And, upon the petition of the assignee and the hearing of the parties concerned, certain settlements and transfers of property made between the bankrupt and the appellant, were declared to be fraudulent, and set aside by the court. From this decree Crawford appealed to this court.

It is very clear that the appeal cannot be sustained. The appellant endeavors to support it, upon the ground that there is no act of Congress now in force establishing a Circuit Court for the Western District of Virginia. But, assuming this to be the case, it does not follow that an appeal to this court can be taken from the decree of the District Court. For we can exercise no appellate power, unless it is conferred by law; and there is no act of Congress authorizing an appeal to this court from the decision of a District Court in a case of bankruptcy. It was so held in *Nelson* v. *Carland*, 1 How., 265, and in the case *Ex parte Christy*, 3 How., 314, 315.

Indeed, if an appeal would lie from a final decree of the District Court, this appeal cannot be maintained. For the decree is not final. An account is directed to be taken of the rents and profits of certain lands, with an option to the appellant to purchase them at a price named in the decree; and in that event he is to be discharged from the account for rents and profits. And, moreover, he is permitted to retain possession of certain slaves, until it should be ascertained whether the other assets of the bankrupt's estate would not be sufficient

*12] to pay *his debts; and an order to account for their hire and the profits of their labor is suspended in the mean time. While these things remain to be done, the decree is not final, and no appeal from it would lie to this court, even if it had been the decree of a Circuit Court exercising its ordinary equity jurisdiction.

Upon either ground, therefore, this appeal cannot be maintained, and is, therefore, dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Virginia, 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.

JOHN DARRINGTON, LORENZO JAMES, AND ROBERT D. JAMES, PLAINTIFFS IN ERROR, *v.* THE BRANCH OF THE BANK OF THE STATE OF ALABAMA. JOHN DARRINGTON AND LORENZO JAMES *v.* SAME.

The bills of a banking corporation, which has corporate property, are not bills of credit within the meaning of the Constitution, although the State which created the bank is the only stockholder, and pledges its faith for the ultimate redemption of the bills.[1]

Where a State Court has, in fact, decided a federal question adversely to the plaintiff, error will lie, notwithstanding the State Court may have violated its own rules of practice in making such decision.

THESE cases were brought up from the Supreme Court of Alabama, by a writ of error issued under the 25th section of the Judiciary Act. The facts and pleadings are stated in the opinion of the court.

It was argued by *Mr. Campbell* for the plaintiffs in error, and *Mr. Hopkins* for the defendants.

Mr. Campbell contended that the transactions as described by the pleas, fell within the prohibitory clause of the Constitution of the United States, "that no State shall issue a bill of credit," and cited 4 Pet., 410; 11 Pet., 313; 7 Ala., 18.

Mr. Hopkins for the defendants in error.

In the case of *Briscoe* v. *The Bank of the Commonwealth of*

[1] FOLLOWED. *Veazie Bank* v. *Fenno*, 8 Wall., 553. CITED. *Curran* v. *State of Arkansas*, 15 How., 309, 318.

As to the right of *Congress* to issue bills of credit, and make them a legal tender for pre-existing debts, see *Hepburn* v. *Griswold*, Id., 603; *Martin* v. *Martin*, 5 C. E. Gr. (N. J.), 421; *Belloc* v. *Davis*, 38 Cal., 242; *O'Neil* v. *McKewn*, 1 So. Car., 147; *Legal Tender Cases*, 12 Wall., 457; *Breen* v. *Dewey*, 16 Minn., 136; *Barringer* v. *Fisher*, 45 Miss., 200; *Townsend* v. *Jennison*, 44 Vt., 715; *Kellogg* v. *Page*, Id., 356; *Longworth* v. *Mitchell*, 26 Ohio St., 334; *Troy* v. *Bland*, 58 Ala., 197.

Kentucky, 11 Pet., 257, this court decided that the notes issued by such a bank as the one which is the defendant in error, were not bills of credit within the prohibition of the Constitution of the United States. In the case of *Owen* v. *The Branch Bank at *Mobile*, which is the defendant *13] in error, the Supreme Court of Alabama decided that the notes issued by this bank were not bills of credit. 3 Ala., 258.

The charter of this bank is a public statute of the State of Alabama. 6 Ala., 289, 294. This court takes notice judicially of such statutes, as it does of the acts of Congress. 9 Pet., 607, 625, 626.

This bank had a large capital, and it is not denied in the pleas, as it was in the case of the Kentucky bank, that the capital was paid. Its notes were received in payment of taxes and debts due to the State of Alabama. As a corporation the bank incurred responsibility, and gave credit to its paper. It was liable for the notes and bills it issued, and its capital was bound, like that of stock banks, for the payment of its notes in gold and silver. All its property, including its capital, was a fund for the payment of the debts of the bank. The notes of the bank were circulated upon its own credit, and every holder of the notes had the power to enforce payment, as the bank could be sued. The notes were not issued by the State, but by the bank in its corporate name, and the bank was not controlled by the State, but by a president and directors appointed by the legislature. For the capital and powers of the bank, see 3 Ala., 267. According to a previous judgment of this court, the issuance and circulation of its notes as money by such a bank is no violation of the Constitution of the United States. 11 Pet., 311, 315, 318, 320, 321, 322.

Mr. Justice McLEAN delivered the opinion of the court.

This is a writ of error to the Supreme Court of Alabama, under the 25th section of the act of 1789.

An action was brought in the Circuit Court of Mobile county against the plaintiffs in error, by the commissioners and trustees of the banks of Alabama, under an act of the State, by serving a notice on them in behalf of the Branch of the Bank of the State of Alabama, at Mobile, as the makers of a promissory note expressly made payable and negotiable at the said branch bank, dated 2d of December, 1843, and in which they promised, twelve months after date, to pay the said branch Bank by the name and description of Henry B. Halcomb, cashier, or bearer, the sum of four thousand dollars,

with interest thereon from date, for value received, which said promissory note is regularly due and unpaid, and is the property of the bank.

The defendants below first pleaded *nil debet*, on which issue was joined.

In their second plea, they aver, that the consideration of the note sued for consisted of certain bills of credit issued by the *State of Alabama, under the name and style of the Branch of the Bank of the State of Alabama, at Mobile, by which the State, under that name, promised to pay the bearer of the same on demand. That these bills of credit were for such sums as showed they were intended to be circulated as money. And that the object of the State was to circulate them as money, through the agency of the bank, for a profit. [*14

The third plea avers that the note, on which suit is brought, was made and delivered to the plaintiff as a trustee for the State, and that the bills were received of the bank by the defendants, to put them into circulation as money for the profit of the State; that the bank was controlled by the State, and that it was alone liable for the issues made by the bank in the transaction stated.

The plaintiff below demurred to the defendant's pleas except the first one, which demurrer was sustained. And on a jury being called to try the issue they found the amount of the note and interest for the plaintiff, on which judgment was entered. This judgment was taken by writ of error before the Supreme Court of Alabama, which affirmed the judgment. And this writ of error is now prosecuted in this court to reverse the judgment of affirmance.

It is argued that this case should be dismissed, as there was no special assignment of error in the Supreme Court of Alabama, as required by the law and the practice of that court.

The Supreme Court of Alabama exercised jurisdiction in the case, and affirmed the judgment of the Circuit Court. This court cannot look behind that judgment, and dismiss the cause here on the ground of a supposed violation of a rule of practice in the State court. Whether there was an assignment of error or not in that court, can be of no importance, as we look to the judgment only and its effects. But it may be proper to say there was an assignment of error in the Supreme Court of Alabama, "that the court sustained the demurrer to the pleas, and gave judgment thereon in favor of the plaintiffs, whereas, by the law of the land it should have been for the defendants."

The judgment on the demurrer in the Circuit Court was not formally entered, but the record states, "and the plaintiffs

moved the court for judgment against the defendants, which was resisted by the defendants, and the plaintiff demurred to all the defendants' pleas except the first one, which demurrer was by the court sustained," &c.

The writ of error brought before the Supreme Court of Alabama the judgment of the Circuit Court as well on the demurrer as on the verdict of the jury, and the affirmance of the judgment extended to both. The pleas demurred to raised the question whether the bills of the bank were bills of credit.

*15] *Under certain restrictions, the Constitution of Alabama authorized the General Assembly to establish a State Bank, with such number of branches as they should from time to time deem expedient.

In 1823 the State Bank was established on the funds of the State, then in the treasury, and a loan obtained by an issue of State bonds. The preamble to the charter states, "whereas it is deemed highly important to provide for the safe and profitable investment of such public funds as may now or hereafter be in possession of the State, and to secure to the community the benefits, as far as may be, of an extended and undepreciating currency; Be it enacted," &c.

In 1832, the bank at Mobile was established with a capital stock of two millions of dollars, procured from the sale of bonds of the State, created for that purpose.

By the charter a president and fourteen directors were to be annually elected by the legislature, who were required to make a report to each session of the legislature. The corporation was authorized to issue notes of a denomination not less than one dollar, to discount notes and deal in bills of exchange, not exceeding certain amounts. The ordinary powers of a banking corporation were conferred, with a prohibition against owing debts exceeding twice the amount of the capital; and the directors were made personally responsible for any excess of indebtment of the bank assented to by them. Until one half of the capital stock was deposited in specie, in its vaults, the corporation was not authorized to commence operations. The remedy for collecting debts was reciprocal for and against the bank. And the credit of the State was pledged for the ultimate redemption of the notes of the bank.

The State of Alabama was the only stockholder of the bank; but it was placed under the control of directors elected by the legislature, and one half of the capital, amounting to the sum of one million of dollars, was in its vault for the redemption of its bills. With the means possessed by the bank when it commenced business, is required

only prudent management to sustain its credit, and effectuate the objects for which it was established.

The bills issued by the bank were made payable on presentation to it, and they were signed by its president and cashier. The bills issued being convertible into specie by the holder, were current, and in all transactions were received and paid out, as equal in value to specie.

It is impossible to say that bills thus issued come within the definition of bills of credit. The agency constituted, not only managed the bank, but were made personally liable under *certain circumstances. The directors, though elected by the legislature, performed their duties [*16 under the charter, and, like all other directors of banks, derived their powers and incurred their responsibilities from the law under which they acted.

It is not perceived that their action was not as free as those of directors who are elected by individual stockholders.

The promise to pay was made by the bank, and its credit gave to its bills circulation: they were in no respect, therefore, like a bill of credit. That must issue on the credit of the State. The principles laid down by this court in the case of *Briscoe* v. *The Bank of the Commonwealth of Kentucky*, apply to this case. 11 Pet., 331. In that case it is said, "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.

"The individual or committee who issue the bill must have the power to bind the State; they must act as agents, and of course do not incur any personal responsibility, nor impart, as individuals, any credit to the paper."

Did the pledge of the credit of the State in the charter of the bank, ultimately to redeem the notes of the bank, make them bills of credit?

The charter is a public law, and this court consider it as before them, the same as it was before the court of Alabama.

Upon the face of the bills there is no promise to pay, by the State, but an express promise by the bank. In this there is an important difference between the notes of the bank and bills of credit. Whatever agency has been employed to issue a bill of credit, the State promises to pay the bill, or to receive it in payment of public dues. And when a particular fund was designated out of which the bill should be paid, it depended upon the faith of the State, whether such fund should be so appropriated.

The bank had not only an ample fund for the redemption of its paper, but a summary mode was provided by which the payment of its bills could be legally enforced. And the directors were personally liable, if the issues of the bank exceeded twice the amount of its capital paid in. And besides the notes and bills of exchange taken on its discounts, enlarged the means of the bank, and increased the security of the billholders.

The charter of the bank gave to it all the means of credit with the public that banks usually have or could desire. That some reliance may have been placed on the guaranty, of the eventual payment of the notes of the bank by the State may be admitted. But this was a liability altogether different from *that of a State on a bill of credit. It was remote and contingent. And it could have been nothing more than a formal responsibility, if the bank had been properly conducted. No one received a bill of this bank with the expectation of its being paid by the State.

*17]

But it is said the State employed the bank as an agency, through which its bills should be circulated, for the profit of the State.

The State, as a stockholder, received a profit, if any profit was realized through the operations of the bank. But this is the condition of individual stockholders in all banks. And as well might it be said that the individual stockholders of a bank issue its notes, as that the State of Alabama issued the notes of the branch bank at Mobile.

A bank in either case acts under its corporate powers, and the directors derive their powers and incur their responsibilities under the law which governs them. The directors of the Mobile bank, in the discharge of their duties, it would seem, were as independent as the directors of other banks.

A bill of credit emanates from the sovereignty of the State. It rests for its currency on the faith of the State pledged by a public law. The State cannot be sued ordinarily on such bill, nor its payment exacted against its will. There is no fund or property which the holder of the bill can reach by judicial process. Such an instrument is altogether different, in form and in substance, from the notes issued by the branch bank at Mobile. The fact that the State of Alabama may be sued by one of its citizens does not alter the case. Such law may be repealed at pleasure, and if judgment could be obtained, the payment of it could not be enforced.

The State, as a stockholder, held its property as a corporation or individual could hold it, in the Mobile bank. The specie in its vaults, notes taken on discounts, and every

description of property, managed by the directors of the bank, were subject to judicial process by its creditors. And in such a procedure the State, in its sovereign capacity, could not interfere. Its powers would be no greater than the powers of individual stockholders of a bank, under similar circumstances.

The affirmance of the judgment of the Circuit Court which sustained the demurrer to the pleas by the Supreme Court of Alabama was right, and its judgment is therefore affirmed.

Mr. Justice GRIER dissented.

*ORDER. [*18

This cause came on to be heard on the transcript of the record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that 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.

CHARLES BALLANCE, PLAINTIFF IN ERROR, *v.* ROBERT FORSYTH, LUCIEN DUMAIN, AND ANTHONY R. BOVIS.

On the 15th of May, 1820, Congress passed an act (3 Stat. at L., 605) for the benefit of the inhabitants of the village of Peoria, by which every person claiming a lot in the village, was to give notice to the register of the land-office, whose report was to be laid before Congress.

On the 3d of March, 1823, Congress passed another act, (3 Stat. at L., 786,) granting to each of the French and Canadian inhabitants, and other settlers according to the report, the lot upon which they had settled; and directed the surveyor of the public lands to make a plat of the lots, for which patents were to be issued to the claimants.

This survey and plat were not made until April and May, 1837.

In November, 1837, a person who was not a settler, purchased at the land-office at private entry, the fractional quarter of land which included some of the above lots, and soon afterwards obtained a patent. Both the certificate and patent reserved the rights of the claimant under the acts of Congress above mentioned.

In 1845 and 1847, these claimants obtained patents.

They were entitled to recover in ejectment from the persons who held under the private entry and patent.[1]

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[1] A patent, subject to the rights of all persons claiming under a certain act of Congress, confers, notwithstanding the reservation, a title in fee.

The title of the plaintiffs was not divested by a tax sale in 1843. The whole fractional quarter section was taxed and one acre off of the east side sold. This sale was irregular.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Illinois.[2]

It was an ejectment brought by Forsyth, Dumain, and Bovis, to recover two lots of ground, viz., Nos. 47 and 65, in the town of Peoria. The bills of exceptions extended over thirty-seven pages of the printed record, and included deeds and depositions and proceedings under a tax sale, &c., &c. It is, therefore, impossible to insert them. The following is a summary notice of the evidence offered on the trial by plaintiffs and defendant.

Plaintiff's Evidence.

1. The act of Congress passed on the 15th of May, 1820 (3 Stat. at L., 605). It directed that every person who *19] *claimed a lot in the village of Peoria, should give notice of his claim to the register of the land-office, whose report should be laid before Congress.

2. An act of Congress passed on the 3d of March, 1823 (3 Stat. at L., 786), after the report of the register had been received. It granted to such of the French and Canadian inhabitants and other settlers in the village, as had settled there, prior to the 1st of January, 1813, the lot so settled upon and improved. The second section of the act required the surveyor of the public lands to cause a survey to be made of the several lots, and to designate on a plat thereof the lot confirmed and set apart to each claimant, and to forward the same to the Secretary of the Treasury, who should cause patents to be issued in favor of such claimants, as in other cases.

This survey and plat were not made until April and May, 1837.

3. A patent to Boushier for lot No. 47, issued on the 27th of March, 1847.

4. A plat of the village.

5. A plat of lot No. 47.

6. Testimony taken under a commission relative to the settlement of the lots.

7. Deed to plaintiffs, 11th December, 1836.

Dredge v. *Forsyth*, 2 Black, 563. See *Stoddard* v. *Chambers*, 2 How., 285, and cases cited in the notes; also *Bryan* v. *Forsyth*, 19 How., 334; *Ballance* v. *Papin*, Id., 342; *Hall* v. *Papin*, 24 Id., 132; *Meehan* v. *Forsyth*, Id., 175.

[2] Reported below, 6 McLean, 562; further decisions, 21 How., 389; 24 Id., 183.

8. Patent for lot No. 66, December 16, 1845.
9. Plat of lot No. 65.
10. Deed to plaintiffs, September 16, 1836.
11. }
12. } Plats of an addition to the town.
13. An agreed statement of certain facts.

Defendant's Evidence.

1. A certificate from the register, showing, that on the 15th of November, 1837, John L. Bogardus entered and purchased the south-east fractional quarter of section, No. 9, containing $23\frac{93}{100}$ acres. This included the lots in question.

2. Deed from Bogardus to Underhill of the whole south-east fractional quarter.

3. Two deeds from Underhill to Ballance, the plaintiff in error.

4. Proceedings relative to a tax sale. The taxes were assessed on the fractional quarter, and an "acre off east side" was sold to Ballance.

5. Deed under the sale from the sheriff conveying the land in dispute.

6. An award between Ballance, Bigelow, and Underhill, whereby the lots in dispute were assigned to Ballance.

*7. Copies of certificates relative to Bogardus's pre-emption. [*20

8. Patent to Bogardus, January 5, 1838.

The plaintiffs then offered in evidence a copy of the certificate of entry which the register gave to Bogardus, and which contained the following reservation:

"Now therefore be it known, that, on presentation of this certificate to the Commissioner of the General Land-Office, the said John L. Bogardus shall be entitled to receive a patent for the lot above described, subject, however, to the right of any and all persons claiming under the act of Congress of 3d March, 1823, entitled 'An Act to confirm claims to lots in the village of Peoria, in the State of Illinois.'

SAMUEL LEECH,
Register."

The patent contained a similar reservation.

The above was all the material evidence given in the case. Each party saved the right on the argument of the cause to object to any of said evidence on the ground of the incompetency or effect of the evidence, but not to make merely

formal objections, such as proof of authenticity of papers offered.

It was further agreed that the property in controversy was worth more than two thousand dollars; whereupon the court instructed the jury to bring in a verdict for the plaintiffs, as by law they were entitled to recover on the above facts. To all of which opinions of the court the defendant excepted, and prayed this, his bill of exceptions, be sealed, signed, and made of record, which is accordingly done, &c.

NATH'L POPE. [SEAL.]

Upon this bill of exception, the case came up to this court.

It was argued by *Mr. Ballance*, for the plaintiff in error, and *Mr. Gamble*, for the defendants in error.

Mr. Justice McLEAN delivered the opinion of the court.

This cause is brought before us, from the District of Illinois, by a writ of error.

It is an action of ejectment to recover the possession of three lots, numbered 47, 65, and 68, in the town of Peoria, under the act of Congress of the 3d of March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria." The claim 47 contains twenty-seven thousand four hundred and forty-nine square feet and seven hundreths; surveyed and designated as covered by claim 47, in the south-east fractional quarter of fractional section nine, in township 8, north of range eight, and east of the fourth principal meridian, &c.

*21] *Lots 65 and 68 contain the same number of square feet, and, in fact, constitute but one lot, situated in the same fractional quarter section. Separate suits were brought for these lots, but, being consolidated, they are included in one. The defendant below pleaded not guilty.

At the trial exceptions were taken to the rulings of the court, which present the points of law to be decided.

The whole of the evidence was copied into the bill of exceptions, on which the court instructed the jury to find a verdict for the plaintiffs, as by law they were entitled to recover on the facts, to which instruction the defendant excepted.

The parties must have considered this case as a demurrer to the evidence, or as a special verdict. As there was evidence on both sides, some of which was conflicting, it could not be considered as strictly a demurrer to evidence. Nor

was it strictly a special verdict, as the instruction was given before the jury found the facts.

From the whole of the evidence being set out in the bill of exceptions, we may suppose it to have been the intention of the parties to treat the facts as agreed or undisputed, in order that the law applicable to them might be pronounced by the court.

In sustaining the jurisdiction of this case, it is not to be considered as a precedent. It imposes a labor on the court which they are not bound to incur. But, as there seems to be not much difficulty in the facts, the court will decide the questions of law, as far as it shall be necessary to examine them.

By the act of the 15th of May, 1820, Congress provided that every person, or the legal representative of every person, who claims a lot or lots in the village of Peoria, shall, on or before the first day of October next, deliver to the register of the land-office, for the district of Edwardsville, a notice of his claim, and the register was required to examine the evidence in support of the same, and report to the Secretary of the Treasury such as in his opinion should be confirmed; and the secretary was required to lay the same before Congress for its determination.

On the 3d of March, 1823, an act was passed granting to each of the French and Canadian inhabitants, and other settlers in the village of Peoria, whose claims are ascertained in a report made by the register of the land-office at Edwardsville, in pursuance of the act of 1820, and who had settled a lot in the village prior to the 1st of January, 1813, &c., where the same shall not exceed two acres; and when the same shall exceed two acres, more than four acres shall not be confirmed. "Provided nothing in this act contained shall be so construed as to *affect the right, if any such there be, of any other person or persons to the said [*22 lots, or any part of them, derived from the United States or any other source whatever, or as a pledge on the part of the United States to make good any deficiency," &c.

And the surveyor of the public lands was required to survey the lots, designating those confirmed, which survey and plat were to be returned to the secretary, who was required to issue patents to the claimants. The surveys, it appears, were not executed for several years; but, at length, having been made and forwarded to Washington, a patent was issued to the legal representatives of Louis Le Boushier for lot No. 47, the 27th of March, 1847. The proviso in the act of 1823 was copied into the patent.

A plat was in evidence showing that lot No. 47 was situated in the south-east fractional quarter, section 9.

Testimony was introduced to show that this lot was inhabited by Le Boushier prior to 1813. On the 11th of December, 1836, Joseph Touchette and Madeline, his wife, who was the daughter of Le Boushier, and his only living child and heir, executed a deed to plaintiff for the above lot.

A patent was also read to Antoine Bourbonne, or to his legal representatives, dated the 16th of December, 1845, for lot 65, also covered by claim 68. By the recitals in this patent, it appeared that this claim had been presented to the register, at Edwardsville, and recommended by him for confirmation, on which the grant was issued under the act of 1823. A plat was introduced, showing the locality of this lot to be in the same fractional quarter section as No. 47, and also a description of its boundary.

A deed from the Bourbonne to the plaintiffs was in evidence for the above lot, dated 16th September, 1836.

Charles Ballance was admitted to defend in the place of Lincoln, that suit having been consolidated with the one brought by the plaintiffs against Goudy for the other lot. Ballance admits himself to be in possession of lots No. 47 and 65–68, described in the declaration.

It was agreed that Ballance was in possession of that portion of said premises covered by lots one and two in block 51, more than seven years before the commencement of this suit, by actual residence with his family thereon, up to 1845, and from that time by his tenants; and that portion of said premises north-west of Water Street, in Bigelow and Underhill's addition to Peoria, was possessed more than seven years by the inclosure and cultivation of the same as a garden.

It was agreed that J. L. Bogardus, in 1832, was in possession of the south-east fractional quarter of section 9, township 8, *north of range 8, east of the 4th principal meridian, and continued in possession until 1834, when Isaac Underhill went into possession under Bogardus, and that Ballance was in possession of the premises in dispute under title from Bogardus; neither of them resided on the premises, but had tenants.

*23]

On the 15th of November, 1837, Bogardus purchased the south-east fractional quarter of section No. 9. A deed for the same was made by Bogardus to Isaac Underhill, dated the 5th of August, 1834. On the 7th of July, 1841, Underhill and wife conveyed to Ballance, lots Nos. 8, 9, and 7, in block No. 34, and lots 5 and 6, in block No. 38, in the above addition to the

town. And, on the 1st of February, 1842, Underhill and wife conveyed to Ballance lot No. 3, in block 51, in the above addition to the town.

A record and proceeding of the county commissioners of Peoria county, showing that a tax was laid upon real property in the county, for 1843, and that such tax was imposed on the south-west and south-east quarters of said section, and that, on a return of the collector, that the owner had no personal property in the county out of which the taxes could be made, a judgment was rendered against the land by the Circuit Court, under the statute of Illinois, and an order was issued to the sheriff, directing him to sell the delinquent land to such person as should pay the tax for the smallest quantity of the tract.

And the defendant offered to read a deed from the sheriff on said tax sale to Charles Ballance, covering a part of lot No. 65, which was objected to by the plaintiffs, and the court sustained the objection, on the ground that the sale was contrary to law, to which decision the defendant excepted.

As there appears to have been no specific exception taken, and as we have not the opinion of the court, except that the evidence was defective, and could not sustain the tax-title, we are left to conjecture as to the particular ground of the decision.

One acre of land was sold by the sheriff, "off of the east side of the south-west and south-east fractional quarters of section number nine," &c. In these two fractional quarters there appear to have been about one hundred and fifty acres. It is not said in what form the acre was to be surveyed. Certainty, in such a case, is necessary to make the sale valid, for on the form of the acre its value may chiefly depend. And there is nothing on the face of the deed or in the proceeding previous to the sale which supplies this defect.

It is singular that the land should be sold in the name of Ballance, and that he should become the purchaser; especially as he appears to have been in possession of the land as owner.

*Although the right of Bourbonne to lot 65 was recognized by the government, by the act of Congress of 1823, yet, until the public surveyor marked the lines, its position and extent could not be ascertained. And it appears that this duty was neglected by the public surveyor for many years. The patent was not issued until in 1845, two years after the tax was assessed. And it is not perceived how the specific lot could be taxed when its boundaries were not known. It seems to have been included in the south-east [*24

fractional quarter section, but it was not taxable as a part of that tract. Both the entry and the patent of Bogardus for the fractional quarter section contained an exception of the rights of all persons claiming under the act of Congress of the 3d of March, 1823. So that the whole or any part of the lots claimed by the plaintiffs, which may have been included in either of the fractional quarter sections, both having the same exception, the claim to such lots was not affected by the patent. And, consequently, neither of the lots were liable to be sold for the taxes on the tracts which included them.

The court will not, unless fraud be shown, look behind the patents for the lots in controversy. That the patents cover the lots, as surveyed, seems not to be disputed. We cannot, therefore, in an action at law, inquire whether the lots, as originally claimed, are accurately described in the patents. The survey having been made by a public officer and sanctioned by the government, the legal title must be held to be in the patentee.

If the patent to Bogardus be of prior date, the reservation in the patent, and also in his entry was sufficient notice, that the title to those lots did not pass. And this exception is sufficiently shown by the acts of the government.

These lots were surveyed before the taxes were assessed for 1843; but the assessments were made on the fractional quarter section, without regard to the lots reserved. Such lots were neither assessed nor sold for the taxes due on them, and they were not liable for the taxes due on the quarter section.

That Ballance, being liable for the tax, should permit his own land to be sold, and purchase one of the lots, or a part of it, to pay the taxes on the larger tract would seem to require explanation. Had a stranger purchased at this sale a part of the quarter sections, from the irregularity of the procedure, it is not perceived how the tax-title could have been sustained. But, however this may be, we are clear that the sale of lot sixty-five, or a part of it, under the circumstances, is void, and, consequently, that the sheriff's deed on such sale was properly rejected. As the whole law of the case seemed to have been submitted to the court, the deed, if admitted as *primâ facie* evidence, could not have changed the result.

*25] *The statute did not protect the possession of the defendant below. His patent excepted these lots; of course he had no title under it, for the lots excepted.

The judgment of the Circuit Court is affirmed with costs.

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ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and 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.

JOHN DOE, EX. DEM. HALLETT & WALKER, EXECUTORS OF JOSHUA KENNEDY, DECEASED, PLAINTIFFS IN ERROR, *v.* ALFRED R. BEEBE, GEORGE W. HILLIARD, ALEXANDER M. CARR, CHARLES T. KETCHUM AND JOHN HORSFELDT.

The principles established in the cases of 3 How., 212, and 9 How., 477, again affirmed, viz., that after the admission of Alabama into the Union as a State, Congress could make no grant of land situated between high and low water marks.[1]

THIS case was brought up from the Supreme Court of Alabama by a writ of error issued under the 25th section of the Judiciary Act.

The plaintiff in error brought an ejectment in the Circuit Court of Mobile county, under the circumstances stated in the opinion of the court. The judgment of that court was against them, and they then appealed to the Supreme Court of Alabama, where the judgment was affirmed. They then brought the case up to this court.

It was argued by *Mr. Campbell*, for the plaintiffs in error.

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

This is an action of ejectment; and the plaintiffs in error claim title to the premises under a contract of sale made by Morales, the Spanish Intendant at Pensacola, with a certain William McVoy, for twenty arpents of land on the west side of the River Mobile, bounding on the river; which contract was afterwards confirmed by an act of Congress.

The contract with McVoy was made in 1806. He subse-

[1] See notes to *Pollard* v. *Hagan*, 3 How., 212, and *Goodtitle* v. *Kibbe*, 9 Id., 471; also *Withers* v. *Buckley*, 20 How., 84; *Griffing* v. *Gibb*, McAll., 212.

quently assigned his interest to William J. Kennedy and
*26] Joshua *Kennedy, and the latter became the sole owner by an assignment from the former. An act of Congress was passed in 1832, confirming the title of Joshua Kennedy upon two conditions: 1st. That the confirmation should amount to nothing more than the relinquishment of the right of the United States at that time in the land; and, 2dly, That the lands before that time sold by the United States, should not be comprehended within the act of confirmation. And in 1837, a patent was issued to Joshua Kennedy, reciting in full this act of Congress under which it was granted.

It is admitted in the record, that the land in question was below high-water mark when the United States sold the land on which Fort Charlotte stood, in the town of Mobile. These lands were divided into lots and sold in 1820 and 1821, and patents were issued to the purchasers in the year last mentioned. The defendants made title to three of these lots, which bounded on the river, and it was admitted that at the time of the sale high water extended over their eastern limits; and that the land now in controversy was reclaimed from the water and filled up by those under whom the defendants claimed.

The question, therefore, to be decided in this case is, whether the title obtained under McVoy's contract, confirmed by the act of Congress in 1832; or the title obtained under the sale of the lots in 1820 and 1821, is the superior and better title.

The principles of law on which this question depends, have already been decided in this court in *Pollard* v. *Hagan*, 3 How., 212, and in *Goodtitle* v. *Kibbe*, 9 How., 477, 478. And, according to the decisions in these two cases, the title under the sale of the lots is the superior one.

The judgment of the Supreme Court of the State of Alabama must, therefore, be affirmed.

ORDER.

This cause came on to be heard on the transcript of the record, from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged, by this court, that the judgment of the said Supreme Court in this cause be, and the same is hereby affirmed with costs.

28

CYRUS H. MCCORMICK, APPELLANT, *v.* CHARLES M. GRAY, AND WILLIAM B. OGDEN.

Partners have the right, *inter sese*, to control the disposition of the firm assets, and to appropriate them to the payment of a claim by one partner on the firm.

Where two partners assigned all their partnership property to a trustee with certain instructions how to dispose of it, and afterwards agreed between themselves to *appoint an arbitrator, recognizing in their bonds the directions given to the trustee, the arbitrator had no right to deviate from these directions, and make other disposition of the property. [*27

The reason given by the arbitrator, that he preferred creditors before awarding a certain sum to one of the partners is insufficient.

Nor had the arbitrator a right to depart, in any particular, from the arrangement of the property which the partners had designated in their deed to the trustee.[1]

Though an award may be good in part and bad in part, yet the part allowed to stand must not be affected by a departure from the terms of the submission.[2]

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

McCormick was the inventor of "McCormick's patent Virginia Reaper," and being desirous of manufacturing the same for sale in the States of Illinois and Wisconsin, entered into partnership with Gray. The articles were very specific, but

[1] The award must decide the whole matter submitted; it must not extend to any matter not within the submission; and must be certain, final, and conclusive of the whole matter referred. *Carnochan* v. *Christie*, 11 Wheat., 446; *De Groot* v. *United States*, 5 Wall., 419; *Hiscock* v. *Harris*, 74 N. Y., 108. S. P. *York &c. R. R. Co.* v. *Myers*, 18 How., 246; s. c., 2 Curt., 28.

Where a submission is full and general of all matters in question between the parties, and the intent appears to be to have everything decided if anything is, a decision of all matters submitted will be imperatively required to validate the award, and an award determining a part only, is void. *Jones* v. *Wellwood*, 71 N. Y., 208.

The fact that the arbitrators passed upon matters outside of the submission, will not render the award inadmissible in evidence, unless apparent from the award and submission. *Burns* v. *Hendrix*, 54 Ala., 78. S. P. *Darst* v. *Collier*, 86 Ill., 96.

In *Adams* v. *Macfarlane*, 65 Me., 143, it is held that a provision in the submission that an annexed statement of disbursements and collections shall be taken by the arbitrator to be correct, does not preclude him from hearing evidence in relation to items not included in such statement—the court refusing to read "correct" as meaning "complete."

[2] S. P. *Whitcher* v. *Whitcher*, 49 N. H., 176; *Bullock* v. *Bergman*, 46 Md., 270. But if the good part can be so disconnected from the remainder that no injustice will be done, the award may be sustained *pro tanto*. *Rawson* v. *Hall*, 56 Me., 142; *Stanwood* v. *Mitchell*, 59 Me., 121; *Sterens* v. *Brown*, 82 N. C., 460; *Keep* v. *Keep*, 17 Hun (N. Y.), 152.

Although an award embraces an item not within the submission, yet, if it also names the character and amount of each item of which the entire sum awarded is composed, it is not void, but the court may render judgment for the amount remaining after deducting the improper item. *Hartland* v. *Henry*, 44 Vt., 593.

too long to be inserted here. The object was to manufacture five hundred reapers for the harvest of 1848, and the partnership was formed on the 30th of August, 1847. Three lots of ground were purchased in Kenzie's addition to Chicago, and the manufacture was commenced.

Some disagreement afterwards occurred, and both parties united in transferring all the assets of the firm to William B. Ogden, and a settlement was to be made according to the award of Judge H. T. Dickey. The principal parts of the assignment to Ogden, are recited in the opinion of the court, and need not be repeated.

Afterwards, on the 20th of December, 1848, they formally agreed to the reference to Judge Dickey, and exchanged arbitration bonds. By these bonds it was made an express condition of the reference that the award to be made by the arbitrator should "not in any way alter or affect the demands of property and assets in the hands of William B. Ogden, as the trustee of said parties, or the agreements between said parties relative to the collection and disposition of said demands, assets, and property, but the same shall remain under the provisions of said contract." The time for making the award, as originally limited, was afterwards extended to sixty days from the 20th of January, 1849.

The referee, on the 20th of March, 1849, made his award, which was as follows:

"*Award between Cyrus H. McCormick and Charles M. Gray.*

It having been submitted to me, by Cyrus H. McCormick and Charles M. Gray, by articles of agreement and submission dated the twentieth day of December, in the year of our Lord one thousand eight hundred and forty-eight, and a supplement thereto dated 19th (nineteenth) January, one thousand eight hundred and forty-nine, to arbitrate and determine certain differences and disputes between them growing out of the

*28] partnership *affairs, business, and dealings of the late firm of McCormick & Gray, submitting all their said partnership differences and all other differences to me as such arbitrator: And the said parties having appeared before me as such arbitrator on the fourteenth day of January last, and for several days thereafter, together with their respective counsel, and witnesses, vouchers and proofs having been then sworn, exhibited, produced, and examined, and the said differences and disputes having been finally submitted to me on the nineteenth day of January last, and it appearing to me that such differences and disputes so existing grew out of the partnership business and dealing of the said late firm of McCormick &

Gray, and in the accounts of the said respective parties, and in the claims on their respective parts, one against the other, for alleged breaches of the copartnership articles, and in the final settlement and adjustment of all their copartnership business, dealings, and accounts, and all of the same having been by me fully examined and considered, I do find and award as follows, to wit:

I do find that the assets and liabilities of said late firm on the fourteenth day of January last, were as they are stated to be in an account of assets and liabilities hereto annexed, and marked A, that is to say:

Real estate constituting assets of said firm, amounting to		$9,406 06
Machinery amounting to		3,637 17
Bills receivable, &c., for reapers,		36,853 16
Iron on hand,	$623 14	
238 sickles, $3.50,	833 00	
13 reapers, $120,	1,560 00	
		3,201 14
		$52,917 52

Liabilities.

Debt to Fitch, Barry, & Co.,	$1,802 82
Debt to Seymour & Morgan,	1,750 60
Debt to Seymour & Morgan,	1,635 29
Debt to O. Orcutt,	30 00
Debt to M. & M. Stone,	105 00
Debt to H. Rowell,	204 08
Debt to George M. Gray,	73 75
Debt to Charles M. Gray,	4,051 88
Debt to C. H. McCormick,	12,050 67
	$21,710 09
Profit and loss.	31,207 43
	$52,917 52

*And I do, therefore, award as follows: [*29

1st. I award out of the money and assets of said firm, whether in the hands of either of said copartners or of their agents, there in the first place be paid the following of said debts and liabilities of said firm, *pro ratâ*, until the same shall be fully paid, viz., the above-mentioned debts and liabilities, principal and interest, to the time of payment due to Fitch, Barry & Co., Seymour & Morgan, (both claims,) O. Orcutt, M. & M.

Stone, H. Rowell, and George M. Gray, and all other outstanding debts, if there should be any found to be omitted in the above account due or coming due by said firm to third persons.

2d. I award that in the next place there be paid to Cyrus H. McCormick, one of said copartners, out of money and assets, the sum of fourteen thousand six hundred and ten dollars, ($14,610,) for his patent fees, as stipulated by the articles of copartnership, for reapers sold by said firm.

3d. I award that in the third place there be paid out of the assets of the said firm, and in the manner hereinafter stated to each of said copartners, viz., to the said Charles M. Gray, and to the said Cyrus H. McCormick, the amount due by said late firm to each of said copartners as stated above, and in the annexed account marked A, viz., to the said Charles M. Gray, the sum of four thousand and fifty-one dollars and eighty-eight cents, (4,051.88,) and to the said Cyrus H. McCormick, the sum of twelve thousand and fifty dollars and sixty-seven cents, (12,050.67,) the said two last mentioned sums to be paid to each of said copartners in the manner specified hereinafter fifthly; and the balance coming to said McCormick over and above his half of his real estate and machinery mentioned hereinafter to be paid to him in money.

4th. I award that out of the balance of the money and assets of said firm, as profits, after paying the items above mentioned, there be paid to the firm of Ogden and Jones, of Chicago, on account of the sale made to them by the said Charles M. Gray, by deed dated the fifteenth day of January, one thousand eight hundred and forty-eight, one fourth part, to Cyrus H. McCormick, one of the said copartners, one fourth part, and to Charles M. Gray, the other of the said copartners, the remaining two fourth parts; the said parts to be paid to each of the said parties, *pro ratâ*, as the moneys and assets are received and collected.

5th. I do award that the real estate and machinery and their appurtenances, and the tools of the said late firm of McCormick & Gray, amounting together, according to the above statement, to thirteen thousand and forty-three dollars and twenty-three *cents, (13,043.23,) that is to say, *30] the real estate to nine thousand four hundred and six dollars and six cents, ($9,406.06,) and the machinery, &c., to three thousand six hundred and thirty-seven dollars and seventeen cents, (3,637.17,) be taken, one half part thereof by each of the said copartners, viz., the said McCormick and the said Gray, at the above-mentioned rate, that is to say, six thousand five hundred and twenty-one dollars and sixty-one

and a half cents, (6,521.61½,) each, and that such appropriation by each of said copartners of one half of the said real estate and machinery at the sum of six thousand five hundred and twenty-one dollars and sixty-one and a half cents, (6,521.61½,) each, be applied towards the payment of the respective balance due to each of them by the said firm, that is to say, of the balance of twelve thousand and fifty dollars and sixty-seven cents due to the said McCormick, and the balance of four thousand and fifty-one dollars and eighty-eight cents, (4,051.88,) due the said Charles M. Gray, and that the balance of the said Charles M. Gray's half of said real estate and machinery, over and above the payment of the said sum of $4,051.88, be applied in part payment of the two fourth parts of the profits of said firm, coming to him as awarded fourthly above.

6th. I do award that the thirteen reapers belonging to said firm, on hand and unsold, be sold with all convenient despatch, and at the best price that can be had for the same, and that out of the proceeds thereof, there be paid to Cyrus H. McCormick the sum of thirty dollars for each of said reapers so to be sold, as a patent fee; but if the said reapers shall sell for a less amount than one hundred and twenty dollars a piece, then the patent fee aforesaid shall be apportioned to the amount of the sale of each reaper in the same proportion as thirty dollars is to one hundred and twenty dollars, and the said patent fee to be paid as aforesaid upon the sale of the said thirteen reapers shall be deducted from the profits to be divided as above fourthly stated.

7th. I do award that the bills, receivable accounts, and debts due the said firm, not already collected, whether in the hands of either of said copartners or their agent or agents, be collected and caused to be collected in money by the said copartners, and each of them, with all reasonable diligence and despatch; and that the iron and sickles on hand mentioned in said account, and all other assets of the said firm, (excepting the real estate and machinery and tools above stated,) not already sold, be sold and converted into money with all convenient and reasonable diligence, and at the best price that can be procured for the same, and the proceeds of all of the above applied in pursuance of the direction and provisions of this award.

*8th. I do award that all moneys, notes, and other property and assets of said late firm, in the hands or possession of or under the control of either of said copartners, shall be forthwith applied by them, and each of them, according to the terms and provisions of this award. [*31

9th. In case any part of the debts mentioned in the first above-mentioned item, or of the patent fees mentioned in the second above-mentioned item, shall have been paid since the hearing of the arbitration aforesaid, the amount of such payment shall be deducted from the amounts directed thereby to be paid.

10th. I do award that all necessary costs and expenses which may be expended or incurred in the sale of any of the copartnership property, and in the collection of the bills receivable and debts due the said firm, shall be paid out of the balance of the partnership moneys and assets fourthly above mentioned, before the whole of such balance shall be finally divided as mentioned in said above-mentioned fourth item.

11th. This award shall be a final settlement of the accounts of the late partnership firm of McCormick & Gray, and of the manner in which the assets of said firm are to be paid, appropriated, and applied, and embracing as well the settlement of the accounts of the respective partners, as an adjustment of their respective claims one against the other, growing out of their said partnership dealings, and of all differences and matters of difference between the said Cyrus H. McCormick and Charles M. Gray, which have been submitted by the arbitration.

All of which is signed by me in duplicate, as my award in the premises, this twentieth day of March, one thousand eight hundred and forty-nine.

HUGH T. DICKEY."

In June, 1849, McCormick filed his bill in the Circuit Court of the United States, for the District of Illinois, against Gray and Ogden for an account, &c., upon the ground that the award was null and void for the following reasons:

"First. The said award is not within the terms or spirit of the said submission; and the said arbitrator exceeded the power and jurisdiction conferred upon him by the said parties, in this, to wit:

1st. That in and by the said assignment from the said McCormick and Gray to said trustee, William B. Ogden, it is expressly declared in the first section thereof, that said Ogden shall proceed to collect said assets as speedily as may be, and after first paying all expenses, costs, and commissions attending the collection and disbursement of the same, shall pay over to said McCormick the sum of $14,610, on account of

*32] patent fees due *him for the manufacture of said Virginia Reaper, as aforesaid; whereas the said arbitrator, wholly disregarding the assignment and the said proviso of

said arbitration-bond hereinbefore mentioned and set forth, in and by his said award, awarded and directed in the seventh section thereof, (amongst other things,) that the bills receivable, accounts, and debits due the said firm, not (then) already collected, whether in the hands of either of said copartners, or of their agent or agents, be collected or caused to be collected in money by the said copartners, and each of them; and in and by the said first section of said award, the said arbitrator awarded (amongst other things) that out of the money and assets of said firm, whether in the hands of either of the said copartners or of their agents, there in the first place be paid certain debts and liabilities of said firm, mentioned and specified in said section, *pro ratâ;* and the said section of the said award directed and awarded, in substance, that in the next place there be paid to your orator out of the funds of said copartnership the sum of $14,610 for his said patent fees. Thus attempting to subvert and annul the said assignment so made to said Ogden, by directing the said parties to collect the said debts and assets so assigned to him, instead of said Ogden, and in utter disregard of his rights and duties as trustee, and to disburse and distribute the funds of said partnership in a different manner from that provided in and by the trusts of said assignment, and postponing the payment of the said sum of $14,610 so due to your orator for patent fees, until after the payment of said debts mentioned in said first section of said award, contrary to the tenor and effect, true intent, and meaning of the said assignment, and of the said arbitration-bond.

2d. The said assignment provides, in the second section thereof, that said Ogden shall pay all legal liablities and debts of the said McCormick and Gray as they shall become due; whereas the said award in the first section thereof awards and directs, in substance, that certain debts in said last-mentioned section specified, shall be paid *pro ratâ* until the same shall be paid.

3d. The said assignment in the third section thereof (amongst other things) provides, in substance, that the balance of said assets, as fast as collected, shall be paid in *pro ratâ* sums as follows; to said McCormick one half of all moneys collected, to Ogden and Jones one fourth, and the remaining fourth to said Gray; provided, however, and it is in said third section agreed and understood, that the respective sums therein provided to be paid to said McCormick and Gray, respectively, shall be retained by said Ogden to await the award of said Dickey, and shall in no case be paid over to either of said parties, until said award shall be made; and

*33] when said award shall be made, in case it *should be made against either party, the amount of such award shall be taken out of the moneys going to the party against whom the said award shall be made, and paid over to the party in whose favor the said award shall be made; and when said award shall have been paid, the balance of said moneys going to said McCormick and Gray, if any there shall be, shall be paid over to them, respectively, in the proportion in said assignment provided; whereas, in and by the fourth section of the said award, it is awarded and directed, that of the balance of the money and assets of said firm, as profits, after paying the items therein mentioned, there be paid to said Ogden and Jones one fourth part, to said McCormick one fourth, and to said Gray the remaining two fourths; and no sum certain is awarded to either party within the intent and meaning of the said assignment and submission, but the assets of the said firm are directed to be distributed and divided as last aforesaid.

4th. That the said arbitrator has exceeded his powers in other respects, and the said award is uncertain, unjust, illegal, and tends to the manifest injury, wrong, and oppression of your orator; and your orator humbly insists and submits that the said award ought to be annulled and wholly set aside, and the said Gray ought to be enjoined and restrained from commencing any suit or other proceeding to enforce the collection thereof, or from interfering with said assignment aforesaid, or intermeddling with the property and assets in said assignment mentioned; and that the said Gray ought to come and account with your orator of and concerning the said partnership dealings and transactions from the commencement thereof; and that the said pretended award, so made as aforesaid, is no bar to such account."

The defendants appeared, and demurred to the bill; and the Circuit Court, then holden by the district judge, sustained the demurrer and dismissed the bill.

The complainant appealed to this court.

It was argued by *Mr. Johnson*, for the appellant, and submitted, on a printed argument, by *Mr. Butterfield*, for the appellee.

Mr. Johnson, for the appellant, made the following points:—

1. That the averments in the bill gave the court jurisdiction over the parties and the subject.

2. That the award, being beyond and against the terms of

the submission, was void. *Archer* v. *Williamson*, 2 Har. & G. (Md.), 68; *Adams* v. *Adams*, 8 N. H., 82; *Carnochan* v. *Christie*, 11 Wheat., 446; *Lyle* v. *Rodgers*, 5 Wheat., 394.

3. The award being out of the way, the bill presents a familiar case for discovery and relief, being by one partner against *another for an account and settlement of partnership transactions; an averment, of itself, vesting the court with jurisdiction, and entitling the complainant to relief. 1 Story, Eq., §§ 450, 672, 683; *Scott* v. *Pinkerton*, 3 Edw. (N. Y.), 70. [*34

Mr. Butterfield, for the appellee, made the following points:—

1. The first point made by the respondent upon this appeal is, that there is nothing in the case to show that the matter in controversy, or the difference between what the appellant is entitled to under the award and what he would be entitled to if the award should be set aside and a new account should be taken, is sufficient in amount to sustain the jurisdiction of the court.

2. The complainant, by applying to the court below, and obtaining leave to amend his bill after the allowance of the demurrer, waived the right to appeal from the decision of the court, allowing the demurrer; and no appeal lies to this court from a decision of the court below, refusing to amend. The dismissal of the suit was a necessary consequence of the neglect of the complainant to amend within the sixty days allowed to him by the court, and no appeal lies from that decision. *Wright et al.* v. *Lessee of Hollingsworth*, 1 Pet., 165; *Matheson's Administrator* v. *Grant's Administrator*, 2 How., 263; *Read* v. *Hodgens*, 2 Moll., 381.

3. The award of the arbitrator was not an excess of power in any respect, and was not inconsistent with the spirit of the assignment of the debts of the firm to William B. Ogden, as trustee.

4. The courts, in support of the validity of an award, will make every reasonable presumption in favor of its being certain and final, as a determination of all the matters in dispute; especially when, as in this case, the award states that the arbitrator has examined and considered all the matters in difference between the parties, and that the award is intended to be a final settlement of all such matters as were submitted to the arbitrator. *Wood* v. *Griffith*, 1 Swanst., 43; *Doe d. Madkins* v. *Horner*, 8 Ad. & El., 235; *Smith* v. *Demarest*, 3 Halst. (N. J.), 195; 9 Ad. & El., 522; 3 Greenl. (Me.), 421; 6 N. H., 264; 1 Leigh (Va.), 491; 9 Wend. (N. Y.), 649; 2

Johns. (N. Y.) Ch., 551; 2 Bay (S. C.), 370; 2 N. H., 179; 1 Dall., 174, 188.

5. An award cannot be set aside, either at law or in equity, except for errors apparent on its face, misconduct in the arbitration, or for some palpable mistake, or on account of the fraud of one of the parties. And nothing *dehors* the award can be pleaded or given in evidence, to show that it is unreasonable or unjust. *Hunch* v. *Blair*, 1 Johns. (N. Y.) Ch., 101; *Shepherd* v. **Merrill*, 2 Id., 276; *Todd* v. *Barlow*, Id., 551; *Heard* v. *Muir*, 3 Rand. (Va.), 121, 128; *Shermer* v. *Beale*, 1 Wash. (Va.), 11; *Plesants* v. *Ross*, 1 Id., 157; *Administrator of Schenck* v. *Cuttrell*, 1 Green (N. J.) Ch., 297; *Strodes* v. *Patton*, 1 Brock., 228.

*35]

The bill in this case, which seeks to raise a question as to the decision of the arbitrator, that the complainant should, out of his share of the profits of the partnership, pay the defendant an amount equal to the one half of the defendant's share thereof, transferred to Ogden and Jones, by reason of the neglect of the complainant to supply his portion of the capital of the firm, pursuant to his agreement, cannot be sustained; for the award estops the complainant from alleging any thing contrary to it. *Garr* v. *Gomez*, 9 Wend. (N. Y.), 649.

6. If a part of the award is invalid, as being contrary to the provisions of the assignment, that does not render the whole award void, but only so much thereof as is inconsistent with the provisions of the assignment, will be rejected, leaving the residue of the award in full force. *Taylor's Administrator* v. *Nicolson*, 1 Hen. & M. (Va.), 67; *McBride* v. *Hagan*, 1 Wend. (N. Y.), 326; *Bacon* v. *Wilber*, 1 Cow. (N. Y.), 117; *Martin* v. *Williams*, 13 Johns. (N. Y.), 264; *Cox* v. *Jagger*, 2 Cow. (N. Y.), 649; *Gordon* v. *Tucker*, 6 Greenl. (Me.), 247; *Lyle* v. *Rodgers*, 5 Wheat., 394.

Mr. Justice CURTIS delivered the opinion of the court.

This is a bill for an account of certain partnership transactions between McCormick and Gray, and to set aside an award by which that account has been stated. The bill was demurred to, and, by a decree of the Circuit Court of the United States for the District of Illinois, it was dismissed, and the complainant appealed.

The demurrer raises the question, whether the award is valid? The objection to the award is, that it is not pursuant to the submission. To decide this question, it is necessary to examine the terms of the submission and the award. The submission is contained in arbitration-bonds, mutually

executed by the parties, bearing date on the 20th day of December, 1848, submitting, generally, all their partnership and other differences with this limitation: "Provided, that the award so to be made by said arbitrator shall not in any way alter or affect the demands of property and assets in the hands of William B. Ogden, as the trustee of said parties, or the agreements between said parties, relative to the collection and disposition of said demands, assets, and property; but the same shall remain under the provisions of said contract."

This clause in the submission refers to an assignment of the principal part of the choses in action of the partnership, in trust *to collect them, made by the partners before the execution of the submission-bonds, which assignment recites the fact of the submission, and contains agreements as to marshalling this part of the partnership assets. Amongst other trusts declared in this assignment are the following:— [*36

"1st. Said Ogden shall proceed to collect said assets as speedily as may be, and, after first paying all expenses, costs, and commissions attending the collection and disbursement of the same, he shall pay over to said McCormick the sum of $14,610, on account of patent fees due him for the manufacture of said Virginia Reapers, as aforesaid.

"2d. To pay all legal liabilities and debts of said McCormick and Gray as they shall become due.

"3d. The balance of said assets, as fast as collected, shall be paid in *pro ratâ* sums, as follows,—to said McCormick, one half of all moneys collected; to Ogden and Jones, one fourth part of said moneys, being the amount heretofore sold and assigned by said Gray to them; and the remaining one fourth part to said Charles M. Gray. Provided, however, and it is hereby expressly understood and agreed between the said McCormick and Gray, that the respective sums herein provided by this clause, to be paid to said McCormick and Gray, respectively, shall be retained by the said Ogden, to await the award of Judge Dickey, in the submission above referred to, and shall in no case be paid over by him to either of said parties until said award shall be made; and when said award shall be made, in case it shall be made against either party, the amount of such award shall be taken out of the moneys going to the party against whom said award shall be made, and paid over to the amount thereof, to the party in whose favor said award shall be made; and when said award shall have been paid, the balance of said moneys going to said McCormick and Gray, if any there shall be, shall be paid over

to them, respectively, in the proportion hereinbefore provided for. Provided, further, that, if said Gray shall not pay to said McCormick, within thirty days from the date hereof, the sum of $2,500, on account of the indebtedness of Gray and Warner to said McCormick, then the said Ogden shall retain and pay over to said McCormick, out of the rest of the moneys to be paid to said Gray, as aforesaid, after first paying any award which said judge may make in the submission above mentioned, against said Gray, the aforesaid sum of $2,500, on account of the said indebtedness of said Gray and Warner, aforesaid, together with ten per cent. damage thereon, as a penalty for any delinquency on the part of said Gray, to pay said sum of $2,500 within the time above limited, every thing hereinbefore contained to the contrary notwithstanding; and the said Gray agrees *to furnish the said McCormick, within the thirty days aforesaid, a full, true, and correct account or statement of the indebtedness of said Gray and Warner to said McCormick; and any excess over and above the said sum of $2,500, which said account or statement shall show to be due to said McCormick, shall also be paid to him by said Gray, within the thirty days above limited, or, in default thereof, the said Ogden shall pay the same out of the same funds, in the same manner and with the like penalty that the said sum of $2,500 is hereinbefore provided to be paid."

*37]

These stipulations, by which this part of the partnership assets is disposed of, are, in legal effect, incorporated into the submission, and limit the authority of the arbitrator. He could do nothing to alter or affect them. But, instead of observing this limitation, his award treats the entire property of the partnership, and the respective rights of the partners, as if no such agreements had been made.

He postpones the payment of the fourteen thousand six hundred and ten dollars to McCormick, for his patent fees to the payment of the debts of the firm, though the agreement of the parties was, that it should be first paid out of the choses in action assigned. It is argued, that this was justified by the prior right of creditors. But, as between the partners, they had a perfect right to control the possession of the partnership funds, and determine that the whole, or any part, should go into the possession of either partner. Both are ultimately liable for the debts, and whether one or other member of the firm shall have possession of the funds, either under a claim as a creditor of the firm, or otherwise, while they act in good faith, is a matter wholly subject to their control. Indeed it is only through them, and by means of their equity

to have the partnership property applied to the payment of the partnership debts, that creditors have any lien on, or specific rights to, the property of the firm, as distinguished from the property of its members. *Ex parte Ruffin*, 6 Ves., 119; *Ex parte Fell*, 10 Ves., 347; *Ex parte Williams*, 11 Ves., 5.

This partnership was solvent, and the object of the submission was to adjust the relative rights of the partners. The payment of the debts, and a provision for them out of the partnership funds, was probably necessary, in order to make a final settlement, without recourse over, in consequence of payments compulsorily made by one partner, which might disturb the balance between himself and his copartner. But it certainly was not within the authority of the referee to make this provision out of a fund which the partners had otherwise disposed of by an express agreement, which they made part of *the submission, and which constituted a limitation on his authority. [*38

It is said that, by the terms of the agreement between the parties contained in the assignment, these debts were to be paid as they should become due, and that to support the award the court will intend, they were all payable at the time it was made. But if this were intended, the agreement would nevertheless remain, by force of which McCormick's patent fees were to be first paid, out of the proceeds of that particular part of the property assigned.

The partners agreed in the assignment, that, after paying McCormick the sum of $14,610, and discharging the legal liabilities of the firm, the balance of the assets assigned, as fast as collected, should be paid, one half to McCormick, one fourth to Gray, and the remaining fourth to certain assignees of Gray, but that each partner should have a lien on the share of the other, for any balance found due to him by the arbitrator: and that McCormick should have a lien on Gray's share, in the hands of the assignee, for a specific claim of twenty-five hundred dollars, together with any further amount which might prove to be due to him according to an account therein agreed to be rendered.

Upon the face of the award we are unable, by any fair intendment, to reconcile it with these stipulations. The radical error of the arbitrator seems to have been, that he disregarded these arrangements of the parties, by which they had finally bound so much of their assets as were in the hands of the assignee. It was his duty to assume that their contract, in respect to this part of the partnership property, was to be specifically executed, and then proceed to consider the equities

of the parties in consequence of such an appropriation of those funds, as well as in consequence of the other facts. But each partner had a right to the specific performance of the trusts declared in the assignment, and the submission gave no power to the arbitrator to make an award inconsistent with their execution. But this award is so. In one aspect of this bill, it is a bill for the execution of those trusts, and no reason appears why they should not be executed, except the award. If the award is valid, the court below rightly decided that the bill must be dismissed, for it not only bars the general account of the partnership transactions, but destroys the particular trusts created by the assignment in favor of each partner, in respect to the proceeds of the choses in action assigned. Yet it was expressly agreed that the arbitrator should do nothing which could have that effect, and so far as the award is relied on as a defence to the bill against Gray and Ogden, the trus-
*39] tee, to have these trusts *performed, it is in direct conflict with the express words of the submission.

It is suggested that the award may be held valid in part, and so far as it does pursue the submission. There are cases in which, after rejecting part of an award, the residue is sufficiently final, certain, and in conformity with the submission, to stand ; but it is indispensable that the part thus allowed to stand should appear to be in no way affected by the departure from the submission. In the present case this does not appear. On the contrary, the basis of this whole award is erroneous, resting on the assumption that the disposal of the entire assets of the partnership was the subject of the award, and it is certain the arbitrator could properly have made no part of this award, as it stands, if he had assumed that the trusts declared in the assignment were to be executed.

It is objected that the amount in controversy is not sufficient to justify an appeal to this court ; but this is a suit for an account involving very large sums of money, the complainant claiming sums greatly exceeding two thousand dollars, by force of the assignment and otherwise, and the defendant Gray insisting on the award, as a bar to the whole claim. It is no answer to say that, if this suit should be defeated, the complainant may have some other title, which will not be worth two thousand dollars less than the value of what he now claims. The question is, whether the matter in dispute in this suit is of the value of two thousand dollars. Besides, this matter is a claim for an account far exceeding that amount, and it does not appear that the defendant concedes to the complainant his whole claim, except some sum less than two thousand dollars. There remains, therefore, a

dispute concerning this large claim, not narrowed by any concession of the defendant, so as to be reduced below the sum which is required by law for an appeal. It is urged, also, that the appeal is not well taken, because the complainant obtained leave to amend, after the decree dismissing the bill was entered. But it appears from the record that this decree to dismiss the bill was regularly stricken out before the leave to amend was granted, and afterwards, when the complainant elected not to amend, the bill was ordered to be dismissed by reason of the demurrer. From this last-mentioned decree the appeal was taken, and it was regularly and properly allowed.

The decree of the Circuit Court must be reversed, and the case remanded with directions to that court to overrule the demurrer, and order the defendants to answer the bill.

*ORDER. [*40

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Illinois, and 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 reversed with costs, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to overrule the demurrer, and order the defendants to answer the bill.

THE UNITED STATES, APPELLANTS, *v.* FRANCIS P. FERREIRA, ADMINISTRATOR OF FRANCIS PASS, DECEASED.

The treaty of 1819, between the United States and Spain, contains the following stipulation, viz.:—

"The United States shall cause satisfaction to be made for the injuries, if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

Congress, by two acts passed in 1823 and 1834, (3 Stat. at L., 768, and 6 Stat. at L., 569,) directed the judge of the Territorial Court of Florida to receive, examine, and adjudge all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the Secretary of the Treasury, who, on being satisfied that the same was just and equitable, within the provisions of the treaty, should pay the amount thereof; and by an act of 1849, (9 Stat. at L., p. 788,) Congress directed the judge of the District Court of the United States for the

Northern District of Florida, to receive and adjudicate certain claims in the manner directed by the preceding acts.

From the award of the district judge, an appeal does not lie to this court.

As the treaty itself designated no tribunal to assess the damages, it remained for Congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of a court, but a mere award, with a power to review it, conferred upon the Secretary of the Treasury.[1]

(Mr. Justice WAYNE did not sit in this cause.)

THIS was an appeal from the District Court of the United States for the Northern District of Florida.

The facts of the case are stated in the opinion of the court.

It was argued by *Mr. Crittenden*, who placed the case upon the ground which will be presently stated, and by *Mr. Johnson* for the appellee. There were also briefs filed on the same side by *Mr. Sherman*, *Mr. W. Cost Johnson*, and *Mr. Ewing*.

Mr. Crittenden, after giving a history of the cause and the laws, proceeded.

*41] *The District Judge, being satisfied with the causes assigned why this claim was not presented under the act of 1834, adjudicated to the petitioner, upon his claim and proof, as the amount or value of his losses, $6,080, and for interest thereon at the rate of 5 per cent. from the tenth of May, 1813, to the 26th June, 1835, $6,726.83, making in all $12,806.83.

From this decision the District Attorney prayed an appeal to the Supreme Court of the United States, "to the end, that he might, if the laws allowed it, prosecute such appeal, if instructed to do so." I know nothing more of this proceeding than that, upon this appeal, the case has been brought to this court; and being here, it would be quite agreeable to me if the court would, by its high authority, settle and determine all the questions that arise out of this case, and which are presented before the Treasury Department in many others of a like character, and especially the question respecting the allowance of interest on the amount of the losses or injuries sustained by the claimants.

These questions have from the first been subjects of controversy between the claimants and the Secretary of the Treasury, and are likely to continue so till some higher

[1] CITED. *In re Kaine*, 14 How., 120; *United States* v. *Ritchie*, 17 Id., 534; *Murray* v. *Hoboken Land &c. Co.*, 18 Id., 280; *Ex parte Vallandigham*, 1 Wall., 253; *Gordon* v. *United States*, 7 Id., 193; *Ex parte Zellner*, 9 Id., 247; *Shoultz* v. *McPheeters*, 79 Ind., 379.

authority shall interpose. It would be conducive to the public interest, and certainly desirable to the government, to obtain the judgment and directions of this enlightened court on this vexed subject.

In the adjustment or adjudication of these Florida claims by the Florida judges, interest was allowed, except in a few instances. The first of these adjudications were presented to the Secretary of the Treasury for payment in the year 1825, and others have been constantly and successively presented from that time to the present. The number of claims thus presented is about two hundred, and the amount paid has exceeded one million of dollars. But from the first, and in every case where interest had been allowed by the Florida judge, the principal only was paid, and the interest disallowed and rejected by the Secretary of the Treasury. For the period of the last twenty-five years this has been the unvaried and uniform course of decision and action by every successive Secretary of the Treasury, who has acted on the subject, sustained by the official opinions of several attorneys-general, and without the expressed dissent of any one of them officially declared.

It is respectfully insisted on the part of the United States that such a uniform and long continued series and course of decision has made the disallowance of interest, in whatever form awarded, a *res adjudicata*.

Congress had power to create a special tribunal, with jurisdiction to examine and adjust or adjudge these claims arising under the treaty with Spain. Their power in this respect was *plenary and discretionary. By the acts above referred to they exercised that power, and created such [*42
a tribunal. It was a judicatory tribunal which they established, consisting of two parts or members, namely, one of the territorial judges of Florida to act and decide in the first instance; and secondly, the Secretary to exercise a revisory power or jurisdiction over the decisions of the Florida judge, paying the amount of them only "on being satisfied that the same is just and equitable within the provisions of the treaty." To this tribunal, thus constituted, Congress gave authority to decide on these claims; the decision of the Secretary of the Treasury being revisory and final. His decision was in its nature judicial, and made of the matter decided, a *res adjudicata*, in every rational and legitimate sense of those terms. The decision of a special or limited tribunal upon a subject within its jurisdiction is just as conclusive and binding as the judgments of courts of the highest and most unlimited jurisdiction.

The present case is, in its origin, and in respect to the question of interest, identical with the other Florida cases above alluded to.

I take it for granted that the substitution of the judge of the District Court of the United States, &c., in place of the territorial judge, as the person to adjust or adjudge these claims, can in no respect make any material difference. The authority of the one and the other is exactly the same, and the effect of their acts the same, whether they be called judges, or commissioners as in the above-cited act of Congress of 22d February, 1847. The act of Congress is the measure of their authority and of the effect of their proceedings under that authority.

Mr. Johnson was the only counsel who argued the case orally, for the appellee; the other counsel filed briefs. It is proper to say, that a motion had been made by the counsel for the appellee to dismiss the case for want of jurisdiction. This may serve to explain the preliminary remarks of Mr. Johnson, which were as follows:

It is our earnest wish, in behalf of the appellee, that this court should take jurisdiction of the case, and hear and decide it upon the merits, that if the decision of the court below be wrong, its errors may be corrected, and we may know the limits of our rights; and if the decision be correct, that it may be so pronounced by the authoritative voice of this high tribunal.

Nevertheless, in order to raise such questions as may be thus raised, we have found it necessary to move to dismiss the appeal. In the consideration of that motion, however, we do not feel bound to use such arguments only as will tend to show that *an appeal does not lie in this case, but think we may with propriety present such views on the subject, and refer to such authorities, as in our judgment in any manner bear upon the question, and which will enable the court the more readily to apprehend and decide it.

*43]

The question now strictly before the court involves the nature of the claim, and the character of the tribunal whose decision is here for revision. We will, therefore, consider it in this order, and —

1st. As to the nature of the claim; is it, and is the class to which it belongs, the proper subject of judicial investigation and decision?

(Then followed an explanation of the case, after which the inference was drawn.)

There can be, therefore, no objection to the ordinary jurisdiction of the courts of the United States, arising from the nature of these claims. They are proper subjects for the investigation of courts of justice, involving as they do questions touching the rights of property and injuries thereto. They fall properly within the jurisdiction of courts of the United States, as the judicial inquiry, and the rights to which it refers, arise out of treaty stipulations, and acts of Congress to carry the treaty into effect.

They are, therefore, wholly unlike the duties attempted to be imposed by the act of March 3, 1792, on the Circuit and District Courts, relative to pensions, and which they refused to perform because they were not judicial, holding the act for that, among other things, unconstitutional and void. Vide 2 Dall., 410, *n.*

Whatever analogy, therefore, may be found in other respects, or if not found, made by construction, between the act of 1792 and that of 1823, they differ wholly in this, that the duty imposed by that act was not judicial in its nature; in this, it is strictly so; and the instructions of the legislature to the judicial tribunals on whom the duty is imposed "to receive, examine, and adjudge," is an explicit instruction to perform that duty judicially.

II. We have next to consider the character of the tribunal whose decision is before this court for revision; and on this point several inquiries suggest themselves:

1st. Was it a mere commission, not judicial in its character, whose decision might be taken up to, and revised by, the Secretary of the Treasury in his capacity as an executive officer?

2d. Or was it a judicial tribunal, part of a judicial system, created by the acts of 1823 and 1834, under the treaty, which acted and decided judicially, but from which an appeal lay, not to this court, but to the Secretary of the Treasury, as the highest *appellate tribunal in that special system created under the treaty by those statutes? [*44

3d. Or was it a judicial tribunal whose decision was final in all cases coming within the special jurisdiction conferred upon it under the treaty?

4th. Or was it an ordinary judicial tribunal, from which, in these as in other cases, an appeal lies to this court?

(Upon each of these questions the argument was very elaborate.)

III. Then arises the question, is the decision final, or does an appeal lie from it to this court?

There is nothing in the nature of the case itself, or the mode

of proceeding directed by the acts of 1823 and 1834, which tends to settle this question. If the United States had not assumed the satisfaction of these injuries, suits would have been brought against the trespassers in the usual form, and a writ of error would have lain to revise the judgments. But the United States assumes the liability, agrees by treaty to open her courts, and allow the injuries to be established by her legal process, and binds herself to make satisfaction for the injuries, if any, which shall be so established. But the United States is not formally made defendant on the record; this was not directed by the acts of Congress, but the claims were presented to the tribunals which she designated "to receive, examine, and adjudge" them. They were claims against the United States, and it is not a matter of substance whether she was named on the record as defendant or not; they were, nevertheless, "cases," within the legal meaning of the term; whether belonging to that numerous class of cases called in the books *ex parte*, or the still more numerous class of cases *inter partes*, is immaterial. But what militates against the right of appeal is the provision, that the judges shall report their decision to the Secretary of the Treasury, who shall "pay the amount thereof."

But, on the other hand, we perceive nothing in these statutes, to cut off an appeal, if the decision be against the claimant. The case before the court was prosecuted in, and decided by, the District Court of Florida, and there seems to be no other reason, than that named, why the general law authorizing appeals from those courts should not extend to and embrace this case. If, however, an appeal do not lie, it must be, as we think, because the decision of the judge of the District Court of Florida was final, not because the Secretary of the Treasury is the appellate tribunal.

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

This purports to be an appeal from the District Court of
*45] the *United States for the Northern District of Florida. The case brought before the court is this:

The treaty of 1819 by which Spain ceded Florida to the United States, contains the following stipulation in the 9th article.

"The United States shall cause satisfaction to be made for the injuries if any, which by process of law shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

In 1823 Congress passed an act to carry into execution this article of the treaty. The 1st section of this law authorizes the judges of the superior courts established at St. Augustine and Pensacola respectively, to receive and adjust all claims arising within their respective jurisdictions, agreeably to the provisions of the article of the treaty above mentioned; and the 2d section provides "that in all cases where the judges shall decide in favor of the claimants the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged."

Under this law the Secretary of the Treasury held that it did not apply to injuries suffered from the causes mentioned in the treaty of 1812 and 1813, but to those of a subsequent period. And in consequence of this decision, another law was passed in 1834, extending the provisions of the former act to injuries suffered in 1812 and 1813, but limiting the time for presenting the claims to one year from the passage of the act. This law embraced the claim of the present claimant.

He did not, however, present his claim within the time limited. And in 1849 a special law was passed authorizing the District Judge of the United States for the Northern District of Florida, to receive and adjudicate this claim and that of certain other persons mentioned in the law, under the act of 1834; the several claims to be settled by the Treasury as in other cases under the said act. Florida had become a State of the Union in 1849, and therefore the District Judge was substituted in the place of the territorial officer.

Ferreira presented his claim according to the District Judge, who took the testimony offered to support it, and decided that the amount stated in the proceedings was due to him. The District Attorney of the United States, prayed an appeal to this court, from this decision; and under that prayer the case has been docketed here as an appeal from the District Court.

*The only question now before us is whether we have any jurisdiction in the case. And in order to [*46 determine that question we must examine the nature of the proceeding, before the District Judge, and the character of the decision from which this appeal has been taken.

The treaty certainly created no tribunal by which these damages were to be adjusted, and gives no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty.

It rested with Congress to provide one, according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty; and Congress had the right to regulate its proceedings and limit its power; and to subject its decisions to the control of an appellate tribunal, if it deemed it advisable to do so.

Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding or the character in which the law authorizes it to act, under any opinion it may entertain, that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law and must obey the law.

The territorial judges therefore, in adjusting these claims, derived their authority altogether from the laws above mentioned; and their decisions can be entitled to no higher respect or authority than these laws gave them. They are referred by the act of 1823, to the treaty for the description of the injury which the law requires them to adjust; but not to enlarge the power which the law confers, nor to change the character in which the law authorizes them to act.

The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims, is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term, are to be made—no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte;* and all that the judge is required to do, is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to
*47] obtain. But neither the evidence, nor *his award, are to be filed in the court in which he presides, nor recorded there; but he is required to transmit, both the decision and the evidence upon which he decided, to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award. And an appeal to this court from such a decision, by such an authority from the judgment of a court of record, would be an anomaly in the history of jurisprudence. An appeal might as well have been taken from the awards of the board of commissioners, under the Mexican treaty, which were recently sitting in this city.

Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right therefore to make the approval of the award by the Secretary of the Treasury, one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him; and his decision against the claimant for the whole or a part of a claim as allowed by the judge is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice; and that the right of supervision given to the Secretary, over the decision of the District Judge, is therefore a violation of the treaty.

The court think differently; and that the government of this country is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created, where one nation agrees by *treaty to pay debts or damages which may be found to be due to the citizens of another country. [*48 This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions; and well known and well understood when treaty obligations of

this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal.

And if the judicial branch of the government had the right to look into the construction of the treaty in this respect, and was of opinion that it required a judicial proceeding; and that the power given to the Secretary was void as in violation of the treaty, it would hardly strengthen the case of the claimant on this appeal. For the proceedings before the judge are as little judicial in their character as that before the Secretary. And if his decisions are void on that account, the decisions of the judge are open to the same objections; and neither the principal nor interest, nor any part of this claim could be paid at the Treasury. For if the tribunal is unauthorized, the awards are of no value.

The powers conferred by these acts of Congress upon the judge as well as the Secretary, are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them. But it is nothing more than the power ordinarily given by law to a commissioner appointed to adjust claims to lands or money under a treaty; or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a Secretary as well as on a commissioner. But is not judicial in either case, in the sense in which judicial power is granted by the Constitution to the courts of the United States.

The proceedings we are now considering, did not take place before one of the territorial judges, but before a District Judge of the United States. But that circumstance can make no difference. For the act of 1849 authorizes him to receive and adjudicate the claims of the persons mentioned in the law, under the act of 1834; and provides that these claims may be settled by the Treasury, as other cases under the said act. It conferred on the District Judge, therefore, the same power, and the same character, *and imposed

*49]

on him the same duty that had been conferred and imposed on the territorial judges before Florida became a State.

It would seem, indeed, in this case, that the District Judge acted under the erroneous opinion that he was exercising judicial power strictly speaking under the Constitution, and has given to these proceedings as much of the form of proceedings in a court of justice as was practicable. A petition in form is filed by the claimant; and the judge states in his opinion that the District Attorney appeared for the United States, and argued the case, and prayed an appeal. But the acts of Congress require no petition. The claimant had nothing to do, but to present his claim to the judge with the vouchers and evidence to support it. The District Attorney had no right to enter an appearance for the United States, so as to make them a party to the proceedings, and to authorize a judgment against them. It was no doubt his duty as a public officer, if he knew of any evidence against the claim, or of any objection to the evidence produced by the claimant, to bring it before the judge, in order that he might consider it, and report it to the Secretary. But the acts of Congress certainly do not authorize him to convert a proceeding before a commissioner into a judicial one, nor to bring an appeal from his award before this court.

The question as to the character in which a judge acts in a case of this description, is not a new one. It arose as long ago as 1792, in *Hayburn's case*, reported in 2 Dall., 409.

The act of 23d of March, in that year, required the Circuit Courts of the United States to examine into the claims of the officers and soldiers and seamen of the Revolution, to the pensions granted to invalids by that act, and to determine the amount of pay that would be equivalent to the disability incurred, and to certify their opinion to the Secretary of War. And it authorized the Secretary, when he had cause to suspect imposition or mistake, to withhold the pension allowed by the court, and to report the case to Congress at its next session. The authority was given to the Circuit Courts; and a question arose whether the power conferred was a judicial one, which the Circuit Courts, as such, could constitutionally exercise.

The question was not decided in the Supreme Court in the case above mentioned. But the opinions of the judges of the Circuit Courts for the Districts of New York, Pennsylvania, and North Carolina, are all given in a note to the case by the reporter.

The judges in the New York Circuit, composed of Chief Justice Jay, Justice Cushing, and Duane, District Judge, held

that the power could not be exercised by them as a court. *50] But in *consideration of the meritorious and benevolent object of the law, they agreed to construe the power as conferred on them individually as commissioners, and to adjourn the court over from time to time, so as to enable them to perform the duty in the character of commissioners, and out of court.

The judges of the Pennsylvania Circuit, consisting of Wilson and Blair, Justices of the Supreme Court, and Peters, District Judge, refused to execute it altogether, upon the ground that it was conferred on them as a court, and was not a judicial power when subject to the revision of the Secretary of War and Congress.

The judges of the Circuit Court of North Carolina, composed of Iredell, Justice of the Supreme Court, and Sitgreaves, District Judge, were of opinion that the court could not execute it as a judicial power; and held it under advisement whether they might not construe the act as an appointment of the judges personally as commissioners, and perform the duty in the character of commissioners out of court, as had been agreed on by the judges of the New York Circuit.

These opinions, it appears by the report in 2 Dall., were all communicated to the President, and the motion for a mandamus in *Hayburn's case*, at the next term of the Supreme Court, would seem to have been made merely for the purpose of having it judicially determined in this court, whether the judges, under that law, were authorized to act in the character of commissioners. For every judge of the court, except Thomas Johnson, whose opinion is not given, had formally expressed his opinion in writing, that the duty imposed, when the decision was subject to the revision of a Secretary and of Congress, could not be executed by the court as a judicial power: and the only question upon which there appears to have been any difference of opinion, was whether it might not be construed as conferring the power on the judges personally as commissioners. And if it would bear that construction, there seems to have been no doubt, at that time, but that they might constitutionally exercise it, and the Secretary constitutionally revise their decisions. The law, however, was repealed at the next session of the legislature, and a different way provided for the relief of the pensioners: and the question as to the construction of the law was not decided in the Supreme Court. But the repeal of the act clearly shows that the President and Congress

acquiesced in the correctness of the decision, that it was not a judicial power.

This law is the same in principle with the one we are now considering, with this difference only, that the act of 1792 imposed the duty on the court *eo nomine*, and not personally on the judges. In the case before us it is imposed upon the judge, and *it appears from the note to the case of Hayburn, that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description; and would have performed the duty as commissioners, subject to the revision and control of the Secretary and Congress, as provided in the law. Nor have Justices Wilson, Blair, and Peters, District Judges, dissented from this opinion. Their communication to the President is silent upon this point. But the opinions of all the judges embrace distinctly and positively the provisions of the law now before us, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such. [*51

Independently of these objections, we are at some loss to understand how this case could legally be transmitted to this court, and certified as the transcript of a record in the District Court. According to the directions of the act of Congress, the decision of the judge and the evidence on which it is founded, ought to have been transmitted to the Secretary of the Treasury. They are not to remain in the District Court, nor to be recorded there. They legally belong to the office of the Secretary of the Treasury, and not to the court; and a copy from the clerk of the latter would not be evidence in any court of justice. There is no record of the proceedings in the District Court of which a transcript can legally be made and certified; and consequently there is no transcript now before us that we can recognize as evidence of any proceeding or judgment in that court.

A question might arise whether commissioners appointed to adjust these claims, are not officers of the United States within the meaning of the Constitution. The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And, if they are to be regarded as officers, holding offices under the government, the power of appointment is in the President, by and with the advice and consent of the senate; and Congress

could not by law, designate the persons to fill these offices. And if this be the construction of the Constitution, then as the judge designated could not act in a judicial character as a court, nor as a commissioner, because he was not appointed by the President, every thing that has been done under the acts of 1823, and 1834, and 1849, would be void, and the payments heretofore made might be recovered back by the United States. But this question has not been made; nor does it arise in the case. It could arise only in a suit by the United States to recover back the money. And
*52] *as the case does not present it, and the parties interested are not before the court, and these laws have for so many years been acted on as valid and constitutional we do not think it proper to express an opinion upon it. In the case at bar, the power of the judge to decide in the first instance, is assumed on both sides, and the controversy has turned upon the power of the Secretary to revise it; and it is in this aspect of the case, that it has been considered by the court, in the foregoing opinion.

The appeal must be dismissed for want of jurisdiction.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Florida, 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.

NOTE BY THE CHIEF JUSTICE, INSERTED BY ORDER OF THE COURT.

Since the aforegoing opinion was delivered, the attention of the court has been drawn to the case of the *United States* v. *Yale Todd*,[1] which arose under the act of 1792, and was decided in the Supreme Court, February 17, 1794. There was no official reporter at that time, and this case has not been printed. It shows the opinion of the court upon a question which was left in doubt by the opinions of the different judges, stated in the note to *Hayburn's case*. And as the subject is one of much interest, and concerns the nature and extent of judicial power, the substance of the decision in *Yale Todd's case* is inserted here, in order that it may not be overlooked, if similar questions should hereafter arise.

The 2d, 3d, and 4th sections of the act of 1792, were repealed at the next session of Congress by the act of February 28, 1793. It was these three sections that gave rise to the questions stated in the note to *Hayburn's case*. The repealing act provided another mode for taking testimony, and deciding upon the validity of claims to the pensions granted by the former law; and by the 3d section it saved all rights to pensions which might be founded

[1] Reviewed. *Florida* v. *Georgia*, 17 How., 505.

"upon any legal adjudication," under the act of 1792, and made it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court, "on the validity of such rights, claimed under the act aforesaid, by the determination of certain persons styling themselves commissioners."

It appears from this case, that Chief Justice Jay and Justice Cushing acted upon their construction of the act of 1792, immediately after its passage and before it was repealed. And the saving and proviso, in the act of 1793, was manifestly occasioned by the difference of opinion upon that question which existed among the justices, and was introduced for the purpose of having it determined, whether under the act conferring the power upon the Circuit Courts, the judges of those courts when refusing for the reasons assigned by them to acts as courts, could legally act as commissioners out of court. If the decision of the judges, as commissioners, was a legal adjudication, then the party's right to the pension allowed him was saved; otherwise not.

In pursuance of this act of Congress, the case of Yale Todd was brought before the Supreme Court, in an amicable action, and upon a case stated at February Term, 1794.

The case was docketed by consent, the United States being plaintiff and Todd the defendant. The declaration was for one hundred and seventy-two dollars and ninety-one cents, for so much money had and received by the defendant to the use of the United States; to which the defendant pleaded *non assumpsit.*

*The case as stated, admitted that on the 3d of May, 1792, the defendant appeared before the Hon. John Jay, William Cushing, and [*53
Richard Law, then being judges of the Circuit Court held at New Haven, for the District of Connecticut, then and there sitting, and claiming to be commissioners under the act of 1792, and exhibited the vouchers and testimony to show his right under that law to be placed on the pension list; and that the judges above named, being judges of the Circuit Court, and then and there sitting at New Haven, in and for the Connecticut District, proceeded, as commissioners designated in the said act of Congress, to take the testimony offered by Todd, which is set out at large in the statement, together with their opinion that Todd ought to be placed on the pension list, and paid at the rate of two thirds of his former monthly wages, which they understood to have been eight dollars and one third per month, and the sum of one hundred and fifty dollars for arrears.

The case further admits, that the certificate of their proceedings and opinions, and the testimony they had taken, were afterwards, on the 5th of May, 1792, transmitted to the Secretary of War, and that by means thereof Todd was placed on the pension list, and had received from the United States one hundred and fifty dollars for arrears, and twenty-two dollars and ninety-one cents claimed for his pension aforesaid, said to be due on the 2d of September, 1792.

And the parties agreed that if upon this statement the said judges of the Circuit Court sitting as commissioners, and not as a Circuit Court, had power and authority by virtue of said act so to order and adjudge of and concerning the premises, that then judgment should be given for the defendant, otherwise for the United States, for one hundred and seventy-two dollars and ninety-one cents, and six cents cost.

The case was argued by Bradford, Attorney-General for the United States, and Hillhouse for the defendant; and the judgment of the court was rendered in favor of the United States for the sum above mentioned.

Chief Justice Jay and Justice Cushing, Wilson, Blair, and Paterson, were present at the decision. No opinion was filed stating the grounds of the decision. Nor is any dissent from the judgment entered on the record. It would seem, therefore, to have been unanimous, and that Chief Justice Jay and Justice Cushing became satisfied, on further reflection, that the power given in the act of 1792 to the Circuit Court as a court, could not be construed to give it to the judges out of court as commissioners. It must be admitted that the

justice of the claims and the meritorious character of the claimants would appear to have exercised some influence on their judgments in the first instance, and to have led them to give a construction to the law which its language would hardly justify upon the most liberal rules of interpretation.

The result of the opinions expressed by the judges of the Supreme Court of that day in the note to *Hayburn's case*, and in the case of the *United States* v. *Todd*, is this:

1. That the power proposed to be conferred on the Circuit Courts of the United States by the act of 1792 was not judicial power within the meaning of the Constitution, and was, therefore, unconstitutional, and could not lawfully be exercised by the courts.

2. That as the act of Congress intended to confer the power on the courts as a judicial function, it could not be construed as an authority to the judges composing the court to exercise the power out of court in the character of commissioners.

3. That money paid under a certificate from persons not authorized by law to give it, might be recovered back by the United States.

The case of Todd was docketed by consent in the Supreme Court; and the court appears to have been of opinion that the act of Congress of 1793, directing the Secretary of War and Attorney-General to take their opinion upon the question, gave them original jurisdiction. In the early days of the Government, the right of Congress to give original jurisdiction to the Supreme Court, in cases not enumerated in the Constitution, was maintained by many jurists, and seems to have been entertained by the learned judges who decided *Todd's case*. But discussion and more mature examination has settled the question otherwise; and it has long been the established doctrine, and we believe now assented to by all who have examined the subject, that the original jurisdiction of this court is confined to the cases specified in the Constitution, and that Congress cannot enlarge it. In all other cases its power must be appellate.

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*54] *Robert R. Barrow, Plaintiff in error, *v.* Nathaniel B. Hill.

Where the only exceptions taken in the court below were to the refusals of the court to continue the case to the next term; and it appears that the continuance asked for below and the suing out the writ of error were only for the purpose of delaying the payment of a just debt, and no counsel appeared in this court on that side, the 17th rule will be applied and the judgment of the court below be affirmed with ten per cent. interest.[1]

This case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

Hill was a citizen of South Carolina, and sold two slaves to Barrow, a citizen of Louisiana. Barrow gave his note for $2,000, dated 12th of February, 1848, payable twelve months after date. When due, it was protested. Hill then filed his petition in the Circuit Court of the United States. Barrow's

[1] See note to *Sims* v. *Hundley*, 6 How., 1.

answer admitted the execution of the note, but alleged that the negroes were unsound. In April, 1850, the cause came on for trial. The counsel for the defendant moved the court for a continuance "on the ground that William C. Fisher, a material witness for the defendant, is absent or does not appear on the trial of this cause; that the said Fisher is in the city at this time; that defendant desired the clerk of this court to summon said Fisher, but that the marshal has not been able to find him and serve him with a *subpœna*. Nevertheless, it appeared that on the next day, Fisher was present in court and examined. The conclusion of the first bill of exceptions was as follows, viz.:

The defendant further declares that he has not induced or consented to said Fisher's absence; to all of which the defendant offered to swear, but the court overruled the motions on the ground that it appeared, by the declaration of the counsel for defendant, that the witness Fisher was the day before seen by him in the city of New Orleans, and therefore the court declared that the testimony of the said witness would be received before the conclusion of the trial. Accordingly, the next morning, the witness appeared in court, and was regularly examined by the counsel of both defendant and plaintiff, and his testimony was commented on by counsel before the cause was finally submitted; whereupon the counsel for the defendant excepts to the ruling of the court, and tenders this his bill of exceptions, praying that the same may be signed and made a part of this record.

THEO. H. MCCALEB,
United States Judge.

*The second bill of exceptions was as follows: [*55

Be it remembered, that at the trial of this cause before the court, at the term aforesaid, the counsel for the defendant moved the court for a continuance, on the grounds that a commission was issued by this court on the 11th March, 1850, to take the testimony of William S. Green, a resident of the State of Kentucky, but supposed to be at that time on a plantation owned by said Green in the parish of Terrebonne, Louisiana. That the testimony of said Green is important, material, and necessary to the defence. That due diligence has been used to have this testimony of said Green taken, but that the said commission has not yet been returned to this court; to all of which the defendant offered to swear, but the court overruled the motion, on the ground that the commission had issued some time after issue joined, and subject to the right of the adverse party to have the case tried,

when regularly docketed; and also upon the ground that a sufficient time had been allowed for the return of said commission. Whereupon the counsel for defendant excepts to the ruling of the court and tenders this his bill of exceptions, praying that the same may be signed and made a part of the record.

THEO. H. MCCALEB,
United States Judge.

After hearing Fisher and another witness for the defendant, and a witness for the plaintiff, the court gave judgment for the plaintiff; whereupon the cause was brought up to this court upon the two exceptions above mentioned.

It was argued by *Mr. Venable*, for the defendant in error, no counsel appearing for the plaintiff in error.

Mr. Venable said,—the only error assigned is, that the judge below overruled a motion for a continuance for reasons set forth in the bill of exceptions; an application for a continuance being addressed to the discretion of the court, it is submitted that, in this case, that discretion was soundly exercised; and the defendant prays that the judgment be affirmed. And, as it appears that this writ of error was sued out for delay, he further asks that damages may be awarded him, according to the seventeenth rule of this court.

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

This case is brought up by a writ of error, directed to the Circuit Court of the United States for the Eastern District of Louisiana.

*56] *No counsel has appeared in this court for the plaintiff in error. The case has been called in its regular order for argument, and thereupon the counsel for the defendant has, under the 19th rule of the court, opened the record and argued the case, and prays an affirmance of the judgment, with ten per cent. damages, on the ground that the writ of error was issued merely for delay.

Upon looking into the record, it appears that two exceptions were taken in the court below by the plaintiff in error; and both of them were taken to the refusal of the court to continue the case to the next term.

It has been repeatedly decided in this court, that a motion for the continuance of the cause addresses itself to the sound judicial discretion of the court, and its decision, for or against the motion, cannot be assigned as error in this court. The

rule is so familiar in practice, that it is unnecessary to refer to cases to prove it. The decision of the Circuit Court, therefore, upon the motions above mentioned, is no ground for reversing the judgment, and does not afford any reasonable foundation for suing out this writ of error.

And, upon examining the statement in the exceptions, and the reasons assigned by the court for its refusal, the inference would seem to be irresistible, that the continuance was not asked for by the plaintiff in error, under the expectation that it would enable him to obtain testimony material to his defence, but to delay the payment of a just debt, and that the writ of error was sued out for the same purpose. The case, therefore, falls within the 17th rule of the court, and the judgment is accordingly affirmed, with ten per cent. interest on the amount, from the rendition of the judgment in the Circuit Court until paid.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel for the defendant in error. 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 with interest at the rate of ten per centum per annum on the amount, from the rendition of the judgment in the Circuit Court until paid.

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*JOHN D. BRADFORD AND BENJAMIN M. BRADFORD, APPELLANTS, *v.* THE PRESIDENT, DIRECTORS, AND COMPANY OF THE UNION BANK OF TENNESSEE. [*57

Where there was a contract for the sale of land for the purchase of which indorsed notes were given, but before the time arrived for the making of a deed, the purchaser failed, and the liability to pay the note became fixed upon the indorser; and a new contract was made between the vendor and the indorser, that, in order to protect the indorser, he should be substituted in place of the original purchaser, fresh notes being given and the time of payment extended, evidence was admissible to show that the latter contract was a substitute for the former.[1]

[1] Parol evidence is admissible to establish a new and subsequent agreement, into which a former written contract entered as inducement. *Hubbell* v. *Ream*, 31 Iowa, 289. See to the contrary, *Kerr* v. *Kuykendall*, 44 Miss., 137. So is it admissible to show a cotemporaneous but distinct contract

Bradford et al. *v.* The Union Bank of Tennessee.

A part of the land having been sold for taxes whilst the first set of notes was running to maturity, (the vendee having been put into possession,) and the vendor being ignorant of that fact when the contract of substitution was made, all that the indorser can claim of the vendor, is a deed for the land subject to the incumbrances arising from the tax-sales. The notes given for the substituted contract must be paid.[2]

The indorser having filed a bill for a specific performance upon the title-bond, which he had received from the vendor, this Court will not content itself with dismissing his bill without prejudice, and thus give rise to further litigation, but proceed to pass a final decree, founded on the above principles.[3]

THIS was an appeal from the District Court of the United States for the Northern District of Mississippi, sitting as a court of equity.

The facts are sufficiently stated in the opinion of the court.

It was argued by *Mr. Volney E. Howard*, for the appellants, and by *Mr. Carlisle* and *Mr. Coxe*, for the appellees.

The counsel for the appellees made the following points, namely: —

1. The defence could not have been made at law in this case, because a court of law has no power to rescind a contract for part failure of consideration, especially on the ground that the inducement to the whole purchase had been defeated by such part failure of title. *Greenleaf* v. *Cook*, 2 Wheat., 13; 2 Kent, 476; *Parham* v. *Randolph*, 4 How. (Miss.), 435.

2. Although judgment had been obtained at law, the complainant had a right to a good and valid title when he paid

on the same subject-matter. *Weeks* v. *Medler*, 20 Kan., 57; *Fay* v. *Gray*, 124 Mass., 500; *Barclay* v. *Wainwright*, 86 Pa. St., 191; *Kerchner* v. *McRae*, 80 N. C., 219; *Jones* v. *Jones*, 18 Hun (N. Y.), 438, 442; *Van Brunt* v. *Day*, 81 N. Y., 251; s. c., 8 Abb., N. C., 336.

The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply to a collateral undertaking. Such fact is always open to inquiry, and may be proved by parol. *Lanphire* v. *Slaughter*, 61 How. (N. Y.) Pr., 36. See, also, *Bates* v. *First Nat. Bank of Brockport*, 23 Hun (N. Y.), 420; *Duparquet* v. *Knubel*, 24 Id., 653. The rule does not apply where the original contract was verbal and entire, and a part only was reduced to writing. *Chapin* v. *Dobson*, 78 N. Y., 74; *Barclay* v. *Hopkins*, 59 Ga., 562. But to materially vary or contradict a written contract by evidence of a contemporaneous parol agreement, it must be alleged that the contract was executed on the faith of the parol agreement. *Callan* v. *Lukens*, 89 Pa. St., 134.

[2] CITED. *Snell* v. *Insurance Co.*, 8 Otto, 89.

[3] APPLIED. *Lockwood* v. *Cleaveland*, 6 Fed. Rep., 724.

The general rule is that a court of equity having obtained jurisdiction for one purpose, will proceed to grant full relief. *Tayloe* v. *Merchants' Fire Ins. Co.*, 9 How., 390; *Corby* v. *Bean*, 44 Mo., 379; *DeBemer* v. *Drew*, 39 How. (N. Y.) Pr., 466; *Cuff* v. *Dorland*, 55 Barb. (N. Y.), 481; *Boyd* v. *Hunter*, 44 Ala., 705; *People* v. *Chicago*, 53 Ill., 424; *McComas* v. *Easley*, 21 Gratt. (Va.), 23; *Booten* v. *Scheffer*, Id., 474; *Cowles* v. *Pollard*, 51 Ala., 445.

the money, and to ask the aid of a court of chancery for that purpose, especially against a foreign corporation seeking to enforce the judgment, after a tender of the money, demand, and refusal of title. The bill should not, therefore, have been dismissed. He was not compelled to take part of the estate, if a main inducement to the purchase had failed. 2 Story, Eq., § 778.

3. The bank does not even tender a deed or title for that portion of the land of which they are seized, or a quitclaim for that which was sold for taxes. It does not admit of doubt, that the court erred in not decreeing some sort of conveyance by the *bank, on the payment of the purchase-money. Bradford could not be put in a worse [*58 position than Brown, if he ought to suffer for Brown's neglect in not paying the taxes.

4. Whether the title-bond to Bradford is to be viewed as a distinct independent contract, or a mere novation of that of 1841, the court cannot look beyond the bond for its terms, nor vary them by parol. It is a covenant, that the bank was seized of the legal title in 1845, and would make a good and valid title when the notes were paid by Bradford. It was the consideration of the new notes, and the substitution of John D. and B. M. Bradford for the former and Brown. It was a contract of the bank's own election, and by which it obtained a new and additional security. 1 Greenl., § 276–277.

It is not competent to show a consideration essentially different from that recited in the deed. Greenl., § 26; 4 Greenl. Cruise, 254, *n.* 1; Id., p. 24, *n.*; 4 Cow. (N. Y.), 431.

Parol additions to a deed are rejected. 1 Sugd., 179 (153).

5. The tax-sales appear to have been regular, and in conformity to the laws of Mississippi; and, if so, vested in the purchasers the title to one half the land. By the laws of that State, the assessment is a lien upon the land. Hutch. Code, p. 176–177.

The defendants admit they cannot make a good title to one section, if the tax-title is valid. The vendee cannot be compelled to take a title thus incumbered as a good and valid title. It is selling him a lawsuit with an adverse possession.

Equity has jurisdiction to decree specific performance of a bond to convey lands, 4 Pick. (N. Y.), 1; *Mills* v. *Metcalf*, 1 A. K. Marsh. (Ky.), 477., and the prayer may be for specific performance or recession. Id., *Woodstock* v. *Bennett*, 1 Cow. (N. Y.), 711; vide also *Stevenson* v. *Maxwell*, 2 N. Y., 408. As to part performance and damages, and decree against parties residing out of the State. *Sutphen* v. *Fowler*, 9 Paige (N. Y.), 280; 11 Id., 277.

The vendee ought not to be compelled to take a title with such a cloud over it; neither should he be left to a suit on his bond against a corporation resident in another State. 7 Blackf. (Ind.), 31; 5 Mon. (Ky.), 189. It is a clear case for equitable relief, either by a total recession of the contract, or specific performance with damages. Certainly, the court should have decreed a conveyance upon the payment of the money.

Mr. Coxe, for the appellees. The questions arising upon the record present no great difficulty. It is a case of clear and undisguised fraud on the part of complainants. The court below ordered the bill to be dismissed, and such, it is confidently believed will be the result in this court.

*59] *The first question which arises was presented in the court below on the demurrer, and is again set up in the answer. It is that, if the allegations of complainants be true, as made in the bill, the facts, as averred, would have constituted a perfect defence in the action at law in which the judgment was obtained, which the bill seeks to enjoin; and that complainants, who were defendants in that action, having omitted to take such defence at law, or, if they did, having failed to sustain it, equity will not now interpose in their behalf.

In cases of fraud it is perfectly well settled, that the jurisdiction of the courts of law and of equity is concurrent. It becomes exclusive only when the case is brought before the one or the other. *Gregg* v. *Lessee of Sayre et al.*, 8 Pet., 244; *Lessee of Swayze* v. *Burke*, 12 Pet., 11; *Russell* v. *Clark's Executors*, 7 Cranch, 69; *Lessee of Rhoades* v. *Selin*, 4 Wash. C. C., 715; 9 Wheat., 403, 532.

In the present case the fraud which is in proof, is one committed by complainants, none such as is alleged being sustained even by a shadow of proof against defendants. If fraud, a good defence at law. *Gilpin* v. *Smith*, 11 Sm. & M. (Miss.), 129; and cases cited.

In the bill claiming relief, complainants aver that an actual sale and purchase of certain real estate were made, and that at the time this contract was concluded, the property which he purchased was in part held in possession under an adverse claim with color of title, and has ever since been thus held, so that the purchaser has never been able to obtain possession or enjoy the benefit of his purchase. If this allegation is true, Bradford had a complete defence at law in the action upon his bonds, for such an adversary holding places him in precisely the same predicament as if he had gone into possession

under his purchase and then been ousted by a paramount title. In *Duvall* v. *Craig*, 2 Wheat., 46, 61, it was held by this court, that if a grantee be unable to obtain possession, in consequence of an existing possession or seizin by a person claiming and holding under an older title, this would be equivalent to an eviction. The local law is in accordance. *Dennis* v. *Heath*, 11 Sm. & M. (Miss.), 206.

Again, he alleges that the bank cannot make him a good title to the property for which he contracted. Admitting that, under the circumstances, this would furnish a valid defence, yet it was equally available at law; 7 Sm. & M. (Miss.), 340. Had he tendered the purchase-money, and demanded such deed as he claims under the bond, and it was then made to appear that the bank was unable to make a good title, his defence at law would have been complete; *Liddell* v. *Sims*, 9 Sm. & M. (Miss.), 596. Nor was it necessary for him to have proceeded thus far, for the *simple fact that the bank did not demand payment and tender a deed, [*60 would have furnished a complete defence. *Washington* v. *Hill*, 10 Sm. & M. (Miss.), 560.

Having thus, upon the facts which the bill alleges, a full, complete, and adequate remedy at law, and having omitted or neglected to avail himself at law of the defence to which those facts, if proved, would have entitled him, he is without remedy in equity; *Graves* v. *Boston &c. Ins. Co.*, 2 Cranch, 419; 2 Story, Eq., § 179 and 887; 1 John. (N. Y.) Ch., 49–465; 6 How. (Miss.), 569; 5 Id., 80; 7 Id., 172; 3 Sm. & M. (Miss.), 453; 4 Id., 358; 8 Id., 131; 9 Id., 98; 10 Id., 112; and clearly in *Truly* v. *Wanzer*, 5 How., 141; Id., 192; *Creath* v. *Sims*, 9 Wheat., 552; *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332.

If we examine the merits of the case, as disclosed in the pleadings and evidence, the entire want of even a semblance of equity will be obvious. The evidence shows, beyond all possibility of doubt, that, in October, 1841, the bank sold the lands in question to Brown, gave him a title-bond, conditioned to make to him a good title upon the payment of the purchase-money, and received from him an obligation to pay this purchase-money as therein specified. In this obligation complainant, John D. Bradford, joined as surety. Payment not being made as stipulated, the bank brought suit on the paper against Bradford, recovered judgment against him, and either, as the answer alleges, issued execution, or, as the bill avers, threatened so to do.

There is no allegation, proof, or pretence, that, in October, 1841, when this purchase and sale were consummated, the

title of the bank to the entire property which it contracted to sell was not absolute and perfect; that the contract of sale was not perfectly honorable, just, and lawful; that the consideration-money was not reasonable and proper. Up to this period no allegation or imputation of impropriety, or unfairness, or want of capacity to carry out the contract, is alleged.

Under the circumstances which have thus been stated, Benjamin M. Bradford made, on behalf of his brother, an application to the bank, in September, 1844, in the form of a letter, addressed to George W. Foster. In this letter it is stated that John M. Bradford had been prevailed upon to become security for Brown; that Brown held the title-bond, and if the purchase-money is paid, the land must be conveyed to him, and become liable to old judgments, which will absorb it and leave his brother remediless. It is then proposed that Brown shall surrender his title-bond, and that a new one shall be given to Bradford, who, on his part, will then give security for the payment of the purchase-money on an extended credit.

That this letter was written by John M. Bradford, or by
*61] his *authority, and with his knowledge, is clearly shown in the record. In his letter of 2d December, 1844, to G. W. Foster, he says: "My friend, J. L. Brown, informs me that the Union Bank has acceded to our proposition made through you," &c. No other proposition appears to have been made in the letter of the brother, for both Foster and Bass say, the proposal contained in this letter was that which we submitted to the bank, and on which alone it acted. It may also be inferred from the testimony of Gholson, and his letter of March 20, 1848, that the Bradfords, when they made their proposition to the bank, knew of the tax-sale made in 1843, and then entertained the design now attempted to be accomplished, of using that sale as a means of defeating the bank in the recovery of the debt.

The complainants' bill exhibits a strong case of the *suppressio veri*, for no allusion, however distant, is made to the position occupied by the parties at the date of the letter, in September, 1844. It certainly cannot be doubted that, had the entire case been presented to the court, no injunction would have been awarded.

The ground assumed, that it was incumbent on the bank to pay the taxes assessed upon the lands subsequent to the contract of purchase and sale with Brown, has no foundation in principle or in authority. From the instant the contract for the purchase and sale of real estate is consummated, the party who has bought and obligated himself to pay the price

stipulated, is the owner. Even if an absolute conveyance has been made, the vendor retains a lien for the purchase-money, and this tacit mortgage may be enforced in equity. If, however, the vendor retains the legal title, which has become the modern practice, and which closes the door against any attempt to perpetrate fraud upon third parties, the case is not essentially changed; the vendor retains the position of a mortgagee. Such is the settled law in Mississippi. 4 Sm. & M., 300; 6 Id., 149; 10 Id., 184.

If the lands in this predicament should be sold for taxes, the vendor may be deprived of that security for the payment of the purchase-money, but it by no means follows that the debt is extinguished. In truth, he may continue that security by paying these taxes; in which case he is entitled, as against his vendee, to add the amount thus paid to the original debt, and enforce reimbursement of the aggregate sum. This is, however, optional with him, and not obligatory.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the District Court of the United States for the Northern District of Mississippi.

*The complainants in the court below, the appellants here, filed their bill for the specific performance of an [*62 agreement with the defendants for the conveyance of two sections of land in the Chickasaw cession.

The land was to be conveyed for the consideration of the sum of $3,741, payable in instalments, the last payment to be made on the 12th of October, 1847, at which time the deed was to be delivered.

The bill states that at the time of the purchase, the defendants had no title to the land, as both sections with the exception of the quarter of one of them, had been previously sold for taxes, and the time for redemption expired. That since then the defendants have redeemed one of the sections; but it is alleged that the purchase of the two sections was one entire contract, and that the main inducement was to obtain a title to the whole tract, and that the purchase would not have been made of either section separately on account of the situation, and state of the improvements. That it was the duty of the defendants to have paid the taxes, and to have prevented the sale therefor.

The bill further states that a judgment had been recorded against the complainants for the amount of the purchase-money; and that the defendants were endeavoring to enforce the collection on execution. That they have tendered the amount of the judgment and interest, and have demanded a

deed conveying a good and sufficient title to the land, which demand has been refused. That they are still willing to pay the judgment with interest and costs, and tendered the same in court, and to accept a complete title from the defendants if they can make one.

The bill prays for an injunction enjoining the defendants from collecting the judgment, that they be compelled to exhibit their title, and to execute the contract specifically, and to account for the rents and profits. And that, if the defendants are unable to execute the contract specifically and entire, it may be delivered up and cancelled, and the injunction made perpetual.

The defendants, in their answer, admit the execution of the contract for the conveyance of the two sections as stated in the bill; but deny that the transaction was intended as a purchase of the land; on the contrary, they insist, it was intended as a substitution of John D. Bradford, one of the complainants, to the rights of one John L. Brown, who had previously purchased the same, and to whom the defendants had agreed to convey the title.

The defendants allege that they entered into a contract with Brown for the sale of the land on the 20th of October, 1841, that he executed to them his four several notes for the purchase-money, payable in one, two, three, and four years, which *63] notes *were indorsed by John D. Bradford, one of the complainants, as surety, and that the contract was conditioned to make to Brown a good and valid title on the payment of the purchase-money.

That default was made in the payment, and a judgment recovered against Bradford as indorser, an execution issued, and about to be levied upon his property. And that thereupon an application was made to them on behalf of Bradford, for an arrangement by which he might have the benefit of the purchase of Brown, as he was insolvent and there were old judgments standing against him, which would bind the land if the title was made to him. That in consequence of these representations they assented to the arrangement, simply on the ground of favor and indulgence to Bradford, not being disposed to coerce the payment of the money from a surety, and at the same time withhold from him the means of indemnifying himself.

And that, at the suggestion on behalf of Bradford, and as the simplest mode of effecting the object of arrangement, they took up the title-bond previously given to Brown, and gave a new one to him, agreeing, at the same time, to a request for further indulgence in the payment of the purchase-money

by extending it for the period of one, two, and three years. That it was under these circumstances, the contract in question was entered into by the defendants, on the 9th of January, 1845, to convey the title to the two sections to Bradford instead of to Brown, the original purchaser.

The defendants admit they have been informed, and believe that both sections, with the exception stated, have been sold for taxes, prior to the date of this last arrangement; but aver that they had no knowledge of the fact at the time. They admit that they had not paid any taxes accruing after purchase by Brown, 12th October, 1841, nor had they paid any attention to the same, as they considered it the duty of Brown.

They admit that they have redeemed one of the sections, and would have redeemed the greater part of the other, had it not been for the interference of the complainants to prevent the purchaser from assenting to it.

They also admit that they cannot make an unincumbered title to the east half and south-west quarter of section No. 12, if the tax-sale is a valid one; but if the same is not, they can make a good valid title to the whole of both sections.

These are the material allegations as set forth in the pleadings. The proofs in the record sustain substantially the view of the case as stated in the answer.

The original purchase of the two sections by Brown from the defendants, of the 12th of October, 1841, extended the payment *of the purchase-money, running through a period of four years; and although it contains no provision for possession in the mean time, it is conceded that the vendee was entitled to it, and that actual possession was taken accordingly. [*64

Indeed, the courts of Mississippi regard the vendor in contracts of this description as standing, in most respects, upon the footing of one who has already conveyed the title, and taken back a mortgage as security for the purchase-money; and the vendee as mortgagor in possession. 4 Sm. & M. (Miss.), 300; 6 Id., 149; 10 Id., 184.

Brown, therefore, during the running of the contract, was at least the owner of the equitable title, accompanied with the possession; and as such was under obligation to take care of and pay the taxes assessed, accruing after his purchase. And the loss of the title to the whole or any portion of the tract in consequence of neglect, in this respect, is attributable to his own fault, for which the defendants are not responsible. No doubt, with a view to the better security of the purchase-money, they might have paid the taxes in case of the neglect

of the vendee, and charged the amount to him. But this was a question they had a right to determine for themselves, and with which Brown had no concern.

It is quite clear, therefore, if the case stood on the original contract of purchase, the defendants, on the tender of the purchase-money, would have been bound only to convey to the vendee a good and valid title to the land at the time, subject to any outstanding title or titles that existed under tax-sales, where the payment of the taxes had accrued subsequent to the purchase. For these titles they would not have been responsible, as they arose from the neglect of Brown.

The question in the case is, whether or not the complainants stand in any different, or better situation.

John D. Bradford, one of them, was surety for Brown for the purchase-money, and against whom a judgment had been recovered for the amount, execution issued, and about to be enforced, and, for aught that appears in the record, he was abundantly able to meet the demand. If payment had been enforced, he would have been left to look to Brown, the principal, for indemnity, who, it is admitted, was insolvent. In this state of the proceedings, he applied to the defendants through his brother, the other complainant, for relief: first, to obtain from them the interest in the land which Brown was entitled to, he consenting that it might be thus transferred; and second, for further indulgence in the time of payment of the money, the brother offering to join in the security. To induce the defendants to make this change, it
*65] was urged that, if the deed was made to *Brown, judgments against him would bind the land, and Bradford be deprived of the means of security for his advance, and that he was sure, from his knowledge of the defendants, it was not their intention to distress him for an act of friendship to Brown, although he had made himself liable for the debt: that for this purpose he wished, with the concurrence of Brown, the title-bond to be changed by the defendants from Brown to him; that this could work no detriment to them, and would afford him security for his liability; and also that the payment might be extended to one, two, and three years.

The defendants consented, and the arrangement was made accordingly, the new bond for the title corresponding with the old one, except in the change of the name of Bradford for Brown and the times of payment. The new bond thus given, 9th of January, 1845, on its face, bound them to make a valid title to the two sections on the 9th of January, 1848, when the last payment became due.

Under these circumstances, it is contended that the defendants are under obligation to make a deed to Bradford, conveying a complete title to the two sections, on his tender of the purchase-money, or, in default thereof, that the agreement between them should be cancelled, on the ground: 1st. That it is not competent for the court, upon settled principles of law, to admit parol evidence to alter or vary the terms or legal effect of the written agreement; and, 2d. Even if it is, that the new bond for the title is distinct from, and independent of, the one given to Brown, and hence the conveyance to Bradford is not subject to the qualifications as to the title to which the conveyance to Brown might have been on account of the outstanding tax-titles from his own neglect.

It is by no means clear, that Bradford is not chargeable with notice of the condition of the title, at the time he made application to the defendants to have the bond changed from Brown to himself. These two sections seem to have been his only means of indemnity as surety, which circumstance would naturally have led him to have made an examination into it; and, especially, as his liability had passed into a judgment, and which was about to be enforced against him. It is fair, also, to presume that he would make the inquiry, with a view to the condition and value of the property in connection with his application to obtain the change of the bond, and get the title to himself. Besides, it is inferable from the evidence in the record, that he resided at the time in the same county in which the lands lie, and was in a situation to obtain readily the necessary information. And, assuming this conclusion to be well founded, the concealment of the facts from the defendants at the time, *would be a fraud upon them, which at once removes all difficulty in respect to the admissibility of the evidence as to the true character of the transaction. [*66

But we do not propose to put the case upon this ground; as we are satisfied, independently of this view, the evidence is admissible and proper to show the understanding and real intent of the parties, although different from that which the written contract imports on its face.

"One of the most common classes of cases," says Judge Story, in his Commentaries on Equity Jurisprudence, "in which relief is sought in equity on account of a mistake of facts, is that of written agreements, either executory or executed. Sometimes by mistake the written agreement contains less than the parties intended; sometimes it contains more; and sometimes it simply varies from their intent by

expressing something different in substance from the truth of that intent. In all such cases, if the mistake is clearly made out by proofs entirely satisfactory, equity will reform the contract, so as to make it conformable to the precise intent of the parties." 1 Story, Eq. Jur., p. 164. And Lord Hardwicke remarked in *Henkle* v. *Royal Exchange Assur. Co.*, 1 Ves. Sr., 317, "No doubt but this court has jurisdiction to relieve in respect of a plain mistake in contracts in writing, as well as against frauds in contracts; so that if reduced into writing contrary to the intent of the parties, on proper proof that would be rectified."

And this ground, it is agreed, is available to a defendant by way of defence in the answer to a bill for a specific performance; as he may thus insist upon any matter which shows it to be inequitable to grant the relief prayed for. The court will not interpose to compel a specific execution, when it would be against conscience and justice to do so. 1 Story, Eq. Jur., 174; 2 Id., 80.

These principles have become elementary, and it is needless to refer to further authorities to sustain them.

Now, we are perfectly satisfied, upon the proofs before us, that it was the agreement and understanding of both parties in this case, that Bradford should be substituted in the place of Brown in the title-bond, and should take such interest as he had in the two sections in question under it, and nothing more; and this, that he might become entitled to the deed, when the purchase-money was paid, which otherwise must have been made to Brown; in other words, an agreement to put the surety in the place of the principal for the sake of indemnity, as it was seen that he would be obliged to advance the money. For this purpose, the defendants were appealed to on the ground that there were judgments against Brown

*67] which would bind the land *if the deed was made to him, and it was suggested that the simplest way to effect the object would be to take up the old, and give a new title-bond to Bradford. The suggestion was readily acquiesced in by the defendants, as a mode of making the change that would enable him to obtain the benefit of the security desired, Brown first consenting to it. But the suggestion was acquiesced in, and the new bond given for the title, in ignorance of the fact that portions of the land had been previously sold for taxes through the neglect of Brown, and the titles outstanding. This fact, as is apparent, affected most materially the character of the transaction, as the mode in making the substitution has had the effect of imposing upon the defendants responsibilities they were not under to Brown;

namely, to make good the title to the two sections, notwithstanding it had been lost by his neglect.

Now this they were not asked by Bradford to do, nor was such the agreement or understanding of either of the parties; but directly the contrary. The agreement was for a substitution of Bradford in the place of Brown, in the previous sale.

The form of the bond for the title, therefore, given to Bradford, and thus inadvertently adopted, and which imposes upon the defendants this new obligation, grew out of a mistake, and misapprehension of the facts as to the condition of the title at the time. Had the condition of the title been known, it is obvious the new bond would not have been given, or, if given, its terms would have been qualified according to the true meaning of the parties.

In its present form it does not at all carry out their understanding and agreement in making the arrangement desired, but defeats them; for in consequence of this misapprehension as to the state of the title, it is not a substitution of interest of Brown, but in effect a resale to Bradford, by which he is entitled not to such a deed as the defendants were under obligation to make to Brown, but to one investing him with a complete title to the land.

And as they are disabled from making this title by reason of the tax-sales, if it is not competent for the court to correct the mistake and reform the contract, according to the real understanding of the parties, the result is, they have lost their land, and Bradford, the surety for the purchase-money, is discharged from his liability—a result any thing but within the contemplation of the parties at the time of the arrangement.

We admit, if the defendants had agreed to resell this land to Bradford, and to give him a title, the fact that they were ignorant of the tax-sales would have afforded no ground of defence to a specific execution. The title-bond in that case would have *stood on the footing both parties intended, namely, that a good title should be given when the purchase-money was paid. [*68

But here there was no agreement to sell on the one side or to buy on the other. The agreement was to give Bradford the benefit of the sale already made, and to make him such a title as the defendants were under obligation to make to Brown. It was in truth but an assent on their part to an agreement on the part of Bradford with Brown that he should be substituted in his place in that sale — a sort of subrogation of the surety to the rights of the principal. The mode adopted to carry out the arrangement would have conformed

to the intention of the parties had the facts been as the defendants had every reason to believe, namely, that no change had taken place in the condition of the title. The mistake as to this fact has given an effect to the instrument far beyond the agreement and real understanding of the parties, and which will operate most unjustly and inequitably, if permitted to stand.

The hardship of the case, as well as the unconscientious advantage sought to be obtained, will be more apparent, when we recur to the fact, that the defendants had no interest whatever in consenting to the change of the contract in favor of Bradford. Their debt was secure and in a situation to be immediately realized, as it was in judgment and execution, and it is admitted he was able to meet it. They were actuated altogether from a disposition to assist him in obtaining some indemnity as surety for this debt, which it belonged to Brown to pay. And as it was a matter of indifference to them whether they made the deed to Brown or to him, they readily assented to the proposed arrangement. Indeed, it would have been hardly creditable, under the circumstances in which the application was made, to have refused it.

We are satisfied, therefore, that the case falls within the established principles of equity, in granting relief against contracts entered into upon a mistake, and misapprehension of the facts, and where the enforcement of which would enable one of the parties to obtain a most unconscientious advantage over the other.

The next question is as to the disposition to be made of the case.

The former course of proceeding in chancery, which was most usually adopted, would be to dismiss the bill without prejudice, and which in this case would lead us to affirm the decree of the court below. The effect of this would probably be to open up a new scene of litigation between the parties; as the complainant, John D. Bradford, could resort to his remedy at law upon the title-bond; and the defendants would be obliged to file a cross-bill for the purpose of staying his proceedings, and reforming *the contract so as to make it conform to the real understanding of the parties.

*69]

The more modern course of proceeding is to dispense with the cross-bill and make the same decree upon the answer to the original bill that would be made, if a cross-bill had been filed, if the defendant submits in his answer to a performance of the real agreement between the parties. The answer is viewed in the light of a cross-bill, and becomes the founda-

tion for a proper decree by the court. This practice has been adopted as most convenient and expeditious in settling definitively the rights of the parties, and for the sake of saving further litigation and expense.

In the case of *Staplyton* v. *Scott*, 13 Ves., 425, the master of the rolls dismissed the cross-bill with costs, considering it unnecessary, as the court would upon the answer decree a specific execution of what was the real agreement.

This practice was followed by Lord Eldon in *Fife* v. *Clayton*, 13 Id., 546, on the ground that it was right in principle, and would save expense. A specific performance was also decreed upon the answer in *Gwyn* v. *Lethbridge*, 14 Ves., 585, and it appears now to be a very common practice in chancery proceedings. 1 Dan. Ch. Pr., 436 and note; 2 Id., 101, 102 and note; Story, Eq. Pl., § 394.

These cases refer more particularly to the right of the defendant to have a decree for a specific execution of the agreement according to the answer so that he may be saved the expense of a cross-bill, even against the claim of the complainant to have his bill dismissed.

The same principle, however, seems to be equally applicable to the complainant where he insists upon the decree for specific performance of the contract as established by the proofs, although different from that set up in the bill. Indeed, we perceive no solid distinction between the two cases. In both, the contract, of course, when ascertained and conformed to the real understanding of the parties, must be such a one as the court deems fit and proper to be enforced. 2 Dan. Ch. Pr., 1001, 1002; *London & Birmingham Railway Co.* v. *Winters*, Craig & P., 62.

We shall adopt this practice in the disposition of this case, as it will save all further litigation and expense, and settle the rights of the parties, as, in our judgment, the principles of equity and justice demand.

The bill was dismissed by the court below without prejudice, leaving the complainants at liberty to resort to any other remedy in the case which they might deem expedient.

We shall, therefore, reverse the decree, and remit the proceedings *to the court below, with directions that the [*70
defendants execute a deed of the two sections of land in question to John D. Bradford with covenant of warranty, subject however to any outstanding title or titles accruing from tax-sales since the sale, and title-bond to John L Brown, 12th Oct., 1841, and deposit the same with the clerk of the court to be delivered to the said Bradford on his surrendering and cancelling the title-bond made to him on the 9th January,

1845, and paying the judgment the defendants have against the complainants for the purchase-money, with interest; also that the injunction be dissolved, and the defendants be at liberty to enforce the execution of the judgment; that no costs shall be allowed to the appellant in this court, and that costs shall be decreed to the defendants in the court below.

Mr. Justice DANIEL and Mr. Justice GRIER dissented.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered, 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, that a decree be entered that the defendants execute a deed of the two sections of land in question to John D. Bradford, with covenant of warranty, subject, however, to any outstanding title or titles accruing from tax-sales since the sale, and title-bond to John L. Brown of the 12th of October, 1841, and deposit the same with the clerk of the said District Court, to be delivered to the said Bradford on his surrendering and cancelling the title-bond made to him on the 9th of January, 1845, and upon his paying the judgment the defendants have against the complainants for the purchase-money with interest; also that the injunction be dissolved, and the defendants be at liberty to enforce the execution of their judgment.

And it is further ordered and decreed that each party pay his own costs in this court, and that costs shall be decreed to the defendants in the court below.

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*71] *The Richmond, Fredericksburg, and Potomac Railroad Company, Plaintiffs in Error, *v.* The Louisa Railroad Company.

The legislature of Virginia incorporated the stockholders of the Richmond, Fredericksburg, and Potomac Railroad Company, and in the charter pledged itself not to allow any other railroad to be constructed between those places, or any portion of that distance; the probable effect would be to diminish the number of passengers travelling between the one city and the other

upon the railroad authorized by that act, or to compel the said company, in order to retain such passengers, to reduce the passage-money.

Afterwards the legislature incorporated the Louisa Railroad Company, whose road came from the West and struck the first-named company's track nearly at right angles, at some distance from Richmond; and the legislature authorized the Louisa Railroad Company to cross the track of the other, and continue their road to Richmond.

In this latter grant, the obligation of the contract with the first company is not impaired within the meaning of the Constitution of the United States.[1]

In the first charter, there was an implied reservation of the power to incorporate companies to transport other articles than passengers; and if the Louisa Railroad Company should infringe upon the rights of the Richmond Company, there would be a remedy at law, but the apprehension of it will not justify an injunction to prevent them from building their road.[2]

Nor is the obligation of the contract impaired by crossing the road. A franchise may be condemned in the same manner as individual property.[3]

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[1] Followed. *Rice* v. *Railroad Co.*, 1 Black, 380.

Public grants should be strictly construed; a corporate charter confers no rights not given expressly, or by necessary implication. *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420; *Fanning* v. *Gregoire*, 16 How., 524; *Minturn* v. *Larue*, 23 Id., 435; *Curtis* v. *County of Butler*, 24 Id., 448; *Rice* v. *Minnesota &c. R. R. Co.*, 1 Black, 369; *Jefferson Branch Bank* v. *Skelly*, Id., 436; *Moran* v. *Miami County*, 2 Id., 722.

To take property already appropriated to another public use, the act of the legislature must show the intent so to do by clear and express terms, or by necessary implication, leaving no doubt or uncertainty respecting the intent. The legislature is not presumed to have abandoned the former use, and turned over the property to the later use, without clear and unmistakable expression of that intention. *Matter of New York &c. R. R. Co.*, 20 Hun (N. Y.), 201, 205.

A contract ceding to a telegraph company the exclusive right to operate and maintain its lines over the right of way of a railroad company does not debar the State, in the exercise of the right of eminent domain, from authorizing the establishment of another telegraph line over the same right of way. *New Orleans &c. R. R. Co.* v. *Southern &c. Teleg. Co.*, 53 Ala., 211. S. P. *Chicago &c. R. R. Co.* v. *Town of Lake*, 71 Ill., 333; *North Carolina &c. R. R. Co.* v. *Carolina Central R'y Co.*, 83 N. C., 489.

As to the extent of the right of one railroad company to appropriate the property of another by laying its track across the track of such other company, see *Hannibal* v. *Hannibal &c. R. R. Co.*, 49 Mo., 480.

[2] Relied on. *Jefferson Branch Bank* v. *Skelly*, 1 Black, 446.

[3] Reviewed. *B. & O. R. R. Co.* v. *P. W. & Ky. R. R. Co.*, 17 W. Va., 853. Cited. *Ashuelot R. R. Co.* v. *Elliot*, 58 N. H., 456; *Union Passenger R'y Co.* v. *Continental R'y Co.*, 11 Phil. (Pa.), 323. See also *Ohio Life Ins. Co.* v. *Debolt*, 16 How., 430; *Williams* v. *Bruffy*, 12 Otto, 254; *Greenwood* v. *Freight Co.*, 15 Otto, 22.

Strickly speaking, there is no such thing as an extinction of the right of eminent domain. If the public good requires it, all kinds of property are alike subject to it, as well that which is held under it as that which is not. Even contracts and legislative grants, which are beyond the reach of ordinary legislation, are not exempt. *New York &c. R. R. Co.* v. *Boston &c. R. R. Co.*, 36 Conn., 196. S. P. *West River Bridge Co.* v. *Dix*, 6 How., 507; *Mills* v. *St. Clair County*, 8 Id., 569; *Re Towanda Bridge Co.*, 91 Pa. St., 216; *Lake Shore &c. R'y Co.* v. *Chicago &c. R. R. Co.*, 97 Ill., 506; *Greenwood* v. *Union Freight R. R. Co.*, 15 Otto, 13; *Sixth Ave. R. R. Co.* v. *Kerr*, 72 N. Y., 330. But see *Grand Rapids &c. R. R. Co.* v. *Grand Rapids &c. R. R. Co.*, 35 Mich., 265; *Mason* v. *Harper's Ferry Bridge Co.*, 17 W. Va., 396; *West. Union Tel. Co.* v. *Amer. Union Tel. Co.*, 65 Ga., 160; s. c., 38 Am. Rep., 781; *Alexandria &c. R'y. Co.* v. *Same*, 75 Va., 780; s. c., 40 Am. Rep., 743.

(Mr. Justice DANIEL did not sit in this cause.)

THIS case was brought up from the Court of Appeals of the State of Virginia, by a writ of error, issued under the 25th section of the Judiciary Act.

The facts in the case are stated in the opinion of the court.

It was argued by *Mr. Robinson*, for the plaintiffs in error, and *Mr. Lyons* and *Mr. Johnston*, for the defendants in error.

Mr. Robinson, for the plaintiffs in error, made the following points:—

1. That, under the act passed the 25th of February, 1834, incorporating the stockholders of the Richmond, Fredericksburg, and Potomac Railroad Company, Sess. Acts, 1833–4, p. 127, there is, by force of the 38th section, copied in the record, at p. 165, and of what has been done under the act, a contract, the obligation of which cannot be impaired by any State law. *Fletcher* v. *Peck*, 6 Cranch, 135, 136, 137; *Terrett, &c.*, v. *Taylor, &c.*, 9 Id., 50; *Wilkinson* v. *Leland, &c.*, 2 Pet., 657; *State of New Jersey* v. *Wilson*, 7 Cranch, 166; *Green* v. *Biddle*, 8 Wheat., 92; *Providence Bank* v. *Billings, &c.*, 4 Pet., 560; *Dartmouth College* v. *Woodward*, 4 Wheat., 637; *State of New Jersey* v. *Wilson*, 7 Cranch, 164; *Armstrong, &c.*, v. *Treasurer *of Athens Co.*, 16 Pet., 289; *Gordon* v. *The Appeal Tax Court*, 3 How., 133.

*72]

2. That a court of equity has jurisdiction to protect the plaintiffs in the enjoyment of their chartered privileges, and should award an injunction to restrain the defendants from any acts which would impair the obligation of the contract under which the plaintiffs claim; from any acts which the defendants are bound (whether by contract or duty) to abstain from. *Green* v. *Biddle*, 8 Wheat., 91; Opinion of Kent, J., in *Livingston* v. *Van Ingen*, 9 Johns. (N. Y.), 585 to 589; *Coats* v. *Clarence Railway Company*, 1 Russ. & M., 181; 4 Cond. Eng. Ch., 378; *Frewin* v. *Lewis*, 1 Myl. & C., 255; 18 Eng. Ch., 255; *Canal Company* v. *Railroad Company*, 4 Gill. & J. (Md.), 3; *Osborn* v. *United States Bank*, 9 Wheat., 838, 841; *Stevens* v. *Keating*, 2 Phill., 334; 22 Eng. Ch., 334; *The Attorney-General* v. *The Great Northern Railway*, 3 Eng. Law & Eq., 263; *The Great Western Railroad Company* v. *The Birmingham and Oxford Railroad Company*, 2 Phill., 597; *Williams* v. *Williams*, 2 Swanst., 253; *Dietrichsen* v. *Cabburn*, 2 Phill., 52; 22 Eng. Ch., 52, and class of cases there referred to; *Kemp* v. *Sober*, 4 Eng. Law & Eq., 64.

3. That the exercise of such jurisdiction should not be declined, because of the provision in the 18th section of the

act incorporating the stockholders of the Louisa Railroad Company, Sess. Acts 1835–6, p. 174, sect. 18, or in the 13th section of the act prescribing general regulations for the incorporation of railroad companies. Sess. Acts 1836–7, p. 107, sect. 13. For even if those provisions apply to the defendants' work between the junction and Richmond, (and the plaintiffs, p. 22, insist they do not,) yet following, as they do, sections relating to proceedings for ascertaining the damages to a proprietor for the condemnation of his land, it is manifest they were only intended for the case of such a proprietor, asking for an injunction to stay the proceedings of a company which is taking his land for its work, and though under the case of *The Tuckahoe Canal Company* v. *The Tuckahoe and James River Railroad Company*, 11 Leigh (Va.), 42, cited in the answer, p. 169, 174, they may apply to land of one corporation taken for the work of another, yet they are not intended for, and are inapplicable to the case of a company enjoying a right under a contract with the State, which asks to be protected in that enjoyment against another company, claiming, not under a prior but a subsequent grant. And 2, whatever may have been the intention of those acts, yet being passed after the grant in the 38th section of the plaintiffs' charter, they cannot be allowed to impair the obligation of the contract arising under that grant; but the plaintiffs claiming under it, are entitled *to whatever is necessary to make that grant effectual and protect them in the enjoyment of their rights. *Babcock* v. *Western Railroad Corporation*, 9 Metc. (Mass.), 556; *Blakesley* v. *Whieldon*, 1 Hare, 180; 23 Eng. Ch. Rep., 180; *Green* v. *Biddle*, 8 Wheat., 75; *Bronson* v. *Kinzie et al.*, 1 How., 319; *McCracken* v. *Hayward*, 2 How., 612. [*73

4. That the court, in respect to those matters which are distinctly raised, should declare the right of the plaintiffs, and upon such declaration decree an injunction in terms ascertaining the extent of the right. *Cother* v. *The Midland Railway*, 2 Phill., 472; 22 Eng. Ch. Rep., 472.

5. That from the facts stated in the bill, and not denied, and also from the map of Mr. Crozet, it is obvious that the probable effect of allowing the defendants to have a railroad between the city of Richmond and the city of Washington, for that portion of said distance which is from the junction to Richmond, will be to diminish the number of passengers travelling between the city of Richmond and the city of Washington, upon the plaintiffs' railroad, or to compel them, in order to retain such passengers, to reduce the passage-money. And if such would be the probable effect, the de-

fendants (as is contended in the petition, as well as in the bill) should until the expiration of the thirty years mentioned in the plaintiffs' charter, have been enjoined from constructing their railroad for said portion of the distance. *Rankin* v. *Huskisson*, 4 Sim., 13; 6 Eng. Ch. Rep., 7; *Blakemore* v. *Glamorganshire Canal Navigation*, 1 Myl. & K., 154; 6 Eng. Ch. Rep., 544, and cases before cited. And the defendants having, notwithstanding the warning given by the letter of the 18th of December, 1848, and by the institution of this suit, proceeded with such construction, they might and should, at the hearing, have been enjoined, and ought now to be enjoined from further constructing or using their railroad for that portion of the distance. *Lane* v. *Newdigate*, 10 Ves., 192. And if the construction has been completed, the injunction against the use should continue not only until the expiration of said thirty years, but for such time after the thirty years as it may reasonably be supposed would be occupied in the construction, if it had not taken place within the thirty years. For, as the bill insists, the protection will not be preserved to the extent to which it is granted, if immediately on the expiration of the thirty years there can be opened for transportation, a railroad constructed within that period.

6. That although an injunction to the extent mentioned in the preceding point would, as contended in the petition, give no higher security to the plaintiffs than was intended by the legislature, yet if the court do not grant it to that extent, it *should, at least, prohibit acts, the probable effect of which would be to diminish the number of passengers travelling between the city of Richmond and the city of Washington, upon the plaintiffs' railroad, or to compel the plaintiffs, in order to retain such passengers, to reduce the passage-money; it should make such prohibition to whatever extent may be necessary to protect the plaintiffs in the enjoyment of their rights.

*74]

7. That the prohibition should be of all transportation of passengers on the defendants' railroad between Richmond and the junction; 1st, upon the ground taken in the bill, and the answer, that he who travels only over a portion of the railroad, equally with him who travels over the whole line, is, within the meaning of the 38th section of the plaintiffs' charter, a passenger travelling between (that is, over the whole, or some part of the intermediate space between) the cities of Richmond and Washington; a ground sustained in part by the judge, and strongly fortified by the views presented in the petition, and, 2d, upon the ground that such

prohibition is necessary to protect the plaintiffs in respect to passengers travelling the whole distance between those cities. For, in the absence of such prohibition, the Louisa company may take passengers at reduced rates between Richmond and the junction, as pointed out in the bill, and between the junction and Washington or Alexandria give through tickets in conjunction with the Orange and Alexandria railroad.

8. That if the court do not prohibit all transportation of passengers on the defendants' railroad between Richmond and the junction, it should, at the least, prohibit the transportation by the defendants on their railroad of passengers travelling between the city of Richmond and the city of Washington. The necessity for an injunction to this extent is not at all obviated by the concession remarked on in the answer. Nor is the remark of the judge, that "to award the injunction now would be to inflict a present, certain, and serious injury upon one party, to prevent a remote, uncertain, and possible injury to the other," well founded as to the injunction here proposed. For no injury is inflicted on the defendants by requiring them to abstain from what it is their duty to abstain from. While on the other hand, a remedy far more effectual than any at law can be had in equity through its restraining power, which besides awarding the injunction as here proposed, may, and it is submitted, should in aid of such injunction, prohibit through tickets between Richmond and Washington, at points south of Richmond and north of Washington, by the Louisa road.

9. That the final decree in these suits in the State court, should be reversed in the Supreme Court; and this court should *proceed to pass such decree as the State court which made such final decree should have passed, to wit: in the second case, for obvious reasons, some of which are stated in the answer to the bill in that case, it should dissolve the injunction and dismiss the bill with costs; and in the first and principal case, it should award such injunction as is proper, and decree against the defendants the costs. The writ of error issued under the act of Congress, is to be so used as to effect the object. *Gelston* v. *Hoyt*, 3 Wheat., 303. The mandate for execution should issue to the Circuit Court of Chancery for the county of Henrico. *Clerke* v. *Harwood*, 3 Dall., 342. [*75

The points made by the counsel for the defendants in error, were the following:

I. That this court has no jurisdiction of the case, the court of final resort in Virginia not having pronounced a final decree or judgment, but having simply refused to relieve the

complainants by injunction, in the face of the statute of the State. This refusal to allow an appeal is no affirmance of the reasons of the court below.

II. That the appellants have not such a monopoly as they claim. That the grant which they insist upon as contained in the 38th section of their charter is void: 1. Because it is unintelligible. 2. Because it is impracticable, as no standard is furnished in the charter, or elsewhere, by which any tribunal can determine what is the extent of the grant or its limitation; and, therefore, no means exist by which to determine when the grant is violated, and when not, according to its terms; no distance being furnished within which, to the right or left of the existing road, another road shall not be made. The franchise claimed is, therefore, undefined, and therefore void; or, if defined, as the appellants insist, it confers upon them an unlimited power over the territory, highways, and people of Virginia, and over the legislative power of the State, and the power to advance and improve the State, which the legislature had no power to confer, and therefore it is void.

One legislature had no power to say to all future legislatures that there should never be more than one railroad between Richmond and Washington, without regard to the wants of the country and the capacity of this road to meet them; or that there should be but one for thirty years; and still less could it transfer the right so to declare to a petty corporation. The change of the form does not increase the power; the defect still is a want of power. The name of "contract" cannot conceal or justify the usurpation. The power of internal improvement over the State generally, or over a large portion of it, cannot be bartered away by the legislature. The legislature is *clothed with power for the benefit of the people, and the improvement of the State, and a law declaring that it shall not be improved, would be a gross abuse, a usurpation, in fact, of power, which would be void. To that extent the monopoly here claimed goes, if sustained.

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III. If the grant is worth any thing, it is only by giving it a reasonable interpretation, having regard to the end proposed, the general interest of the community, and the power of the legislature; and thus interpreted, it only means that the appellants should have a monopoly of the passengers travelling from Richmond to Washington directly, or to such intermediate point as the Fredericksburg railroad could carry them to. This interpretation the appellants deny, and thus make their grant unintelligible. It was not intended to

forbid the construction of a railroad to Winchester, or the Ohio, because, when a passenger reached either of those points, he might get on the Baltimore and Ohio road, and thus get to Washington. Nor was it intended that the people residing five, ten, or twenty miles east and west of the Fredericksburg road, should be denied for thirty years the use of a railroad, unless they would first travel to, and then travel upon, the Fredericksburg railroad.

Taking this view, the most favorable for the appellants which can be taken, the decree in Virginia is correct.

IV. The grant to the appellants, under the most enlarged and extravagant view of it, relates only to the profits of passengers. It has no reference to freights, and was never intended to have, and if intended, cannot, by its words, have the effect to denude the legislature of the power to authorize a railroad to carry agricultural products, and other freights; and therefore the decree in Virginia was right. The court had, therefore, no power to prevent the construction of the road. If it could do any thing, it could only restrain the improper use of it, when a proper case should be made, which was not made by the appellants.

V. There was no violation of the rights of the appellants in authorizing the Louisa Company to cross their road, because they could do so only upon condition of paying the value of the privilege, even to the extent, if necessary, of the entire value of the franchise. A franchise is but a qualified property, and cannot, therefore, be more sacred and inviolable than the unqualified property of the owner in fee, whose property is condemned for the purposes of the franchise; over every franchise the "*jus publicum*" must prevail, as it does over all other property. 3 Leigh (Va.), 318; 11 Id., 42; 11 Pet., 544, 549, 567, 638, 641, 646, 6 How., 507.

If the opposite conclusion can be maintained, then the monstrous result follows, that the railroad of the appellants is an *impassable barrier between Eastern and Western Virginia, which can never, at any point, be crossed [*77 by another railroad. The legislature never intended to erect such a barrier, and had not the power to do it if they would.

VI. If the appellants sustained any wrong, their remedy was not by injunction. 1. Because an injunction must have inflicted enormous and certain mischief upon the appellees, while the injury to the appellants, if it was denied, was uncertain, hypothetical, and might never occur, and could be redressed without an injunction. In such cases an injunction is never awarded.

2. Because the chancery courts in Virginia have, by law,

no jurisdiction to grant an injunction in a case like the present. (See acts referred to in the answer, viz., 13th sect. of Gen. Railroad Law, 1837, and 18th sect. of the Charter of the Louisa Company.) And Virginia alone can prescribe the jurisdiction of her own courts. She can mould her remedies as she pleases. She can abolish her chancery courts as New York has done, or she can define their jurisdiction at pleasure; and this court has no power to say that she shall have chancery courts, or, if she has them, they shall exercise a jurisdiction forbidden by her laws. She may be bound to provide some remedy for wrong, but she is the exclusive and sovereign judge of the form of the remedy. But she is not bound to furnish any remedy for the courts of the United States. The judiciary act of the United States applies only when she does provide a remedy.

VII. As to the last bill filed by the appellants, this court can have no jurisdiction. A refusal of an injunction is not a final decree under any interpretation of those words, for a new bill may be presented every day, and the refusal of one is no bar to another. A court may refuse an injunction, and yet at the hearing decide for the plaintiff.

The Supreme Court of the United States does not sit to revise the Virginia chancellors upon applications for injunctions.

The following authorities will be relied upon in the argument by the counsel for the appellees, viz.:—

I. 6 How., 209; *Gibbons* v. *Ogden*, 6 Wheat., 448.

II. 11 Pet., 467, 547; 6 Cranch, 133, 135; 3 Dall., 388; Vattel, 4, 14, 40, 41; Domat, book 1, tit. 6, sect. 1; Puffend., book 8, c. 5, sect. 7; *Attorney-General* v. *Burridge*, 10 Price, 372, 373; Locke on Government, 304, 307.

III. Johnson's Dictionary—"Between."

V. Vattel, 40, 41, 103; *Hawkins* v. *Barney's Lessee*, 5 Pet., 457; *Coats* v. *The Clarence Railway Co.*, 1 Russ. & M., 181.

VI. Eden on Injunc., 236; *Earl of Ripon et al.* v. *Hobart*, 3 Myl. & K., 169, 174; *Attorney-General* v. *Nichol*, 16 Ves., 342, *Bonaparte* v. *The Camden & Amboy Railroad*, 1 Baldw., 205; *Jackson* v. *Lamphire*, 3 Pet., 280.

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Mr. Justice GRIER delivered the opinion of the court.

This case comes before us on a writ of error to the Court of Appeals of Virginia.

The appellants filed their bill in the Superior Court of Chancery for the Richmond Circuit, setting forth that, on the 25th of February, 1834, the General Assembly of Virginia passed an act entitled "An act to incorporate the stockholders of the

Richmond, Fredericksburg and Potomac Railroad Company." That in order to induce persons to embark their capital in a work of great public utility, the legislature pledged itself to the said company, that, in the event of the completion of said road from the city of Richmond to the town of Fredericksburg, within a certain time limited by said act, the General Assembly would not, for the period of thirty years from the completion of said railroad, allow any other railroad to be constructed between those places, or any portion of that distance, the probable effect of which would be to diminish the number of passengers travelling between the one city and the other upon the railroad authorized by said act, or to compel the said company, in order to retain such passengers, to reduce the passage-money; that the stock was afterwards subscribed, the charter issued, and the road constructed, within the time limited by the act; that on the 18th of February, 1836, an act was passed incorporating "The Louisa Railroad Company, for the purpose of constructing a railroad from some point on the line of the Richmond, Fredericksburg and Potomac Railroad, in the neighborhood of Taylorsville, passing by or near Louisa court-house, to a point in the county of Orange, near the eastern base of the south-west mountains, with leave to extend it to Blue Ridge, or across the same to Harrisonburg; that on the 28th of December, 1838, this railroad was opened from Louisa court-house to the junction with complainants' road. The bill then gives a history of the several contracts made between the two companies for the transportation of the freight and passengers of the Louisa railroad from the junction to Richmond, and of the frequent and protracted disputes and difficulties which arose between the two corporations on the subject of the compensation to be paid to the complainants for such services, the particulars of which it is unnecessary to mention; the result being, that the respondents insisting that the demands made by complainants for this service were exorbitant and oppressive, finally petitioned the legislature for leave to extend their road from the junction to the city of Richmond. That complainants resisted, and protested against the passage *of such an act, as an infringement of the rights guaranteed to them by their act of incorporation. Nevertheless, the legislature on the 23d of March, 1848, passed an act authorizing the respondents to extend their road from the junction to the dock, in the city of Richmond, unless the complainants would comply with certain terms which were deemed reasonable; and these terms being refused by the complainants, the respondents commenced the construction of their [*79

road to Richmond, and to extend it across the road of complainants at the junction.

The bill insists that the grant of the act of the 27th of March, 1848, to the Louisa Railroad Company, is inconsistent with the previous grant to complainants, and impairs the obligation of the contract made with them; that the lands condemned for their franchise cannot be taken from the complainants for the use of the respondents, and that they have, therefore, no right to build their road across the road of complainants. It prays, therefore, that the respondents may be enjoined: 1st. From entering upon any lands which have been condemned for the use of complainants' road, for the purpose of constructing a railroad across it; 2d. That the respondents may be enjoined from all further proceedings towards the construction of a railroad between the junction and the city of Richmond; and, 3d. That they may be enjoined from "transporting on the railroad so proposed, persons, property, or the mail, and especially from transporting passengers travelling between the city of Richmond and the city of Washington."

The respondents, in their answer, deny "that the act of Assembly which authorizes them to construct their road from its terminus at the city of Richmond, in any manner violates the bill of rights, or Constitution of Virginia, or the Constitution of the United States, or any right guaranteed to the complainants by their act of incorporation. They deny, also, that it is their purpose to invade or violate any right or privileges of the complainants by the manner in which they shall use their road if they are permitted to construct it."

The State court decided: 1st. That the privilege or monopoly guaranteed to the complainants by the the 38th section of their act of incorporation, was that of transporting passengers between Richmond and Washington; but that the legislature, by that enactment, did not part with the power to authorize the construction of railroads between Richmond and Fredericksburg for other purposes; that they had, therefore, the right to authorize the extension of respondents' road to the dock in the city of Richmond, and consequently the court refused to enjoin the respondents from constructing their road. 2d. That a grant of a franchise to one company

*80] to make a railroad or canal, is not *infringed by authorizing another railroad or canal to be laid across it, on paying such damages as may accrue to the first, in consequence thereof. The injunction for this purpose was therefore refused.

3d. "That if the Louisa Company shall hereafter use their

road by transporting passengers in violation of the rights guaranteed to the complainants by the 38th section of their charter, the remedy at law seems to be plain, easy, and adequate; if, however, it should, from any cause, prove to be inadequate, it may be proper to interpose by injunction, and that will depend on the facts which may then be made to appear."

The decree having dismissed the complainants bill, was "a final decree or judgment"; and that decree having been affirmed by the Court of Appeals by their refusal to entertain an appeal; and, moreover, the record showing that "there was drawn in question the validity of a statute and authority exercised under the State of Virginia," "on the ground of their being repugnant" to that clause of "the Constitution of the United States" which forbids a State to pass "any law impairing the obligation of contracts"; and "the decision of the court being in favor of their validity," there can be no doubt of the jurisdiction of this court to review the decision of the State court.[1]

For this purpose, it will be necessary to set forth, at length, the 38th section of the act of incorporation of the company complainant, which contains the pledge or contract which their bill claims to have been impaired or infringed by the act of 1848, authorizing the respondents to continue their road from the junction to the dock in Richmond. It is as follows:—

"And whereas the railroad authorized by this act will form a part of the main northern and southern route between the city of Richmond and the city of Washington, and the privilege of transporting passengers on the same, and receiving the passage-money, will, it is believed, be a strong inducement for individuals to subscribe for stock in the company, and the General Assembly considers it just and reasonable that those who embark in the enterprise should not be hereafter deprived of that which forms a chief inducement to the undertaking.

"38. *Be it therefore enacted and declared, and the General Assembly pledges itself to the said company*, That, in the event of the completion of the said railroad from the city of Richmond to the town of Fredericksburg, within the time limited by this act, the General Assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of

[1] CITED. *Gregory* v. *McVeigh*, 23 Wall., 306; *Williams* v. *Bruffy*, 12 Otto, 254; s. c., 1 Morr. Tr., 413.

Richmond and the city of Washington, or for any portion of the said distance, the probable effect of which would be to *81] diminish the number *of passengers travelling between the one city and the other, upon the railroad authorized by this act, or to compel the company, in order to retain such passengers, to reduce the passage-money: *Provided, however*, That nothing herein contained shall be so construed as to prevent the legislature, at any time hereafter, from authorizing the construction of a railroad between the city of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said city of Richmond and the said towns: *And provided, also*, That nothing herein contained shall be construed to prevent the General Assembly from chartering any other company or companies to construct a railroad from Fredericksburg to the city of Washington."

Two objections were made by counsel to the validity of this act, on which we do not think it necessary to express an opinion. They are: 1st. That one legislature cannot restrain, control, or bargain away the power of future legislatures, to authorize public improvements for the benefit of the people. 2d. That the grant made by this section is void for uncertainty, being both unintelligible and impracticable, furnishing no standard by which any tribunal can determine when the grant is violated and when not, according to its terms.

For the purposes of the present decision, we shall assume that the legislature of Virginia had full power to make this contract, and that the State is bound by it; and moreover, that the franchise granted is sufficiently defined and practicable for the court to determine its extent and limitations.

It is a settled rule of construction adopted by this court, "that public grants are to be construed strictly."

This act contains the grant of certain privileges by the public, to a private corporation, and in a matter where the public interest is concerned; and the rule of construction in all such cases is now fully established to be this: "That any ambiguity in the terms of the contract must operate against the corporation, and in favor of the public; and the corporation can claim nothing but what is clearly given by the act." See *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 544.

Construing this act with these principles in view, where do we find that the legislature have contracted to part with the power of constructing other railroads, even between Richmond and Fredericksburg, for carrying coal or other freight? Much less can they be said to have contracted, that no railroad connected with the western part of the State, shall be suffered to cross the complainants' road, or run parallel to it,

in any portion of its route. Such contract cannot be elicited from the letter or spirit of this section of the act.

On the contrary, the preamble connected with this section *shows that the complainants' road was expected to [*82 "form a part of the main northern and southern route between the city of Richmond and the city of Washington"; and the inducement held out to those who should subscribe to its stock, was a monopoly "of transporting passengers" on this route, and this is all that is pledged or guaranteed to them, or intended so to be, by the act. It contains no pledge that the State of Virginia will not allow any other railroad to be constructed between those points, or any portion of the distance for any purpose; but only a road, "the probable effect of which would be to diminish the number of passengers travelling between the one city and the other, upon the railroad authorized by the act," or to compel the company to reduce the passage-money.

That the respondents will not be allowed to carry the passengers travelling between the city of Richmond and the city of Washington, is admitted; and they deny any intention of so exercising their franchise as to interfere with the rights secured to complainants. That the parties will differ widely as to the construction of the grant owing to the ambiguity created by the use of the word "between," as it may affect the transportation of passengers travelling to or from the west, is more than probable. But on this application for an injunction against the construction of respondents' road, the chancellor was not bound to decide the question, by anticipation: And, although he may have thrown out some intimation as to his present opinion on that question, he has very properly left it open for future decisions, to be settled by a suit at law, or in equity, "upon the facts of the case as they may then appear." But however probable this dispute or contest may be, it is not for this court to anticipate it, and volunteer an opinion in advance.

The act of 1848, authorizing the extension of the complainants' road, is silent as to any grant of power to transport passengers, so as to interfere with the pledge given to complainants; and it is sufficient for the decision of the case before us, to say, that the grant of authority to respondents to extend their road from the junction to the dock at the city of Richmond, does not, *per se*, impair the obligation of the contract contained in the 38th section of complainants' charter. The conditions annexed to the grant to respondents, by which the complainants were enabled to defeat it, cannot affect the question in any way. If the 38th section of the act of incor-

poration of complainants does not restrain the legislature from constructing another railroad for any purpose, parallel or near to the complainants', the respondents have a right to proceed with the construction of their road, and the State court was justified in refusing the injunction.

The counsel, very properly, have not insisted in their argument *in this court, on this point made in their bill, that the legislature had no power to authorize the construction of one railroad across another. The grant of a franchise is of no higher order, and confers no more sacred title, than a grant of land to an individual; and, when the public necessities require it, the one, as well as the other, may be taken for public purposes on making suitable compensation; nor does such an exercise of the right of eminent domain interfere with the inviolability of contracts. See *West River Bridge Company* v. *Dix*, 6 How., 507.

*83]

Leaving, therefore, the question, as to the proper construction of the contract or rights guaranteed to the complainants, by this section of their charter, to be settled when a proper case arises, we are of opinion that the State court did not err in refusing to enjoin respondents from constructing their road according to the authority given them by the act of Assembly of 27th March, 1848, and that said act does not impair the obligation of the contract made with the complainants, in the 38th section of their act of incorporation. The judgment of the Court of Appeals of Virginia is therefore affirmed, with costs.

Mr. Justice McLEAN, Mr. Justice WAYNE, and Mr. Justice CURTIS dissented.

Mr. Justice CURTIS.

I have been unable to agree with the majority of the court in this case, and some of the principles on which a decision depends are of so much importance, as affecting legislation, that I think it proper to state my opinion and the reasons on which it rests.

That the 38th section of the complainants' charter contains a contract between the corporation and the State, the obligation of which the latter cannot impair by any law, must, I think, be admitted. Whether "An act for the extension of the Louisa Railroad to the dock in the city of Richmond," does impair that obligation, depends upon the interpretation which the contract requires; and, inasmuch as it is the duty of this court to determine whether the obligation of the con-

tract has been impaired, it is necessarily its duty to decide, what is the true interpretation of the contract.

The 38th section, with its preamble, are as follows:

"And whereas the railroad authorized by this act will form a part of the main northern and southern route between the city of Richmond and the city of Washington, and *the privilege of transporting passengers on the same*, and receiving the passage-money, will, it is believed, be a strong inducement to individuals to subscribe for stock in the company, and the General Assembly *considers it just and reasonable [*84 that those who embark in the enterprise should not be hereafter *deprived of that* which forms a chief inducement to the undertaking,

"38. *Be it therefore enacted and declared, and the General Assembly pledges itself to the said company*, That in the event of the completion of the said railroad from the city of Richmond to the town of Fredericksburg, within the time limited by this act, the General Assembly will not, for the period of thirty years from the completion of the said railroad, allow any other railroad to be constructed between the city of Richmond and the city of Washington, *or for any portion of the said distance, the probable effect of which would be to diminish the number of passengers travelling between the one city and the other, upon the railroad authorized by this act*, or to compel the company, in order to retain such passengers, to reduce the passage-money: *Provided, however*, That nothing herein contained shall be so construed as to prevent the legislature, at any time hereafter, from authorizing the construction of a railroad between the city of Richmond and the towns of Tappahannock or Urbana, or to any intermediate points between the said city of Richmond and the said towns; *And provided, also*, That nothing herein contained shall be construed to prevent the General Assembly from chartering any other company or companies to construct a railroad from Fredericksburg to the city of Washington."

The preamble in effect declares what general object the parties have in view, and the section makes known to what extent and by what means that subject is to be accomplished. That general object is to secure the corporation from being deprived of the passenger travel on its railroad; and the means of prevention are, to prohibit for thirty years the existence of any other road, the probable effect of which would be to diminish the number of passengers travelling between Washington and Richmond upon the railroad of the complainants.

The first question is, whether what is called the extension

of the Louisa road, is a railroad, the probable effect of which would be to diminish those passengers; and this depends on what passengers are referred to in the contract.

It is maintained by the appellees that only passengers travelling the distance between Washington and Richmond are intended; but this is not consistent either with the substantial object of the parties, or with the language they have employed to make known their agreement. "The privilege of transporting passengers *on the same* and receiving the passage-money," and protection from being "deprived of *that* which forms the chief inducement of the undertaking," would be but imperfectly secured, if limited to one particular class of passengers only. Such a *limitation inconsistent with the apparent object of the parties is not to be engrafted on the contract unless clearly expressed. It is said that the words "passengers travelling between the one city and the other," contain this limitation, their meaning being passengers travelling from one city to the other. The word "between" in this clause admits of that interpretation, but does not require it. That word may also designate any part of the intermediate space, as well as the whole. It may be correctly said that the complainants' railroad is between Richmond and Washington, though it does not traverse the whole distance from one of those cities to the other, and the words which immediately follow, certainly tend strongly to show that it was in this last and more comprehensive sense the word "between" was here used. The whole clause is, "passengers travelling between one city and the other, *upon the railroad authorized by this act*." But the railroad there referred to, upon the completion of which this contract was to take effect, was only to be from Richmond to Fredericksburg, so that, strictly speaking, passengers could not travel to or from the city of Washington upon the railroad authorized by the act; they could thus pass over only a part of the intermediate space between Washington and Richmond. This clause therefore does not control the evident general intent of the parties to protect the passenger travel, but rather tends to make that general intent more clear. The question being whether the travellers referred to are only those going the whole distance, and one part of the descriptive words, designating where they are travelling, being ambiguous, and the other part which points out how they are travelling, being clear, the result of the whole is to include all who travel in the intermediate space between the two cities, upon the complainants' railroad. And this construction is still further strengthened by the stipulation that the

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State will not authorize another road "to be constructed between the city of Washington and the city of Richmond, *or for any portion of the said distance*"; for if the object of parties was merely to protect the enjoyment by the complainants of the tolls derivable from passengers going from one of those cities to the other, it is highly improbable that the State would have agreed to this broad restriction. Construing the preamble and the section together, I think it was the intention of the parties to secure to the complainants, for the period of thirty years, the exclusive enjoyment of all the railroad passenger travel over every part of the line between Washington and Richmond; and that the mode of security agreed on by the parties was, that the State should not authorize the construction of any such railroad as might probably interfere with that exclusive enjoyment.

*In coming to this conclusion I have not overlooked the rule, that grants from States to corporations of such exclusive privileges, are to be construed most strongly against the grantees. But this rule, like its converse, *fortius contrà proferentem*, which applies to private grants, is the last to be resorted to, and never to be relied upon, but when all other rules of exposition fail. Bac. Max. reg. 3; 2 Bl. Com., 380; *Love* v. *Pares*, 13 East, 86. In *Hindekoper's Lessee* v. *Douglass*, 3 Cranch, 70, Chief Justice Marshall says: "This is a contract; and although a State is a party it ought to be construed according to those well established principles which regulate contracts generally." A grant such as is now in question, in consideration of the grantees risking their capital in an untried enterprise, which, if successful will greatly promote the public good, in no proper sense confers a monopoly. It enables the grantees to enjoy, for a limited time, what they may justly be considered as creating. It is in substance and reality, as well as in legal effect, a contract, and in my judgment it is the duty of the court to give it such a construction as will carry it into full effect; imposing on the public no restriction, and no burden, not stipulated for, and depriving the company of no advantage, which the contract, fairly construed, gives. This is required by good faith; and to its demands all technical rules, designed to help the mind to correct conclusions, must yield. Having come to the conclusion that the intention of the parties to this contract was to secure to the complainants exclusive enjoyment of all railroad passenger travel over every part of the distance between Richmond and Washington for thirty years, and that the means adopted to effect this object was the promise of the State to authorize the construction of no railroad which [*86

might probably interfere with that exclusive enjoyment, the next inquiry is, whether the extension of the Louisa Railroad to the dock in the city of Richmond would probably have that effect. This act enables the Louisa Railroad Company to extend their road, from its junction with the complainants' road, at a point about twenty-four miles from Richmond, to that city, and thus to make another railroad between Richmond and that point on the complainants' road.

That this authority comes within that part of the restrictive stipulation, which describes the route over which another railroad is not to be built, is clear; for it does authorize "another railroad," "for a portion of the distance" "between the cities of Richmond and Washington." But it is said that it does not come within the residue of the restrictive clause, because its probable effect will not be to diminish that passenger travel designed to be secured to the complainants. To this I cannot assent. The Louisa Company, by their original
*87] charter, are *expressly authorized to carry passengers on their railroad, and when they are empowered by the act now in question to extend their road, it is a necessary implication that the extension is for the same uses, and subject to the same rights, and powers, and privileges as the original road, to which it is to be annexed. And accordingly we find, that by the 5th section of this act, the legislature has prescribed a limit of tolls, as well for passengers as for merchandise, coming from or going to another railroad and passing over the whole length of the Louisa road and each part of it, including the extension.

Passengers using the complainants' road between Richmond and the junction, may be divided into three classes. Those who travel the whole, or a part of the distance between Richmond and the junction, and do not go beyond the junction; those who do go to, or come from points beyond the junction on the complainants' road; and those who travel on the Louisa road, beyond the junction, going west, or coming east. The extension of the Louisa road is adapted to carry all these, and by the act complained of, the Louisa Company is authorized to construct a road to carry them. It may certainly be assumed, that a corporation, created to conduct a particular business for profit, will do all such business as it is its clear interest, and within its authority to do, and which it was created for the very purpose of doing. And if so, the effect of this extension must be, to transport thereon a part of all these classes of passengers, and thus to diminish the number of those same classes of passengers, who, at the time of the passage of the act in question, used the complainants' road.

As to those passengers who do not use the Louisa road beyond the junction, I am at a loss to perceive any reason why they are not within the description of passenger travel designed to be secured to the complainants; and if they are excluded therefrom, I know of none who would be included, unless upon the interpretation already considered and rejected, that the contract was designed to embrace only passengers travelling the entire distance between Richmond and Washington. It is not absolutely necessary to go any further to find that this extension act impairs the obligation of the contract, by authorizing another road to be built, the probable effect of which would be, to diminish the number of passengers travelling on the complainants' road between the junction and Richmond. But it is clear to my mind, that the third class of passengers using the Louisa road, are as much within this contract as any others. To explain my views on this point, it is necessary to refer to a few dates.

The complainants were incorporated in February, 1834, and their act of incorporation contained the compact now *relied on. Their road was completed and opened for use in January, 1837. In February, 1836, an act was [*88 passed incorporating the stockholders of the Louisa Railroad Company. In December, 1838, the Louisa road was opened for use to the Louisa court-house, and from that time to March, 1848, the passengers using the Louisa road, going to or coming from Richmond, and points between that city and the junction, passed over the road of the complainants. In March, 1848, the complainants and the Louisa Company having differed concerning the tolls to be charged by the former on passengers and merchandise going to or coming from the Louisa road, the legislature passed the "Act for the extension of the Louisa Railroad," which contains the following section:—"Be it further enacted, that in case the Richmond, Fredericksburg, and Potomac Railroad Company shall, at the next annual meeting of the stockholders, stipulate and agree, from and after the expiration of the present contract with the Louisa Railroad Company, to carry all passengers and freight coming from the Louisa Railroad from the junction to the city of Richmond, at the same rate per mile as may at the same time be charged by the Louisa Railroad Company on the same passengers and freight; and shall also agree to carry all passengers and freight entered at the city of Richmond for any point on the Louisa Railroad, at the same rate per mile as is charged at the time for the same, by the Louisa Railroad Company: and shall also agree to submit to the umpirage of some third person or persons, to be chosen by

the said companies, the compensation to the Richmond, Fredericksburg, and Potomac Railroad Company for collecting at the depots in Richmond the dues of the Louisa Railroad Company, and any other matters of controversy which may arise between the said companies owing to the connection between them, then this act to be void, or else to remain in full force." It will thus be seen that the passenger travel, which it is the object of this act to take away from the complainants' road, had been *de facto* a part of its passenger travel between Richmond and the junction for about ten years. It is maintained that as the Louisa Railroad, from the junction westward, was the cause of the existence of this travel upon the complainants' road, between Richmond and the junction, the Louisa corporation might be empowered to construct another road between those points for the purpose of doing that business. In other words, that passenger travel actually existing on the complainants' road, may properly be diminished by the construction of another road for a part of the distance between Richmond and Washington, provided it be done by a party who at some prior time was instrumental in increasing the
*89] passenger travel; *that we are to inquire whether by this new and competing road any more is to be taken away than was brought by the corporation which builds it, and if not, then the competing road does not diminish the number of passengers, travelling on the complainants' road, within the fair meaning of this contract. I cannot give to this contract such a construction. It seems to me to be at variance with its express terms and with what must have been within the contemplation of the parties when it was entered into. The promise not to authorize any other railroad between Washington and Richmond, or for any part of that distance, the probable effect of which would be to diminish the number of passengers travelling on the complainants' railroad is absolute and unqualified. It contains no reservation in favor of parties who have been instrumental in bringing that travel to the complainants' road. It extends over the period of thirty years, and applies to the travel actually existing thereon during every part of that period, to whatever causes its existence there may be attributable. It must have been contemplated by the parties that the number of travellers on the complainants' road would increase during the long period of thirty years; it must have been known to them that this increase would be likely to arise, among other causes, from the increased number of passengers coming laterally to the line, in consequence of the construction of other railroads, as well as from increased facilities of access by other means.

They enter into a contract which by its terms protects this increased travel during the whole period, and by whatever causes produced, just as much as it protects the travel existing during the first month after the opening of the road. How then can we engraft upon the contract an exception not found there, and say, that when it speaks generally of passengers travelling upon the road, it does not mean passengers which another railroad corporation has brought there? I am unable to see why not, as much as if a steamboat or stage company had brought them. In my opinion this class of passengers on the complainants' road, are as truly within the contract as any others; and a railroad, the object of which is to take away this class of passengers from the complainants' road, is one which the State has promised it would not authorize to be built.

Parties may agree, not only on the substantial rights to be protected, but on the particular mode of protecting them; and if they do agree on a particular mode, it becomes a part of their contract, which each party have a just right to have executed. In this compact the parties have agreed on the mode of protection. It is that the State will not authorize to be built any other railroad, which would probably have the effect to diminish the *number of passengers on the complainants' road. It is the right to construct, and not the right to use which the contract restrains. To say that the State may properly authorize a road to be built, the purpose of which is to carry passengers, and thus diminish the number of passengers on the complainants' road, but that the road thus authorized must not be used to the injury of the complainants' rights, is to strike out of the contract the stipulation that such a road should not be authorized to be built. The power of the State to enable a corporation to build another road to carry merchandise only, seems to me to have nothing to do with this question. When the legislature shall adjudge that the public convenience requires another railroad there, to carry merchandise only, and that therefore the power of eminent domain may be exercised to build it, and when a company is found ready to accept such a charter, and risk their funds in its construction, then a case will arise under the power of the legislature to authorize a road for the transportation of merchandise only. But in the law now in question the legislature has not so adjudged; no such charter has been granted, or accepted, and no such road built; but one which the State is by its own promise restrained from authorizing. It seems quite aside from the true inquiry, therefore, to urge that the State might have [*90

empowered a company to make a railroad on which to transport merchandise only; for it has not done so.

It has been suggested by one of the defendants' counsel, that though the power of the legislature to enter into a compact for some exclusive privileges is not denied, yet that the legislature had not power to grant such privileges as are here claimed by the complainants, and therefore the State is not bound thereby. This is rested not upon any express restriction on the powers of the legislature, contained in the Constitution of Virginia, but upon limitations resulting by necessary implication from the nature of the delegated power confided by the people of that State to their government. But if, as must be, and is admitted, it is one of the powers incident to a sovereign State to make grants of rights, corporeal and incorporeal, for the promotion of the public good, it necessarily follows that the legislature must judge how extensive the public good requires those rights to be. Whether the State shall grant one acre of land, or one thousand acres; whether it shall stipulate for the enjoyment of an incorporeal right, in fee, for life or years; whether that incorporeal right shall extend to one, or more subjects; and what shall be deemed a fit consideration for the grant in either case, is intrusted to the discretion of the legislative power, when that discretion is not restrained by the constitution under which it acts. This has been the interpretation by all courts, and the practice under all *constitutions in the country so far as I know, and it seems to me to be correct. See *Piscataqua Bridge* v. *New Hamp. Bridge*, 7 N. H., 35, and cases there cited; *Enfield Bridge* v. *The Hart. & N. H. R. R. Co.*, 17 Conn., 40; *Washington Bridge* v. *State*, 18 Conn., 53.

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It remains to consider whether this court has jurisdiction to reverse the decision of the State court.

The Court of Appeals having refused to entertain an appeal, the superior Court of Chancery of the Richmond Circuit, was the highest court of the State, to which the complainants could carry the case; and it is to the decision of that court we must look. The questions are whether that court erroneously decided against a right claimed by the complainants under the Constitution of the United States, and whether the bill was dismissed by reason of that erroneous decision. The points decided are set out with great clearness upon the face of the decree. Their substance is, that the construction of this extension road is lawful, the legislature having power to authorize it; that it may lawfully be used for the transportation of passengers, who, but for the existence of the Louisa road would never have come on to the line of the

Fredericksburg road; that whether the Louisa Company will use the extension for the transportation of any other passengers, and thus infringe complainants' rights, does not appear; when the supposed case shall occur, it may be proper to interfere by injunction, if, upon the facts of that case as they shall appear, there is not a plain, adequate, and complete remedy at law.

It is clear, then, that the Chancellor decided, against the right claimed by the complainants, under the Constitution, that this extension should not be constructed. In my opinion, this decision was erroneous. It is clear, also, that he decided against their right, under the Constitution, to be protected in the enjoyment of the passenger travel coming upon their road, in consequence of the existence of the Louisa road. I think this was also erroneous. By reason of these decisions the bill was dismissed. They left nothing but a case of contingent damage, which would not happen at all, if the Louisa Company should carry only the passengers coming upon the line of the complainants' railroad by reason of the existence of the Louisa road; there was no certainty to what extent, or under which circumstances, or whether at all, the complainants' rights would be infringed.

Upon these views of the contract of the State, and the rights of the complainants, it necessarily followed that the bill was to be dismissed; for equity would not interfere in a case where the defendants had valuable rights and powers, which they might not *exceed, and which they ought not to be restrained from exercising. But on the other [*92 hand if the defendants had no such rights, or powers; if they were claiming them and about to exercise them, in a manner certain to inflict great and continuing injury on the complainants, the extent of which injury a court of law could not fully ascertain, and could redress, even partially, only by a great multiplicity of suits, then no court of chancery would hesitate to grant relief. It is certain therefore that this bill was dismissed, by reason of, what I consider, the erroneous views taken by the chancellor, of the rights claimed by the complainant under the Constitution of the United States.

It has been argued that by the local law of Virginia, contained in the general railroad act of that State, the chancellor had not jurisdiction to grant an injunction to restrain the construction of the extension road. If the chancellor had so decided and dismissed the bill, for that reason this court could not reverse that decision. But he did not so decide; and I cannot infer that he would so decide if this case were

to be remanded, because I am of opinion that the statute relied on has no application to this case.

My opinion is that the decree of the Superior Court of Chancery should be reversed and the case remanded, with such directions as would secure to the complainants the remedy to which they are entitled, to prevent the violation of rights, secured to them by the Constitution of the United States.

ORDER.

This cause came on to be heard on the transcript of the record from the Court of Appeals of the Commonwealth of Virginia, 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 Court of Appeals in this cause be, and the same is hereby affirmed with costs.

HENRY PARISH, DANIEL PARISH, LEROY M. WILEY, JOHN R. MARSHALL, THOMAS P. NORRIS, AND THOMAS PARISH, MERCHANTS AND PARTNERS TRADING UNDER THE FIRM AND STYLE OF PARISH & CO., APPELLANTS, *v.* CALEB MURPHREE, ADMINISTRATOR OF GEORGE GOFFE, DECEASED; LOUISA C. GOFFE, THOMAS WILLIAMS, JR., JOHN H. HENDERSON, TRUSTEE, &C., MARTHA LUCY, ADDISON BOYKIN AND WIFE, ELIZABETH G. GOFFE, CALVIN NORRIS, AND DAVID STRODER.

The Statute of Frauds in the State of Alabama declares void conveyances made for the purpose of hindering or defrauding creditors of their just debts.

*93] *Where a person made a settlement upon his wife and children, owing at that time a large sum of money, for which he was soon afterwards sued, and became insolvent, these circumstances, with other similar ones, are sufficient to set aside the deed as being fraudulent within the statute.[1]

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[1] S. P. *Hudgins* v. *Kemp*, 20 How., 45; *Gillespie* v. *McKnight*, 3 Bank. Reg., 117; *Moreland* v. *Atchison*, 34 Tex., 351; *Booker* v. *Worrill*, 57 Ga., 235; *Hunt* v. *Spencer*, 20 Kan., 126; *McAnally* v. *O'Neal*, 56 Ala., 299; *Fellows* v. *Smith*, 40 Mich., 689; *Burton* v. *Farinholt*, 86 N. C., 260.

Where the evidence as to the intent to defraud is conflicting, the jury must determine the intent of the parties. *Reiger* v. *Davis*, 67 N. C., 185; *Pratt* v. *Curtis*, 2 Low., 87; *Holden* v. *Burnham*, 63 N. Y., 74; *French* v. *Holmes*, 67 Me., 186; *Burdsall* v. *Waggoner*, 4 Col., 256; *Thomas* v. *Mackey*, 3 Id., 390.

In the case of a voluntary conveyance, a fraudulent intent will generally be presumed from the fact that the grantor was indebted at the time of execution. *Gilmore* v. *North Amer. Land Co.*, Pet. C. C., 460. But if there was a valuable consideration, a

THIS was an appeal from the District Court of the United States for the Northern District of Alabama.

secret trust, or an intent to hinder, etc., must be shown. In such a case, actual fraud alone will invalidate the conveyance. *Crawford* v. *Kirksey*, 55 Ala., 282.

A voluntary conveyance is not deemed void as to subsequent, but only as to antecedent, creditors. *Hinde* v. *Longworth*, 11 Wheat., 199; *Burbank* v. *Hammond*, 3 Sumn., 429; *Gilmore* v. *N. Amer. Land Co.*, Pet. C. C., 460; *Hopkirk* v. *Randolph*, 2 Brock., 132; *Mattingly* v. *Nye*, 8 Wall., 370; *Harlan* v. *Maglaughlin*, 90 Pa. St., 293; *Mutual Life Ins. Co.* v. *Sandfelder*, 9 Mo. App., 285. *Contra*, *Robinson* v. *Cathcart*, 2 Cranch C. C., 590; *Ridgeway* v. *Underwood*, 4 Wash. C. C., 129; *Redfield* v. *Buck*, 35 Conn., 328; *Lockhard* v. *Beckley*, 10 W. Va., 87; *Rose* v. *Brown*, 11 Id., 122; *Matthai* v. *Heather*, 57 Md., 483.

A voluntary conveyance, made with an actual intent to defraud either precedent or subsequent creditors, is void as to those whom it was intended to defraud. *Churchill* v. *Wells*, 7 Coldw. (Tenn.), 364; *Laughton* v. *Harden*, 68 Me., 208. Thus a voluntary conveyance made in contemplation of incurring a future liability is void as to the future creditor. *Mattingly* v. *Wulke*, 2 Ill. App., 169.

In determining whether a conveyance is fraudulent or not, the fact of relationship between the parties may properly be considered by the jury. *Burton* v. *Shoemaker*, 7 Kan., 17.

A conveyance by a father to his son, whilst indebted, of all his estate and property, unaccompanied with change of possession, is evidence of intent to hinder, delay, and defraud creditors. *Middleton* v. *Sinclair*, 5 Cranch C. C., 409.

A conveyance taken in the name of the wife, of property purchased and paid for by the husband, whilst indebted, is presumptively fraudulent. *Alston* v. *Rowles*, 13 Fla., 117. And where shortly after a voluntary conveyance to the wife, the husband fraudulently disposes of his remaining estate, fraud in the conveyance to the wife will be presumed. *Burdick* v. *Gill*, 2 McCrary, 486.

A transfer by a husband of all his property to his wife and daughter, on condition that the wife will discontinue a pending suit for limited divorce, and thereafter live apart from him, is fraudulent and void as to existing creditors. *Morgan* v. *Potter*, 17 Hun (N. Y.), 403. As to what consideration is sufficient to uphold such a conveyance from a husband to his wife, as against creditors of the former, see *Syracuse Chilled Plow Co.* v. *Wing*, 20 Hun (N. Y.), 206.

A husband is authorized to make a suitable provision for his wife, and if made without any fraudulent intent or purpose, it will be sustained. Where, therefore, a husband, who is entirely solvent, openly purchases property and causes the same to be conveyed to his wife, retaining sufficient property in his own hands for the purposes of his business and abundant means to pay all his existing debts, and the circumstances show that neither insolvency nor inability to meet his obligations could reasonably have been within his contemplation, and that no new or more hazardous business was in contemplation, the transaction cannot be held fraudulent and void as against subsequent creditors. *Carr* v. *Breese*, 81 N. Y., 584.

An antenuptial settlement of real estate, though made with intent to defraud the creditors of the intended husband, will not be set aside without the clearest proof that the intended wife participated in the fraud. *Prewit* v. *Wilson*, 13 Otto, 22.

In *Moyer* v. *Adams*, 9 Biss., 390, a conveyance by the husband to the wife was set aside, notwithstanding the property was originally paid for in part, and subsequently improved with the wife's money; the husband having for some years traded on the faith of his ownership of the property, and then conveyed to the wife, in order to avoid his creditors.

In *Slater* v. *Sherman*, 5 Bush. (Ky.), 206, it was held that a conveyance by defendant to his wife, three days after committing an assault upon the plaintiff, was fraudulent and void as against plaintiff's claim for damages for the

It was a bill filed by the appellants, as creditors, to set aside a deed of settlement made by George Goffe upon his wife and daughters, under circumstances which are detailed in the opinion of the court.

The District Court sustained the deed upon the following ground.

"The true practical rule which I think is fully authorized by the case of *Hinds's Lessee* v. *Longworth*, is laid down by the Supreme Court of New York, in the case of *Jackson* v. *Town*. That rule is, that 'neither a creditor nor a purchaser can impeach a conveyance *bonâ fide* made, founded on natural love and affection, free from the imputation of fraud, and when the grantor had, independent of the property granted, an ample fund to satisfy his creditors.'

"Testing the case under consideration by this rule, we must look to the evidence to ascertain the amount and value of the property owned by George Goffe, as well as by the firm of G. & J. M. Goffe, at the period of the sale to Williams, and the conveyance of his notes for the benefit of Mrs. Goffe and her daughters, independent of the Blount Springs tract; and also to determine whether these deeds are made *bonâ fide*, and free from the imputation of fraud."

The District Court considered that the facts of the case brought it within the operation of this rule, and therefore upheld the deed.

The complainants appealed to this court.

It was argued by *Mr. Volney E. Howard*, for the appellants, for whom also a printed brief was filed by *Mr. J. A. Campbell*, and submitted by *Mr. Wilcox*, for the defendants, on a printed brief.

The following sketch will present the views of the respective counsel upon the questions of fact and of law.

The counsel for the appellants stated that the defendants rely upon the following facts: 1st. That Goffe was fully able to pay his debts with the property that remained to him, and that his insolvency, which was declared and notorious in the early part of 1839, arose from the improvident dealings of 1837 and 1838, as a country merchant. 2d. That Goffe had been advanced by the father of his wife, and this settlement

assault, it appearing that the intent of the transaction was to hinder and defeat the successful prosecution of plaintiff's right of action for the wrongs and injuries inflicted upon him. S. P. *Bongard* v. *Block*, 81 Ill., 186.

The payment of all his debts existing at the time of the conveyance, by the grantor, repels the idea of an intent to defraud creditors. *Claflin* v. *Mess*, 3 Stew. (N. J.), 211.

was a return for his *kindness. 3d. That Mrs. Goffe relinquished dower in the lands, and that her relinquishment was the consideration of the settlement. [*94

Much evidence was taken on the first issue, none on the second, and Williams was examined as to the third, and proved that after the arrangements for a sale had been concluded by Goffe to him of the Blount Springs, Goffe proposed the settlement of four notes on his children, amounting to $40,000. That he (Williams) insisted upon the settlement embracing the wife of Goffe, and threatened to interrupt the contract if his wishes were not fulfilled. That Goffe settled the last note due (due in 1848) for $14,000 upon his wife, making the whole settlement $54,000. Record, 158, 159, 160.

Much evidence was taken upon the first part of the case. The result of it was that Goffe in 1836 and 1837 carried on the business of selling merchandise. That he failed to meet his payments in the fall of 1837, in New York, and in the early part of 1838, a very large amount of his paper lay over, including the large debt of the plaintiffs. That suits were instantly commenced against him by a large number of creditors; and early in 1839, he was sold out. That in that year he "run off" with about $10,000 worth of property, to Texas, and died in a year or two after.

The fact is shown that Goffe was largely indebted, and had sent to the north for a larger credit at the date of his contract with Williams, and had obtained it. That he did not disclose this transaction.

In the record, a statement of twenty-seven judgments will be found. Of these, four were rendered on notes dated in February, 1837, and four in the months of September and October, 1837, independent of the judgments recovered by the plaintiff.

The record also shows that Goffe sought and obtained credit in New York without any disclosure of the disposition of the notes of Williams, and the deed of trust on the Springs, to his wife and children.

The principal seat of the business of Goffe was at Tuscaloosa, then the capital of Alabama, and the Blount Springs are situate in a secluded spot in a poor and mountainous country, having but little intercourse with commercial cities.

The judge of the District Court assumed that the fact that Goffe was able to pay his debts in September, 1837, was proven, and upheld the settlement.

The record shows that he (Goffe) sought and obtained credit for these plaintiffs at that time.

The evidence simply indicates insolvency at the date of the sale apart from the property of the Blount Springs.

*95] *Covington, his clerk, exaggerates the value of his property. The Tuscaloosa store was sold for $1,000, and is put down at $10,000.

The wild lands in Blount and Walker counties were unsalable at the government price.

In Alabama, the statute of 13 and 27 Elizabeth, have been substantially reënacted. Clay, Dig., tit. Frauds. The construction of that statute by the Supreme Court is, that all voluntary conveyances as to existing creditors are in law fraudulent, and that the creditor is not required to prove circumstances of fraud. 2 Stew. (Ala.), 336; 9 Ala., 937, 945; 16 Ala., 233; 3 Port. (Ala.), 196; 6 Ala., 506; 10 Ala., 432; 14 Ala., 350.

The Supreme Court of the United States, in *Sexton* v. *Wheaton*, 8 Wheat., 229, notice this construction of the act. In construing this statute, the courts have considered every conveyance not made on consideration deemed valuable in law, as void against previous creditors. 1 Ired. (N. C.) Eq., 180; 4 Wash. C. C., 129, 137; 4 Sm. & M. (Miss.), 303; 1 Brock., 501, 511; 3 Johns. (N. Y.) Ch., 481; 12 Pet., 179, 198; 1 Rob. (Va.), 125; 8 Metc. (Mass.), 411; 7 How., 220.

The utmost relaxation of this rule is, that when the gift is reasonable in amount, where an ample estate is left to the debtor for the payment of existing creditors without hazard to their rights, or any material diminution of their prospects of payment, his settlement will not be held invalid.

Under this relaxed rule, the case of the defendants cannot be maintained.

The debts due by the donor were large, covering quite the whole of the property that remained to him, upon a favorable calculation. The settlement was enormous, and greatly impaired the prospects of payment of the creditors.

Insolvency for such an amount is proven, that the indebtedness of Goffe, in 1837, cannot have been fully ascertained in this case. 1 Amer. Lead. Cas., by Hare & Wallace, 60.

The evidence of Williams to show a different consideration for the settlement than the one apparent on the deed of trust, has not succeeded. Goffe had already concluded to settle $40,000, when Williams first conversed with Goffe, on the children. At the suggestion of Williams, he adds the last note due ten years after, to the settlement, in favor of the wife. The fraudulent motive was already in operation when Williams spoke, and we nowhere understood that the wife demanded the settlement, or that it was a consideration for

the transfer itself. It seems rather to have been done to pacify Williams.

The deed of trust expresses no consideration of the kind now set up. It is a purely voluntary settlement on the face of the *deed. It is not competent to the defendants to change its character. 4 Phil. Ev. (Hill & Cowen's notes), *n.* 287, p. 583; 16 Ohio, 438; 7 Johns. (N. Y.), 341; 11 Wheat., 213. [*96

Mr. Wilcox, for the appellees, made the following points:—

But two questions are presented by the record; one of fact, and one of law.

1. Was George Goffe indebted to insolvency, apart from the Blount Spring property, at the time he made the settlement on his wife and daughters? The deposition of Elam Covington, who was well acquainted with Goffe's affairs, settles this question. He states that Goffe owned at the time of the settlement, independent of the Blount Spring property, real estate to the amount of $12,000—negroes worth $13,000. There were debts due him from other persons to the amount of $10,000; making in all $35,000 of his individual means. The assets of the firm of G. & J. M. Goffe, at the same time, consisted of $10,000 worth of merchandise, and $10,000 in debts due them. In addition to this, Goffe still held the two first notes given by Williams, amounting to $10,000; making an aggregate of $65,000 worth of property (partnership and individual) liable to the individual and firm debts. The debts of Goffe (both individual and partnership) according to the testimony of the complainants' own witnesses, only amounted to about $25,000. The first question, then, is fully answered; for there is no conflict of testimony. The allegation of the bill, that the settlement was made to hinder and delay creditors, is fully denied by the answers, and a good reason shown for its being made, to wit, that Goffe, when a poor young man, had married his wife, and obtained by her a considerable amount of property, a portion of which he wished, while in prosperous circumstances, to settle on his children. Mrs. Goffe also had relinquished her right of dower to the Blount Spring tract of land; and, in consideration of this, the settlement was made on her. Goffe at first refused to make it, and only consented, finally, at the urgent solicitation of his friends. This conclusively shows that he was actuated by no fraudulent design. See deposition of Colonel Williams. It is also shown that Goffe paid his debts until the fall of 1839, two years after the settlement was made.

2. Will an indebtedness not amounting to insolvency, existing at the time of a voluntary settlement, invalidate it? or, is such indebtedness *per se* evidence of fraud?

Whatever may have been the conflict of authorities (English and American) on this point, it can no longer be considered open, since the decision by this court, in the case of *Hinds's Lessee* v. *Longworth*, 11 Wheat., 199. The doctrine
*97] of *per se* *fraud is here expressly repudiated, and each case made to depend on the circumstances attendant on it. Indeed, common sense will dictate that a man who makes a settlement of this sort under ordinary circumstances, and at the same time retains a sufficiency of property to pay all the debts that may be existing against him, cannot intend a fraud. A fraud, or a desire to avoid the payment of his debts, would lead him to cover up, or secrete all. See also *Van Wyck* v. *Seward*, 6 Paige (N. Y.), 62; 1 Edw. (N. Y.), 497; 2 Bland (Md.), 26; 3 Dessaus. (S. C.), 1.

The decree of the court below dismissing the bill of complaint was therefore correct, and an affirmance is respectfully asked.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal in chancery, from the District Court of Northern Alabama.

The bill was filed to set aside a deed of settlement, made by George Goffe, dated the 12th September, 1837, on his wife and four daughters, on the ground, that it was made in fraud of creditors.

At the date above stated, Goffe and wife, by deed of general warranty, conveyed to Thomas Williams, Jr., six hundred and forty acres of land, including the "Blount Spring Tract," in Blount County, State of Alabama, for the consideration of sixty-four thousand dollars.

To secure the payment of the consideration, on the same day, Williams executed a deed of trust on the same property to Joseph M. Goffe and George Goffe, for which notes bearing interest were given, five thousand dollars payable 1st March, 1838, five thousand payable on the 1st of October following, ten thousand the 1st of October, 1840, ten thousand the 1st of October, 1842, ten thousand the 1st of October, 1844, ten thousand the 1st of October, 1846, and fourteen thousand the 1st of October, 1848. Williams was to remain in possession of the land, and was authorized to sell parts of it to meet the above payments.

On the same day, George Goffe executed a deed of settlement signed also by Joseph M. Goffe, by which he appro-

priated to his four daughters, the four ten thousand dollars notes above stated, and the fourteen thousand dollars note to his wife in consideration of "the natural love and affection he had for them."

The complainants represent that George and J. M. Goffe did business together as merchants, and that on the 2d of February, 1837, they executed to them their promissory note for $5,169, payable in thirteen months; and on the same day another note, payable in twelve months, for five thousand one hundred and *sixty-eight dollars and twenty-five cents; also another note on the 22d September, 1837, [*98 for $953.25, payable nine months after date. On all which notes judgments were obtained in the District Court, amounting to the sum of $14,667.42, at November term, 1841. Executions having been issued on the judgments, were returned no property, and the defendants are alleged to be insolvent. And the complainants pray that George Goffe may be decreed to pay the amount due them, and on failure to do so, that Williams may be decreed to pay the same, and in default thereof, that the lands and real estate or debts assigned to Mrs. Goffe and her children, may be converted into money by sale or otherwise so as to pay the sum due the complainants.

The defendants deny the allegations of the bill, and aver that at the time of the settlement the Goffes were able to pay their debts; that their assets exceeded their liabilities, and that the complainants have failed to collect their claims through their own negligence.

The statute of frauds of Alabama declares that "every gift, grant, or conveyance of lands, &c., or of goods or chattels, &c., by writing or otherwise, had, made, or contrived, of malice, fraud, covin, collusion, or guile, to the end or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts, &c., shall be from henceforth deemed and taken only as against the person or persons, his, her, or their heirs, &c., whose debts, suits, &c., by such means, shall or might be, in anywise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void," &c.

This statute appears to have been copied from the English statute of the 13th Elizabeth, and most of the statutes of the States, on the same subject, embrace substantially the same provisions. The various constructions which have been given to the statutes of frauds by the courts of England and of this country, would seem to have been influenced, to some extent, from an attempt to give a literal application of the words of the statute instead of its intent. No provision can be drawn so as to define minutely the circumstances under which fraud

may be committed. If an individual being in debt, shall make a voluntary conveyance of his entire property, it would be a clear case of fraud; but this rule would not apply if such a conveyance be made by a person free from all embarrassments and without reference to future responsibilities. But between these extremes numberless cases arise, under facts and circumstances which must be minutely examined, to ascertain their true character. To hold that a settlement of a small amount, by an individual in independent circumstances, and which if known to the public, would not affect his credit, is fraudulent, would be a *perversion of the statute. It did not intend thus to disturb the ordinary and safe transactions in society, made in good faith, and which, at the time, subjected creditors to no hazard. The statute designed to prohibit frauds, by protecting the rights of creditors. If the facts and circumstances show clearly a fraudulent intent, the conveyance is void against all creditors, past or future. Where a voluntary conveyance is made by an individual free from debt, with a purpose of committing a fraud on future creditors, it is void under the statute. And if a settlement be made, without any fraudulent intent, yet if the amount thus conveyed impaired the means of the grantor so as to hinder or delay his creditors, it is as to them void.

*99]

In the case before us, two of the debts, exceeding ten thousand dollars, were contracted in February, 1837, seven months before the settlement deed was executed. The other debt of nine hundred fifty three dollars and twenty five cents, was contracted the 22d of September, ten days after the settlement. The property conveyed amounted to sixty-four thousand dollars, fifty-four thousand of which were covered by the settlement.

This conveyance is attempted to be sustained on the ground that Mrs. Goffe relinquished her dower to the tract conveyed, and that George Goffe, including the partnership concerns, held an aggregate property, after the settlement, amounting to the sum of sixty-five thousand dollars; and that the debts against Goffe individually and also against the partnership, did not exceed twenty-five thousand dollars. It appears that in the Fall of 1837, and in the early part of 1838, a large amount of his paper being due, at New York, including the plaintiffs' was not paid. Suits were commenced against him, and early in 1839, his property, within the reach of process, was all sold. Goffe, it is proved, sent to Texas in 1839, by his brother, ten negroes and other property, worth about ten thousand dollars. In 1840, George Goffe went to Texas,

where he afterwards died. Twenty-seven judgments were rendered against him, four of which were on notes dated the 27th of February, 1837, and four on notes given in September and October following, independent of the plaintiffs' judgments.

These facts are incompatible with the assumption, that Goffe's assets were more than double his liabilities. His aggregate of property must have been made of exaggerated values, and too low an estimate was made of his eastern debts. After the settlement and, as it would seem, before it was known to his eastern creditors, his purchases of merchandise were large, and his business at home was greatly extended. Several stores were established by him in partnership with his brother. After having abstracted from his means fifty-four thousand dollars, this *enlargement of his [*100 business shows a disposition to carry on a hazardous enterprise, at the risk of his creditors. In less than three years after the settlement, judgments were obtained against the partnership for between twenty-five and thirty thousand dollars; no inconsiderable part of which had been contracted and was due at the time of the settlement. These facts prove, that after the voluntary conveyance Goffe was unable to meet his engagements. Nothing can be more deceptive, than to show a state of solvency by an exhibit on paper of unsalable property, when the debts are payable in cash. Such property when sold will not, generally, bring one fifth of its estimated value. And such seems to have been the result in the case before us.

But to avoid the settlement, insolvency need not be shown nor presumed. It is enough to know that when the settlement was made, Goffe was engaged in merchandising principally on credit; his means consisted chiefly of a broken assortment of goods, debts due for merchandise scattered over the country in small amounts, wild lands of little value, a few negroes, and a very limited amount of improved real estate, the value of which was greatly over-estimated. On such a basis, no prudent man with an honest purpose and a due regard to the rights of his creditors, could have made the settlement.

A conveyance under such circumstances, we think, would be void against creditors, at common law; and we are not aware that any sound construction of the statute has been given which would not avoid it. *Sexton* v. *Wheaton et ux.*, 8 Wheat., 229; *Hindes's Lessee* v. *Longworth*, 11 Wheat., 199; *Hutchinson et al.* v. *Kelley*, Rob. (La.), Rep., 123; *Miller* v. *Thompson*, 3 Port. (Ala.), 196.

The decree of the District Court is reversed, and the cause is remanded to that court, with instructions to enter a decree for the complainants as prayed for in the bill.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged and decreed by this court, that the decree of the said District Court, in this cause be, and the same is hereby reversed with costs, and that this cause be, and the same is hereby remanded to the said District Court, with instructions to enter a decree for the complainants, as prayed for in the bill.

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*101] *EUCLID WILLIAMSON, THOMAS F. ECKERT, AND JOHN WILLIAMSON, PLAINTIFFS IN ERROR, *v.* ALEXANDER B. BARRETT, ROBERT CLARK, NATHANIEL D. TERRY, HENRY LYNE, JAMES T. DONALDSON, WILLIAM BROWN, AND JOHN B. SPROWLE.

The usage upon the River Ohio is, that when the steamboats are approaching each other in opposite directions, and a collision is apprehended, the descending boat must stop her engine, ring her bell, and float; leaving the option to the ascending boat how to pass.

The descending boat was not bound to back her engines, and it was correct in the Circuit Court to refuse leaving to the jury the question whether or not, in fact, such backing of the engines would have prevented the collision, where the ascending boat was manifesting an intention to cross the river.[1]

The proper measure of damages is a sum sufficient to raise the sunken boat, repair her and compensate the owners for the loss of her use during the time when she was being refitted.[2]

THIS case was brought up by writ of error, from the Circuit Court of the United States, for the District of Ohio.[3]

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[1] Compare *The Cayuga*, 1 Ben., 171.

[2] CITED. *Missouri River Packet Co.* v. *Hannibal &c. R. R. Co.*, 1 McCrary, 291. See also *The Catherine* v. *Dickinson*, 17 How., 175; *The Baltimore*, 8 Wall., 386; *The Free State*, 1 Otto, 206; *The Scotland*, 15 Id., 36; *The Potomac*, Id., 632. See note to *Smith* v. *Condry*, 1 How., 28. Where the vessel sunk is abandoned, the measure of damages is the difference between her value, in her then and former condition. *The Catherine* v. *Dickinson*, 17 How., 170; but if actually raised and repaired, the cost incurred is the true measure of indemnity. *Ibid.*; *The Granite State*, 3 Wall., 310; *The Blossom*, Olc., 188. For cases deciding the extent and limits of the right to damages for demurrage, in collision cases, see also *The Walter P. Pharo*, 1 Low., 437; *The Russia*, 4 Ben., 572; *Swift* v. *Brownell*, 1 Holmes, 467.

[3] Reported below, 4 McLean, 589.

It was an action of trespass on the case brought by the owners of the steamboat Major Barbour, (the defendants in error,) against the owners of the Paul Jones, another steamboat, for injuries resulting from a collision between the boats.

On the 3d of February, 1848, at a place upon the Ohio River, about one hundred miles below Louisville, the Major Barbour was descending the river, and a collision ensued between her and the Paul Jones, which was ascending; by means of which the Major Barbour became filled with water and sunk.

On the 17th of February, 1848, Barrett and others being citizens of Kentucky, brought an action of trespass on the case, against Williamson and the other owners of the Paul Jones, in the Circuit Court of the United States, for the District of Ohio.

In October, 1849, the cause came on for trial upon the general issue plea. The jury found a verdict for the plaintiffs for $6,714.29. The following is the bill of exception taken upon the trial.

"Seventh Circuit Court of the United States, Ohio District, *Alexander B. Barrett*, *Robert Clark*, *Nathaniel D. Terry*, *Henry Lyne*, *James T. Donaldson*, *William Brown*, *John B. Sprowle*, v. *Euclid Williamson*, *Thomas F. Eckert*, *John Williamson*. Be it remembered, that on the trial of this cause, evidence was given, showing that before and at the time of the collision mentioned in the pleadings in this cause, the plaintiffs' boat, the Major Barbour, was descending the Ohio River, and the defendants' boat, the Paul Jones, was ascending the same river, and heavily loaded, and the Major Barbour was light, the Paul Jones being a much larger boat than the Major Barbour.

It was claimed by the plaintiffs, and testimony offered by them, tending to show that their boat was descending the middle *of the river, and that the collision took place at or about the middle of the river. [*102

It was claimed on the part of the defendants, and evidence was offered to show, that their boat was ascending near the Indiana shore, and that the plaintiffs' boat was also running near that shore, and that the collision took place near that shore. The plaintiffs also offered evidence tending to show that the Paul Jones, a short time before the collision, suddenly turned out of the Indiana shore, and ran across the river into the plaintiffs' boat; and the defendants offered evidence tending to show that the plaintiffs' boat, a short time before the collision, suddenly turned out from the Indiana shore and crossed the bow of the Paul Jones.

Evidence was also given tending to show that the engines of the plaintiffs' boat were stopped, and the boat floated for some time previous to the collision; but it was admitted that she did not back her engines; and it was claimed by the plaintiffs that she was not bound by the rules or usages of navigation to back her engines.

Evidence was also given tending to show that the Paul Jones, some time previous to the collision, stopped her engines, and then reversed her engines to back the boat, and made from one to three revolutions back, and was actually backing at the time of collision.

And it was claimed by the plaintiffs, that their boat's engines were stopped, and the boat floating as soon as danger of collision was anticipated; and on the part of the defendants it was claimed, that the said Major Barbour's engines were not stopped sufficiently early, and that owing to that, and her not attempting to back her engines, she contributed to the collision.

The plaintiffs and defendants also offered evidence of pilots on the Ohio River, tending to show that boats navigating the Ohio River, were bound to observe the following rules in passing each other: The boat descending, in case of apprehended difficulty or collision, was bound to stop her engines, and float at a suitable distance, so as to stop her headway; and the boat ascending should do the dodging or manœuvring. And some of the pilots also testified, that it was also the duty of both boats to back their engines, so as to keep the boats apart when danger was apprehended, and to do all they could to prevent a collision; but the greater part of them said the rule of the river required the descending boat to stop its engines and float, being at the place of collision, near the middle of the river. And the defendants' counsel asked the court to instruct the jury that, if by backing the Barbour's engine, in addition to stopping and floating, the collision could have been avoided, and the plaintiffs did not back her engines, the plaintiffs could not recover, and that *plaintiffs
*103] were bound to make use of all the means she had to prevent a collision. And thereupon the court charged the jury as follows:

That if the Major Barbour was in her proper track for a descending boat, as proved by several witnesses, near the middle of the river, and the Paul Jones in ascending the river was in her proper track, near the Indiana shore, and she turned out of her proper course, across the river, or quartering, in the language of some of the witnesses, so as to threaten a collision with the Major Barbour; and that as soon as this

was discovered the Major Barbour stopped her engine, rang her bell, and floated down the stream, as the custom of the river required, leaving the ascending boat the choice of sides, and this was the law of the river, that on the near approach of the Major she was not required to back her engines, as that might bring her in contact with the other boat, but might presume that the Paul Jones did not intend to run into her, and that for an injury done to the Major Barbour under such circumstances, by the Paul Jones running into her, the plaintiffs are entitled to recover such damages, as appears from the evidence was done to the Major Barbour.

That if the Major Barbour turned out of her course, running near the Indiana shore, and this turning out of her course contributed to the collision, the plaintiffs could not recover. That where both boats were in fault, the plaintiffs could not recover. That in such case, the fault of the Major Barbour must be such as led to or contributed to the collision. That if the collision was the result of an unavoidable accident the plaintiffs could not recover.

That should the jury find for the plaintiffs, they will give damages which shall remunerate the plaintiff for the damages incurred, necessarily, in raising the boat, and in repairing her; and also for the use of her during the time necessary to make the repairs and fit her for business. That the jury were not bound to give interest, as claimed by the plaintiffs, but they would give such sum in damages as they shall deem just and equitable under the circumstances.

To which charge of the court, so far as it relates to charging that the Major Barbour was not required to back her engines, but might presume that the Paul Jones did not intend to run into her; and also to so much of the charge as directs the jury that they might give damages for the use of the boat during the time necessary to make the repairs and fit her for business; and also to the refusal of the court to charge or instruct the jury as requested, the defendants, by their counsel, except, and pray this their bill of exceptions may be signed and sealed, which is done and ordered to be made a part of the record.

JOHN MCLEAN, [SEAL.]
H. M. LEAVITT, [SEAL.]

*Upon this exception, the case came up to this court and was argued by *Mr. Chase* and *Mr. Lincoln*, for the plaintiffs in error, and by *Mr. Crittenden*, for the defendants in error. A brief was also filed by *Mr. Fox*, for the plaintiffs in error. [*104

The counsel for the plaintiffs in error, contended that the action should have been "trespass" and not "trespass on the case," because the declaration charged the act to have been done by the defendants below, they being in possession of the boat at the time.

The counsel for the plaintiffs in error then contended, that there were errors in the instructions of the court, both as to the collision and the damages.

1. As to the collision, what was the question before the court below, and upon which the jury were to decide?

It was this. Was the defendants' boat navigated carelessly or unskilfully, and was the plaintiffs' boat from that cause injured. If so, did the plaintiffs in any way substantially contribute to such injury. The plaintiffs below were bound, 1st, to make out fault in those navigating the Paul Jones, directly causing their damage, and 2d, a freedom of those navigating the Major Barbour from any fault substantially contributing to the same.

If the plaintiffs below contributed in any way or to any extent, if they were in fault, although in a much less degree than the defendants, and such fault substantially contributed to the injury, they were not entitled to a verdict.

The judgment, if rendered, was to be for the whole damages, and the jury had no right to distinguish between the degrees of fault of the parties. Of this there is no dispute. I refer the court to a few of the many authorities upon the above position. *Pluckwell* v. *Wilson*, 24 E. C. L., 368; 5 Carr. & P., 375; *Luxford* v. *Large*, 24 E. C. L., 391; 5 Carr. & P., 421; *Handyside* v. *Wilson*, 14 E. C. L., 429; 3 Carr. & P., 527; *Wolf* v. *Beard*, 34 E. C. L., 435; 8 Carr. & P., 373; *Sills* v. *Brown*, 38 E. C. L., 248; 9 Carr. & P., 601; *New Haven, &c.* v. *Vanderbilt*, 16 Conn., 420.

There are numerous others to the same effect. There is nothing to be found in the books in opposition to the following statement of the law, taken from the case of *Pluckwell* v. *Wilson*, a case of collision between carriages:

"It is for the jury to say whether the injury to the plaintiff's chaise was occasioned by negligence on the part of the defendant's servants, without any negligence on the part of the plaintiff himself; for if the plaintiff's negligence were in any way concerned in producing the injury, he cannot recover."

*105] *Chancellor Kent very briefly states the rule thus: "But according to the English and American rules in the courts of common law, if there be fault or want of care on both sides, or the loss happen without fault on either side,

neither party can sue the other." 3 Kent, Com. (5th Ed.), 231.

The question to be tried, then, was one of negligence or want of care.

2. Upon the subject of damages, the counsel contended that the court erred in charging the jury that the plaintiffs below could recover for lost time or for compensation for the use of the boat while undergoing repairs, there being no allegation of such damages.

There are authorities against such damages in cases where the pleadings are properly framed. *Blanchard* v. *Ely*, 21 Wend. (N. Y.), 343; *Boyd* v. *Brown*, 17 Pick. (Mass.), 453; *The Anna Maria*, 2 Wheat., 327; *The Amiable Nancy*, 2 Wheat., 546; *De Armistad de Rue*, 5 Wheat., 385; *Smith* v. *Condry*, 1 How., 28; *Conrad* v. *Pacific Insurance Company*, 6 Pet., 262.

The case of *Blanchard* v. *Ely*, is direct to the point.

They are considered too speculative, or problematical. The use of the boat might have been of benefit, or might have involved the plaintiff in trouble; might have sunk them money by unprofitable business, or by a collision with some other boat, or she might have sunk by a danger of the river. It is not at all certain that she would have been of any value to them.

I admit, however, that there are cases directly in opposition to *Blanchard* v. *Ely*. But they are cases where there was a special allegation of such damages, and in that, the case before the court is distinguished from them.

There was such allegation in the case of *New Haven Steamboat & Transp. Co.* v. *Vanderbilt*, 16 Conn., 420.

Also in the cases of *Haldeman* v. *Beckwith*, which was before this court two years ago. The declarations were so similar to these two cases, that I had that in the former case printed for the use of this court, when the case of *Haldeman* v. *Beckwith* was before them. See Appendix, A. In the report of the case in the 16th Conn. it does not appear that there was a special allegation of loss of time, and that the declaration gave the party direct notice of his claim. But there was such allegation.

Such damages could not be recovered in this case, unless it be what the law denominates general damages.

The object of pleading is to give notice to the other party of the claim set up, that he may come prepared to defend it; and nothing can be recovered but that which naturally and necessarily flows from what is alleged.

From the declaration in this case, no one would suppose,

*106] that *any thing but a total loss of the boat would be claimed. An entirely different claim was, however, interposed.

In case of a total loss, the value of the boat is the rule of damages. *The Apollon*, 9 Wheat., 362.

Now the expense of raising and repairing the boat, with compensation for lost time, may have been much greater than the whole value of the boat.

If that be the claim set up, the party would come prepared with evidence, as to these points: was it prudent to raise and repair her? was not the party too long in doing it? did he not pay too much? and was not the value for use of the boat, as given in evidence by him, greater than it really was?

These considerations show, I think, that the allegation for a total loss does not necessarily or naturally include the damages allowed.

(Upon both of the above points, the arguments of the counsel were very elaborate.)

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Ohio.

The plaintiffs in the court below, the defendants here, who were the owners of the steamboat Major Barbour, brought an action against the defendants, the owners of the steamboat Paul Jones, to recover damages occasioned by a collision upon the Ohio River on the 3d February, 1848.

The Major Barbour was descending the river at the time, and the Paul Jones ascending, the latter heavily laden and of much larger size than the former.

Evidence was given by the plaintiffs tending to show, that their boat was about in the middle of the river at the time the collision took place; that the defendants' boat was ascending the Indiana shore, and that a short time before the collision she suddenly changed her course and left the shore, running across the river into the Major Barbour, causing the damage in question. While on the part of the defendants, it was claimed, and evidence given to show, that the plaintiffs' boat was descending near the Indiana shore, and that the collision occurred near that shore, and that the plaintiffs' boat a short time before it happened suddenly turned out from the shore and ran across the bow of the Paul Jones, causing the damage.

Evidence was also given tending to show that the engine of the plaintiffs' boat was stopped, and the boat floated as soon as the danger was discovered, and for some time previous to

the collision, but, it was admitted she did not back her engines, and it was claimed that she was not bound to do so, according to *the rules and usages of the navigation. [*107
While, on the part of the defendants, it was claimed, and evidence given to show, that the Paul Jones, some time before the collision, stopped her engines, and reversed the same to back the boat, and had made from one to three revolutions back, and was actually backing at the time of the collision; and also that the engines of the plaintiffs' boat were not stopped sufficiently early, and owing to that, and not attempting to back her engines, she contributed to the collision.

Evidence was further given tending to show, that boats navigating the Ohio river were bound to observe the following rules in passing each other: The boat descending, in case of apprehended difficulties, or collision, was bound to stop her engines, and float, at a suitable distance, so as to stop her headway; and the boat ascending, to make the proper manœuvre to pass freely.

When the evidence closed, the counsel for the defendants requested the court to instruct the jury, that the plaintiffs ought not to recover, if the collision could have been avoided by reversing the engines and backing their boat, in addition to stopping and floating; and, that the master was bound to use all the means in his power to prevent a collision.

And thereupon, the court among other things charged, that if the Major Barbour was in her proper track for a descending boat, near the middle of the river, and the Paul Jones in ascending the river was in her proper track near the Indiana shore, and the latter turned out of her proper course across the river or quartering, as stated by some of the witnesses, so as to threaten a collision; and that as soon as discovered, the Major Barbour stopped her engine, rang her bell, and floated down the stream, as the custom of the river required, leaving the ascending boat the choice of sides to pass her, and this being the law of the river, she was not, on the near approach of the boat, required to back her engine, as that might bring her in contact with the other boat. She had a right to presume the Paul Jones did not intend to run directly into her. And that, if any injury was done to the Major Barbour, the plaintiffs' boat, under such circumstances, by the Paul Jones running into her, the plaintiffs were entitled to recover.

The court further charged, that, if the jury should find for the plaintiffs, they ought to give such damages as would remunerate them for the loss necessarily incurred in raising the boat, and in repairing her; and also for the use of her

during the time necessary to make the repairs, and fit her for business.

I. As to the first branch of the instruction. In order properly to appreciate it, it is material to notice the relative *108] position of *the two boats at the time of the collision, which is assumed in the instruction, and in respect to which circumstances it was given, and, as claimed by the plaintiffs, the jury would be warranted in finding. For, the principle stated was not laid down as an abstract proposition, or rule of navigation, but one applicable to the state of the case specially referred to as supposed to have been made out upon the evidence.

The case was this: The plaintiffs' boat was in her proper track, descending the river near the middle, while the defendants' was ascending the same in her proper track near the Indiana shore. And as the boats were approaching each other in this relative position, the Paul Jones, the defendants' boat, changed her course across the river towards the middle of the same, somewhat in an oblique direction according to some of the witnesses, and thereby endangering a collision. That as soon as this was discovered, the Major Barbour, the plaintiffs' boat, stopped her engine, rang her bell and floated, as the custom of the navigation required, leaving to the other boat the option to pass either her bow, or stern.

It was upon this state of facts, the court instructed the jury that the plaintiffs' boat was not bound to make the additional manœuvre of backing her engines, as that might, under the circumstances, have brought about the collision she was endeavoring to avoid; and, that for the injury done by the Paul Jones running into her, the plaintiffs were entitled to recover.

The counsel for the defendants had requested the court to instruct the jury, that, if the plaintiffs' boat by backing her engines in addition to stopping, and floating, could have avoided the collision, she was bound to do so, and the defendants were not liable, as the master was responsible for the use of all the means in his power to prevent it. And the error, supposed to have been committed, consists in the refusal to give this instruction, under the peculiar circumstances of the case, and in giving that which we have stated.

It is not to be denied, that the Major Barbour, according to the position of the boats as assumed in the instruction, had observed strictly the custom, and usages of the river. But it is claimed, that a state of facts had occurred from the position of the Paul Jones, whether by the fault of those in command or not, that made it the duty of the master of the

plaintiffs' boat not sternly to have adhered to this usage, but, to have made the movement insisted upon, if by so doing the accident could have been avoided. This position is founded upon an exception to the general law of the navigation as modified by the circumstances of the particular case, by which the master of the vessel not in fault is bound to make every fair and reasonable effort, *in the emergency, within his power, from due exercise of skill and good seamanship, to avoid, if possible, the impending calamity. Upon the water as upon the land, the law recognizes no inflexible rule, the neglect of which by one party, will dispense with the exercise of ordinary care and caution in the other. A man is not at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he does not use common and ordinary caution to avoid it. One person being in fault will not dispense with another's using ordinary care for himself.[1] [*109

And, undoubtedly, if a state of facts had been shown in this case, arising out of the circumstances attending the sudden change of the course of the Paul Jones, from which an inference might fairly have been drawn, that it was the duty of the master of the Major Barbour not only to have stopped her engines, but to have reversed them, and backed his boat, in order to avoid the danger, and, that by so doing it might have been avoided, the point should have been put to the jury, with the instruction, if they so found, the plaintiffs could not recover. Before, however, any such instruction could be properly claimed, the defendants must have made out a state of the case to which it was applicable, and from which the omission to make the movement laid a foundation for the inference of fault on the part of the Major Barbour.

The fact that it would have prevented the catastrophe is not enough; circumstances must be shown that would make it the duty of the master to give the order.

There is no rule of law or of the river that imposes upon him, in such an emergency, the obligation, to give a particular direction to his vessel, simply because it might avoid the danger. The question in all such cases is, whether, in the exercise of due care and caution in the management of her at the time in any given case, such a direction should have been given. If it should, then he is chargeable with the consequences of the neglect.

Applying these principles to the state of facts in respect to

[1] CITED. *The Helen*, 5 Hughes, 122.

which the instruction in question was given, we think it will be found that no error was committed.

The defendant's boat had suddenly turned out of the accustomed track, which was along the Indiana shore, apparently for the purpose, if she had any in view, of crossing to the other side; and, as soon as this change was discovered, the engines of the descending boat were stopped, allowing her to float according to the usage in such cases, for the purpose of enabling the other to pass across her bow or stern, as she might elect.

Now, it could not be known, at least there is nothing in the *110] *case to show that it was known to the master of the descending boat, which of the two courses open to her the other intended to adopt. If she determined to pass his bow, undoubtedly, reversing the engines and backing his boat would have been a very proper manœuvre; but if she determined to cross his stern, the movement would have been improper, and might have been disastrous. Either a forward or backward movement under the circumstances would have embarrassed the operations of the other boat, as the master had a right to assume the one descending would adhere to the usage of the river, and leave him free to make choice of his course in passing upon that assumption.

Under these circumstances, we think it clear it would have been erroneous to have instructed the jury, that the master of the Major Barbour was bound not only to stop her engines, but to back her, if, by so doing, the danger could have been avoided. For before the neglect to make that movement could be charged as a fault, it should have appeared that the master knew the colliding boat intended to pass her bow. In the absence of such knowledge, her proper position was that which the usage of the river prescribed, namely, to stop her engines and float, leaving the other the choice to pass across either her bow or stern. This was his plain duty, not only from the law of the river, but due, under the circumstances, to the other boat, as affording her the most favorable opportunity to extricate herself from the danger in which she had become involved by her own fault in carelessly leaving her proper track.

II. As to the question of damages.

The jury were instructed, if they found for the plaintiffs, to give damages that would remunerate them for the loss necessarily incurred in raising the boat, and repairing her; and also, for the use of the boat during the time necessary to make the repairs, and fit her for business.

By the use of the boat we understand what she would pro-

duce to the plaintiffs by the hiring or chartering of her to run upon the river in the business in which she had been usually engaged.

The general rule in regulating damages in cases of collision is to allow the injured party an indemnity to the extent of the loss sustained. This general rule is obvious enough; but there is a good deal of difficulty in stating the grounds upon which to arrive, in all cases, at the proper measure of that indemnity.

The expenses of raising the boat, and of repairs may, of course, be readily ascertained, and in respect to the repairs, no deduction is to be made, as in insurance cases, for the new materials in place of the old. The difficulty lies in estimating the damages sustained by the loss of the service of the vessel while she is undergoing the repairs.

*That an allowance short of some compensation for this loss would fail to be an indemnity for the injury is apparent. [*111

This question was directly before the court of admiralty in England, in the case of the *Gazelle*, decided by Dr. Lushington, in 1844. 2 W. Rob., 279. That was a case of collision, and in deciding it, the court observed, "that the party who had suffered the injury is clearly entitled to an adequate compensation for any loss he may sustain for the detention of the vessel during the period which is necessary for the completion of the repairs, and furnishing the new articles."

In fixing the amount of the damages to be paid for the detention, the court allowed the gross freight, deducting so much as would, in ordinary cases, be disbursed on account of the ship's expenses in earning it.

A case is referred to, decided in the common-law courts, in which the gross freight was allowed without any deduction for expenses, which was disapproved as inequitable and exceeding an adequate compensation, and the qualification we have stated laid down.

This rule may afford a very fair indemnity in cases where the repairs are completed within the period usually occupied in the voyage in which the freight is to be earned. But, if a longer period is required, it obviously falls short of an adequate allowance. Neither will it apply where the vessel is not engaged in earning freight at the time. The principle, however, governing the court in adopting the freight which the vessel was in the act of earning, as a just measure of compensation in the case, is one of general application. It looks to the capacity of the vessel to earn freight, for the benefit of the owner, and consequent loss sustained while deprived of

her service. In other words, to the amount she would earn him on hire.

It is true, in that case, the ship was engaged in earning freight at the time of the collision; and the loss, therefore, more fixed, and certain than in the case where she is not at the time under a charter-party, and where her earnings must in some measure depend upon the contingency of obtaining for her employment. If, however, we look to the demand in the market for vessels of the description that has been disabled, and to the price there, which the owner could obtain or might have obtained for her hire as the measure of compensation, all this uncertainty disappears. If there is no demand for the employment, and, of course, no hire to be obtained, no compensation for the detention during the repairs will be allowed, as no loss would be sustained.

But, if it can be shown, that the vessel might have been chartered during the period of the repairs, it is impossible to deny that the owner has not lost in consequence of the damage, the amount which she might have thus earned.

*112] *The market price, therefore, of the hire of the vessel applied as a test of the value of the service will be, if not as certain as in the case where she is under a charter-party, at least, so certain that, for all practical purposes in the administration of justice, no substantial distinction can be made. It can be ascertained as readily, and with as much precision as the price of any given commodity in the market; and affords as clear a rule for estimating the damage sustained on account of the loss of her service, as exists in the case of damage to any other description of personal property, of which the party has been deprived.

In the case of the Gazelle, for ought that appears, the allowance of the freight afforded a full indemnity for the detention of the vessel while undergoing the repairs. This would be so, as already stated, if they were made within the period she would have been engaged in earning it. If it were otherwise, it is certain, that the indemnity allowed fell short of the rule laid down under which it was made, which was, that the party was entitled to an adequate compensation for any loss he might sustain for the detention of the vessel during the period which was necessary for the completion of the repairs and furnishing the new articles.

The allowance of the freight she was earning at the time was but a mode of arriving at the loss in the particular case under the general rule thus broadly stated; and afforded, doubtless, full indemnity.

We are of opinion, therefore, that the rule of damages laid

down by the court below was the correct one, and is properly applicable in all similar cases. There was no question made in respect to the freight of the vessel, and hence the general principle stated was applicable, irrespective of this element, as influencing the result.

There were some other questions raised in the case of a technical character, and urged on the argument. But we deem it sufficient to say, that they are so obviously untenable, that it is not important to notice them specially.

We are of opinion, therefore, the judgment of the court below was right, and should be affirmed.

Mr. Justice CATRON dissented, with whom Mr. Chief Justice TANEY, and Mr. Justice DANIEL concurred.

Mr. Justice CATRON.

This action is one of owners against owners of respective steamboats. It is an action on the case, in which no vindictive damages can be inflicted on the defendants, as they committed no actual trespass; and therefore, in assessing damages against them, moderation must be observed.

*In the next place, the collision occurred on the Ohio River, and the rules of law applicable to the controversy must accommodate themselves to that navigation. [*113

The injured boat was sunk, and the plaintiffs declared for a total loss; but it came out in evidence, that she was raised and repaired, and again commenced running the river. On this state of facts the jury was charged: 1st. That damages should be given for raising the boat: 2d. For repairing her: and 3d. Also damages in addition, "for her use, during the time necessary to make the repairs and fit her for business."

The expression "for her use," must mean either the clear profits of her probable earnings; or, how much she could have been hired for to others during the time of her detention. Both propositions come to the same result, to wit: how much clear gains the owners of the Major Barbour could have *probably* made by their boat, had she not been injured, during the time she was detained in consequence of being injured. This probable gain, the jury was instructed to estimate as a positive loss, and to charge the defendants with it.

The suit is merely for loss of the boat, and has no reference to the cargo. It does not appear that she had either cargo, or passengers; nor does the evidence show in what trade she was engaged.

In cases of marine torts, no damages can be allowed for

loss of a market; nor for the probable profits of a voyage. The rule being too uncertain in its nature to entitle it to judicial sanction. Such has been the settled doctrine of this court for more than thirty years.

In the case of the *Amiable Nancy*, 3 Wheat., 560, when discussing the propriety of allowing for probable loss of profits on a voyage that was broken up by illegal conduct of the respondents' agents, this court declared the general and settled rule to be, that the value of the property lost, *at the time of the loss;* and in case of injury, the diminution in value, by reason of the injury, with interest on such valuation, afforded the true measure for assessing damages: "This rule," says the court, "may not secure a complete indemnity for all possible injuries; but it has certainty, and general applicability to recommend it, and in almost all cases, will give a fair and just recompense." And in the suit of *Smith* v. *Condry*, 1 How., 35, it is declared, that in cases of collision "the actual damage sustained by the party, at the *time* and *place*, of the injury, is the measure of damages." In that case there was detention as well as here, but it never occurred to any one, that loss of time could be added as an item of damages.

*114] In other words, that damages might arise after *the injury and be consequent to it; and which might double the amount actually allowed.

The decision found in 3 Wheat. was made in 1818, and I had supposed for many years past, the rule was established, that consequential damages for loss of time, and which damages might continue to accrue, for months after the injury was inflicted, could not be recovered; and that there was no distinction in principle, between the loss of the voyage, and loss of time, consequent on the injury.

The profits claimed and allowed by the Circuit Court, depended on remote, uncertain, and complicated contingencies, to a greater extent, than was the case, in any one instance, in causes coming before this court, where a claim to damages was rejected for uncertainty.

Here, full damages are allowed for raising the boat, and for her repairs. To these allowances no objection is made; it only extends to the additional item for loss of time. That the investigation of this additional charge will greatly increase the stringency, tediousness, and charges of litigation, in collision cases, is manifest; nor should this consideration be overlooked. The expense and harassment of these trials have been great when the old rule was applied; and, the contest, if the rule is extended, must generally double the expense and vexation of a full and fair trial. Nor will it be

possible, as it seems to me, for a jury, or for a court (where the proceeding is by libel) to settle contingent profits, on grounds more certain, than probable conjecture. The supposition that the amount of damages can be easily fixed, by proof of what the injured boat could have been hired for on a charter-party, during her detention, will turn out to be a barren theory, as no general practice of chartering steamboats, is known on the western rivers, nor can it ever exist; the nature of the vessels, and the contingencies of navigation being opposed to it. In most cases, the proof will be, that the boat could not have found any one to hire her; and then, the contending parties will be thrown on the contingency, whether she could have earned something, or nothing; little, or much, in the hands of her owner, during the time she was necessarily detained; and this will involve another element of contention of great magnitude; to wit, whether she was repaired in reasonable time. Forasmuch as no necessity will be imposed on the owner to bestow the repairs, as is now the case, he will rarely, if ever, do so; and having the colliding boat and her owners in his power, gross oppression will generally follow, in applying this new and severe measure of damages to western river navigation.

In a majority of cases of collision on the western waters, *partial injury, repairing, and detention of the injured boat occur. Contests before the courts have been numerous where the precise question of compensation here claimed was involved, and yet in an experience of twenty-five years, I have never known it raised until now. The bar, the bench, and those engaged in navigation, have acquiesced in the rule, that full damages for the injury at the time and place when it occurred, with legal interest on the amount, was the proper measure; nor do I think it should be disturbed; and that therefore the judgment of the Circuit Court should be reversed, because the jury were improperly instructed, in this particular. [*115

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the District of Ohio, and was argued by counsel. On consideration whereof, it is now here ordered, and adjudged, by this court, that the judgment of 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.

David D. Mitchell, Plaintiff in Error, *v.* Manuel X. Harmony.

In some of the States it is the practice for the court to express its opinion upon facts, in a charge to the jury. In these States, it is not improper for the Circuit Court of the United States to follow the same practice.[1]

During the war between the United States and Mexico, where a trader went into the adjoining Mexican provinces which were in possession of the military authorities of the United States, for the purpose of carrying on a trade with the inhabitants which was sanctioned by the executive branch of the government, and also by the commanding military officer, it was improper for an officer of the United States to seize the property upon the ground of trading with the enemy.

Private property may be taken by a military commander to prevent it from falling into the hands of the enemy, or for the purpose of converting it to the use of the public; but the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.[2]

The facts as they appeared to the officer must furnish the rule for the application of these principles.

But the officer cannot take possession of private property for the purpose of insuring the success of a distant expedition upon which he is about to march.

Whether or not the owner of the goods resumed the possession of them at any time after their seizure, was a fact for the jury. In this case, they found that he did not resume the possession and in this they were sustained by legal evidence.

The officer who made the seizure cannot justify his trespass by showing the orders of his superior officer. An order to commit a trespass can afford no justification to the person by whom it was executed.[3]

The trespass was committed out of the limits of the United States. But an action for it may be maintained in the Circuit Court for any district in

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[1] Cited. *Insurance Co.* v. *Rodel*, 5 Otto, 238. But it must be done in such a way as not to be binding on the jury. *Tracy* v. *Swartwout*, 10 Pet., 80; *United States* v. *Laub*, 12 Id., 1; *Games* v. *Stiles*, 14 Id., 322; *United States* v. *Packages of Pins*, Gilp., 235; S. P. *State* v. *Hundley*, 46 Mo., 114.

[2] Cited. *Brady* v. *Atlantic Works*, 2 Bann. & A., 437; *Campbell* v. *James* 4 Id., 468. Compare *Britton* v. *Butler*, 9 Blatchf., 456; *Eastern Lunatic Asylum*, 27 Gratt. (Va.), 163.

The necessity which justifies the taking of property is not that overpowering necessity which admits of no alternative, but if the interests at stake may probably be promoted by the appropriation of the property, it is the right and duty of the officer on whom rests the obligation to omit no useful precaution, to take and appropriate it. *Taylor* v. *Nashville &c. R. R. Co.*, 6 Coldw. (Tenn.), 646. S. P. *Wellman* v. *Wickerman*, 44 Mo., 484.

[3] Applied. *Beckwith* v. *Bean*, 8 Otto, 305. Distinguished. *Coolidge* v. *Guthrie*, 1 Flipp., 101. Followed. *Dow* v. *Johnson*, 10 Otto, 171. Cited. *Raymond* v. *Thomas*, 1 Otto, 716. S. P. *Jacobs* v. *Levering*, 2 Cranch, C. C., 117; *Clay* v. *United States*, Dev., 25.

A public officer is personally responsible for illegal acts done by him under the instructions of a superior. *United States* v. *Kendall*, 5 Cranch, C. C., 163; s. c., 12 Pet., 524; *Lennig* v. *Maxwell*, 3 Blatchf., 126; *Munsell* v. *Maxwell*, Id., 364. But in *Sheridan* v. *Furber*, 1 Blatchf. & H., 423, it was held that a mate could justify an assault on a seaman, by evidence that he acted under the orders of the master not knowing them to be illegal.

which the defendant may be found upon process against him, where the citizenship of the respective parties gives jurisdiction to a court of the United States.[4]

*Under the 18th rule of this court, the mode of calculating interest, when a judgment of the Circuit Court is affirmed, is to compute it at the rate of six per cent. per annum, from the day when judgment was signed in the Circuit Court until paid. (See report of the clerk and order of court at the end of this case.)[5] [*116

This case was brought up, by a writ of error, from the Circuit Court of the United States for the Southern District of New York.[6]

Mitchell was an officer of the army, and was sued in an action of trespass by Harmony for seizing his property in the Mexican State of Chihuahua.

By an act passed on the 3d March, 1845, (5 Stat. at L., 750,) Congress allowed a drawback on foreign merchandise exported in the original packages to Chihuahua and Santa Fé, in Mexico. Harmony was a trader engaged in this business, and on the 27th of May, 1846, had transported to Independence, in Missouri, a large amount of goods imported under this law, and in conformity with the regulations of the Treasury Department. On the 27th of May he left Independence, with several other traders, before the passage of the the act of Congress of 13th May, recognizing the existence of war with Mexico, was known there.

The whole history of Colonel Doniphan's expedition was given in the record, being collected from official documents and the depositions of persons who were present. A brief narrative is given in the opinion of the court of all the facts which bore upon the present case.

The declaration was in the usual form and contained three counts, all of them charging the same trespass, namely, that the defendant, on the 10th of February, 1847, at Chihuahua, in the Republic of Mexico, seized, took, drove, and carried away, and converted to his own use, the horses, mules, wagons, goods, chattels, and merchandise, &c., of the plaintiff, and compelled the workmen and servants of the plaintiff having charge, to abandon his service and devote themselves to the defendant's service. The property so alleged to have

[4] All actions of trespass, except those for injury to real property, are transitory in their character. *McKenna* v. *Fisk*, 1 How., 241.

[5] See also *United States* v. *Russell*, 13 Wall., 628; *West Wisconsin R'y Co.* v. *Foley*, 4 Otto, 101; *Cammeyer* v. *Newton*, Id., 234; *Perkins* v. *Fourniquet*, 14 How., 328; but under special circumstances the rate will be increased to ten per cent. *Bank of Kentucky* v. *Wistar*, 3 Pet., 431; *Barrow* v. *Hill*, *ante*, *54; *Lathrop* v. *Judson*, 19 How., 66; *Prentice* v. *Pickersgill*, 6 Wall., 511. S. P. *Rice* v. *McElhannon*, 48 Mo., 224.

[6] Reported below. 1 Blatchf., 549.

been taken is averred to be of the value of $90,000, and the damages, $100,000.

Besides the general plea of not guilty to the whole action, the defendant, Mitchell, pleaded several special pleas.

1st. That war existed at the time between the United States and Mexico; that he was a lieutenant-colonel, &c., forming a part of the military force of the United States, employed in that war, and under the command of Colonel A. W. Doniphan, and he justifies the taking, &c., under and in virtue of the order, to that effect, of his superior and commanding officer, Colonel Doniphan; that the order was a lawful one, which he was bound to obey, and that he was not otherwise instrumental in the alleged trespass.

*117] *2d. Alleging the same preliminary matter, avers that the plaintiff, Harmony, was a citizen of the United States, and, with a full knowledge of the war, had gone with his wagons, merchandise, &c., into Mexico with design to trade with the people of Mexico, and to afford aid to the same in said war; that said Doniphan, as he had a right to do, commanded the defendant to seize, take, &c., the said wagons, &c., and that he did, in obedience to said order take, &c., doing nothing more than was necessary to the execution of that order.

3d. With the same preliminary matter as in the second plea, justifies the taking by his own (Colonel Mitchell's) authority as an officer.

The three special pleas above stated are to the first count of the declaration.

To the second count the defendant pleaded of like effect with the above; and three like pleas were plead to the third count.

To the three first and three last pleas, that is, the pleas to the first and third counts, issues were joined to the country.

To the special pleas to the second count, the plaintiff replied as follows, to wit:—To the first, that the said Doniphan did not command the said horses, wagons, &c., to be stopped, taken, &c., nor were the same taken in contemplation of any proceeding in due course of law for any alleged forfeiture thereof, but to apply the same to the use of the United States without compensation to the plaintiff, of which the defendant had notice.

To the second, that the plaintiff did not carry his goods, &c., out of the United States, for any purpose of trading with the enemy, or elsewhere than in places subdued by the arms of the United States, and by license and permission; and that said Doniphan did not command the defendant to take

the same for or on account of any supposed unlawful design of the plaintiff to trade with the enemy, &c., but to apply the same to the use of the United States, without compensation to the plaintiff.

To the third, that he did not, after notice of the war, carry his goods into Mexico, "except to and into such place and places as had been, and was, or were captured, subdued, and held in subjection by the forces of the United States," &c., and by the permission of the commanding officer of said forces; nor with design to carry on any friendly intercourse or trade with the citizens of Mexico hostile to the United States; and that the defendant did not, in the performance of his duty as lieutenant-colonel, seize, take, &c., said property, by reason of any supposed unlawful design of the plaintiff to trade with the enemy, &c., but the same was taken by the defendant of his own wrong, &c.

*On all these pleas and replications, issues were joined to the country. [*118

When the testimony was closed, the judge charged the jury. The whole of the charge is set forth in the dissenting opinion of Mr. Justice Daniel, and therefore need not be recited here. The bill of exceptions brought the whole charge up to this court. The jury found a verdict for the plaintiff for $90,806.44; for which and the costs, amounting to $5,048.94, the court gave judgment for Harmony.

The cause was argued in this court by *Mr. Crittenden*, (Attorney-General,) for the plaintiff in error, and *Mr. Cutting* and *Mr. Vinton* for the defendant in error. *Mr. Moore* also filed a printed brief.

Mr. Crittenden, for the plaintiff in error, contended that the charge was incorrect throughout, and founded upon misconception of the facts and the law, and that the judgment ought therefore to be reversed.

The principal points, as stated in the charge, and decided by the judge, are as follows:—

1st. "One ground on which the defence is placed, is, that the plaintiff was engaged in an unlawful trade with the enemy, and that, being engaged in an unlawful trade, his goods were liable to confiscation, and any person, particularly an officer of the army, could seize the same."

After thus stating the point, the judge tells the jury, "this ground has, as I understand the evidence, altogether failed."

The true point of the defence is here misconceived and

misstated. It is not that the plaintiff was "*engaged* in unlawful trade with the public enemy," but that he had the "*design*" to engage in such trade, and thereby afford aid to the enemy, and that this authorized the means of prevention used by defendant. The pleadings show that the issue is expressly made on the "design," and not on any actual unlawful trade. The mind of the jury was thus misled from the true issue by the judge's misapprehension. If he had observed that the true issue and point of defence rested on the "design" of the plaintiff, could he have said that Harmony's repeated solicitations and manifest wishes to precede the army, and finally his secret preparations, attempted to be concealed by falsehood, to separate himself from that army in the midst of the enemy's country, were no evidence of a "design" to trade with that enemy, under the protection of his Spanish passport? Or could he have said that such a "design" would not, in point of law, have justified the seizure of his wagons, goods, &c., and their detention, till the *119] *danger was passed? I believe that the learned and honorable judge would have answered both these questions in the negative. The unlawfulness of trade with the enemy, and the right, under circumstances like those of the present case, to detain goods, designed for the enemy, and which might be "useful" to him, are doctrines supposed to be established by authority and reason. 2 Wildman, Internat. Law, 8; 1 Kent, Com., 66; Grotius, book 3, ch. 1, pp. 1–11, and particularly p. 5.

The charge of the judge, therefore, on this first point, was inapplicable to the defence specifically made by plea, and, to say the least, was misleading.

2dly. The judge tells the jury: "Another ground taken by the defendant, and relied upon, depends upon another principle of public law, viz., the taking possession of the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy."

If this is understood to imply that, to justify the taking of goods only where it is certain that they will otherwise fall into the hands of the enemy, then it seems to me that the principle of law is too strictly laid down. The principle, if there be use or reason in it, must extend to cases wherever a reasonable apprehension may be entertained that goods may fall into the enemy's hands.

But take the law to be as stated by the judge. He proceeds to say: "Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch

of the defence has also failed. No case of peril or danger has been proved which would lay a foundation for taking possession of the goods of the plaintiff," &c.

He adds, "the peril must be immediate and urgent," &c.; "in this case there was no immediate or impending danger," &c.

With respect, I must say that this part of the charge is not a comment on the evidence, it is a peremptory decision, a positive conclusion of facts from the evidence, which ought to have been left to the jury; and the law and the fact are so blended that no jury could well distinguish the one from the other.

The judge tells the jury that no "immediate and urgent peril" was proved in this case. It seems to me that the depositions of Doniphan and Clark, before referred to, do prove such a peril, in the strongest manner, and in the most eminent degree; and that the judge, mistaking the evidence, misled the jury as to the fact.

The charge is furthermore erroneous in requiring that the peril should be "immediate," "impending," "urgent." The principle of public law which the judge lays down does not *require it. But the radical error is, that the charge [*120 throws the burden upon the defendant of proving in court all the circumstances that conduce to make up the required peril, and that it makes the court or jury, judges of those circumstances, as of a *res integra*, without allowing any effect to the decision of the defendant, or his commander, by whose authority the goods of the plaintiff are alleged to have been received.

The law made it the business of the commander to decide, in the first instance, whether the peril was such, and the condition of his army and of the enemy such, as required their seizure and detention, and his decision must be entitled to some respect. Unless the integrity of his judgment can be impeached, that decision stands as proof and protection for him, against any suit or legal proceeding against him. He, no more than a judge on the bench, can be sued for a mere mistake of judgment, if mistake he has made. This is as true in respect to military, as it is in respect to civil officers, and as true in respect to the exercise of military, as of civil authority. *Crowell et al.* v. *McFadon*, 8 Cranch, 94; 9 Cranch, 355; *Martin* v. *Mott*, 12 Wheat., 19–33; 9 Pet., 134; *Wilkes* v. *Dinsman*, 7 How., 128, 129; *Luther* v. *Borden*, Id. 45, et seq.

These authorities fully, I think, establish the doctrine for which I contend, and the incorrectness of the instructions given to the jury in this respect.

3dly. The next and third point of the charge is this: "The

next ground of defence, and which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the public authorities for public use."

In respect to this the judge admits the "right of a military officer, in a case of extreme necessity of the government of the army, to take private property for the public service." But then the judge further tells the jury, "in my judgment, all the evidence taken together does not make out an immediate peril or urgent necessity existing at the time of the seizure, which would justify the officer in taking private property and impressing it into the public service; the evidence does not bring the case within the principle of extreme necessity," &c.

Against this particular charge the plaintiff in error relies upon and urges all the exceptions and objections made to the preceding charges, and upon the authorities cited above. The seizure, as it is called, was in this case made by a military officer; he must decide in the first instance whether an "extreme necessity," (if that be required,) "for the safety of the army," made it proper to make the seizure. If the law made it his duty to decide it, and he gave an honest, though mistaken, judgment on *the subject, will the same law hold him personally responsible for it?

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Let the reason of the case, and the authorities last cited, answer the question. Yet, by the charge, the military question decided by the general in the field, and in the midst of danger, is to be rejudged in court, *de novo*. This cannot be either justice or law. To make the military officer in such a case liable, it must be shown that his decision was corrupt, malicious, or, at least, without any reasonable ground.

If this view of the subject be in any degree right, the charge must be erroneous.

4thly. The judge says, "as to the remaining grounds of defence, the liability of the defendant for taking the goods and appropriating them to the public service, accrued at the time of the seizure. If it was an unlawful taking, the liability immediately attached; and the question was, whether that liability had been discharged or released by any subsequent act of the plaintiff. Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible. Then, was any act done by the plaintiff which waived the liability, or by which he resumed the ownership and possession of the goods?" On this question the judge doubts "if there be any evidence showing an intent,

on the part of the plaintiff, to resume ownership over the goods, &c., or any act done by him that would, when properly viewed, lead to that result."

In reviewing this last charge, it is to be remembered that Harmony was never deprived of the ownership, or even the possession, of his property, otherwise than constructively, by force of the order of the 10th February, 1847, which required him to accompany the army, and which order he obeyed. He retained ownership and possession, but was constrained to use those rights in a particular manner, and he did so use them. There is more and better ground to "doubt" whether he was ever deprived of ownership or possession, than to "doubt" whether he ever "resumed" that ownership and possession. He certainly, and by all the evidence, did have uncontrolled possession, and exercised uncontrolled ownership of the goods, from their arrival at the city of Chihuahua. There is no room for any doubt as to this fact. It is in effect admitted, and the attempt is made to qualify it, by alleging that Harmony took possession of said goods, and made sales of them, under agreement and arrangement with Colonel Doniphan. Now, if this was so, by what series of implications, by what accumulation of constructions construed, can the defendant, Mitchell, be made responsible, under the arrangement, for the whole value *of the goods, merely because of the trespass, if trespass it was, committed by him on the evening preceding the 10th of February, 1847? It might as reasonably be pretended by Harmony, if he had retailed his goods in Chihuahua, and any of the purchasers had failed to pay the price, that Mitchell was responsible for that price, because it all came from his old trespass. Yet the plain import of this charge is to make Mitchell liable for all the goods, notwithstanding that said Harmony had made them the subject of a subsequent contract with Doniphan, under which, as Harmony has attempted to prove, these same goods were lost by the inattention and negligence of Doniphan. [*122

There seems, therefore, that there was no legal ground to make Mitchell liable to the extent to which he is made so by this charge, and that it is therefore erroneous.

But, as it appears to me, the great error of this part of the judge's charge is in his telling the jury, in effect, that the order of Colonel Doniphan afforded no legal defence or protection to Colonel Mitchell. The judge said that "Colonel Mitchell, who executed the order, was not alone responsible; Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible," &c.

On the part of Mitchell, it is most respectfully, but earn-

estly, contended that this instruction to the jury is not warranted by law, but is directly contrary to law.

The order was such a one as Mitchell was bound by law to obey; and it would be contradictory in the law to bind him to obey, and then to punish him for obeying.

In addition to the cases and authorities cited on the 2d point, and which are relied on as particularly applicable to this, the court is referred to the act of Congress of the 10th of April, 1806, "for establishing rules and articles for the government of the armies of the United States," and particularly the 9th article of the 1st section, which makes disobedience to the "lawful command of his superior officer" punishable, at the discretion of a court-martial, with death. 2 Stat. at L., 361.

If the judge, by his charge, meant to say that, in his opinion, there was no evidence—no competent evidence—before the jury to maintain the two grounds of defence first alluded to by him, then the questions he decided were questions of law, just as much as questions arising on demurrers to evidence, and were proper to be decided by the judge, and not by the jury.

Considering it, then, as a question of law, like that arising on a demurrer to evidence for some material defect, it becomes necessary to examine the evidence, to ascertain whether the question of law has been correctly determined.

*123] To that *examination the plaintiff in error confidently appeals, to show that the charge in this particular is plainly erroneous.

The points made by the counsel for the defendant in error were the following:

First. In respect to any justification of the seizure and use of the property, based upon an alleged unlawful trading with the enemy.

1. The evidence tended to prove, and the jury found, that the plaintiff below was not engaged in illegal trading, or, in the language of the pleadings and authorities, "in affording aid or assistance to the enemy"; that neither the defendant nor Colonel Doniphan arrested his property as being forfeited, nor had grounds for so doing; but that this was merely an after-thought, other grounds having been alleged; and that the plaintiff, for all the trading he pursued or contemplated, had the sanction and license of Colonel Doniphan and of the defendant himself, and their superior officers, up to the President; and was acting to "aid and assist" the United States, and the policy of our government, attaching

himself to its interests, trading under its protection, facilitating its supplies, and uniting himself with its fate; and simply declining (as he well might) to devote his property gratuitously to what an inferior agent supposed was the public service.

2. The law involved in the charge on this point was correctly stated. The plaintiff, a citizen of the United States, acting under such sanction and permission as he had, could rightfully and legally trade with the Mexicans:

(*a.*) In a territory and with inhabitants reduced to subjection. *The United States* v. *Rice*, 4 Wheat., 246; 2 Gall., 501; *Fleming* v. *Page*, 9 How., 603, and authorities there cited:

(*b.*) Under such license to trade as was given; which was within the competency of the officers who granted it, and a common course in prosecuting a campaign under a variety of circumstances; "so to modify the relations of a state of war as to permit commercial intercourse." *The William Penn*, 3 Wash. C. C., 484; *The George*, 1 Mason, 24; *The Julia*, 8 Cranch, 181; *Scholefield* v. *Eichelberger*, 7 Pet., 592.

The Secretary of War was the proper organ of government. *The United States* v. *Eliason*, 16 Pet., 302.

3. The defendant could not arrest for examination, and then proceed with the property in pursuit of other objects, without deciding to seize as forfeited, or to restore. No delay for examination was necessary; nor can delays be tolerated which may operate oppressively. *The Anna Maria*, 2 Wheat., 327; *Maley* v. *Shattuck*, 3 Cranch, 458.

*4. Defendant cannot be permitted to treat the property as arrested for the cause alleged, or, for the [*124 purpose of trial and condemnation, as forfeited, or as in fact forfeited, when the conduct of all throughout has been so inconsistent with that idea; when he did not, in fact, arrest it for that cause and purpose. He cannot deprive the plaintiff of the rights to which he is entitled on such a trial, nor dispose of the property as if condemned. The cause alleged for the seizure is important and issuable. If an officer even have legal process in his hands, and do not act under it, it is no justification. If he legally arrest property for probable cause of forfeiture, he cannot damage it, or convert it to his use with impunity. See cases above cited. *Lucas* v. *Nockells*, 4 Bing., 729; *The Eleanor*, 2 Wheat., 345; *Del Col* v. *Arnold*, 3 Dall., 333.

Second. In respect to the justification set up on the trial, but not in the pleadings, of taking the property, lest it should fall into the hands of the enemy.

1. The evidence tended to prove, and the jury found, the facts to be as understood and referred to by the judge; that El Paso and its neighborhood, including the presidio or fort of San Eleasario, at which the property was at the time of seizure, were in the possession of the arms of this government; that there was no public force of the enemy at the time in its neighborhood which put the goods in danger of being captured; that the plaintiff's property stood in the same condition as that of any other trader in the country; that there was no immediate or urgent peril of its falling into the enemy's hands, and, at the most, only a contingent and remote peril; that there was no impending danger—no enemy present or advancing; and that the plaintiff was able and willing to defend himself against marauding parties.

2. The rules of law stated were correct; the peril must be great, immediate, and urgent, such as an enemy near or advancing; not remote, and the attack uncertain and contingent. A mere general exposure of the property to capture, from a hostile public force, not near nor advancing, but at rest 200 miles distant, or from irregular marauding parties, to which all property is exposed during war, and particularly so on a frontier, cannot be sufficient to justify the seizure. *Mayor, &c. of New York* v. *Lord*, 17 Wend. (N. Y.), 285; 18 Id., 126; and cases referred to; so "to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity," per Chancellor Walworth, Id., p. 129. A jettison during an impending peril, Id., p. 130.

3. The person or property of a citizen cannot be seized and carried away by an inferior officer, and the latter be *125] justified by *a mere order of his official superior, not stating any cause, and being in fact without cause. Such an order during war is different from one during peace, only as it affords a justification against the public enemy, or against one acting, at the time, with or in the garb of an enemy.

4. The pleadings do not sufficiently set up the present defence to admit of it. Two of the pleas to each count are confined to the cause of illegal trading, and do not even allege a forfeiture for that cause. See *Gelston* v. *Hoyt*, 3 Wheat., 246; *Hall* v. *Warren*, 2 McLean, 332.

The other one (the first one of each set) is radically defective. It neither avers any forfeiture or cause of arrest, nor sufficiently states the facts and circumstances to show the authority and jurisdiction of Colonel Doniphan.

(*a.*) Such facts are necessary to be averred in order that

issue may be taken upon them; and that the plaintiff may not have his property taken for one pretence, and be exposed to the hazard of a trial upon various different pretences, of which he had no notice. See Precedents, 3 Chit. Pl., 1081–1094, &c.

(*b.*) The stopping, seizing, taking, driving, and carrying away of the personal property of a citizen, damaging and converting it, cannot be justified by a mere order of a military officer during war. *Gelston* v. *Hoyt*, 3 Wheat., 246, originally 13 Johns. (N. Y.), 561; *Murray* v. *The Charming Betsy*, 2 Cranch, 64. [Express orders of the President to capture in a *quasi* war. No justification of an arrest and bringing in for trial. Officer excused, under the circumstances, only from vindictive damages.]

(*c.*) It results that, if the existence of a military necessity be requisite to make the command lawful, that fact should have been pleaded, and must be established. If, under any conceivable circumstances of danger, Colonel Doniphan's or the defendant's own judgment of the existence of such a necessity would have an effect to make the seizure justifiable, (and without such a judgment it clearly cannot be justified, even if it can with it,) then the circumstances of danger, and the fact of such judgment having been given, and the order and action based only upon that cause, should have been distinctly pleaded (so that the defendant might be held to prove them, and the plaintiff be prepared to controvert them); and all these should have been clearly established, which they were not. Under whatever color the acts may have been committed, the truth, good faith, and sufficiency of the causes alleged are the subjects of investigation as questions of fact without regard to the official station. *Wilson* v. *Mackenzie*, 7 Hill (N. Y.), 95, citing *Sutton* v. *Johnstone;* 1 T. R., 544, and 1 McArthur on Courts Martial, 268, 4th Ed., and 436, Appendix, No. 24; **Percival* v. *Hickey*, 18 Johns. (N. Y.), 257; and see cases cited under the 3d and 4th subdivisions of the 1st point. [*126

Third. In respect to the remaining ground set up on the trial, but not in the pleadings, viz.: that the taking the property, its damage, or conversion, was for public use, and was justified, without other authority, by necessity.

1. The evidence tended to prove, and the jury found, that there was no such necessity; that there was no immediate, existing, impending and urgent occasion for the seizure; but that the property was taken on the frontier, (by an inferior officer, not instructed by the government, nor even by any general officer, and in the contingency that happened of General Wool not being in Chihuahua,) for the purpose of

strengthening an invading force against Chihuahua, and of attacking a fortification more than 200 miles distant, in the interior of the enemy's country; and even for this it was not urgently necessary. The finding of the jury, if it admitted that the property was taken for and applied to the public use, declared that it was so taken and so used without the requisite authority to justify it. It appeared there had been an application to Congress to declare or recognize the necessity, which had not been successful.

2. The limitations of the charge, as to the character of the necessity requisite to justify such a seizure, were just, and did not prejudice the defendant. "An immediate, existing, impending, and urgent necessity" as explained and exemplified in the charge, was at least indispensable. See authorities under 2d subdivision of the 2d point.

3. A forced service beyond the realm has always been condemned. The war could not legally be presumed to be urged for purposes of conquest, nor for the capture or acquisition of Chihuahua even by ordinary means. The use of extraordinary means for an invasion and capture of a city and by an inferior officer acting without orders, was in every respect unauthorized and illegal. *Fleming* v. *Page*, 9 How., 603; 1 Rolle, Abr., 116, l. 10, ad. 30; 2 Inst., 47; 1 Bl. Com., 139; *Lyon* v. *Jerome*, 26 Wend. (N. Y.), 485, 491, 492, 494.

4. Private property cannot be taken for public use without compensation and against the consent of the owner. The officer who so takes it is subject to an action for its value. The duty of the government to compensate for property taken and applied to the public service is well established; but compensation cannot be given without legislative sanction; and no discretionary power existing in any executive officer (much less an inferior one acting without orders) to compel the citizen to furnish property or funds, or to suffer from its being taken, can be tolerated under our system of govern-
*127] ment. The legislature *cannot be put under such an obligation or duty, to indemnify the sufferer, nor the citizen be turned over to Congress, by any one, compulsorily, for such redress. The actor against the citizen must be responsible until compensation be given. He may also be liable to an extent which the government may not sanction, by reason of his resorting to an unjustifiable course, or taking too much, or of a wrong kind, or wasting or using it. The indemnity which the government may or ought to afford him, is no defence to a suit. The defendant, therefore, is responsible to the plaintiff even if the supposed necessity had

clearly existed, and the charge on this point is wholly in favor of the defendant, and not exceptionable. Art. 4 and 5 of Amendments to Constitution; *Van Horne's Lessee* v. *Dorrance*, 2 Dall., 311; Compensation Act of 9th April, 1816, § 6, 3 U. S. Stat. at L., 262; *Gelston* v. *Hoyt*, 3 Wheat., 246; 13 Johns. (N. Y.), 139, 561; *Ship American Eagle and cargo*, seized by order of the President, as fitted out for illegal purposes: verdict, $107,000; American State Papers, Claims, p. 601; Report of Committee, No. 427; also p. 475, No. 311; Appropriation Act, 9 April, 1818, 3 U. S. Stat. at L., 418; Act for relief of Gelston's Ex'r, 7 July, 1838, c. 200, 6 U. S. Stat. at L., 728; *Case of Major Austin and Lieut. Wells*, seizing disaffected persons under orders of Gen. Pike, American State Papers, Claims, p. 545; Reports of Committee, 15th Cong., 1st Sess., Nos. 379, 431; Act for their relief, April 20, 1818, c. 75, 6 U. S. Stat. at L., 210; *Case of General Swartwout*, impressing boats in an emergency, by order of General Wilkinson, American State Papers, Claims, p. 649; Report of Committee, No. 44, and p. 731; Report, No. 526; Act for his relief, 3d March, 1821, c. 55, 6 U. S. Stat. at L., 261; *Case of teamster in Canada*, seizing rum by order of Col. Clark, American State Papers, Claims, p. 523; Report of Committee, 14 Cong., 2d Sess., No. 350. Other cases of impressments, &c., 6 U. S. Stat. at L., 146, 162, 171, 240, c. 26, 162, 173, 125, 38; Report, No. 294, p. 462. *Bloodgood* v. *Mohawk & H. R. R. Co.*, 18 Wend. (N. Y.), 16, 17, 31, 42.

5. The pleadings and the proofs were subject to the same objection under this point, as stated in the last subdivision to the third point.

6. The cause of action being transitory, and not merely against the peace, but affecting property, there is no objection to impleading the defendant wherever he can be found. *McKenna* v. *Fisk*, 1 How., 248; 18 Johns. (N. Y.), 257; 7 Hill (N. Y.), 95, before cited.

Fourth. The directions as to the time when the liability attached, and as to the transactions with Colonel Doniphan, not *being sufficient to discharge the defendant, were correct. The evidence tended to prove, and the jury [*128 found, that there had been no intent to resume ownership, nor any release of liability. There was nothing in placing the goods subject to the order of Colonel Doniphan, when the plaintiff could no longer attend to or watch them, that amounted in itself to any release or resumption of ownership inconsistent with the liability of the defendant. Plaintiff was not bound to trade with the enemy, nor to accept the property in such a different and hostile place, under such dif-

ferent circumstances, damaged, scattered, destroyed, and impossible to be saved; and he did not so accept it. Whatever he could save he had a right to save, without impairing his right of action, or deducting any thing more than he could realize. *Conrad* v. *Pacific Ins. Co.*, 6 Pet., 274, and cases there referred to.

Fifth. The discussion by counsel and opinion by the court, after the testimony was closed, before the counsel summed up in form, were without objection or exception; it was convenient and appropriate in such a case of voluminous written testimony and peculiar circumstances; it involved the necessity of commenting upon facts, before a formal summing up by counsel; but this also was without objection or exception. The comments of the court are to be treated as if made by way of hypothesis, and for purposes of illustration; they took nothing from the jury. It was left to the jury to say whether their views of the evidence accorded with the judge's review of them, addressed to the jury for their consideration; they cannot be the ground of exception or review. *Carver* v. *Astor*, 4 Pet., 1, 23, 80, &c.

There was, in fact, no exception. These and various other matters are out of place in the bill of exceptions. Rule 38 of January Term, 1832; *Zeller* v. *Eckert*, 4 How., 297; *United States* v. *Morgan*, 11 How., 158.

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

This is an action of trespass brought by the defendant in error, against the plaintiff in error, to recover the value of certain property taken by him, in the province of Chihuahua during the late war with Mexico.

It appears that the plaintiff, who is a merchant of New York, and who was born in Spain, but is a naturalized citizen of the United States, had planned a trading expedition to Santa Fé, New Mexico, and Chihuahua, in the Republic of Mexico, before hostilities commenced; and had set out from Fort Independence, in Missouri, before he had any knowledge of the declaration of war. As soon as the war commenced, *129] an expedition was *prepared under the command of General Kearney, to invade New Mexico; and a detachment of troops was set forward to stop the plaintiff and other traders until General Kearney came up, and to prevent them from proceeding in advance of the army.

The trading expedition in which the plaintiff and the other traders were engaged, was, at the time they set out, authorized by the laws of the United States. And when General

Kearney arrived they were permitted to follow in the rear and to trade freely in all such places as might be subdued and occupied by the American arms. The plaintiff and other traders availed themselves of this permission and followed the army to Santa Fé.

Subsequently General Kearney proceeded to California, and the command in New Mexico devolved on Colonel Doniphan, who was joined by Colonel Mitchell, who served under him, and against whom this action was brought.

It is unnecessary to follow the movements of the troops or the traders particularly, because, up to the period at which the trespass is alleged to have been committed at San Elisario, in the province of Chihuahua, it is conceded that no control was exercised over the property of the plaintiff, that was not perfectly justifiable in a state of war, and no act done by him that had subjected it to seizure or confiscation by the military authorities.

When Colonel Doniphan commenced his march for Chihuahua, the plaintiff and the other traders continued to follow in the rear and trade with the inhabitants, as opportunity offered. But after they had entered that province and were about to proceed in an expedition against the city of that name, distant about 300 miles, the plaintiff determined to proceed no further, and to leave the army. And when this determination was made known to the commander at San Elisario he gave orders to Colonel Mitchell, the defendant, to compel him to remain with and accompany the troops. Colonel Mitchell executed the order, and the plaintiff was forced, against his will, to accompany the American forces with his wagons, mules and goods, in that hazardous expedition.

Shortly before the battle of Sacramento, which was fought on the march to the town of Chihuahua, Colonel Doniphan, at the request of the plaintiff, gave him permission to leave the army and go to the hacienda of a Mexican by the name of Parns, about eight miles distant, with his property. But the plaintiff did not avail himself of this permission; and apprehended, upon more reflection, that his property would be in more danger there than with the army; and that a voluntary acceptance on his part, and *resuming the possession at his own risk, would deprive him of any remedy for its loss if it should be taken by the Mexican authorities. He remained therefore with the troops until they entered the town. His wagons and mules were used in the public service in the battle of Sacramento, and on the march afterwards. And while the town remained in possession of [*130

the American forces he endeavored, but without success, to dispose of his goods. When the place was evacuated they were therefore unavoidably left behind, as nearly all of his mules had been lost in the march and the battle. He himself accompanied the army, fearing that his person would not be safe if he remained behind, as he was particularly obnoxious, it seems, to the Mexicans, because he was a native of Spain, and came with a hostile invading army.

When the Mexican authorities regained possession of the place, the goods of the plaintiff were seized and confiscated, and were totally lost to him. And this action was brought against Colonel Mitchell, the defendant, in the court below, to recover the damages which the plaintiff alleged he had sustained by the arrest and seizure of his property at San Elisario, and taking it from his control and legal possession.

This brief outline is sufficient to show how this case has arisen. The expedition of Colonel Doniphan, and all its incidents, are already historically known, and need not be repeated here.

At the trial in the Circuit Court the verdict and judgment were in favor of the plaintiff; and this writ of error has been brought upon the ground that the instructions to the jury by the Circuit Court, under which the verdict was found, were erroneous.

Some of the objections taken in the argument here, on behalf of the defendant, have arisen from a misconception of the instructions given to the jury. It is supposed that these directions embraced questions of fact as well as of law, and that the court took upon itself the decision of questions arising on the testimony, which it was the exclusive province of the jury to determine. But this is an erroneous construction of the exception taken at the trial. The passages in relation to questions of fact are nothing more than the inferences which in the opinion of the court were fairly deducible from the testimony; and were stated to the jury not to control their decision, but submitted for their consideration in order to assist them in forming their judgment. This mode of charging the jury has always prevailed in the State of New York, and has been followed in the Circuit Court ever since the adoption of the Constitution.

The practice in this respect differs in different States. In some of them the court neither sums up the evidence in a charge to the jury nor expresses an opinion upon a question of fact. Its *charge is strictly confined to questions of law, leaving the evidence to be discussed by coun-

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sel, and the facts to be decided by the jury without commentary or opinion by the court.

But in most of the States the practice is otherwise; and they have adopted the usages of the English courts of justice, where the judge always sums up the evidence, and points out the conclusions which in his opinion ought to be drawn from it; submitting them, however, to the consideration and judgment of the jury.

It is not necessary to inquire which of these modes of proceeding most conduces to the purposes of justice. It is sufficient to say that either of them may be adopted under the laws of Congress. And as it is desirable that the practice in the courts of the United States should conform, as nearly as practicable, to that of the State in which they are sitting, that mode of proceeding is perhaps to be preferred which, from long established usage and practice, has become the law of the courts of the State. The right of a court of the United States to express its opinion upon the facts in a charge to the jury was affirmed by this court in the case of *M'Lanahan* v. *The Universal Insurance Co.*, 1 Pet., 182, and *Games* v. *Stiles*, 14 Pet., 322. Nor can it be objected to upon the ground that the reasoning and opinion of the court upon the evidence may have an undue and improper influence on the minds and judgment of the jury. For an objection of that kind questions their intelligence and independence, qualities which cannot be brought into doubt without taking from that tribunal the confidence and respect which so justly belong to it, in questions of fact.

It was in pursuance of this practice, that the proceedings set forth in the exceptions took place. When the testimony was closed and the questions of law had been raised and argued by counsel, the court stated to them the view it proposed to take of the evidence in the charge about to be given. And it is evident, from the statement in the exception, that this was done for the purpose of giving the counsel for the respective parties an opportunity of going before the jury, to combat the inferences drawn from the testimony by the court, if they supposed them to be erroneous or open to doubt.

It appears from the record that the counsel on both sides declined going before the jury, evidently acquiescing in the opinions expressed by the court, and believing that they could not be successfully disputed. And the judge thereupon charged the jury that if they agreed with him in his view of the facts that they would find for the plaintiff, otherwise for the defendant; and upon this charge the jury found

for the plaintiff, and assessed the damages stated in the pro-
*132] ceedings. It is manifest, therefore, that *the Circuit Court did not, in its instructions, trench upon the province of the jury, and that the jury could not have been misled as to the nature and extent of their own duties and powers. The decision of the facts was fully and plainly submitted to them. And their verdict for the plaintiff, upon the charge given to them, affirms the correctness of the views taken by the court; and the opinions upon the evidence as therein stated must now be regarded as facts found by the jury; and as such are not open to controversy in this court.

This statement of the manner in which the case was disposed of in the Circuit Court was necessary to disengage it from objections which do not belong to it, and to show what questions were decided by the court below, and are brought up by this writ of error. We proceed to examine them.

It is admitted that the plaintiff, against his will, was compelled by the defendant to accompany the troops with the property in question when they marched from San Elisario to Chihuahua; and that he was informed that force would be used if he refused. This was unquestionably a taking of the property, by force, from the possession and control of the plaintiff; and a trespass on the part of the defendant, unless he can show legal grounds of justification.

He justified the seizure on several grounds.

1. That the plaintiff was engaged in trading with the enemy.

2. That he was compelled to remain with the American forces, and to move with them, to prevent the property from falling into the hands of the enemy.

3. That the property was taken for public use.

4. That if the defendant was liable for the original taking, he was released from damages for its subsequent loss, by the act of the plaintiff, who had resumed the possession and control of it before the loss happened.

5. That the defendant acted in obedience to the order of his commanding officer, and therefore is not liable.

The first objection was overruled by the court, and we think correctly.

There is no dispute about the facts which relate to this part of the case, nor any contradiction in the testimony. The plaintiff entered the hostile country openly for the purpose of trading, in company with other traders, and under the protection of the American flag. The inhabitants with whom he traded had submitted to the American arms, and the country was in possession of the military authorities of the United

States. The trade in which he was engaged was not only sanctioned by the commander of the American troops, but, as appears by the record, was permitted by the Executive Department of the government, *whose policy it was to [*133 conciliate, by kindness and commercial intercourse, the Mexican provinces bordering on the United States, and by that means weaken the power of the hostile government of Mexico, with which we were at war. It was one of the means resorted to to bring the war to a successful conclusion.

It is certainly true, as a general rule, that no citizen can lawfully trade with a public enemy; and if found to be engaged in such illicit traffic his goods are liable to seizure and confiscation. But the rule has no application to a case of this kind; nor can an officer of the United States seize the property of an American citizen, for an act which the constituted authorities, acting within the scope of their lawful powers, have authorized to be done.

Indeed this ground of justification has not been pressed in the argument. The defence has been placed, rather on rumors which reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.

The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

In the argument of these two points, the circumstances under which the goods of the plaintiff were taken have been

much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a danger or neces-
*134] sity, such as the court described, *did not exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is, whether the law was correctly stated in the instruction of the court; and whether any thing short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public.

The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be intrusted with some discretionary power as to the measures he should adopt; and if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay,

and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

*In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon which he acted, that private rights must for the time give way to the common and public good. [*135

But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.

The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the ques-

tion here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it.

The case mentioned by Lord Mansfield, in delivering his opinion in *Mostyn* v. *Fabrigas*, 1 Cowp., 180, illustrates the principle of which we are speaking. Captain Gambier, of the British navy, by the order of Admiral Boscawen, pulled down the houses of some sutlers on the coast of Nova Scotia, who *were supplying the sailors with spirituous liq- *136] uors, the health of the sailors being injured by frequenting them. The motive was evidently a laudable one, and the act done for the public service. Yet it was an invasion of the rights of private property, and without the authority of law, and the officer who executed the order was held liable to an action, and the sutlers recovered damages against him to the value of the property destroyed.

This case shows how carefully the rights of private property are guarded by the laws in England; and they are certainly not less valued nor less securely guarded under the Constitution and laws of the United States.

We think, therefore, that the instructions of the Circuit Court on the 2d and 3d points were right.

The 4th ground of objection is equally untenable. The liability of the defendant attached the moment the goods were seized, and the jury have found that the plaintiff did not afterwards resume the ownership and possession.

Indeed, we do not see any evidence in the record from which the jury could have found otherwise. From the moment they were taken possession of at San Elisario, they were under the control of Colonel Doniphan, and held subject to his order. They were no longer in the possession or control of the plaintiff, and the loss which happened was the immediate and necessary consequence of the coercion which compelled him to accompany the troops.

It is true, the plaintiff remained with his goods and took care of them, as far as he could, during the march. But whatever he did in that respect was by the orders or permission of the military authorities. He had no independent control over them.

Neither can his efforts to save them from loss, after they arrived at the town of Chihuahua, by sale or otherwise, be construed into a resumption of possession, so as to discharge the defendant from liability. He had been brought there with the property against his will; and his goods were subjected to the danger in which they were placed by the act of the de-

fendant. And the defendant cannot discharge himself from the immediate and necessary consequences of his wrongful act, by abandoning all care and control of the property after it reached Chihuahua, and leaving the plaintiff to his own efforts to save it. He could not discharge himself without restoring the possession in a place of safety; or in a place where the plaintiff was willing to accept it. And the plaintiff constantly refused to take the risk upon himself, after they arrived at Chihuahua, as well as on the march, and warned Colonel Doniphan that he would not.

Neither can the permission given to the plaintiff to leave the troops and go to the hacienda of Parns, affect his rights. He *was then in the midst of the enemy's country, and to leave the American forces at that point might [*137 have subjected his person and property to greater dangers than he incurred by remaining with them. The plaintiff was not bound to take upon himself any of the perils which were the immediate consequences of the original wrong committed by the defendant in seizing his property and compelling him to proceed with it and accompany the troops.

The 5th point may be disposed of in a few words. If the power exercised by Colonel Doniphan had been within the limits of a discretion confided to him by law, his order would have justified the defendant even if the commander had abused his power, or acted from improper motives. But we have already said that the law did not confide to him a discretionary power over private property. Urgent necessity would alone give him the right; and the verdict finds that this necessity did not exist. Consequently the order given was an order to do an illegal act; to commit a trespass upon the property of another; and can afford no justification to the person by whom it was executed. The case of Captain Gambier, to which we have just referred, is directly in point upon this question. And upon principle, independent of the weight of judicial decision, it can never be maintained that a military officer can justify himself for doing an unlawful act, by producing the order of his superior. The order may palliate, but it cannot justify.

But in this case the defendant does not stand in the situation of an officer who merely obeys the command of his superior. For it appears that he advised the order, and volunteered to execute it, when, according to military usage, that duty more properly belonged to an officer of inferior grade.

We do not understand that any objection is taken to the jurisdiction of the Circuit Court over the matters in contro-

versy. The trespass, it is true, was committed out of the limits of the United States. But an action might have been maintained for it in the Circuit Court for any district in which the defendant might be found, upon process against him, where the citizenship of the respective parties gave jurisdiction to a court of the United States. The subject was before this court in the case of *McKenna* v. *Fisk*, reported in 1 How., 241, where the decisions upon the question are referred to, and the jurisdiction in cases of this description maintained.

Upon the whole, therefore, it is the opinion of this court, that there is no error in the instructions given by the Circuit Court, and that the judgment must be affirmed with costs.

*138] *Mr. Justice DANIEL dissented.

In this case I find myself constrained to disagree with the opinion of the court just pronounced. This disagreement is not so much the result of any view taken by me of the testimony in this case, in conflict with that adopted by my brethren; for, with respect to the character of the testimony, were that the subject regularly before us, there perhaps would exist little or no difference of opinion. With some modifications, perhaps unimportant, I might have agreed also to the legal propositions laid down by the court, so far as I have been able to extract them from the charge of the judge. My disagreement with the majority, relates to a great principle lying at the foundation of all legal inquiries into matters of fact; lying indeed at the foundation of civil society itself: the preservation, in its fullest scope and integrity, unaffected, and even unapproached by improper influences, direct or indirect, of the venerable, the sacred, the unappreciable trial by jury. In the remark just made, or in any criticism which may be attempted as to the charge of the judge at circuit, in this case, I would have it understood that there is no officer to whose learning, or to whose integrity of purpose, I would with greater confidence intrust either the rights of the citizen, or the exposition of the law, than I would to the judge whose opinion is before us; but in this instance, it seems to me, that in accordance with a practice which, although it has obtained in some of the courts, is regarded as irregular and mischievous, he has stepped beyond the true limits of the judicial province. Duty demands of me, therefore, however ineffectual the effort, that I should oppose my feeble resistance to the aggression.

I object to the charge of the judge in this case, as I would to every similar charge of a court presiding over a jury trial at common law, because it is not confined to a statement of

the points of law raised by the pleadings, and to the competency or relevancy of the testimony offered by either party in reference to those points; but extends to the weight and efficiency of the evidence, all admissible, and in fact admitted, and declares to the jury minutely and emphatically, what that testimony does or does not prove. And now let us examine the language of the charge. It is as follows:

"One ground on which the defence is placed is, that the plaintiff was engaged in an unlawful trade with the public enemy, and that, being engaged in an unlawful trade, his goods were liable to confiscation; and any person, particularly an officer of the army, could seize the same.

This ground, as I understand the evidence, has altogether failed. He was not only so engaged, but was engaged in trading *with that portion of the territory reduced to subjection by our arms, and where his trading with [*139 the inhabitants was permitted and encouraged. The army was directed to hold out encouragement to the traders. There is no foundation, therefore, for this branch of the defence. Another ground taken by the defendant, and relied upon, depends upon another principle of public law, viz., the taking possession of the goods at a time and place when it was necessary for the purpose of preventing them from falling into the hands of the enemy. This has been urged as particularly applicable to the plaintiff's goods, some of which consisted of articles which might be used as munitions of war, wagons for transportation, &c.

Taking the whole of the evidence together, and giving full effect to every part of it, we think this branch of the defence has also failed.

No case of peril or danger has been proved which would lay a foundation for taking possession of the goods of the plaintiff at San Elisario, on that ground, either as it respects the state of the country, or the force of the public enemy. On the contrary, it was in the possession of the arms of this government. There was no enemy, no public force at the time in the neighborhood, which put the goods in the danger of being captured. The plaintiff's goods, therefore, stood in the same condition as the goods of any other trader in the country. The testimony does not make out a case of seizure of property justified by the peril of its falling into the enemy's hands. The peril must be immediate and urgent, not contingent or remote; otherwise every citizen's property, particularly on the frontiers, would be liable to be seized or destroyed, as it must always be more or less exposed to cap-

ture by the public enemy. The principle itself, if properly applied, of the right to take property to prevent it from falling into the hands of the enemy, is undisputed. But in this case there was no immediate or impending danger, no enemy advancing to put the goods in peril. They were more exposed to marauding parties than to any public force, the danger from which the plaintiff considered himself able to take care of. The next ground of defence, and which constitutes the principal question in the case, and upon which it must probably ultimately turn, is the taking of the goods by the public authorities for public use. I admit the principle of public law; but this rests likewise upon the law of necessity. I have no doubt of the right of a military officer, in a case of extreme necessity, for the safety of the government or of the army, to take private property for the public service.

An army upon its march, in danger from the public enemy, would have a right to seize the property of the *140] citizen, and use *it to fortify itself against assault while the danger existed and was impending, and the officer ordering the seizure would not be liable as a trespasser; the owner must look to the Government for indemnity. The safety of the country is paramount, and the rights of the individual must yield in case of extreme necessity. No doubt, upon the testimony, if the enemy had been in force, in the neighborhood of the United States troops, with the disparity which existed at Sacramento, and the same danger for the safety of the troops existed at San Elisario that threatened them there, the commanding officer might, for the safety of his army, seize and use, while the danger continued, the wagons and teams of the plaintiff that could be immediately brought into the service, to meet and overcome the impending danger. An immediate, existing, and overwhelming necessity would justify the seizure for the safety of the army.

Looking, however, at the testimony, it seems to me quite clear that these goods were seized, not on account of any impending danger at the time, or for the purpose of being used against an immediate assault of the enemy, by which the command might be endangered, but that they were seized and taken into the public service for the purpose of coöperating with the army in their expedition into the enemy's country, to Chihuahua. The mules, wagons, and goods were taken into the public service for the purpose of strengthening the army, and aiding in the accomplishment of the ulterior object of the expedition, which was the taking of Chihuahua:

it was not to repel a threatened assault, or to protect the army from an impending peril; in my judgment, all the evidence taken together does not make out an immediate peril or urgent necessity existing at the time of seizure which would justify the officer in taking private property and impressing it into the public service; the evidence does not bring the case within the principle of extreme necessity; it does not make out such a case, or one coming within the principle; there is not only no evidence of an impending peril to be resisted by the public force, but the goods were taken for a different purpose, viz., for the purpose of coöperating with the army against Chihuahua; the army had to march over two hundred miles before it reached or found the enemy; the danger, if any, lay in the pursuit, not in remaining at San Elisario or returning to Santa Fé; there had been a sudden insurrection against the authority of the government in that neighborhood, but it was immediately suppressed.

As to the remaining grounds of defence, the liability of the defendant for taking the goods and appropriating them to the public service accrued at the time of the seizure; if it was an unlawful taking, the liability immediately attached, and the *question was whether that liability had been discharged or released by any subsequent act of the plaintiff; Colonel Mitchell, who executed the order, was not alone responsible, Colonel Doniphan, who gave the order, was also liable; they were jointly and severally responsible; then, was any act done by the plaintiff which waived the liability, or by which he resumed the ownership and possession of the goods? Certainly the abandonment of the goods to Colonel Doniphan cannot be regarded as an act of resumption of ownership; on the contrary, it was consistent with the assertion of his liability; there had been a negotiation between them; Colonel Doniphan advised him to sell the goods at Chihuahua and look to the government for indemnity, and, in pursuance of this, measures were taken for their protection and safe-keeping. I doubt if there be any evidence showing an intent on the part of the plaintiff to resume ownership over the goods as his private property after they had been seized by the army, or any act done by him that would, when properly viewed, lead to that result." [*141

The bill of exceptions concludes as follows:

"After the judge expressed his views of the case as above stated, the counsel on both sides declined going to the jury.

The presiding judge accordingly charged the jury that the law was as had been stated by him, and that if they agreed

with him in his view of the facts, that they would find for the plaintiff, otherwise for the defendant.

The counsel for the defendant did then and there except to each of the four propositions mentioned in the charge above stated.

The jury, without leaving their seats, returned a verdict for the plaintiff for $90,806.44.

And because none of the said exceptions, so offered and made to the opinions and decisions of the said associate justice, do appear upon the record of the said trial; therefore, on the prayer of the said defendant, by his said counsel, the said associate justice hath to the bill of exceptions set his seal, April term, one thousand eight hundred and fifty.

S. NELSON. [SEAL.]"

The record, above cited, informs us that after the judge had expressed his views of the case as above stated, the counsel on both sides declined going to the jury. And surely, after such an expression, no other result could well have been anticipated. In the first place, the counsel for the plaintiff could not have made to the jury so authoritative an argument in behalf of his client; and in the next place the counsel for the defendant must have been a rash man could he have attempted to throw his individual weight (whatever might have been his ability) in opposition to this authoritative declaration and influence of the court. Nay, *it
*142] may be insisted, that if the court, in passing upon the weight of the evidence, was acting within its legitimate sphere, the counsel would have been justly obnoxious to the imputation of indecorum, if not of contempt, in assailing before the jury the judge's decision; for the respective provinces of the court, the counsel, and the jury, are separate, distinct, and well defined, and neither should be subject to invasion by the other.

But after the counsel had been thus silenced, and the weight of the evidence fully and minutely pronounced upon by the court, it is insisted, that the alleged irregularity was entirely cured, by a declaration from the court to the jury, "that if they agreed with him in his view of the facts, they should find for the plaintiff, otherwise they might find for the defendant." But the natural and obvious inquiry here is, what the judge's view of the facts had to do with this matter. It was the jury who were to find the facts for the judge, and not the judge who was to find the facts for the jury; and if the verdict is either formally, or in effect, the verdict of the judge, it is neither according to truth nor com-

mon sense, the verdict of the jury; and these triers of fact had better be dispensed with, as an useless, and indeed an expensive aud cumbersome formula in courts of law, than be preserved as false indicia of what they in reality do not show. Moreover, this determination of facts by the court does not place the parties upon fair and equal grounds of contest before the minds of the jury; it is placing the weight of the court, which must always be powerfully felt, on the side of one of the parties, and causing the scale necessarily to preponderate by throwing the sword, which, under such circumstances, can hardly be called the sword of justice, into one of the scales in which the rights of the parties are hanging.

The practice of passing upon the weight of the evidence and of pronouncing from the bench what that evidence does or does not prove, accords neither with the nature and objects of jury trial, as indicated by its very name, nor as affirmed by the fathers of the law who have defined this institution and proclaimed it to be the ark of safety for life, liberty, and property. Thus it is called the trial *per pais*, or by the country, to distinguish it as a determination of the rights of the subject or citizen by his fellow subjects or citizens, from a determination thereon by the action of mere officials or creatures of the government. And with respect to the peculiar intent and effects of this tribunal of the people we read thus: Justice Blackstone, speaking of this institution, says: "The trial by jury has ever been, and, I trust, ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when *it is applied to criminal cases! It is the most transcendent privilege which any subject [*143 can enjoy or wish for, that he cannot be affected, either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." Again he says: "Great as this eulogium may seem, it is no more than this admirable constitution, when traced to its principles, will be found in sober reason to deserve. The impartial administration of justice, which secures both our persons and our property, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is wisely ordered, therefore, that the principles and axioms of law, which are general propositions flowing from abstracted

reason, and not accommodated to times or men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope: the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of facts preëstablished. But in settling and adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And again: "Every new tribunal erected for the decision of facts without the intervention of a jury, (whether composed of justices of the peace, commissioners of the revenue, or judges of a court of conscience, or any other standing magistracy,) is a step towards establishing aristocracy, the most oppressive of absolute governments. It is, therefore, upon the whole, a duty which every man owes to his country, his friends, his posterity, and himself, to maintain, to the utmost of his power, this valuable constitution in all its rights; to restore it to its ancient dignity if at all impaired by the different value of property, or otherwise deviated from its first institution; and above all to guard it against the introduction of new and arbitrary methods of trial, which, under a variety of plausible pretences, may in time imperceptibly undermine this best preservative of English liberty."

With regard to the legitimate and proper mode of operation, and effect of the trial by jury, the language of Lord Coke should ever be kept in mind, as furnishing the true and only true standard by which to measure this valuable institution. After giving his derivation of the terms verdict and judgment, *144] *this great common lawyer proceeds, "*Et sicut ad quæstionem juris non respondent juratores sed judices; sic ad quæstionem facti, non respondent judices sed juratores.*" For jurors are to try the fact, and the judges ought to judge according to the law that ariseth upon the fact, for *ex facto jus oritur*. The manner of stating the above propositions by this great lawyer and commentator is worthy of particular attention, as defining and illustrating with clearness and precision, the powers and duties of the court and the jury. He has not simply said, *ad quæstionem juris respondent judices*, nor in like manner *ad quæstionem facti, respondent juratores*, but he has placed them in a striking opposition and contrast, and drawn a well-defined limit around the functions of both the court and the jury, and informed them, in terms too

unequivocal for misapprehension, that the limit, thus prescribed, neither has the power to transcend; has declared to each what it shall not do. Thus, literally translated, his annunciation is "And as with respect to the questions of law, the jury must not respond, but only the judges; so, or in like manner, or under like restriction, the judges must not respond to questions of fact, but only the jury." There can be no escape from the force of the positions thus laid down by Lord Coke, by the argument that the jury are not absolutely bound by the opinion pronounced by the court upon the weight of the evidence. The proper inquiry here is, not as to the absolute and binding authority of the court's opinion upon the weight of evidence, but that inquiry is, what are the legitimate and appropriate functions of the court and the jury; whether the former, in pronouncing upon the weight of the evidence, can, within any rational sense, be responding only to questions of law, or whether it is not controlling the free action of the jury by the indirect exertion of a power which all are obliged to concede that it does not legitimately possess; the power of responding to the facts of the case. This is one of the mischievous consequences against which we are assured by Justice Blackstone, that the trial by jury was designed to guard, when he remarks that, "in settling and adjusting a question of fact when intrusted to any single magistrate, partiality and injustice have an ample field to range in, either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder." And if this power of interpretation or of weighing the evidence cannot safely be deposited within the regular commission of the judge, much less should an attempt to wield that power be tolerated, when confessedly beyond his commission. The objection here urged to the interposition of the court as to the weight of evidence, is by *no means weakened by the excuse or explanation that such declaration by the court is not binding, but is given in the way of advice to the jury; the essence of the objection is perceived in the control and influence which an interposition by court is almost certain to produce upon the otherwise free and unembarrassed action of the jury, and the restraint it imposes upon the views and efforts of the advocate, who, in a great majority of instances, will hardly venture to throw himself openly into a conflict with the court. And again the maxim which declares that *ad quæstionem facti non respondent judices*, would seem to forbid this advice altogether, or to render it officious or irregular at least. The court can exercise a legitimate and [*145

effectual control over the verdict of juries by the award of new trials, and should be restricted to this regular exertion of its acknowledged power. Let us test this interposition by the court, by comparing it with a similar irregularity on the part of the jury. "*Ad quæstionem juris non respondent juratores sed judices*," says the maxim. Now, suppose the jury sworn in a cause should declare to the court what evidence was competent or relevant to the issues they were to try, and what, in their view, should be the law governing the contest between the parties. Would not such a proceeding be regarded as extremely irregular and wholly unjustifiable? And why would it be so regarded? Simply because in so acting the jury would transcend the province assigned them by their duty; because they would not be conforming to the maxim *ad quæstionem legis non respondent juratores sed judices*. And yet, perhaps, there would be greater color for this proceeding than can be found to excuse the interference by the court in questions of fact; for it is undeniable that from the earliest periods of the practice of jury trials, the jury, of right, could find a general verdict, thereby constituting themselves judges both of law and fact.

In accordance with the maxim quoted from Lord Coke, may be cited other authorities of great weight. Thus, in the case of *Rex* v. *Poole*, to be found in Cases in the King's Bench, in the time of Lord Hardwicke, it is said by Hardwicke, C. J., that "it is of the greatest consequence to the law of England, and to the subject, that the powers of the judge and the jury be kept distinct; that the judge determine the law, and the jury the fact; and if ever they come to be confounded, it will prove the confusion and destruction of the law of England." So likewise in Foster, p. 256, it is said, that "the construction of the law, upon the facts found by the jury, is in all cases undoubtedly the proper province of the court." It has been said, that the course pursued by the judge in this case is in conformity with the practice of the courts of Eng-
*146] land, and in the *majority of the States of this Union. For the establishment of the position assumed, either with regard to the English courts, or with respect to the tribunals of the several States, no authorities have been cited; but, even if this position should be conceded, it is not the less clear that the rule it is invoked to sustain is a flagrant departure from the great principle so emphatically asserted by the fathers of the law, and should not the less be viewed and shunned as an abuse rather than an example worthy of imitation. In what number of States of this confederacy such a practice (such an abuse, as I would term it) may prevail has

not been shown; certain it is, that in many of the Southern States it does not obtain, and would not be tolerated. It has also been said, that the right of the judge to instruct the jury upon the weight of testimony has been ruled as the established doctrine of this court. If this be so, it is a revelation which the friends of jury trial, in its full integrity and independence, will grieve to learn, and will be disposed to regard as a demolition by this court of that sacred ark of civil liberty, for which, by the greatest services it may render, it can hardly ever be able to atone. It is true that, in the case of *Carver* v. *Jackson*, 4 Pet., 80, there is an expression of Mr. Justice Story, in delivering the opinion of the court, broad enough to cover this irregular exercise of power by the court in its widest extent. But, upon examination, it will be seen that this expression had no real connection with the points regularly before the court, and, as a mere dictum, was entirely without authority. In the introductory part of his opinion, Mr. Justice Story, meaning merely to express his disapprobation of a practice of bringing up for review the entire charge of the court below, without stating specific points or grounds of exception, as extremely inconvenient, takes occasion to use the following remark, namely,—that, "with the charge of the court to the jury upon mere matters of fact, and with its commentaries upon the weight of evidence, this court has nothing to do." But it is remarkable that this judge goes on to say, with respect to these commentaries, that they are of no binding legal effect; thus, in reality, pronouncing their condemnation in the same breath which sanctions their admission to affect, if it can be done without legal or binding obligation, the minds of the jurors. Surely it may be assumed as a postulate, that a court of justice, in adjudicating upon the rights of the citizen or of the State, should do, and can have power to do, nothing which is irregular, or vain, or useless. Its duty and its office is to do the law, and nothing but the law. The anomalous and contradictory doctrine above noticed has, I think, been condemned by a more recent and a far more correct decision of this court; a decision *directly in point upon this subject,—I allude to the case of *Hanson* v. *Eustace*, 2 How., 706. In that case, [*147 the late Justice Baldwin, under the rule which admits of secondary evidence when the primary evidence is not within the power of a party, or is withheld improperly by his adversary, went so far beyond the just application of the rule as to say to the jury what the secondary or presumptive evidence did actually prove; but still accompanied his declaration with the salvo, "that if they agreed with him in opinion." This is

his language: "Should your opinion agree with ours on this point, you will presume that there was a deed from Robert Phillips, or his heirs, competent to vest the title to the sixth street lot in the firm of Robert and Isaac Phillips; that it so remained at the time of the assignment, and that it was by such conveyance as would enable them to enjoy the property against Robert Phillips and his heirs." And this court reversed the decision of the Circuit Court, upon the ground that the judge's charge declared to the jury what their conclusions, from the secondary evidence, ought specifically to be. This decision I regard as in strict conformity with the doctrines promulged by the fathers of the law, the doctrine which alone can prevent the inestimable trial by jury from becoming a mere mockery and a deception to those who have been taught to revere and rely upon it as the best safeguard of these rights. Transforming this institution from what it was intended to be, and once was in reality,—a trial by the country,—into a mere formula, to be moulded at the discretion of the court. I think that the judgment of the Circuit Court should be reversed.

David D. Mitchell, Plaintiff in Error, } In obedience to the
v. } order of the court in
Manuel X. Harmony. } this case, yesterday, the clerk of this court having filed the following report, namely:—

Supreme Court of the United States. No. 178. *December Term*, 1851.

David D. Mitchell, Plaintiff in Error, } In error to the Cir-
v. } cuit Court of the
Manuel X. Harmony. } United States for the Southern District of New York.

In calculating the interest on the judgment of affirmance in the above-entitled cause, the clerk respectfully presents, at the instance of the respective counsel, the following different modes for the consideration of the court:—

1. Interest, at the rate of six per cent., on the judgment of the Circuit Court, from the 9th November, 1850, the day the judgment was signed, to this date.

*148] *2. Interest, from the 1st April, 1850, the first day of the term at which the judgment was rendered, to this date.

3. Interest, at the rate of 7 per cent., from 7th November, 1850, to 26th February, 1851, (the date of the writ of error,) and then at 6 per cent. on the aggregate, to this date.

4. Interest, at the rate of 7 per cent., from 1st April, 1850,

to 26th February, 1851, and then at 6 per cent. on the aggregate, to this date.

The clerk feels bound to confine his calculations to the 18th rule of the court, irrespective of the act of Congress of 23d August, 1842. WM. THOMAS CARROLL, C. S. C. U. S.

14th May, 1852.

Calculation No. 1.

$95,855.38	Judgment of Circuit Court, U. S., for New York, signed 9th November, 1850.
8,706.85	Interest, at 6 per cent. per annum, from 9th November, 1850, to 14th May, 1852,—one year,
$104,562.23	six months, and five days.

Calculation No. 2.

$95,855.38	Judgment of Circuit Court, U. S., for New York, rendered 1st April, 1850.
12,204.57	Interest, at 6 per cent. per annum, from 1st April, 1850, to 14th May, 1852,—two years, one
$108,059.95½	month, and fourteen days.

Calculation No. 3.

$95,855.38	Judgment of Circuit Court, U. S., for New York, signed 9th November, 1850.
1,994.35	Interest, at 7 per cent. per annum, from 9th November, 1850, to 26th February, 1851,—three
97,849.73	months and seventeen days.
7,139.51	Interest on this amount at 6 per cent. per annum, from 26th February, 1851, to 14th May, 1852,
$104,989.24	—one year, two months, and eighteen days.

Calculation No. 4.

$95,855.38	Judgment of Circuit Court, U. S., for New York, rendered 1st April, 1850.
6,076.15	Interest, at 7 per cent. per annum, from 1st April. 1850, to 26th February, 1851,—ten months and
$101,931.53	and twenty-six days.
7,440.99	Interest on this amount, at 6 per cent. per annum, from 26th February, 1851, to 14th May, 1852,
$109.372.52	—one year, two months, and eighteen days.

*And *Mr. Vinton* having filed the following exceptions, namely:— [*149

The defendant in error, M. X. Harmony, excepts to the report of the clerk, touching the computation of interest on the above-named judgment of the Circuit Court, U. S., for the Southern District of New York, in this, namely:—

1st. That, by the act of Congress of the 23d of August, 1842, the said defendant in error is entitled to the same rate of interest on said judgment (being 7 per cent.) as he would be entitled to if said judgment had been rendered in a State court of the State of New York; whereas, the said computation allows 6 per cent. only on said judgment. See 5 Stat. at L., 518.

2d. That the said interest ought to be computed, on said judgment, from the 1st Monday in April, 1850, instead of from the 9th of November of that year. See printed record, pages 19 and 20.

S. F. VINTON,
May 14, 1852. *For Defendant in Error.*

And the said defendant in error, also, at the same time, moves the court to open up the judgment of affirmance (rendered in this court at its present term) of said judgment of said Circuit Court, touching the damages allowed in said judgment of affirmance; and in lieu of 6 per cent. per annum, therein given on said judgment below, to allow 7 per cent. per annum therein, to be computed from the day of 1850, in conformity to said act of Congress, of the 23d of August, 1842.

S. F. VINTON,
For Defendant in Error.

It is thereupon now here ordered by the court, that the said report and exceptions be set down for argument next Monday, the 17th instant.

The court declined to hear any argument on the motion of *Mr. Vinton*, and the exceptions filed by him to the clerk's report, and took the same under advisement.

On consideration of the motion made by Mr. Attorney-General Crittenden, on the 13th instant; of the report by the clerk, filed the 14th instant; of the exceptions to said report, by Mr. Vinton, filed the same instant; and of the motion filed by Mr. Vinton, the 15th instant, it is the opinion of the court, that the first calculation by the clerk in his report is the proper mode of calculating the damages given under the rule of court. Wherefore, it is now here ordered by the court, that the judgment entered in this case, on the 12th instant, do stand as the judgment of this court.

*ORDER. [*150

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.

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, APPELLANTS, *v.* NATHANIEL C. MCLEAN, ASSIGNEE IN BANKRUPTCY OF JOHN MAHARD, JR.

Where a defendant in error or an appellee wishes to have a case dismissed because no citation has been served upon him, his counsel should give notice of the motion when his appearance is entered, or at the same term; and also that his appearance is entered for that purpose. A general appearance is a waiver of the want of notice.[1]

An appeal in equity brings up all the matters which were decided in the Circuit Court to the prejudice of the appellant; including a prior decree of that court from which an appeal was then taken, but which appeal was dismissed under the rules of this court.[2]

BEFORE this case was reached upon the docket, a motion was made to dismiss it upon the ground that the appellees had not been served with a citation, and also upon another ground, which is stated in the following opinion of the court as pronounced by Mr. Justice McLean.

Mr. Justice MCLEAN.

This is an appeal from the Circuit Court of the Ohio District, and a motion is made to dismiss it on two grounds.

1. Because no citation has been issued.

2. "Because the appeal is from the decree of 1848 and interlocutory decrees, whereas all the matters contested by the appellants were finally adjudicated and decreed at the November term, 1846, from which decree an appeal was taken

[1] DISTINGUISHED. *Carroll* v. *Dorsey*, 20 How., 207. REFERRED TO. *Moynahan* v. *Wilson*, 2 Flipp., 135. See note to *McDonough* v. *Millaudon*, 3 How., 693; also *United States* v. *Yates*, 6 Id., 605.

[2] CITED. *The William Bagaley*, 5 Wall., 412; *Mail Co.* v. *Flanders*, 12 Id., 135.

which was dismissed by this court, and no appeal has been since taken."

At November term, 1846, a decree was entered against the appellants. In January term, 1847, an appeal was prayed by them from that decree, which was granted, and bond was given. But the appellants failing to file the record and docket the cause in this court, as required by the rules, it was, on motion of the appellee's counsel docketed and dismissed at December term, 1847. At the same term a motion was made to reinstate the cause upon the docket, which motion was overruled.

*151] *Afterward, at October term, 1849, the appellants prayed an appeal from the final decree made at the November term, 1848, which was granted, and that is the appeal which is now pending.

It seems that no notice of this appeal has been served on the appellee, and on that ground the motion to dismiss is made. A general appearance was entered by the counsel for the appellee at December term, 1850, but the motion to dismiss was not filed until February, 1852. In the case of *McDonough* v. *Millaudon*, 3 How., 707, a motion was made to dismiss the cause on the ground that the clerk of the Supreme Court of Louisiana issued the writ of error, and signed the citation; and the court said, "this case has been here for two terms; a writ of *certiorari* has been sent down, at the instance of the defendant in error, in whose behalf the motion is made, to complete the record; he now moves to dismiss for the first time, and we think he comes too late."

The object of a citation on a writ of error or an appeal is to give notice of the removal of the cause, and such notice may be waived by entering a general appearance by counsel. Where an appearance is entered, the objection that notice has not been given is a mere technicality, and the party availing himself of it, should, at the first term he appears, give notice of the motion to dismiss, and that his appearance is entered for that purpose. A delay to give this notice may throw the other party off his guard, until the limitation of the writ of error or the appeal may have expired. In this case we think the motion is made too late.

The record appeal was regularly taken and perfected. By this appeal all the questions are brought before us, which were decided to the prejudice of the appellants. From the nature of the controversy until the final decree was entered, as between all the parties, the case could not, properly, be brought before this court. The motion to dismiss is overruled.

When the case was called in its regular order, it was argued, and the following is a report of it.

JOHN S. BUCKINGHAM AND MARK BUCKINGHAM, APPELLANTS, *v.* NATHANIEL C. MCLEAN, ASSIGNEE IN BANKRUPTCY OF JOHN MAHARD, JR.

Where a bill in chancery was filed by the assignee of a bankrupt, claiming certain shares of bank stock, the same being also claimed by the bank and by other persons who were all made defendants, and the answer of the bank set forth apparently valid titles to the stock, which were not impeached by the complainant in the subsequent proceedings in the cause, nor impeached by the other defendants, the Circuit Court decreed correctly in confirming the title of the bank.

*A power of attorney to confess a judgment is a security within the second section of the Bankrupt Act, 5 Stat. at L., 442. [*152

And this security is void if given by the debtor in contemplation of bankruptcy. But by these terms is meant an act of bankruptcy on an application by himself to be decreed a bankrupt, and not a mere state of insolvency.[1]

In this case there is evidence enough to show that the debtor contemplated a legal bankruptcy when the power of attorney was given.

It is not usury in a bank which has power by its charter to deal in exchange, to charge the market rates of exchange upon time bills.[2]

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

On the 27th of May, 1842, John Mahard, Jr., filed his petition in bankruptcy, and on the 20th of July, 1842, was declared a bankrupt.

Nathaniel C. McLean was appointed his assignee in bankruptcy.

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[1] CITED. *Watson* v. *Taylor*, 21 Wall., 386. S. P. *Ex parte Bonnet*, 1 N. Y. Leg. Obs., 310; *Jones* v. *Sleeper*, 2 Id., 131; *Dennett* v. *Mitchell*, 6 Law Rep., 16; *Atkinson* v. *Farmer's Bank*, Crabbe, 529; *Ex parte Sanger*, 2 Bank Reg., 164; *Ex parte Debbler*, Id., 185; *Ex parte Schick*, 2 Ben., 5; *Matter of Black*, Id., 196; *Matter of Craft*, Id., 214; *Pierce* v. *Evans*, 61 Pa. St., 415. Such a transaction was not an act of bankruptcy under the act of 1800, unless the debtor procured judgment to be entered thereon and execution issued. *Barnes* v. *Billington*, 1 Wash. C. C., 29. And mere honest inaction on the part of an insolvent debtor, who is sued on a just debt and allows judgment to go against him, is not an act of bankruptcy, under the act of 1867, § 39, unless it appears that there was an actual intent to prefer a creditor. *Wright* v. *Filley*, 1 Dill., 171. As to the meaning of the words "in contemplation of bankruptcy," see *Re Wolfskill*, 5 Sawy., 385.

[2] S. P. *Orr* v. *Lacy*, 4 McLean, 243. The *purchase* of securities at any price which the parties may agree upon is not usurious. *Junction R. R. Co.* v. *Bank of Ashland*, 12 Wall., 226; *Alabama Gold Life Ins. Co.* v. *Hall*, 58 Ala., 1. Compare *Atlantic State Bank* v. *Savery*, 82 N. Y., 291.

John Mahard had been transacting business at Cincinnati with his brother, William Mahard, under the firm of J. & W. Mahard, and at New Orleans, under the firm of Mahard & Brother.

On the 12th of August, 1842, William Mahard filed his petition in bankruptcy.

On the 5th of January, 1843, McLean filed his bill in the Circuit Court against a great number of persons, who had outstanding liens on the property of John Mahard, Jr., at the time of his filing his petition in bankruptcy. They were,

The President, Directors, and Company of the Lafayette Bank of Cincinnati; the President, Directors, and Company of the Northern Bank of Kentucky; Andrew Johnson; John S. Buckingham; Mark Buckingham; the Ohio Life Insurance and Trust Company; the President, Directors, and Company of the Bank of the United States, incorporated by the State of Pennsylvania; the President, Directors, and Company of the Commercial Bank of Cincinnati; the President, Directors, and Company of the Franklin Bank of Cincinnati; James Dundas, Mordecai D. Lewis, Samuel W. Jones, Robert L. Pitfield, and Robert Howell, assignees, &c.; John Mahard, Sen., John McLaughlin, George Milne, and James Keith, partners, doing business in the firm name of Geo. Milne & Co., Charles B. Dyer, Frederick Trow, John C. Avery, late sheriff, and John H. Gerard, present sheriff of Hamilton county.

The assignee, McLean, enjoined proceedings in the State courts where the parties were prosecuting their several liens, and brought all matters connected with the bankrupts into the Circuit Court of the United States.

In the progress of the cause, a number of collateral matters were brought into the case; but the facts upon which the questions arose before this court are stated in the opinion, to which the reader is referred.

*153] *It was argued by *Mr. Read*, for the Buckinghams, and by *Mr. Chase* and *Mr. Rockwell*, for the Lafayette Bank, the Franklin Bank of Cincinnati, and the Northern Bank of Kentucky. The interest of these banks was drawn in question by the third point raised by *Mr. Read*, who contended that the notes, bills and mortgages held by them, were void on account of usury.

Mr. Read made the following points, viz.:

1st. The forty-nine shares of stock should have been decreed to the Buckinghams, and not to the bank.

2d. That the judgment, execution, and levy of the Buck-

inghams were valid; the fruits of the sale should have been decreed to them, and not to the assignee as general assets.

3d. That the notes, bills, and mortgages of the said banks were void, having been discounted at higher rates of interest than were permitted by their charters, and the mortgages were given to secure such discounts or notes substituted therefor.

1. As to the forty-nine shares of bank stock.

In her answer, the Lafayette Bank contends that she held this stock of John Mahard as collateral security to pay the amount of $15,000, secured by mortgage on real estate, and also on general lien under her charter as security for general debts.

The bank, before the master, claimed the right to apply the stock to pay unsecured debts under her charter lien.

On the 13th of April, 1842, on the same piece of paper on which the stock had been assigned to the bank, was an assignment to Buckingham in these words:

"The forty-nine shares of the stock are transferred to John S. Buckingham, for value received."

Point. A party having a lien or other interest in property, standing by and permitting it to be sold without notice or assenting to its sale, loses all right in said property.

2. That if general creditors have an interest in such property, and the first lien-holder parts with his lien by consenting to its transfer, and such transfer is void by operation of law, the lien of the first holder does not reattach, but the property stands as general assets for the benefit of all creditors.

2d. As to the $1,300 made on Buckingham's execution.

It may be laid out of view that the Mahards did any act in creating liens or a cognovit, in contemplation of bankruptcy, as all the parties in their answers deny it.

On the 7th of April, 1842, John Mahard executed a power of attorney to confess judgment in favor of John S. Buckingham for $14,000, which was done the next day in the Supreme Court of the State of Ohio. Execution issued 20th of April, 1842, levy made upon real estate and certain personal property; which latter sold for $1,300.

*John Mahard petitioned to be declared a bankrupt, 27th May, 1842. [*154

Cognovit and judgment within two months prior to petition, held, therefore, void under the second section of the bankrupt act.

Point 1*st.* The second section of the Bankrupt act does not embrace in its terms, or by necessary implication, powers of

attorney to *bonâ fide* creditors to confess judgment. Bankrupt act, 19th August, 1841.

2d. The power of attorney gives no lien or preference, but the judgments, by operation of law, and not the act of the bankrupt.

In the matter of Allen, 5 Law Rep., 362; *Wakeman* v. *Hoyt*, 5 Law Rep., 309; *Downer et al.* v. *Brackett et al.* 5 Law Rep., 394; 1 Bac. Ab., 628; *Foster, ex parte*, 5 Law Rep., 55.

3d. As to the invalidity of notes, bills, and mortgages of the banks, it is conceded that these banks could deal in exchange at fair and usual rates; but their charters did not authorize them to discount, by way of loan, at higher rates of interest than six per cent. in advance. If a bank or moneyed corporation exceeds its powers in exacting interests on discounts and loans at higher rates than permitted by their charter, all notes thus discounted and loans made are void, and all mortgages and pledges to secure payment are void also. *Bank of Chillicothe* v. *Paddleford et al.*, 8 Ohio, 257; *Creed* v. *Commercial Bank*, 11 Ohio, 493; *Miami Exporting Co.* v. *Clark*, 13 Ohio, 18.

Banks may charge fair rate of exchange. *Andrews* v. *Pond*, 13 Peters, 65.

Difference between sale and a discount. Sale at any price, discount only at legal rates. A loan, if seller bound to pay if obligee does not. Comyn on Usury, Add. 287, 5 Law Lib.; *Rex* v. *Ridge*, 4 Price, 50; 2 Exch., 30; Byles on Bills, 72; *Lee, ex parte*, 1 P. Wms., 782; Eden on Bankruptcy, 145; 7 Wend. (N. Y.), 578; *Ketchum* v. *Barber*, 4 Hill (N. Y.), 244; *Rapelye* v. *Anderson*, 4 Id., 476; *Rice* v. *Mather*, 3 Wend. (N. Y.), 62; *Yankey* v. *Lockheart*, 4 J. J. Marsh. (Ky.), 276; *Knights* v. *Putnam*, 3 Pick. (Mass.), 184, 187; 12 Id., 565; 4 Mass., 156; *Powell* v. *Waters*, 17 Johns. (N. Y.), 176; 15 Id., 44; 7 Wend. (N. Y.), 569; 4 Hill (N. Y.), 476; 2 Johns. (N. Y.) Cas., 60; 3 Id., 66; 3 McCord (S. C.), 365; 2 Cow. (N. Y.), 675; 7 Pet., 103, 109; 3 Cranch, 180; 1 Pet., 37; 4 Pet., 205; 2 Str., 1243; 7 Wend. (N. Y.), 633, 642; 8 Cow. (N. Y.), 669.

Lex loci, or place of performance to fix rate. Story on Bills, § 148.

Excessive exchange or commission on collection, or discounting depreciated paper, whereby higher rates than legal in-
*155] terest *is obtained, will be deemed usurious. Hewson, ex parte, 1 Madd., 112; 7 Wend. (N. Y.), 581–582; 13 Johns. (N. Y.), 47; 1 Leigh, N. P., 482; 4 Hill (N. Y.), 219, 229; Comyn on Usury, 134.

Exchange charged on bill payable in a place where the money will be as valuable as at a place of discount, a shift or device to exact over six per cent., charge of attorneys' fees, &c. *Miami Ex. Co.* v. *Clark*, 13 Ohio, 1; Chit. on Bills, 89 (a), note; *State* v. *Taylor*, 10 Ohio, 381; *Shelton* v. *Gill*, 11 Ohio, 418; *Spaulding* v. *Bank of Muskingum*, 12 Ohio, 544; *Creed* v. *Com. Bank*, 11 Ohio, 495.

Discounter must show the charge to be well founded; expense of collecting compensated by way of exchange; the usage of banks cannot control the law. 8 Bac. Ab., 424; *Bank United States* v. *Davis*, 2 Hill (N. Y.), 452; 13 Johns. (N. Y.), 47; 16 Id., 375; 9 Mass., 49; 3 Bos. & P., 154.

True differences only are to be charged. *Merritt* v. *Benton*, 10 Wend. (N. Y.), 116; 2 Hill (N. Y.), 640; Id., 452; 7 Wend. (N. Y.), 581.

No such thing as time exchange. McCullough, "Exchange"; Story on Bills, p. 481.

Discounted in depreciated paper, to be paid in silver, usurious. *United States Bank* v. *Owens*, 2 Pet., 527; *United States Bank* v. *Waggener*, 9 Pet., 378; 1 Pet., 44; 2 Har. & G. (Md.), 13; 1 J. J. Marsh. (Ky.), 47; 2 Hill (N. Y.), 499; 1 Hall (N. Y.), 519.

Unreasonable charge for commission, or improbable difference of exchange. *Hine* v. *Handy*, 1 Johns. (N. Y.), Ch. 6; *Dunham* v. *Day*, 13 Johns. (N. Y.), 47; 7 Wend. (N. Y.), 581–582; 16 Johns. (N. Y.), 375.

Risk of making place of payment only to be charged as exchange. 4 Hill (N. Y.), 221; Id., 250; 2 Paige (N. Y.), 272, 275.

Bank's charge according to length of time an artifice. 4 Hill (N. Y.), 480; 10 Ohio, 381.

Mortgages in Ohio but a security. *Lessee of Perkins* v. *Dibble*, 10 Ohio, 439; *Moore* v. *Burnet*, 11 Ohio, 341; 4 Kent, Com., 195, 5th ed.; 21 Wend. (N. Y.), 485; 26 Id., 555.

Usury defeats a mortgage. 3 Pow. on Mort., 896, *n.*

Substituted securities void, taint of usury follows. Chit. on Bills, 89; *Walker* v. *Bank of Washington*, 3 How., 72.

All the discounts of these banks were on time bills; sight bills at par; exchange from $1\frac{1}{2}$ to $2\frac{1}{2}$ per cent.

Mr. Chase and *Mr. Rockwell* made the following points.

I. The mortgage in the Lafayette Bank was made more than two months before the filing of the bankrupt petition, and was not made in contemplation of bankruptcy, in violation of the provisions of the Bankrupt act.

Answer of Lafayette Bank, p. 48: "And these re-

spondents, further answering, deny that said mortgage was
*156] executed by *said John in contemplation of bankruptcy, or that he was known or considered to be in a state of insolvency; but these respondents had good reason to believe, and did believe, that said John was solvent, and fully able to pay all his debts, and therefore they agreed to give, and did give him time to enable him the more readily to pay the said debts then due to these respondents. Respondents insist that said John Mahard, Jr., did not contemplate bankruptcy at the time of the execution of said mortgage, but that he executed and delivered the same in good faith, to secure a *bonâ fide* debt then due to these respondents as aforesaid.

"And these respondents further answering, state, that said mortgage was executed, delivered, and recorded more than sixty days before the filing of said petition by said John Mahard, Jr., for the benefit of said act, and that the transaction between said Mahard and these respondents was in good faith; and if the said John Mahard (which they deny) had it in contemplation, at the time of executing said mortgage, to take the benefit of said act, these respondents had no notice of such intention, either express or implied, and their mortgage is not affected by any subsequent proceedings in bankruptcy," &c.

The cases decided by the English courts under the statute of 1 Jac., c. 15, if applicable to the United States Bankrupt act, do not sustain the doctrine that a conveyance made by an insolvent person is to be considered as a conveyance in contemplation of bankruptcy.

The 2d section of that statute provided that every person using the trade of merchandise who should "make, or cause to be made, any fraudulent conveyance of his lands, tenements, goods, or chattels, to the intent, or whereby his creditors shall, or may be defeated or delayed, for the recovery of their just and true debts, shall be accompted and adjudged a bankrupt."

Gibbs, C. J., in *Fidgeon* v. *Sharpe*, 5 Taunt., 541, said: "With respect to this doctrine of contemplation in cases of bankruptcy, we have nothing either in the common or statute law to show what it is. The cases in which this doctrine was introduced made it depend upon the *quo animo*."

In *Morgan* v. *Brundrett*, 5 Barn. & Ad., 297, Patteson, J., says: "The recent cases have gone too great a length. They seem to have proceeded on the principle, that if a party be insolvent at the time he makes payment or a delivery, and afterwards he become bankrupt, he must be deemed to have

contemplated bankruptcy at the time when he made such payment; but I think that is incorrect; for a man may be insolvent and yet not contemplate bankruptcy."

And Parke, J., says: "The meaning of those words," (in *contemplation of bankruptcy,) "I take to be that the payment or delivery must be with intent to defeat the [*157 general distribution of effects which takes place under a commission of bankruptcy. It is not sufficient that it should be made (as may be inferred from some of the late cases) in contemplation of insolvency. These cases I think have gone too far."

Gibbs, C. J., in *Fidgeon* v. *Sharpe*, 5 Taunt., 545, lays down the correct rule. See it quoted, 8 Metc. (Mass.), 385. See also, *Hartshorn* v. *Slodden*, 2 Bos. & P., 582; *Gibbins* v. *Phillipps*, 7 Barn. & C., 529; *Atkinson* v. *Brindall*, 2 Bing. N. R., 225; 2 Scott, 369; *Belcher* v. *Prittie*, 10 Bing., 408.

The statute of Jac. 1 has been modified by recent enactments.

By the 12th sect. of 2 & 3 Vict. c. 11, it is provided that "all conveyances by any bankrupt *bonâ fide* executed, before the issuing any fiat of bankruptcy, shall be valid, notwithstanding any prior act of bankruptcy by him committed, provided the person to whom such bankrupt so conveyed had not at the time of such conveyance notice of such act."

And the 1st sect. of the 2 & 3 Vict. c. 29, after reciting 6 Geo. 4, c. 16, sect. 81, and 2 & 3 Vict. c. 11, sect. 12, enacts, "That all contracts, dealings, and transactions, by and with any bankrupt, really and *bonâ fide* made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date, &c., of the fiat, shall be deemed to be valid, notwithstanding any act of bankruptcy; provided also, that nothing herein contained shall be deemed to give validity to any payment, &c., of any bankrupt, being a fraudulent preference of any creditor."

The following American cases give the construction of the United States Bankrupt act upon this point:—

In the matter of Rowell, Mr. Justice Prentiss, of the United States District Court of Vermont, 21 Vt., 625, says: "What constitutes such a preference is a question concerning which there are conflicting authorities; but the prevailing dictum seems to be, that a payment, when it consists of a part only of the debtor's property, must be made in contemplation of bankruptcy, and must be voluntary. Both must concur. If it be in contemplation of bankruptcy, but not voluntary, or

be voluntary and not in contemplation of bankruptcy, something more must appear than mere insolvency; enough to show, if not a determination to become a bankrupt, at least that bankruptcy was in view as a consequence of the insolvency; and to be voluntary, the payment must originate with the debtor, the first step being taken by him and not by the creditor."

*158] **Gassett et al.* v. *Morse et al.*, United States District Court of Vermont, 21 Vt., 627, where in relation to the proviso as to conveyances made more than two months before, &c., Prentiss, J. (p. 633), says: "It cannot reasonably be taken to have any other effect than merely to give validity to a transaction *bonâ fide* entered into more than two months before the filing of the bill, so far as it concerns the party dealing with the bankrupt. It cannot be understood as giving any protection to the bankrupt himself, either on the question of bankruptcy, or on the question of his right to a discharge. If the transaction be fraudulent on his part, why should he not be deemed a bankrupt or denied a discharge, as the case may be, though the rights of the party under the transaction, who may be an innocent party, should remain unaffected?"

In the matter of Pearce, 6 Law Rep., 261, Judge Prentiss held "that it is not a necessary and legal inference that a conveyance was made in contemplation of bankruptcy, merely because the debtor was insolvent at the time; but it must appear that the conveyance was made by the debtor in anticipation of failing in his business, or committing an act of bankruptcy, or of being declared bankrupt at his own instance, and intending to defeat the general distribution of his effects."

In *Ashby* v. *Steere*, 2 Woodb. & M., 347, Judge Woodbury examined all the cases on the subject, and says (p. 357) that "if a preference is made by the debtor without contemplating a subsequent resort to the law, the sale and preference are not void at all. Nor if made with such contemplation, though culpable in the debtor, is it invalid as to the creditor, unless he took the property with notice of what was contemplated, and thus designedly coöperated against the act, and did it within the short period of two months prior to the debtor's application for the benefit of the act."

Again, (pp. 357, 358,) "The law wisely considers it better that a preference of this kind, which is good at common law, and when the creditor does not know of the design of the debtor to go into bankruptcy, and does not coöperate to defeat the policy of that law, should not be disturbed as to

the public, after two months as before named, than such assets should go into a common fund for all creditors."

In *Jones* v. *Howland*, 8 Metc. (Mass.), 377, per Hubbard, J., opinion of court, p. 387: "The instruction requested by the counsel for the defendants was substantially correct. With some slight modification, it may be stated as follows: That if, on the 8th day of March, Stowell feared or believed himself to be insolvent, but did not contemplate stoppage or failure, and intended to keep on, making his payments and transacting his business, hoping that *his affairs might be afterwards retrieved; and in that state of mind [*159 made the sale or payment of that day without intending to give a preference to the defendants, and as a measure connected with his going on in his business, and not as a measure preparatory to, or connected with, a stoppage in business, then the sale or payment on that day was not a sale or payment made in contemplation of bankruptcy within the meaning of the act."

And see Wilkinson's Appeal, 4 Pa. St., 284, 288, 289, where the court say, (referring to the cases of *Wakeman* v. *Hoyt*, 5 Law Rep., 306, and *Arnold et al.* v. *Maynard*, by Story, J., 5 Law Rep., 296,) "These last two decisions do not sustain the position that the confession of a judgment by a person, even deeply indebted and insolvent, constitutes of itself a fraud on the Bankrupt act, and is an act of bankruptcy, &c.

"We apprehend that to take the cause out of the saving clause, it is incumbent upon those who attempt to defeat its operation to show by satisfactory evidence that the act or dealings were not *bonâ fide*." Id., p. 290.

"This view of the case appears to be in conformity with the decisions of this court on the subject. Thus, in *Haldeman* v *Michael*, 6 Watts & S. (Pa.), 128, it was ruled that a bond with warrant of attorney to confess judgment, which was given two months and twenty days before the petition to have the debtor declared a bankrupt was presented by his creditor, and on which a *fi. fa.* was issued on the same day the bond and warrant were given, was good and valid, and did not constitute an act of bankruptcy. Judge Hays says that the slightest solicitation on the part of a creditor will protect the transaction. 'Unless it clearly appears that the act originated with the debtor, and that he took the first step to make the transfer, it will not be deemed a fraudulent preference. And it is incumbent on the party who seeks to defeat the transaction to show that it was voluntary.'" Id., p. 291.

The case of *McAllister* v. *Richards*, 6 Pa. St., 133, does not vary this rule, and refers to the above case in 4 Pa. St., as containing the correct rule on the subject.

II. The debt of $15,000, secured by mortgage to the Lafayette Bank, was not an usurious or prohibited loan of money under the charter of the bank.

1. The interest charged upon this sum of $15,000 was only at the rate of 6 per cent. per annum, with no additional charge of any kind.

The amended bill charges that this loan was "at and for a rate of interest greater than at the rate of six per cent. per annum in advance."

*160] *This the answer positively denies. The respondents, in their answer say, "These respondents loaned to the said J. & W. Mahard the sum of $15,000, at Cincinnati, at or about the date of said mortgage, to enable them to take up a portion of the drafts on which they were liable, as already stated. These respondents have already stated that the first and only draft of said J. & W. Mahard not paid at maturity, to the knowledge of these respondents, was protested on the 18th November, 1841, but was arranged and taken up to the satisfaction of these respondents; all other drafts of said J. &. W. Mahard were taken up by them as they became due at New Orleans, whether with the proceeds of the loan made by these respondents, as aforesaid, or not, these respondents have no positive knowledge; when the said drafts were paid, these respondents regarded the debt evidenced thereby as paid, and fully discharged and extinguished."

The answer further states, that when these notes for $15,000 were discounted, they "had then ninety-two days to run, and were to be received without reduction for one year, then one third to be paid, and so on, until final payment in three years; that the proceeds of said notes, reserving the sum of two hundred and thirty dollars, the interest for ninety-two days, were placed to the credit of said J. & W. Mahard."

The interest on $15,000 for ninety-two days, computing 365 days to the year, is just $230.78, so that the bank received seventy-eight cents less than the legal interest.

It is claimed that these notes were discounted in order to enable the Mahards to take up their drafts when they became due, and the transaction would be affected by any taint of usury which might be claimed to attach to the drafts.

These notes were in no sense a renewal of the drafts; they were not substituted for the drafts. The avails were passed

to the credit of the Mahards. The drafts were all supposed to continue outstanding, and at their maturity were taken up at New Orleans, but whether with proceeds of these notes or not is not certain.

There was no pledge or legal appropriation of the avails of those notes to meet the drafts. Only one of the drafts was due when the notes were discounted.

2. In the discounting of the drafts there was no usury.

The charge made on the drafts, as shown in the answer to the amended bill, was interest at 6 per cent. on each. The exchange on the first was 1 per cent., and the other three 1½ per cent. The drafts were all at four months, on New Orleans.

The answer expressly states, "The exchange charged in each *case was the customary and regular rate at the time of the discounting of the bills; and these respon- [*161 dents expressly deny that any illegal interest was taken or charged on said bills, or any of them."

It is the universal settled rule of law that a charge for exchange, unless used as a cover for usury, is legal and not usurious.

The case of *Andrews* v. *Pond et al.*, 13 Pet., 65, contains a full statement and illustration of the rule on this subject.

The party in this case paid 10 per cent. damages on a protested bill, drawn on Alabama, in New York, and 10 per cent. interest and exchange on a new bill to be given, besides the expenses on the protested bill. The amount due on the first bill, 21st February, 1837, was $6,000. The amount of the new bill, including damages, interest, exchange, and expenses of protest, due on the 13th May, 1837, less than three months, was $7,287.78.

Per case, Taney, C. J. (p. 76): "The transaction, taken altogether, was indeed a ruinous one on the part of the defendant. A debt of $6,000, payable at Mobile, on the 21st of February, was converted into a debt of $7,287.78, payable at the same place on the 25th of April, following; being an increase of $1,287.78 in the short space of eighty-one days. Yet, if the defendants brought it upon themselves by their failure to take up the first bill at maturity, and the transaction was not intended to cover usurious interest, they must meet the consequence of their own improvidence. The sum of $6,525.25 was undoubtedly due from them to H. Andrews & Co., on the day the bill in question was drawn. They were entitled to demand that sum in New York, or a bill that was equivalent to it at the market price of exchange; and if ten per cent. discount was the usual price at which others pur-

chased bills of this description in the market of New York, they had a right to take the bill at that rate in satisfaction of their debt."

Again (p. 77): "There is no rule of law fixing the rate which may be lawfully charged for exchange. It does not altogether depend upon the cost of transporting specie from one place to another, although the price of exchange is, no doubt, influenced by it. But it is also materially affected by the state of trade, by the urgency of the demand for remittances, and by the quantity brought into the market for sale; and sometimes material changes take place in a single day, although no alteration has happened in the expenses of transporting specie. The court, therefore, can lay down no rule on the subject."

The fact that bills on time are sold or discounted at a higher rate of exchange than sight bills, does not prove the *162] transaction *to be usurious. *Pilcher, Assignee, &c.*, v. *The Banks*, 7 B. Mon. (Ky.), 548. See, also, 11 Ohio, 417; 13 Pet., 65.

When there is a suspension of specie payment by the banks, the fact of a charge of a higher rate for time than for sight drafts does not even tend to show that there was any attempt to cover an usurious loan.

The rate of exchange, when the payment is to be made in specie at the place of payment, is, in the main, the expense, risk, &c., of the transportation of specie.

The rate charged on sight drafts, even if payable in specie, is not always the same as that on drafts on time. In one case, the rate has reference to the present known value of the funds at the place of payment; in the other, to the rate at the maturing of the paper.

When the banks have suspended specie payment, the ordinary certainty in such transactions ceases, and there is a marked difference between sight and time drafts.

The party buying or discounting drafts at a future time, acts in reference to the possible and uncertain state of things which may exist when his money is returned to him in a depreciated currency at a distant place. The soundness of the banks in whose paper the notes may be paid, the discount on the paper of those banks, the uncertainty attending commercial affairs, and the apprehension of future depreciation of bank paper, all form part of the consideration as to the rate of exchange.

The question is one not affecting the character of the draft or note offered for sale or discount, but the value of the funds at the place of payment where the same is paid.

When the draft is drawn at a place, where, from the suspension of banks, bank paper is the currency, upon a place where they have not suspended, and debts are paid in specie, the effect of this state of things is apparent.

A draft drawn on London at New York, when the banks of New York suspended specie payment, would be sold at a premium, which would represent, not only the real state of exchanges between the two countries, but the difference in the value between gold and silver and the market value of the depreciated currency.

And *vice versâ*, a draft sold at London on New York, would be in the same manner at a heavy discount. If such draft was drawn on time, however abundant money might be in London, and however low the rate of interest, or however unquestionable the character of the paper offered, the rate of exchange charged would be much higher than on a sight draft, on account of the uncertainty of the value of the depreciated currency in which the debt was to be paid.

*For these reasons it might well be that at the same time that drafts on New Orleans at Cincinnati were at a discount, similar drafts at New Orleans on Cincinnati might be at a similar discount. Because men would prefer to have their money returned to them, at the maturity of the paper, in the paper of the banks known to them and at home, in preference to that of banks unknown to them and at a distance. This would not apply to specie, the value of which is known and uniform. [*163

3. If usurious interest were taken by the bank, by the general principle of equity, a party seeking relief must pay the principal and legal interest, and, by the settled law of Ohio, the contract is void only for the excess of interest.

Lord Thurlow, in *Scott* v. *Nesbit*, 2 Bro., 641; 2 Cox, 183, said: "I take it to be an universal rule that if it be necessary for you to come into this court to displace a judgment at law, you must do it on the equitable terms of paying the principal money due with lawful interest."

"It is the fundamental doctrine of the court, that in case of usury equity suffers the party to the illicit contract to have relief; but whoever brings a bill in case of usury, must submit to pay principal and interest due." Per Lord Hardwicke, 1 Ves. Sr., 320.

Lord Eldon, 3 Ves. & B., 14, says: "At law you must make out the charge of usury, and at equity you cannot come for relief, without offering to pay what is really due," &c.

Chancellor Kent, 5 Johns. (N. Y.) Ch., 143, after citing the foregoing cases, says: "The equity cases speak one uni-

form language, and I do not know of a case in which relief has been afforded to a plaintiff, seeking relief against usury, by bill, upon any other terms." 1 Johns. (N. Y.) Ch. R., 367; 3 Ves. & B., 14; 2 Ves., 138; 16 Ves., 124, *n.* 1; 2 Ves., 489; 2 Bro. Ch., 641; 1 Story, Eq. Jur., §§ 301, 302.

Mr. Justice CURTIS delivered the opinion of the court.

Nathaniel C. McLean, as the assignee of John Mahard, Jr., a bankrupt, filed his bill in the Circuit Court of the United States for the District of Ohio, for the purpose of relieving property of the bankrupt from incumbrances thereon, alleged to have been created in fraud of the Bankrupt act. A final decree having been entered in the cause, John S. Buckingham and Mark Buckingham, parties defendant to the bill, have prosecuted this appeal.

They allege that the decree of the Circuit Court was erroneous in three particulars.

The first is, that the title of John S. Buckingham to forty-nine shares of the stock of the Lafayette Bank has been declared *to be subject to an incumbrance thereon in favor of the bank, whereas John S. Buckingham had the better title thereto.

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The amended bill states "that said Mahard, before and at the time of filing his petition to be declared bankrupt, was the owner of forty-nine shares, of one hundred dollars each, of the capital stock of the Lafayette Bank of Cincinnati; that the said Lafayette Bank and John S. Buckingham set up some claim to said forty-nine shares of stock, of the particular nature of which your petitioner is ignorant. And your petitioner charges, that neither said Lafayette Bank, nor John S. Buckingham, have any valid legal claim to said shares of stock, but that petitioner, assignee, &c., is justly entitled thereto."

The answer of the bank responds to this allegation in the bill "that said John Mahard was the owner of forty-nine shares of the capital stock of the bank of these respondents, on each of which the sum of one hundred dollars had been paid; that he became the owner of said shares, so far as these respondents are advised, on the 13th day of September, 1841, and afterwards transferred the same to the cashier of said bank, as collateral security for the debt of J. & W. Mahard to these respondents, and these respondents now claim to have the control of said shares in virtue of said transfer, and also in virtue of their lien upon the capital stock of said bank, owned by debtors to the same, which

lien is created and confirmed by the charter granted to these respondents by the legislature of the State of Ohio."

John S. Buckingham and Mark Buckingham both demurred to this amendment of the bill. Their demurrer was overruled; but no answer to this particular allegation was filed by either of them; and the record contains no evidence, introduced by any party, touching the title to this stock. In this state of the record it is most manifest, only one decree could be made. The bank, in response to the allegations of the bill, having disclosed two titles to this stock, either of which was sufficient, if valid, and the assignee having shown nothing to impeach either title, his claim could not be allowed; and John S. Buckingham, being entirely silent respecting the charge in the bill, that he makes some claim to this stock, does, in effect, make none in this cause, and cannot complain of a decree for not awarding to him what he does not appear to have claimed.

The second objection made by the appellants to the decree is, that it declares their title to certain moneys, made by the levy of an execution, in their favor, on personal property of the bankrupts, to be invalid, as against the assignee.

On the 7th of April, 1842, a power of attorney to William M. Corry, Esq., to confess a judgment against the mercantile firm *of the bankrupts, in favor of John S. Buckingham, for the sum of fourteen thousand eight hundred [*165 dollars, was executed by John Mahard, Jr., for himself and his copartner, William Mahard, who was at the time in New Orleans. By virtue of this power a judgment for that sum was confessed on the 8th of April. On the 20th of April, William Mahard, by an instrument under seal which recited the substance of this power, and that it was given with his concurrence, confirmed and ratified it as his act. On the 22d of May, 1842, execution was taken out and levied on personal property of the judgment debtors. On the 27th of May, 1842, John Mahard, Jr., filed his petition and was subsequently decreed a bankrupt thereon. The judgment, though confessed in favor of John S. Buckingham alone, was founded on a debt due to both the appellants, who were *bonâ fide* creditors of J. & W. Mahard.

The question is, whether these proceedings came within the second section of the Bankrupt Act, 5 Stat. at L., 442. This section provides: "That all future payments, securities, conveyances, or transfers of property, or agreements, made, or given by any bankrupt, in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person any preference or priority over the general

creditors of such bankrupt, shall be deemed utterly void, and a fraud upon this act."

By the law of Ohio, a judgment creates a lien on the real estate of the judgment debtor, and the levy of an execution creates one on his personal estate levied on. A power of attorney to confess a judgment, whenever a judgment is taken under it, does in fact operate to create a security upon the debtor's real estate; and when an execution issues on that judgment, to create a lien on the personal estate levied on. It is true these liens arise by operation of law, from the judgment, and execution, and its levy, which are the acts of officers of the law, and not of the debtor. But the power of attorney is designed to, and does, produce those acts, which depend upon it for their validity, and therefore through those acts does create the security. The operation of law is always necessary to give effect to any form of security, which indeed is but the legal consequence of the act of the party; and the lien created by a judgment is none the less the legal consequence of the act of the party, because it is necessary that after the power is executed, a judgment should be rendered. When it is rendered, the creditor has a security, by operation of law, through the act of the debtor, and therefore such a security may be correctly said, in the language of this section, to be made or given by the debtor.

If it were not so, one of the acts of bankruptcy, described in the first section of this statute, would make a valid title to *166] the *creditor. It is an act of bankruptcy, for the debtor willingly to procure his goods or lands to be attached, distrained, sequestered, or taken on execution. It cannot be supposed that what was in itself an act of bankruptcy, and done for the purpose of giving a preference over the general creditors, was intended to be left valid, and effectual to defeat one of the two great objects of the law, which were to grant a discharge to honest debtors who should conform to its provisions, and to distribute their property ratably among all their creditors.

But if a judgment, confessed by the debtor through a power of attorney, be not a security given by him, there is nothing in this act which defeats a preference thus created, and the provisions of this second section become practically inoperative in respect to all property of the debtor which may be bound by a judgment, or even by the levy of an execution; since a speedy and well-known mode of preferring a creditor, by confessing a judgment, is left open to all debtors who may desire to give preferences, even in contemplation of bankruptcy. This consequence, while it would not

justify a forced construction of the words used in the act, does certainly require that the utmost meaning and effect, fairly attributable to them, should be laid hold of to prevent so great a mischief.

The language employed in the English bankrupt acts shows that, under that system, a judgment is treated as a security. The 21 James 1, c. 19, § 9, uses the language "that, if any person have a security for his debt by judgment, statute," &c. The revising act, 6 Geo. 4, c. 16, § 108, provides that, "no creditor, having security for his debt, &c., shall receive more than a ratable part of such debt, except in respect to any execution or extent, served and levied by seizure upon, or any mortgage or lien upon, any part of the property of such bankrupt, before the bankruptcy." Thus classing judgments with mortgages, under the word securities. And the Irish Bankrupt Act, 11 & 12 Geo. 3, c. 8, § 5, enacted, that "nothing herein contained shall extend to any security by judgment, obtained before the bankrupt became a trader." Mr. Eden (Eden on Bankruptcy, 285) remarks, concerning the difference in phraseology between the 21 James 1, and 6 Geo. 4, that the general term, security, employed by the latter, would necessarily include all the particulars enumerated in the old statute; that is, security necessarily includes judgments. In many of the States, a bond and warrant of attorney to enter up judgment is a usual mode of taking security for a debt, and judgments thus entered are treated as securities, and an equitable jurisdiction exercised over them by courts of law. In some States, they operate only as a lien on the lands of the debtor, in others, on his personal estate *also; *Brown* v. *Clarke*, 4 How., 4; and wherever, by the local law, a judgment or an execution operates to [*167 make a lien on property, we are of opinion it is to be deemed a security; and when rendered upon confession, under a power given by the debtor for that purpose, it is a security made or given by him within the meaning of the Bankrupt Act, and is void, if accompanied by the facts made necessary by that act to render securities void. These facts are, that the security was given "in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser, surety, or other person, a preference or priority over the general creditors of such bankrupt."

The inquiry, whether this security was given in contemplation of bankruptcy, involves the question what is meant by those words. It is understood that, while the Bankrupt Law was in operation, different interpretations were placed upon them in different circuits. By some judges, they were held

to mean contemplation of insolvency,—of a simple inability to pay, as debts should become payable,—whereby his business would be broken up; this was considered to be a state of bankruptcy, the contemplation of which was sufficient. By other judges, it was held, that the debtor must contemplate an act of bankruptcy, or a voluntary application for the bankrupt law. *In re Pearce*, 6 Law Rep., 261; *In re Rowell*, 6 Law Rep., 298; *Jones* v. *Howland*, 8 Met. (Mass.), 377; *Taylor* v. *Whitehouse*, 5 Humph. (Tenn.), 340.

It is somewhat remarkable that this question should be presented for the first time for the decision of this court after the law has been so long repealed, and nearly all proceedings under it terminated. Perhaps the explanation may be found in the fact, that when securities have been given within two months before the presentation of a petition by or against the debtor, the evidence would usually bring the case within either interpretation of the law. However this may be, it is now presented for decision; and we are of opinion that, to render the security void, the debtor must have contemplated an act of bankruptcy, or an application by himself to be decreed a bankrupt.

Under the common law, conveyances by a debtor, to *bonâ fide* creditors, are valid, though the debtor has become insolvent and failed, and makes the conveyance for the sole purpose of giving a preference over his other creditors. This common-law right, it was the object of the second section of the act to restrain; but, at the same time, in so guarded a way as not to interfere with transactions consistent with the reasonable accomplishment of the objects of the act. To give to these words, contemplation of bankruptcy, a broad scope, and somewhat loose meaning, would not be in furtherance of the general purpose with which they were introduced.

*168] *The word bankruptcy occurs many times in this act. It is entitled "An act to establish a uniform system of bankruptcy." And the word is manifestly used in other parts of the law to describe a particular legal *status*, to be ascertained and declared by a judicial decree. It cannot be easily admitted that this very precise and definite term is used in this clause to signify something quite different. It is certainly true in point of fact, that, even a merchant may contemplate insolvency and the breaking up of his business, and yet not contemplate bankruptcy. He may confidently believe that his personal character, and the state of his affairs, and the disposition of his creditors, are such, that when they shall have examined into his condition they will extend the times of payment of their debts, and enable him to resume

his business. A person, not a merchant, banker, &c., and consequently not liable to be proceeded against and made a bankrupt, though insolvent, may have come to a determination that he will not petition. The contemplation of one of these states, not being in fact the contemplation of the other, to say that both were included in a term which describes only one of them, would be a departure from sound principles of interpretation. Moreover, the provisos in this section tend to show what was the real meaning of this first enacting clause. The object of these provisos was, to protect *bonâ fide* dealings with the bankrupt, more than two months before the filing of the petition by or against him, provided the other party was ignorant of such an intent, on the part of the bankrupt, as made the security invalid under the first enacting clause. And the language is, "provided that the other party to any such dealings or transactions had no notice of a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act." These facts, of one of which a *bonâ fide* creditor must have notice, to render his security void, if taken more than two months before the filing of the petition, can hardly be supposed to be different from the facts which must exist to render the security void under the first clause; or, in other words, if it be enough for the debtor to contemplate a state of insolvency, it could hardly be required that the creditor should have notice of an act of bankruptcy, or an intention to take the benefit of the act. It would seem that notice to the creditor of what is sufficient to avoid the security, must deprive him of its benefits, and consequently, if he must have notice of something more than insolvency, something more than insolvency is required to render the security invalid; and that we may safely take this description of the facts which a creditor must have notice of to avoid the security, as descriptive, also, of what the bankrupt must contemplate to render it void.

*In construing a similar clause in the English bankrupt law, there have been conflicting decisions. It [*169 has been held that contemplation of a state of insolvency was sufficient. *Pulling* v. *Tucker*, 4 Barn. & Ald., 382; *Poland* v. *Glyn*, 2 Dow. & Ry., 310. But both the earlier and later decisions were otherwise, and, in our judgment, they contain the sounder rule. *Fidgeon* v. *Sharpe*, 5 Taunt., 545; *Hartshorn* v. *Slodden*, 2 Bos. & P., 582; *Gibbins* v. *Phillipps*, 7 Barn. & C., 529; *Belcher* v. *Prittie*, 10 Bing., 408; *Morgan* v. *Brundrett*, 5 Barn. & Ald., 297. And see the opinion of Patteson, J., in the last case.

Considering, then, that it is necessary to show that the

debtor contemplated an act of bankruptcy, or a decree adjudging him a bankrupt on his own petition, at what time in this case must he have had this in contemplation? He gave the power of attorney on the 7th of April; the judgment was confessed and entered up on the next day; the execution was taken out and levied, and the lien created thereby, on the 22d of May; and five days afterwards, being less than two months after the execution of the power, the debtor presented the petition under which he was decreed a bankrupt. The only act done by the debtor was the execution and delivery of the power of attorney. It was a security by him made or given, only by reason of that instrument. What followed were acts of the creditor and of officers of the law, with which the debtor is no more connected than with the delivery by a creditor of a deed to the office of the register, to be recorded, or the act of the register in recording it. It would seem that, if the intent of the debtor is to give a legal quality to a transaction, it must be an intent accompanying an act done by himself, and not an intent or purpose arising in his mind afterwards, while third persons are acting; and that, consequently, we must inquire whether the debtor contemplated bankruptcy when he executed the power. It is true, this construction would put it in the power of creditors, by taking a bond and warrant of attorney, while the debtor was solvent and did not contemplate bankruptcy, to enter up a judgment and issue execution, and by a levy acquire a valid lien, down to the very moment when the title of the assignee began. But this was undoubtedly so under the statute of James, which, like ours, contained no provision to meet this mischief; and it became so great that, by the 108th section of the revising act of 6 Geo. 4, it was enacted, that "no creditor, though for a valuable consideration, who shall sue out execution on any judgment obtained by default, confession, or *nil dicit*, shall avail himself of such execution, to the prejudice of other fair creditors, but shall be paid ratably with such creditors."

If the Bankrupt Act of 1841 had continued to exist, a *similar addition to its provisions would doubtless have become necessary.

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It remains to inquire whether the debtor in this case, in point of fact, contemplated bankruptcy, and designed to give a preference to the appellants, when he executed the power on the 7th of April.

It has been stated at the bar that by some accident, much of the evidence bearing on this question was lost, and is not inserted in the record. We have no doubt of the fact; but

this question must be decided here upon what remains; and we think there is sufficient now on the record to show that bankruptcy was in contemplation when the power was given. The petition to be decreed a bankrupt was filed only fifty days after the date of the power. No material change in the state of the debtor's affairs appears to have occurred between the 7th of April and the 27th of May. The only property which came into the hands of the assignee, uncovered by valid liens of particular creditors, was the thirteen hundred dollars made by this execution out of property already incumbered by a mortgage to another creditor, for the sum of upwards of fourteen thousand dollars, dated on the 18th of March preceding, and which has been adjudged by the Circuit Court to be void, under the second section of the Bankrupt Act, and no appeal taken.

The bankrupt was a member of a mercantile firm, doing business in Cincinnati and New Orleans, and the commercial paper of this firm, to a very large amount, had been protested for non-payment, and was known to the bankrupt to have been so, before this power was given. Holding an execution for $14,800, the appellants were able to make upon it only $1300. Both the mercantile firm and the individual bankrupt were in a state of deep, and so far as appears, irretrievable insolvency, and there is no reason to doubt the bankrupt knew these facts. Though a competent witness for the appellants on the question of his own intent, and able to give decisive evidence, if believed, he has not been examined, nor is there any evidence in the record to control the strong presumption that the purpose he executed on the 22d of May, by filing his petition, existed in his mind fifty days before, when his circumstances were the same, and the inducements to take advantage of the act were as great, as at the time he actually attempted to do so.

It is true the appellants say in their answers they did not know or believe, when the power was given, and do not now believe, the debtor then contemplated bankruptcy. But their answer, though responsive, in this particular, to the bill, is entitled to little weight concerning the state of mind of the debtor, no reasons being given for their belief and none of the facts explained *from which an opposite inference [*171
is to be drawn, 9 Cranch, 160; and their own state of mind is not material, because the petition was filed within two months after the date of the power.

It has been suggested that the execution of the power of attorney by Mahard was in itself an act of bankruptcy, because he thereby procured his goods to be taken on execution.

But the act requires that this should be done willingly, or fraudulently. The Buckinghams being *bonâ fide* creditors there is no ground upon which this act can be deemed fraudulent unless it was done in contemplation of bankruptcy and with intent to give a preference, and this would bring us back to the inquiry whether such contemplation and intent existed; and it is explicitly denied by the answers of the Buckinghams that the power was executed by Mahard willingly, it having been done under strong pressure by them, and only at last because a suit was threatened if he did not comply. There is no evidence to control these statements in their answers, so that we cannot say that *per se* the giving of the power was an act of bankruptcy. 1 Deacon's B. L., 446; *Thompson* v. *Freeman*, 1 T. R., 155; *Hunt* v. *Mortimer*, 10 Barn. & C., 44; *Morgan* v. *Brundrett*, 5 Barn. & Ad., 297.

We have therefore found it necessary to go into the inquiry whether the bankrupt did in fact contemplate bankruptcy when the power was given, and intend to give a preference thereby; and being of opinion that he did, there is no error in the decree of the Circuit Court in this particular.

The third objection made to the decree of the court below is, that it established the validity of sundry mortgages on the property of the bankrupts, held by certain banking corporations. It is alleged by the appellants that these mortgages were void, on account of usury; that though, by the statute law of Ohio, a usurious contract is valid, for the principal sum lent, with lawful interest thereon, yet, if a banking corporation make a usurious contract, it is utterly void, because such a banking corporation has no lawful authority to make such a contract, exceeds its powers by attempting to do so, and consequently neither party is bound thereby.

We have not thought it necessary to examine this position, because we are of opinion that usury, in either of these mortgages, is not proved.

The power of these banking corporations to deal in exchange is not controverted. There is no usury on the face of any one of these transactions. It is incumbent on the party who charges usury to prove it; and where it is alleged to consist in taking excessive rates of exchange, or in resorting to the form of a bill of exchange in order to keep out of sight a usurious compensation for the simple loan of money, these
*172] facts must be proved. **Andrews* v. *Pond et al.*, 13 Pet., 65; *Creed* v. *The Commercial Bank*, 11 Ohio, 489. The answer of each bank denies such intent, and avers that the exchange charged in each case was the customary and regular rate at the time of the discount of each bill.

There is not evidence to prove the contrary. Indeed it was agreed by the counsel on both sides, during the argument, that the rates charged were the usual and customary prices of exchange between Cincinnati, where the bills were drawn, and New Orleans, where they were payable, at the times they were discounted. The counsel for the appellants urged that the rates were higher than were charged on sight bills. But these were time bills, and it is no proof of usury that the banks did not take the market rates on sight bills which they did not discount, if they took only the market rates on those they did discount. It was also insisted that the banks did not buy these bills, but were the first takers for loans of money made to the drawers. But we are unable to perceive how the fact that the banks were the first takers can be of any importance in this case, nor do we deem it material that the bills were discounted for the drawers.

The reason why the addition of the current rate of exchange to the legal rate of interest does not constitute usury is, that the former is a just and lawful compensation for receiving payment at a place where the money is expected to be less valuable than at the place where it is advanced and lent. And this reason exists when the lender discounts the drawer's bill as well as when he buys a bill in the market of the payee. In neither case is it usury to take the regular and customary compensation for the loss in value by change of place of payment. It is argued that no usage, or custom can make an unlawful contract valid. This must be admitted. But the contract is not unlawful, unless more than six per cent. has been reserved or taken for interest; if more has been reserved or taken, not for the loan and forbearance, but for a change in the place of payment, then the contract is lawful; and in determining whether the excess over six per cent. has been reserved for interest, or as a just compensation for changing the place of payment, the custom, or the market value of this change, is evidence of the real intent of the parties, and so evidence of the validity of the contract.

Our opinion is that usury was not made out in either of these mortgages and that there was no error in the decree of the court below declaring their validity. The decree of the Circuit Court is affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District *of Ohio, and was argued by coun- [*173

sel. 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.

SMITH HOGAN, ARTHUR S. HOGAN, AND REUBEN Y. REYNOLDS, PLAINTIFFS IN ERROR, *v.* AARON ROSS, WHO SUES FOR THE USE OF ROBERT PATTERSON.

Where a declaration contained two counts, one of which set out an injunction-bond with the condition thereto annexed, and averred a breach, and the second count was merely for the debt in the penalty; and the pleas were all applicable to the first count, which was upon trial stricken out by the plaintiff, and the court gave judgment upon the second count for the want of a plea, this judgment was proper, and must be affirmed.[1]

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

The question was one of pleading, and arose in this way:

At June term, 1840, of the District Court of the United States for the Northern District of Mississippi, Aaron Ross, a citizen of Pennsylvania, recovered a judgment against George Wightman and Smith Hogan, for $3,177.05, with interest from the 11th day of December, 1839.

Ross issued an execution upon this judgment.

On the 30th of September, 1842, when this execution was in the hands of the marshal, Smith Hogan obtained an injunction prohibiting further proceedings under the execution. The signers of the injunction-bond were Smith Hogan, Arthur S. Hogan, and Reuben Y. Reynolds.

In November, 1843, in the Circuit Court of the United States, the following entry was made upon the docket.

SMITH HOGAN *v.* AARON ROSS.	401.	Dismissed by order of complainant's solicitors.

In May, 1845, Ross brought an action upon the injunction-bond, the penalty of which, being double the amount of the judgment, was $6,354.10. The declaration set out the bond and averred, as a breach of the condition, that Hogan had not prosecuted his writ of injunction to effect, but the same was dissolved and the bill of the said Smith, by said court,

[1] CITED. *Aurora City* v. *West*, 7 Wall., 91.

dismissed. To *this declaration, three pleas were filed in June, 1845, to the second and third of which the plaintiff demurred, and afterwards the defendant demurred to the plaintiff's declaration. All the demurrers were sustained; and the court gave leave to the plaintiff to amend his declaration. [*174

In December, 1846, the plaintiff filed his amended declaration. This was the commencement of the system of pleading which came before this court for review.

The amended declaration consisted of two counts.

The first, after setting out in *hæc verba* the condition of the injunction-bond, sets out the breach of the condition, specially, in this, that the said Smith Hogan did not prosecute his said writ of injunction to effect, &c., but afterwards, &c., dismissed the same. It then avers that by means of the wrongful suing out of said injunction, plaintiff has sustained damage to the amount of $4,000. It proceeds to aver, that since the dismissal of the injunction, &c., neither of said obligors, nor any other person, hath paid to plaintiff the damages, &c., nor any part of the judgment enjoined by said writ of injunction.

The second count is upon the obligatory part of the bond alone, without any reference to the condition, and the only breach assigned is the general one, the non-payment of the money mentioned in the bond.

The defendants put in the five following pleas.

1. And the said defendants, by leave of the court first had, by attorney, come and defend the wrong and injury, when, &c., and say *actio non*, because they say that they have prosecuted their said injunction with effect, and this they pray, may be inquired of by the country, &c.; and the plaintiff likewise.

Topp & Miller.

2. And for further plea in this behalf the said defendants say *actio non*, &c., because they say that the said plaintiff was not damnified or in any manner injured by the wrongful suing out of said injunction by the said Smith Hogan, and this they are ready to verify; wherefore they pray judgment, &c.

Replication and issue in short by consent.

Topp & Miller.

3. And for further plea in this behalf the said defendants say *actio non*, because they say they have fully, well, and truly performed all and singular the conditions in said bond specified, and this they are ready to verify; wherefore they pray judgment, &c.

Replication and issue in short by consent.

Topp & Miller.

4. And for further plea in this behalf the said defendants say *actio non*, because they say they have fully, well, and truly *performed all and singular the conditions in said bond specified, in this, to wit, that on the day of , 184 , at the district aforesaid, the said plaintiff sued out of the office of the clerk of said District Court a writ of *fieri facias*, founded on the judgment in the bond and declaration mentioned, which on the day and year aforesaid went into the hands of the marshal of said district, to be executed and returned according to law. And the said defendants aver that said marshal, by virtue of said execution, did levy and make, of the property, goods, and chattels of said defendant, Smith Hogan, a large sum of money, to wit, the sum of four thousand dollars, and this they are ready to verify; wherefore they pray judgment, &c.

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5. And for further plea in this behalf the said defendants say *actio non*, because they say, that the judgment upon which the execution issued, and to enjoin which the supposed injunction-bond upon which this suit is founded was executed, was fully paid off, satisfied, and discharged, and before the issuance of the execution enjoined, to wit, on the 1st day of June, A. D., 1842, at, to wit, in the district aforesaid, and this they are ready to verify; wherefore they pray judgment, &c.

DAVIS & GOODWIN,
Attorneys for plaintiff.

Replication and issue.

TOPP & MILLER.

To the fourth plea there was the following special replication.

Replication to 4th plea.

UNITED STATES OF AMERICA,

District Court, Northern District of Mississippi.

AARON ROSS, use, &c., }
v. }
SMITH HOGAN et al. }

And said plaintiff, by attorney, comes, and &c., and says, as to the plea of said defendants by them fourthly above pleaded, *precludi non*, &c., because, he says, that although the writ of *fieri facias*, founded upon the judgment of the plaintiff in said plea mentioned, was levied upon two negroes as the property of Smith Hogan, one of the defendants therein, yet said plaintiff says that the said two negroes were levied upon

by the marshal of said northern district, at the same time, by virtue of sundry writs of *fieri facias*, founded on judgments recovered in said District Court against said defendant, Smith Hogan, to wit, one *in favor of Stephen Davis, for $1,194.20; two in favor of James A. Henden, one for $1,194.20, and the other for $3,582.60, and one in favor of Fellows, Wordworth & Co., for the sum of $2,172.46, numbered 23, 24, 25, and 26; and the said two negroes being afterwards sold by said marshal, by virtue of said several writs of *fieri facias*, together with the writs of *fieri facias* founded upon the judgment of said plaintiff; yet said plaintiff avers that the sum of money, to wit, the sum of eleven hundred and seventy-eight dollars, raised by the sale of said negroes by virtue of the writs aforesaid, was by the order of said District Court, to wit, at the June term, 1844, thereof, applied and appropriated to the payment and satisfaction of said other writs of *fieri facias* above mentioned; and said plaintiff avers that no portion of said sum of money raised as aforesaid was appropriated or applied to the payment or satisfaction of said writ of *fieri facias* founded upon the judgment of plaintiff in said plea mentioned; wherefore said plaintiff says he has not had any satisfaction of his said judgment, mentioned in said plea, and this he is ready to verify, &c.; wherefore he prays judgment, &c. [*176

TOPP & MILLER,
For plaintiff.

To the second and third pleas the plaintiff demurred, as follows:

And the said plaintiff, as to the said pleas of the said defendants by them secondly and thirdly above pleaded in this behalf, says, he is not bound by the law of the land to reply to the same; and for causes of demurrer to said second plea the plaintiff states and sets forth the following, to wit:

1st. Said second plea tenders an issue to an immaterial matter, and not directly put in issue by the declaration.

2d. The said second plea is not responsive to the averments in the declaration mentioned; the plaintiff does not complain that said defendants failed to prosecute their said injunction with effect; the gravamen in the declaration of the plaintiff is this, that the defendant, Smith Hogan, wrongfully obtained and sued out the injunction by which the plaintiff was hindered and delayed in the collection of his said judgment.

3d. And the said plea is in other respects informal and insufficient, &c. EVANS, and TOPP & MILLER,
For plaintiff.

And for cause of demurrer to said third plea, plaintiff shows the following causes:

1st. Said plea only alleges general performance of the conditions of the bond, when special breaches are assigned in the declaration.

*177] *2d. And is otherwise informal and insufficient.

EVANS, and TOPP & MILLER,
For plaintiff.

To the special replication to the fourth plea, the defendant put in the following rejoinder.

And the said defendants, as to the replications of the said plaintiff to the fourth and sixth pleas of the said defendants, say that the said plaintiff ought not, by reason of any thing by them in said replications alleged, to have or maintain their aforesaid action thereof against them, because they that the other writs of *fieri facias* founded on judgments recorded in said District Court against the defendant, as described and set forth in said replication, were younger in point of time than the judgment and execution founded thereon in the plea mentioned. And the said defendants in fact say, that the said plaintiff, by virtue of the execution founded upon the judgment against one George Wightman and Smith Hogan, being the execution in the declaration and fourth and sixth pleas mentioned, and which judgment was rendered and recorded in said District Court, at the June term thereof, 1840, the said marshal did make and levy of the proper goods and chattels of the defendant, Smith Hogan, the said sum of four thousand dollars, in said plea mentioned. And the said defendants in fact further say, that the judgment upon which the execution issued, as mentioned and set forth in said replications to the fourth and sixth pleas of the said defendants, were not rendered and recorded in said court until the times as hereinafter mentioned, to wit, the judgment in favor of James A. Henden, at the June term, 1842, of said District Court; the judgment in favor of Stephen Davis, at the June term, 1842; the judgment in favor of Fellows, Woodworth & Co., at the June term, 1842, of said District Court; and so the said defendants in fact say, that the said plaintiff hath obtained payment and satisfaction of his said execution in the said replications mentioned, and this the said defendants are ready to verify; wherefore they pray judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against these defendants.

DAVIS & GOODWIN,
Attorneys for defendants.

The plaintiff demurred to this rejoinder, and the defendants joined in demurrer.

On the 11th of December, 1846, the demurrer to the rejoinder was sustained, and the court ordered that the defendants have leave to answer over, which they declined to do; and thereupon the cause was continued by consent of parties till the next term of the court.

*In June, 1847, the cause was continued again.

In December, 1847, it came on for trial. A jury being impanelled, the plaintiff, by his attorney, read to the jury the pleadings, a certificate of the clerk of the Circuit Court, showing that the bill in the case of *Hogan* v. *Ross* was dismissed by order of complainant's solicitors, and there rested his case. The defendants then put in a demurrer to the evidence. [*178

On the 10th of December, 1847, the following proceedings took place.

Friday, December the 10*th*, 1847.

This day came the parties by their attorneys, and it appearing to the satisfaction of the court that defendants have filed no plea to the second count in plaintiff's declaration, but have therein wholly made default: It is therefore considered by the court, that plaintiff recover of defendants the sum of six thousand three hundred and fifty-four dollars and ten cents debt, in the said second count in the declaration mentioned, and also the costs in this cause expended. And the plaintiff, by attorney, comes and remits the sum of twenty-six hundred sixty-two dollars and seventy-eight cents, being part of the judgment above mentioned.

Defendants' motion in arrest of judgment, filed and entered December 10th, 1847, as follows, to wit:

AARON ROSS, use of, &c.,
v.
SMITH HOGAN and others. } 401.

The defendants move the court to arrest the judgment in this case:

1. Because the court cannot pronounce a final judgment upon the second count in the declaration.

2. For other causes. DAVIS & GOODWIN.

Also, afterwards, to wit, on the 11th day of December, being a day of the December term of said court last aforesaid, the further proceedings were had in the foregoing cause, to wit:

AARON ROSS, use of Robert Patterson,
v.
SMITH HOGAN, ARTHUR S. HOGAN, AND REUBEN Y. REYNOLDS.

Saturday, December the 11*th*, 1847.

This day came the parties, by their attorneys, and then came on to be heard defendants' demurrer to plaintiff's testimony; in which said demurrer the plaintiff was ordered to join, but refused to join, and thereupon dismissed the first *179] count in his *declaration set forth; whereupon the defendants demanded judgment on the demurrer to the evidence for want of joinder thereto, which is refused by the court.

And also, afterwards, to wit, on the day and at the term last above stated, the further proceedings were had in the aforesaid cause, to wit:

AARON ROSS, who sues for the use of Robert Patterson,
v.
SMITH HOGAN, ARTHUR S. HOGAN, AND REUBEN Y. REYNOLDS. } 401.

Saturday, December the 11*th*, 1847.

This day again came the parties, by their attorneys, and thereupon came on to be heard defendants' motion to arrest the judgment rendered in this cause on yesterday; and, after argument, it is considered by the court that said motion be overruled.

A writ of error brought all these proceedings up to this court.

It was argued by *Mr. Reuben Davis*, for the plaintiffs in error, and *Mr. Coxe*, for the defendant in error.

Mr. Davis. This was an action of debt founded upon an injunction-bond. The declaration contained two counts. The first count sets out the bond and condition, and assigns breaches; the second is only upon the penal part of the bond. The defendants below filed but one plea, which undertakes to answer the whole declaration, and is an answer to the whole.

The case having been put to the jury, the plaintiff introduced his proof and closed. Thereupon the defendants demurred to the testimony, and tendered an issue to the court. The plaintiff refused to join in the issue upon the demurrer,

and the court refused to compel him to do so, or allow the defendants to sign judgment. Thus stood the case, when the plaintiff's counsel asked the court for judgment final by default upon the second count, upon the ground that it had not been replied to. This was allowed by the court; still leaving the demurrer to the testimony undisposed of.

The court certainly erred in allowing judgment upon the second count. The plea undertakes to answer the whole declaration; and if it does not do so, the objection should have been by demurrer. The plaintiff could not sign judgment. 6 Johns. (N. Y.), 63; 18 Id., 28; 20 Id., 471; 1 Saund., 28, *n.* 3; Chitty, 510.

I confess that when a plea undertakes to answer only a part of the declaration, and afterwards answers more, judgment in *that case may be signed for so much as the plea in its commencement does not undertake to answer. 6 [*180 Johns. Rep., 63; 18 Johns. (N. Y.), 28; 20 Id., 471; 1 Saund., 28, *n.* 3; 2 Chit., 510.

It was a manifest error to allow plaintiff to take judgment, even if the plea had not extended to the second count of the declaration final. 4 Phill. Ev., 169; 1 Saund. Pl. & Ev., 319.

The only remaining question is, what the judgment of the court shall be? There can be no question that the court will feel it to be their duty to reverse the judgment below. This being done, I insist that it will be the duty of the court to render upon the demurrer such judgment as the court below should have rendered in the case. There can be no necessity for reversing the judgment, and returning to the court below, as there is nothing to be settled by that court.

Mr Coxe, after stating the nature of the amended declaration, proceeded to comment upon the rest of the pleadings.

The defendants appear and plead several pleas.

1. *Actio non*, because they have prosecuted their injunction with effect, and pray an issue to the country.

2. General *non damnificatus* with a verification.

3. General performance of condition with a verification.

4. Full performance of all and singular the conditions of said bond, in this, viz., that plaintiff sued out a writ of *fieri facias* on the judgment in the bond and declaration mentioned, which went into the hands of the marshal; and that the said marshal did, by virtue of the same, levy and make of the property of said Smith Hogan $4,000; no time specified.

5. That prior to the issuing of the execution enjoined, viz.,

in June, 1842, the judgment upon which it issued was fully paid.

It will be observed that oyer is not prayed of either the bond or the condition, and consequently none was given. The five pleas put in, informal and defective as they are in many respects, while they profess to answer the entire declaration, are substantially only an answer to the first count, leaving the second unnoticed. The pleadings on both sides, after the *narr.*, are unskilfully drawn; a replication is filed to the 4th plea, to which there is a rejoinder and a demurrer to that rejoinder, a demurrer to the 2d and 3d pleas, issue joined on the first. The demurrer to the rejoinder was argued and sustained; leave given to defendants to answer over, which was declined; whereupon judgment on that was given for plaintiff.

The cause came on to be tried on the issue joined on the first plea; after the plaintiff had produced his evidence, *181] defendants *demurred to the evidence, which demurrer was argued; and afterwards the court rendered judgment for plaintiff on the second count in the declaration for want of a plea; a motion was made in arrest of judgment, which was overruled. The demurrer to the evidence came on to be heard, the plaintiff refusing to join therein and dismissing the first count in his declaration, and judgment was entered for plaintiff on the 2d count.

It cannot be doubted that there was much irregularity in the conduct of the case; but it all originated in the bad pleading of defendants, and it is apparent that the final judgment is in accordance with the law and justice of the case.

The rule of pleading is clearly laid down by Mr. Sergeant Williams, 1 Saund., 28, *n.* 3, and the authorities there cited. Every plea must answer the whole declaration or count. If a plea, as in this case, begin with an answer to the whole declaration, but in truth the matter pleaded is only an answer to part, the whole plea is bad. In such case plaintiff may take judgment for the part unanswered as by *nil dicit.* 4 Co., 62 a; 1 Chit., 132, *n.* (a); Id., 526, *n.*

It must be apparent on the whole pleadings that defendants had no defence to the action, and merely made defence for delay, and that plaintiff is entitled to judgment on the merits.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action of debt instituted by the defendant in error, who was plaintiff in the court below against the plaintiffs in error, as the obligors in an injunction-bond. To the original declaration three pleas were filed at the June term

of the court, 1845; to the second and third of these pleas the plaintiff demurred; and at the December term, 1845, the defendants demurred to the plaintiff's declaration. The demurrers to the two pleas above mentioned were sustained by the court, and afterwards, viz.: on the 10th December, 1846, the court decided in favor of the demurrer to the declaration; giving at the same time leave to amend. The plaintiff, under this leave, filed his amended declaration, presenting the case which was acted upon in the court below. The amended declaration consists of two counts; the first sets out the injunction-bond with the condition thereto annexed, and alleges a breach of that condition as the special ground of the action. The second count is for the penalty of the bond, as having been forfeited by failure of payment. The defendants filed five pleas to the amended declaration; upon the first of these pleas an issue of fact was joined, and the four following were by the court adjudged bad upon demurrer. At the December term of the court, 1847, the cause coming on for trial upon the issue joined *upon the first plea, after the testimony on the part of the [*182 plaintiff was closed, the defendants tendered a demurrer to the evidence offered by the plaintiff, but in this the plaintiff refused to join, and dismissed or struck out the first count in his declaration; whereupon the defendants moved the court for judgment on the demurrer to evidence, for want of a joinder thereon, but this motion the court refused to grant, and afterward entered up the following judgment: "It appearing to the satisfaction of the court that the defendants have filed no plea to the second count in the plaintiff's declaration, but have therein made default; it is therefore considered by the court that the plaintiff recover of the defendants the sum of six thousand three hundred and fifty-four dollars and ten cents debt in the second count in the declaration mentioned, and the costs in this cause expended.

If in our examination of the decision of the Circuit Court, it were deemed necessary to pass upon the legal effect of the pleas tendered by the defendants below, and overruled by the court, we could have no hesitation in pronouncing each of those pleas bad upon demurrer. It is a settled rule in pleading, that wherever a plea in its commencement professes to respond to the entire declaration or count, and is in substance and reality in answer to part only of such declaration or count, the plea is bad, and the defect may be availed of, upon demurrer. If a plea profess in the commencement to answer only part of the declaration or count, and is in truth and substance a response to such part alone, the plaintiff

should not demur, because the residue of the count or declaration is unanswered, but should take judgment for that residue by *nil dicit*, as by demurring he would operate a discontinuance of the entire cause. The authorities upon these canons of pleading will be found collected from the earliest decisions by Sergeant Williams in note 3 to the case of the *Earl of Manchester* v. *Vale*, 1 Saund., 28. The same rules are expressly affirmed in *Tippet* v. *May*, 1 Bos. & P., 411; *Everard* v. *Patterson*, 6 Taunt., 625; *Wilcox* v. *Newman*, 1 Chit., 132, and *Hallet* v. *Holmes*, 18 Johns. (N. Y.), 28. In the case before us every plea tendered by the defendants embraces within its commencement the entire cause of action, averring that the plaintiff should not have or maintain his action; yet each of them in its body and substance, is limited to the condition of the injunction-bond and to some stipulation in that condition to which each plea specifically refers. The pleas demurred to therefore, could not but be properly overruled; and with respect to that upon which issue was joined, it being immaterial and inconclusive as to the entire declaration, and defective in the same sense with the others, had the issue been found against the plaintiff, he would
*183] *still have been entitled to judgment *non obstante veredicto*. But upon this record there remains no subject for the application of the rules of pleading above adverted to. The first count in the declaration having been dismissed or stricken out, every thing which was pertinent strictly to that count, or which constituted a defence to the case made thereby, falls with the count against which such defence was interposed. The case then remains solely on the second count in the declaration, and it cannot be pretended that to this count, consisting purely of a money claim, connected with no condition, any pleas have been interposed upon this record to this count; therefore the case must be considered as one of plain default entirely unanswered by the defendant below, and as having been properly so treated by the Circuit Court. The judgment of the Circuit Court is therefore affirmed.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel; on consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs and damages at the rate of six per centum per annum.

Thomas J. Coffee, Plaintiff in Error, *v.* The Planters Bank of Tennessee.

By the eleventh section of the Judiciary Act, 1 Stat. at L., 78, no action can be brought in the Federal courts upon a promissory note or other chose in action, by an assignee, unless the action could have been maintained, if there had been no assignment. But an indorsee may sue his own immediate indorser.

Hence, where an action was brought by an indorsee upon checks which had been indorsed from one person to another in the same State, and some of the counts of the declaration traced the title through these indorsements, no recovery could have been had upon those counts.[1]

But the declaration also contained the common money counts; and, upon the trial, these were the only counts which remained, all the rest having been stricken out. The suit against the maker, and also against all the indorsers, except one, had been discontinued.[2]

The statute of the State where the trial took place authorized a suit upon such an instrument as if it were a joint and several contract.

The dismissal of the suit against all the indorsers except one, and the striking out of all the counts against him except the common money counts, freed the judgment against him from all objection; and, therefore, when brought up for review upon a writ of error, it must be affirmed.

This case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of Mississippi.

*The facts are stated in the opinion of the court. [*184

It was argued by *Mr. Coxe*, for the plaintiff in error, and *Mr. Badger*, for the defendants in error.

Mr. Coxe. This was an action in the Circuit Court of the United States by the Planters Bank against plaintiff in error and six others, as the drawers and indorsers of several checks, bills, promissory notes, &c. The plaintiff is averred to be a corporation, created by the laws of Tennessee, &c.; and each and every of the defendants is averred to be a citizen of the State of Mississippi, and these averments were necessary to give jurisdiction to the court. The declaration contains numerous special counts, in all of which, however, the instrument which is the subject of it is averred to have been made in the State of Mississippi, between parties, citizens of that State, and which, after several indorsements, finally came to the hands of plaintiff. In no one instance, however, was the defendant the immediate indorser to plaintiff. It is supposed that in such a case the Circuit Court had no jurisdiction. *Young* v. *Bryan*, 6 Wheat., 146; *Sullivan* v. *Fulton Steam-*

[1] See *Dromgoole* v. *Farmers' &c. Bank*, 2 How., 241, and cases cited in the note.

[2] See *United States* v. *Linn*, 1 How., 103, and note (1).

boat Company, 6 Wheat., 450; *Mollan* v. *Torrance*, 9 Wheat., 537; *Evans* v. *Gee*, 11 Pet., 80.

The only ground upon which jurisdiction in this case can be sustained is supposed to be presented in the last count in the declaration. This is the common money count.

This action is, as has been stated, brought originally against seven defendants. Every count in the declaration was a joint contract. Three of the defendants were served with the first process; five upon the second or *alias* summons. It does not appear ever to have been served on the Mississippi and Alabama Railroad Company. Moss, Packett, Coffee, and Sheldon plead *non assumpsit* jointly; Crozier pleads separately. The death of Washington and Shelton is suggested, and the suit abated as regards them. This is the proper course when defendants are jointly responsible, but not when their liabilities are several and distinct. The plaintiffs then discontinued the action as to all the defendants, except Coffee, plaintiff in error, and forthwith proceeded to have a jury impanelled to try the issue joined. Verdict and judgment for plaintiffs against Coffee.

The record then presents this case: All the defendants are averred to be jointly responsible on a joint contract. Plaintiff in error, with two of his associates, pleads a joint plea. Upon this issue is joined. It is insisted that under these circumstances a discontinuance of the action against one is a discontinuance as against all.

*185] *The issue being upon a joint plea, averring that the parties did not, as is alleged in the declaration, jointly promise the verdict and judgment against Coffee singly, as having made a several promise, is a departure from the issue, and void.

When the *narr.* consisted of two counts against two individuals, and demurrer because one of the defendants was not named in the last count, plaintiff cannot enter a *nol. pros.* on that count, and proceed on the other. So if one pleads infancy, plaintiff cannot enter a *nol. pros.* as to him, and proceed against the other. Tidd, Pr., 630. In *assumpsit* or other action upon contract, plaintiff cannot enter a *nol. pros.* as to one, unless it be for some matter operating in his personal discharge, without releasing the others. Tidd, 632.

In the case at bar, the declaration avers a joint contract between the plaintiffs and seven defendants. Three of the defendants being served with process, appear and plead jointly that they did not promise as is alleged against them. The death of some of the defendants is suggested, and consequently all the others are to be considered as living. At this

stage of the case the plaintiff discontinued his action against all the defendants except one, and proceeds to take a verdict and judgment against him.

It is admitted upon authority that if one alone is sued upon a joint contract, he must avail himself of the non-joinder of his co-contractor by a plea in abatement. If, however, the plaintiff in his declaration shows the contract to be joint, no plea in abatement is required, if it also appear that the party who ought to have been joined is living. 1 Chit. Pl., 29; 1 Wms. Saund., 291. This doctrine is distinctly laid down in *Scott* v. *Godwin*, 1 Bos. & P., 73; 2 Saund., 422, Wms. Note; *United States* v. *Linn*, 1 How., 104; *United States* v. *Girault*, 11 How., 22.

Such omission, apparent on plaintiffs' pleadings, may either be moved in arrest of judgment or in error

Mr. Badger, for defendants in error.

It is contended, for the defendants in error, that there is no error in the judgment. The jurisdiction of the court below is evident upon the undisputed averments of the declaration.

There was nothing irregular; nothing erroneous in permitting the discontinuance as to the other parties: on the contrary, the regularity and legality of the proceeding have been sanctioned by cases in this court.

In the case of *McAfee* v. *Doremus*, 5 How., 53, McAfee had been sued in the Circuit Court of Mississippi as indorser of a bill of exchange, jointly, with four persons as the drawers of the *bill. McAfee appeared, and pleaded severally the general issue, and three of the four drawers having [*186 been served with process, the action was discontinued as to the four, carried on against McAfee alone, and upon a judgment rendered against him, a writ of error was brought in this court. Here the judgment was unanimously affirmed, the court saying that there was "no objection, in principle or in practice, to the discontinuance of the writ against the drawers of the bill."

In the *Bank of the United States* v. *Moss*, 6 How., 32, there was, on appearance by all the defendants, a joint plea, and afterwards the action was discontinued as to one of the parties, and a verdict and judgment taken against the others. To this, there was no objection taken below or here, and no writ of error was brought upon the judgment.

Mr. Justice DANIEL delivered the opinion of the court.

The questions of law to be decided in this cause, arise upon the following facts: The defendant in error, (the plaintiff in the court below,) described in the pleadings to be a

corporation created by the laws of the State of Tennessee, the stockholders of which are citizens of Tennessee, declared in *assumpsit*, in the court below against the Mississippi and Alabama Railroad Company, averred to be a corporation created by the laws of Mississippi, and also against William H. Shelton, Robert G. Crozier, Henry K. Moss, Samuel M. Puckett, Thomas G. Coffee, (the plaintiff in error,) and William H. Washington, averring the said individuals to be all citizens of the State of Mississippi. The declaration contained twenty-four counts; twenty-three of which set out respectively checks drawn by the Mississippi and Alabama Railroad Company, for different sums of money, payable to some of the individual defendants in the court below, and indorsed by the payee and successively by the other defendants, so as at last to become payable to the plaintiff below, the defendant in error as the last indorsee.

The last or twenty-fourth count in the declaration was upon an *indebitatus assumpsit*, for one hundred and fifty thousand dollars, for money lent and advanced, for the like sum for money laid out and expended, and for the like sum for money had and received, laying the damages at three hundred thousand dollars.

The defendants below, Moss, Puckett, Shelton, and Coffee the plaintiff in error, appeared to the suit and pleaded jointly the general issue. Crozier also appeared and pleaded *non assumpsit*. The Mississippi and Alabama Railroad Company did not appear. Afterwards, upon a suggestion of the death of Washington and Shelton, the suit was abated as to these parties, and upon the motion of the plaintiff below, the de-
*187] fendant in error, *the suit was ordered to be discontinued as to all the defendants below except the plaintiff in error; and a jury being impanelled upon the issue joined as to him, found a verdict against him in damages for the sum of $149,924.97 for which sum together with costs of suit, a judgment was entered by the Circuit Court. No exception appears to have been taken to the forms of proceeding, nor to any ruling by the court upon the trial, and the questions for consideration here are raised upon facts as above set forth.

On behalf of the plaintiff in error it is insisted, that upon none of the twenty-three counts, each of which sets forth a deduction of title by intermediate indorsements from the payees, can this action be maintained, because it appears, on the face of those counts, that the drafts or checks constituting the claim were drawn by a corporation situated within the State of Mississippi, and the members of which corporation were citizens and inhabitants of that State, in favor of

payees who, being also citizens of that State, could not sue upon those drafts in the courts of the United States, and could not, by indorsement, confer upon others a right denied by the law to themselves.

By the 11th section of the act of Congress establishing the Judicial Courts of the United Sates, it is declared, that no District or Circuit Court of the United States shall have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange. This provision has been expounded by this court as early as 1779 in the case of *Turner's Administrator* v. *The Bank of North America*, 4 Dall., 8. It has received a farther interpretation in the case of *Montalet* v. *Murray*, 4 Cranch, 46; of *Young* v. *Bryan*, 6 Wheat., 146; of *Mollan* v. *Torrance*, 9 Wheat., 537; and of *Evans* v. *Gee*, 11 Pet., 80. These several decisions have settled the construction of the 11th section of the Judiciary Act, and the principle they have affirmed is unquestionably fatal to a right of recovery under the twenty-three first counts, for they deny jurisdiction in the courts of the United States over cases of intermediate deduction of title from the payee, where such payee and the maker of the instrument are citizens of the same State, with the exception of foreign bills of exchange; and in the case before us every special count is framed upon a title thus deduced; and is not within the exception made by the statute. But whilst the authorities cited have laid down the above doctrine with reference to intermediate deductions of title from the payee of a note or check, they have ruled with equal clearness that as between the *immediate indorsee and indorser, being citizens and inhabitants of different States, the jurisdiction of [*188 the Federal courts attaches, as upon a distinct contract between these parties, independently of the residence of the original and remote parties to the instrument. Upon the doctrine thus ruled, the following question recurs for our decision upon this record, viz., whether the plaintiff below, the defendant in error, as a corporation created by and situated within the State of Tennessee, and the members of which corporation were citizens of that State, as immediate indorsee of the plaintiff in error, a citizen and inhabitant of the State of Mississippi, had the right to a recovery against him, as the immediate indorser of the notes or checks on which the action was founded. As to the general principle relative to the jurisdiction of the Federal courts, and as to the right of re-

covery or of action as between the immediate indorsee and indorser, we have already stated that principle as having been conclusively settled; if then there can be an objection to its application or controlling effect in the case before us, it must exist as to the manner of that application in the proceedings in this cause, and not to the rule itself. Such objection, it has been attempted, on the part of the plaintiff in error, to maintain. Thus it is disclosed upon the record, that after the general issue pleaded by all the defendants except the Mississippi and Alabama Railroad, who were in default, the action was by order of the Circuit Court, on the motion of the plaintiff, discontinued as to all the defendants except the now plaintiff in error, the last indorser, and as to him also, upon all the counts except the general *indebitatus assumpsit*, upon which the case was tried and verdict and judgment obtained. It has been insisted, that the proceeding just mentioned, under the order of the Circuit Court, was erroneous; that the liability of the defendants was a joint liability, as set forth in the declaration, and could not be severed upon motion, and that the discontinuance as to one of the defendants was a discontinuance as to them all. It may here be remarked, in the first place, that however the liability of the defendants below may have been presented by the declaration, it is certain that the responsibility of the indorser to his immediate indorsee, is strictly a several responsibility, and that so far as the jurisdiction of the Federal court is concerned, there is no right in the indorsee to look beyond that responsibility into transactions between citizens of the same State. The courts of the United States, therefore, could not, upon the face of the pleadings, take cognizance of questions beyond the several responsibility arising out of the transaction between the indorsee and his immediate indorser. We deem it unnecessary, however, to examine critically, in connection *189] with *the proceedings had in their cause, the doctrine of joint and several obligations as settled by the common law and the rules of pleading founded thereon, and are the less disposed to listen to objections drawn from that source at this stage of the case, as not an exception has been taken upon the record to any of the proceedings in the Circuit Court, which are therefore entitled to every presumption in their favor, whether of fact or law, which is not excluded by absolute authority. But the proceedings in this case should not be tested by the rules of the common law in relation to joint and several obligations; but should be judged of by the regulations of a local polity which has been adopted by the courts of the United States, and in conformity with

which the pleadings in this case have been controlled and modelled.

By the statute of Mississippi, vide Howard & Hutchinson's edition, c. 44, p. 578, s. 9, it is declared that, "Every joint bond, covenant, bill, or promissory note, shall be deemed and construed to have the same effect in law as a joint and several bond, covenant, bill, or promissory note, and it shall be lawful to sue out process and proceed to judgment against any one of the obligors, covenantors, or drawers of such bond, covenant, bill, or promissory note, in the same manner as if the same were joint and several." In the same collection, c. 45, p. 594, s. 28, it is laid down, that "it shall hereafter be lawful for the holder or holders of any covenant, bond, bill, or promissory note, signed by two or more persons, to sue any number of the covenantors, obligors, or drawers thereof in one and the same action."

By these statutory provisions the rules prescribed under the common law with respect to suits upon joint and several promises have been essentially changed, and the same license which concedes to a party the power of instituting his suit against one or more, or all the parties to an undertaking, carries with it by necessary implication the right to prosecute or discontinue it in the same sense and to the same extent and degree. In accordance with this conclusion is the interpretation given to the statutes of Mississippi by the Supreme Court of that state, as will be seen in the cases of *Peyton & Halliday* v. *Scott*, 2 How. (Miss.), 870; *Lynch et al.* v. *Commissioners of the Sinking Fund*, 4 Id., 337; *Dennison* v. *Lewis*, 6 Id., 517; *Prewet* v. *Caruthers et al.*, 7 Id., 304; and that interpretation, by the State court, of these statutes, has been repeatedly sanctioned as a rule of proceeding in the Circuit Court of the United States for the District of Mississippi, by the decisions of this court as will be seen by the cases of *McAfee* v. *Doremus*, 5 How., 53; of *The Bank of the United States* v. *Moss et al.*, 6 How., 31; and of *The United States* v. *Girault et al.*, 11 *How., 22. It follows, then, from the foregoing authorities, as an inevitable conclusion, that [*190 whether the undertakings set out in the special counts or in the general *indebitatus assumpsit* be taken as joint or as joint and several, it would have constituted no valid objection to the proceedings in the Circuit Court by which the cause was discontinued, as to all the defendants save the last or immediate indorser, even had such an objection been directly and expressly presented and reserved by the pleadings. That discontinuance deprived him of no right, imposed upon him no burden or responsibility he was not already bound to sus-

tain—it merely left him in the exact position in which his undertaking with the plaintiff below could be regularly and properly adjudicated. Upon full consideration, therefore, we think that the judgment of the Circuit Court should 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 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 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.

ALEXANDER H. WEEMS, PLAINTIFF IN ERROR, *v.* ANN GEORGE, CONELLY GEORGE, ROSE ANN GEORGE, WIFE OF JOHN STEEN, MARY ANN GEORGE, WIFE OF THOMAS CONN, NANCY GEORGE, WIFE OF JAMES GILMOUR, MARGARET GEORGE, WIFE OF WILLIAM MILLER, JOHN STEEN, THOMAS CONN, JAMES GILMOUR, AND WILLIAM MILLER.

Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he failed to do; and in consequence of such failure the liens were enforced, and had to be paid by the heirs of the original owner, a suit by these heirs against the purchaser to recover damages for the non-fulfilment of his contract to extinguish the liens, was not within the prohibition of the 11th section of the Judiciary Act, 1 Stat. at L., 78. The heirs, being aliens, had a right to sue in the Circuit Court.[1]

In a trial in Louisiana, where the judge tried the whole case without the intervention of a jury, a bill of exceptions to the admission of testimony by the judge, cannot be sustained in this court.[2]

The extinguishment of the liens by the heirs of the original owner, was effected by process of law and attended with costs. It was proper that these
*191] costs also, as well as *the amount of the liens, should be recovered by the heirs from the defaulting party who had failed to fulfil his contract. The article, 1929 of the code of Louisiana, does not include this case, but it is included within article 1924.

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[1] An alien may sue in the Circuit Court even though he be a resident of the same State as the citizen defendant. *Breedlove* v. *Nicolet*, 7 Pet., 413.

[2] CITED. *Burr* v. *Des Moines R. R. &c. Co.*, 1 Wall., 103. That an exception will lie to the improper *rejection* of evidence, where the trial is by the court without a jury, see *Arthurs* v. *Hart*, 17 How., 6.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

The plaintiff in error, and Alexander George, being joint owners of certain real property, made a partition of it between them on the 14th of January, 1847, by a written act of partition, and the plaintiff in error undertook, and promised to pay, certain promissory notes, made by Alexander George in favor of John McClain Durand, and which were secured by mortgage on the property described in the act of partition, among which were two notes, one for the sum of $1,305.38, payable on the 1st of January, 1848, with interest at six per cent. per annum from maturity; and one for the sum of $1,250.22, payable on the 1st of January, 1849, with interest at six per cent. per annum from maturity. When the note for $1,305.38 fell due the plaintiff in error paid $600 on account upon it, leaving the remainder unpaid; and, when the other note fell due, he failed to pay it, also. After default was made in the payment of the last note, the holder of the two notes instituted suit against the defendants in error, the heirs and legal representatives of Alexander George, who was then dead, and recovered the amount due on them, viz.: $1,955.60, and costs of protest, with interest at six per cent. per annum on $705.38, from 4th January, 1848, and on the remainder from 4th January, 1849, by judgment, and issued an execution or *fi. fa.*, under which certain slaves were seized, in the parish of St. Tammany, and brought over to the city of New Orleans, where they were sold on the 13th of June, 1849, and the sum of $2,435.88, out of the proceeds of the sale, were applied to the payment of the debt and of the costs made.

On the 1st of December, 1849, Ann George, &c., the defendants in error, filed their petition against Weems in the Circuit Court of the United States for the Eastern District of Louisiana, claiming to be reimbursed this sum of $2,435.88, with interest and costs. (Another claim was made for the value of a negro slave who died, but as a *remittitur* was entered before final judgment, it is not necessary to notice this further.)

The defendant put in two pleas to the jurisdiction: 1st, that the plaintiffs were not aliens, and 2d, that they derived their right from George; and as he and Weems were both citizens of Louisiana, the plaintiffs were prohibited, by the 11th section of the Judiciary Act, from bringing suit in the United States court. These pleas were overruled.

After sundry other proceedings, the defendant filed the following answer.

*192] *Now comes the defendant in the above entitled suit, and denies all and singular the allegations in the plaintiff's petition contained; he denies specially that the plaintiffs are the heirs of said Alexander George, or that they have, or ever had any interest in the succession of said Alexander George. He denies that plaintiffs ever authorized the institution of this suit, and avers that they have no interest in the pretended causes of action set forth in said petition. He avers, also, that he is in no manner liable to plaintiffs herein. Your respondent further says, that if at any time he has refused or failed to pay any of the notes mentioned in said petition, it was because one Rickerman had brought suit against the succession of said Alexander George, claiming a lien and privilege upon said island for work, labor, &c., in constructing a levee thereon, which lien and privilege neither said Durand nor the curator of said succession would discharge, and your respondent is in no way liable for the consequences of such refusal. Wherefore defendant prays to be hence dismissed with his costs, and for general relief, &c.

CHAS. M. EMERSON,
J. S. WHITTAKER,
Defendant's Attorneys.

On the 4th of April, 1850, the cause came on for trial before the judge, without a jury, when the following final judgment was given, viz.

This cause this day came on to be heard; Halsey and Bonford, Esqs., appearing for the plaintiffs, and Emerson, Esq., for defendant. When, after argument of counsel, the court being satisfied that the law and the evidence are in favor of the plaintiffs, Ann George et al., doth order, adjudge, and decree, that the said plaintiffs do have and recover judgment against the defendant, Alexander W. Weems, for the sum of two thousand four hundred and thirty-five dollars and eighty-eight cents, with interest on nineteen hundred and fifty-five dollars and sixty cents of said sum, from 13th June, 1849, at the rate of six per centum per annum, until paid, and costs of suit to be taxed.

Judgment rendered 4th April, 1850.

Judgment signed 22d April, 1850.

THEODORE H. MCCALEB, [SEAL.]
United States Judge.

In the course of the trial, the following bill of exceptions was taken.

Be it remembered, that on the trial of this cause, the plaintiffs offered in evidence a certificate marked D, of one N. B. Harmer, clerk of the eighth Judicial District Court for the parish of St. Tammany, for the purpose of proving that certain claims against the succession of Alexander George were satisfied and *paid by the heirs of said George. To the introduction of this document the defendant objected, [*193 on the ground that it was not competent nor within the official duties and acts of the clerk to certify to the existence of facts from the inspection of, and from documents and papers on file in the suit; and that the facts and the papers showing them should have been copied, and the certificate given as to the verity of the copy. The court overruled the objection and admitted the evidence.

Be it remembered, also, that on the trial of said cause the plaintiffs offered one J. M. Durand as a witness to prove that he had brought suit against the defendant in this suit, the said Alexander W. Weems, to recover the amount of the notes set forth in this suit, and that said Weems had taken a suspensive appeal from an order of seizure and sale, to the Supreme Court of the State of Louisiana. The defendant objected to these facts being stated by the witness, on the ground that it was not competent to prove the contents, or any part of the contents, of written documents, or of judicial records by parol, without first proving the destruction of the said documents or records. But the court overruled the objection and permitted the witness to testify to the facts above mentioned. THEODORE H. MCCALEB,
United States Judge.

The defendants brought the case up to this court by writ of error.

It was argued by *Mr. Miles Taylor*, for the plaintiff in error, and *Mr. Lawrence*, for the defendants in error.

Mr. Taylor, for the plaintiff in error.

Upon the trial of the cause, the defendants in error, in the court below, offered in evidence a certificate of the clerk of the eighth Judicial District Court for the parish of St. Tammany, for the purpose of proving that certain claims against the succession of Alexander George were satisfied and paid by the heirs of the said George. To the introduction of this certificate the plaintiff in error objected, on the ground that it was not competent for, nor within the official duties or power of the clerk, to certify to the existence of facts from the inspection of documents and papers on file in a suit, and

that such facts, if they existed, could only be shown by duly certified copies of the documents and papers on file, showing such facts; and the objection was overruled by the court, and the certificate admitted. And the defendants in error further offered one J. M. Durand as a witness to prove that he had brought suit against the plaintiff in error, to recover
*194] the amount of the notes sued on *in this case, and that he, the plaintiff in error, had taken a suspensive appeal therein to the Supreme Court of Louisiana. To the introduction of this testimony the plaintiff in error objected, on the ground that one could not be permitted to prove the contents, or any part of the contents, of judicial records by parol, without first proving the destruction of the said records; and the objection was overruled, and the testimony admitted. To the decisions of the court overruling these objections, and admitting the certificate of the clerk, and the testimony of the witness Durand, the plaintiff excepted; and his bill of exceptions was duly allowed and signed by the court, as will be seen at p. 8 of the transcript.

And this ruling of the court was erroneous, and an error apparent on the face of the record.

As to the certificate of the clerk:

1st. If it relates to facts shown by papers or documents on file in his office, he cannot certify the substance of such papers; he must give a transcript of them. *Smoot* v. *Russell*, 1 Mart. (La.) N. S., 522; 1 Phill. Ev., 317.

2d. If it related to facts within his knowledge, it was inadmissible; because the statement was not made under oath, &c. *Ellicott* v. *Pearl*, 10 Pet., 412.

As to the testimony of the witness Durand:

1st. It was not the best evidence the nature of the case admitted of.

2d. Judicial records can only be proved by copies duly certified to be true copies from the originals. 1 Phill. Ev., 383; *Hagan* v. *Lucas*, 10 Pet., 400.

Mr. Lawrence, for defendants in error.

The plaintiff in error pleaded to the jurisdiction (p. 3.), on the ground that the petitioners are not aliens, as alleged; and, especially, that the said Alexander George was, in his lifetime, and at the date of the notes, &c., a citizen of Louisiana; and that Durand and wife (the vendors to George) were also citizens of Louisiana.

The first bill of exceptions states, that the plaintiffs below offered in evidence a certificate of the clerk of the parish court, for the purpose of proving that certain claims against

the succession of Alexander George were paid by the heirs of said George, which was objected to on the ground that the clerk was not authorized to certify as to facts from inspection of records.

The second bill of exceptions states, that the plaintiffs below offered Durand as a witness, to prove that he had brought suit against Weems on the notes set forth in the petition. The defendant objected, on the ground that it was not competent to prove the contents of judicial records by parol, without first proving their loss or destruction.

*1st. The plea to the jurisdiction. [*195

The plaintiffs below were aliens. The action was not brought upon the promissory notes, but upon the agreement in the act of partition. They were not assignees of a chose in action, in the sense of the 11th section of the Judiciary Act. The plaintiffs below were the heirs of George, and not his assignees. *Chappedelaine* v. *Dechenaux*, 4 Cranch, 306; *Sere et al.* v. *Pitot*, 6 Cranch, 332.

2d. As to the 1st bill of exceptions. The evidence offered is not shown to be material. The object of it was to prove that the plaintiffs below had paid claims against the estate of Alexander George, in order to show that they had taken possession of the succession of Alexander George, and were discharging their duties in that capacity.

3d. As to the 2d bill of exceptions. The evidence of Durand was offered, not for the purpose of proving the contents of a judicial record, but simply to establish the fact that a suit was brought; that fact being only used as proof of a demand from Weems before the commencement of an action against the defendants in error. A demand by suit was not necessary.

4th. The objection, that the judgment for principal, interest, costs of protest on the notes, and for the further sum of $389.08, was erroneous, is not well taken; and the art. 1929 of the Civil Code, which is cited, is not applicable. The previous articles, from 1924, are applicable to this case. See, also, *The United States* v. *King*, 7 How., 854; *Field* v. *The United States*, 9 Pet., 202.

Mr. Justice GRIER delivered the opinion of the court.

The defendants in error brought this suit in the Circuit Court of the United States for the Eastern District of Louisiana, against Weems, the plaintiff in error, by petition, according to the practice in the courts of that State. They aver, in their petition, that they are aliens, and subjects of the Queen of Great Britain, with the exception of two, who

were citizens of the State of Illinois; and that they are the heirs of Alexander George, deceased. That said George, in his lifetime, was owner of a certain island, the undivided moiety of which he had sold to Weems. That, in the act of partition between them, Weems agreed to pay two certain notes, given by George for the purchase-money, and which were secured by mortgage on the land,—one for $1,305.82, payable on the 1st of January, 1848, and the other for $1,250.22, on 1st of January, 1849. That Weems paid the sum of $600 on the notes, but neglected or refused to pay the balance. That Alexander George having died, and the defendants in error having been admitted to the succes-
*196] sion as *his heirs, an execution was issued on the mortgage for the balance of the notes, on which certain slaves held by them, as such heirs, were seized and sold; and the sum of $2,435.88 raised in satisfaction of the balance of said notes, with interest and costs of suit.

The defendant below filed two pleas to the jurisdiction: 1st, That the plaintiffs were not aliens, as set forth in their bill; and, secondly, that the claim of the plaintiffs is under Alexander George, who was a citizen of Louisiana.

These pleas were overruled,—the first, it is to be presumed, because it was not true in fact; and the second, because it was not good in law. For the plaintiffs' petition does not set forth a claim as assignees of the negotiable paper or notes mentioned therein, but for damage and loss incurred by them, from the neglect and refusal of Weems to pay certain liens which he had contracted to pay in the act of partition between himself and George.

As the argument submitted by the counsel for plaintiff in error does not insist that there was error in overruling these pleas to the jurisdiction, they need not be further noticed.

The case was afterwards heard on the merits before the court, without the intervention of a jury; and a paper, called a bill of exceptions to the admission of certain testimony, is found on the record, on which the plaintiff in error seems mainly to rely for the reversal of judgment. It might be thought, perhaps, hypercritical to object to the form of this paper, as it comes from a State where common-law forms are little known in practice; but it may be remarked, that this document certifies only that certain testimony was offered and received by the court after objection by the defendant's counsel, and does not state that any exception was taken to such ruling of the court, or that the judge who signed it was asked to seal, or did seal a bill of exceptions. But, waiving this objection, the first exception is to receiving in evidence

a certain paper, marked D. That paper is not copied in, or annexed to, the bill. It is said to be a certificate from the clerk of the eighth Judicial District for the parish of St. Tammany, offered to prove that certain claims against the succession of Alexander George were paid by his heirs. The objection to it was undoubtedly a good and valid objection, if the contents of the paper were what the objection assumes them to be. But as the paper itself is not set forth in the bill, this court cannot know whether the objection was overruled, because the paper was not what it assumed to be, or because the objection was not well taken, if it was.

The second exception was to the admission of parol testimony, that a suit had been brought against the defendant, *Weems. The objection, that the contents of a record [*197 cannot be proved by parol, is certainly a good and legal one, if such were the offer or such the evidence given by the witness.

But the bill does not state any of the preceding evidence in the case, nor the purpose or bearing of the testimony offered. It may have been merely offered to show demand of the payment of a note; a fact *in pais*, which may be proved in parol, like any other mode of demand, notwithstanding it was made by presenting a writ.

But there remains an objection to these bills of exception which is conclusive against them, even if they had been drawn in all proper and legal form. It has been frequently decided by this court that, notwithstanding there is no distinction between suits at law and equity in the courts of Louisiana, in those of the United States this distinction must be preserved. When the case is submitted to the judge, to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law. In such cases, when a party feels aggrieved by the decision of the court, a case should be made up, stating the facts as found by the court, in the nature of a special verdict, and the judgment of the court thereon. If testimony has been received after objection, or overruled, as incompetent or irrelevant, it should be stated, so that this court may judge whether it was competent, relevant, or material, in a just decision of the case. See *Craig* v. *Missouri*, 4 Pet., 427.

In *Field* v. *The United States*, 9 Pet., 202, Marshall, C. J., in delivering the opinion of the court, says: "As the case was not tried by a jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if

the District Court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself, constitute any ground for the reversal of the judgment." And, again, in *The United States* v. *King*, 7 How., 853, 854, it is decided, that "no exception can be taken where there is no jury, and where the question of law is decided in delivering the final decision of the court." And, "when the court decides the fact without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions."

It is alleged, also, that there is error on the face of this record, because the court allowed the whole amount levied from the property of the plaintiffs below, being the amount *198] of the notes *and costs; because, by art. 1929 of the Code of Louisiana, "the damages due for delay in the performance of an obligation are called interest. The creditor is entitled to these damages without proving any loss, and whatever loss he may have suffered he can recover no more." But we are of opinion that this objection is founded on a mistake of the nature of the action, which is not brought on the notes mentioned in the petition, but for damages suffered by the plaintiffs below, on account of the non-performance by the defendant of his stipulations contained in his act of partition. This case, therefore, comes within the art. 1924 of the code, which says: "The obligations of contracts extending to whatsoever is incident to such contracts, the party who violates them is liable, as one of the incidents of his obligations, to the payment of the damages which the other party has sustained by his default."

The judgment of the Circuit Court is affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States, for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed, with costs and damages, at the rate of six per centum per annum.

Sampson B. Lord and George W. Jenness, Plaintiffs in Error, *v.* John Goddard.

Where an action was brought against certain persons for giving a commercial letter of recommendation with intention to defraud and deceive, whereby the party to whom the letter was addressed gave credit and sustained a loss, the question for the jury ought to have been whether or not there was fraud and an intention to deceive, in giving the letter.[1]

If there was no such intention, if the parties honestly stated their own opinion, believing at the time that they stated the truth, they are not liable in this form of action, although the representation turned out to be entirely untrue.[2]

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[1] S. P. *Iasigi* v. *Brown*, 17 How., 183. But it is error to instruct the jury, in the trial of such an action, to consider whether the defendant had *reasonable grounds* for his belief that his statement was true. The question for the jury is simply whether he did or did not have the *belief*. *Dilworth* v. *Bradner*, 85 Pa. St., 238.

[2] S. P. *Russell* v. *Clark*, 7 Cranch, 69; *Tappan* v. *Darling*, 3 Mason, 101; *Weed* v. *Case*, 55 Barb. (N. Y.), 534; *Marsh* v. *Falker*, 40 N. Y., 562; *Marshall* v. *Gray*, 57 Barb., 414; s. c., 39 How. Pr., 172; *Merchants' Nat. Bank* v. *Sells*, 3 Mo. App., 85; *St. Louis &c. R'y Co.* v. *Rice*, 85 Ill., 406; *Banta* v. *Savage*, 12 Nev., 151; *Reel* v. *Ewing*, 4 Mo. App., 569; *Wharf* v. *Roberts*, 88 Ill., 426; *Clement* v. *Boone*, 5 Ill. App., 109; *Sims* v. *Eiland*, 57 Miss., 607; *Gordon* v. *Butler*, 15 Otto, 553; *Horrigan* v. *First Bank*, 9 Baxt. (Tenn.), 137. Compare *Foard* v. *McComb*, 12 Bush (Ky.), 723. Thus an officer, who states at an execution sale, erroneously, but in good faith, that the land is free from incumbrances, is not liable in an action for deceit. *Tucker* v. *White*, 125 Mass., 344. But one who *recklessly* and falsely represents as good the financial condition of another, thereby inducing a sale by plaintiff to such person on credit, is liable. *Einstein* v. *Marshall*, 58 Ala., 153.

An expression of belief, known to be false, by the seller of a note, as to the maker's responsibility, is actionable. *Foster* v. *Swasey*, 2 Woodb. & M., 217. So of a false representation by one of several partners as to the solvency of his firm. *Morgan* v. *Skidmore*, 55 Barb. (N. Y.), 263. S. P. *Paddock* v. *Fletcher*, 42 Vt., 389; *Witmark* v. *Herman*, 44 N. Y. Superior, 144.

Where one states as a fact material to the transaction, something of which he has no knowledge, and the fact is otherwise, to plaintiff's injury, he is liable. *Johnson* v. *Beeney*, 9 Ill. App., 64.

Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor, against the partner making such false representations. *Eaton, Cole, &c., Co.* v. *Avery*, 83 N. Y., 31; *affirming*, 18 Hun, 44.

The absence of intent to deceive may be proved by the testimony of the defendant on his own behalf, or on behalf of his co-defendants alleged to have been acting with him in the fraud. *Hubbell* v. *Alden*, 4 Lans. (N. Y.), 214.

In *McBean* v. *Fox*, 1 Ill. App., 177, it was held that where the facts essential to sustain an action for deceit concur, the motive is immaterial. This was an action against a principal for false representations by his agent in selling a promissory note.

In *McKown* v. *Furgason*, 47 Iowa, 636, it is held, that even though the

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of New Hampshire.

Goddard was the plaintiff below, and Lord and Jenness the defendants.

The declaration in two counts alleged that the plaintiffs in error, October 28, 1847, intending to deceive and defraud the
*199] *defendant in error, wrongfully and deceitfully made and signed a letter of recommendation in favor of E. K. West and A. W. Daby, addressed to the defendant in error, in which they represented they had full confidence in West & Daby, dealers in coal, lumber, &c., that they were men well worthy of credit, and good for what they wished to purchase, and that West was visiting Bangor for the purpose of purchasing lumber for the New York market, and did thereby falsely, fraudulently, and deceitfully cause and procure the defendant in error to sell, and that he, confiding in the statements, on the 9th of November, 1847, did sell to West & Daby certain timber on credit, &c. Whereas, in fact, West & Daby were not worthy of credit, and that the plaintiffs in error well knew the same, and that West & Daby have not paid, &c.

The plaintiffs in error pleaded severally, not guilty, on which issue was joined.

The defendant in error offered, in support of his declaration, the letter addressed to him, as follows, viz.:

"To John Goddard, Esq., Bangor, Me.

"Sir,—We the undersigned have full confidence in Messrs. E. K. West and A. W. Daby, dealers in coal, lumber, lime, &c. They are men well worthy of credit, and good for what they wish to purchase. The bearer of this, Mr. E. K. West, is visiting your city for the express purpose of purchasing lumber for the New York market. Yours respectfully,

S. B. LORD,
GEORGE W. JENNESS.

"*Portsmouth, N. H., October 28th*, 1847."

In July, 1850, the cause came on for trial, when the jury,

falsity of the representations of the solvency of another was not known by defendant, yet he would be liable if he intended to convey the impression that he had knowledge of their truth.

In *Babcock* v. *Libbey*, 17 Hun (N. Y.), 131, expressions of opinion as to the ability of a corporation to pay, were held not actionable, though the corporation had ceased to exist, that fact being unknown to defendant, and the former members of the corporation being still engaged in business under the corporate name.

under the instructions of the court, found a verdict for the plaintiff for $2,300.

The bill of exceptions was very comprehensive. It began with reciting the writ, the declaration, and other pleadings, then recapitulated the evidence of two persons with all the interrogatories and cross-interrogatories, and also the evidence of seven persons taken upon the stand. It is not necessary to recite any of this, as the point stated in the instructions of the court was the only matter brought into discussion.

The evidence being closed, the counsel for the defendants then prayed the honorable court to instruct the jury, that, in in order to maintain the plaintiff's declaration, it must be proved that the representations made were false, and that the defendants made them knowing they were false, and intending to defraud the plaintiff; and that, if the defendants made the representations on such information as they believed to be true, *whether that information was true or false, this action cannot be maintained. The defendants further [*200 requested the honorable court to charge the jury, that if the plaintiff had not proved, to the satisfaction of the jury, either that the defendants gave the recommendation in this case knowing that it was false, and intending to defraud the plaintiff, or that they gave it without any information of the credit or means of West & Daby; or if the jury believe that the defendants gave such information respecting said West & Daby as said defendants believed to be true and sufficient, whether that information was true or false, and whether it was sufficient or not, the defendants were entitled to a verdict.

But the honorable court declined to do this, and did not charge the jury in the terms and manner, and to the extent prayed; but the honorable court did instruct the jury upon the subject-matter so prayed for as follows: that, as a general rule, one ground upon which to maintain the plaintiff's declaration is, it must be proved that the representations made were false, and that the defendants made them knowing they were false, and intending to defraud the plaintiff; and that if the defendants made the representations on such information as they believed to be true, whether that information was true or false, the action cannot be maintained; but a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable if the debtor is insolvent, unless the jury see circumstances in the case, of real fraud. But if a party state this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person

recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer that those so recommending did wrong, and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about, or what they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon such authority or information as you may think, under the instructions, they ought to have acted upon, you will charge them.

Whereupon the counsel for the defendants did then and there except to the aforesaid refusal, and the instructions and charge of the honorable court.

Upon this exception the case came up to this court.

It was argued by *Mr. Norris*, for the plaintiffs in error, and *Mr. Washburn*, for the defendant in error.

*201] *Mr. Norris*, for the plaintiffs in error.

I. Both counts in the declaration allege, not only that the plaintiffs in error, intending to deceive and defraud the defendant in error, wrongfully and deceitfully made the representations alleged, and did thereby falsely, fraudulently, and deceitfully cause him to sell the lumber to West & Daby on a credit; but they allege, also, that the plaintiffs in error well knew the representation to be false.

In making these averments the pleader but complied with the ordinary rules of pleading. It was necessary that the declaration should allege in some form, substantially, that they had knowledge of the falsity of their representations, or an actual intent to defraud under circumstances that made knowledge immaterial.

It is essential, in order to support an action of this character, that such knowledge should be proved, and found by the jury, or at least that an actual intent to defraud should be shown.

That knowledge of the falsity must be averred and proved, where the actual intent to defraud does not exist, is very clear. *Pasley* v. *Freeman*, 3 T. R., 59, 60, 62, 63, &c.; *Haycraft* v. *Creasey*, 2 East, 92; *Ashlin* v. *White*, Holt, N. P., 387; *Ames* v. *Milward*, 8 Taunt., 637; *Foster* v. *Charles*, 6 Bing., 396; 7 Bing., 105; *Freeman* v. *Baker*, 5 Barn. & Ad., 797; *Moens* v. *Heyworth*, 10 Mees. & W., 147; *Clifford* v. *Brooke*, 13 Ves., 133.

The case of *Collins* v. *Evans*, in error, 5 Ad. & El., N. S.,

820, 827, although not upon a representation, fully sustains the principle.

The American cases are equally explicit. *Russell* v. *Clarke's Executors*, 4 Cranch, 92, 94; *Tryon* v. *Whitmarsh*, 1 Metc. (Mass.), 1; *Stone* v. *Denny*, 4 Id., 159, 161; *Fooks* v. *Waples*, 1 Harr. (Del.), 131; *Young* v. *Hall*, 4 Ga., 95; *Boyd's Executors* v. *Brown*, 6 Pa. St., 316.

Perhaps this declaration might be supported by evidence of an actual intent to defraud, without proving knowledge of the falsity of the representations.

But there must be fraud. *Lord* v. *Colley*, 6 N. H., 99, 102; *Taylor* v. *Ashton*, 11 Mees. & W., 401; *Stafford's Administrator* v. *Newsom*, 9 Ired. (N. C.), 507; *Munroe* v. *Gardner*, 3 Brev. (S. C.), 31; *Allen* v. *Addington*, 7 Wend. (N. Y.), 9; *Addington* v. *Allen*, 11 Id., 374, 382, 388, 402, 408.

All these cases are express to the point, that a mere false representation is insufficient.

In case for a false warranty, the *scienter* need not be alleged and proved. 2 East, 446; 1 How. (Miss.), 288. But this is *because the gravamen of the action is the undertaking of the defendant, and not his fraud. 2 East, [*202
451, 452. In the present case the plaintiffs in error are not parties to a contract, and the gravamen is fraud.

II. The evidence has no tendency to prove the *scienter*, or an intent to defraud any one.

The representation by the plaintiffs in error, that they had full confidence in West & Daby, and that they were well worthy of credit, and good for what they wished to purchase, has no tendency to prove the fact to be otherwise. And the proof of the fact that it was otherwise, if proved, has no tendency to show such knowledge, or to show fraud.

But this is all the evidence to charge them. There is nothing having even a remote tendency to show that they had any suspicion that the representation was not strictly true.

There is evidence to show that they made the representation fairly.

Suppose they made it incautiously, without any such inquiry as would have been made by more careful and suspicious men? It is clear that this cannot charge them. *Young* v. *Covell*, 8 Johns. (N. Y.), 23; 11 Mees. & W., 415.

The case put by Pothier, and cited with approbation by Chief Justice Kent, in *Upton* v. *Vail*, 6 Johns. (N. Y.), 184, goes even beyond this case. "If," says Pothier, "you had only recommended Peter to his creditor as honest and able to pay, this was but advice, and not any obligation; and if Peter was at the time insolvent, you are not bound to in-

demnify the creditor for the sum which he loaned to Peter, by means of your advice, which he has lost, *Nemo ex consilio obligatur.* The rule is the same if the advice was given rashly and indiscreetly, without being duly informed of the circumstances of Peter, provided it was sincerely given. *Liberum est cuique apud se explorare an expediat sibi consilium.* But if the recommendation was made in bad faith, and with knowledge that Peter was insolvent, in this case you are bound to indemnify the creditor."

III. The representation in this case is, in its very nature, but the expression of an opinion, and for this reason the action cannot be maintained without showing affirmatively knowledge of its falsity. If the plaintiffs in error had made a positive assertion, as of their own knowledge, it would have been but the assertion of a strong opinion, without evidence to show knowledge of its falsity. *Haycraft* v. *Creasey*, 2 East, 92, which is the leading case upon this point, is explicit. See also *Page* v. *Bent*, 2 Metc. (Mass.), 374; 6 N. H., 102, 103.

IV. There was nothing to leave to the jury, there being no evidence to prove knowledge or fraud by the plaintiffs in error.

*203] *V. The charge to the jury does not require them to inquire whether the plaintiffs in error had any knowledge that the representation was false, or any fraudulent purpose. But it authorizes them to find a verdict for the plaintiff in that action, notwithstanding they had no such knowledge or suspicion, and acted in entire good faith.

It leaves to the jury, in effect, the question, whether, in their opinion, the plaintiffs in error acted without sufficient caution; with directions, in that case, to charge them. Nothing, it is believed, having the character of authority, sustains such a position.

If there had been evidence to be weighed by the jury, tending to show that the plaintiffs in error acted in bad faith, (which there was not,) the jury were not instructed to consider it, and did not consider it. The allegation in the original writ that they well knew the falsity of what they represented, was neither proved nor found by the verdict.

Nothing has been tried except the question whether the jury were of opinion that the plaintiffs in error were imprudent.

VI. There are cases where a representation has been held to be fraudulent, although the party had no knowledge at the time of its falsity, and no actual intent to defraud was shown. *Hazard* v. *Irwin*, 18 Pick. (Mass.), 96; *Stone* v. *Denny*, 4

Metc. (Mass.), 151; *Hammatt's Executor* v. *Emerson*, 27 Me., 308; *Snyder* v. *Findley*, 1 Coxe (N. J.), 48, 78; *Barnett* v. *Stanton*, 2 Ala., 181; *Buford* v. *Caldwell*, 3 Mo., 477; *Warner* v. *Daniels*, 1 Woodb. & M., 91, 107; *Mason* v. *Crosby*, Id., 343, 353; *Smith* v. *Babcock*, 2 Id., 246.

It is understood that the defendant in error relies upon this class of cases.

With the exception of the case in Coxe, (which raised a question respecting the payment of a note,) the cases just cited were founded upon representations by vendors of property, or by their agents.

How far the principle of some of these cases may be regarded as brought in question by *Omrod* v. *Huth*, 14 Mees. & W., 651, (in which, cotton being sold by the sample, upon representation that the bulk corresponded with the sample, it was held, that an action on the case by the purchaser, for a false and fraudulent representation, was not maintainable without showing that such representation was false to the knowledge of the seller, or that he acted fraudulently or against good faith in making it,) we need not stop to inquire. See also *Atwood* v. *Small*, 6 Cl. & F., 233, 338, 447; *Early* v. *Garret*, 9 Barn. & C., 928.

It is sufficient that, taking the cases above cited as they stand, to the full extent, they do not apply to this case.

*1. They are cases where the party had some interest to make the representation. Here the cause of [*204 action is not connected with any sale by the plaintiffs in error, or with any thing by which the assertion can have the character of a false warranty. The action has no foundation in a contract between the parties.

In *Humphreys* v. *Pratt*, 5 Bligh, N. S., 154, which might seem at first to have some tendency to sustain this action, the learned counsel for the defendants in error contended for no more than "a principal of law that he who affirms that which he does not know to be true, or that which he knows to be false, to another's prejudice, and his own gain, is a wrongdoer," and expressly admitted that, "if the party making the representation has no interest, the action may not lie, unless it is done maliciously," pp. 162, 163. The reasons of the judgment are not stated in the report, but the grounds upon which the case is to be sustained, as stated by Mr. Chief Justice Tindal, 5 Ad. & E. N. S., 829, are very far from sustaining the reporter's abstract; which has no support from the report of the same case, 2 Dow & C., 288; *Adamson* v. *Jarvis*, 4 Bing., 66, may lead to the belief that the considera-

tions suggested by Chief Justice Tindal were in truth the grounds of Lord Windford's opinion in *Humphreys* v. *Pratt*.

In *Taylor* v. *Ashton*, 11 Mees. & W., 415, Mr. Baron Parke says, "It is insisted that even that" [gross negligence] "accompanied with a damage to the plaintiff, in consequence of that gross negligence, would be sufficient to give him a right of action. From this proposition we entirely dissent, because we are of opinion that, independent of any contract between the parties, no one can be made responsible for a representation of this kind, unless it be fraudulently made."

2. In those cases the party asserted the fact as of his own knowledge, either in terms, or in a manner which implied that he had such actual knowledge, and this is relied on as a ground for the opinion that he was liable. 4 Metc. (Mass.), 151, 156. In the present case the representation begins by merely stating the confidence of the parties who made it, and it is not stronger than that in *Tryon* v. *Whitmarsh*, 1 Metc. (Mass.), 1.

3. From the nature of most of those cases, the party might naturally have had actual knowledge of what he asserted, and he was bound to know it before he made a positive assertion, from which he was to derive a benefit, and which entered into the contract constituting part of the *res gestæ*. It was because he might well have had the knowledge that he professed to have, that the representation was held fraudulent. 3 Mo., 477. In this case, as the plaintiffs in error lived in Portsmouth, and West & Daby in New York, there was no reason to suppose actual knowledge.

*205] *4. The difference between the case at bar and the cases referred to, is further shown by what has been already suggested. Without evidence to show that the representation was known to be false, actual knowledge of the matter stated is not to be inferred by the party to whom it is made. The representation is but the expression of an opinion, and is to be so understood.

In *Pasley* v. *Freeman*, 3 T. R., 56, Grose, J., held the representation to be matter of judgment and opinion. Buller, J., said, "My brother Grose considers this assertion as mere matter of opinion only, but I differ from him in that respect." We naturally inquire why? And the reason immediately follows: "For it is stated in this record that the defendant knew that the fact was false." 3 T. R., 57.

This distinction is adverted to and recognized in *Hazard* v. *Irwin*, 18 Pick. (Mass.), 95, 105, and in numerous cases before cited. In *Kidney* v. *Stoddard*, 7 Metc. (Mass.), 252, the defendant had knowledge of the falsity, and was not en-

titled, therefore, to say that he had merely expressed an opinion. So in *Clopton* v. *Cozart*, 13 Sm. & M. (Miss.), 363, the representation, which had the form of an assertion made as of personal knowledge, was held not to have the character of opinion. But the decision is directly upon the ground that the defendants had knowledge of the falsity of the representation.

VII. The plaintiffs in error had in fact information that led them to the belief of the truth of the representation which they made. They had as much knowledge as they assumed to have—good ground for the confidence they expressed. This is shown by the letter to one of them from his son in New York. It is submitted that here is a most perfect defence. The representation was not made "under circumstances which manifested a recklessness of truth," but upon all the information which the defendant in error could reasonably have supposed to be in the possession of those who made it. *Collins* v. *Evans*, in error, 5 Ad. & Ell., 820, 826, 827; *Williams* v. *Wood*, 14 Wend. (N. Y.), 126, 130; 2 Ala., 187.

VIII. If there was any ground upon which the case could rightfully be submitted to the jury, it was for them to inquire whether the plaintiffs in error did or did not believe what they represented, or whether they made the assertion with the express intention of enabling West & Daby to obtain credit; whether they were able to pay or not, the plaintiffs in error being parties to an actual fraudulent intent. (The preliminary question for the court, would be, whether there was any evidence whatever to support the action on either ground.) But the charge submits no question of that character to the jury. If it had, the result must have been different.

*Unless the representation of a matter as true, which was in fact false, the assertion having been made in [*206 good faith, without knowledge of its falsity, and being one in which the party neither had, nor appeared to have any interest, is sufficient to charge him in damages, as for a fraud, the defendant in error has no cause of action. This is the extent of the proof. But it is believed that no authority can be found to sustain such a proposition. The case of *Evans* v. *Collins*, 5 Ad. & El., N. S., 804, which comes nearest to the enunciation of such a principle, is followed immediately by its antidote, in the shape of a reversal of the judgment, by the unanimous opinion of the judges in the Exchequer Chamber, on the very ground that knowledge of the falsity of the representation was essential to the maintenance of the

action, 5 Ad. & El., N. S., 620. And in *Barley* v. *Walford* 9 Ad. & El., N. S., 208, Lord Denman, who delivered the opinion in *Evans* v. *Collins*, not only recognizes the reversal as settling the law, but admits the reasonableness of the doctrine. The Court of Queen's Bench had been misled by supposing that the case of *Humphreys* v. *Pratt*, in the House of Lords was an authority for the principle laid down in *Evans* v. *Collins*.

It may be said of the cases which distinctly assert, or distinctly recognize the principles contended for by the plaintiffs in error, that their name is legion, for they are many.

To those already cited may be added, *Eyre* v. *Dunsford*, 1 East, 327; *Tapp* v. *Lee*, 3 Bos. & P., 367, 371; *Hamer* v. *Alexander*, 5 Bos. & P., 241, 245; *Wood* v. *Waine*, 1 Esp., 442; *Scott* v. *Lara*, Peake, 226; *Hutchinson* v. *Ball*, 1 Taunt., 558, 564; *Corbett* v. *Brown*, 8 Bing., 33; *Polhill* v. *Walter*, 3 Barn. & Ad., 114; *Cornfoot* v. *Fowke*, 6 Mees. & W., 358; *Rawlings* v. *Bell*, 2 Man. G. & S., 951, 960; *Carr*, *ex parte*, 3 Ves. & B., 110; *McDonald* v. *Trafton*, 15 Me., 227; *Holbrook* v. *Burt*, 22 Pick. (Mass.), 554; *Lobdell* v. *Baker*, 1 Metc. (Mass.), 93; 3 Id., 472; *Benton* v. *Pratt*, 2 Wend. (N. Y.), 385; *Gallager* v. *Brunell*, 6 Cow. (N. Y.), 346, 352; *Weeks* v. *Burton*, 7 Vt., 67, 70; *Ewins* v. *Calhoun*, Id., 79: *West* v. *Emery*, 17 Vt., 583, 586; *McCraken* v. *West*, 17 Ohio, 24; *Perkins* v. *Sterritt*, Litt. (Ky.) Sel. Cas., 218; *Chisholm* v. *Gadsden*, 1 Strobh. (S. C.), 220; *Foster* v. *Swasey*, 2 Woodb. & M., 217.

If the plaintiffs in error had given a guaranty, there is no evidence in the case, upon which they could have been held responsible. It will be more than passing strange, if they are to be held *ex delicto*, for the payment of the debt, in the shape of damages, without evidence of express fraud, intentional wrong, actual bad faith.

*207] **Mr. Washburn*, for defendant in error.

I. The record shows—

1. That the defendant in error lived in Bangor, Maine, and the plaintiffs in error, in Portsmouth, N. H. The distance between these places is about two hundred miles.

2. That the defendant was acquainted with the plaintiffs, and would be likely to repose confidence in their representations; and that this was understood by the plaintiffs themselves. The letter from the latter, in which the representation complained of was made, was addressed to the defendant by name.

3. That West & Daby, wishing to purchase lumber, were

directed by plaintiffs to defendant, with the following positive and unqualified representation—"They" (West & Daby) "are men well worthy of credit, and good for what they wish to purchase."

4. That upon this representation, West & Daby were able to purchase, and did purchase, of the defendant, a quantity of lumber, amounting in value to about $2,000.

5. That the representation was wholly untrue. That West & Daby were neither worthy of credit, nor good for what they wished to purchase.

6. That Lord had means to know the facts. That if he did not know of the insolvency of West & Daby, he was probably entirely ignorant of their situation, unless he may be supposed to have derived information respecting it from the letter of his son, who was, as the record says, proved to be unworthy of belief, and that Jenness's position was no better than Lord's.

II. If the evidence shows, or the verdict necessarily implies, as I respectfully submit is the case, all that has been stated, the following propositions and deductions are fully warranted.

The plaintiffs made an unequivocal and unqualified representation, which the defendant might well rely upon as true, and known to be true by the plaintiffs. Relying upon it he sold his lumber to West & Daby, and lost the value of it. The wrongful conduct of plaintiffs occasioned that loss, and they should be held responsible for it.

A positive declaration like this carries with it the other declaration, (implied,) that the party making it knew what the pecuniary circumstances and credit of the persons recommended were; and, particularly, when he believes that another party will act upon the strength of it. It is as if the plaintiff had said to defendant, "We know all about the pecuniary circumstances and credit of West & Daby; they are well worthy of credit, and good for what they wish to purchase."

The plaintiffs did not undertake to assert a mere opinion, but they stated a fact as of their own knowledge. That statement was grossly untrue.

*It is as false and fraudulent to state positively as true, as a fact, what one knows nothing about, as what one knows to be false. The same injury would be done in the former case as in the latter. [*208

"To state what is not known to be true is just as criminal, in the eye of the law, as to state what is known to be false,"

under circumstances like those in this case. *Buford* v. *Caldwell*, 3 Mo., 477.

"It is perfectly immaterial, so far as regards the question of law, whether Findley knew or did not know the falsity of the facts which he represented." *Snyder* v. *Findley*, 1 Coxe (N. J.), 48, 78; 1 Doug., 654. But were the plaintiffs ignorant? They were, or worse. They had no reason for believing what they asserted. The evidence throws the strongest suspicion upon their act. Jenness stands with Lord. Lord had the means of knowing the condition of West & Daby. The letter from his son, whose character he must have known, cannot relieve him. The son had "failed in business, and was unworthy of belief." Who would think to ask for a letter of recommendation from such a man as Lord, junior, but one of like character and condition? What would speak more suggestively and suspiciously of West & Daby than the letter from young Lord? *Noscitur a sociis.* It is submitted that the circumstances of the letter from the son, of the letter to the defendant, written by the daughter-in-law, who knew West in York, as she says, of the character of the son, have a tendency to raise the presumption that the plaintiffs were not entirely ignorant or innocent; that they must have known or suspected enough to dissuade them from the use of the strong language employed in the letter to defendant, if they had meant fairly by him. Did the plaintiffs make "full and proper inquiries"? or did they "make the recommendation upon such information as they ought to have acted upon"? Is the verdict of the jury negatively answering these questions (unless they found positive knowledge on the part of the defendants), unwarranted by the evidence?

But the plaintiffs are concluded by the terms of their letter; they cannot be permitted to say that they did not know of the insolvency of West & Daby; or to allege that their representation was not false and fraudulent.

When, to repeat, one makes a positive representation to another, who, he presumes, may act thereon, and who, he knows, has no other means of information, he cannot be permitted, after the injury is done, and done solely by reason of his act, to allege that he was ignorant, and knew nothing of what he had said, and affirmed in the most explicit language
*209] to be *true, and true of his own knowledge; for if he does not know the truth of what he says, he has no right to use terms of positive affirmation; the use of which, in such case, would be evidence of recklessness, tantamount to fraud.

Nor can he be permitted to say that he believed what he affirmed; for if he had nothing but belief or opinion in reference to the matter, he should have so expressed himself, and not employed language, the import of which was so unequivocal and decisive, as to lead the party addressed to understand that he wrote from intimate acquaintance and actual knowledge. Herein this case differs from many of the cases cited by plaintiffs. Goddard could not have supposed that the language of the plaintiffs was adopted simply to express an opinion founded on such a miserable basis as they now allege. Are not men to be held responsible for such reckless and wanton disregard of the rights of others as is shown in this case, even when considered in the most favorable aspect for the plaintiffs?

Where the legitimate consequence of a positive assertion, false in fact, is to cause an injury to an innocent party, every principle of morality, and every rule of law, forbids its being made with impunity. The form of the statement implies a falsehood — implies knowledge, and belief founded on knowledge. The falsehood in such case is wilful, and wilful falsehood imports fraud. It would be a reproach to the law if it did not furnish a remedy in a case like this.

The cases relied upon by the plaintiffs are dissimilar to this. It is believed that not one of them is applicable to the state of facts appearing upon this record. But it is believed that some of the cases cited, under the head VI., fully sustain the positions of the defendant.

Under the charge of the judge, the jury must have found, and were authorized by the evidence to find, all the facts as to knowledge, intent, belief, &c., necessary to support the action. The law, as applicable to the facts, was correctly given to the jury.

For the facts bearing upon the questions before the court, I would refer to the record at large, rather than to the abstract made by the plaintiffs.

Mr. Justice CATRON delivered the opinion of the court.

Goddard sued Lord & Jenness in the Circuit Court of New Hampshire, alleging that the defendants by letter recommended West & Daby as men well worthy of credit, and good for what they wished to purchase; that they were dealers in coal, lumber, lime, &c., and that West, one of the firm, was visiting Bangor, Maine, for the purpose of purchasing lumber for the New York market.

*The letter, set forth in the declaration, was dated at Portsmouth, New Hampshire, and directed to God- [*210

dard, at Bangor, Maine. West and Daby resided in New York.

On the faith of this letter Goddard credited West & Daby for a cargo of lumber worth nearly two thousand dollars, giving them four months time: for which lumber West & Daby never paid, having been insolvent when the letter of recommendation was given, and so continued afterwards. It is clear that they were mere insolvent adventurers, without property, and entitled to no credit or confidence.

The declaration alleges that the letter was given by Lord & Jenness with an intention to deceive and defraud Goddard; and that they did procure credit for West & Daby falsely and fraudulently. On the plea of the general issue the parties went to trial, when it appeared that Lord had a son residing in New York, who, on the 28th of October, 1847, gave a letter of introduction to West, dated at New York, and directed to Lord, the father, at Portsmouth, N. H. The letter recommended the firm of West & Daby, as fully worthy of credit, and requested that Lord, the defendant, should recommend West & Daby to others. West delivered this letter, and on the same day got the one on which the suit is founded. It was written by the wife of the younger Lord, who was in Portsmouth, at the instance of West; he being known to her, but not known to Lord or Jenness the defendants. They seem to have acted on the information contained in the younger Lord's letter and on the representations of his wife.

On this state of facts, the court charged the jury—1. That, as a general rule, it must be proved that the representations made were false; and that the defendants made them, knowing they were false, and intended to defraud the plaintiff; and if the defendants made the representations, believing them to be true, they were not liable. "But a party, if stating positively that a person is entitled to credit, should do it from his own knowledge, or from full and proper inquiries; and then he is not liable if the debtor is insolvent, unless the jury see circumstances in the case of real fraud. But, if a party states this positively as to the credit of an individual, and does it ignorantly, not knowing the credit of the person recommended, and without making full and proper inquiries, and the statements turn out to be false, the jury may infer that those so recommending did wrong, and deceived, because they must know that third persons are likely to rely on their stating what they personally know, or had duly inquired about, or what they had good reason to suppose their information as to it was sufficient and true. If the defendants in this case did not make the recommendation upon

*such authority or information as you may think under the instructions they ought to have acted upon, you will charge them." [*211

The jury found for the plaintiff on this charge, and the only question is whether it was proper.

The gist of the action is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention; if the party honestly stated his own opinion, believing at the time that he stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue. Since the decision in *Haycroft* v. *Creasy*, 2 East, made in 1801, the question has been settled to this effect in England.

The Supreme Court of New York held likewise in *Young* v. *Covell*, 8 Johns., 23.

That court declared it to be well settled that this action could not be sustained, without proving actual fraud in the defendant, or an intention to deceive the plaintiff by false representations. The simple fact of making representations, which turn out not to be true, unconnected with a fraudulent design, is not sufficient.

This decision was made forty years ago, and stands uncontradicted, so far as we know, in the American courts.

Taking the foregoing instruction together, we understand it to mean this: that if the jury believed due inquiry as to the credit of West & Daby had not been made by Lord & Jenness, and that they had signed the letter ignorantly, and regardless of the fact, whether the persons recommended were or were not entitled to credit, then the jury should charge the defendants: the real test of conduct, according to the charge, obviously being, whether Lord & Jenness ought to have accorded confidence to the younger Lord's letter, and to its sanction by his wife; and whether this information was of such a character as to justify them in writing the letter to Goddard, without further inquiry.

That this instruction, taken in its proper sense, was evasive of the true rule, and calculated to mislead the jury, is manifest, and therefore the judgment must be reversed, and the cause sent down for another trial.

ORDER.

This cause come on to be heard on the transcript of the record from the Circuit Court of the United States for the District of New Hampshire, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged

*212] 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*.

JAMES S. MORSELL, SPECIAL BAIL OF WILLIAM SMITH, PLAINTIFF IN ERROR, *v.* HENRY A. HALL.

In Maryland, it is correct to take a recognizance of bail before two justices of the peace.

Where a *scire facias* was issued against special bail, who pleaded two pleas, to the first of which the plaintiff took issue, and demurred to the second; and the cause went to trial upon that state of the pleadings without a joinder in demurrer; and the court gave a general judgment for the plaintiff, this was not error.

The refusal or omission to join in demurrer was a waiver of the plea demurred to.

In this case, if the plea had been before the court, it was bad; because being a plea that the note was paid before the original judgment, it called upon the party to prove a second time what had been once settled by a judgment. The omission of the court to render a judgment upon the plea could not be assigned as error.

A judgment of a court upon a motion to enter an *exoneretur* of bail is not the proper subject of a writ of error.[1]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Maryland.

The facts were these:—

In 1843, Henry A. Hall, a citizen of Maryland, brought a suit in the Circuit Court of the United States for Maryland, against William Smith, a citizen of the State of Mississippi. James S. Morsell was one of two persons who became jointly and severally, special bail; and the recognizance of bail was taken before two justices of the peace for Calvert county.

In April, 1847, Hall obtained a judgment, in consequence of an opinion given by this court at the preceding term, which is reported in 5 How., 96.

In May, 1847, he sued out a writ of *capias ad satisfaciendum* against Smith, which was returned "*non est.*"

In November, 1847, he issued a *scire facias* against Morsell.

In April, 1848, Morsell appeared and filed two pleas, viz.,

[1] FOLLOWED. *United States* v. *Abatoir Place*, 16 Otto, 162. CITED. *Cook* v. *Burnley*, 11 Wall., 676; *Steines* v. *Franklin County*, 14 Id., 22; *The Elmira*, 16 Fed. Rep., 139.

1. *Nul tiel record.* This plea was based upon the fact that the recognizance of bail was taken before two justices of the peace. In the argument before this court this objection was not urged; but as the opinion of the Circuit Court was thus established, it is proper that a record of it should be made. The opinion was short and may be inserted, viz.:

"This mode of taking bail conforms to the long-established practice of this court. An act of assembly of Maryland, passed *in 1715, c. 28, § 2, authorized this mode of taking bail in suits in the then Provincial Court, which, like [*213 this court, had jurisdiction coextensive with the State. This court adopted the practice, and has always since acted upon it.

"This written rule, No. 62, adopted in 1802, was not intended to alter the previous practice of this court, and has never been so construed. It is merely intended to confer the power upon other State officers also, so as to increase the facilities of giving bail where the defendant resided at a distance from the place of holding the court; for, upon searching the records we find recognizances of bail taken soon after the adoption of the rule of 1802, before two justices of the peace of the State, in the same manner with the recognizance now before the court. A precedent has been produced as far back as 1812, and a more careful search would probably show precedents still earlier. The same practice has continued without interruption ever since; and, indeed, any other rule would be oppressive to citizens of the State who reside at a distance from the place of holding the court, especially as they would most commonly be obliged to bring their bail with them. In the case before us the recognizance of bail having been taken and sanctioned according to the established rules and practice of this court, the judgment upon the plea of *nul tiel record* must be for the plaintiff."

2. That the promissory note filed as the cause of bail in the action against Smith, was paid before the judgment was obtained against Smith.

To the first of these pleas Hall took issue, and the judgment of the court was as is above recorded.

To the second plea he demurred; and instead of joining in demurrer, Morsell took no notice of it, but the judgment of the court was for the plaintiff generally. A motion was made to enter an *exoneretur* on the bail-piece, which was overruled.

A writ of error brought the case up to this court.

It was argued by *Mr. Stewart* and *Mr. Johnson*, for the plaintiff in error, and *Mr. Dulany*, for the defendant in error.

The counsel for the plaintiff in error did not pass the objection founded upon the plea of *nul tiel record*, as before remarked; but contended that the judgment below should be reversed because the court did not decide upon the demurrer, *Harris* v. *Wall*, 7 How., 693; *Wheelwright* v. *Jutting*, 7 Taunt., 304; *Thompson* v. *Macirone*, 4 Dowl. & Ry., 619.

2. That if it be assumed that the court did decide upon the demurrer in favor of the plaintiff below, that such decision was erroneous, because the debt, in reference to which the *214] *recognizance of bail was entered into, is shown to have been discharged before the institution of the original suit. *Jackson* v. *Hassel*, Doug., 330; 6 T. R., 363; *Tetherington* v. *Golding*, 7 T. R., 80; 2 Tidd, Pr., 992, 993; *Clark* v. *Bradshaw*, 1 East, 86; 4 Halst. (N. J.), 97.

Mr. Dulany. The ground taken by the plaintiff in error in his second plea is, that, in the affidavit made by the defendant in error, in his original suit against William Smith, he filed, as cause of bail in said suit, a promissory note for the sum of $2,678.90, which had been paid (he does not say by whom) before the judgment against Smith in that suit was obtained.

In support of the demurrer to this plea, it would seem sufficient to remark, that the plea relies upon a matter of defence which, if it had been established, as it might have been if true, in the principal action by Hall against William Smith, would have been an effectual bar to the recovery of the verdict and judgment in that case.

It is a maxim of law that there can be no averment in pleading against the validity of a record, therefore no matter of defence can be alleged which existed anterior to the recovery of the judgment. 1 Chit. Pl. (Am. Edition), 1844, p. 486, and margin; *Cardsa* v. *Humes*, 5 Serg. & R. (Pa.), 65; *McFarland* v. *Irwin*, 8 Johns. (N. Y.), 77; *Moore* v. *Bowmaker*, 2 Marsh. (Ky.), 392; 6 Taunt., 379.

Now the payment of the note, which is the ground of defence apparently relied upon in the above plea, was anterior (as is expressly averred in the plea itself) to the rendition of the judgment against Smith, and upon that judgment the *scire facias* in this case was issued against the plaintiff in error as special bail of Smith. The plea must, therefore, be held bad, and the judgment of the court below sustained, else there is great error in the above-stated legal maxim and in the authorities by which it is supported.

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

This is a *scire facias* brought by Hall against Morsell, as the special bail of William Smith, in a suit in the Circuit Court of the United States for the District of Maryland, in which Hall recovered a judgment, and proceeded by proper process to charge the bail.

Morsell appeared to the *scire facias*, and pleaded: 1st. *Nul tiel record;* and 2dly. That the promissory note, filed as the cause of bail in the action against Smith, was paid before the judgment was obtained against Smith. The plaintiff, in the court below, took issue on the first plea, and demurred to the second; *but the defendant did not join in the demurrer. The court gave judgment for the plaintiff, [*215 upon which this writ of error is brought.

The plaintiff in error alleges, that according to the record, the case was decided on the first plea only, and that the demurrer was not disposed of by the judgment—and they assign as error, 1st. That no judgment was given on the second plea; and 2dly, if the court consider it to be overruled by the general judgment for the plaintiff below, that then the judgment is erroneous, because the plea was a good defence.

As relates to the first objection, the refusal or omission of the plaintiff in error to join in demurrer was a waiver of the plea, and there was no issue in law upon the second plea upon which the Circuit Court was required to give judgment. *Townsend* v. *Jemison*, 7 How., 719, 720.

And as concerns the second objection, if the plea was before the court and not waived, it was no defence. For the right of the defendant in error being established by the judgment in his favor, he was not bound to prove it over again in the *scire facias* against the bail. 1 Chit. Pl. (Am. Ed. of 1847), 469, 486, and margin.

And consequently the omission to enter a formal judgment upon it could not, under the act of Congress of 1789, c. 20, s. 32, be assigned as error. The omission would be a mere imperfection in form, not affecting the right of the cause or the matter in law as they appear on the record. *Roach* v. *Hulings*, 16 Pet., 319; 4 How., 164, *Stockton and others* v. *Bishop;* and *Parks* v. *Turner & Renshaw*, decided at the present term.

The record, as transmitted to this court, shows that a motion was made, before the judgment on the *scire facias* to enter an *exoneretur* of the bail upon ground similar to that taken in the second plea; and that affidavits were filed in support of, and also in opposition to the motion. And it has

been urged, in the argument here, that the Circuit Court erred in not granting this motion.

A motion to enter an *exoneretur* of the bail is no defence to a *scire facias* even if sufficient grounds were shown to support the motion (which we do not mean to say was the case in the present instance). It is a collateral proceeding, not forming a legal defence to the *scire facias*, but addressing itself to the equitable discretion of the court, and founded upon its rules and practice. Chit. Pl. (Am. Ed. 1847), 469. No writ of error will therefore lie upon the decision of a motion of that kind; because a writ of error can bring up nothing but questions of law. It does not bring up questions of equity arising out of the rules and practice of the courts. And
*216] the proceedings upon the motion to *discharge the bail form no part of the legal record in the proceedings on the *scire facias* and ought not to have been inserted in the record transmitted to this court.

There is no foundation therefore for any of the errors assigned in this case, and the judgment of the Circuit Court must be affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States, for the District of 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 cost and damages, at the rate of six per centum per annum.

THE UNITED STATES, APPELLANTS, *v.* WILLIAM AND ALEXANDER MCCULLAGH AND JAMES CORNAHAN, TRUSTEES OF THE HEIRS OF ALEXANDER MCCULLAGH AND DAVID MCCALEB.

The act of June 17, 1844, (5 Stat. at L., 676,) reviving the act of 1824, gives jurisdiction to the District Courts in cases only where the title set up to lands, under grants from former governments, is equitable and inchoate, and where there is no grant purporting to convey a legal title.

Grants from the British government, as well as those of France and Spain, are equally within this restriction.

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

The opinion of the court sets out the facts of the case so far as to raise the question of jurisdiction.

It was argued by *Mr. Lawrence* and *Mr. Crittenden*, (Attorney-General,) for the United States, and by *Messrs. Janin* and *Taylor*, for the appellees.

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

This case arises on a petition filed by the appellees in the District Court for the Eastern District of Louisiana, praying that their title to a certain tract of land containing one thousand acres, situated on the Mississippi River, to the westward of Baton Rouge, may be declared valid and confirmed. They claim title under Alexander McCullagh, Sen., who obtained a grant from the British authorities while they were in possession of the *country and before it was ceded to Spain. The grant was made on certain conditions [*217 therein specified, which it is not necessary to state, as the court is of opinion that the District Court had no jurisdiction in the questions upon which the validity or invalidity of the title claimed by the appellees against the United States, depends.

The proceeding is under the act of June 17th, 1844, and this court have always held that under that act the District Court has jurisdiction in those cases only where the title set up by the petitioner is equitable and inchoate; and where there is no grant purporting to convey a legal title as contradistinguished from an equitable one. It is true that the cases heretofore decided have arisen under titles derived from the French or Spanish authorities while they respectively held the territory and exercised dominion over it. And this is the first case that has come before the court in which the title sought to be confirmed is derived from the government of Great Britain. But as respects the jurisdiction of the District Court, claims of this description are placed by the act of 1844, on the same footing with those which are derived from France or Spain. The jurisdiction conferred in either case is that of a court of equity only; and the titles which the court is authorized to confirm, are inchoate and imperfect ones, which upon principles of equity, the government of the United States are bound to confirm and make perfect.

In this case, all of the questions upon which the title of the appellees depend, are strictly legal questions, to be decided in a court of law, in a suit at law. They are not, therefore, within the equity jurisdiction given by the acts of 1824 and

1844. There are no equitable considerations involved in the controversy; and the validity or invalidity of this claim, can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them, and on that account they were not embraced in the acts of Congress above mentioned.

It appears, in this case, that the District Judge had an interest in the land in question, and the cause was certified to the Circuit Court for the Eastern District of Louisiana, under the act of March 3, 1821, and the decree affirming this title was passed by the Circuit Court. This decree must be reversed; and a mandate issued to the Circuit Court to dismiss the petition without prejudice to the rights of the United States or the appellees.

ORDER.

This cause came on to be heard on the transcript of the *218] *record from the Circuit Court of the United States, for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby reversed, and that this cause be, and the same is hereby remanded to the said Circuit Court, with directions to dismiss the petition of the claimants without prejudice to the rights of either the United States or the appellees.

HENRY MILLER, PLAINTIFF IN ERROR, *v.* DAVID AUSTEN, WILLIAM S. WILMERDING, AND DAVID AUSTEN, JR., DEFENDANTS.

A statute of Ohio declares all promissory notes, drawn for a sum certain, payable to any person or order, or to any person or his assignees, negotiable by indorsement.

The following paper, namely,—

"No. 959. Mississippi Union Bank, Jackson, Miss., February 8, 1840. I hereby certify that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with five per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate. $1,500. Wm. P. Grayson, Cashier,"—

was negotiable by indorsement under the statute, and the indorsee had a right to maintain an action against an indorser.[1]

[1] CITED. *Dred Scott* v. *Sandford*, 19 How., 604; *Talcott* v. *Township of Pine Grove*, 1 Flipp., 124.

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the District of Ohio.[2]

On the 8th of February, 1840, the Mississippi Union Bank issued the following certificate:

MISSISSIPPI UNION BANK,
Jackson, Miss., Feb. 8th, 1840.

I hereby certify, that Hugh Short has deposited in this bank, payable 12 months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order, upon the return of this certificate.

$1500. WM. P. GRAYSON, *Cashier.*

On which are the following indorsements:

Pay to George Lockwood or order. HENRY MILLER,
Cincinnati, Ohio.

Pay Austen, Wilmerding & Co. or order, without recourse.
GEORGE LOCKWOOD.

On the 4th of May, 1840, L. V. Dixon, justice of the peace and *ex officio* notary-public, presented the paper declared on at the counter of the Mississippi Union Bank, at Jackson, and demanded *of the teller payment in specie, or its equivalent, which that officer, after consultation with [*219 the other officers of the bank, refused; but offered to pay in the notes of the bank, which the notary would not accept. The defendant, Miller, was duly notified as indorser, by a written and printed notice, directed to him at Cincinnati, and deposited in the post-office in time for the first mail of the next day.

In July, 1847, Austen, Wilmerding & Co., brought an action against Miller in the Circuit Court of Ohio. The suit was brought against Miller as indorser, and the declaration contained three counts.

1st. Alleging it to be a promissory note of the Union Bank, payable to the order of Henry Miller, and by him indorsed to George Lockwood, who indorsed it to plaintiffs below.

2d. Alleging it to be a draft drawn by Henry Miller, on the Mississippi Union Bank, at Jackson, requesting the said bank to pay to George Lockwood, and by him indorsed to the plaintiffs below, and charging a due presentment for payment, and notice of non-payment.

[2] Reported below, 5 McLean, 153.

3d. On a common count for money lent and advanced, paid, laid out, and expended, money had and received, and on an account stated.

The plea was *non assumpsit.*

In October, 1850, the cause came on for trial, when the jury found a verdict for the plaintiff for $2,468.86.

Upon the trial, the plaintiff offered the note in evidence, together with the protest, &c. Objection was taken, but the court overruled it, and admitted the evidence. This was the subject of the first bill of exception.

The second exception was to the refusal of the court to grant certain prayers asked for by the defendant, of which it is only necessary to notice the following.

1st. That the paper offered in evidence is not a negotiable instrument under the laws of Ohio, and cannot be sued on by the plaintiffs in the cause.

6th. That said paper offered in evidence is not a promissory note, nor is it a bill of exchange, but is a mere certificate, acknowledging the receipt and deposit of paper or obligations of some kind, which are payable twelve months after 1st May, 1839, bearing interest at the rate of five per cent. till due.

Upon these exceptions the case came up to this court, and was argued by *Mr. Fox*, for the plaintiff in error, and by *Mr. Chase* and *Mr. Rockwell*, for the defendants in error.

Only those parts of the arguments will be noted, which bear upon the point decided by the court.

*220] *Mr. Fox.* We maintain this is not a promissory note, as described in the declaration, so as to pass by indorsement, as mercantile instrument. That is not so considered in a mercantile sense, nor is it a promissory note under the statute of Ohio.

Under the statute of Ohio, (Swan's Stat., 587,) "all bonds, promissory notes, bills of exchange, foreign and inland, drawn for any sum or sums of money certain, and made payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon; . . . but nothing in this section shall be construed to make negotiable any such bond, note, or bill of exchange, drawn to any person or persons alone, and not drawn payable to order, bearer, or assigns." A check and certificate of deposit are not mentioned in this statute as being negotiable.

Under this statute, the Supreme Court of Ohio has decided that this identical paper is not a promissory note, negotiable under the laws of Ohio, as will be seen by reference to the Western Law Journal, vol. 4, p. 527.

Suit was brought by these plaintiffs against Miller, on the same certificate, and was decided by Judge Hitchcock, May term, 1847. The case is reported very shortly, but the point decided is fully shown. We claim that this, being a decision upon a local statute, the statute must, by this court, be construed in the same way as the statute is construed by the Supreme Court of Ohio. Whether it is such a note as is negotiable in Ohio, depends upon the statutes of Ohio; and the courts of that State having given a judicial construction to the statute, this court will adhere to the construction, because the very essence of the contract of indorsement depends upon the laws of Ohio, where it was made. 6 Cranch, 225; 10 Wheat., 50; 13 Pet., 397; 11 Wheat., 367; 6 Pet., 297.

We suppose, therefore, that we may safely rely upon the decision of the Supreme Court of Ohio, on this identical paper, between the same parties, as decisive of this question.

But independently of that decision, we maintain this is not such a promissory note as is or can be negotiable under the well-settled rules of law.

In the first place, there can be no such thing as a negotiable promissory note, unless there is an express promise to pay a certain amount. An implied promise will not answer. Story on Promissory Notes, sect. 14.

Where there is "no more than a simple acknowledgment of the debt, with such a promise to pay as the law will imply," it is not a promissory note. *Patterson* v. *Poindexter*, 6 Watts & S. (Pa.), 231. In that case this question is very fully examined by *the Supreme Court of Pennsylvania, on a certificate of deposit, exactly like the one now before the court, and which was held not to be a promissory note, after two arguments. The court referred to *Horne* v. *Redfearn*, 6 Scott, 267, as conclusive on the subject. [*221

In *Fisher* v. *Leslie*, 1 Esp., 426, it was held that a slip of paper "I O U eight guineas," is not a promissory note; the court held the paper was the mere acknowledgment of the debt, but was neither a promissory note nor a receipt.

An instrument acknowledging the receipt of £200 in drafts, for the payment of money, and promising to pay the money specified in the drafts, is not a promissory note. *Williamson* v. *Bennett*, 2 Campb., 417.

In the next place, it is not a promissory note, because it is payable upon a contingency and not at all events. It is payable only upon the order of Henry Miller, and upon the return of the certificate.

A promissory note must not depend upon any contingency

whatever. Story on Prom. Notes, 22; *Williamson et al.* v. *Bennett et al.*, 2 Campb., 417; *Roberts* v. *Peake*, 1 Burr., 323.

This point was also decided in the case already alluded to, of *Patterson* v. *Poindexter*, 6 Watts & S. (Pa.), 232, where the court say the promise is a contingent one, depending upon the return of the certificate.

We call the attention of the court particularly to this case, because it was precisely like the present. The certificate was issued by the same bank, and the language is precisely the same, as are also the indorsements. It is the only well-considered case in the books, on this subject, and it decides that the paper is neither a promissory note, nor a bill of exchange, nor a check upon a bank, but is only what it purports to be, a mere certificate of deposit, which is neither a bill, note, or check.

Again, if this is a promissory note and negotiable, can the consideration be inquired into? If it can, in the hands of an assignee it ceases to be a negotiable promissory note. And we claim that the consideration of this note may be inquired into; that it may be shown for instance, that the statement that Hugh Short had deposited the amount named, is not in fact true. That portion of the note is like the statement of a bill of lading, acknowledging the receipt of goods, and may, like all statements of receipt, be explained or contradicted.

And we maintain that in a suit against the Mississippi Union Bank, the bank might show that instead of money being deposited, worthless bank-notes were deposited, and an offer to return the same notes would discharge the obligation.

Again, to whom (if this is a promissory note) is it payable?

*222] *It acknowledges the receipt from Hugh Short, payable in twelve months with interest, of $1,500, for the use of Henry Miller, and payable only to his order. The amount received is from Short. It is payable, by the first part of the note, in twelve months, to Short, and not to Miller. The subsequent words "for the use of Henry Miller," do not alter the legal effect of the note. It is still a receipt of money from Short. It is payable to him in legal contemplation, notwithstanding the words "for the use of Henry Miller." These words do not vary the legal obligation. Supposing it had been a note promising to pay $1,500 to Hugh Short or order, for the use of Henry Miller, could it be pretended that any one, besides Short or his indorsee, could have recovered on the note at law? Under such circumstances, Miller would have had an equitable interest, but

not the legal interest, and he or his assignee could not have recovered in a suit at law.

In order to sustain this suit as on a promissory note, the promise has to be implied, for there is no express promise to pay. Supposing that an implied promise to pay is sufficient, (which we think it is not,) to whom is this implied promise to be raised on this particular instrument?

As before remarked, if the promise had been express, to pay to Short, for the use of Miller, the legal title would have been in Short. Now, if in the absence of an express promise, we substitute an implied promise, must it not have the same effect? The plaintiffs below claimed the word payable was equivalent to an express promise to pay. Supposing it is so, for the sake of argument, how does the case stand? The certificate certifies that Hugh Short has deposited in the bank, payable in twelve months from 1st May, 1839, with 5 per cent. interest till due, $1,500. From this statement the promise to be implied, from the word payable, would be to Hugh Short. The subsequent statement, "for the use of Henry Miller," would no more in this case than in the case of an express promise, change the nature of the legal obligation. The words "for the use of Henry Miller" would in each case be of no further efficacy than to point out the equitable owner of the paper.

But it is claimed that the additional words used, "and payable only to his order, upon the return of this certificate," change the whole legal character of the instrument, and make what before was payable to Hugh Short, now payable to Henry Miller, or order. We contend that such is not the fair construction of the instrument, but that it must be construed in the same way as though an express promise had been made to pay to Hugh Short, and if that express promise had been inserted, the paper would read thus:

*"I certify that Hugh Short has deposited in this bank $1,500, which is promised to be paid 12 months from 1st May, 1839, with 5 per cent. interest till due, to the order of said Short, (for the use of Henry Miller,) upon the return of this certificate." [*223

In other words, we contend that the words "for the use of Henry Miller," only indicate the equitable rights of the parties, and do not in any way effect the legal character of the paper. And to test this matter more fully, let us suppose that Hugh Short was owing Henry Miller $1,500, and that supposing Henry Miller would be willing to accept his pay in this certificate of deposit, he obtains it in the form of the paper now in suit. Suppose further, that on his offering it

to Mr. Miller, the latter refused to accept it, in whose name could the amount have been recovered in a court of law, of the bank? Miller could not have recovered, because he had refused to become the holder or owner of the paper. Is it not clear, then, that in such a state of case, Short could have received the amount? But if the construction is as contended for by counsel, Short could not have recovered, because the implied promise was not to him. We, however, contend that the promise, if expressed, would have been to Short, and if implied, it is also to him, and the other words, "for the use of Henry Miller," is only to designate the equitable course, which the legal owner or depositor, intends the money shall take, and that the words payable to his order, relate back to the original depositor, Short, and not Miller, just in the same way and manner as if there had been an express promise to pay. Short would then be the promisee, and would be a trustee for Miller, if the latter saw proper to receive the certificate.

So that we think it clear that this was not a promissory note; that it was not a promissory note to Henry Miller, but was an obligation of an equitable character, and he might have used the name of Hugh Short, in order to recover at law. That his indorsement of the certificate was no more than a mere authority to receive the money, and did not subject him to the payment of the sum mentioned in the certificate in case of default by the bank. Story on Prom. Notes, §§ 128, 129.

Mr. Chase and *Mr. Rockwell.*

The first exception only remains for consideration, namely, that the paper declared on, is not a negotiable promissory note under the laws of Ohio.

There is nothing peculiar in the legislation of Ohio in relation to promissory notes. The statute "making certain instruments of writing negotiable," provides that "all promissory notes drawn for any sum or sums of money certain, *224] and made *payable to any person or order, or to any person or bearer, or to any person or assigns, shall be negotiable by indorsement thereon," &c. Swan's Stat. This legislation does not at all affect the general principles so firmly established by repeated decisions in respect to negotiable paper.

"A bill or note is not confined to any set form of words. A promise to deliver or to be accountable, or to be responsible for so much money, is a good bill or note." 3 Kent, Com., 75; Chitty on Bills, 40, and notes.

"No particular words are necessary; the form may be varied at the pleasure of the individual, so, always, that it amounts to a written promise for the payment of money absolutely and at all events, and interferes with no statute regulation. Thus, an order or promise to deliver a certain sum of money to A, or to be accountable or responsible to A, for a certain sum of money, or that A shall receive it from the maker, is a good promissory note; so a receipt for money to be returned when called for, or an acknowledgment, due to A a certain sum of money payable on demand; or a promise to pay or cause to be paid to A a certain sum of money; or an instrument acknowledging the receipt of money of A, promising to pay it on demand with interest; or acknowledging the receipt of money to be repaid in one month; or acknowledging to have borrowed a certain sum of money, in promise of payment thereof." Story on Prom. Notes, 15, § 12.

A promise implied by law, founded upon a mere acknowledged indebtment, will not be sufficient. Thus, where A wrote upon a slip of paper "I O U eight guineas," it was held to be a mere due-bill, and not a promissory note. But if the promise were "Due to A B £ 20, payable to him or order," it would be a promissory note, for it contains more than the law would imply, and becomes negotiable. Story on Prom. Notes, 17, § 14; *Curtis* v. *Rickards*, 1 Mann. & G., 46; *Russell* v. *Whipple*, 2 Cow. (N. Y.), 536.

The decisions in Ohio are in strict accordance with these principles.

In *Moore* v. *Gano*, 12 Ohio, 302, the following instrument was held a promissory note:—

Bridgeport, 12*th month*, 30*th*, 1836.

Received of John Moore, five thousand one hundred and ten dollars, which we promise to replace to the said Moore on demand, with interest from date.

GANO, THOMS, & TALBOTT.

In *McCoy* v. *Gilmore*, 7 Ohio, Pt. 1, 268, it was held that "no special form of words is necessary to constitute a *promissory note. It is enough if the intent appear, and the sum can be made certain by calculation." [*225

In *Ring* v. *Foster*, 6 Ohio, 279, a contract by which A agreed to pay to B one hundred and forty dollars, "provided B delivers the crop of tobacco raised by him and C, then B is to have one fourth of the above sum in hand, and in addition three dollars per hundred weight for that part yet to be

delivered, payable one fourth in hand, and the balance in one hundred and twenty days," was held to be a promissory note.

These cases show the doctrine in Ohio on this subject; and that it is quite as liberal in favor of commerce as that of England, or her co-states.

The plaintiff in error relies upon a brief note of a decision said to have been made by the Supreme Court of Ohio in Hamilton county. The case is not reported, but merely the point supposed to have been decided; and this not by an authorized reporter, in any book of reports, but as an item of intelligence for a law journal. Those conversant with the *stirrup* practice of the Supreme Court on the Circuit in Ohio, would not claim the weight of authority for this paragraph in the Law Journal.

There is, however, it must be admitted, a decision, not of an Ohio court, but of a Pennsylvania court, both respectable and respected, which sustains the doctrine insisted on by the plaintiff in error. In the case of *Patterson* v. *Poindexter*, 6 Watts & S. (Pa.), 227, it was held that a certain certificate of deposit, in all respects like that now in controversy, was not a negotiable note. The opinion of the court maintains three propositions:

1st. That the words "payable to order" do not import a promise to pay; which is in direct opposition to the whole current of English and American authority.

2d. That a promise to pay on "return of the certificate," is a contingent and conditional promise, and therefore the note by which such promise is made is not a promissory note; and this, although the court is immediately after, forced to admit that "true it is that such a contingency is no more than is implied in every promissory note."

3d. That the words "payable twelve months from 18th May, 1839, with five per cent. interest till due," constitutes a special agreement for interest, which is inconsistent with the character of a promissory note; and this, also, is in direct opposition to the current of authority.

Upon these three propositions the court rested their conclusion that the paper in question was not a negotiable promissory note.

The only authority cited in support of this conclusion was *Horne* v. *Redfearn*, 6 Scott Cas., 267.

*226] *This was a decision under the Stamp Act. Suit was brought on the following letter:

December 25, 1829.

SIR: I have received the sum of £20, which I borrowed

of you, and have to be accountable for the same with legal interest.

I am, &c., PETER REDFEARN.

It was stamped as a special agreement, and was sued on as such. It was objected that it was a promissory note, and not being stamped as such, could not be given in evidence. But Chief Justice Tindal said: "I think this case may be decided by referring to the provisions of the Stamp Act, without referring to the cases which have been cited." He then proceeded to hold that the instrument, being stamped as a special agreement, and not as a promissory note, fell within the exemption of the act, 55 Geo. 3, c. 184, from the promissory note stamp "of all other instruments bearing in any degree the form or style of promissory notes, but which shall in law be deemed special agreements, except those hereby expressly directed to be deemed promissory notes." The Chief Justice added, "It would be a very harsh construction of the act to hold the document to be a promissory note, after the commissioners on stamps have impressed it with an agreement stamp, upon payment of the usual penalty."

This brief statement clearly shows that the case of *Horne* v. *Redfearn* went entirely upon a construction of the Stamp Act; and it is remarkable enough that, by this very act, simple certificates of deposit, issued by banks, without any words such as "payable," and the like, importing a promise to pay, are declared to be promissory notes. So that there cannot be a doubt that in England the paper now in controversy would be held to be a promissory note, whether the question was decided upon general principles or statutory provisions.

The Pennsylvania decision, then, is without the support of any English case, as it is without the support of any general principle of law applicable to promissory notes.

We shall proceed to show that it is in direct conflict with American authorities.

In the case of *Kilgore* v. *Bulkley*, 14 Conn., 363, the Supreme Court of Connecticut held the following certificate of deposit to be a promissory note:

$10,608.75. *Chelsea Bank*, *July* 6, 1839.

I do hereby certify that David E. Wheeler, Robert S. Taylor, and Noah Bulkley, have deposited in this bank the sum of ten thousand six hundred and eight dollars seventy-five cents, payable on the first day of December next, to their order, on the return of this certificate.

D. E. WHEELER, *President.*

*227] *And the following writing, indorsed upon the paper, was held to be an indorsement by which the parties made themselves liable as indorsers of a negotiable note:

"For value received, we hereby assign to S. F. Maccracken, Joseph S. Lake, and Daniel Kilgore, Commissioners of the Ohio Canal Fund, or their successors, the amount of the within certificate."

The case of the *Bank of Orleans* v. *Merril*, 2 Hill (N. Y.), 295, is also in direct conflict with the case of *Patterson* v. *Poindexter*. In that case, the action being brought on a certificate of deposit, the court said, "the instrument in question is in effect a negotiable promissory note.

Thus, then, stands the case. The paper in controversy has all the requisites which an unbroken current of decisions has pronounced essential to a promissory note. It is a promise to pay a sum of money certain, at a fixed time, for value received. It was regarded by the maker, by the defendant, and by the plaintiffs, as a negotiable promissory note. By the maker, for it was in the language of the Ohio statute, "drawn payable to order;" by the defendant, for he issued it payable to the order of his indorsee, and he added to his signature the place of his residence, obviously that, in the event of non-payment, it might be known where to direct notice; by the plaintiffs, for they caused it to be presented for payment, and protected as negotiable paper. Two American courts, of distinguished ability, have expressly held similar instruments to be negotiable paper. One American court has held otherwise.

This statement would seen to be decisive. We do not think it worth while to comment on the positions of the counsel for the plaintiffs in error, that the paper in question is not a promissory note, because subject to the condition of the return of the certificate; and that, if it is a note at all, it is a note to Hugh Short, and not to Henry Miller. The first is refuted by the remark of the court which suggested it, that it is a condition which is implied by law in every promissory note; and the second is refuted by the language of the instrument, and the act of the defendant himself.

We will only add two or three cases, which illustrate somewhat strikingly the disposition to which the Supreme Court of New York referred, when they said, "the great commercial advantages growing out of negotiable instruments, have induced the courts to adopt a most liberal rule in construing

them." The first case is that of *Walker* v. *Roberts*, 1 Carr. & M., 590 (41 E. C. L. R., 321). The following document was held to be a promissory note:

*"February, 1831. William Walker lent to James Roberts £19 19*s.* 11*d.*; to pay five per cent. for the same £19 19*s.* 11*d.*; to pay on demand to the said William Walker, giving James Roberts six months' notice of the same. James Roberts, Mary Roberts." [*228

The other case is that of *Henschel* v. *Mahler*, 3 Hill (N. Y.), 132. The action was upon the following instrument:

"For francs 8,755.60, payable on the 31st of December, 1839. On the 31st of October, of this year, pay to the order of ourselves, 8,755 francs 60 centimes, payable in Paris, the 31st of December, of this year."

It was held a valuable negotiable bill of exchange, notwithstanding the ambiguity; the words, "on the 31st of October, in this year," being rejected as repugnant, and the bill held payable "on the 31st of December."

We refer the court, also, to 1 Greenl. (Me.), 535; 2 Cow. (N. Y.), 536; 10 Wend. (N. Y.), 675; and, in deciding the last of which cases, Nelson, J., said, "the instrument is a promissory note within the statute, as it contains every quality essential to such paper. The acknowledgment of indebtedness on its face implies a promise to pay the plaintiffs," and the payment, by its terms, was to be in money, absolutely. The instrument on which this last action was brought was as follows: "Due Kimball & Kiniston three hundred and twenty-five dollars, payable on demand."

Mr. Justice CATRON delivered the opinion of the court.

The only question this case presents that we deem worthy of notice is, whether the paper sued on is a negotiable instrument; it is as follows:

"No. 959. Mississippi Union Bank, Jackson (Miss.), Feb. 8, 1840. I hereby certify, that Hugh Short has deposited in this bank, payable twelve months from 1st May, 1839, with 5 per cent. interest till due, fifteen hundred dollars, for the use of Henry Miller, and payable only to his order upon the return of this certificate. $1,500. Wm. P. Grayson, Cashier."

The suit was by the last indorsee against his immediate indorser, and brought in Ohio. The statute of that State de-

clares all promissory notes, drawn for a sum certain, payable to any person or order, or to any person or his assigns, negotiable by indorsement.

The established doctrine is, that a promise to deliver, or to be accountable for, so much money, is a good bill or note. Here the sum is certain, and the promise direct. Every rea-
*229] son exists *why the indorser of this paper should be held responsible to his indorsee, that can prevail in cases where the paper indorsed is in the ordinary form of a promissory note; and as such note, the State courts generally, have treated certificates of deposit payable to order; and the principles adopted by the State courts in coming to this conclusion, are fully sustained by the writers of treatises on bills and notes. Being of opinion that the Circuit Court properly held the paper indorsed, negotiable, it is ordered that the judgment 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 Ohio, 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.

ALANSON SALTMARSH, PLAINTIFF IN ERROR, *v.* JAMES W. TUTHILL.

In a suit by the indorsee against the indorser of a bill, where the defence was usury, the drawer and drawee were incompetent witnesses, when offered to prove certain facts, which, when taken in conjunction with certain other facts, to be proved by other witnesses, would invalidate the instrument.[1]
Being incompetent witnesses to establish the whole defence, they are also incompetent to establish a part.

THIS case was brought up, by writ of error, from the District Court of the United States for the Middle District of Alabama.

The only question was one of evidence, which is fully explained in the opinion of the court.

It was argued by *Mr. J. A. Campbell* and *Mr. Seward*, for

[1] DISTINGUISHED. *Sweeny* v. *Easter*, 1 Wall., 173.

the plaintiff in error, and *Mr. Pryor*, for the defendant in error.

Mr. Justice CATRON delivered the opinion of the court.

Hill drew a thirty days' bill, dated at Mobile, on William Bower & Co., for four thousand dollars, payable to Coleman. It was indorsed by Coleman to Saltmarsh, and by him to James W. Tuthill, who sued Saltmarsh. The parties went to trial on the general issue, and the defence relied on was usury. By the laws *of Alabama, a party to any [*230
security for the payment of money, who takes more than after the rate of eight per cent. per annum for the money advanced, is prohibited from recovering any interest, and can have judgment only for the original sum loaned. And this abatement, was the matter in controversy. To prove the usury, Hill, the drawer, and William Bower, one of the drawees, were introduced on behalf of the defendant; and objected to by the plaintiff as incompetent, on the ground that a party to negotiable paper who, by the sanction of his name, gave it credit and currency, could not afterwards, upon his own testimony, invalidate the instrument, by showing that the consideration on which it was executed was illegal. The witnesses were rejected.

Both Hill and Bower were offered to prove facts which, when taken in connection with additional facts, that might be proved by others, would invalidate the instrument in part, by abating the interest. The proof was offered, and only material to establish the defence of usury, this being the sole defence. It must be admitted, that if the party to the bill had been introduced to establish the whole defence, then he was incompetent; and to hold, that he could prove a defence in part, without which piece of evidence no successful defence could be made, would be a mere evasion of the rule, which excludes such witness from giving evidence to impeach the consideration.

No other question is presented to us, nor does any other exist in the record, worthy of notice. 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 District Court of the United States for the Middle 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 District Court in this cause be, and the same is hereby affirmed with costs and damages, at the rate of six per centum per annum.

Cyril C. Tyler, and his wife, Sarah P. Tyler, Appellants, *v.* George N. Black.

Where a person desired to purchase land from a party who was ignorant that he had any title to it, or where the land was situated; and the purchaser *231] made fraudulent *representations as to the quantity and quality of the land, and also, as to a lien which he professed to have for taxes which he had paid; and finally bought the land for a grossly inadequate price, the sale will be set aside.[1]

This was an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

The facts are all stated in the opinion of the court.

It was argued by *Mr. Fessenden*, for the appellants, and *Mr. Rowe*, for the appellee.

The points made by the counsel for the appellants were the following, viz.:

The complainants claim to have their deed to Black, dated November 30, 1846, cancelled, and a reconveyance of said estate, on the following grounds.

1. For fraud and fraudulent representations.

2. For inadequacy of price, as, of itself, furnishing evidence of fraud.

3. For the two preceding grounds united.

General Considerations. The acts and declarations of Black, to show he had formed a design to commit frauds in making this purchase, as opportunity should offer.

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[1] S. P. *Warner* v. *Daniels*, 1 Woodb. & M., 90; *Mason* v. *Crosby*, Id., 342; *Adams* v. *Jones*, 39 Ga., 479; *Hammond* v. *Pennock*, 5 Lans. (N. Y.), 358; *McClure* v. *Lewis*, 72 Mo., 314.

Mere inadequacy of price is no ground for setting aside a sale of land, unless so gross as to shock the moral sense, and thus become, *per se*, evidence of fraud. *Hale* v. *Wilkinson*, 21 Gratt. (Va.), 75; *Booten* v. *Sheffer*, Id., 474.

A wilful misrepresentation as to the income derived from a patent for an invention, — a half interest in which was to be the consideration for the land sought to be purchased, — *held* sufficient evidence of fraud to set aside the sale. *Crosland* v. *Hall*, 6 Stew. (N. J.), 111. S. P. *Meyers* v. *Funk*, 56 Iowa, 52.

In *Fackler* v. *Ford*, McCahon, 21, it was held that representations by the would-be purchaser that, if a contract were to be made, he had capital, and would make improvements which would induce immigration of mechanics, &c., were too indefinite to vitiate the contract.

All such acts and declarations of Black made to other persons, about the time of the transaction, are competent evidence for complainants, for that purpose. *Bradley* v. *Chase*, 22 Me., 511; *Warner* v. *Daniels*, 1 Woodb. & M., 90; *Wood* v. *The United States*, 16 Pet., 342; s. c., 14 Pet., 430.

Complainants rely on the testimony of the Vermont witnesses, viz.: Edward F. Putnam, Albert G. Soule, E. P. Soule, and Phebe Hendricks, to prove such acts and declarations of Black.

First Proposition. The bill, answer, and evidence, establish complainants' proposition of fraud, on the part of Black, in several particulars, either of which is sufficient to entitle them to a decree in their favor.

1. As to complainants' title and the evidence of it, and Black's misrepresentations concerning it.

2. Black's misrepresentations as to the number of acres.

3. Black's misrepresentations as to incumbrances on the land, and particularly of his lien thereon for taxes, alleged to have been paid by himself.

4. Black's misrepresentations of the value of the land.

(Each one of these points was examined according to the evidence.)

Second Proposition. The doctrine is well stated in Story, Eq. Jur., §§ 245 and 246. After stating the general proposition that mere inadequacy is not a sufficient ground for relief, he says, (§ 246,) "Still, however, there may *be such [*232 unconscionableness, or inadequacy in a bargain, as to demonstrate some gross imposition, or undue influence; and in such cases, courts of equity ought to interfere upon the satisfactory ground of fraud. But then, such unconscionableness, or such inadequacy, should be made out as would, to use an expressive phrase, shock the conscience, and amount, in itself, to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relation between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud."

The same doctrine is stated in Fonb. Eq., B. 1, c. 2, sect. 9, note *e*.

"Where the deed is executed, if the parties have not been on equal footing, or, if there has been any concealment, or misrepresentation, or imposition, courts of equity uniformly set aside such deed or contract." Sugd. Vend., 6th Amer. ed., p. 317, and note 2.

"Where the circumstances of the case are such as have afforded an opportunity, either from the situation or condi-

tion of the parties, or the nature of the property, for either of them to take a fraudulent advantage of the other, and the consideration is grossly inadequate, this court considers that circumstance to be evidence of fraud, and will not only refuse a specific performance at the instance of the former, but will, at the suit of the latter, rescind the transaction." Jer. Eq. Jur., 483, and notes.

"A conveyance, obtained for an inadequate consideration, from one not conusant of his right, by a person who has notice of such right, will be set aside, although no actual fraud or imposition be used." Sugd. Vend., 6th Amer. ed., 320.

"Although it may be impossible, by any general proposition, to define what is to be understood by gross inadequacy of consideration, as it must, in a great measure, depend upon the circumstances of each individual case in which the question may arise, yet, if it be so gross and palpable, as of itself to afford evidence of actual fraud, the court will set aside a sale." Jer. Eq. Jur., 433 (note 7); *Osgood* v. *Franklin*, 2 Johns. (N. Y.) Ch., 1, and cases cited.

In *Turner* v. *Harvey*, 1 Jac. Ch., 169, which was a case where the vendors were ignorant of a fact or circumstance considerably increasing the value, the court say: "If a word, a single word be dropped which tends to mislead the vendor, the principle that the purchaser is not bound to give the vendor information as to the value of the property, will not be allowed to operate."

Again, in Hill on Trustees, 152, it is said, "Mere inadequacy, of itself, is not enough to set aside a contract; but where the inadequacy is so gross that it is impossible to state it to a man *of common sense, without producing an exclamation as to the inequality of it, the court will infer, from that fact alone, that there must have been such imposition or oppression in the transaction, as to amount to a case of fraud, from which it would not suffer any benefit or advantage to be derived. Other circumstances of fraud will aid the court."

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To apply these principles to the case at bar.

The inadequacy of price, in this case, is such, as of itself, to afford evidence of fraud. In 1799 Parsons conveyed to Putnam for 50 cents an acre. Black paid Tyler and wife 8½ cents an acre.

Black, in his answer, says that it was worth from 50 cents to $2 per acre, November 30, 1846. Now 50 cents to $2 averages $1.25 per acre; so that Black purchased for 8½ cents

an acre what he admits was worth $1.25 an acre. He bought for $50 what he admits was worth $757.50.

Third proposition. The bill may be sustained on the ground of fraud and fraudulent representation, and for inadequacy of price, united.

On these principles the court will find a rule for their guidance in *Seymour* v. *Delancey*, 6 Johns. Ch. R., 222. Chancellor Kent, in that case, found it convenient to take the average value, as established by the witnesses on the one side and the other.

On this principle the land was worth about $4.45 an acre, or $2,688.36, in November, 1846, date of deed of Tyler and wife to Black.

The denials of the answer are thus overcome, and the bill is maintained.

The counsel for the defendant in error made the following points, viz.:

The court has no jurisdiction. The value of the matter in controversy is one of the points at issue in the case. The proofs fail to show the land to be worth $2,000. It is not worth over 50 cents per acre, as shown by respondent's witnesses.

(The arguments upon this point upon both sides depend so entirely upon references to the testimony, that they cannot be reported.)

Point 2. There was no inadequacy of price.

The inadequacy, to be evidence of fraud, must be so gross as to shock the conscience. 1 Story, Eq. Jur., §§ 244, 245, 246; 1 Sugd. Vend., [*422, 423,] 318, 319, and cases there cited. Here is no satisfactory proof of such inadequacy as would even amount to damage. 1 Story, Eq. Jur., § 203. The consideration, on Black's part, was the $100 paid, the amount due for taxes and interest, and his claim for trouble and expenses, in *discovering and notifying the heirs. There is no sufficient proof now (as before shown) [*234 that all which Black takes by his deed is worth more than that. At the time of the contract it was doubtful how much he would take by his deed, or whether he would take anything.

It was not then fully ascertained whether Dr. Putnam died seized of any portion of this lot; and it was not known of how much, if any. It was not even known that Parsons had sold him any land, or if any, how much. The extent of Mrs. Tyler's rights, as heir at law, was not clearly ascertained. The value of the land was unknown. Defendant had no in-

formation but that derived from Mrs. Sheldon, and Tilden, and from the Putnams.

Where neither of the parties knows the value of the estate, no inadequacy of consideration can operate, even to prevent a decree for specific performance in favor of the purchaser. Anon. cited in 1 Bro. C. C., 158, and 6 Ves., 24; 1 Sugd. Vend., [*441, 442,] 318.

Point 3. There was no fraudulent concealment.

A purchaser is under no obligation to give any information, unless there be some relation of confidence between the parties. 2 Kent, Com. (5th ed.), 490. By Lord Thurlow, in *Fox* v. *Macreth*, 2 Bro. C. C., 420; *Laidlaw* v. *Organ*, 2 Wheat., 178; 1 Story, Eq. Jur., § 207.

The parties to this contract were strangers to each other. The complainants are persons of intelligence, and in "comfortable circumstances."

Black offered to communicate every thing for a reasonable compensation; and the offer was made at the commencement of the conversation, and repeated afterwards. In fact there was no concealment.

Before the execution of the deed the complainants were informed of every fact, known to the defendant, in relation to the land and their title thereto.

It is too late for complainants to take advantage of any concealment during the negotiation, they having executed the deed after all the facts were fully disclosed. Hovenden on Frauds, 106, cites *Fleetwood* v. *Green*, 15 Ves., 594; *Burroughs* v. *Oakley*, 3 Swanst., 168; 1 Sugd. Vend., 392, §§ 27, 28, and cases cited; 1 Story, Eq. Jur., § 203, a.

Point 4. There was no misrepresentation.

The testimony of E. F. Putnam and others, as to the representations made to them at Fairfield, is irrelevant and inadmissible. The interrogatories, which called it out, were objected to. If admissible, it is discredited by the evident bias and strong feeling of the witnesses; by their mutual con-
*235] tradictions, in *relation to Black's denial of knowledge of the quantity of land, and his statements in relation to the number of acres, the price of land sold, the place searched for papers, &c.; and by their statement that Black said Mrs. Tyler was dead, which contradicts the case as settled by bill and answer.

Black did not represent that he had a tax-title, or a lien on the land. The charge is inconsistent in its several parts, and with complainants' proof. The claim, which he set up, was the claim which the answer shows that he had, an equitable one on the owners of the land, and not a legal charge on

the land itself. He made no representation as to the number of acres.

This charge is not made the subject of a particular interrogatory, but is covered by interrogatories 7 and 16; and is denied in the answer.

Black stated that he "did not know how many acres belonged to said Aaron Putnam"; he could not have known. The statement of the number of acres, if made, was a mere matter of opinion, so understood by all parties, and there is no evidence that it was insincere.

A misrepresentation must be of something more than a mere matter of opinion. 1 Story, Eq. Jur., 179; *Hepburn* v. *Dunlop*, 1 Wheat., 179.

The representation, if made, was not material. The land in itself is worthless; the only value is the timber. The number of acres gives no idea of the quantity of that. About the timber there was no representations made and no inquiries. It was no inducement to the sale. The bill contains no averment that it was an inducement (see p. 627); no denial of its truth; no interrogatory in relation to it; no averment that the complainants believed it. It was not regarded as evidence of the value of the land sold by either party, for Tyler afterwards inquired again as to the character and value, and Black declared he knew nothing about it. The only inducement specifically charged is the doubt as to Mrs. Tyler's title. The only unfairness in relation to the value of the land charged against Black is the withholding information. He said that Tilden's part of the lot was purchased at a shilling per acre, and not at twelve and a half cents, as charged. Tilden paid a shilling. Black so stated at Fairfield; the Soules interpolated the word "York"; Stanwood borrows the story and reduces the York shilling to Federal currency.

500 acres at 12½ cents = $62.50, incumbered by tax claims for about $300. The story is incredible, and inconsistent with the propositions made by Black. What Black did say was not thus incredible or inconsistent, for Stanwood believed him, and *thought a doubtful title to half the land worth more than he asked for his information. [*236

Black's representations of his inducements to purchase are not shown to be false; and, if they were, that would furnish no grounds for rescinding the contract.

A purchaser is under no legal obligation to make a true disclosure of his motives. *Vernon* v. *Keys*, 12 East, 632, 637, 638.

Point 5. The misrepresentation must be of something, in

regard to which the party places known trust and confidence in the other. If the party had no right to place reliance upon it, and it was his own folly to give credence to it, it will not avoid the contract. 1 Story, Eq. Jur., §§ 197, 199.

Before any of the representations complained of were made, Black assured Dr. Tyler that he would give no information whatever, unless paid therefor; and repeatedly made the same assurance to him, in substance, in reply to his pressing questions. If, after that, Dr. Tyler relied upon any thing, wrung from the defendant by his importunate inquiries, it was a folly, from the consequences of which a court of equity will not relieve him.

Point 6. Before they executed the deed, the complainants knew where the land is situated, and where the evidence of their title is recorded, and could have ascertained whether the representations made by Black were true.

If Black made all the representations charged in the bill, they then knew that some of them were untrue, and were put on their guard as to the rest.

Misrepresentation of a matter, where a party was capable of seeing whether it was right or not, is no ground for relief. *Ainslie* v. *Medlycot*, 9 Ves., 13; 1 Madd. Ch., 253; *Bayley* v. *Merrel*, Cro. Jac., 386; 3 Bulstr., 95; 1 Story, Eq. Jur., § 149; 2 Kent, Com., 485, 486, *n. d.*

The deceit must be such as ordinary prudence would not protect the party against. 1 Story, Eq. Jur., § 200, a.

Point 7. Black's claim on account of taxes paid, &c., is valid *in foro conscientiæ*. Complainants will not be entitled in equity to the relief prayed for, until provision is made for that claim.

They have never offered to pay him if he would rescind the contract; nor even requested him to rescind. The bill contains no such offer. The parties cannot be placed *in statu quo*.

Mr. Justice WAYNE delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the District of Maine, sitting as a court of equity.

The complainants, Tyler and wife, filed their bill to set aside a sale of land made by them to Black, upon the ground of fraud, concealment, and fraudulent representations made
*237] to them by *Black; and also upon the ground of inadequacy of price as furnishing evidence of fraud.

Towards the latter end of the last century, the State of Massachusetts established a lottery for the sale of some lands

in Maine; and one Zenos Parsons drew a prize of 1920 acres, being lot number one in township No. 33.

On the 25th of March, 1799, Parsons conveyed to Aaron Putnam, of Charlestown, Massachusetts, for the consideration of six hundred dollars, twelve hundred and twelve acres of the said land, being an undivided interest. Putnam had three children, two sons, and a daughter. The daughter married Tyler, and they were the complainants and appellants in the present cause. One of the sons died without issue, and the other son left two children, viz., Edward and Elizabeth, who married Soule, who resided in Fairfield, Vermont.

At the time of the death of Aaron Putnam, his daughter was a minor, and resided in Massachusetts. When the transaction occurred which gave rise to the present suit, she was residing with her husband, Tyler, at Hopkinton, in New Hampshire. Black resided near the land in Maine, and had acted as the agent of the owner of the remaining undivided interest for upwards of twenty years.

In November, 1846, Black went to Fairfield, in Vermont, and offered to purchase the share of Edward and Elizabeth, who were ignorant of their title to the land; but they refused to sell. Black there learned that Tyler and his wife were the owners of one half of the 1212 acres which had been conveyed by Parsons to Putnam, and immediately proceeded to Hopkinton to see them. At this time Black's position was this: he resided at the town of Ellsworth, which communicated, by a navigable stream, with the land in question; he had been connected, since 1833, with his father, John Black, in the business of agency for the proprietors of nearly all the lots in the townships in which the land in question was situated; and in the seasons of 1844–5 and 1845–6 there had been lumbering operations upon lands in the neighborhood.

The interview between Black and Tyler is thus described by Joseph Stanwood in his deposition.

Second. To the second interrogatory he saith:—"I was present at the public house when Mr. Black came here and took the deed, as before stated; my father-in-law and I were then keeping a public house; Mr. Black came in and inquired for Doctor Tyler; what sort of a man was he, and what were his circumstances as to property; I told him he was a physician, doing a tolerable good share of business; had his house and other buildings clear of debt, as I supposed."

*Third. To the third interrogatory he saith:—"I was not present at the commencement of the interview [*238 betwixt Tyler and Black; I left the room soon after Tyler came in; after they had been together perhaps an hour, Tyler

came out and told, in substance, that Black and he had been talking about some land in Maine; I went into the room with them; Black said there was a tract of land in Maine, and he could find no person that had any claim to it, unless it belonged to the heirs of Doctor Putnam; Black said he would give Tyler fifty dollars for a deed of the land from Tyler and his wife; or, if they would give him fifty dollars, he would tell them all he knew about the land; they came to no agreement at that time, but separated late at night; the next morning Black said he had concluded to make Tyler another offer for the land; he would give him one hundred dollars for a deed; I went to Doctor Tyler, told what Black had offered, and he came in and concluded to take it.

Fourth. To the fourth interrogatory he saith:—"The inquiries in the first part of this interrogatory were not made, if made at all, in my presence, but I inferred from their conversation that these questions had been settled before I came into the room; Black represented that the land was situated in a township, and gave the number of the township, but refused to name the county; when the deed was made, he directed me to insert a different number from that he had represented in the previous conversation; he either represented that the township in which the land was situated was thirty-one, and directed me to insert thirty-three in the deed, or represented thirty-three as the number of the township, and had thirty-one inserted in the deed, but which I cannot now recollect.

Fifth. To the fifth interrogatory he saith:—"That Black said the land was holden, if held at all, by virtue of a lottery ticket, the form of which he attempted to describe; it was made of pasteboard or thick paper, as I understood; he said he had lately seen one in the hands of a Mr. Webster, I think, but I am not certain about the name; Black said he had made many inquiries about the title to this land; he had been to Springfield, Mass., and other places, for this purpose, but could find no record of the title anywhere; and he did not suppose there was any deed of this land on record, but that the whole claim to it depended upon the lottery ticket, and that alone.

Sixth. To the sixth interrogatory he saith:—"When Tyler inquired how many acres Doctor Putnam owned, Black answered, about five hundred."

Seventh. To the seventh interrogatory he saith:—"Black said he had a claim on this land for the taxes he had paid on *239] *it; he said he had paid taxes on this land twenty-eight or twenty-nine years; think he said twenty-nine years; the amount I do not recollect, if he stated it; he said

Tyler must pay him the amount of these taxes, and twenty-five per cent. interest, at all events, before he could avail himself of any title to this land, and this he required in addition to the fifty dollars mentioned in my answer to the third interrogatory; he said he would have the land sold for taxes, and get a good title."

Eighth. To the eighth interrogatory he saith:—"I do not recollect that Black represented what was the value of this particular piece of land, but he said a part of the same tract had been sold for twelve and a half cents per acre, and was still undivided; so that if Tyler should ever be able to find and get possession of the land, he would find himself an owner in common with others, and it would become necessary for him to get a division before he could do anything with the land; he said a road had been, or would be, laid out through this township, which would much increase the taxes; he assigned as a reason why he wished to purchase the land, that another person had appeared and claimed a large part of it, and he thought it was best for him to be looking out for the remainder; and he had traced it back to Doctor Putnam, and had not found that he had parted with his title; till this claim was made to a part of the land, he had supposed he was in quiet possession, and the claimants were all dead.

Ninth. To the ninth interrogatory he saith:—"Black's first offer was fifty dollars, and he did not vary from this till the morning, when he offered one hundred dollars; whether he professed to be liberal or not I do not recollect, but said it was all he would give till the morning."

Tenth. To the tenth interrogatory he saith:—"Black said he could have had the land sold for taxes, and obtained a title that way; I asked him why he had not done so; he said he was afraid other speculators would come in and trouble him, or get the land; I think he mentioned Norcross."

Eleventh. To the eleventh interrogatory he saith:—"I made the deed for Tyler and his wife to sign; when I commenced writing the deed, Black took from his pocket a memorandum, and dictated to me a description of the land, and caused me to use words different from those I should have used; he then, for the first time, gave the name of the county in which the land is situated, and the number of the township, which was different from the number he had before given, as I have before stated in my answer to the fourth interrogatory; and he directed me to put in a much larger sum for the consideration in the deed than he gave Tyler, which I did."

*It appeared afterwards, in evidence, that the deed [*240

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from Parsons to Putnam was on record in the office for registering deeds for land in Hancock county, kept in the town of Ellsworth; and it also appeared that Black had no lien upon the land for taxes paid by him.

In December, 1846, Edward Putnam wrote to Tyler giving an account of Black's visit to him and his ineffectual efforts to purchase his share of the land.

In June, 1847, Tyler and wife filed their bill against Black in the Circuit Court of the United States for the District of Maine. It set out their title; averred their entire ignorance of it until informed by Black; charged that he had deceived them by false representations as to their title, and as to the character, quantity, and value of the land, and also by setting up false pretensions to a lien upon it held by him on account of his having paid the taxes. The bill further charged that the land was heavily covered with timber, which could easily be carried to market, and was worth twenty thousand dollars; and that confiding in the fraudulent representation of Black, they had been induced to sell it for the grossly inadequate consideration of one hundred dollars.

In October, 1849, Black filed his answer. He admitted the title of the complainants, his interview with them; their allegation to him of their ignorance respecting their title; his agency for lands in the neighborhood; but he denied ever having been upon that particular lot, or that he had caused an exploration of it to be made, or that he had any particular knowledge of it; denied that he had ever claimed to have a title or lien for taxes paid; averred that in 1844 or 1845, he accidentally learned that Tilden, (whom he had supposed to be the owner of the whole lot and for whom he had been the agent,) was the owner of only an undivided part, and that thereupon he had examined the records of the registry of deeds for Hancock county, for the purpose of ascertaining in whom the title was vested, but could find nothing there relative to it. That he then examined a plan-book, and there found the name of Zenos Parsons, Springfield, set down against this lot as the owner of it; that in the summer of 1846 he was informed by Tilden that said Parsons conveyed to one Dr. Putnam, of Charlestown, a part of this lot.

Both the bill and answer contained other particulars, which it is not necessary to mention. Much evidence was taken under commissions.

At September term, 1849, the cause came up for hearing upon the bill, answer, pleadings, and evidence, when the Circuit Court dismissed the bill, and the complainants appealed to this court.

In the argument of the cause here it was insisted by the *counsel for the defendant that this court had not [*241
jurisdiction, as it did not appear in the evidence that the value of the land in controversy was enough to justify the appeal. We think otherwise; one of the witnesses gives an exaggerated estimate, and others not enough to enable us to say what the value of the land is; but the exploration, made at the instance of the complainants, satisfies us that the land for its timber alone, if it had no other uses, is worth more than two thousand dollars.

If we look too at its value at the time when Black bargained for it, we think it must be admitted that the sum which he offered and which the complainants accepted upon his representations, was an inadequate price.

But the ground upon which we shall put this case is, that the defendant did not act fairly in the representations made by him to the complainants of the quantity and quality of the land, and in his statement to them that he had a claim upon the land for taxes, which was not true. The quantity of the land is larger than he said it was, and from his agency for the owner of a part of it for many years, and his knowledge how the title was acquired, he must have known what the grant called for. In representing it to be less, he could only have done so to diminish, in the view of the complainants, its value. The untruth in regard to his claim for taxes, without any thing else, is sufficient for us to cancel the deed for a fraudulent misrepresentation.

Stanwood's testimony has been given in detail, because it corresponds with the averments in the bill, and is confirmed in all essential particulars by the admissions of the defendant in his answer, especially in two, which we think decisive of the decree which ought to be made in this case. Those are the defendant's repeated misrepresentations, made at different times and to different persons, and to these complainants when he was bargaining with them for the land, as to the quantity, and his misstatements concerning the taxes paid upon it by his father and himself for many years, especially used by him to the complainant as an inducement for him to sell the land for the small sum which he offered for it.

It cannot be doubted that the defendant knew, when he went to Fairfield to buy this land, where he learned that the wife of this complainant was a daughter of Aaron Putnam, that he knew the latter's interest in the Parsons grant exceeded five hundred acres; indeed, that he positively knew it could not be short of twelve hundred acres. He stated, however, to Stanwood, that it did not exceed five hundred; to

Louisa Stanwood the same. When he went to Fairfield to buy the land, he said, in reply to Edward Putnam's inquiry as to
*242] the number of acres, *that he did not know any thing about the amount of the land, that he did not know the number of acres, and said there were four or five hundred acres. Soule, another witness, represents, that when questioned concerning the quantity, he answered that he did not know, that there was probably two or three hundred acres, and that the value was merely nominal. Phebe Hendrick says that Black said, that the number of acres might be two hundred and fifty, but could not exceed three hundred acres. Mrs. Soule says the same. These statements are so inconsistent with the narrative given by Black in his answer of his and his father's agency for many years, for Tilden, who was the owner of a part of the Parsons grant, for which, as the agent of Tilden they had paid the taxes for more than twenty-seven years, that it must be concluded he concealed and misrepresented the quantity to the complainants to induce them to sell. He states that he had learned, as early as February, 1846, that Tilden's interest in the land did not exceed seven hundred and seven acres. That Tilden afterwards told him, that Parsons had conveyed to Putnam a part of the lot, but denies that he had, prior to November, 1846, when he went to have the deed of the complainants to him recorded, any knowledge that Aaron Putnam was the owner of one thousand two hundred acres of the Parsons lot or grant. Now this last may very well be so; but whether he had that knowledge or not, he must have misrepresented as to the quantity of the land, when he so repeatedly undertook to speak of it as not being more than from three to five hundred acres. It is not the less a misrepresentation because he did not know how much Parsons had conveyed to Putnam. He undertook to speak of it as if he did, as an inducement to the complainant to sell to him, and in that way misled him to do so.

The defendant's answer in respect to the averment in the bill of his statement to them of the payment of taxes upon this land is evasive, and directly at variance with the proofs in the cause. He states that his father had been the agent for the owners of land in the township for more than thirty years, and that he had been his associate in such agencies since the year 1833, that it was a part of their agency to pay the taxes assessed on the land under their care; that the taxes on this township have, during all the time of their agency for Tilden, been paid by his father and himself as though the whole of said lottery lot had been the property of

Tilden, and that he did not know until recently that Tilden did not own the whole of it. And in what he means to be a direct denial of the plaintiffs' bill in this particular, he denies that he ever claimed any title to the land by virtue of a tax-sale and deed therefor, or that he had any lien on the same for taxes paid by himself, but that he told them that he might have *allowed the land to be sold for taxes, and that we, meaning his father and himself, had paid the taxes [*243 and ought to be reimbursed in the sums so paid, with such interest as the law allowed in cases where land was sold for taxes, which he believed to be twenty-five per cent., and that Tyler replied that was right, and that whoever owned the land ought to pay them.

The proofs in the cause of the use which he made of this payment of taxes is, that he represented to the complainant when bargaining for the land that he had a claim upon the land for the taxes he had paid for twenty-eight or twenty-nine years; that Tyler must pay him the amount of the taxes and twenty-five per cent. interest before he could avail himself of any title to the land, and this he required in addition to the fifty dollars which he asked, for the information he had concerning the land, for which he would tell them all he knew about the land. This is a part of Stanwood's evidence. Louisa Stanwood testifies, that the defendant said, that Tyler would have to pay the taxes at any rate before he could do any thing with the land, and he could go home and have the land sold for taxes and get a good title, and Tyler would never be the wiser for it. To Putnam he said the taxes he had paid on the land were two hundred dollars or over; that he claimed a lien upon the land on account of it. Albert G. Soule says, that Black stated, having ascertained that Edward F. Putnam and his wife were heirs to a quantity of land in Maine, which came by their grandfather Dr. Putnam, that he had come to get a conveyance of it; "that he had paid the taxes on the land for twenty-seven years, and he wanted either that they should convey to him their interest or refund the amount which he had paid for taxes. Being asked what the amount was, he replied he did not know, but thought two hundred dollars. He was asked for his account; he answered he had it not with him. Another witness, Phebe Hendrick, says, that Black said he had paid the taxes for a long time, amounting to about two hundred dollars. Mrs. Soule repeats the same.

We have then, from these witnesses, a confirmation of what was said by Black to these complainants when he was bargaining with them for their share of this land. His object

evidently was to induce them to take his small offer for the land in consideration of their obligation to repay him taxes, which there is no proof in the cause he ever paid.

In the two particulars stated, we think the entire proceedings of Black in this transaction were inconsistent with fair dealing, and that what was said by him both as respects the quantity of the land and the taxes he had paid upon it amount to a fraudulent misrepresentation, entitling the complainant to the relief of having the deed of conveyance to Black cancelled. We shall direct it to be done.

*244] *We shall direct the deed from the complainants to the defendant to be cancelled, and that the defendant reconvey to the complainants all the right, title, and interest acquired of him from them in said land. And we further direct that an account shall be taken in the court below of such profits as the defendant may have made from said land, and that he shall account for the same to the complainants, subject to a deduction therefrom of the sum of $100 paid by the defendant to the complainants as the consideration of their transfer to him of their interest in the land, if the said profits exceed the said $100, and if no profits have been made, then that the complainants repay to the defendant the aforesaid $100.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maine, and was argued by counsel. On 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 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.

JOHN CAMPBELL, WILLIAM ELLISON, GEORGE STEECE, AND HIRAM CAMPBELL, PLAINTIFFS IN ERROR, *v.* JOHN DOE, *ex dem.* THE TRUSTEES AND TREASURER OF ORIGINAL SURVEYED TOWNSHIP, NO. 1, IN RANGE NO. 19, &c.

On the 20th of May, 1826, Congress passed an act (4 Stat. at L., 179) giving school lands to such townships, in the various land districts of the United

States, as had not been before provided for, which were to be selected for such townships by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township was situated for which the selection was made.

The Secretary of the Treasury, through the Land-Office, directed the Registers to made selections and return lists thereof, to be submitted to him for his approbation.

Under this direction, the land in question was selected and reserved from sale.

Afterwards, the Register withdrew the selection, by authority of the Commissioner of the Land-Office, and permitted a person to enter and take it up, this person knowing the circumstances under which it had been reserved from sale.

Finally, the Secretary of the Treasury selected the land in question, under the authority given to him by the act of 1826.

This selection was good, and conferred a title, overruling the intermediate entry.[1]

THIS case was brought up from the Supreme Court of the *State of Ohio, by a writ of error, issued under the 25th section of the Judiciary Act. [*245

The facts are all stated in the opinion of the court.

It was argued by *Mr. Marsh*, for the plaintiffs in error, and *Mr. Vinton*, for the defendant in error.

Mr. Marsh, for the plaintiffs in error, contended that the entry of Hamilton was legal; that the reservation from sale had been withdrawn, and consequently the land was open; that, if the Secretary of the Treasury must be supposed to have sanctioned the first order, reserving the land for sale, so he must be supposed equally to have sanctioned the second order, authorizing the withdrawal of the reservation; that, if Hamilton's entry was legal, the subsequent selection of the same land by the Secretary was void, because the act of Congress only authorized him to select unappropriated land, and this was not so; that there was no fraud, or any mistake, on the part of the Register or of Hamilton.

Mr. Vinton, for the defendant in error, contended, —

1st. That the selection of the land in controversy, as school land, by the Secretary of the Treasury, on the 9th of January, 1834, vested the legal title thereof in the State

[1] For other decisions respecting school lands, their selection, location, &c., see *Vincennes University* v. *Indiana*, 14 How., 268; *Kissell* v. *St. Louis Public Schools*, 18 Id., 19; *Ham* v. *Missouri*, Id., 126; *Cooper* v. *Roberts*, Id., 173; s. c., 6 McLean, 93; *Springfield Township* v. *Quick*, 22 How., 56; *Minnesota* v. *Bachelder*, 1 Wall., 109; *Public Schools* v. *Walker*, 9 Id., 282; *Hastings* v. *Devlin*, 40 Cal., 358.

of Ohio. See act of the 20th of May, 1826, 4 Stat. at L., 179, and act of the 3d of March, 1803, 2 Stat. at L., 225.

2d. The prior sale to Hamilton and certificate of purchase cannot avail him, for several reasons:

1. Because the title thus vested in the State overreaches his certificate, and reaches back to the date of the original selection of the land for schools, and the report of it, as such, to the Commissioner of the General Land-Office. *Lessee of Hammond* v. *Warfield*, 2 Harr. & J. (Md.), 158; 17 Ohio, 287, 288.

It will be insisted that this consequence results from the fact, that the duty of making the selections conferred on the Secretary, as incident to its proper discharge, a discretion, to be exercised by him in a manner most beneficial to the objects of the grant, consistent with a due regard to the interests of the United States; and that, to exercise this discretion wisely and intelligibly, he must have at his command the means of ascertaining every fact necessary to a proper selection; such, for example, as the ascertainment of the quality of the land, which could only be done through subordinate agencies. And that, therefore, the selection of the land, under the circular of the 24th of May, 1826, and the report of it, by the

*246] Register, to the General *Land-Office, by direction of the Secretary, for his decision thereon, being necessary and proper preliminary steps towards carrying the act into execution, had the effect in law to sever the land, thus selected and reported, from the mass of the public lands, until his decision was had; and, when approved by him, the whole proceeding was in law one act, and constituted the selection by the Secretary required by the act of the 20th of May, 1826.

That the land was, from the commencement of the act of selection, severed from the mass of public lands. See *Wilcox* v. *Jackson*, 13 Pet., 513.

2. Because, whether the title of the State overreaches the sale to Hamilton or not, his purchase was void, for the reason that the land was at the time withheld from sale, and could not be entered by him.

In support of this position, it will be insisted that the selection and report of the land to the General Land-Office, being made by the direction of the Secretary, for his decision thereon, the question of its approval was in law pending before him, and under his consideration until his decision should be made; which pending consideration necessarily, for the time being, suspended the sale of the lands selected; and, whether this be so or not, the sale was expressly prohibited

by the circular of the 30th of August, 1832, until the Register should be officially advised of the approval or rejection of the selection by the Secretary.

It will be claimed, also, that the power of reservation from sale, in such case, is incident to the proper execution of the act of May 20, 1826, making the grant of these school lands, and is also incident to the general supervisory power of the Secretary over the public lands given by the act of the 25th of April, 1812, entitled "An act for the establishment of a General Land-Office in the Department of the Treasury," which act was at that time in force. 2 Stat. at L., 716.

It will also be further insisted that, though the selection of these school lands was specially intrusted to the Secretary of the Treasury, by the law granting them, and required his express approval, yet the circulars of the 24th of May, 1826, and the 30th of August, 1832, issued by the Commissioner of the General Land-Office, prescribing the mode of selection and withdrawing the selected lands from sale, will, in the absence of proof to the contrary, be presumed to have been issued under the direction and sanction of the Secretary. *Wilcox* v. *Jackson's Lessee*, 13 Pet., 512.

This, however, is not a conclusive presumption of law, but belongs to that class of presumptions which may be *rebutted by proof. 1 Greenl. Ev., §§ 33 and 34, page 42. [*247

And where the facts of a case are agreed, this court will apply and has applied to those facts the presumptions of law belonging to this class. *Doddridge* v. *Thompson*, 9 Wheat., 483; *Wilcox* v. *Jackson*, 13 Pet., 512, 513.

3d. The sale to Hamilton was void because the letter of the Commissioner of the General Land-Office of the date of the 19th of March, 1833, giving to the register permission to withdraw the selection and make another in its stead, was written without authority from the Secretary of the Treasury. That it was so, is shown by the facts that the said Commissioner subsequently recommended the approval of said selection to the Secretary, who, on appeal to him, confirmed it with a full knowledge of the sale to Hamilton, of said letter of the 19th of March, 1833, and of all the correspondence relating to the said tract of land existing at that date; which facts rebut the presumption that might otherwise arise that said letter was written by authority. 1 Greenl. Ev., §§ 33 and 34.

4th. Because, without the express permission of the Secretary, the Commissioner had no more authority to reject a selection duly made and reported, than he had to confirm it. 17 Ohio, 288.

5th. Because, if said letter of the 19th of March, 1833, were written by authority of the Secretary, the Register did not comply with its directions, inasmuch as he withdrew the selection theretofore made, and made no other in its stead, and thus, as far as in him lay, defeated the grant altogether.

Mr. Justice McLEAN delivered the opinion of the court.

This action of ejectment is here on a writ of error to the Supreme Court of Ohio, under the 25th section of the Judiciary Act. The plaintiffs in error claim title to a quarter section of land under an entry made with the Register of the Land-Office; the defendants claim the same as reserved for school purposes. As both parties claim under an act of Congress, either is entitled to a writ of error to have the judgment against the right asserted, revised in this court.

By the act of the 20th of May, 1826, Congress gave school lands to such townships and fractional townships in the land districts of the United States as had not been provided for, to be selected within such townships by the Secretary of the Treasury, out of any unappropriated public lands within the land district in which the township was situated. Under that act, fractional township No. 1, range No. 19, of the Chillicothe land district of Ohio, was entitled to 160 acres of land.

*248] *On the 24th of the same month the Treasury Department issued a circular, through the General Land-Office, to the Registers of the different land districts, directing them to make selections of the lands granted and return a list to the General Land-Office, for the approbation of the Secretary of the Treasury.

The Register of the Chillicothe land district caused to be selected the south-east quarter of section No. 15, township 2, range 18, the land now in controversy. A return of this selection was made to the General Land-office the 23d October, 1828. This return contained other tracts not made as required by the law, and consequently the list was returned to the Register for correction. The errors being corrected the list was again returned to the General Land-Office. But afterwards, in 1832, a circular from the Land-Office was directed to the Register, accompanied by a printed form and directions so that the returns of lands selected should be uniform. The tracts selected were required to be noted and reserved from sale. Where good land could not be procured in the township, the selection was authorized to be made in the nearest adjacent township which contained good land. The land above selected is not in township No. 1, range No.

19, nor in the next adjacent township; but in the nearest adjacent township in which good land could be procured.

In pursuance of the above instruction, the Register withheld the land from sale. On the 7th March, 1833, he informed the Commissioner that "some of the selections which he had reported were half quarter sections, and that others did not lie 'either in the township or in the nearest adjacent township where good land exists,' 'which are not in accordance with the general rules laid down in the Commissioner's last circular"; and he says, 'I have withheld from sale all the lands selected which were embraced in my two reports,' and he inquires whether the fact of his having reported them takes them out of the general rule prescribed for his government; and whether he should consider all the selections heretofore made, and have them made in exact conformity to the instructions."

In answer to the above the Commissioner says, "on the subject of the school lands, selected by you in 1831, I have to state that, as there has been no action of the department on these selections, you are at liberty to withdraw them and select other lands in their stead, in conformity to my circular of the 30th August, 1832."

Under this letter, it seems, the Register permitted Hamilton to enter the land in controversy; but no other school land was selected in lieu of it. On this entry being made the school *trustees of the township appealed to the Secretary of the Treasury, against the sale of the land, [*249 and claimed the original selection. And the same being laid before the Secretary, he sanctioned and confirmed the original selection. This was done the 9th January, 1834.

The decision of this case must depend upon the validity of Hamilton's entry. He had full notice that the quarter section had been selected for school purposes, and was reserved from sale. This information was given him by the Register on his first application to enter it. He then endeavored to purchase it from the trustees. The selection of that tract was made, at first, as the law required, though other tracts on the same list had not been so selected.

The entry by Hamilton may have been permitted by the Register, through inadvertence or mistake. This supposition is at least as probable, and indeed more so, than that he withdrew the selection and failed in his duty to select another tract in place of it. But, in whatever light this may be viewed, we are clear, that the Secretary of the Treasury had the power, under the act of Congress, to make the selection; and his decision, declaring the entry of Hamilton invalid,

was, under the circumstances, conclusive. This tract, selected by the Secretary under the act of 1826, "is held by the same tenure, as provided in the second section of that act, and upon the same terms for the support of schools, in such township, as section number sixteen is held." By the act of the 3d March, 1803, it is declared that lands appropriated for schools, shall be vested in the legislature of the State in trust, &c.; and in the same act section number sixteen, in each township, was designated for school purposes. If, therefore the quarter section in dispute was legally selected for school purposes, the legal title became vested in the Legislature of Ohio.

The general duties of the Commissioner of the General Land-Office are required to be performed "under the direction of the head of the Treasury Department." And where a duty is especially enjoined on the Secretary of the Treasury, although he may perform it through the Commissioner of the General Land-Office, who may well be presumed to act under his authority where the contrary does not appear; yet where the Secretary has interposed and decided the matter, as in the case under consideration, his decision must be considered as the only one under the law. So far then, as the sanction of the Secretary was given to the appropriation of the land in dispute, to school purposes, it must be considered as a valid appropriation.

This view imposes no hardship on Hamilton, as he had notice of the tract selected, and his repeated attempts to pur-
*250] chase the *same land cannot be favorably considered by the court. Under the circumstances, no right became vested in him, by reason of his entry of the land, which could be regarded or enforced by a court of equity. The judgment of the State court is, therefore, affirmed.

ORDER.

This cause came on to be heard on the transcript of the record, from the Supreme Court of the State of Ohio, 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.

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JOHN GLENN AND CHARLES M. THRUSTON, APPELLANTS, *v.* THE UNITED STATES.

In 1796, when Delassus was commandant of the port of New Madrid, he exercised the powers of sub-delegate, and had authority, under the instructions of the Governor-General of Louisiana, to make conditional grants of land.

He made a grant to Clamorgan, who stipulated, upon his part, that he would introduce a colony from Canada, for the purpose of cultivating hemp and making cordage.

This obligation he entirely failed to perform.

By the laws and ordinances of the Spanish colonial government, (which this court is bound, under the act of 1844, to adopt, as one of their rules of decision,) this condition had to be performed before Clamorgan could become possessed of a perfect title.

The difference between this case and that of Arredondo explained.

If the Spanish Governor would have refused to complete the title, this court, acting under the laws of Congress, must also decline to confirm it.[1]

After the cession of the province of Louisiana to the United States, Clamorgan could not legally have taken any steps to fulfil his condition. He was forbidden by law. By the treaty of cession, no particular time was allowed for grantees to complete their imperfect grants. It was left to the political department of the government, and Congress accordingly acted upon the subject.

The 3d day of March, 1804, was the time fixed by Congress, and the grant must now be judged of, as it stood upon that day.

THIS was an appeal from the District Court of the United States for the State of Arkansas.

Glenn and Thruston, the appellants, filed a petition in the District Court of Arkansas, on the 24th of January, 1846, in virtue of the act of 1824, as revived by the act of 1844, claiming confirmation of a concession of a large tract of country which lies partly in Arkansas and partly in Missouri, consisting of nearly half a million of acres of land and known as the Clamorgan grant.

*The circumstances of this grant are fully set forth in the opinion. [*251

The District Court decided against the claim and the petitioners appealed to this court.

It was argued by *Mr. Webster* and *Mr. Johnson*, for the appellants, and *Mr. Crittenden*, (Attorney-General,) for the United States. The points made by the counsel respectively were the following.

For the appellants:

1st. Because if the concession was upon conditions, they were conditions subsequent to the vesting of the estate in the

[1] DISTINGUISHED. *Freemont* v. Id., 569). FOLLOWED. *De Villemont* v. *United States*, 17 How., 556 (but see *United States*, *post*, *261.

grantee, and could only be taken advantage of by some proceeding for that purpose instituted by Spain, or by France, or by the United States claiming under Spain, and no such proceedings have been instituted. 3 Am. St. Papers, 270; 5 Id., 704.

2d. Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the grantee, the estate vested without such performance because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession. *The United States* v. *Arredondo et al.*, 6 Pet., 706; *Soulard et al.* v. *The United States*, 4 Pet., 511; *Delassus* v. *The United States*, 9 Pet., 117; *The United States* v. *Percheman*, 7 Pet., 51; *Strother* v. *Lucas*, 12 Pet., 410; *The United States* v. *Forbes*, 15 Pet., 173; *The United States* v. *King*, 3 How., 773; *Chouteau* v. *Eckhart*, 2 How., 344; *The United States* v. *Lawton et al.*, 5 How., 10; *Hughes et al.* v. *Edwards et al.*, 9 Wheat., 489; 2 Black., 157; 2 Thomas's Coke, 18.

3d. Because there was a sufficient survey of the grant; and

4th. Because no such survey was necessary, the calls of the grant being sufficiently certain of themselves to separate the land granted from the rest of the royal domain.

5th. That the District Court had jurisdiction over the claim. Act of 26 May, 1824, c. 173, 4 Stat. at L., 52; act of 9 July, 1832, c. 180, 4 Stat. at L., 565; act of 17 June, 1844, c. 95, 5 Stat. at L., 676.

6th. That the decision of the District Court of Missouri was no bar to this suit.

Mr. Crittenden, for the United States.

I. That the claim is barred under both the act of 1824 and 1832.

*252] *II. That Delassus had no authority to make such a concession, and the burden of proof is on the claimants to show that he had such authority.

III. That the concession could not have been perfected into a complete title, from the political considerations mentioned.

IV. That the conditions of the concession were never performed during the sovereignty of Spain over the country, or since, and that Clamorgan must be considered as having abandoned the claim.

V. That the cession of Louisiana to the United States did

not make the concession absolute, without the performance of the conditions.

VI. That the survey of 1806 was void for want of authority to make it.

VII. That the concession is void for uncertainty in the description of the land intended to be conceded.

That Clamorgan lost all claim to have the concession perfected into a complete title, even if it had been in all other respects unobjectionable, by his failure to comply with the requisitions of the 23d article of Morales' regulations of 1799, to make known his incomplete title within the six months limited by that article. Read the 23d article in connection with the four preceding articles. 2 White's Recop., 240.

Mr. Justice CATRON delivered the opinion of the court.

In August, 1796, James Clamorgan petitioned Colonel Delassus, then acting as commandant of the post and dependency of New Madrid, for a grant of land fronting on the Mississippi River, for many miles, and running back to the western branches of White River, including a section of country equal in area to 536,904 arpens, as was afterwards ascertained by measurement. To obtain title and possession of this large quantity of land, Clamorgan represented, that he was a merchant residing in St. Louis; that he had been strongly encouraged by the Governor-General of the Province of Louisiana, to establish a manufactory of cordage, fit and proper for the use of his Spanish Majesty's vessels, and especially for the necessities of the Havana, to which place his Excellency desired the petitioner to export the cordage, under his, the Governor-General's protection; of which facts the commandant was advised, so that he might exercise his power to favor an enterprise likely to become very important to the prosperity of the dependency, and very lucrative to all the inhabitants of Upper Louisiana. Furthermore, that the petitioner, Clamorgan, was then connected in correspondence and interest with a powerful house in Canada, which might procure for him a sufficient number of cultivators to teach in that region *the manner of cultivating hemp, [*253
and fabricating it into various kinds of cordage, in the most perfect manner, so as thereby to respond to the views of the General Government; which desired the prosecution of this enterprise by all proper and honest means that possibly could be used, in order to exempt His Majesty from drawing in future from foreigners this article so important for the equipment of his vessels.

Clamorgan further stated, that "it is with this hope that

the petitioner has actively made the most pressing demands to obtain from his correspondents in Montreal a considerable number of people proper for this culture, who must of necessity by inducement be attracted hither, although at this moment the political circumstances of Canada appear to oppose it; but in more favorable times hereafter this object may undoubtedly be obtained. Notwithstanding which, the petitioner is obliged to assure himself, in advance, from you, Monsieur, a title which may guarantee to him the propretorship of a quantity of arable land, proportioned to his views, in order to form an extensive establishment, as soon as the time shall appear favorable to his enterprise, and as soon as his correspondents shall be able, without compromitting their sense of duty, to cause to emigrate to this country the number of people necessary to give birth to this culture, so much desired by the government."

"Considering, Monsieur, this exposition of the petitioner, and the particular recommendations of His Excellency the Governor-General of the province, the petitioner hopes that you will be pleased to grant him the quantity of land which he desires to obtain, as well in order to favor him, the execution of all which may contribute to the future success of his project, as to furnish him the means of attracting hereafter from a foreign country an emigration of cultivators, which may not, perhaps, be obtained until after a considerable lapse of time, and upon promises of rewards, which the petitioner will be obliged to fulfil in their favor."

The land solicited is then described; and the petitioner proceeds to set forth the title he desires: "To the end that as soon as it may be in the power of the petitioner, he may be able to establish and select, in the tract of land so demanded, those portions which shall be best fitted to improve for the culture of hemp; because, inasmuch as a great tract of said lands is now drowned in swamps and unimprovable lowland, making it impossible to fix establishments in its whole extent; all to be done that the petitioner may enjoy the land, and dispose of it always as a property belonging to him, his heirs or assigns; and also may distribute them, or part of them, if he think fit, in favor of such person or per-
*254] sons as he may judge proper, to attain, as far *as on him depends, the accomplishment of his project; and the petitioner will never cease to return thanks for your favors."

To this demand of Clamorgan, the commandant responded, and proceeded to grant as follows: "Since, by the exposition contained in this petition, the means of the petitioner are

apparent to me, and his new connection with the house of Todd, which will be able to facilitate to him the accomplishment of the enterprise proposed, the profit whereof, if it succeed, will redound in part to the advantage of this remote country, miserable on account of its small actual population; and I giving particular attention to the recommendations which Señor the Baron de Carondelet, Governor-General of these provinces, has communicated to me, when he thought fit to appoint me commandant of this post and its dependencies, 'to seek by all means the mode of increasing the population, and of encouraging agriculture in all its branches, and particularly the cultivation of hemp,' it appearing to me that the propositions which the petitioner makes are conducive to the attainment of this last recommendation. In virtue of this, I concede to him, for him and his heirs, the tract of land which he solicits, in the place and with the same boundaries that he prays for, provided there is injury to no one; and so that the same may be established, he shall cause a survey to be made, not obliging him to accomplish this immediately, as from the excessive extent of space, it would cause him great expense, if it were done before the arrival of the families, which he is bound to cause to come from Canada, but so that on their arrival, and being put in possession, it shall be his duty to secure his property, by means of exercising the power of survey, in order afterwards that he may make application to the Governor-General, to obtain his approval with the title in form of this his concession."

By various conveyances, the foregoing claim was vested in Glenn and Thruston, who filed their petition in the District Court of Arkansas, seeking to have it confirmed according to the act of 1844. They set forth Clamorgan's application; the commandant's decree thereon, and the mesne conveyances.

The Attorney of the United States answered, and, among other grounds of defence set up, alleged, that he was wholly uninformed as to the several statements and allegations contained in the petition; that he denied the said statements and allegations, and required full proof thereof; as well as of all other matters and things necessary or material, to establish the validity of the claim of said James Clamorgan.

On these issues the parties went to trial.

The petitioners established by proof that Clamorgan's application, and the Governor's decree thereon, were genuine; and *also proved a due execution of the several conveyances vesting title in Glenn and Thruston. No other [*255
evidence was introduced by either side. The District Court

dismissed the petition; and from that decree an appeal was prosecuted to this court.

No controversy has been raised drawing in question the validity of the mesne conveyances; nor do we suppose there is any difficulty in locating the lands demanded in Clamorgan's petition: *Primâ facie,* its locality is sufficiently described to authorize a survey thereof according to Spanish usages.

As regards the commandant's power to make the concession to Clamorgan there is more difficulty. In 1796, when Delassus was commandant at the post of New Madrid, he also acted as sub-delegate and exercised the faculty of granting concessions for, and ordering surveys of land. In the exercise of his functions he was directly subordinate to the Governor-General at New Orleans; and acted according to his instructions. Nor was he in any degree dependent on the Lieutenant-Governor of Upper Louisiana, residing at St. Louis; as appears by a letter of August 26, 1799, from Morales to Delassus, reciting the facts. The letter is found in document 12, of Senate Documents, 2d Session, 21st Congress, p. 29, and filed as evidence by Judge Peck, preparatory to his trial before the Senate of the United States.

In a deposition of Delassus, forming part of the documents filed before the Board of Commissioners for Missouri, in 1833, and afterwards returned by them for the consideration of Congress, Delassus states the fact that he, as commandant at New Madrid, exercised the powers of sub-delegate. Doc. No. 59, p. 17, H. Repts., 1st Session, 24th Congress.

This commandant's powers were therefore coextensive with those of the Lieutenant-Governor at St. Louis, in distributing the public domain. Having acted under the Governor-General, to whose orders and instructions the commandant was bound to conform, it becomes necessary to ascertain what these instructions were in the present instance; and taking the facts stated in Clamorgan's memorial, and in Delassus's decree thereon, to be true, (as we are compelled to do,) it is sufficiently manifest, as we think, that the commandant did stipulate with Clamorgan, in accordance with the Governor-General's instructions. That the Governor-General had power thus to contract was held by this court, when the agreements of Maison Rouge, and Bastrop, were before it for adjudication; and having done the same through his deputy in this instance, the acts of that deputy cannot be called in question, on the assumption that he exceeded his powers.

*256] In the document No. 59, above referred to, Delassus states *what his practice was, in giving out conces-

sions. He kept no books in which the fact was recorded; all he did was to indorse his decree on the petition, and return it to the party demanding the land; and the party might hand it to the surveyor, or retain it at his option. That he, Delassus, believed the surveyor made a note of the concession of record; but whether before or after the survey was made, he knew not, as that matter did not concern the deponent. That no time was limited within which the party was bound to survey.

Thus it appears that Clamorgan got the paper title relied on, in the ordinary form, and which he retained in his own hands until after Upper Louisiana was delivered to the United States in March, 1804. No possession was taken of the land, or any part of it; nor was it surveyed during the time Spain governed the country; nor has any claimant under Clamorgan ever had possession, so far as this record shows.

The surveys produced to us are private ones, and of no value in support of the claim. And this brings us to a consideration of the mere title paper, standing alone. On its true meaning this controversy depends.

1. The petition of Clamorgan, and Delassus's decree on it, must be construed together; there being a proposition to do certain acts on the one side, and an acceptance on the other, limited by several restrictions.

2. What is stated in either paper as to facts, or intent, must be taken as true.

Such are the rules laid down in *Boisdoré's case*, 11 How., 87, and which apply here.

The country was vacant, and greatly needed population; which could only be drawn from abroad; and this population Clamorgan stipulated that he would supply, and establish a colony from Canada on the land. That he would introduce cultivators of hemp and artisans skilled in the manufacture of cordage; and would grow hemp and make cordage, to an extent so large as to be of national consequence.

On the faith of these promises the grant was made. As already stated, no step was taken by Clamorgan to perform the contract; all that he did was a presentation of his petition, and the obtaining of Delassus's approval and decree on it. This paper he retained about thirteen years, when it was assigned to Pierre Choteau, May 2d, 1809, by a deed of conveyance for the land claimed. In view of these facts, several legal considerations arise.

It was held in *Arredondo's case*, 6 Pet., 711, that, by consenting to be sued, the United States had submitted to judicial action, and considered the suit as of a purely judicial

*257] character *which the courts were bound to decide as between man and man litigating the same subject-matter; and that, in thus deciding the courts were restricted within the limits, and governed by the rules Congress had prescribed. The principal rules applicable here, are, that in settling the question of validity of title, we are required, by the act of 1824, to proceed in conformity with the principles of justice; according to the law of nations; the stipulations of the treaty by which the country was acquired, and the proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which the claim is alleged to have been derived.

When deciding according to the law of nations, and the stipulations of the treaty, we are bound to hold, that such title as Clamorgan had by his concession, or first decree, stood secured to him as private property; and that the claim being assignable, the complainants represent Clamorgan. And this brings us to the question as to what right was acquired by the concession, according to the laws and ordinances of the Spanish Colonial Government, existing and in force, when the grant was made. By these, the commandant Delassus had authority to contract, and give concessions, and make orders of survey, by first decrees, either with or without conditions; as this court held in the case of *Soulard* v. *The United States*, 10 Pet., 144; provided, the concession was founded on a consideration *primâ facie* good; either past, when the concession was made, or to follow in future. Here, the consideration was to arise, by future performance, on the part of the grantee. But, it is insisted that forasmuch as a title vested in Clamorgan by the grant to him, even admitting that it was incumbered with conditions, still, as their performance was to happen subsequent to the vesting of the estate, the want of performance could only be taken advantage of by a proceeding instituted by government for that especial purpose; nor could want of performance be set up as a defence, in this suit.

If the premises assumed were true, the conclusion would necessarily follow; and Arredondo's case is relied on in support of this position, and as governing the present case. That proceeding was founded on a perfect title, having every sanction the Spanish government could confer. It was brought before the courts according to the 6th section of the act of May 23, 1828, which embraced perfect titles, and was only applicable to suits in Florida.

The subsequent condition there relied on to annul the grant, was rendered immaterial, and perhaps impossible, by the grantor himself, as this court held; and the grantee discharged

from its performance. But in Clamorgan's case, the conditions to occupy *and cultivate were precedent conditions; they addressed themselves to the Governor- [*258
General, and their performance was required in advance. Before any right existed in Clamorgan to apply for a complete title, or even to have a public survey, preparatory to such application, he was bound by his contract to establish his colony on the land; and furthermore, to set up his manufactory to make cordage, and to supply it with hemp grown on the land, unless these conditions were waived on the part of the Spanish government. And as we are called on by the complainants to adjudge the validity of this claim, and to order that a patent shall issue for the land, in the name of the United States, it necessarily follows, the same duty is imposed on us that would have devolved on the Governor-General, had the Spanish government continued in Louisiana.

By the Spanish regulations, Clamorgan was not recognized as owner of a legal title without the further act of the King's deputy, the Governor-General; or the Intendant-General, after the power to make perfect grants was conferred on him. Until this was done, the legal title remained in the crown; and the same rule has been applied in this country; no standing can be allowed to imperfect and unrecognized claims in the ordinary judicial tribunals, until confirmed either by Congress directly, or by a special tribunal constituted by Congress for that purpose.

For our opinion more at large on this subject, we refer to the case of *Menard* v. *Massey*, 8 How., 305, 306, 307.

As we are asked to decree the final title, and bound to do so, in like manner that the Spanish Governor-General or Intendant was bound, it follows we may refuse, for the same legal reasons, that they could refuse. And the question presented is, whether we are bound to refuse, according to the face of the contract sued on, and in conformity to our previous decisions in other cases, defending on similar principles?

Very many applications made for perfect titles to the District Courts, under the act of 1824, have been resisted, because subsequent conditions had not been complied with: First, such as mill grants in Florida, where the usual quantity of 16,000 acres was given by concession, with a condition that the mill should be built within a specified time: Second, where grants were made for the purpose of cultivation, and no cultivation followed, as in the case of Wiggins (14 Pet.), and of Boisdoré (11 How.): Third, where, by the concession, parties were required by special regulations to levee and ditch

on the river's front in Lower Louisiana. These were subsequent conditions, just as much as the introduction of a colony of hemp-growers, and the manufacture of cordage, by Clamorgan; and yet, no one has ever successfully maintained that *259] a party having such concession, could *hold the land and obtain a perfect title, although he did not build the mill, nor occupy and cultivate, nor levee and ditch, founded on the assumption that performance was unnecessary. In all these cases it was held that performance was a condition precedent and the real equity, on which a favorable decree for a patent could be founded, under the act of 1824.

If Clamorgan's concession carries with it conditions, similar in principle, it must abide by this settled rule of decision. This depends on the true meaning of his contract with the Spanish authorities. He agreed to establish a colony by introducing a foreign population, and to grow hemp and manufacture cordage, to an amount so large as to make it a national object. By these promises he obtained a concession for more than half a million of arpens of land. A promise of performance was the sole ground on which the Spanish commandant made the concession; and actual performance was to be the consideration on which a complete title could issue.

So far from complying, Clamorgan never took a single step, after the agreement was made; and in 1809 sold out his claim on speculation, for the paltry sum of fifteen hundred dollars. Under these circumstances we are called on to decide in his favor, according to the principles of justice: this being the rule prescribed to us by the act of 1824, and the Spanish regulations. To hold that an individual should have decreed to him, or to his assignees, a domain of land more than equal to seven hundred square miles, for no better reason than that he had the ingenuity to induce a Spanish commandant to grant the concession, founded on extravagant promises, not one of which was ever complied with, would shock all sense of justice. And such decision would be equally contrary to the policy pursued by Spain, which was, to make grants for the purposes of settlement and inhabitation, and not to the end of mere speculation. We so held in *Boisdore's case* (11 How., 96), and the principle applies even more strongly in this case than it did in that; as there, something was done towards compliance; and here, nothing has been attempted.

The remaining ground on which the complainants demand a confirmation is the following: "Because if the concession was upon conditions which should have been complied with in order to vest the estate as against Spain, whilst the conditions were practicable and might have been performed by the

grantee, the estate vested without such performance, because the province was ceded by Spain before the time for performance had expired, and because of the change of government, manners, &c., consequent on that cession.

That Clamorgan could take no step after the change of government, is not open to controversy.

*By the 14th section of the act of March 28, 1804, which established the Territories of Orleans and Louisiana, Clamorgan was prevented from doing any further act in support of his title, had he been disposed so to do. He was positively prohibited from making settlements on the land, or making a survey of it, under the penalty of fine and imprisonment. But no advantage resulted from this provision to claimants whose concessions carried with them conditions that had not then been complied with. [*260

The 1st section of the act of 1824, in conformity to which we are now exercising jurisdiction, limits the courts, as to the validity of title and standing of the various claims, to the condition they held before the tenth of March, 1804.

By the 3d article of the treaty of cession by which Louisiana was acquired, it was stipulated that the inhabitants of the ceded country should be admitted as soon as possible, and become citizens of the United States, and be maintained in the free enjoyment of their property in the mean time. But no time was provided by the treaty within which conditions appertaining to imperfect grants of land might be performed; this was left to the justice and discretion of our government; and in a due exercise of that discretion, the acts of 1804 and 1824 were passed; and to these acts of Congress, the 2d section of the act of 1824 commands us to conform.

The treaty addressed itself to the political department; and up to the passing of the act of 1824, that department alone had power to perfect titles, and administer equities to claimants. And when judicial cognizance was conferred on the courts of justice to determine questions of title between the government and individuals, the limits of that jurisdiction were prescribed, to wit: that no act done by the Spanish authorities, or by an individual claimant, after the 3d day of March, 1804, should have any effect on the title; but that its validity should be determined according to its condition at that date.

All claims lying within the territory acquired by the treaty of 1803, which have been brought before the courts, according to the acts of 1824 and 1844, have been compelled to abide by this test; great numbers have been rejected, because the conditions of occupation and cultivation had not been

complied with before the restraining act of 1804 was passed, or before the 10th day of March, 1804. Nor have the claimants under Clamorgan more right to complain than others; his neglect extended through nearly eight years, during the existence of the Spanish government; whereas many similar claims have been rejected, where the neglect was not half so long.

If Clamorgan could come forward because of the prohibition, and be heard to excuse himself from performing the *261] onerous *conditions his contract imposed, so could every other claimant who had neither taken possession, nor in any manner complied with his contract, do the same; and on this assumption, concessions issued by France or Spain would be without condition, and a simple grant of the land described in the paper. Its genuineness, and proof of identity of the land, would settle the question of title.

No tribunal has ever accorded any credence to this claim; two boards of commissioners have pronounced it invalid: the first in 1811, and the second in 1835. The latter on the ground that the conditions of the grant had not been complied with. By this decision it fell into the mass of public lands, according to the 3d section of the act of July 9, 1832, which declares that the lands contained in the second class (being those rejected) shall be subject to sale as other public lands. By the act of 17th June, 1844, another opportunity was afforded to apply to the District Court for a confirmation; that court agreed with the boards of commissioners, and again declared the claim invalid, because the conditions had not been complied with, and dismissed the petition; and with this decree we concur.

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 Arkansas, 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 District Court in this cause be, and the same is hereby, affirmed.

THE HEIRS OF DON CARLOS DE VILEMONT, APPELLANTS, *v.* THE UNITED STATES.

In 1795, Baron de Carondelet, the Governor-General of Louisiana, made a grant of land on the Mississippi River, upon condition that a road and clear-

ing should be made within one year, and an establishment made upon the land within three years.

Neither of these conditions was complied with, nor was possession taken under the grant until after the cession of the country to the United States.

The excuses for these omissions, namely, that the grantee was commandant at the post of Arkansas, and that the Indians were hostile, are not satisfactory; because the grantee must have known these circumstances when he obtained the grant.

According to the principles established in the preceding case of *Glenn and Thruston* v. *The United States*, the Spanish authorities would not have confirmed this grant, neither can this court confirm it.

Moreover, in this case, the land claimed cannot be located by a survey.[1]

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

*It was a petition filed by the heirs of Don Carlos de Vilemont, under the act of 1824, as revived by the act of 1844, praying the confirmation of a grant of land issued by the Baron de Carondelet in 1795. [*262

The circumstances attending the grant are set forth in the opinion of the court.

The District Court decided against the claim and the petitioners appealed to this court.

In the District Court, Horace F. Walworth, Mary B. Miles, and James B. Miles, were made defendants with the United States.

It was argued in this court by *Mr. Taylor*, for the appellants, and *Mr. Lawrence* and *Mr. Crittenden*, (Attorney-General,) for the appellees. A brief was also filed by *Mr. Pike* for Mr. Walworth.

Mr. Taylor, for the appellants, thus noticed the omission of Vilemont to comply with the conditions of the grant. (It will be seen, by referring to the opinion of the court, that this was an important point in the case.)

The confirmation of the claim is resisted in the answer of the District Attorney, on the ground that the conditions of the grant were not complied with. The conditions, as has already been stated, were those almost invariably inserted in orders of survey, that a road and a settlement should be made within a given day. The record contains the testimony of two aged inhabitants of Louisiana, who, as officers in the same regiment in which Vilemont served many years, were attached to the person of the Governor, and one of whom was employed in the Land-Office in New Orleans, showing

[1] DISTINGUISHED. *Freemont* v. *United States*, 17 How., 556 (but see Id., 569). FOLLOWED. *Ledoux* v. *Black*, 18 How., 475.

that these conditions were mere matters of form and mechanically inserted with the orders of survey, without inquiring into the situation of the land. They add that they never were enforced, and that no land was ever forfeited under the Spanish government on account of a non-compliance with these conditions. This testimony is emphatically confirmed by Judge Simon, for many years a practising lawyer in Louisiana, and during six years a judge of the Supreme Court of that State, before whose eyes probably thousands of such claims have passed.

In this instance the land was asked for to establish a stock farm. What necessity was there to cultivate it, if such was the purpose of the grant? And how much of the two leagues front and one in depth should have been cultivated and established? The land was twenty-five leagues below the mouth of the Arkansas, and more than that distance from
*263] any white *settlement. What use would there have been for a road, and where would it have been?

But if these conditions, in such a case, were more than an idle formality, Vilemont would have been relieved from a compliance with them. In 1795, when the grant was made, and until 1802, Vilemont was the civil and military commandant of the post of Arkansas. During all this period he never left his post, not even to visit New Orleans. His presence there was constantly required by the threatening aspect of the Indian tribes by whom he was surrounded, while the garrison of the fort never exceeded forty men. Eight letters from Governor Carondelet to Vilemont, (which will be found on pp. 72–76 of the printed and Vilemont's official correspondence with the Governor of Louisiana, until his appointment to a higher office, in 1802,) furnish a striking proof of the arduous service in which he was engaged, and of ceaseless feuds among the Indians, and attacks upon the whites, and leave no doubt that even a temporary absence from the command would not have been tolerated by the Governor. Can it be pretended that, under these circumstances, the government seriously, and under pain of forfeiture, expected him to make a road within one year, and a settlement within three years, upon this rude and remote spot? The government kept him until 1802 at the post of Arkansas; the government then removed him to a new scene of service, and this, if any case, falls under the rule established in the *United States* v. *Arredondo et al.*, 6 Pet., 745. "It is an acknowledged fact that if a grant is made on a condition subsequent, and its performance becomes impossible by the act of the grantor, the grant becomes single."

The other reason why a settlement could not be required of Vilemont is, that hostile Indians made it impossible. Vilemont was not bound, though he might have attempted, to form a settlement by agents. Indeed, already, in 1795 or 1796, he sent Bogy there with that object, but Bogy was driven off by the Indians. Nor did the danger from the Indians cease until a number of years after the change of government.

Mr. Crittenden, for the United States, made the following points:

I. That the appeal ought to be dismissed for want of being duly prosecuted.

II. That the appellant's ancestor was never put in possession of the lands, and the conditions on which the concession was made were not performed during the time therein limited, or during the sovereignty of Spain over the country, or subsequently.

*There is no evidence whatever that the Surveyor-General, or a deputy approved by him, ever put Vilemont into possession of the lands as required by the terms of the concession. No survey was ever made, and no plat and certificate were ever reported to the governor, and no title in form could therefore have been issued to Vilemont at any time during the continuance of the Spanish power. [*264

The petition of de Vilemont sets forth his desire to establish a plantation and stock farm, in order to supply the post, of which he was commandant, with cattle. This is the inducement he presents to de Carondelet to make the concession. It was accordingly made to him under the express condition that he shall make the regular road and clearing within the peremptory* term of one year, the concession to be null, if, at the precise expiration of three years, the land should not be established.

From the date of the grant, in 1795, until the delivery of Louisiana to the United States, in 1803, he had completely failed to comply with the conditions above mentioned, and thereby forfeited all right to require a title in form. He had done nothing whatever. This, therefore, is not such a concession as might have been perfected into a complete title had not the sovereignty of the country been transferred to the United States.

But to examine the evidence on the point of non-performance of the conditions presented in the record:

* The Spanish word is printed *percutorio;* it should have been *peremptorio.* All the translators agree in translating peremptorio.

The appellants themselves state, in their petition, that De Vilemont "endeavored, soon after the date of said concession, to procure persons to make a settlement, but could not succeed" on account of the danger arising from hostile Indians. It further states, "that in the year 1803 he again attempted a settlement, but that, from the year 1807," he, or persons employed by him or his family, had been in actual possession of part of the land.

The above is the petitioners' own statement. In 1813, in De Vilemont's lifetime, when he presented his claim to the recorder of land titles, he did not submit a particle of proof to show that he had done any thing with respect to establishing the stock farm, making the road, or settling the land. Joseph Bogy, his father-in-law, then testified that he, De Vilemont, proposed to witness to settle on the tract, but that he declined on account of the supposed danger from the Indians, which continued until 1803. Francis de Vaugene also then testified that the Indians continued so hostile as to make it unsafe to settle at Isle Chicot till the year 1803.

*265] *It will thus be seen that De Vilemont made no pretence then, or offered no proof to show, that he had fulfilled any of the conditions, but he sets up an excuse merely for not having done so. The recorder, under the column titled "possession, inhabitation, or cultivation," states, "danger from the Indians prevented settlement," and gives his opinion that the claim ought not to be confirmed, the conditions not having been complied with.

Mr. Crittenden then examined the evidence.

But it is said that De Vilemont could not leave his post to attend to the performance of the conditions, that he was prevented from performance by danger from the Indians, and that the conditions were merely formal.

The answers to the first of these excuses are obvious. De Vilemont styles himself, in the petition to Baron de Carondelet, the commandant of the post of Arkansas, and asks for the land at the place it is given, the inducement being, that he might furnish cattle to the post. It would be strange if, under these circumstances, his not being allowed to leave the post should excuse the performance of the conditions. As to being prevented from establishing the stock farm, and performing the other conditions, by danger from the Indians, he knew that the Indians were in the country at the time he made the application; and if he sought for a concession, the conditions of which he could not comply with, it can afford no exemption from their performance. As to the allegation that the conditions were merely formal, it is negatived by the

third article of O'Reilly's regulation, where the non-performance of the conditions as to roads, settlements, &c., is thus spoken of: "And in default of fulfilling these conditions, their land shall revert to the king's domain, and be granted anew." 2 White's Recop., 228. These regulations were approved by the king. See letter of Marquis de Grimaldi to Unzaga, 24th August, 1770, Id., 460. See also the third, fourth, fifth, and sixth articles of regulations of Morales, Id., 235.

III. That the evidence in the case shows that De Vilemont had abandoned his claim to the land.

IV. That the concession is void, because no land was severed from the public domain by survey giving it a certain location, previous to the treaty of cession, and the description is so vague, indefinite, and uncertain, that no location can be given to the lands. *United States* v. *Miranda*, 16 Pet., 156; *United States* v. *Boisdoré*, 11 How., 63.

V. That the decree as to floats is void, the individuals holding the lands in respect of which floats are decreed, not having been made parties in the case.

*Mr. Justice CATRON delivered the opinion of the court. [*266

The heirs of Don Carlos de Vilemont filed their petition in the District Court of Arkansas, to have a confirmation of a grant for two leagues of land front, by one league in depth, lying on the right descending bank of the Mississippi, at a place called the Island del Chicot, distant twenty-five leagues below the mouth of the Arkansas River; the cypress swamp of the island being called for as the upper boundary of said tract.

The Governor-General granted the land on the express conditions, "that a road and regular clearing be made in the peremptory space of one year; and this concession to be null, if, at the expiration of three years' time, the said land shall not be established; and, during which time it cannot be alienated; under which conditions the plat and certificate of survey shall be made out and remitted to me in order to provide the interested with the corresponding title in form." The concession was made June 17, 1795. No possession was taken of the land by De Vilemont, nor any survey made or demanded, during the existence of the Spanish government. The petition alleges that possession was first taken in 1807; and as an excuse for the delay, it is stated, that the grantee was commandant at the post of Arkansas up to the end of the year 1802, and confined to his official duties there; and, 2dly, that so hostile were the Indians in the neighbourhood of the

land, that no settlement could be made on it. The proof shows that De Vilemont first took possession in 1822 or 1823. The 2d regulation of O'Reilly of 1770, required that roads should be made and kept in repair, in case of grants fronting on the Mississippi River; and that grantees should be bound within the term of three years to clear the whole front of their lands to the depth of two arpens; and, in default of fulfilling these conditions, the land claimed should revert to the king's domain; nor should proprietors alienate until after three years' possession was held, and until the conditions were entirely fulfilled. In this instance the time was restricted to one year for making the improvements required by the regulations, and three years were allowed for making an establishment on the premises. In this case where a front of six miles was granted, a clearing to the whole extent was of course not contemplated; yet to a reasonable extent it certainly was; but it was undoubtedly necessary, that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations.

The act of March 26, 1804, prohibited any subsequent entry on the land; and declared void all future acts done to the end of obtaining a perfect title even by an actual settler, if the settlement was not made before the 20th of December, 1803; *De Vilemont's title must therefore abide by its condition when the act of 1804 was passed. For further views on this subject we refer to our opinion expressed on Clamorgan's title, at the present term, in the case of *Glenn and Thruston* v. *The United States.*

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We are asked to decree a title, and to award a patent, on the same grounds that the Governor-General of Louisiana, or the Intendant, would have been bound to do, had application for a perfect title been made during the existence of the Spanish colonial government. The only consideration on which such title could have been founded, was inhabitation and cultivation, either by De Vilemont himself, or his tenants; and having done nothing of the kind, he had no right to a title; nor can an excuse be heard that hostility from Indians prevented a compliance with the conditions imposed, as Vilemont took his concession subject to this risk;[1] and the alleged excuse that he was commandant of the post of Arkansas, and bound to be constantly there in the performance of his official duties, is still more idle, as he held this

[1] QUOTED. *United States* v. *Noe*, 23 How., 317.

office when the concession was made, and knew what his duties were.

The petition was dismissed by the District Court, because the land claimed could not be located by survey. The concession is for two leagues front, by one in depth, with parallel boundaries, situate at Chicot Island; the cypress swamp on the island being the upper boundary. Chicot Island is represented in the concession as being twenty-five leagues below the mouth of the Arkansas River. The land now claimed by the petition is represented to lie five leagues below the mouth of that river, at a place known as Chicot Point; being a peninsula included in a sudden bend, and surrounded on three sides by the Mississippi River.

It is difficult to conceive that Chicot Point, lying in fact nearly twenty-five leagues below the mouth of the Arkansas, is the Chicot Island to which the concession refers; but admitting that the Point was meant, (which we believe to be the fact,) still, no cypress swamp is found there to locate the upper boundary; nor is it possible to make a decree fixing any one side line, or any one place of beginning, for a specific tract of land.

Our opinion is, that, on either of the grounds stated, the petition should be dismissed, and the decree below affirmed.

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 Arkansas, and was argued by counsel. [*268
On consideration whereof, 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, affirmed.

WILLIAM NEVES AND JAMES C. NEVES, APPELLANTS, *v.* WILLIAM H. SCOTT AND THOMAS N. BEALL, ADMINISTRATORS OF WILLIAM F. SCOTT, DECEASED, AND GEORGE W. ROWELL AND LAWRENCE G. ROWELL, EXECUTORS OF RICHARD ROWELL, DECEASED.

The courts of the United States, under the Constitution and laws, have equity jurisdiction. Unless the general principles of equity have been modified by the laws or usages of a particular State, those general principles will be carried out everywhere in the same manner, and equity jurisprudence be

the same, when administered by the courts of the United States, in all the States.[1]

Hence, the decision of a State Court, in a case which involved only the general principles of equity, and was not controlled by local law or usage, is not binding as authority upon this court.[2]

In the case of *Neves et al.* v. *Scott et al.*, reported in 9 How., 196, this court decided two points,—one, that volunteers could, in that case, claim the interference of chancery to enforce the marriage articles in question; and the other, that the articles constituted an executed trust.

The Supreme Court of Georgia does not agree with this court upon the first point. Nevertheless, this court does not change its decision.

Moreover, the second point upon which this court rested the case does not appear to have been brought before the Supreme Court of Georgia; and, of course, it expressed no opinion upon the point.

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

It was argued at December term, 1849, and is reported in 9 How., 196. It being suggested afterwards that, at the time when the case was argued and decided, Richard Rowell, the principal defendant, was dead, the judgment was stricken out and the cause argued again.

It was argued by *Mr. Johnson*, for the appellants, and *Mr. Cone*, for the appellees.

Mr. Cone, for the appellees made the following points:

1st. The marriage contract is executory; it conveys no titles, and creates no trusts, nor does it impair or abridge the rights of the husband during the continuance of the coverture. 2 Story, Eq. Jur., §§ 1, 379, 380, 381, 382, 383. Clancy on Rights, 269; Hill on Trustees, 420.

2d. Roper on Husband and Wife, 156, 161; *Scarborough* v. *Bowman, 1 Beav., 34; *Stanton* v. *Hall*, 2 R. & M., 180; *Harkins* v. *Colton*, 2 Port. (Ala.), 463; *Cook* v. *Kinney*, 12 Ala., 42; *Stewart* v. *Stewart*, 7 Johns. (N. Y.) Ch., 229; 7 Sm. & M. (Miss.), 798; *Lee* v. *Perdue*, 3 Bro. Ch., 368.

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The fact that the parties to the contract considered it as final, and contemplated no further settlement, cannot alter its legal character or change its legal effect. *Hester, Executor*, v. *Young*, 2 Ga., 45, 46; *Barker* v. *Giles*, Rice (S. C.) Eq., 516; *Lee* v. *Perdue*, 3 Bro. Ch., 381; Hill on Trustees,

[1] APPLIED *in an admiralty case, Watts* v. *Camors*, 10 Fed. Rep., 149. LIMITED AND EXPLAINED. *Pulliam* v. *Pulliam*, 20 Fed. Rep., 78. CITED. *Noonan* v. *Lee*, 2 Black, 509; *Johnston* v. *Roe*, 1 McCrary, 165; *Northern Pac. R. R. Co.* v. *St. Paul &c. R. R. Co.*, 2 Id., 265; *Strettell* v. *Ballou*, 3 Id., 47; s. c., 9 Fed. Rep., 257. See notes to *McCollum* v. *Eager*, 2 How., 61, and *Bennett* v. *Butterworth*, 11 Id., 669.

[2] FOLLOWED. *Orendorf* v. *Budlong*, 12 Fed. Rep., 26.

84; *Antrobus* v. *Smith*, 12 Ves., 39; 6 Humph. (Tenn.), 127.

2d. The complainants are not within the marriage consideration, and do not claim through any person, that is, they claim not as heirs, but as purchasers under the articles; they are, therefore, volunteers. *Osgood* v. *Strode*, 2 P. Wms., 255; *Goodwin* v. *Goodwin*, 1 Ves., 228; *Tudor* v. *Anson*, 2 Ves., 582; *Marston* v. *Gowan*, 3 Bro. Ch., 170; *Strode* v. *Russell*, 2 Vern., 621; *Bias* v. *Bias*, 2 Ves., 164; Atherley on Mar. Set., 66, 73, 74, 75; Story, Eq. Jur., § 986; *Kittery* v. *Atwood*, 1 Vern., 298, 471; 2 P. Wms., 172; 1 P. Wms., 483; *Beatson* v. *Beatson*, 12 Sim., 281; *Goring* v. *Nash*, 3 Atk., 186; *Holt* v. *Holt*, 2 P. Wms., 248; *Johnson* v. *Legard*, Turn. & R., 281, 293; *Colgate* v. *Mulgrave*, 2 Keen, 98; *Salton* v. *Chetwynd*, 3 Meriv., 249; 6 Mau. & Sel., 60.

3d. Courts of equity will not interpose in favor of volunteers, either upon a contract, covenant, or settlement. 2 Story, Eq., §§ 793, 973, 986, 987; 1 Turn. & R., 296; *Coleman* v. *Sarel*, 2 Ves., 50; Hill on Trustees, 83; Atherley on Mar. Set., 72, 73, 74, 76; 2 Story, Eq. Jur., 372, 433, 706, 787; *Jeffreys* v. *Jeffreys*, 1 Craig & P., 138, 141; *Ellison* v. *Ellison*, 6 Ves., 656; *Colman* v. *Sarel*, 3 Bro. Ch., 12; *Edwards* v. *Jones*, 1 Myl. & C., 226; *Dillon* v. *Coffin*, 4 Id., 647; *Halloway* v. *Headington*, 8 Sim., 324, 571; *Meek* v. *Hallowell*, 1 Hare, 464, 475; *Wycherly* v. *Wycherly*, 2 Eden, 177; 2 Keen, 81, 123, 134.

4th. But if there were any doubt in relation to the soundness of the foregoing positions, the law of Georgia upon these points has been settled by a decision of the Supreme Court of that State, made upon the contract now under consideration, and being a contract made in Georgia, and to be executed in Georgia, its character, interpretation, force, and effect, must be governed by the laws of that State.

Carroll v. *Renich*, 7 Sm. & M., 798; 12 Wheat., 153, 167; 5 Pet., 151; 6 Pet., 172; 8 Pet., 361; 8 How., 170; 1 Gall., 160, 371.

In the case of *Merritt et al.* v. *Scott & Beall*, 6 Ga., *563, the questions now presented to this court upon this contract came before the Supreme Court of that [*270 State. That court established the following positions:

1st. That marriage articles, like those now under consideration, will be specifically executed upon the application of any person within the scope of the consideration of such marriage, or claiming under such person.

2d. That in no case whatever will courts of equity interpose in favor of mere volunteers, whether it be a voluntary

contract, or a covenant, or a settlement, however meritorious may be the consideration, and although they stand in the relation of a wife or child.

3d. That where a bill is brought by a person who is within the scope of the marriage consideration, or claiming under them there, courts of equity will decree a specific execution throughout, as well in favor of mere volunteers as plaintiffs in the suit.

4th. That no persons are within the marriage consideration but the husband and wife and their issues; that all others are volunteers.

5th. That the complainants in that case (who occupied the exact position that the complainants do in this case in relation to the contract) were not entitled to the aid of a court of equity to enforce the covenant in their favor.

6th. That although the contract under consideration made no provision for the issue of the marriage, yet that did not aid the case of the complainants; that they were still volunteers, and as such, not entitled to the aid of a court of equity.

7th. That the decree rendered in the case of Catherine Neves against Richard Rowell was not such a partial execution of the marriage contract as would enure to the benefit of complainants, nor could said decree be invoked in their favor; and that they were not entitled to the discovery and relief that they sought.

Mr. Justice CURTIS delivered the opinion of the court.

This case came on to be heard at the December term, 1849, and was argued by counsel. The decision of the court is reported in 9 How., 196, under the name of *William Neves and James C. Neves, appellants*, v. *William F. Scott and Richard Rowell.* At the present term, it was suggested to the court, that at the time when the cause was argued and decided, Richard Rowell, the principal party defendant in interest, was dead; and thereupon proceedings took place which made his representatives parties, and the decree heretofore entered was striken out, the cause brought forward, and again heard at the present term. It has been elaborately and ably argued *271] upon the grounds *on which it rested at the former hearing, and upon one additional ground, which will first be adverted to.

It appears that a short time before the former argument, the Supreme Court of Georgia, where the marriage articles in question were made, and the parties thereto domiciled, in a suit between other persons claiming a separate interest under these articles, had made a decision, involving an equitable

title like that passed on by this court. This decision was not made known to us at the former hearing; and the respondent's counsel now maintains, that it is binding on this court, as an authoritative exposition of the local law of Georgia, by the highest tribunal of that State.

To appreciate this position, it is necessary to ascertain what questions have been decided by the Supreme Court of Georgia, and are for decision by this court.

By reference to the case in 9 How., 196, it will be found that there were two questions presented to this court, either of which being decided in favor of the complainant, would dispose of the cause.

The first was, whether the trusts manifested by this particular instrument, were what a court of equity deems executed trusts, that is, trusts actually defined and declared and in the view of a court of equity created, or whether a court of equity would treat the instrument as only exhibiting an incomplete intention to create some trusts at a then future period; and the second being, whether the complainants, as collateral heirs of one of the settlers, can have the aid of a court of equity, to enforce the delivery of the property to them, or are precluded from that relief, by the fact that they are not issue of the marriage; in other terms, whether by the rules of equity law the complainants are volunteers, or within the consideration of the articles. No question has arisen, concerning any statute law of Georgia; nor was it then, nor is it now suggested, that any word, or phrase, or provision of the articles, should bear any peculiar, or technical meaning, by reason of any local law or custom. Indeed, the actual intentions of the parties are so plain, that no doubt has been suggested concerning them; and the only inquiry in either court has been, how far, and in favor of what parties, a court of equity will lend its aid to carry those intentions into effect. And, accordingly, the Supreme Court of Georgia, as well as this court, has resorted to the decisions of the High Court of Chancery in England, and to approved writers on equity jurisprudence, as affording the proper guides to a correct decision. If, according to sound principles of the law of equity, a trust existed, or the complainants have an equitable right to the specific performance of an agreement to create a trust, then the relief is to be granted, otherwise it is to be refused.

*Such being the nature of the questions, we do not consider this court bound by the decision of the Supreme Court of Georgia. The Constitution provides, that the judicial power of the United States shall extend to all cases in equity arising between the citizens of different States. Con- [*272

gress has duly conferred this power upon all Circuit Courts, and among others upon that of the District of Georgia, in which this bill was filed, and the same power is granted by the Constitution to this court as an appellate tribunal.

Wherever a case in equity may arise and be determined, under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable thereto. These principles may make part of the law of a State, or they may have been modified by its legislation, or usages, or they may never have existed in its jurisprudence. Instances of each kind may now be found in the several States. But in all the States, the equity law, recognized by the Constitution and by acts of Congress, and modified by the latter, is administered by the courts of the United States, and upon appeal by this court.

Such has long been the settled doctrine of this court, repeatedly and steadily affirmed in whatever form the question has been presented. In *The United States* v. *Howland*, 4 Wheat., 115, Chief Justice Marshall said: "As the courts of the Union have a chancery jurisdiction in every State, and the Judiciary Act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other States." So Mr. Justice Story, in *Boyle* v. *Zacharie et al.*, 6 Pet., 658, says: "The chancery jurisdiction given by the Constitution and laws of the United States is the same in all the States of the Union, and the rules of decision are the same in all." See also *Robinson* v. *Campbell*, 3 Wheat., 222; *Livingston* v. *Story*, 9 Pet., 654; *Russell* v. *Southard*, decided at the present term, and reported in 12 How., 139.

But while we do not consider this decision of the Supreme Court of Georgia a binding authority, on which we have a right to rest our decision, the respect we entertain for that learned and able court, has led us to examine its opinion with great care; and although we find it not consistent with some of the views heretofore taken by us of one of the questions arising under this marriage settlement, we do not find that the ground on which our decision was actually rested was at all examined by that learned court. That ground is, "That the deed in question is a marriage settlement, complete in itself; an executed trust, which *requires only to be *273] obeyed and fulfilled by those standing in the relation of trustees, for the benefit of the *cestuis que trust*, according

to the provisions of the settlement." 9 How., 211. This position does not appear to have been taken by the counsel for the complainants in the Supreme Court of Georgia, nor is it noticed by the court in its opinion; though it is conceded, in the course of the opinion, that while "courts of equity will not enforce a mere gratuitous gift, or a mere moral obligation or voluntary executory trust, it is otherwise, of course, where the trust is already vested."

On the former argument in this court we formed the opinion, that the instrument in question did completely define and declare, and so did create, certain trusts; that they were, in the sense of a court of equity, trusts executed; that the complainants were *cestuis que trust;* that the failure to interpose trustees to hold the property created no difficulty, each party to the settlement being regarded, so far as may be necessary to effectuate their intent, as holding their several estates as trustees for the uses of the settlement; and so the complainants were entitled to the relief prayed.

We find nothing in the opinion of the Supreme Court of Georgia in conflict with these views, because we do not find they were there adverted to; and after considering the elaborate and able argument of the respondent's counsel at this term, we remain satisfied of the correctness of our opinion, and judgment must be entered accordingly.

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 Georgia, 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, 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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*William W. De Forest, George F. Thomas, and Robert W. Rodman, Plaintiffs in error, [*274
v. Cornelius W. Lawrence, late Collector of New York.

The tariff law of 1846, passed on the 30th of July, (9 Stat. at L., 42,) contains no special mention of imported sheepskins, dried with the wool remaining on them.

They must be regarded as a non-enumerated article, and charged, with a duty of twenty per cent. *ad valorem.*

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Southern District of New York.

The plaintiffs in error, W. W. De Forest & Co., sued the collector to recover back money paid under protest, for duties on importations into New York, in the years 1847 and 1848, from Buenos Ayres, invoiced as sheepskins, having the wool on them.

The collector (under instructions from the Secretary of the Treasury) demanded and received a duty of thirty per cent. *ad valorem* on the wool upon the sheepskins, and a duty of five per cent. *ad valorem* upon the pelts.

The wool upon the skins was appraised at, . .		$18,596.52
Duty thereon at thirty per cent.,	$5,578.95	
Skins without the wool, ...		9,972.14
Duty thereon at five per cent., .	498.60	
Total valuation of wool and skins, . . .		$28,568.66
Total duty,	$6,077.55	

Whilst the collector thus charged one duty upon the skin and another upon the wool, the importers claimed to enter the articles at a duty of five per cent. upon the whole, and the court decided that the proper duty to be charged was twenty per cent. upon the entire valuation.

The cause of this great difference of opinion was as follows:

By the act of 19th May, 1828, (4 Stat. at L., 271, chap. 55, § 2, first paragraph,) a duty is imposed on wool unmanufactured: "And all wool imported on the skin shall be estimated as to weight and value, and shall pay the same rate of duty, as other imported wool."

By the act of July 14, 1832, (same vol., chap. 227, § 2, first paragraph, p. 584,) wool unmanufactured is charged with duty: "Provided, that wool imported on the skin shall be estimated, as to weight and value, as other wool."

By the act of 30th August, 1842, (5 Stat. at L., chap. 270, *275] *§ 1, paragraph first, p. 548,) a duty on wool unmanufactured is imposed: "Provided, also, that wool imported on the skin shall be estimated, as to weight and value, as other wool."

In the 5th sect. and sixth paragraph of that same act, of 1842, (p. 554,) duties are imposed "on sheepskins, tanned

and dressed, or skivers, two dollars per dozen; on goat or sheepskins, tanned and not dressed, one dollar per dozen; on all kid and lambskins, tanned and not dressed, seventy-five cents per dozen; and on skins tanned and dressed, otherwise than in color, to wit, fawn, kid, and lamb, usually known as chamois, one dollar per dozen; . . . on raw hides of all kinds, whether dried or salted, five per cent. *ad valorem;* on all skins pickled and in casks, not specified, twenty per cent. *ad valorem.*"

Subsequently to these three statutes, so mentioning and distinguishing those three several classes of imports, came the statute of 30th July, 1846, (9 Stat. at L., (Little & Brown,) ch. 74, p. 42,) entitled "An act reducing the duties on imports, and for other purposes."

The first section enacted, that, from and after the first day of December then next, "in lieu of the duties heretofore imposed by law, on the articles hereinafter mentioned, and on such as may be now exempt from duty, there shall be collected, levied, and paid, on the goods, wares, and merchandise, herein enumerated and provided for, imported from foreign countries, the following rates of duty." Then follows the enumeration of various articles, subject to various duties, in schedules from A to H, ranging from duties of one hundred per centum to five per centum *ad valorem.*

Section 2 enacts that the goods "mentioned in schedule I shall be exempt from duty."

Section 3 imposes 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 schedule C, of articles subject to thirty per cent. *ad valorem*, "woolen unmanufactured" is mentioned, but "wool imported upon the skin" is not specially provided for therein. In schedule H, among other articles subject to the duty of five per cent. *ad valorem*, "raw hides and skins of all kinds, whether dried, salted, or pickled," are mentioned; but "wool imported on the skin" is not therein mentioned. In schedule I, of articles exempt from duty, wool imported on the skin is not mentioned, neither is it mentioned in any one of the schedules, from A to I inclusive.

On the trial of the case in the Circuit Court, Mr. Justice Nelson instructed the jury that the article came most appropriately within the schedule of non-enumerated articles, and as such was chargeable with a duty of twenty per cent.

*To which charge the counsel for the plaintiffs excepted, on the ground that the court should have [*276 charged the jury that the article imported by the plaintiffs,

raw sheepskins dried, fell under schedule H, of the Tariff of 1846, and was not a non-enumerated article, but on the contrary, was enumerated under said schedule H, and was liable only to a duty of five per cent., and not to a duty of 20 per cent. That the said article being a raw skin dried, and being not otherwise specifically provided for in said act, was liable only to the same rate of duty as all other raw skins dried. And the counsel for the said plaintiffs requested the court to charge the said jury accordingly, which request was refused by the court, and the counsel for the plaintiffs thereupon excepted.

Upon this exception, the cause came up to this court, and was argued by *Mr. Schley*, for the plaintiffs in error, and by *Mr. Crittenden*, (Attorney-General,) for the defendant.

The points for the plaintiffs in error were the following:

I. The Tariff of 1846 provides,

1. For such articles of import as are "specially enumerated," as liable to certain rates of duty.

2. Such as are "exempt" from duty; and

3. Such as are not "specially provided for in this act," but, as non-enumerated articles, are made subject generally to a duty of twenty per cent. *ad valorem.*

II. If an article is not "specially enumerated," or "exempt," it must fall under the third class of "non-enumerated" articles.

This act, therefore, provides for every possible article of import, and whether any duty is leviable, and if so, at what rate, is to be tested by this act alone.

III. The terms "skins" and "hides" are general descriptions or denominations of certain classes of articles, known by that name both as natural products and as articles of merchandise and commerce.

It is to be presumed that Congress used and intended them to be understood as they are ordinarily used and understood. The "skin" or the "hide," the covering of the flesh of animals, as a composite article, has parts: the fleece and the pelt. When the general term is used, the parts are included; as in speaking of the head, we include the eyes or the hair.

IV. If the article is to be removed from its natural and commercial classification, be broken up, and one part be artificially classed as wool, or hair, or fur, this can only be done by express provision. Such an instance of separation ap-

pears in schedule G, where "furs undressed, when on the skin," are made liable to a duty of ten per cent.

*V. "Wool" and "hair" are used to designate a certain portion of the covering of the animal after it is [*277 shorn, clipped, or cut off the skin; until clipped or cut they are a part of the skin. A contract for wool would not justify a delivery of sheepskins; nor a contract for sheepskins, a delivery either of wool, or of a pelt shorn of the wool.

VI. "Wool unmanufactured," mentioned in schedule C, and "hair of all kinds, uncleaned and unmanufactured," mentioned in schedule G, refer to wool and hair, clipped or cut, and not to the skin or hide with the wool or hair on, in its natural state. When the skin or hide is shorn, one part is denominated wool or hair, and the remainder is no longer termed a "skin," but a "pelt."

VII. Thus as "hair" pays a duty of ten per cent., but the skin with the hair on, only a duty of five per cent., in the case of a deerskin; so in the case of a sheepskin, while the "wool" pays a duty of thirty per cent., the skin with the wool on should pay only a duty of five per cent.

VIII. The terms "skins" and "hides" are generic, and include all kinds of skins and hides. Schedule H embodies this idea in words, "hides and skins of all kinds," and intends the hide or skin of every animal, deer, sheep, calf, horse, &c. Though all these are known in trade as hides and skins, yet to distinguish them, the denominations of deerskins, sheepskins, calfskins, horsehides, &c., are appropriately used. To say that because one kind of skins is called "sheepskins," and another "deerskins," &c., they are by such distinctive terms, removed from the general class designated in schedule H, "hides and skins of all kinds," would be to destroy the class entirely; for one after another, every kind of hide and skin could be thus removed until no kind would be left. If, because a particular skin is called in commerce a sheepskin, it is removed from the genus "skin," by the same argument Saxony wool, or Smyrna wool, would not be comprised under "wool unmanufactured;" nor camwood or fustic, under "dye woods," in schedule H; nor horsehair under "hair of all kinds," nor beaver fur under "furs," nor emeralds under "precious stones," in schedule G, &c.

It is obvious that such a rule of construction would destroy the tariff. Does a stone cease to be a precious stone because it is called an emerald? or a skin cease to be a skin because it is called a sheepskin?

IX. If schedule H, then, merely described "hides and skins

of all kinds," a sheepskin would be comprised under it as appropriately as any other kind of skin.

X. But schedule H requires that the "hide or skin" should be "raw," that is, unmanufactured or undressed, in order to *278] *bring it under that schedule. The article in question in this case was "raw." Again, schedule H requires that it should be "dried," "salted," or "pickled," (various ways of preserving the skins). The article in question was "dried."

XI. The Buenos Ayres sheepskins imported by the plaintiffs were "raw skins, dried," and as such, were articles enumerated in schedule H, and liable only to a duty of five per cent.

In the argument of these points, the counsel referred to the following authoritles: 1 Sumn., 166; 1 Story, 341, 560, 610; 2 Id., 374; 8 Pet., 277; 10 Id., 137; 3 How., 106; 7 Id., 786; 1 Exch., 281; Hume's Laws of the Customs, 284, 287.

Mr. Crittenden. The importation must fall within the class of articles embraced in the third section of the act of 1846, as not specially otherwise provided for, and thereby be subjected to a duty of twenty per cent. *ad valorem.*

"Wool, imported on the skin," was, by the act of 1828, subjected to a specific duty of four cents per pound, and also in addition to an *ad valorem* duty of forty per cent.; and also increasing annually by five per cent., until the *ad valorem* duty amounted to fifty per centum; by the act of 1832, it was subjected to a specific duty of four cents per pound, with the additton of an *ad valorem* duty of forty per cent.; and by the act of 1842, it was subjected to a specific duty of three cents per pound, with the additional duty of thirty per centum *ad valorem.* So stood the revenue laws in the statute books when the revenue act of 30th July, 1846, was framed, and under consideration, and passed. It is not reasonable to suppose that "wool imported on the skin," an article of foreign importation, which had been, *eo nomine*, so long distinguished from "raw hides and skins," by different descriptions, and by different rates of duty imposed on them, respectively, were, by the act of 1846, confounded and subjected to one and the same rate of duty, under one and the same name.

By the well-established rules of construing statutes, "if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them." Where there are different statutes in *pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one

system, and as explanatory of each other. *Rex* v. *Loxdale and others*, 1 Burr., 447; 4 Bac. Abr. Statute (I.), 3, 646; *The King* v. *Mason*, 2 T. R., 586; *Allesbury* v. *Pattison*, Doug., 30; 1 Bl. Comm., 60, and Tucker's note, 3; Dwarris on Statutes, 700.

*The revenue laws of the United States are all to be taken together as one system, one statute as explanatory of another. The revenue act of 30th July, 1846, has reference expressly to the former law for imposing duties and for exempting articles from duties. [*279

In accordance with the established rules for construing statutes, "wool, imported on the skin," so noticed as an article of commerce, and as such subjected to duty, in acts of 1828, 1832, and 1842, cannot be lost sight of in construing the act of 30th July, 1846; that article of commerce not being otherwise specially provided for in any of the schedules, from A to I inclusive, must, of course, come under the general provision of the third section, which imposes the duty of twenty per cent. *ad valorem* upon all goods imported from abroad, not otherwise specially provided for in the act.

After the distinctions so clearly drawn, in the revenue law of 1842, between sheepskins, imported with the wool on the skin, and raw hides and skins, dried, salted, or pickled, a construction of the act of 1846, would be preposterous and in violation of the established rules, which should obliterate that distinction, force sheepskins imported with the wool on the skin into the denomination of raw hides, to be subjected to the same rate of duty as if they had been imported divested of the wool.

The evidence adduced by the plaintiffs established, without doubt, that the sheepskins were imported with the wool on the skin. The law applicable to the fact made the importations liable to the rate of duty provided in the third section of the act of 1846.

The opinions of the witnesses introduced by the plaintiffs, that sheepskins, imported with the wool on the skin, dried, as it came from the body of the sheep, may be comprehended under the denomination of raw hides and skins dried, cannot change the law, can have no legal effect to alter the construction of the statutes. It is the province of the witness to testify as to fact; it is the province of the judge to pronounce the law applicable to the fact.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the Southern District of the State of New York.

The action was brought by the plaintiffs against the defendant, the late collector of the port of New York, to recover back an excess of duties paid under protest on an article imported from Buenos Ayres, described in the invoices and entries as "sheepskins." The importations were under the tariff act of 1846. The article was imported with the
*280] wool on the skins, and by the *instructions of the Secretary of the Treasury, the collector was directed to cause the wool to be estimated and appraised, and to be charged with a duty of thirty per cent. *ad valorem* under schedule C, and five per cent. on the skin, under schedule H. The plaintiffs claim that no more than a duty of five per cent. *ad valorem* should be charged upon the entire article. It is usually described, in the invoices, and shipped as sheepskins, and known in trade and commerce by that designation. The skin is in the same condition as when taken from the animal, except it is dried. It is not dressed.

The court below charged the jury, that the article came within neither of the schedules mentioned, but was more properly a non-enumerated article, and chargeable with a duty of twenty per cent. *ad volorem.* And judgment was rendered in the case accordingly.

By the act of May 19, 1828, (4 Stat at L., 271, § 2,) a duty is charged upon wool imported on the skin; and direction is given to estimate it as to weight and value, and impose the same duty as on other imported wool.

A similar provision is found in the act of July 14, 1832, (Id., 584, § 2,) and also, in the act of August 30, 1842, (5 Id., 548).

The article is not enumerated according to its previous designation in the revenue laws in the act of July 30, 1846, (Sess. Laws, 68,) and, of course, no duty is specifically charged upon it in that act as in the previous acts. But it is claimed on the part of the plaintiffs, that it falls within the description under schedule H, "raw hides, and skins of all kinds, whether dried, salted, or pickled, not otherwise provided for," and which are chargeable only with a duty of five per cent. *ad valorem.*

This description was obviously taken from the act of 1842, (§ 5, para. 6,) "on raw hides of all kinds, whether dried or salted, five per cent. *ad valorem;* on all skins pickled, and in casks, not specified, twenty per cent. *ad valorem.*"

The only difference between this act, and the present one, is, that the two classes, "raw hides," and "skins," are now ranged in one class, and the duty of five per cent. charged upon each. "Skins pickled" are classed with "raw hides

dried or salted," which latter article, it is well known, is extensively imported into the country for the purpose of being manufactured into leather, and the duty is fixed at a low rate for the encouragement of the manufacturer.

In this same act of 1842, it will be remembered, sheepskins, imported with the wool on, were charged with a specific duty, the same as unmanufactured wool, thus distinguishing the article from skins pickled, referred to in the 6th paragraph of the 5th sect. of that act.

*We have no doubt, from the association of skins with raw hides in the act of 1846, in connection with [*281 the description and classification in the act of 1842, that they should be regarded as an article imported, like raw hides, for the purpose of being manufactured; and, by no reasonable construction, can be regarded as descriptive of the article in question.

The argument is quite as strong, and we think stronger, in favor of ranging the article under the clause in schedule E: "skins of all kinds, not otherwise provided for," and which is chargeable with a duty of twenty per cent. *ad valorem.*

Neither do we think that the article can be separated, and a duty charged separately upon the estimated quantity of the wool, and upon the skin, according to the rate chargeable upon each. This would be the introduction of a principle in the construction of the revenue acts heretofore unknown, and which has no countenance in the provisions of the acts themselves.

The 20th section of the act of 1842 looks to the component parts of a manufactured article of two or more materials in fixing the duty; but does not separate it, and charge the duty on each part according to the class to which it belongs. It assesses the duty on the entire article at the highest rate at which any of the component parts might be charged.

It is difficult also to say to what length this principle, if admitted, must be carried in construing these acts. It could not, consistently, be limited to the article in question; for, while skins, dried, are charged only with the duty of five per cent. *ad valorem*, "hair of all kinds" is chargeable with a duty of ten per cent.; and the same rule of construction that would separate the sheepskin, and charge a duty separately on the wool, and on the skin, would require the deerskin, with the hair on, to be separated, and the duty to be levied on each part. And so, in respect to every other skin dried salted, or pickled, imported with the hair on.

It is true, that in the acts of 1828, 1832, and 1842, is each of which a specific duty was charged upon the wool

imported on sheepskins, the appraisers were directed to estimate the weight and value, for the purpose of assessing the duty. But the article was not divided, as no separate duty was assessed upon the skin by either of these acts. The act of 1842 assessed a duty upon "skins pickled and in casks," but skins imported with the wool on, when separated from the wool, would not fall within this description. The whole duty, therefore, that could be properly assessed upon the article was assessed upon the estimated quantity of wool imported upon it.

The article has never been classed in any of the tariff acts under the designation of skins; but has been charged always, *since it came under the notice of these acts, with a specific duty. It has been thus charged, since the act of 1828, down to the present act, a period of some eighteen years. And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the custom-house.

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It is but fair to presume, after having been treated by the law-makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different.

The 3d section of the act of 1846 enacts, that on all goods, wares, and merchandise not specifically provided for in the act, a duty of twenty per cent. *ad valorem* shall be charged.

Under the foregoing view of the law of the case, sheepskins, imported with the wool on, must be regarded as a non-enumerated article, and fall within this third section.

The probability is, that the enumeration was omitted from

an oversight, else the article would have been chargeable with a duty in the way provided for in the act of 1842. But, having been omitted, and not specifically provided for, it necessarily comes within the section mentioned, and subject to a duty of twenty per cent. *ad valorem*.

We are of opinion, therefore, the judgment of the court below was right, and 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. *On consideration whereof, it is now here ordered and [*283 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 cent. per annum.

JOHN WALSH, EDWARD WALSH, AND DICKINSON B. MOREHEAD, OWNERS OF THE STEAMBOAT IOWA, APPELLANTS, *v.* PATRICK ROGERS, THOMAS SHERLOCK, JOHN B. SIMMONS, EDWARD MONTGOMERY, JOHN W. BAKER, AND P. A. ANSHUTE, CLAIMANTS OF THE STEAMBOAT DECLARATION, HER TACKLE, APPAREL, AND FURNITURE.

in a case of collision, upon the River Mississippi, between the steamboats Iowa and Declaration, whereby the Iowa was sunk, the weight of evidence was, that the Iowa was in fault, and the libel filed by her owners against the owners of the Declaration was properly dismissed.[1]

Ex parte depositions, under the act of 1789, without notice, ought not to be taken, unless in circumstances of absolute necessity, or in cases of mere formal proof or of some isolated fact.[2]

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

The libel was filed by the appellants, in the District Court, where they obtained a decree on the 1st of May, 1848, for $18,500 and costs. An appeal was taken to the Circuit Court.

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[1] CITED. *Jackson* v. *Steamboat Magnolia*, 20 How., 299, 340; *The Grace Girdler*, 7 Wall., 204; *The Juniata*, 3 Otto, 339; *Eglert* v. *Citizens' Ins. Co.*, 2 McCrary, 387.

[2] FOLLOWED. *Bank* v. *Hitz*, 1 Mack., 126.

On the 19th of February, 1850, the cause was heard finally in the Circuit Court, and upon consideration of all the testimony, as well that considered by the District Court, as the testimony subsequently taken, and arguments of counsel, the judgment of the District Court was declared to be erroneous, was ordered to be reversed and annulled, and the libel to be dismissed at the costs of the appellants.

The libellants then appealed to this court.

It was argued by *Mr. Fendall* and *Mr. Chilton,* for the appellants, and *Mr. Badger*, for the appellees.

The questions were exclusively those of fact and evidence, as will be seen by a reference to the opinion of the court. No question of law was raised in the case.

Mr. Justice GRIER delivered the opinion of the court.

This case presents no question of law for our decision. As is usual in cases of collision, each party makes out a good case by the testimony of the pilot and crew of his own boat. This collision occurred, also, after night; and although the night *284] was *not very dark, the most calm spectator, on such occasions, is subject to great illusions as to the motion and position of the respective vessels. The attention of passengers is also seldom given to the subject until their fears are excited; and the danger to life and property threatened by the sudden shock of the collision, generally renders them incapable of a clear apprehension of what passes at the time, or a distinct recollection of what preceded the event. The pilot and crew of each boat feel bound to exonerate themselves from blame, and consequently cannot be expected to give a very candid statement of the facts. In such cases the oral examination of witnesses before the court, with a stringent cross-examination by skilful counsel, is almost the only method of eliciting truth from such sources. This may be done in the District Court, and sometimes, possibly, on appeal to the Circuit Court. But such a course of sifting out the truth in doubtful cases cannot be pursued here. We are disposed, therefore, to require that the appellant should be held to make out a pretty clear case of mistake in the court below, before he should expect a reversal of their judgment. Raising a doubt on contested facts is not sufficient for the action of this court. An appeal should not be a mere speculation on chances.

It is admitted in this case, that if the story told by the libellants' witnesses is true, they are entitled to recover the value of their boat. It is admitted, also, that if the facts tes-

tified by the respondents' witnesses are true, the appellants ought not to recover. Their several statements cannot be reconciled; and one or the other of them must be false in all its material allegations.

The libellants' witnesses testify: That on the 1st of October, 1847, about 8 o'clock in the evening, the steamboat Iowa was ascending the River Mississippi, above Morgan's Bend, on a voyage from New Orleans to St. Louis. That she had previously landed a passenger about two miles below the place of collision, on the right bank of the river. That she then crossed the river to the left bank, and was proceeding in her proper place, close to the shore (from ten to twenty-five feet from it). That the Declaration was seen coming down the river towards the Iowa. That the Iowa stopped her engine a minute before the collision. The Declaration turned towards the left bank, and ran quartering into the Iowa, driving her, by force of the collision, against the shore, where she sunk immediately, and so suddenly, that one of the passengers was drowned in his berth. In support of this statement, the pilot, the captain, fifteen of the crew, and five passengers, have testified. They are supported, also, by two witnesses on the right bank, who testified that the Iowa crossed the river immediately after letting out the passengers. Without criticizing these depositions, as to the probability of the facts *stated, or the consistency of each with itself and the others, we shall merely state the opportunity which [*285 they respectively had, by their own statements, for observing the material facts to which they have testified. The pilot and five of the crew were, by their own account, in a situation to know and correctly judge of the facts to which they have testified. The captain and eleven of the crew were not; some were in the cabin, some in the social hall, and many in their beds asleep, till their attention was aroused by the collision. Yet, whether asleep or awake, they all swear as positively to the relative course and position of the vessels, before and at the time of the collision, as those who were in a situation to observe them.

Of the five passengers who corroborate the statement of the crew, one was engaged in the social hall playing cards, and another asleep in his berth, till aroused by the collision; a third was discredited by proof of his declarations, soon after the occurrence, that the pilot of the Iowa was drunk, and caused the collision by his incapacity; and a fourth, by his admission that he expected to recover six hundred dollars lost by the sinking of the Iowa, out of the damages to be recovered from the defendants.

On the contrary, the witnesses for the respondents swear distinctly and positively to the following statement of facts:

1st. That the Declaration was coming down the river in the middle of the channel, rather nearer the left than the right bank, having two or more companies of volunteers, with their officers, on board as passengers.

2d. That it was a clear, starlight night, and that the decks of the Declaration were covered with passengers in a situation to see correctly every thing that occurred.

3d. That the Iowa, when first seen, was about a mile off, coming up the right shore of the river, and had not yet crossed to the left.

4th. That when the Iowa came near, or somewhat below the Declaration, she turned suddenly across the river, either because the boat became unmanageable by the pilot from "smelling a bar," or with an intention to cross under the bows of the Declaration.

5th. That from the course pursued by the Iowa she threatened to strike the wheel-house of the Declaration; and that, to avoid this, the engine of the Declaration was stopped, and afterwards reversed, so that she was commencing a retrograde movement at the time of the collision.

6th. That the Iowa came on under a full head of steam, and impinged herself against the bows of the Declaration, breaking her flag-staff, and causing the death of one of the soldiers on the deck.

*286] *7th. That the head of the Declaration was turned round quartering up stream by force of the collision, and that the Iowa continued under a full head of steam till she struck the left bank of the river, and there sunk in a few minutes.

Nineteen of the crew of the Declaration were examined. Eleven of them were in a situation to see what they testify to. Eight others, whose attention was first called to the matter by the stopping of the engine and backing the boat, corroborate the others as to that fact, without attempting to testify to facts which could not have come under their personal notice. Their statements are circumstantial, consistent, and probable, while those detailed by appellants' witnesses are improbable and almost incredible. But what is perfectly conclusive of the case, is the fact that the testimony of these nineteen witnesses, who may be supposed to be under the usual bias on such occasions, is completely corroborated by that of seventy of the passengers. Fifty-four of these were standing on the decks, or other parts of the vessel, where they had a full view of the whole transaction from the time that

the boats came within sight of each other, till the Iowa sunk to the bottom. They all concur in swearing positively to the facts we have stated, and that they could not be mistaken. The remaining sixteen corroborate them as to the stopping and backing of the engine of the Declaration, and the position of the boats immediately after the collision.

If confidence can be placed in human testimony, it is plain that the libellants are not entitled to the judgment of the court in their favor.

Indeed, the only argument which has been urged against this overwhelming mass of testimony is, that the numerous witnesses of respondents coincide so completely in all the circumstances and facts related, not only in their order of narration, but in their language and phraseology, that it leads to the suspicion of a factitious story, got up after consultation. But the number of the witnesses, the respectability and standing of many of them, the fact that their testimony was taken at different times, by different commissioners, at different places, leaves no room for such an imputation. The coincidence of statement and similarity of language and expression may well have arisen from the fact that their testimony was taken under the act of Congress, *ex parte*, without cross-examination, and probably by an agent who had the same stereotyped leading questions put to each of the witnesses in the same sequence and in the same words.

While we are on this subject, it will not be improper to remark, that when the act of Congress of 1789 was passed, permitting *ex parte* depositions without notice, to be taken, where *the witness resides more than a hundred miles [*287 from the place of trial, such a provision may have been necessary. It then required nearly as much time, labor, and expense to travel one hundred miles, as it does now to travel one thousand. Now, testimony may be taken and returned from California, or any part of Europe, on commission, in two or three months, and in any of the States east of the Rocky Mountains in two or three weeks. There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of the common law; and, except in cases of mere formal proof, (such as the signature or execution of an instrument of writing,) or of some isolated fact, (such as demanded of a bill, or notice to an indorser,) testimony thus taken is liable to great abuse. At best, it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it,

as will suit his case. In closely-contested cases of fact, testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way. This provision of the act of Congress should never be resorted to unless in circumstances of absolute necessity, or in the excepted cases we have just mentioned.

Let 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 Eastern District of Louisiana, 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.

WASHINGTON AND SANDERS TAYLOR, PLAINTIFFS IN ERROR, *v.* JOHN DOE, *ex dem.* AUSTIN MILLER.

By the laws of Mississippi, deeds of trust and mortgages are valid, as against creditors and purchasers only from the time when they are recorded.

A judgment is a lien from the time of its rendition.

Therefore, where a judgment was rendered, in the interval between the execution and recording of a deed, it was a lien upon the land of the debtor.[1]

A *fieri facias*, being issued upon this judgment, was levied upon the land; but, before the issuing of a *venditioni exponas*, the debtor died.

*288] *It was not necessary to revive the judgment by a *scire facias;* but the sheriff who had thus levied upon the land could proceed to sell it, under a *venditioni exponas;* and a purchaser, under this sale, could not be ejected by a claimant under the deed given by the debtor.[2]

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[1] S. P. *Brown* v. *Clarke*, 4 How., 4.

The Mississippi Code (art. 262) has abrogated this, and now a judgment or decree is a lien only from the time of its enrolment. *McKee* v. *Gayle*, 42 Miss., 676. And see *Bergen* v. *State*, 58 Miss., 623; *Clark* v. *Duke*, 59 Id., 575. And a judgment lien on a growing crop only takes effect as the crop comes into existence; and will be second to a mortgage earlier made though subsequently recorded (Miss. Acts, 1873, Ch. 80, § 4). *Cooper* v. *Turnage*, 52 Miss., 431.

A judgment of a federal court is a lien on land in the district, irrespective of a State statute requiring enrolment in the county in which the lands to be affected lie. *Carroll* v. *Walkins*, 1 Abb. U. S., 474; *United States* v. *Humphreys*, 3 Hughes, 201.

In Iowa it is held that the lien of a judgment for damages for the sale of intoxicating liquors (Code, § 1557) is not superior to that of an antecedent mortgage. *Goodenough* v. *McCoid*, 44 Iowa, 659,

[2] S. P. *Bleecker* v. *Bond*, 4 Wash C. C., 6.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

It was an ejectment, brought in the court below by Miller, against the Taylors, who were the purchasers of the property in question at a sheriff's sale. The controversy was respecting the validity of the sale, the circumstances attending which are detailed in the opinion of the court. The following table shows the date of the various transactions.

Crane was the owner, and in possession of the property.

September 21, 1840, Crane made a deed of trust to Pitser Miller.

November 17, 1840, a judgment was given against Crane, at the suit of some third person, for $6000, in the Circuit Court of the County of Marshall.

Upon this judgment a *fieri facias* was issued, returnable to the first Monday in June, 1841.

December 7, 1840, the deed from Crane to Pitser Miller was recorded.

April 16, 1841, the execution was levied upon the land in controversy. Whereupon Crane claimed the benefit of the valuation law of Mississippi. The property was valued at six thousand dollars, but two thirds not being bid, the papers were returned to the clerk's office.

February 20, 1842, Crane died.

May 30, 1842, twelve months after the return of the papers, a writ of *venditioni exponas*, tested on the first Monday in March, 1842, was issued, commanding the sheriff to sell the land.

August 17, 1842, the sheriff sold the land to the Taylors; and on the same day made them a deed for it and put them in possession.

April 20, 1843, Pitser Miller put up the land for sale under the deed of trust from Crane, when Austin Miller became the purchaser, and received a deed from the trustee.

In October, 1847, Miller brought his action of ejectment against the Taylors in the District Court of the United States for the Northern District of Mississippi, Miller being a citizen of the State of Tennessee.

In December, 1849, the cause came on for trial.

On the foregoing facts, which were established by legal testimony, the court charged the jury, that if they believed, from *the evidence in the case, that the *venditioni exponas*, by virtue of which the land in controversy was [*289
sold, and under which the defendants became purchasers thereof, was issued and tested after the death of said William

Crane, and without a revival of the judgment by *scire facias*, then such sale and purchase were void, and conferred no title on defendants.

The defendants excepted and brought the case up to this court.

It was argued by *Mr. Volney E. Howard*, for the plaintiffs in error, and by *Mr. Vinton* and *Mr. Stanton*, for the defendants in error.

Mr. Howard, for plaintiffs in error.

The only question involved in this case is, whether an execution sale is void when the party defendant died before the test of the *venditioni exponas*, and the judgment was not revived by *scire facias*.

1. A judgment in Mississippi is a lien upon all property from the date of its rendition. In this case the judgment was rendered previous to the conveyance, and the purchaser took it subject to the lien and the right of the judgment creditor to sell. *Pickens* v. *Marlow*, 2 Sm. & M. (Miss.), 428; 3 Id., 67; 9 Id., 9.

2. Sheriffs' sales in Mississippi, under executions issued after the death of the defendant, and without revival by *scire facias*, have always been held only voidable, and not void, and therefore sustained in actions of ejectment. *Smith et al.* v. *Winston et al.*, 2 How. (Miss.), 607; 5 Id., 256; 9 Sm. & M. (Miss.), 218.

3. This being an important property rule in Mississippi in relation to real estate, it is submitted, that this court, under its former decisions, will follow the interpretation of the Supreme Court of Mississippi, especially the late case of *Shelton* v. *Hamilton*, which is printed as part of this brief, so far as it relates to this principle, and the certified manuscript copy, herewith filed. 5 Cranch, 22; 2 Cranch, 87; 1 Wheat., 27; 2 Wheat., 316; 10 Wheat., 152; 12 Wheat., 153; 4 Peters, 127; 5 Id., 151.

The counsel for the defendants in error contended, that the decisions are uniform and almost uninterrupted, to the effect that a levy on real estate does not divest the title of the judgment debtor, or satisfy the execution, as in the case of a levy on personal goods. The land, therefore, descends to the heir in spite of the levy; and in order to subject it by a process tested after the death of the ancestor, the heir must be made a party by *scire facias*. *Erwin's Lessee* v. *Dundas et al.*, 4 How., *58; 6 Ala., 658; 2 How. (Miss.), 601; 5 Id., *290] 629; *Davis* v. *Helm*, 3 Sm. & M. (Miss.), 17; *Smith* v. *Walker*, 10 Id., 589; 3 Ala., 204; 7 Id., 660.

The writ of *venditioni exponas* is a proceeding *in personam*, not *in rem*. It must have persons for parties. Against a dead man it is wholly void. *Gwin* v. *Latimer*, 4 Yerg. (Tenn.), 22; *Overton* v. *Perkins*, 10 Id., 328; *Rutherford* v. *Reed*, 6 Humph. (Tenn.), 423; *Samuels* v. *Zackery*, 4 Ired. (N. C.), 377; *Baden* v. *McKeene*, 4 Hawks (N. C.), 279; *Woodcock* v. *Bennett*, 1 Cow. (N. Y.), 711; *Stymets* v. *Brooks*, 10 Wend. (N. Y.), 206.

In *Hughes* v. *Rees*, 4 Meeson & Welsby, 468, the court say the *venditioni exponas* is "part of the *fieri facias*," "a species of *fieri facias*," "a writ directing the sheriff to execute the *fieri facias* in a particular manner."

The act of 1840, called the valuation law of Mississippi, did not alter these principles. It enacted, that if lands levied on would not sell for two thirds of their appraised value, the sheriff should return the *fieri facias*, with all proceedings, to the court; and if the judgment should not be satisfied after twelve months, a *venditioni exponas* should issue. The sheriff is not authorized to sell without this new process. It is the writ alone which vests in that officer the power to sell and convey lands. *Natchez Ins. Co.* v. *Helm*, 13 Sm. & M. (Miss.), 182.

The cases in Peck (Tenn.), 80; 4 Bibb. (Ky.), 345, and 2 Bay (S. C.), 120, quoted as being opposed to the foregoing authorities, are not in fact such. The case of *Toomer* v. *Purky*, 1 Const. (S. C.), 323, would seem to be in opposition to the current of authorities; but it must be regarded as having been decided without due consideration.

Mr. Justice DANIEL delivered the opinion of the court.

This was an action of ejectment, instituted in the court below by the plaintiff, a citizen and inhabitant of the State of Tennessee, against the defendants, citizens and inhabitants of the State of Mississippi; and the facts proved in the cause and about which there appears to have been no contrariety of opinion, were to the following effect. That the plaintiff and the defendants derived their titles from one William Crane, who was at one time seized and possessed of the demised premises. That being so seized and possessed, Crane conveyed the land, on the 21st of September, 1840, to one Pitser Miller, for the purpose of securing a debt in said conveyance mentioned; that this deed from Crane, after having been proved, was delivered to the probate clerk of the county wherein the land was situated, on the 7th day of December, 1840, and was on that day recorded. That *this land was afterwards duly advertised for sale under the trust [*291

above mentioned, was regularly sold in pursuance thereof, by the trustee, on the 20th day of April, 1843, to the lessor of the plaintiff for the sum of $1,000, and conveyed to him by the trustee by deed, which was acknowledged and recorded on the day and in the year last mentioned. That the defendants were in possession of the demised premises at the commencement of this action, and that the land in dispute was worth $4,000.

The defendants then proved, that on the 17th of November, 1840, a judgment was recovered in the Circuit Court of the county in which the demised premises are situated, against the said Crane, for the sum of $6,000; that, on this judgment, an execution was sued out against the goods and chattels, lands and tenements, of the said Crane, returnable to the 1st Monday in June, 1841, which execution, on the same day on which it was sued, came to the hands of the sheriff of the county, and was by him levied on the land in controversy on the 16th of April, 1841. That thereupon the said Crane claimed the benefit of the valuation law of Mississippi, and in pursuance of that law, the land was valued at six thousand dollars, and that being after such valuation advertised and offered for sale, and two thirds of the appraised value not having been offered for the said land, the execution and papers connected therewith were returned to the clerk's office of the court of the county, according to law; that after the expiration of twelve months, viz., on the 30th of May, 1842, a writ of *venditioni exponas*, tested on the 1st Monday in March, 1842, was sued out by the clerk of the county aforesaid, directed to the sheriff of said county, commanding him to sell the land which had been levied upon, and on which the appraisement and suspension had been taken, as before set out; that, by virtue of this writ of *venditioni exponas*, the said sheriff, after duly advertising the land, sold the same on the 17th day of August, 1842, when the defendants became the purchasers thereof, at the price of $800, and having paid the purchase-money, the sheriff conveyed to them the said land by a deed in due form of law, which was acknowledged and recorded on the 17th of August, 1842, the date of the said deed; that under this deed the defendants were in possession of, and claimed title to, the land in question.

The plaintiffs' lessor then proved that Crane, upon an execution against whom the land had been seized, and at whose instance that execution had been stayed under the provisions of the statute, departed this life on the 20th of February, 1842, during the twelve months' suspension of the proceedings on that process, and before the test and suing out

of the *venditioni *exponas*, under which the land had been sold, and purchased by the tenants in possession. [*292

Upon the foregoing facts, the judge charged the jury, that if they believed from the evidence, the *venditioni exponas*, by virtue of which the land in controversy was sold, and under which the defendants became the purchasers thereof, had been sued out and tested after the death of Crane, and without a revival of the judgment by *scire facias*, then the sale and purchase were void, and conferred no title on the tenants in possession.

With reference to the proofs in this case, and the charge pronounced thereon by the court below, a single question only has been discussed by the counsel, and it is certainly that which must be decisive upon the judgment of this court, viz., the question involving the validity of the proceedings upon the judgment against Crane, and the legal consequences flowing from those proceedings. By the statute of Mississippi (vide Howard & Hutchinson's Collection, c. 34, sect. 5, p. 344,) deeds of trust and mortgages are valid as against creditors and purchasers, only from the period at which they are delivered to the proper recording officer. By the law of the same State (vide How. & Hutch., c. 47, sect. 43, p. 621,) a judgment *proprio vigore* operates a lien upon all the property of a defendant from the time that it is rendered.

The trust deed from Crane to Pitser Miller, not having been recorded until after the judgment against Crane, and the sale under the trust not having been made until after the lapse of more than three years from the judgment, and not until two years after the levy of the execution upon the lands under that judgment, the title derived from the sale and conveyance by the trustee, must, by the operation of the statutes above cited, be inevitably postponed to the rights of the claimant under the judgment, unless the latter, with the proceedings had thereon, can have been rendered null by some vice or irregularity which deprived them of legal validity.

It is insisted, for the lessor of the plaintiff, that such vice and irregularity are manifested by the facts which controlled the charge of the judge of the court below, viz., the suing forth of the *venditioni exponas* and the proceedings upon that process, after the death of the defendant in that judgment, and without any revival thereof against the representative of that defendant.

In considering the objection thus urged, it must be taken as a *concessum* on all sides that, by the law of Mississippi, the judgment against Crane operated as a lien on his land, and that by the execution and levy, the fruits of that judgment,

the lien had attached particularly and specifically upon the subject of *its operation. So far then as the rights of *293] the parties to the judgment and the subject-matter to be affected by those rights were concerned, every thing was determined; all controversy was closed. The law had taken the subject entirely to itself, to be applied by its own authority and its own rules. Did the indulgence of appraisement, and the temporary suspension allowed in a certain predicament to the debtor, alter the rights or obligations of the parties, or change the status, or liability, or appropriation, of the subject which the law had already taken into its own hands? To admit of any conclusions like these, would be to open again controversies already closed, and to wrest from the fiat of the law, the subjects it had specially and absolutely applied. The privilege of appraisement and suspension was in itself a great indulgence; it would become an opprobrium to justice, if it could be converted into a means of abrogating rights which she had expressly and deliberately conferred. The appraisement and suspension wrought no change in the relative position of the parties, it neither released nor weakened the hold taken by the law on the subject, but only completed the proceedings on the conditions which the statute had prescribed, the operation it had begun, and which it had the regular authority to fulfil. We regard the *venditioni exponas* in this case merely as a continuation and completion of the previous execution by which the property had been appropriated, and was still in the custody of the law, and not as a separate, independent, much less an original proceeding, the offspring or result of a distinct and farther adjudication. This interpretation is in conformity with the meaning and purpose of the process of *venditioni exponas*, and with the terms of that writ as provided in the statute of Mississippi, which runs in the following language, viz. (Vide How. & Hutch. Col., c. 42, sect. 18). "We command you that you expose to sale those goods and chattels, lands and tenements of A B, to the value of which, according to our command, you have taken, and which remain in your hands unsold as you have certified to our judges, of our Court, to satisfy C D the sum of whereof in our said court he hath recovered execution against the said A B by virtue of a judgment in the said court, &c.," thus showing the consummation of the right of the plaintiff, the divestiture of possession of the defendant, and the transfer of that possession to the custody and possession of the law by the levy of the previous execution. Considering this to be the situation of the property, and regarding the force of the judgment and levy

as not having been affected by the appraisement and suspension of sale, it becomes unimportant to investigate the results attempted to be deduced from the fact *that the *venditioni exponas* was sued out after the death of the defendant Crane. [*294 According to our view this fact would have been immaterial both upon the rules of the common law and upon the provisions of the stat. of the 29 Car. 2, adopted in many of the States; for by the former the execution would have been valid if tested before the death of the defendant, and by the statute if delivered to the officer before that period; but in this instance not only did the lien which could be enforced by *fieri facias* exist from the date of judgment, according to the statute of Mississippi, but it was actually consummated by seizure in the lifetime of the defendant in the judgment. Upon the point of the validity of an execution against the personalty, if tested and sued in the lifetime of the debtor, numerous authorities might be cited from the English decisions and from the adjudications of the State courts, as well as the decision of this court in the case of *Erwin's Lessee* v. *Dundas et al.* in 4 How., 58, in which many of the cases have been reviewed. A particular reference to the cases upon this point, however, is not deemed important in the present instance, though it may not be altogether out of place to refer to several decisions of the Supreme Court of Mississippi ruling a doctrine which would go very far in sustaining the title of the defendants in the ejectment, admitting that the validity of the first execution and levy on the judgment against Crane was a matter regularly open for examination. Thus the cases of *Smith and Montgomery* v. *Winston and Lawson*, 2 How. (Miss.), 601; of *Drake et al.* v. *Collins*, 5 Id., 253; and of *Harrington* v. *O'Reilly et al.*, 9 Sm. & M. (Miss.), 216, have laid it down as the law of Mississippi in relation to real as well as personal estate, "that a sale made under an execution which issued without a revival of the judgment is not absolutely void but voidable only, and cannot be avoided collaterally."

This last question this court do not feel themselves now called upon to settle; considering the levy under the first judgment against Crane and the lien thereby created as having been consummated, and the property placed by the proceedings in the custody of the law, they regard the title of the defendants below derived from the judgment, the levy of the *fieri facias*, and sale under the *venditioni exponas*, as regular and valid, and one which should have been sustained. The judgment of the District Court is therefore reversed, and

the cause remanded to that court to be tried upon a *venire facias de novo*, in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the
*295] *Northern District of Mississippi, 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, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said District Court, with directions to award a *venire facias de novo*, and to proceed therein in conformity with the opinion of this court.

THOMAS TREMLETT, PLAINTIFF IN ERROR, *v.* JOSEPH T. ADAMS.

The tariff law of July 30, 1846 (9 Stat. at L., 42), reduced the duties on imported coal, and was to take effect on the 2d of December, 1846. The sixth section provided that all goods, which might be in the public stores on that day, should pay only the reduced duty.

On the 6th of August, 1846, (9 Stat. at L., 53,) Congress passed the Warehousing Act, authorizing importers, under certain circumstances, to deposit their goods in the public stores, and to draw them out and pay the duties at any time within one year.

But this right was confined to a port of entry, unless extended, by regulation of the Secretary of the Treasury, to a port of delivery.

Therefore, where New Bedford was the port of entry, and Wareham a port of delivery, the collector of New Bedford (acting under the directions of the Secretary of the Treasury) was right in refusing coal to be entered for warehousing at Wareham.

Where an importer deposited a sum of money, as estimated duties, with the collector, which, upon adjustment, was found to exceed the true duty by a small amount, and the collector offered to pay it back, but the importer refused to receive it, the existence of this small balance is not sufficient reason for reversing the judgment of the Circuit Court, which was in favor of the collector.

THIS case was brought up, by writ of error, from the Circuit Court for the District of Massachusetts.

It was a suit brought in the Circuit Court, by Thomas Tremlett, a merchant of Boston, against Adams, the collector of the port of New Bedford, for return of duties.

The case is stated in the bill of exceptions, which was as follows:

This was an action of assumpsit, brought against the

defendant, collector for the port of New Bedford, to recover the sum of twenty-two hundred and sixty-seven dollars, seventy-seven cents, and interest, excess of duties upon sundry cargoes of coal, imported into the port of Wareham, in the collection district of New Bedford, by the plaintiff, and claimed to be illegally exacted by said defendant, and paid by said plaintiff under protest.

At the trial of the case before his honor, Judge Sprague, the following facts were admitted by the defendant, namely:

1st. That, in the months of September and October, 1846, *the plaintiff, Thomas Tremlett, a merchant of Boston, imported from Pictou, in Nova Scotia, into the port of Wareham, in the collection district of New Bedford, nine cargoes of coal, as follows, namely: [*296

	Chaldrons.	T.	Cwt.	Qrs.	Lbs.	Duty charged.	Money deposited.
Brig Indus	121 1–6	157	13	2	12	$279 44	$285 00
Schooner Congress .	132	173	19	0	16	304 42	315 00
Brig Mary Sophia .	116 1–6	153	10	2	12	268 68	280 00
Barque Acadia . .	249 11–12	329	7	0	10	576 37	575 00
Brig Charles Edward	153 3–12	210	19	0	26	353 43	360 00
Schooner Armida . .	161 5–12	212	14	1	26	372 27	375 00
Brig Hudson . . .	161 2–12	212	7	3	16	371 69	375 00
Brig China	173 8–12	228	17	1	12	400 52	400 00
Brig Moselle . . .	289 8–12	249	19	0	8	457 32	438 00
	1458 9–12	1922	8	1	26	$3364 14	$3403 00

Amounting, in the aggregate, to $1{,}458\frac{9}{12}$ chaldrons, or 1,922 tons, 8 cwt. 1 qr. 26 lbs., as appears by the custom-house records.

These several cargoes of coal were shipped at Pictou, for the port of Wareham, a port of delivery only; and, upon the arrival at that port of the first-mentioned vessel, the brig Indus, on or about the 3d of September, 1846, the plaintiff made application at the custom-house in New Bedford, to the defendant, Joseph T. Adams, then collector at said port, to enter said coal, for warehousing, at Wareham, aforesaid, under the provisions of the act of Congress, entitled, "An act to establish a warehousing system," &c., passed August 6th, 1846. But the defendant refused to allow the plaintiff to enter said coal for warehousing, as aforesaid, under the act aforesaid, because said Wareham was not a port of entry, but a port of delivery; and required him, if he would land said coal at said Wareham, to enter the same under the act for the collection of duties, passed August 30th, 1842, and to deposit

$285 to cover the duties which might be found to be legally due and payable thereon. The plaintiff, in order that said vessel might be permitted to discharge her cargo, complied with this requisition, first entering the following protest in writing:

"I protest against paying duties, wishing to warehouse the coal per brig Indus, from Pictou;" and signed "Thomas Tremlett, by his attorney, Jacob Parker."

The usual permit was then granted by the collector, to land the coal from said vessel at said Wareham, and the coal was accordingly landed; and, upon the arrival at said Wareham of the other cargoes of coal, by the several vessels above named, *said plaintiff made like applications to the defendant, at the collector's office at New Bedford, to enter each cargo for warehousing under said act of August 6th, 1846, at Wareham, aforesaid.

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But the defendant, in like manner, as in the case of the brig Indus, refused permission to Warehouse, as aforesaid, and required the plaintiff to make the same entry as in that case, and deposit a sum of money upon the entry of each cargo, sufficient to cover the duties which might be found to be legally due and payable thereon, under the provisions of the act of August 30th, 1842, the plaintiff first entering a protest in writing, in each case, and upon the entry of each cargo, in manner and form as in the case of the brig Indus, above mentioned; and said coal was thereupon landed, and deposited in the same manner as that per brig Indus.

2d. That all of said coal, landed at said Wareham from the above-named vessels, was deposited in one pile, and remained in the place where it was originally deposited until after December 19th, 1846.

3d. That the aggregate sum deposited with the defendant by the plaintiff, to cover the amount of duties on the several cargoes of coal above mentioned, was $3,403, and the duties on said coal, computed under the Tariff Act of August 30, 1842, would amount to $3,364.14; that by the act of July 30, 1846, the duties on the coal in question would amount to $1,135.23.

4th. That the brigs Indus and Mary Sophia were British vessels; that it has been the invariable practice of the collectors at New Bedford, for more than twenty years, to allow foreign vessels the same rights and privileges, as to unlading and discharging their cargoes at the port of Wareham, that are granted to American vessels, and that no objection was made or intimated by the defendant to the plaintiff to his

landing the cargoes of said "Indus" and "Mary Sophia" at said Wareham.

5th. That said Wareham is the principal port, in the collection district of New Bedford, where coal is imported for consumption.

6th. That the defendant, on or before the 19th of December, 1846, delivered to the plaintiff's attorney a statement of the balance due to the plaintiff for money deposited, over and above the amount of duties claimed on the nine cargoes of coal aforesaid, amounting to $38.86, and offered then to pay the same to Mr. Parker, the plaintiff's attorney, which he declined to receive; and that on the 13th of November, 1849, Mr. Adams, the defendant, tendered the same amount in specie to Thomas Tremlett, the plaintiff, at his office in Boston, which he refused to receive, and informed the defendant that in 1846 he instructed Mr. Parker, his attorney, not to receive it.

*7th. That the paper hereto annexed marked A, is a true copy of the commission under which D. Nye acted as an officer of the revenue, from the date of the commission till after January, 1849; and that the paper marked B, annexed hereto, is a true copy of an official letter, received by D. Nye from said defendant, at or about the time it bears date, and that the papers annexed, marked C and D, are true copies of official letters received by the defendant from the Secretary of the Treasury of the United States. [*298

Boston, December 13th, 1849.

(The paper marked A was merely an authority to David Nye to act as deputy-collector, inspector, gauger, weigher, and measurer, for the port of Wareham, dated October 3, 1843.

The paper marked B was an authority to Nye, from Adams, under the authority of the Secretary of the Treasury, to warehouse coal, &c., at Wareham, under the Warehousing Act of 1846. But this authority was dated August 22, 1848.

The paper marked C was dated August 27th, 1846, and was a letter from the Secretary of the Treasury to Adams, refusing to allow any article to be warehoused without the limits of a port of entry.

The paper marked D was from the same to same, dated July 5th, 1849, merely saying that the District Attorney had been instructed to defend Adams in the suit brought by Tremlett.)

Upon these facts the plaintiff, by his counsel, requested the court to rule and instruct the jury,—

1st. That the right or privilege of warehousing goods at

any ports or places within the United States is regulated by the laws of Congress, which specify the ports and places at which, and the manner in which, such warehousing shall be permitted, and that no discretion as to the selection of such ports or places, or as to the manner in which such warehousing shall be allowed, is reposed in the collector, or any other executive officer.

The plaintiff further requested the court to rule and instruct the jury,—

2d. That by law there is no distinction as to the exercise of such right of warehousing between ports of entry and ports of delivery, and that if the plaintiff at the time had a right, under the existing laws, to warehouse his goods in a port of entry in any district in the United States, he had equally a right to warehouse them at any port of delivery in such district, upon complying with the requirements of the laws regulating the warehousing of goods.

The plaintiff further requested the court to rule and instruct the jury,—

3d. That the plaintiff, being unlawfully prevented from
*299] warehousing *his goods as aforesaid, and required to pay duties upon them according to the rates established by the Tariff Law of 1842, ought to recover of the defendant the difference between the amount of duties chargeable under the Tariff Act of 1842 and that under the Tariff Act of 1846, and interest thereon from the time of payment of the several sums.

The plaintiff further requested the court to rule and instruct the jury,—

4th. That if, upon the facts, the plaintiff could not recover the whole of the difference between the amount of duties properly chargeable under the act of 1842, and the amount properly chargeable under the act of 1846, he was entitled to recover the sum of $38.86, being the surplus in the defendant's hands over and above the amount of the duty properly chargeable according to the act of 1842. But the court refused to give the instructions so prayed for; but, on the contrary thereof, did rule and instruct the jury that the plaintiff could not maintain his action, nor recover either of said sums of money, or any part thereof; to all which rulings and instructions the plaintiff excepts, and prays that his exceptions may be allowed.

PELEG SPRAGUE, [SEAL.]
Judge, &c.

The jury accordingly found for the defendant, and upon these exceptions, the case came up to this court.

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It was argued by *Mr. Sherman*, for the plaintiff in error, and by *Mr. Bibb*, for the defendant in error. There was also an elaborate brief on the same side, filed by *Mr. Crittenden* (Attorney-General).

Mr. Sherman, for the plaintiff in error, contended that the court below erred,—

1st. In refusing the instructions prayed for in behalf of the plaintiff below.

2d. In the instructions which it gave to the jury.

(The arguments of the counsel upon both sides were founded upon a minute examination of preceding laws, which it would be difficult to compress within reasonable limits, and at the same time do justice to the arguments. The reporter, therefore, confines himself to a mere statement of the points.)

Mr. Sherman united both the above points in his arguments.

1st. That under the Constitution and laws of the United States, a right existed to warehouse the coal at a port of delivery.

2d. The right to warehouse at the port in question being given by law, the plaintiff could not be deprived of that right by any instructions issued by the Secretary of the Treasury to carry the *act into effect. Sect. 5 of Warehousing [*300
Act, 9 Stat. at L., 53; *Tracy & Balister* v. *Swartwout*, 10 Pet., 95; *Elliot* v. *Swartwout*, 10 Pet., 153; and *Greely* v. *Thompson*, 10 How., 234, decided at the last term of the Supreme Court.

3d. The defendant, as collector of the customs, having deprived the plaintiff of the right to warehouse his said nine cargoes of coal at Wareham, and to enter the same, under the Tariff Act of July, 1846, upon the payment of $1,135.13, the duty imposed on the same by that act, and exacted of the plaintiff a deposit of money, as for duties, amounting to $3,403, the plaintiff has a right to recover the difference, with interest.

4th. Or, otherwise, if it be decided that the duties were legally due under the Tariff Act of 1842, amounting to $3,364.11, the plaintiff having deposited with the defendant the sum of $3,403, is entitled to recover the difference, viz., $38.89, with interest. *Boyden* v. *Moore*, 5 Mass., 365, 369; *Breed* v. *Hurd*, 6 Pick. (Mass.), 356; *Whipple* v. *Newton*, 17 Id., 168.

On the other hand, the counsel for the defendant in error

contended that the first, second, and third instructions, as moved, were not according to the law of the case upon the facts established by the evidence, and facts pertinent to the issue, which no evidence conduced to prove, (and are therefore to be considered as not having existed). They would, if given, have misled the jury.

The first and second instructions moved misconstrue the revenue laws. Important distinctions between ports of entry and delivery, and ports of delivery only, are made by the laws. The Secretary of the Treasury had a discretion to refuse to suffer coal to be warehoused at ports of delivery only, where no collector, naval officer, or surveyor resided; where the collector of the port of entry had to discharge, at one, two, or three ports of delivery only, annexed to his collection district, all the duties of collector, naval officer, and surveyor; and where, in the opinion of the Secretary, the additional charge of a permanent officer to reside at the port of delivery only, with the rent to be paid for warehouses, would overgo the receipts from storage, and diminish the revenue at such port of delivery only.

The third instruction moved by the plaintiff, when applied to the facts of the case, assumes, in the first place, that the Secretary of the Treasury "unlawfully" prevented the warehousing of the coal at Wareham; and in the next place assumes that, because the collector obeyed the instructions of the Secretary, the defendant became a wrongdoer; and in the third place assumes that the defendant is liable, and, in the language of the count, became indebted to the plaintiff, *301] and promised him to *pay the difference of duty on the coal between the Tariff of 1842, and that of December, 1846.

If the Secretary of the Treasury had been sued as the wrongdoer instead of the collector, the Secretary could have defended and maintained his instructions against warehousing coal at Wareham, a port of delivery only, as being a lawful exercise of a discretionary power confided by the revenue laws existing before the act to establish a system of warehousing, not impaired by that act, but confirmed by its fifth section; which discretionary power so given by the laws, was necessary and proper to the uniformity and efficiency of the system of revenue from the customs, over which the judicial department has no control.

The second proposition assumed by the plaintiff, that the defendant, in obeying the instructions to him as collector, by the Secretary of the Treasury, against warehousing the coal at the port of Wareham, became thereby a wrongdoer, and

liable to the plaintiff for damages, would not follow, if it were conceded, that the Secretary of the Treasury, in the exercise of his functions, erred in the construction of the revenue laws, and thereupon issued wrong instructions to the collector against warehousing at Wareham.

The third assumption, as to the amount of the remote consequential damages, would not follow from the plaintiff's first and second premises, if they were conceded.

The conduct of the defendant, as collector, whether he pursued the right line of his duty, or departed from it and became a trespasser, and if a wrongdoer for what damages he became responsible, are matters to be adjudged by the laws in force defining his duties as collector at the time when the plaintiff made his protest against the conduct of the collector; not by the error of the Secretary of the Treasury, whom the law had put over him as a light, a guide, and a buckler; nor by laws which did not take effect until months after the plaintiff's protest; nor by the after voluntary act of the plaintiff himself, of omission or commission.

The fourth instruction moved relates to the sum of $38.86, twice tendered to the plaintiff, and twice refused.

This is certainly a small business, a little matter, a very trifling matter, wherewith the plaintiff hath elected, (after two tenders and refusals,) to engage the time and attention, first of the Circuit Court of the United States, by an action originally brought therein, whose cognizance, as defined by law, is intended to be limited to cases "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," and secondly, the time and attention of this court, whose appellate jurisdiction in such like cases is, by the law, intended to be confined to *matters in dispute [*302 exceeding the sum or value of two thousand dollars, exclusive of costs.

If the plaintiff had truly stated his demand, for the said sum of thirty-eight dollars eighty-six cents, neither the Circuit Court nor this court could have held cognizance of the plea. But by refusing this sum when tendered, and by mixing this matter with his protest about the warehousing, and, by stating his demand at five thousand dollars, he has compelled the Circuit Court and this court to hold cognizance of his complainant.

If the jury had found for the plaintiff the sum of thirty-eight dollars eighty-six cents, then, according to the twentieth section of the Judiciary Act of 24th September, 1789, "he shall not be allowed, but, at the discretion of the court, may be adjudged, to pay costs."

When, upon the facts given in evidence, the plaintiff moved this fourth instruction, that "he was entitled to recover the sum of $38.86," he thereby confined and dwindled his demand to that sum; the court was called to adjudicate as to that sum; to lend its assistance to the plaintiff to recover that sum and no more; a matter far beneath the cognizance of that court.

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

This is an action brought by the plaintiff against the collector of the port of New Bedford, for refusing to permit the plaintiff to enter for warehousing at Wareham sundry cargoes of coal, imported from Pictou, Nova Scotia, which were shipped for Wareham, and arrived in the months of September and October, 1846. Wareham was a port of delivery in the collection district of which New Bedford was the port of entry; and the collector, in refusing to permit them to be entered for warehousing at Wareham, acted under the directions of the Secretary of the Treasury. The plaintiff was required to pay in cash the duties imposed by the act of 1842, before the permit for landing at Wareham was granted. And this suit is brought to recover the difference between the duties paid and the duties to which the coal would have been liable if it had been warehoused at Wareham and remained in store as the plaintiff desired until the reduced tariff went into operation. The case depends upon the construction of the Warehousing Act of August 6, 1846.

The law is framed in very general terms, referring to other laws for some of its regulations; and containing but few specific directions as to the manner in which it should be carried into execution. And it authorizes the Secretary of the Treasury to make from time to time such regulations, not inconsistent with law, as might be necessary to give full
*303] effect to the provisions of *the act, and secure a just accountability under it. This mode of legislation has naturally led to some ambiguity, and has given rise to this controversy.

The act went into operation on the day it was approved by the President. And the plaintiff insists that, under its provisions, he was entitled, as soon as it passed, to land his goods at the port of delivery upon bonding for the duties; and to have them placed there in store in order to avail himself, if he thought proper, of the reduced tariff, which took effect on the 2d of December, in the same year. The 6th section of the Tariff Act of July 30, 1846, which

passed a few days before the Warehousing Act, of which we are now speaking, provided that all goods imported after the passage of that law, and remaining in the public stores on the 2d of December following, when the act went into operation, should be subject to no other duty upon entry thereof than if they had been imported after that day.

In expounding the Warehousing Act, it must be borne in mind, that it was not passed for the purpose of enabling the importer to avail himself of the reduced rates of duty. It is a part of the general and permanent system of revenue; and its evident object is to facilitate and encourage commerce by exempting the importer from the payment of duties, until he is ready to bring his goods into market. The opportunity it afforded of taking advantage of the reduced rates of duty was an accidental circumstance arising from the time at which it happened to be passed. The provisions in the 6th section of the Tariff Act of July 30, 1846, had no reference to goods entered for warehousing. There was no law at that time which authorized the importer so to enter them. And although the Warehousing Act, which passed a few days afterwards, enabled the importer, by warehousing his goods, to take the benefit of the provisions of the previous law, yet it was not passed for that purpose. And it must be regarded and interpreted, not as an act passed for a temporary purpose, or to meet a change of tariff, but as one intended to be equally applicable to goods imported after the 2d day of December, as to goods imported between the 30th of July and that time. The plaintiff had the same legal rights in this respect at the time he offered to enter his coal at Wareham as an importer of the present day, and nothing more; and no greater advantages were intended to be given him by the Warehousing Act.

Previous to the passage of this act no goods, chargeable with cash duties, could be landed at the port of delivery until the duties were paid at the port of entry. The importer had no right to land them anywhere until they had passed through the custom-house. And they could not be landed at the port of delivery without the permit of the proper officer at the port of *entry. This permit in effect [*304
delivered them to the owner to be landed under the usual inspection, and sold and disposed of as he thought proper; and the permit could not be granted unless the duties had been paid.

There could, therefore, but rarely be any necessity for public stores or warehouses at a port of delivery, before the passage of the Warehousing Act.

It was otherwise at ports of entry. The importer himself had no right to land them even at a port of entry before the duties were paid. But when the entry at the custom-house was imperfect, for want of the proper documents, or where the goods were damaged in the voyage, and the duties could not be immediately ascertained; or the cash duties were not paid after the forms of entry had been complied with; in all of these cases the collector was directed, by existing laws, to take possession of such goods, and place them in public stores, and retain them until the duties were paid. And as all of this was to be done at the port of entry, public stores were necessary at such ports; and they had accordingly been provided for by law, before the passage of the Warehousing Act.

Now, the Warehousing Act, so far as the landing and storing of goods is concerned, places goods entered for warehousing upon the same footing with goods upon which the duties have not been paid. It provides, that in all cases of failure or neglect to pay the duties within the period allowed by law to the importer, to make entry thereof, or whenever the owner, importer, or consignee, shall make entry for warehousing in the manner directed in the act, the collector shall take possession of the goods and deposit them in the public stores, or in other stores to be agreed on by the collector or other chief officer of the port, and the importer of the goods to be secured in the manner provided for in the act of 1818 relative to the warehousing of wines and distilled spirits. The warehoused goods, therefore, are to be taken possession of by the same officer and stored, and treated like goods upon which the importer had failed to pay duty. And, as the latter were necessarily to be taken possession of at the port of entry, and accustomed to be stored there, the natural inference from this association is, that the law contemplated the storage of warehoused goods at the same place, and did not mean to give the importer a right to store them at any port of delivery to which he might have chosen to ship them. The Warehousing Act gives him no peculiar privileges over the importer of goods directed to be placed in the public stores because the duties were not paid; nor any greater right to select for himself the place of storage.

The 2d section of the act strengthens this construction of the *1st section. It provides that warehoused goods, *305] deposited in the public stores in the manner provided in the 1st section, might be withdrawn and transported to any other port of entry; and directs that the party should give bond for the deposit of them in store, in the port of

entry to which they shall be destined. The use of the words "ports of entry," in this provision, implies that they were to be stored in a port of that description in the first instance, and to be deposited again in a like port, if they were transported coastwise.

Again, the directions as to the manner in which they are to be secured while they remain in the store, and to be delivered to the party when he is entitled to receive them, leads to the same conclusion. They cannot be withdrawn without a permit from the collector and naval officer of the port at which they are stored. And as there is no naval officer appointed or needed at a port of delivery, this provision would appear to have contemplated the storage at a port of entry and not of delivery. There are certain expressions in the law which may be applied to a port of delivery as well as of entry. But they were introduced for the purpose of authorizing the Secretary of the Treasury, under the power to make regulations, to have suitable storehouses to provide at a port of delivery, when the nature and importance of the trade might require it.

The act of 1799, c. 22, § 21, (1 Stat. at L., 642,) authorizes the collector, with the approbation of the principal officer of the Treasury Department, to employ proper persons as weighers, gaugers, measurers, and inspectors at the several ports within this district; and also, with the like approbation, to provide, at the public expense, storehouses for the safe-keeping of goods, and such scales, weights, and measures, as may be necessary. The secretary and collector were, therefore, under this law, to determine where storehouses were necessary; and might provide them at a port of delivery, if they believed the interests of the public and of commerce demanded it. But the law confided it to their discretion to determine whether they should or should not be provided at any particular port of delivery; and the Warehousing Act has not changed the law in this respect, and does not require that there should be public storehouses at every port of delivery at which the importer might wish to warehouse his goods.

The record shows, that after this transaction took place, the secretary did authorize goods to be warehoused at Wareham. But the question before us is not whether he might not have authorized it before; but whether, independently of any regulation by the secretary, the importer had not an absolute right, as soon as the law was passed, to land his goods at the port of *delivery to which they were destined, and store them there, upon giving the bonds which the law requires. [*306 We think he had not, and that the right, given under the

Warehousing Act, was confined to a port of entry, unless extended, by regulation of the secretary, to a port of delivery.

Indeed, the execution of the law would be impracticable under the construction contended for by the plaintiff. For it directs that the bond to be taken on the entry for warehousing, shall be prescribed by the secretary; and it is made his duty to make regulations to carry the law into full effect, and secure a just accountability. These things required time; and the collector could not act without them. Yet, if the plaintiff's construction be the correct one, his right to enter his coal for warehousing at Wareham was as absolute the day after the law passed as it was when he offered to make the entry. For if the law gave him the right, independently of any regulations by the secretary, he was not bound to wait until they were made and the form of the bond prescribed; but might have demanded his rights on the 7th of August, and sued the collector if he failed to obtain them. It is evident that Congress could not have intended to confer upon the importer this right. Nor can the law receive that construction without rejecting the provisions which authorize the secretary to prescribe the form of the bond, and to direct the manner in which the act was to be carried into effect. These provisions, in relation to the power of the secretary, are important, and were intended to guard the public against any abuse of the privileges which the Warehousing Act gave to the importer.

Moreover, many of the ports of delivery are at places where the trade is trivial and unimportant, and where it would be difficult to procure suitable storehouses for a cargo unexpectedly arriving and demanding to be warehoused. In many of them there are not a sufficient number of officers to superintend the landing and warehousing of a cargo of an ordinary ship, and guard it afterwards from being improperly withdrawn. The Warehousing Act does not authorize the appointment of additional officers, at ports of delivery, nor provide for any additional expenses to be incurred by the public in carrying it into execution. And if the collector is bound to grant a permit to land the goods, at any port of delivery which the importer may select for his shipment, it is easy to foresee the abuses to which it would lead; and the frauds that might be practised under it, Congress can hardly be presumed, from any general or ambiguous language, to have intended, in this law, to dispense with all the safeguards which had been so carefully provided and preserved in previous acts. We think

*307] neither its words nor its *manifest object will justify such a construction, and that the collector was right

in refusing the permit to the plaintiff to land and warehouse the coal in question at Wareham.

As regards the small balance of the plaintiff's deposit which remained in the collector's hands after the payment of the legal duties, it is no ground for reversing the judgment of the Circuit Court. The defendant offered to pay it, but the plaintiff refused to receive it. The money placed in the hands of the collector for the estimated duties was a deposit in trust for the United States for the amount that should be found actually due; and for the plaintiff for the balance, if any should remain after the duties were paid. And as the plaintiff refused to receive this balance when tendered, it continues a deposit in the hands of the defendant with the plaintiff's consent; and he cannot subject the collector to the costs and expenses of a suit until he can show that it is wrongfully withheld.

The judgment of the Circuit Court is therefore affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of 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.

THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY, PLAINTIFFS IN ERROR, *v.* SEBRE HOWARD.

In Maryland, the clerk of a county court was properly admitted to prove the verity of a copy of the docket-entries made by him as clerk, because, by a law of Maryland, no technical record was required to be made.

And, moreover, the fact which was to be proved being merely the pendency of an action, proof that the entry was made on the docket by the proper officer, was proof that the action was pending, until the other party could show its termination.

Where the question was, whether or not the paper declared upon bore the corporate seal of the defendants, (an incorporated company,) evidence was admissible to show that, in a former suit, the defendants had treated and relied upon the instrument, as one bearing the corporate seal. And it was admissible, although the former suit was not between the same parties; and although the former suit was against one of three corporations, which had afterwards become merged into one, which one was the present defendant.

The admission of the paper as evidence only left the question to the jury. The burden of proof still remained upon the plaintiff.

*The evidence of the president of the company, to show that there was an understanding between himself and the plaintiff, that another per- [*308

son should also sign the paper before it became obligatory, was not admissible, because the understanding alluded to did not refer to the time when the corporate seal was affixed, but to some prior time.

In order to show that the paper in question bore the seal of the corporation, it was admissible to read in evidence the deposition of the deceased officer of the corporation, who had affixed the seal, and which deposition had been taken by the defendants in the former suit.

If the defendants had relied upon the paper in question to defeat the plaintiff in a former suit, they are estopped from denying its validity in this suit. It was not necessary to plead the estoppel, because the state of the pleadings would not have justified such a plea.

Where the covenant purported to be made between two persons by name, of the first part, and the corporate company, of the second part, and only one of the persons of the first part signed the instrument, and the covenant ran between the party of the first part and the party of the second part, it was proper for the person who had signed on the first part to sue alone; because the covenant enured to the benefit of those who were parties to it.

In this particular case, a covenant to finish the work by a certain day, on the one part, and a covenant to pay monthly on the other part, were distinct and independent covenants. And a right in the company to annul the contract at any time, did not include a right to forfeit the earnings of the other party, for work done prior to the time when the contract was annulled.

A covenant to do the work according to a certain schedule, which schedule mentioned that it was to be done according to the directions of the engineer, bound the company to pay for the work, which was executed according to such directions, although a profile was departed from which was made out before the contract was entered into.[1]

So, also, where the contract was, to place the waste earth where ordered by the engineer, it was the duty of the engineer to provide a convenient place; and if he failed to do so, the other party was entitled to damages.

Where the contract authorized the company to retain fifteen per cent. of the earnings of the contractor, this was by way of indemnity, and not forfeiture; and they were bound to pay it over, unless the jury should be satisfied that the company had sustained an equivalent amount of damage by the default, negligence, or misconduct of the contractor.

Where, in the progress of the work, the contractor was stopped by an injunction issued by a court of chancery, he was not entitled to recover damages for the delay occasioned by it, unless the jury should find that the company did not use reasonable diligence to obtain a dissolution of the injunction.

If the company annulled the contract merely for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring the contractor, he was entitled to recover damages for any loss of profit he might have sustained; and of the reasons which influenced the company, the jury were to be the judges.[2]

THIS case was brought up by writ of error, from the Circuit Court of the United States for the District of Maryland.

It was a complicated case, the decision of which involved numerous points of law, as will be seen by the syllabus prefixed to this statement.

There were six exceptions to the admissibility of evidence taken during the progress of the trial in the Circuit Court. The plaintiff below then offered eleven prayers to the court,

[1] CITED. *Upstone* v. *Weir*, 54 Cal., 126.

[2] *Smith* v. *O'Donnell*, 8 Lea (Tenn.), 478.

and the defendant, thirteen. The court laid aside all the prayers and embodied its instructions to the jury in thirteen propositions.

The facts of the case, out of which all these points of law arose, were the following:

*Prior to 1836, there existed in Maryland a company called the Delaware and Maryland Railroad Company, [*309 which, by an act of the legislature, passed on the 14th of March, 1836, was united with the Wilmington and Susquehannah Railroad Company; the two united, taking the name of the latter.

It will be perceived that this company is not, *eo nomine*, one of the parties to the present suit, and it may as well be now mentioned that afterwards a further union of companies took place by virtue of a law of Maryland, passed on 20th of January, 1838. The following companies were united, viz.: The Baltimore and Port Deposit Railroad Company; The Wilmington and Susquehannah Railroad Company; The Philadelphia, Wilmington, and Baltimore Railroad Company; —the three, thus united, taking the name of the latter company, which was the plaintiff in error.

On the 12th of July, 1836, whilst the Washington and Susquehannah Railroad Company had a separate existence, a contract was entered into between them and Howard for the prosecution of the work in Cecil county, in the State of Maryland. Two copies of this paper were extant. They were substantially alike except in this; that one of them (the one referred to as marked B) was sealed by Sebre Howard, and was signed by James Canby, President, with his private seal affixed. It was not sealed by the Railroad Company. The other (referred to as marked A) was signed and sealed by Howard, and signed also by Canby, as president. It also bore an impression which purported to be seal of the company.

This latter paper was the basis of the present suit, which was an action of covenant. Some of the points of law decided in the case refer to the paper, which makes it necessary to insert it, viz.:

Agreement between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehannah Railroad Company, of the second part.

The party of the first part, in consideration of the matters hereinafter referred to and set out, covenants and agrees, to and with the party of the second part, to furnish and deliver, at the proper cost of the said party of the first part, the building materials which are described in the annexed schedule,

to the said party of the second part, together with the necessary workmanship and labor on said railroad, and at such times, and in such quantities as the party of the second part shall designate; and faithfully, diligently, and in a good and workmanlike manner, to do, execute and perform the office, work, and labor in the said schedule mentioned.

*310] *And the party of the second part, in consideration of the premises, covenants and agrees to pay the party of the first part the sums and prices in the said schedule mentioned, on or before the first day of November next, or at such other times and in such manner as therein declared.

Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular, or negligent; then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null; and the party of the first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right to except to, or question the same, in any place, or under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part, for the damages occasioned to him by the said non-compliance, irregularity, or negligence.

And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the moneys at any time due to the said party of the first part. Thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals.

SEBRE HOWARD, [SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
JAMES CANBY, *President.* [SEAL.]

Sealed and delivered in the presence of—
WILLIAM P. BROBSON. [SEAL.]

Schedule referred to above.

The above-named Sebre Howard and Hiram Howard contract to do all the grading of that part of section No. 9, in the

State of Maryland, of the Wilmington and Susquehannah Railroad, which extends from station No. 191, to the end of the piers and wharf in the River Susquehannah, opposite Havre de Grace, according to the directions of the engineer, and according to the specification hitherto annexed, for the sum of twenty-six cents per cubic yard, for every cubic yard excavated; the said section to be completed in a workmanlike manner, viz., one mile from *station No. 191, by October 15, 1836, and the residue by November 1, ensuing. [*311

They also contract to make the embankment at the river from the excavation of the road, provided the haul shall not exceed a distance of eight hundred feet from the eastern termination of the said embankment; all other portions of the hauling together not to exceed an average of eight hundred feet; and for any distance exceeding the said average the price is to be one and a half cents per cubic yard for each hundred feet.

The party of the second part contracts to pay to the said Sebre and Hiram Howard, the said sum of twenty-six cents per cubic yard in monthly payments, according to the measurement and valuation of the engineer, retaining from each payment fifteen per cent. until the final completion of the work. If any additional work, in consequence of water, grubbing, or hard material, is required on the side ditch or ditches, or through Cowden's woods, the same is to be decided by the engineer, as in case of rock, &c.

Specification of the manner of grading the Wilmington and Susquehannah Railroad.

Before commencing any excavation or embankment, the natural sod must be removed to a depth of three inches from the whole surface occupied by the same, for the purpose of afterwards sodding the slopes thereof, and all stumps, trees, bushes, &c., entirely removed from the line of road as directed by the engineer. In cases of embankment a grip must be cut about one foot deep for footing the slopes, and preventing them from slipping. The embankments must be very carefully carried up in layers of about one foot in thickness, laid in hollow form, and in so doing, all hauling or wheeling, whether loaded or empty, must be done over the same. The slopes of excavations and embankments will be one and a half horizontal to one perpendicular, except where otherwise ordered by the engineer, and are to be sodded with the sods removed from the original surface.

Side ditches and back drains must be cut wherever ordered

by the engineer, at the same price as the common excavation. The side ditches will on an average be about nine feet wide on top, and about two feet deep, and will extend along a great portion of the road. In most places where embankments are to be made, the cutting of the adjacent parts is about sufficient for their formation, and as the contractor is supposed to have examined the ground and profiles, and to have formed his estimates accordingly, no allowance will be made for extra hauling. Where more earth is required than is procured from the excavations, the contractor shall take it from such places *312] as the engineer may *direct, the cost per cubic yard being the same as the other parts. Where there is any earth from the excavations, more than is required for the embankments, it shall be placed where ordered by the engineer.

All the estimates will be made by measuring the excavations only.

Loose rocks, boulders, ironstone, or other pebbles, of a less weight than one fourth of a ton, are to be removed by the contractor at the same price as the common excavation; but in cases of larger size, or for blasting, the price shall be a matter of special agreement between the contractors and engineer, and if the former should not be willing to execute it for what appears to the engineer a fair price, the latter may put the same into other hands.

No extra allowance will be made for cutting down trees, grubbing, bailing, or other accidental expenses.

Measurements and estimates will be taken about once a month, and full payment will be made by the directors, after deducting 15 per cent., which deduction on each estimate will be retained until the entire contract is completed, which must be on or before the

It is distinctly understood by the contractors that the use of ardent spirits among the workmen is strictly forbidden.

WILLIAM STRICKLAND,
Chief Eng. of the Wil. & Sus. R. R.

(*Indorsed.*)—*S. and H. Howard's Contract.*

Sebre Howard went to work alone, Hiram Howard never having signed or participated in the contract.

On the 17th of September, 1836, he was served with an injunction issued by the High Court of Chancery of Maryland, against the Maryland and Delaware Railroad Company, its agents and servants, commanding them to desist from the prosecution of a particular part of the work.

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On the 30th of October, 1836, the injunction was dissolved.

On the 18th of January, 1837, the directors of the company passed the following resolution:

A communication was received from the chief engineer, representing that the contract of S. & H. Howard for section No. 9, was not in due progress of execution, and recommending that it should be forfeited, which was read, and on motion of Mr. Gilpin the following resolution was adopted, viz.:

"Whereas a contract was duly executed between S. Howard (acting for himself and H. Howard) and the Wilmington and Susquehannah Railroad Company, bearing date the 12th day of July last, whereby the said S. & H. Howard contracted, for the *consideration therein mentioned, to [*313 do all the grading of that part of section No. 9, of the said railroad which extends from station No. 191, to the end of the piers and wharf in the River Susquehannah, opposite Havre de Grace, according to the directions of the engineer of the said railroad, and to the specification thereto annexed, and to complete the same by the time therein mentioned; and whereas, the times appointed for the completion of said contract have elapsed, and the work is not yet completed, and the party of the second part is of the opinion that the contract is not duly complied with by the party of the first part, and that the said contract is not in due progress of execution:—Therefore, resolved, that the said contract be, and the same is hereby declared to be forfeited."

A suit was then brought in Cecil County Court, by Sebre and Hiram Howard, against the Wilmington and Susquehannah Railroad Company, which was finally disposed of at October term, 1847. The result of the suit is shown in the following copies of the docket-entries, which were admitted in evidence by the Circuit Court, but the admissibility of which constituted the subject of the first bill of exceptions.

In Cecil County Court, October Term, 1847.

S. & H. Howard, use of Charles Howard, use of Hinson H. Cole, $5,000, use of Daniel B. Banks, $1,000,
v.
The Wilmington and Susquehannah Railroad Company.

Procedendo and record for the court af appeals; leave to amend pleadings; nar. filed; pleas filed; similiter; replica-

tion and demurrer; leave to defendant to amend pleadings; amended pleas; replication and demurrer; rejoinder; agreement; leave to defendants to issue commission to Wilmington, Delaware; agreement filed; jury sworn; jury find their verdict for the defendants, under instructions from the court, without leaving their box; December 3d, 1847, judgment on the verdict.

In testimony that the above is a true copy of the docket-entries taken from the record of Cecil County Court, for October term, 1847, I hereunto set my hand, and the seal of said court affix, this 12th of November, A. D., 1849.

R. C. HOLLYDAY, [SEAL.]
Clerk of Cecil County Court.

This suit having thus failed, Sebre Howard, a citizen of the *314] *State of Illinois, brought an action of covenant in his own name, in the Circuit Court of the United States for the District of Maryland. The declaration set out the following breaches which were filed short by agreement of counsel.

1st breach. In not paying the estimate of the first of January.

2d breach. Damages resulting from the injunction sued out by John Stump.

3d breach. For not building the bridge over Mill creek, and the culvert in Cowden's woods, whereby the plaintiff was damaged by the necessity of making circuitous hauls.

4th breach. For omission seasonably to build the wharf and cribs on the Susquehannah, whereby the plaintiff was prevented from hauling the earth from the excavations made by him upon said road.

5th breach. For refusal to point out a place or places to permit plaintiff to waste or deposit the earth from the excavations of the road.

6th breach. For refusal to pay for the overhaul.

7th breach. For fraudulently declaring contract forfeited, and thereby depriving plaintiff of gains which would otherwise have accrued to him on the completion of the contract, and refusal to pay the amount of the 15 per cent. retained by the defendants under the several estimates.

8th breach. For not paying said 15 per cent. so retained upon the several estimates.

The defendants put in the following pleas:

Pleas. And the said defendant, by William Schley, its attorney, comes and defends the wrong and injury, when, &c., and says, that the said supposed agreement in writing, in the

said declaration mentioned, is not the deed of this defendant. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf, says, that the said supposed agreement in writing, in the said declaration mentioned, is not the deed of the Wilmington and Susquehannah Railroad Company, in the said declaration mentioned. And of this the said defendant puts itself upon the country, &c.

And the said defendant, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, for a further plea in this behalf to the said declaration, says, that the said Wilmington and Susquehannah Railroad Company, in the said declaration mentioned, did not make, or enter into, an agreement in writing with the said plaintiff, sealed with the corporate seal of the *said Wilmington and Susque- [*315
hannah Railroad Company, in manner and form as the said plaintiff hath above in his said pleading alleged. And of this the said defendant put itself upon the country, &c.

WILLIAM SCHLEY,
Attorney for Defendant.

It was agreed that leave was given to the defendants to give in evidence any matter of defence which could be specially pleaded.

Upon this issue the cause went to trial, when the jury, under the instructions of the court, which will be hereafter set forth, found a verdict for the plaintiff for twenty-four thousand four hundred and twenty-five dollars and twenty-four cents damages, with costs.

It has been already mentioned that the defendants took six exceptions, during the progress of the trial, to the admission of evidence. They were as follows:

First Exception. At the trial of this cause, the plaintiff, to maintain the issue on his part joined, proved by Richard T. Hollyday, a competent witness, that he is the present clerk of Cecil County Court, and that the following is a true copy of the docket-entries under the seal of Cecil County Court in a case heretofore depending in that court.

(Then followed the docket-entries above quoted.)

The plaintiff then offered to read said docket-entries in evidence to the jury, for the purpose of showing that such a suit was depending in said court, as shown by said docket-

entries, and for no other purpose; but the defendant, by its counsel, objected to said docket-entries as legal and competent evidence in this cause, and insisted that the same ought not to be read to the jury as evidence in this cause, for the purpose for which they were offered, or for any other purpose. But the court overruled the said objection, and permitted the said docket-entries to be read in evidence in this cause, and the same were accordingly read to the jury. To the admission of which said docket-entries in evidence, the defendant, by its counsel, prayed leave to except.

Second Exception. The plaintiff then further proved, by said Richard T. Hollyday, that he was present in the month of December, 1847, at the trial in Cecil County Court of the said cause, specified in the said docket-entries referred to in the first bill of exceptions, and being shown the paper marked A, of which the following is a true copy:

(The paper marked A has been already described in this statement.)

He was asked whether or not he had ever seen said paper before, and particularly whether or not he had seen the paper
*316] A *exhibited as a paper of defendant's, and in the possession of the counsel for the defendant in said case, specified in said docket-entries at the said trial in December, 1847; but the defendant, by its counsel, objected to said question, and to the admission in evidence of any answer to the same, on the ground that that suit was between different parties; but the court overruled the objection to said question, and to the answer to the same, and permitted the said witness to answer the same, who deposed that the plaintiff in said case, at said trial in Cecil County Court, relied upon another paper, shown to the witness marked B, and which is as follows:

(The paper marked B has been heretofore described in this statement.)

But that one of the counsel for the defendant had then and there in his possession, at said trial, the said paper, marked A, and handed the said paper to Judge Chambers as the real contract in the case, and spoke of it as the real and genuine contract between the parties.

To which said question to said witness and to the answer given by the said witness thereto, the defendant by its counsel prayed leave to except.

Third Exception. The said Richard T. Hollyday being further examined, stated that whether the impression on said paper, marked A, is or is not the seal of the Wilmington and Susquehannah Railroad Company, he does not know, not

having seen at any time the seal of the said company; but that the witness thinks that said paper A was offered in evidence by the defendant in said cause, in Cecil County Court, as the deed of said company, and that evidence of that fact that it was such deed was offered by said defendant. The plaintiff then offered to read in evidence to the jury the said paper marked A, but the defendant, by its counsel, objected to the admissibility of said paper in evidence to the jury. But the court overruled the said objection, and permitted the said paper to be read in evidence to the jury, as *primâ facie* proved to be the deed of the said Wilmington and Susquehannah Railroad Company; to the admission of which said paper in evidence, the said defendant, by its counsel excepted.

Fourth Exception. The plaintiff then further proved by Francis W. Ellis, a competent witness, that he is a member of the bar of Cecil County Court, and that he was present at said court in December, 1847, at the trial of said case, specified in said docket-entries set out in the first bill of exceptions; that at said trial no evidence whatever was given by the defendant; but that, at the conclusion of the plaintiff's case, an objection was made by the counsel for the defendant in the case, to the plaintiff's *right of recovery, and he thinks the ground of objection was that the action [*317 should not have been brought in the names of Sebre Howard and Hiram Howard. The said witness further stated that, at said trial, one of the counsel for the defendant in that case had in his hands the paper marked A, offered in evidence in this case by the plaintiff, and that he stated, not only to those around him at the bar, but also in conversation with the presiding judge, that said paper was the real contract between the parties.

Evidence of Henry Stump. The plaintiff further proved by Henry Stump, a competent witness, that he was present at the trial, in December, 1847, in Cecil County Court of the said case, specified in the said docket-entries set out in the first bill of exceptions, and that he was so present as one of the counsel for said plaintiff, and that he took part in the trial. That at said trial the said paper, marked A, was offered in evidence by the defendant, and relied on by the counsel for the defendant in that case, the same having been proved by a witness, to be sealed with the corporate seal of said defendant; and that the objection to the right of recovery in that case was based on said paper, marked A, as a deed; and that the production and proof of said paper A, as the sealed deed of the defendant, at once satisfied him that

said suit could not be maintained, and that he therefore suffered the verdict to be taken for the defendant.

The plaintiff then read the agreement of union, dated 5th February, 1838, between the Wilmington and Susquehannah Railroad Company, the Baltimore and Port Deposit Railroad Company, and the Philadelphia, Wilmington, and Baltimore Railroad Company, under the last-mentioned name. He then offered to read in evidence a copy of an injunction, issued from the Court of Chancery of Maryland, on the 13th September, 1836, at the suit of John Stump against the Delaware and Maryland Railroad Company. The defendant objected to the admissibility of the copy so offered; but the objection was overruled, and the court permitted said paper to be read in evidence to the jury, "for the purpose of showing the fact that an injunction had issued, which it was admitted had been served on Howard, on the 17th September, 1836, and as furnishing evidence of excuse, on the part of said Howard, for his failure to complete the work to be done, under his contract, by the time therein specified."

Fifth Exception. After evidence, on various points, had been given on both sides, the defendant offered to prove by James Canby, "that when the two papers, respectively marked A and B, were signed by him and by Sebre Howard, and sealed by the latter, that it was then understood between them, that both said *papers were also, thereafter, to be signed and sealed by Hiram Howard." The plaintiff objected to the evidence, so offered to be given; and the court sustained the objection, and refused to allow the question to be propounded to the said witness, or to be answered by said witness, and rejected as inadmissible the evidence so proposed to be given.

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[Mr. Canby had previously proved that he was then the president of the Wilmington and Susquehannah Railroad Company, and that both the papers, A and B, were signed and sealed by him, and by Sebre Howard. He had also proved that, although the impression on paper A was the seal of said company, yet that it was never placed there by his authority, or by the authority of the board. He had also proved that the section was let to Sabre and Hiram Howard. Evidence had also previously been given, that all the estimates were made in the names of S. & H. Howard; and that all receipts, for payments made, were given in their joint name.]

The object of the defendant, by the evidence proposed to be given, was to confirm the evidence of the said witness, that the seal of the company impressed on paper A, was not placed

there by his authority, or by the authority of the board; and further, and, more especially, to show that, in point of fact, said paper A was not intended, sealed or unsealed, as it then stood, to be the complete and perfect contract of the company; and that the actual execution of the contract by Hiram Howard, also, was a condition precedent to its existence as the contract of the company.

Sixth Exception. This exception covered upwards of an hundred pages of the printed record. The evidence offered by the plaintiff and objected to by the defendant, consisted principally of so much of the record of the case in Cecil County Court, as preceded the appeal, in that case, to the Court of Appeals; and it was offered by the plaintiff below, for the purpose of introducing, as evidence against the defendant below, the deposition of William P. Brobson, taken in that case, on behalf of the defendant in that case, and whose subsequent decease was proved. The defendant objected to the admission of said deposition in evidence in this case. The court, however, admitted the deposition, and it was accordingly read. The deposition was taken 7th April, 1840.

Seventh Exception. This included an exception to the refusal of the court to grant the prayers offered by the counsel for the defendants, and also an exception to the instructions given by the court to the jury. It has been already stated that the court laid aside the prayers offered by the counsel on both sides, and gave its own instructions to the jury; but by way of illustration, *the prayers offered by the counsel for the plaintiff are here inserted also. [*319

Plaintiff's Prayers.

1st. If the jury believe that Sebre Howard made with the defendants the contract in question, and went on to perform the work under the same, and so continued the same until the month of January, 1837, when the company declared his contract forfeited, and that the engineers of the company made an estimate of the work so done, showing a balance due the contractor, Howard, of , then plaintiff is entitled to recover that sum, with interest.

2d. If the jury believe the facts stated in the foregoing prayer, and further find that the plaintiff was stopped by the officers of the defendant from proceeding in the work, which stoppage was induced by the injunction issued and given in evidence; and if they further find that the defendant had neglected to procure any title to the land worked upon until

after such injunction was laid and dissolved, then the plaintiff is entitled to recover such amount of damages as the jury may find from the evidence that he sustained by reason of his being turned off from said work.

3d. If the jury find the facts stated in the preceding prayers, then by the true construction of the contract the plaintiffs are entitled to the excess of overhaul, resulting from going off the company's lands, and descending to and ascending from Mill creek, in the construction of the embankment east of Mill creek.

4th. If the jury find all the facts stated in the preceding prayers, and further find that the plaintiffs were obstructed in the performance of their work by the absence of proper cribs at the River Susquehannah, where plaintiff was at work at the time; and if they further find that he was, in consequence of such non-performance by defendants, turned away from this work, then plaintiffs are entitled to recover such amount as the jury may find he sustained damage by reason of such omission of defendant.

5th. That by the true construction of the contract in this case, the defendants were bound to furnish ground to waste the earth upon which was to be dug out of the hills through which the road was to be cut by plaintiff; and if they find that the defendants refused to do so, plaintiff is entitled to recover such sum as the jury may find he sustained loss by not being furnished with ground to waste such earth upon.

6th. That plaintiff is entitled to recover for any and every overhaul exceeding an average of 800 feet.

7th. That if the jury find that the plaintiff faithfully performed *his work under this contract, and was only prevented from finishing it by the misconduct of the defendant, then plaintiff is entitled to recover such sum as he would have made by completing said contract.

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8th. If the jury believe that the defendant wilfully and fraudulently, and without any reasonable or proper cause, declared the contract given in evidence forfeited, then the plaintiffs are entitled to recover, notwithstanding such declaration of forfeiture, for any damages arising to them, after such declaration of forfeiture, in consequence thereof.

9th. That by the true construction of the contract given in evidence, it was the duty of the defendant to have all the culverts and bridges upon the route of said road, within the limits of plaintiffs' contract, prepared for the free pursuance of his work; and if the jury believe that defendants or persons employed by them neglected so to do, they, defendants,

are liable for such damages as plaintiffs show they sustained in consequence of such omission or neglect of defendant.

10th. That by the true construction of this contract, it was the duty of defendants to prevent or remove all obstructions to the plaintiffs' work which it was within their power to remove; and it was their duty to have obtained a right to work on the road before said plaintiffs commenced their work; and if they find that, in consequence of legal proceedings against said company, plaintiffs were obstructed and hindered in the performance of their work, and thereby seriously damaged, that plaintiffs are entitled to recover for such damage.

11th. That plaintiffs are entitled to recover for all work and labor actually done and performed under said contract, including the 15 per cent. retained upon the several estimates, after deducting the payments shown to have been made.

And the defendant offered the following.

Defendant's Prayers.

1st. The defendant, by its counsel, prays the court to instruct the jury that if they shall find, from the evidence in this cause, that the seal upon the contract, offered in evidence by the plaintiff, dated 12th July, 1836, was not affixed to the said contract by the authority of the Wilmington and Susquehannah Railroad Company, and was affixed without the authority of the defendant in this suit, and was so affixed after the execution of the agreement of union, offered in evidence by the plaintiffs, dated the 5th of February, 1838, the plaintiff is not entitled to recover upon it in this suit.

*2d. If the jury shall find, from the evidence in this cause, that at the trial in Cecil County Court, in December, 1847, of the case of Sabre Howard and Hiram Howard against the Wilmington and Susquehannah Railroad Company, spoken of in their testimony, by Mr. Hollyday, Mr. Ellis, Mr. Stump, and Mr. Scott, the plaintiffs in said suit offered in evidence to the jury, in support of the issue joined on their part, the contract offered in evidence in this cause, marked exhibit B, and shall further find, from the evidence in the cause, that the defendant in said suit offered no evidence whatever in support of the issue joined on its part, and that the counsel for the defendant in that suit, when the plaintiffs offered to read in evidence the contract, marked B, objected to the admissibility of the same in evidence upon the issue joined in said suit, upon the ground that whereas the plaintiffs in that suit declared on an alleged contract, made [*321

by the said plaintiffs with the said defendant in that suit, yet the said paper, so offered to be read in evidence by the said plaintiffs, being executed only by said Sebre Howard, and under his seal, was the contract alone of said Sebre Howard, and was not the same contract alleged by the plaintiffs in the pleadings in that case; and shall further find, from the evidence in the cause, that this was the only objection made and argued in the trial of said cause on the part of the defendant, and was the only point then and there decided by the said court, then the reliance on said objection does not estop or debar the defendant in this suit from denying that the paper, marked exhibit A, now offered in evidence in this suit by the plaintiff, is not the deed of the Wilmington and Susquehannah Railroad Company, even if the jury shall find, from the evidence in the cause, that the said paper A was then and there in court, in the possession of the defendant's counsel in that suit, and was spoken of by him, as stated by the witnesses, as the real contract between the parties; provided, they shall also find, from the evidence in the cause, that the counsel who appeared for the defendant in said suit were then wholly ignorant of the fact that said seal had been placed on the said contract, without any authority, as aforesaid.

3d. If the jury shall find, from the evidence in the cause, that the work done on the 9th section of the Wilmington and Susquehannah Railroad on and after the 12th day of July, 1836, so far as done by the plaintiff, Sebre Howard, was so done by said plaintiff as one of the firm of Sebre and Hiram Howard, and that all the estimates were made out as in favor of said firm, and received and receipted for by the plaintiff, so far as any moneys were received by him from the said company in the *name and on behalf of said firm; and that the *322] plaintiff, in his dealings and transactions with said company, professed to act as one of said firm, and for and on behalf of said firm, and never notified the said company, or any of its officers, whilst engaged in work on said road, that he was not acting as a member of said firm, and for and on behalf of said firm, then the plaintiff is not entitled to recover in this case upon the first breach by him assigned in his declaration.

4th. If the jury shall find, from the evidence in the cause, that the resolution of the board of the Wilmington and Susquehannah Railroad Company, dated 18th January, 1837, offered in evidence in this cause, was duly passed by said board, and shall not find from the evidence in the cause that the same was fraudulently passed by said board, or by

said company, then the plaintiff is not entitled to recover on the 7th breach of his declaration.

5th. If the jury shall find with the defendant on the fourth prayer, and shall also find, from the evidence in the cause, that notice was given on the same day, to the plaintiff in the suit, of the passage of said resolution, then the said contract was thereby rendered null so far as concerned any liability thereunder on the part of the defendant; and that the plaintiff is not entitled to maintain this suit.

6th. If the jury shall find, from the evidence in the cause, that the first mile of said section No. 9 was not finished on or before the 15th day of October, 1836, and was not, in fact, finished at any time, nor accepted by the defendant as fully and completely graded by the plaintiff, or by the said firm of Sebre Howard and Hiram Howard; and shall further find, from the evidence, that the alleged excuses, alleged in pleading by the plaintiff, were not in any respect the cause of, or contributory to the failure on the part of the said plaintiff, or of the said plaintiff and said Hiram Howard, to finish the same in the time limited for that purpose in said contract, then the plaintiff is not entitled to recover in this case on said first breach in his said declaration.

7th. If the jury shall find, from the evidence, that the injunction issued by John Stump, offered in evidence in this cause, was issued without any justifiable cause, and without any basis in right, and that the issuing of said injunction was not based on any actual omission of duty on the part of said company, then the plaintiff is not entitled to recover on the second count of his declaration.

8th. If the jury shall find, from the evidence in the cause, that the plaintiff was contractor on another section of the road of the said company, and that said former section was completed by him before the making of the contract offered in *evidence in this case; and shall further find, that in the execution of said former contract the plaintiff [*323 provided bridges and other modes of intercommunication from one part of his work to another, without any complaint; and shall further find that it was the known usage of said company to leave to the contractors the business of construction of their bridges so as to pass with materials and excavation from one part of their work to another, and that such is the known and uniform usage of other public works, then the plaintiff is not entitled to recover on the second breach of his declaration.

9th. If the jury shall find, from the evidence in the cause, that the plaintiff, at the time he was stopped by the assistant engineer, Mr. Farquhar, from throwing more earth against

the outer crib of the embankment at the river, might readily and conveniently have deposited many thousand cubic yards of earth within the limits of said embankment, if he had chosen so to do; and that the plaintiff perversely and stubbornly refused so to do; then the plaintiff is not entitled to recover on the 4th breach of his declaration.

10th. If the jury shall find, from the evidence, that the excavations made by the plaintiff, in the month of December, 1836, were needed by the defendant for the embankment at the river; and shall also find that the same could have been conveniently deposited there by the plaintiff, and that the plaintiff knew these facts, then the plaintiff is not entitled to recover on the 5th breach of his declaration.

11th. If the jury shall find that fair and proper estimates were made by defendant for all the overhaul of earth made by the plaintiff, over the average haul of 800 feet, then the plaintiff is not entitled to recover on the 6th breach of his declaration.

12th. If the jury shall believe that, at the time of the execution of the agreement, the road to be excavated and graded was staked out and marked upon the ground, and that a profile was shown, showing the depth of excavation to be made, and the height of the embankments, and that afterwards the plan of the road was altered and changed, by which the excavations were to be deeper and wider, and some of the embankments higher and some lower, to suit the altered plan of the road, and that the work done by the plaintiff, and for which he claims damages, was in grading the road according to the altered plan, then the plaintiff is not entitled to recover in this action.

13th. If the jury shall believe that all the work done in pursuance of the agreement stated in the declaration was done by Sebre and Hiram Howard, and not by Sebre Howard alone, that then the plaintiff is not entitled to recover.

*324] *The court thereupon rejecting the respective prayers on both sides, gave the jury the following instructions:

Court's Instructions to the Jury.

SEBRE HOWARD
v.
THE PHILADELPHIA, WILMINGTON, AND BALTIMORE RAILROAD COMPANY.

1st. If the corporate seal of the Wilmington and Susquehannah Railroad Company was affixed to the instrument of

writing upon which this suit is brought, with the authority of the company, while it had a separate existence for the purpose of making it at that time, and as it then stood the contract of the company, then the said instrument of writing is the deed of the said corporation, although it was never delivered to the plaintiff nor notice of the sealing given to him; and although no seal was affixed by the corporation to the duplicate copy delivered to him; and the defendant in the present action is equally bound by it, and in like manner.

2d. If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant, as a contract under the seal of the Wilmington and Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard against the last-mention[ed] company in Cecil County Court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of the said sealing, because such a defence would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court.

3d. If upon either of these grounds the jury find the instrument of writing upon which this suit is brought to be the deed of defendant, then the plaintiff is entitled to recover in this suit any damage he may have sustained by a breach of the covenants on the part of the corporation; but if they find that it is not the deed of the defendant upon either of these grounds, then their verdict must be for the defendant.

4th. The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs.

5th. If the defendant annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting *the work with proper diligence, and for the reasons assigned in the resolution of the board, [*325 they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the company acted in this respect under a mistaken opinion as to his conduct.

6th. But this annulling did not deprive him of any rights vested in him at that time, nor make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money

then due him for his work, or any damages he had then already sustained.

7th. The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the company under its authority, was done under this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of *assumpsit*.

8th. If the jury find for the plaintiff upon the first or second instructions, he is entitled to recover the amount due on the work done by him in December, 1836, and January, 1837, according to the measurements and valuation of the engineer of the company, and cannot go into evidence to show that they were erroneous, or that he was entitled to a greater allowance for overhaul than the amount stated in the estimates of the engineer.

9th. Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the company refused, on the application of the plaintiff to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the the negligence, acts, or default of the defendant.

10th. Also, the plaintiff is entitled to recover the fifteen per cent. retained by the company, unless the jury find that the company has sustained damage by the default, negligence, or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of the fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the company.

11th. The corporation was not bound to provide bridges over the streams to enable the plaintiff to pass conveniently with his carts from one part of the road to another.

12th. The decision of the Court of Appeals is conclusive evidence that the injunction spoken of in the testimony was *not occasioned by the default of the defendant; and the plaintiff is not entitled to recover damages for the delay occasioned by it, unless the jury find that the company did not use reasonable diligence to obtain a dissolution of the injunction.

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13th. If the jury find that the resolution of the company annulling the contract was not in truth passed for the reasons

therein assigned, but for the purpose of having the remaining work done upon cheaper terms than those agreed upon in the contract with the plaintiff, or for the purpose of oppressing and injuring the plaintiff, then he is entitled to recover damages for any loss of profit he may have sustained by the refusal of the company to permit him to finish the work he had contracted to perform, if he sustained any.

The defendant, by its counsel, prayed leave to except, in respect of all and each of the prayers offered on the part of the defendant, to the court's refusal to grant said several prayers respectively, and also prayed leave to except to the instructions given by the court to the jury, and to each one of said instructions, severally and respectively, and prayed that the court here would sign and seal this, its seventh bill of exceptions, according to the form of the statutes in such case made and provided; and which is accordingly done this 16th day of November, 1850.

R. B. TANEY, [SEAL.]
U. S. HEATH, [SEAL.]

Upon all these exceptions the case came up to this court, and was argued by *Mr. Schley*, for the plaintiffs in error, and *Mr. Nelson* and *Mr. Johnson*, for the defendant in error.

The reporter has not room to notice the arguments of Mr. Schley, for the plaintiffs in error, upon the points of evidence brought up in the six first exceptions. The points made by him upon the 7th exception which included the rulings of the court as instructions to the jury, were the following:

1. The defendant in error cannot, as sole plaintiff in the action, maintain the suit. Whether the contract be the deed of the company, or a mere contract by parol, the covenantees or promisees, as the case may be, are Sebre Howard and Hiram Howard. This point, if well taken, is decisive of the case. Platt on Covenants, 18; *Clement* v. *Henley*, 2 Rolle's Abr., 22; Faits (F.) Pl., 2; *Vernon* v. *Jefferys*, 2 Str., 1146; *Petrie* v. *Bury*, 3 Barn. & C., 353 (10 Eng. C. L., 108); *Rose* v. *Poulton*, 2 Barn. & Ad., 822 (22 Eng. C. L., 194); *Scott* v. *Godwin*, 1 Bos. & P., 67; *Anderson* v. *Martindale*, 1 East, 497; 1 Wms. Saund., 201, f., and cases cited there; 1 Saund. Pl. & Ev., 390; *Wetherell* v. *Langton*, 1 Exch. (Welsby, H. & G.), 634; *Foley* v. *Addenbrooke*, 4 Q. B., 197 *(45 Eng. C. L., 195); *Hopkinson* v. *Lee*, 6 Q. B., 964 (51 Eng. C. L., 963); *Wakefield* v. *Brown*, 9 Q. B., 209 (58 Eng. C. L., 217); *Smith* v. *Ransom*, 21 Wend. (N. Y.), 204. [*327

2. Unless the instrument, on which the action is founded, was, in fact, the deed of the Wilmington and Susquehannah Railroad Company, existing and operative as such, at the time of the union of the companies, an action of covenant cannot be maintained thereon, under the act of 1837, against the plaintiff in error. This point, if well taken, is decisive of the case.

3. If the last preceding proposition cannot be supported, in its full extent, still, upon the issue joined on the plea of *non est factum*, the plaintiff in error was not estopped, in law, from showing that the paper was not, in fact, the deed of the Wilmington and Susquehannah Railroad Company. *Wilson* v. *Butler*, 4 Bing. N. C., 748 (33 E. C. L., 521); 1 Chit. Pl., 603; and cases referred to in the notes.

4. The alleged production of the instrument, in the former suit, as a deed, would not, as matter of law, have been a fraud upon the administration of justice. Fraud or no fraud was a question of fact for the jury; and the application of the doctrine of estoppel ought to have been only upon the hypothesis, that the jury would find fraud, as a fact in the case. Accident, mistake, or surprise, might afford good ground for relief in equity, under very peculiar circumstances; but not for the application of estoppel *in pais*, in the absence of all intention to perpetrate a fraud. Reference is made to the various cases collected in the notes, in 44 Law Lib., 467; *Conard* v. *Nicholl*, 4 Pet., 295; *United States* v. *Arredondo*, 6 Pet., 716.

5. Even if the instrument was properly held to be the deed of the said company, yet, upon its true construction, time was of the essence of the contract. As the evidence clearly showed that the work was not performed, within the time limited in that behalf, and as there was no valid excuse for the default, the plaintiff below could not recover on the basis of said agreement. The proper form of action would have been *assumpsit*, upon a *quantum valebat*, for the work and labor done. This objection, if well taken, is decisive of the case. 1 Chit. Pl., 340, and cases in note (4); *Watchman* v. *Crook*, 5 Gill & J. (Md.), 254; *Watkins* v. *Hodges & Lansdale*, 6 Harr. & J. (Md.), 38; *Bank of Columbia* v. *Hagner*, 1 Pet., 455, 465; *Longworth* v. *Taylor*, 1 M'Lean, 395; *Fresh* v. *Gilson*, 16 Pet., 327, 334; Notes to *Cutter* v. *Powell*, Smith, L. C., 44 Law Lib., 17, 27; Gibbon's Law of Contracts, § 20 to § 47; and the cases there stated.

6. By force of the declaration of forfeiture, if validly made, *328] (that is, if made under the circumstances stated as the hypothesis *of the fifth instruction,) the instrument

was annulled, so far as it imposed any obligation upon the company. It could not be made, thereafter, the basis of an action against said company. Whilst conceding that the plaintiff below was not thereby deprived of any rights, completely vested in him before forfeiture; yet, it will be insisted that the remedy, for the enforcement of such rights, is not by an action upon the instrument itself. *Assumpsit*, upon a *quantum valebat*, would have been the appropriate form of action, or relief could have been had in equity. It will, therefore, be respectfully insisted, that the sixth instruction, (which is founded upon the same hypothesis as the fifth,) confounds the distinction between right and remedy. As to the first branch, vide *Mathewson* v. *Lydiate*, 5 Co., 22 b; s. c. Cro. Eliz., 408, 470, 546. As to second branch, 1 Chit. Pl., 340, n. 4; and cases there cited.

7. At all events, no action at law can be maintained against the plaintiff in error, on said annulled contract, (if validly annulled,) under the provisions of the act of 1837, c. 30. The forfeiture was declared on the 18th January, 1837. The act was passed on the 20th January, 1838. The instrument, therefore, was not a subsisting obligation of the Wilmington and Susquehannah Railroad Company, when the act of union was passed.

8. The claim to the fifteen per cent. retained by the company, was not a vested right, at the time the contract was annulled. Even if the sixth instruction was correct, the tenth instruction was erroneous. By the express terms of the agreement, the retained per cent. was not demandable until the completion of the contract. As the contract was never fulfilled by the contractor, the retained per cent. cannot be demanded, in an action based on the contract.

9. No recovery can be had, in this suit, in respect of any matter, not embraced in the contract. The subject-matter of the contract is to be limited and confined to the original plan of the work, as contemplated and established, when the contract was made. The obligation of the contract cannot be extended beyond the subject-matter. It had not the capacity of expansion or contraction, in accordance with any changes that the company might choose to make. Such additional work cannot be recovered in this action, as declared in the seventh instruction of the court, as work done under the covenant, and within its stipulations. 2 Stark. Ev., 768; *Fresh* v. *Gilson*, 16 Pet., 327.

10. There was no implied covenant on the part of the company, to procure a place for the waste of the surplus excavations, if any. But even if there was such implied covenant,

there was no evidence in the cause from which it could rea-
*329] sonably be *inferred, that there was any excavation to be wasted as surplus.

11. The defendant below was not liable, in any manner, for the consequences of the injunction issued from chancery. The action was grounded on the alleged covenant; and the company, by its contract, had not warranted against interruption by the wrongful acts of any stranger. There is a wide difference between allowing the interruption to avail to the plaintiff below, as an excuse on his behalf for non-performance of the work within the prescribed time; and in making the delay of the company, in removing the cause of interruption, a ground of action, against the defendant below, as being a violation by the company of its covenant. Platt on Covenants, 601, (3 Law Lib., 269,) and case referred to in the notes there.

12. It will be insisted, that there was no evidence in the cause to justify the hypothesis of the thirteenth instruction of the court; that there was nothing from which the jury could legitimately find the facts of fraud and oppression, which are made the basis of that instruction.

13. And it will also be insisted, that the thirteenth instruction is erroneous, in this, that thereby it is laid down, that the loss of profits, if any, sustained by the plaintiff, is the proper measure of damages to be allowed by the jury, if they should find that the company improperly refused to permit the plaintiff to perform his work. *Gilpins* v. *Consequa*, Pet. C. C., 85; *Hopkins* v. *Lee*, 6 Wheat., 109; *Bell* v. *Cunningham*, 3 Pet., 69, 86; 2 Greenl. on Ev., § 261; *Fairman* v. *Fluck*, 5 Watts. (Pa.), 516, 518; Story on Agency, 216; *Short* v. *Skipwith*, 1 Brock., 108.

14. The third prayer of the defendant ought to have been granted. Even if, in fact, or by estoppel, the paper A was the deed of the company; yet, if the work was really performed by, or on behalf of, the firm of S. & H. Howard, and the dealings and transactions of the company, in relation to said work, were with the said firm, (without notice of any proposed or actual separate performance of the work by the plaintiff, individually, as under said paper A,) then the defendant had a right to insist, that as the work was done by said firm, the privity of contract, in relation thereto, was with said firm, and that the estimate was payable only to the firm, under the paper B, as the subsisting contract between the parties, or otherwise upon an assumpsit to said firm.

15. The ninth and tenth prayers of the plaintiff ought to have been granted. The evidence of Mr. Heckert shows that

"the embankment under the change of grade was 650 feet long and 100 feet wide, and there was much space wherein Howard *could have placed the earth from his excavations to make the said embankment." Besides this, [*330 there were express directions from the engineer to the plaintiff below, to place the embankment (not against the crib, but) on each side of the centre-line of the embankment for the width of twenty-five feet on each side of said centre-line. His conduct in throwing the embankment against the outer crib was wilful and perverse.

The counsel for the defendants made the following references to authorities, to show that the exceptions were not sustainable:

On the First Exception. Act of Assembly of Maryland, 1817, c. 119; Peake, Ev., 34; *Jones* v. *Randall*, Cowp., 17.

On the Second and Third Exceptions. Acts of Assembly of Maryland, 1831, c. 296; 1835, c. 93; 1837, c. 30; Agreement of Union, 1838, February 5th, (page 29th of the record); 4 Serg. & R. (Pa.), 246; 2 Hill (N. Y.), 64; 1 Metc. (Mass.), 27; 5 Mon. (Ky.), 530; 17 Conn., 345, 355; 18 Id., 138, 443; *Fishmonger* v. *Robertson*, 5 Mann. & G., 131, 192, 193.

On the Fourth Exception. Same authorities cited in support of the 4th instruction.

On the Sixth Exception. 1 Greenl. Ev., § 553, p. 618; 1 Ad. & Ell., 19.

On the Seventh Exception. In support of the 1st, 2d, and 3d instructions. Co. Lit., Lib. 1, § 5, 36 (a.), *n.* 222; 2 Leon., 97; 1 Ventr., 257; 1 Lev., 46; 1 Sider., 8; Carth., 360; 3 Keble, 307; 1 Kyd on Corp., 268.

In support of the 4th Instruction. *Terry* v. *Dance*, 2 H. Bl., 389; 1 East, 625, 631; 2 Johns. (N. Y.), 272, 387; 5 Id., 78; 15 Mass., 500; 19 Johns. (N. Y.), 341; 2 Wash. C. C., 456; *Campbell* v. *Jones*, 6 T. R., 570; *Fishmonger* v. *Robertson*, 5 Mann. & G., 197; *Howard* v. *Philadelphia Railroad Co.*, 1 Gill (Md.), 311; *Goldsborough* v. *Orr*, 8 Wheat., 217; 1 Wms. Saund., 320 b.; *Pordage* v. *Cole*, Id., 220, *n.* 4; *Carpenter* v. *Creswell*, 4 Bing., 409; *Boon* v. *Eyre*, 1 H. Bl., 273.

Mr. Justice CURTIS delivered the opinion of the court.

Sebre Howard brought his action of covenant broken, in the Circuit Court of the United States for the District of Maryland, and upon the trial, the defendants took seven bills of exception, which are here for consideration upon a writ of error. Each of them must be separately examined.

The first raises the question, whether Howard could prove

that a certain suit was pending in Cecil County Court by the testimony of the clerk of that court to the verity of a copy of the docket-entries made in that suit by him, as clerk.

*331] *It is not objected that a copy of the docket-entries was produced instead of the original entries, because no court is required to permit its original entries to go out of the custody of its own officers, in the place appointed for their preservation; but the objection is, that a formal record ought to have been shown. There are two distinct answers to this objection, either of which is sufficient.

By the act of Assembly of Maryland, (1817, c. 119,) the clerk of the County Court is not required to make up a formal record. The docket-entries and files of the court stand in place of the record. When a formal record is not required by law, those entries which are permitted to stand in place of it are admissible in evidence. Several judicial decisions in England have been referred to by the counsel of the plaintiff in error, to the effect, that the finding of an indictment at the sessions cannot be proved by the production of the minute-book of the sessions, from which book the roll, containing the record of such proceedings, is subsequently made up. See 2 Phil. Ev., 194. But the distinction between those cases and a case like this is pointed out in a recent decision of the Court of King's Bench, in *Regina* v. *Yeoveley*, 8 Ad. & El., 806, in which it was held, that the minute-book of the sessions was admissible to prove the fact that an order of removal had been made, it appearing that it was not the practice to make up any other record of such an order; and Lord Denman fixes on the precise ground on which the evidence was admissible in this case, when he says, "the book contains a caption, and the decision of the sessions; and their decision is the fact to be proved."

So in *Arundell* v. *White*, 14 East, 216, the plaintiff offered the minute-book of the Sheriff's Court in London, containing the entry of the plaint, and the word "withdrawn," opposite to the entry, and proved it was the usual course of the court to make such an entry when the suit was abandoned by the plaintiff; it was held to be competent evidence to prove the abandonment of the suit by the plaintiff and its final termination. In *Commonweatlh* v. *Bolkom*, 3 Pick. (Mass.), 281, it was decided that the minute-book of the sessions, showing the grant of a license to the defendant, was legal evidence of that fact, there being no statute requiring a technical record to be made up.

And in *Jones* v. *Randall*, 1 Cowp., 17, copies of the minute-book of the House of Lords were admitted in evidence of a

decree, because it was not the practice to make a formal record.

The principle of all these decisions is the same. Where the law, which governs the tribunal, requires no other record than the one, a copy of which is presented, that is sufficient. In *Maryland, no technical record was required by law to be made up by the clerks of the county courts; [*332 and, therefore, no other record than the one produced was needful to prove the pendency of an action in such a court.

But there is another point of view in which this evidence was clearly admissible.

The fact to be proved was the pendency of an action. An action is pending when it is duly entered in court. The entry of an action in court is made, by an entry on the docket, of the title of the case, by the proper officer, in the due course of his official duty. Proof of such an entry being made by the proper officer, accompanied by the presumption which the law entertains, that he has done his duty in making it, is proof that the action was duly entertained in court, and so proof that the action was pending; and if the other party asserts that it had been disposed of, at any particular time after it was entered, he must show it. The docket-entry of the action was therefore admissible for this special purpose, because it was the very fact which, when shown, proved the pendency of the action, until the other party showed its termination.

The second bill of exceptions was taken to the ruling of the court admitting a witness to testify that he was present at the trial of the above-mentioned case in Cecil County Court, in December, 1847, in which Sebre Howard and Hiram Howard were shown by the docket-entries to have been plaintiffs, and the Wilmington and Susquehannah Railroad Corporation defendant; that the plaintiffs at that trial relied on a paper writing, shown to the witness, and set out in the bill of exceptions; that one of the counsel of the defendant had in his possession another paper writing, also shown to the witness, and being the deed declared on in this suit; and that the defendant's counsel handed this last-mentioned paper to the presiding judge, and spoke of it as the true and genuine contract between the parties.

To render the ruling, to which this bill of exceptions was taken, intelligible, it is necessary to state, that the Wilmington and Susquehannah Railroad Corporation was the defendant in that action, which was assumpsit, founded on the paper first spoken of by the witness, which did not bear the seal of the corporation; that by the act of Assembly of

1837, c. 30, the Baltimore and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington, and Baltimore Company, were consolidated, under the name of the Philadelphia, Wilmington, and Baltimore Railroad Company, and that this action being covenant, against the Philadelphia, Wilmington, and Baltimore Railroad Company, and the plea *non est factum*, the plaintiff was
*333] endeavoring to prove, that the *paper declared on bore the corporate seal of the Wilmington and Susquehannah Railroad Company. This being the fact to be proved, evidence that the corporation, through its counsel, had treated the instrument as bearing the corporate seal, and relied upon it as a deed of the corporation, was undoubtedly admissible. It is objected that the parties to that suit were not the same as in this one; but this is wholly immaterial. The evidence does not derive its validity from any privity of parties. It tends to prove an admission by the corporation, that the instrument was sealed with its seal. It is further objected that the admission was not made by the defendants in this action, but by the Wilmington and Susquehannah Corporation. It is true the action in the trial of which the admission was made, being brought before the union of the corporations, was necessarily in the name of the original corporation; but as, by virtue of the act of union, the Wilmington and Susquehannah Company, the Baltimore and Port Deposit Company, and the Philadelphia, Wilmington, and Baltimore Company were merged in and constituted one body corporate, under the name of the Philadelphia, Wilmington, and Baltimore Railroad Company, it is very clear that at the time the trial took place in Cecil County Court, all acts and admissions of the defendant in that case, though necessarily in the name of the Wilmington and Susquehannah Company, were done and made by the same corporation which now defends this action. This exception must therefore be overruled.

The third exception is that the court permitted the deed to be read to the jury, although only vague and inconclusive evidence had been given, that it bore the corporate seal. We do not consider the evidence was vague, for it applied to this particular paper, and tended to prove it to be the deed of the company. Whether it would turn out to be conclusive, or not, depended upon the fact whether any other evidence would be offered to control it, and upon the judgment of the jury. But the deed was rightly admitted to be read as soon as any evidence of its execution, fit to be weighed by the jury, had been given by the plaintiff. It was argued that

this evidence was not sufficient to change the burden of proof; and it is true that, upon the issue whether the paper bore the corporate seal, the burden of proof remained on the plaintiff throughout the trial, however the evidence might preponderate, to the one side or the other, (*Powers* v. *Russell*, 13 Pick. (Mass.), 69); but the court did not rule that the burden of proof was changed, but only that such *primâ facie* evidence had been given as enabled the plaintiff to read the deed to the jury.

The subject-matter of the fourth exception became wholly immaterial in the progress of the cause, and could not be assigned *for error, even if the ruling had been erroneous. *Greenleaf's Lessee* v. *Birth*, 5 Pet., 112. But we think [*334 the ruling was correct.

The fifth exception was taken to the refusal of the court to allow a question to be answered by James Canby, one of the defendant's witnesses. This witness had already testified as follows:

"Leslie and White were the first contractors, and they were induced to relinquish it at the instance of the board, and it was then let to Sebre and Hiram Howard; the terms and price, and other essentials of the contract, were entered into on the 12th July, 1836; and on that day two papers were prepared and were then signed by him, and also signed by Sebre Howard; and deponent, as president of the company, expressly directed the secretary, Mr. Brobson, that the seal of the company was not to be fixed to either paper until Hiram Howard signed and sealed both of them. The two papers, respectively marked A and B, being shown to him, he stated that they are the two papers to which he refers; that the impression of the seal on said paper A, is the seal of the Wilmington and Susquehannah Railroad Company, but that said seal was not placed there, he is very positive, at any time whilst he was president of said company, and was never placed there by his authority or by the authority of the board."

The defendant now insists he had a right to prove by this witness, that although the paper bore the corporate seal of the company, it was not its deed, because of an understanding between the witness and the plaintiff that Hiram Howard was to execute the paper. If the offer had been to prove that at the time the corporate seal was affixed, it was agreed the instrument should not be the deed of the company, unless, or until, Hiram Howard should execute it, the evidence might have been admissible. *Pawliny et al.* v. *The United States*, 4 Cranch, 219; *Derby Canal Company* v. *Wilmot*, 9

East, 360; *Bell* v. *Ingestre*, 12 Ad. & El. N. S., 317. But the understanding, to which the question points, was prior to the sealing, and in no way connected with that act, of which the witness had no knowledge. It did not bear upon the question whether the instrument was the deed of the company, and was properly rejected.

The sixth exception rests on the following facts: The plaintiff offered to read the deposition of a deceased witness taken by the defendants in the case in Cecil County Court, to prove that the paper in question bore the seal of the corporation placed there by the deponent, an officer of the corporation. The defendant objected, but the court admitted the evidence. We consider the evidence was admissible upon two grounds; to *prove that in that case the defendant *335] had asserted this instrument to be the deed of the corporation, and relied on it as such; and also, because the witness being dead, his deposition, regularly taken in a suit in which both the plaintiff and defendant were parties, touching the same subject-matter in issue in this case, was competent evidence on its trial. It is said the parties were not the same. But it is not necessary they should be identical, and they were the same, except that Hiram Howard was a coplaintiff in the former suit, and this diversity does not render the evidence inadmissible, 1 Greenl. Ev., 553; 1 Ad. & El., 19.

The seventh and last bill of exceptions covers nine distinct propositions given by the court to the jury as instructions. The first of the instructions excepted to was as follows:

"If the jury find from the evidence that this instrument of writing was produced in court, and relied upon by the present defendant, as a contract under the seal of the Wilmington and Susquehannah Railroad Company, in an action of *assumpsit* brought by Sebre and Hiram Howard, against the last-mentioned company in Cecil County Court; and that the said suit was decided against the plaintiffs upon the ground that this instrument was duly sealed by the said corporation as its deed, then the defendant cannot be permitted in this case to deny the validity of said sealing, because such a defence would impute to the present defendant itself a fraud upon the administration of justice in Cecil County Court."

It is objected that this instruction applied the doctrine of estoppel, where the matter of the estoppel had not been relied on in pleading. The rules on this subject are well settled. If a party has opportunity to plead an estoppel and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel and commits the matter to the jury, who are to find the truth. 1 Saund., 325 a., *n.* 4;

2 Barn. & A., 668; 2 Bing., 377; 4 Bing. N. C., 748. But if he have not an opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence, on the trial, under any issue which involves the fact, and both the court and the jury are bound thereby. 1 Salk., 276; 17 Mass., 369. Now the plea in this case was *non est factum*, which amounts to a denial that the instrument declared on was the defendant's deed at the time of action brought. If sealed and delivered, and subsequently altered, or erased, in a material part, or if the seal was torn off, before action brought, the plea is supported. 5 Co., 23, 119 b.; 11 Co., 27, 28; Co. Litt., 35 b., *n.* 6, 7. It follows that a replication to the effect that on some day, long before action brought, the instrument was the deed of the defendant, would be bad on demurrer, for it would not completely answer the plea.

*The plaintiff cannot be said to have an opportunity [*336
to plead an estoppel, and voluntarily to omit to do so, when the previous pleadings are such that if he did plead it, it would be demurrable.

Besides, a plea of *non est factum* rightly concludes to the country, and so the plaintiff has no opportunity to reply specially any new matter of fact. He can only join the issue tendered, and if he were prevented from having the benefit of an estoppel, because he has not pleaded it, it would follow that the plaintiff can never have the benefit of an estoppel when the defendant pleads the general issue, for in no such case can he plead it. This was clearly pointed out in *Trevivan* v. *Lawrence*, 1 Salk., 276, where the court say, "that when the plaintiffs' title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel." And it is in this way that the numerous cases of estoppels *in pais* which are in the recent books of reports, have almost always been presented.

It is further objected, that the facts supposed in the instruction did not amount in law to an estoppel. We think otherwise. *Hall* v. *White*, 3 Car. & P., 137, was detinue for certain deeds. The defendant wrote to the plaintiffs' attorney, and spoke of the deed as in his possession under such circumstances as ought to have led him to understand a suit would be brought upon the faith of what he said. Best, C. J., ruled: "If the defendant said he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover, though the assertion was a fraud on his part." In *Doe* v. *Lambly*, 2 Esp., 635, the defendant had informed the plaintiffs' agent that his tenancy commenced at Lady-day, and the agent gave a notice to quit on that day. This not

being heeded, ejectment was brought, and the tenant set up a holding from a different day. But Lord Kenyon refused to allow him to show that he was even mistaken in his admission, for he was concluded. *Mordecai* v. *Oliver*, 3 Hawks (N. C.), 479; *Crocket* v. *Lassbrook*, 5 Mon. (Ky.), 530; *Trustees of Congregation &c.* v. *Williams*, 9 Wend. (N. Y.), 147, are to the same point.

These decisions go much further than this case requires, because the defendant not only induced the plaintiff to bring this action, but defeated the action in Cecil County Court, by asserting and maintaining this paper to be the deed of the company; and this brings the defendant within the principle of the common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, fraud in law if he does not know it to true. *Polhill* v. *Walter*, 3 Barn. & Ad., 114; *Lobdell* v. *Baker*, 1 Metc. (Mass.), 201.

*337] *Certainly it would not mitigate the fraud, if the false assertion were made in a court of justice and a meritorious suit defeated thereby. We are clearly of opinion, that the defendant cannot be heard to say, that what was asserted on the former trial was false, even if the assertion was made by mistake. If it was a mistake, of which there is no evidence, it was one made by the defendant, of which he took the benefit, and the plaintiff the loss, and it is too late to correct it. It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point.

The next instruction is objected to on the ground that Hiram Howard ought to have been joined as a coplaintiff. By reference to the indenture, it will be seen that it purports to be made between Sebre Howard and Hiram Howard, of the first part, and the Wilmington and Susquehannah Railroad Company, of the second part. The covenants are not by or with these persons *nominatim*, but throughout the party of the one part covenants with the party of the other part. Sebre Howard alone and the corporation sealed the deed.

It is settled that if one of two covenantees does not execute the instrument, he must join in the action, because whatever may be the beneficial interest of either, their legal interest is joint, and if each were to sue, the court could not know for which to give judgment. *Slingsby's case*, 5 Co., 18, b.; *Petrie* v. *Bury*, 3 Barn. & C., 353. And the rule has recently been carried so far as to hold, that where a joint covenantee had

no beneficial interest, did not seal the deed, and expressly disclaim under seal, the other covenantee could not sue alone. *Wetherell* v. *Langton*, 1 Wels. H. & G., 634. But this rule has no application until it is ascertained that there is a joint covenantee, and this is to be determined in each case by examining the whole instrument. Looking at this deed, it appears the covenant sued on was with "the party of the first part," and the inquiry with whom the covenant was made, resolves itself into the question, what person, or persons, constituted "the party of the first part," at the moment when the deed took effect?

The descriptive words, in the premises of the deed, declare Sebre and Hiram Howard to be the party of the first part; but, inasmuch as Hiram did not seal the deed, he never in truth became a party to the instrument. He entered into no covenant contained in it. When, in the early part of the deed, the party of the first part covenants with the party of the second part to do the work, it is impossible to maintain, that Hiram Howard is there embraced, under the words "party of the first part," as a covenantor. And when, in the next sentence, the party of the *second part covenants with the party of the first part to pay for the work, it [*338 would be a most strained construction to hold, that the same words do embrace him as a covenantee. There can be no sound reason for the construction, that the words party of the first part mean one thing, when that party is to do something, and a different thing, when that party is to receive compensation for doing it. The truth is, that the descriptive words are controlled by the decisive fact, that Hiram did not seal the deed, and so *error demonstrationis* plainly appears. An examination of the numerous authorities cited by the counsel for the plaintiff in error will show that they are reconcilable with this interpretation of the covenants; for, in all the cases in which one of the persons named in the deed did not seal, he was covanted with *nominatim*. Our conclusion is, that the action was rightly brought by Sebre Howard alone.

The next instruction excepted to was as follows: "The omission of the plaintiffs to finish the work within the times mentioned in the contract, is not a bar to his recovery for the price of the work he actually performed; but the defendant may set off any damage he sustained by the delay, if the delay arose from the default of the plaintiffs."

The time fixed for the completion of the contract was the first day of November, 1836. The company agreed to pay twenty-six cents per cubic yard, in monthly payments, according to the measurement and valuation of the engineer. These

monthly payments were made up to December, 1837; and when the contract was determined by the company, January 18th, 1838, under a power to that effect in the instrument, which will be presently noticed, there remained due the price of the work done in December, and on eighteen days in January.

The question is, whether the covenant to pay was dependent on the covenant to finish the work by the first day of November. So far as respects each monthly instalment, earned before breach of the covenant to finish the work on the first day of November, it is clear the covenants were independent. Or, to state it more accurately, the covenant to pay at the end of each month, for the work done during that month, was dependent on the progress of the work, so far as respected the amount to be paid; but was not dependent on the covenant to finish the work by a day certain. The only doubt is, whether, after the breach of this last-mentioned covenant, the defendants were bound to pay for the work done after that time.[1]

There is an apparent, and perhaps some real conflict, in the decisions of different courts on this point. 2 Johns. (N. Y.), 272, 387; 10 Johns. (N. Y.), 204; 2 H. Bl., 380; 8 Mass., 80; 15 Mass., 503; 5 Gill *& J. (Md.), 254. We do
*339] not deem it needful to review the numerous authorities because we hold the general principle to be clear, that covenants are to be considered dependent, or independent, according to the intention of the parties, which is to be deduced from the whole instrument; and in this case we find no difficulty in arriving at the conclusion, that the covenants were throughout independent. There are, in this instrument, no terms which import a condition, or expressly make one of these covenants in any particular dependent on the other. There is no necessary dependency between them, as the pay for work done may be made though the work be done after the day. The failure to perform on the day does not go to the whole consideration of the contract, and there is no natural connection between the amount to be paid for work after the day, and the injury or loss inflicted by a failure to perform on the day. Still it would have been competent for the parties to agree that the contractor should not receive the monthly instalment due in November, if the work should not be then finished, and that he should receive nothing for work done after that time.

But we find no such agreement. On the contrary, the covenant to pay for what shall have been done during each

[1] Applied. *Neis* v. *Yocum*, 16 Fed. Rep., 170.

preceding month is absolute and unlimited, and the parties have provided a mode of securing the performance of the work and the indemnification of the company from loss, wholly different from making these covenants in any particular dependent on each other. They have agreed, as will be presently more fully stated, that the company may declare a forfeiture of the contract in case the work should not proceed to their satisfaction, and may retain fifteen per cent. of each payment to secure themselves from loss. Without undertaking to apply to this particular case any fixed technical rule, like that held in *Terry* v. *Duntze*, 2 H. Bl., 389, we hold it was not the intention of these parties, as shown by this instrument, to make the payment of any instalment dependent on the covenant to finish the work by the first day of November; and that consequently the instruction given at the trial was correct.

The sixth instruction, which is also excepted to, must be read in connection with the fifth and the provision of the contract to which they refer. The contract contains the following clause:

"Provided, however, that in case the party of the second part shall at any time be of opinion that this contract is not duly complied with by the said party of the first part, or that it is not in due progress of execution, or that the said party of the first part is irregular or negligent, then, and in such case, he shall be authorized to declare this contract forfeited, and thereupon the same shall become null, and the party of the *first part shall have no appeal from the opinion and decision aforesaid, and he hereby releases all right [*340 to except to, or question the same in any place under any circumstances whatever; but the party of the first part shall still remain liable to the party of the second part for the damages occasioned by the said non-compliance, irregularity, or negligence."

The instructions thereon were:

5th. "If the defendant annulled this contract, as stated in the testimony, under the belief that the plaintiff was not prosecuting the work with proper diligence, and for the reasons assigned in the resolution of the board, they are not liable for any damage the plaintiff may have sustained thereby, even although he was in no default, and the company acted in this respect under a mistaken opinion as to his conduct."

6th. "But this annulling did not deprive him of any rights vested in him at that time, or make the covenant void *ab initio*, so as to deprive him of a remedy upon it for any money

then due him for his work, or any damages he had then already sustained."

The law leans strongly against forfeiture, and it is incumbent on the party who seeks to enforce one, to show plainly his right to it. The language used in this contract is susceptible of two meanings. One is the literal meaning, for which the plaintiff in error contends, that the declaration of the company annulled the contract, destroying all rights which had become vested under it, so that if there was one of the monthly payments in arrear and justly due from the company to the contractor, and as to which the company was in default, yet it could not be recovered, because every obligation arising out of the contract was at an end.

Another interpretation is, that the contract, so far as it remained executory on the part of the contractor, and all obligations of the company dependent on the future execution by him of any part of the contract might be annulled. We cannot hesitate to fix on the latter as the true interpretation.

In the first place, the intent to have the obligation of the contractor, to respond for damages, continue, is clear. In the next place, though the contractor expressly releases all right to except to the forfeiture, he does not release any right already vested under the contract, by reason of its part performance, and *expressio unius exclusio alterius.* And finally, it is highly improbable, that the parties could have intended to put it in the power of the company, to exempt itself from paying money, honestly earned and justly due, by its own act declaring a forfeiture. The counsel for the plaintiff in error seemed to feel the pressure of this difficulty, and not to be willing to maintain that *vested rights were absolutely destroyed by the act of the company; and he suggested *341]
that though the covenant were destroyed, assumpsit might lie upon an implied promise. But if the intention of the parties was to put an end to all obligation on the part of the company arising from the covenant, there would remain nothing from which a promise could be implied; and if this was not their intention, then we come back to the very interpretation against which he contended; for if the obligation arising from the covenant remains, the covenant is not destroyed. We hold the instruction of the court on this point to have been correct.

The next instruction, excepted to, was in these words:— "The increased work occasioned by changing the width of the road and altering the grade having been directed by the engineer of the company under its authority, was done under

this covenant, and within its stipulations, and may be recovered in this action, without resorting to an action of assumpsit."

The covenant of the plaintiff was "to do, execute, and perform the work and labor in the said schedule mentioned." And the schedule mentions "all the grading of that part of section 9, &c., according to the directions of the engineer," &c. We think this instruction was correct. The plaintiff in error insists that the covenant was to do the grading precisely as shown by a profile made before the contract was entered into. If this were so, the company would have been disabled from making any change either of width or grade, without the consent of the defendant. We do not think this was the meaning of the contract, and both the company and the contractor having acted on a different interpretation of it, the company must now pay for the increased work of which they have had the benefit.

The ninth instruction was as follows:—

9th. "Also, if from any cause, without the fault of the plaintiff, the earth excavated could not be used in the filling up and embankments on the road and at the river, it was the duty of the defendant to furnish a place to waste it. And if the company refused, on the application of the plaintiff to provide a convenient place for that purpose, he is entitled to recover such damages as he sustained by the refusal, if he sustained any; and he is also entitled to recover any damage he may have sustained by the delay of his work or the increase of his expense in performing it, occasioned [by] the negligence, acts, or default of the defendant."

To this the plaintiff in error objects, "that it assumes that the company was bound to provide a place on which to waste the earth." The contract says the contractor is to place earth, not wanted for embankment, "where ordered by the engineer." *He can rightfully place it nowhere until ordered by the engineer, and if such an order was refused, or delayed, and the contractor was thereby injured, he had a clear right to damages. It cannot be supposed such an order was to be given or obeyed, if obedience to it would be a trespass. Before giving it, the company was bound to make it a lawful order, the execution of which would not subject the parties to damages for a wrong, and therefore was bound to provide a place, and, of course, a reasonably convenient place as well as seasonably to give the order. [*342

The plaintiff in error also excepted to the tenth instruction, which must be taken together with the clause of the

contract to which it relates, to be intelligible. The contract contains the following provision:—

"And provided, also, that in order to secure the faithful and punctual performance of the covenants above made by the party of the first part, and to indemnify and protect the party of the second part from loss in case of default and forfeiture of this contract, the said party of the second part shall, notwithstanding the provision in the annexed schedule, be authorized to retain in their hands, until the completion of the contract, fifteen per cent. of the money at any time due to the said party of the first part; thus covenanted and agreed by the said parties, this twelfth day of July, 1836, as witness their seals."

The instruction was:—

10th. "Also, the plaintiff is entitled to recover the fifteen per cent. retained by the company, unless the jury find that the company has sustained damage by the default, negligence, or misconduct of the plaintiff. And if such damage has been sustained, but not to the amount of fifteen per cent., then the plaintiff is entitled to recover the balance, after deducting the amount of damage sustained by the company."

It is argued that here is a stipulation that the fifteen per cent. may be retained by the company until the completion of the contract by the defendant; that it never was completed by him, and so the time of payment had not arrived when this action was brought.

Now, it is manifest that one of the events contemplated in this clause was a forfeiture such as actually took place; that in that event the contract never would be completed by the defendant, and so its completion could not with any propriety be fixed on as to the limit of time during which the company might retain the money, unless it was the intention of the parties that the fifteen per cent. so retained should belong absolutely to the company in case of a forfeiture of the contract. But the parties have not only failed to provide for
*343] such forfeiture of the fifteen *per cent., but have plainly declared a different purpose. Their language is, that this money is retained, "to indemnify and protect the party of the second part from loss, in case of default and forfeiture of this contract."

There is a wide difference both in fact and in law, between indemnity and forfeiture; yet it is the former and not the latter which the parties had in view. Whether an express stipulation for a forfeiture of this fifteen per cent. could have been enforced, it is not necessary to decide.

But when the parties have shown an intent to provide a

fund for indemnity merely, the legal, as well as the just result is, that after indemnity is made and the sole purpose of the fund fully executed, the residue of it shall go to the person to whom it equitably belongs. Rightly construed the words, "until the completion of the contract," refer to the time during which all monthly payments were to be made, and give the right to retain the fifteen per cent. out of each and every payment, rather than fix an absolute limit of time during which these sums might be retained. In neither event, contemplated by this clause, would this limit of time be strictly proper. If a forfeiture of the contract took place, it was manifestly inapplicable; and if no forfeiture did take place, but damage were suffered by the company, from default of the contractor, equal to the fifteen per cent., it cannot be supposed their right to retain was to cease with the completion of the contract. This objection, therefore, must be overruled.

The plaintiff in error also excepts to the 12th instruction. We do not deem it needful to determine whether there was evidence to go to the jury, that the company did not use reasonable diligence to obtain a dissolution of the injunction, because we consider so much of the instruction as relates to this subject, to be a proper qualification of the absolute and peremptory bar, asserted in the first part of the instruction; and if the company desired to raise any question concerning the proper tribunal to decide on the matter of diligence, or respecting the evidence competent to justify a finding thereon, some prayer for particular instructions respecting these points should have been preferred. But we consider there was some evidence bearing on this question of diligence, and that it was for the jury and not the court to pass thereon.

Two objections are made to the thirteenth instruction. The first is, that this instruction assumed the existence of evidence, competent to go to jury, to prove that the defendants fraudulently terminated the contract under the clause which enabled them to declare it forfeited. To this objection, it is a conclusive answer that the defendants themselves prayed for an instruction substantially *like that given. [*344
The other objection is, that the jury were instructed to allow by way of damages, such profit as they might find the plaintiff had been deprived of by the termination of the contract by the defendants, if they should find the act of termination to be fraudulent.

It is insisted that only actual damages, and not profits, were in that event to be inquired into and allowed by the jury. It must be admitted that actual damages were all that

could lawfully be given in an action of covenant, even if the company had been guilty of fraud. But it by no means follows that profits are not to be allowed, understanding, as we must, the term profits in this instruction as meaning the gain which the plaintiff would have made if he had been permitted to complete his contract. Actual damages clearly include the direct and actual loss which the plaintiff sustains *propter rem ipsam non habitam.*

And in case of a contract like this, that loss is, among other things, the difference between the cost of doing the work and the price to be paid for it. This difference is the inducement and real consideration which causes the contractor to enter into the contract. For this he expends his time, exerts his skill, uses his capital, and assumes the risks which attend the enterprise. And to deprive him of it, when the other party has broken the contract and unlawfully put an end to the work, would be unjust. There is no rule of law which requires us to inflict this injustice. Wherever profits are spoken of as not a subject of damages, it will be found that something contingent upon future bargains, or speculations, or states of the market, are referred to, and not the difference between the agreed price of something contracted for and its ascertainable value, or cost. See *Masterton* v. *Mayor of Brooklyn*, 7 Hill (N. Y.), 61, and cases there referred to. We hold it to be a clear rule, that the gain or profit, of which the contractor was deprived, by the refusal of the company to allow him to proceed with, and complete the work, was a proper subject of damages.

We have considered all the exceptions; we find no one tenable, and the judgment of the court below is affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of 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 and damages at the rate of six per centum per annum.

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*Martin Very, Appellant, *v.* Jonas Levy. [*345

In equity, where a creditor agrees to receive specific articles in satisfaction of a debt, even although it be a debt upon bond, secured by mortgage, he will be held to the performance of his agreement.

But, in order to bring a case within this principle, there must be, —

1. An agreement not inequitable in its terms and effect.
2. A valuable consideration for such agreement.
3. A readiness to perform, and the absence of laches, on the part of the debtor.

Where the agreement to receive payment in goods was made by a person who acted under a power of attorney from the creditor, authorizing him to trade, sell, and dispose of notes, bills, bonds, or mortgages, and, under this power, a partial payment was received in goods, which was afterwards recognized as a payment by the creditor, the power was sufficient to authorize an agreement to receive the remaining amount, also in goods, at any time when called for within twelve months, especially as the bond had yet four years to run.[1]

This agreement was not inequitable; there was a valuable consideration for it; and the debtor was always ready to comply with it, on his part.[2]

The creditor cannot now allege fraud in his debtor. It is not charged in the bill; and, although he may not have known of the agreement when the bill was framed, yet, when the answer came in, he might have amended his bill, and charged fraud.[3]

This was an appeal from the Circuit Court of the United States for the District of Arkansas.

In 1841, one Darwin Lindsley owned a lot of land in the town of Little Rock, and State of Arkansas, which was known as lot No. 7, in block or square No. 35, in that part of the city west of the Quapaw line, and known as the Old Town.

On the 3d of March, 1841, he sold this lot to Jonas Levy, who gave two bonds, each for $4,000, one payable five years after date, and the other six years after date. Both were to carry interest, at 7 per cent., payable quarter-yearly. The bond, payable in five years, was not involved in the present suit, and no further notice need be taken of it. Both bonds were secured by a mortgage of the property.

On the 25th of March, 1841, Lindsley assigned the six years' bond to Martin Very, a citizen of the State of Indiana.

This bond had the following credits indorsed upon it:

1841, March 15	$550.00
1842, January 29	181.12
1843, March 3 (in goods)	1898.25

[1] Explained. *City of Memphis* v. *Brown*, 1 Flipp., 206.

[2] Cited. *Leber* v. *Minneapolis &c. R'y Co.*, 29 Minn., 256.

[3] A plaintiff's claim to relief on the ground of fraud on the part of defendant must be specially charged in the bill. *Badger* v. *Badger*, 2 Wall., 87; *Langdon* v. *Goddard*, 2 Story, 267; *Moore* v. *Greene*, 19 How., 69; *Beaubien* v. *Beaubien*, 23 Id., 190. See also *Baker* v. *Nachtrieb*, 19 How., 130; *Very* v. *Watkins*, 23 How., 472; *Clements* v. *Nachebœuf*, 2 Otto, 425.

The last credit was signed Martin Very, by J. S. Davis, and arose in this way:

On the 25th of November, 1842, Davis addressed the following letter to Levy.

NEW ALBANY, Indiana, Nov. 25, 1842.

DEAR SIR,—My object in writing to you, is to inquire what *you will give in cash and jewelry for the last note that you gave to Darwin Lindsley, and which was assigned [*346 by him to Martin Very. I have bought a part of the note, and am authorized to make disposition of it, and I thought, as a matter of justice, you should have the refusal of the note, at a considerable discount, if you desired it. Please let me hear from you at your earliest convenience. I write for myself and Mr. Very. I am, respectfully yours, &c.

MR. JONAS LEVY. JOHN S. DAVIS.

(Indorsed,)—Mr. JONAS LEVY, Little Rock, Arkansas.

(Postmarked)—New Albany, Ind., Nov. 26.

On the 28th of January, 1843, Very executed the following power of attorney to Davis:

Know all men, by these presents, that I, Martin Very, of the county of Floyd, and State of Indiana, have made, constituted, and appointed, and do, by these presents, make, ordain, constitute, and appoint, John S. Davis, of the city of New Albany, Indiana, my true and lawful attorney, for me, and in my name, and for my use, to ask, demand, sue for, recover, and receive, all such sum or sums of money, notes, bills, bonds, mortgages, or debts, which are or shall be due, owing, or belonging to me, in any manner, or by any means whatsoever; and I hereby give my said attorney full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held or owned by me, on any resident or residents of the State of Arkansas; and I hereby give my said attorney full power and authority, in and about the premises, to have, use, and take all lawful ways and means, in my name, for the purposes aforesaid; and, upon the receipt of such debts, dues, or sums of money, to make, seal, and deliver, acquittances and other sufficient discharges for me, and in my name, or, upon the sale of any bill, bond, note, or mortgage, to execute a good and sufficient assignment of the same to the purchaser thereof, for me, and in my name; and, generally, to do and perform, in my name, all other acts and things necessary to be done and performed in and about the premises, as fully and amply, to all intents and purposes,

as I myself could or might do, if personally present; and attorneys, one or more, under him, for the purpose aforesaid, to make and constitute, and again at pleasure revoke. And I hereby ratify and confirm all and whatsoever my said attorney shall lawfully do, in my name, in and about the premises, by virtue of these presents; and I hereby make this power of attorney irrevocable, to all intents and purposes. In testimony whereof, I have *hereunto set my hand and seal, this, the 28th day of January, in the year of our Lord 1843. [*347

MARTIN VERY. [SEAL.]

Signed, sealed, and delivered in presence of

JOS. P. H. THORNTON.

Under this power, Davis went to Little Rock, and, on the 3d of March, 1843, put the receipt above mentioned upon the back of the bond for $1,898.25, paid in goods; and, on the same day, executed the following paper, viz.:

LITTLE ROCK, March 3d, '43.

I hereby agree to take in goods, such as jewelry, &c., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by the said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices, at said Little Rock; said goods to be called for within twelve months from this time. MARTIN VERY.

By J. S. DAVIS,

Attorney in fact.

Davis stated in his deposition that, in January, 1844, he wrote to Levy, directing him to pay the balance, in jewelry, watches, &c., to Mr. Waring, in Little Rock; that he received an answer from Levy, declining to do so; but that he had lost or mislaid this answer from Levy.

On the 3d of February, 1844, Davis wrote to Levy the following letter:

NEW ALBANY, Feb. 3, 1844.

DEAR SIR,—If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two thirds watches, you will please notify me of the fact by return of mail, and I will send on for them at once. The things you let me have before were too high,—at least, Mr. Very says so. Let me hear from you. I am your friend, JOHN H. DAVIS.

MR. J. LEVY.

(Postmark)—New Albany, Ind., Feb. 5.

(Indorsed)—MR. JONAS LEVY, Jeweller, Little Rock, Ark.

In April, 1848, Very filed his bill in the Circuit Court of the United States for the District of Arkansas against Levy, for the purpose of foreclosing the mortgage. The answer of Levy admitted all the allegations of the bill, but set up as a defence the execution of the power of attorney by Very to Davis, and the subsequent agreement between Davis and himself, by which *the goods were to be called for within twelve months. It was then alleged, that not only during the next twelve months, but always afterwards, Levy had kept on hand goods enough of the proper character to pay the balance due, been always ready and still was ready to deliver them, and had often urged the complainant to receive and accept them, and would deposit them in the custody of any one directed by the court.

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Levy brought into court a large quantity of goods and jewelry, which was placed in the hands of a receiver.

The case being heard on bill, amendment, answers, replications, exhibits, and testimony, the court held Very bound by the agreement, and found that Levy had always had sufficient goods on hand ready to be delivered; and directed the master to ascertain the balance due on the bond, and the value of the goods delivered to the receiver.

The master reported the balance due on the 3d March, 1844, to be $2,002.59, and the value of the goods, $5,776.99. No exception was taken to the report, and it was confirmed.

The court then ordered the complainant to select out of the goods, to the amount of $2,002.59, and on his failure, after notice to his solicitor, that the master should do so. The complainant failed to select; the master set apart the requisite amount, the residue were redelivered to Levy, and the court decreed that Very should receive the goods so set apart by the master, and that the bond and mortgage were satisfied; denied the relief prayed, and dismissed the bill; all costs to be paid by the complainant.

Very appealed to this court. It was argued by *Mr. Sebastian*, for the appellant, and by *Mr. Lawrence*, for the appellee, on whose side there was also a brief filed by *Mr. Pike*.

Mr. Sebastian, for appellant.

Much irrelevant matter is drawn into the case, which it is not my purpose to notice; and except the points noticed below, the whole defence fails, upon the well-settled principle that matters set up in an answer by way of avoidance avail nothing unless proved. 1 Munf. (Va.), 373; 1 Johns. (N. Y.), 590; 14 Id., 74; 4 Paige (N. Y.), 33; *Cathcart* v. *Robinson*, 5 Pet., 267; *United States Bank* v. *Beverley*, 1 How., 151.

Under the power given to Davis, he had authority, as is contended for Very, only to receive the amount of the bond and mortgage in money, or to sell and transfer them, and no other authority whatever to agree to receive at a future day a payment in goods, and to bind his principal so to receive them,—no authority to substitute a new contract, by which Very must *necessarily be a loser, and bind Very to its performance. From the pleadings and evidence, it [*349 is clear that Davis did not receive payment, in money or otherwise. Is it not equally clear that he did not sell and transfer the bond and mortgage? And in what part of the power can the authority be found for Davis to bind Very by a new contract, to be performed in future? The whole object of the power was to close up and put an end to his business in Arkansas, and not to entangle himself with new contracts, liabilities, and litigation, and which has been the result of the unwarrantable construction put on the power by Levy, and the unauthorized acts of Davis under it.

And it is a well-settled principle of law, and nowhere controverted, that if an agent exceed his authority his acts in such excess do not bind his principal. *Taggart* v. *Stanbery*, 2 McLean, 549; *Planters' Bank* v. *Cameron et al.*, 3 Sm. & M. (Miss.), 613; *Gordon* v. *Buchanan*, 5 Yerg. (Tenn.), 79; 2 Kent, Com. (1st ed.), 483; 3 Eng. (Ark.), 230; *Wahrendorff* v. *Whitaker*, 1 Mo., 148; 3 Stew. (Ala.), 26, 27; *Fox* v. *Fisk*, 6 How. (Miss.), 345; *Fenn* v. *Harrison*, 3 T. R., 759; *Stewart* v. *Donnelly*, 4 Yerg. (Tenn.), 180; *Thompson* v. *Stewart*, 3 Conn., 183; 1 Hovenden on Frauds, 180; *North River Bank* v. *Aymar*, 3 Hill (N. Y.), 266; *Piatt* v. *Oliver*, 2 McLean, 316; Story on Agency, § 165, 172.

This was a special authority to Davis, and not a general one, and Levy was bound to know the extent of his authority; and if that authority was exceeded, Levy must be the loser by the unauthorized act, and not Very, who gave not the authority. 2 Kent, Com. (original ed.), 484; *Payne* v. *Stone*, 7 Sm. & M. (Miss.), 373; *Gullett* v. *Lewis*, 3 Stew. (Ala.), 26, 27; 1 Hovenden on Frauds, 179, 181; 3 Hill (N. Y.), 266; *Owings* v. *Hull*, 9 Pet., 628; Story on Agency, § 72, 73, 81, 165; Story on Contr., § 284; *Denning* v. *Smith*, 3 Johns. (N. Y.) Ch., 344.

And a special power must be strictly pursued, and cannot be enlarged. *Batty* v. *Carswell*, 2 Johns. (N. Y.), 50; *Mayor &c. of Little Rock* v. *The State Bank*, 3 Eng. (Ark.), 230; 2 Kent, Com. (1st ed.), 484; *Dickenson* v. *Gilliland*, 1 Cow. (N. Y.), 498; *Nixon* v. *Hyserott*, 5 Johns. (N. Y.), 59; Story on Agency, § 165.

And although Davis's power should be esteemed, in technical parlance, as a general agency, yet the act performed under it must have reference to, and be limited by, "the purpose for which the power was given." And the purpose in this case, as is clearly shown by the power itself, was not to make new obligations to be performed by himself, but to re-
*350] ceive payment and *close up finally those due to him from others. See 3 Sm. & M. (Miss.), 613; Story on Agency, § 21, 62–69, 83, 89; 6 How. (Miss.), 345; 4 Yerg. (Tenn.), 180; *Mechanics Bank* v. *Bank of Columbia*, 5 Wheat., 337; Story on Contr., § 287.

And even in such case the act performed must appear to have been a necessary means of carrying into effect the power granted by the principal. And could the new contract made by Davis be deemed a legitimate and necessary means of receiving payment in money, or of effecting a sale of the securities? Surely not. See 3 Sm. & M. (Miss.), 613; Story on Agency, § 62–69, 83; 5 Johns. (N. Y.), 59.

Here, too, a special power of attorney was given in writing, and such powers are subjected to a "strict interpretation." Story on Agency, § 68, 69; Story on Cont., § 287.

A factor is a general agent, yet he cannot bind his principal to sales on credit, or to any mode of payment other than the receipt of the money at the sale, unless there be a general usage established controlling such agency. 2 Kent, Com. (1st ed.), 485, 486.

And any general agent to receive payment of a debt is bound to receive it in money only, unless otherwise directed. *Martin's Adm.* v. *The United States*, 2 Mon. (Ky.), 90; 4 Yerg. (Tenn.), 180; 6 How. (Miss.), 345; 3 Stew. (Ala.), 27; Story on Agency, § 62, 98, 99, 181; Story on Cont., § 299.

And the power to sell and transfer could surely not authorize the compromitment of Very's rights, by any species of contract whatever not embraced in the letter, spirit, or meaning of the terms used in the power. *Clarke's Lessee* v. *Courtney*, 5 Pet., 347; 5 Johns. (N. Y.), 59; Story on Agency, § 62–69, 89; *Williamson* v. *Berry*, 8 How., 544.

And the opinion of Davis as to the extent of his powers under the agency, and that he was authorized to bind Very by this new contract with Levy, cannot aid the latter, nor is it any evidence of Davis's authority to make it. *Clark's Ex'ors* v. *Van Reimsdyk*, 9 Cranch, 158; *Garvin* v. *Lowry*, 7 Sm. & M. (Miss.), 27; 5 Wheat., 337.

The act of Davis's agreeing to receive goods in payment was never ratified by Very; nor can such ratification be pre-

sumed, because the evidence of Davis himself, invoked by Levy, shows that Very knew not of the existence of such a contract, and that the payment in goods, indorsed on the bond, was no part of the contract to receive other goods, in future. And an acquiescence in receiving the goods already paid cannot be tortured into a ratification of an unauthorized act of a faithless agent to receive others in future, and of which the principal had no knowledge.

*For the ratification of such an act, whether in fact or presumed, could not be binding on Very, without a [*351 full knowledge of its existence and of all the circumstances under which it was made. *Lyon* v. *Tams & Co.*, 6 Eng. (Ark.), 205; *Cairnes* v. *Bleeker*, 12 Johns. (N. Y.), 305; 2 Kent, Com. (4th ed.), 616; 2 Stark. Ev. (7th Am. ed.), 43, notes A, B; *Armstrong* v. *Gilchrist*, 2 Johns. (N. Y.) Cas., 430, note A; 7 Sm. & M. (Miss.), 27; *Owings* v. *Hull*, 9 Pet., 629; Story on Agency, § 90, 239, 242, *et seq.*

Besides, even were it in law true, which is denied, that Davis had authority to bind Very by the new contract entered into with Levy, yet from the evidence of Davis himself, who is Levy's own witness, such contract was obtained by the false pretences and fraud of Levy himself, both by the suppression of truth and utterance of falsehood, and could not be binding either upon Davis or Very, in law or equity. For fraud vitiates and renders void all contracts into which it enters. See Story on Cont., § 165, 167, *et seq.*, 177, *et seq.*, 542, *et seq.;* Roberts on Frauds (Philadelphia ed. of 1807), 521; 2 Saund. Pl. & Ev., 527, 528; *Anderson* v. *Lewis*, 1 Freem. Ch., 206; *Bell* v. *Hill*, 1 Hayw. (N. C.), 95; *Reigal* v. *Wood*, 1 Johns. (N. Y.) Ch., 406; *Stoddard* v. *Chambers*, 2 How., 318; *Barnesley* v. *Powell*, 1 Ves., 120; *Pope* v. *Anderson*, 1 Sm. & M. (Miss.) Ch., 156.

Levy's entire defence rests on this unauthorized contract made by Davis; and a contract, too, which the only evidence (that of Davis) establishing its existence, proves conclusively to have been obtained by fraud. And will a court of equity, under such circumstances, enforce it?

The counsel for the appellee made the following points.

Point 1. The arrangement made by Davis was warranted by the letter of attorney, regarding that in connection with, and explaining it by, the other facts in the case.

The debt was not due within about three years. All the interest accrued was overpaid. Levy was looked upon as insolvent, and the mortgaged property not worth the debt.

The power of attorney not only authorized Davis to col-

lect and receipt for money due Very, but to sell, trade, and dispose of the bond and mortgage in question, and to assign the same. Davis's testimony shows that this power, though general in its terms as to any and all debts, was really intended to apply only to this identical debt. It is very evident that the real object of the power was to enable Davis to dispose of the claim, or make some kind of compromise or arrangement by which it might be closed up at once. The *352] letter of Davis himself shows that it *had already been in contemplation to allow Levy to pay the debt in goods, and that it was thought to be only just to give him the refusal, in offering the claim for sale, and he was applied to accordingly.

When this was done, Davis owned part of the claim. He says in his testimony that such was the case, but that when he made the arrangement he no longer had an interest. He did not tell Levy that. And if he no longer had an interest in the claim, why was the power of attorney expressly declared to be irrevocable?

In considering whether the arrangement made by Davis was within the power conferred, it is legitimate to consider whether a proposal to receive payment in goods at a fair price was an unusual or extraordinary inducement to be held out in order to procure purchasers for a debt not due within three years; whether Very could have imagined that such a claim could be disposed of, traded, or sold, without some discount or change of the mode of payment; whether it was to be expected that Levy would pay the whole debt in money at that time.

Davis had a general power given him to sell, trade, or dispose of the claim. He was not limited as to the person to whom he should sell, or the mode in which the price should be paid. No one can doubt that if he had sold it to a third person for goods or jewelry, part paid at once, and part to be paid in twelve months, the sale would have been within the power, for surely there is no warrant to say that an unqualified power to sell a debt limits the agent to sell for cash.

And as there was no restriction as to the person, it was quite as competent to him to sell to Levy as to any one else. It was natural to expect that Levy would give more than any one else.

Again, how was the power to collect to be exercised, except by a compromise of some kind. The debt was not due, and could not be collected by law. It could only be collected by the consent of Levy, a consent not to be expected without any consideration. Taking the whole language of the power

together, it is obvious that Very meant to dispose of the claim in some way to some person, and the previous letter of Davis shows that the object was to dispose of it to Levy for goods, at a discount.

All grants of power are to be construed liberally, so as to meet the ends and purposes of the parties. *Kenworthy* v. *Bate*, 6 Ves., 793; *Nicolet* v. *Pillot*, 24 Wend. (N. Y.), 240; *North River Bank* v. *Rogers*, 22 Id., 649; *McMorris* v. *Simpson*, 21 Id., 612.

For the general rules as to the construction of powers, we need refer only to 2 Sugd. on Pow., c. 8, 9, 18; 22 Wend. (N. Y.), 651; 1 Wash. C. C., 457.

*In *Parsons* v. *Administrators of Gaylord*, (3 Johns. (N. Y.), 463,) C gave his bond to B; on payment of which B was to convey land to him. B delivered the bond to F with authority to receive payment; F took a note in payment of it. Held that his agency authorized this, and B's subsequent dissent made no difference, but the bond was extinguished. [*353

The extent of a power given to an agent is deducible as well from facts as from express obligation. In the estimate of such facts, the law has regard to public security, and often applies the rule that he who trusts must pay. *Parsons* v. *Armor & Oakly*, 3 Pet., 428.

In law, however, it may be in words or technical language, there is no difference between a general agency, so far as the principal is concerned, when considering what acts bind him, and an agency giving the agent general and unlimited power to do any particular act or transact any particular business, without pointing out the mode of doing the act. Story on Agency, §§ 17, 18, 127, V. 1, 128, 129, 133; *Andrews* v. *Kneeland*, 6 Cow. (N. Y.), 354; *Jeffrey* v. *Bigelow*, 13 Wend. (N. Y.), 518; *Planters Bank* v. *Cameron et al.*, 3 Sm. & M. (Miss.), 613; 2 Kent, 617, 620; *Sandford* v. *Handy*, 23 Wend. (N. Y.), 266; *Le Roy* v. *Beard*, 8 How., 466; *Anderson* v. *Cowley*, 21 Wend. (N. Y.), 279.

In either case, all the incidents necessary to effectuate the objects of the power are implied and go with it. A power shall be construed as a plain man would understand it. *Withington* v. *Herring*, 5 Bing., 442.

Point 2. Even if the acts of Davis were originally an excess of power, they were so acquiesced in and ratified by Very, that he was ever after estopped to repudiate the agreement.

Undoubtedly so far as goods were actually received, it was a good payment. Notice to the agent is notice to the principal; and if Very had any ground to complain that his agent

had acted in bad faith, or transcended his authority; if he meant not to abide by the contract made by him, good faith required that he should at once notify Levy of that determination. There is no pretence that he did so, or that he was at all dissatisfied. So far as the goods were received, he accepted them. That appears in the bill itself.

Suppose Levy had, during the year, delivered the residue of the goods, could Very then have repudiated the acts of his agent? And if that agent had authority to receive goods in payment, had he not authority to agree and contract to secure them?

In his bill of complaint, Very expressly states, as one of the payments made on the bond, the sum of $1,898.25, without explanation or qualification, and exhibits the bond, with
*354] the *indorsement, "Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3, 1843, Martin Very, by J. S. Davis." This is an explicit admission that he received the goods, an admission that it was a valid payment, and an admission either of an original authority in Davis to receive pay in goods, or of a ratification by Very of his act in receiving them.

How can he profit by the act of his agent by adopting part of the transaction and repudiating the residue? Especially how can he do this, when the latter was the price given by his agent for the benefit which he did not object to accept? *Le Roy* v. *Beard*, 8 How., 466.

Under the authority given by the power of attorney, and in pursuance of the previous proposition contained in the letter, Davis received nearly two thousand dollars in goods, and agreed in writing to receive the residue within twelve months. Can Very be allowed, after thus inducing Levy to pay, in goods and money, the whole debt to within a little over two thousand dollars, can he be allowed, after thus getting the debt reduced to not much more, if not actually less than the value of the mortgaged property, to enforce it against that property, repudiating the agreement made for him and in his name, by his agent?

And though Davis denies in his testimony that the receipt of the goods actually accepted, and the written agreement to receive the residue in the same way, were concurrent acts and parts of a single transaction, yet his own letter and all the circumstances infallibly demonstrate that this is an utter falsehood, and that Levy paid the amount in goods long before it was due, in consideration of the promise to receive the residue

in the same way, or in performance of the very written agreement itself.

On what ground is Very to be allowed to escape from this firm contract, made by his agent in his name, in pursuance of an ample power? *Righter* v. *Steel et ux.*, 3 Sandf. (N. Y.) Ch., 608.

It is perfectly evident that Davis executed the power in entire good faith towards Very. All the circumstances show that he did precisely what was intended to be done; and his statement, that he afterwards wrote to Levy to turn over the residue of the goods to a particular person at Little Rock, makes the proof on this point conclusive, and shows that all that Davis did was ratified.

No weight is due to the statement of Davis, that Levy declined turning over the residue of the goods, because it is inconsistent with the undeniable fact that he always retained the *goods, kept them apart, did not expose them to sale, said they were to go in payment of the debt; because the letter is not produced, and was rather too important to be lost, and because the refusal may have been a qualified one, on good grounds, which the letter would show. [*355

Point 3. The arrangement so made extinguished the original debt and mortgage.

As was held by the Supreme Court of Arkansas in *Levy* v. *Very*, above cited, if the agreement of Very, by his agent Davis, had been under seal, it would, together with the payment made in goods, have completely extinguished the original obligation, and been pleadable in bar at law. See also *Case* v. *Barber*, T. Raym., 450; *Thatcher* v. *Dudley et ux.*, 2 Root (Conn.), 169; *Good* v. *Cheeseman*, 2 Barn. & Ad., 328; *Cartwright, Adm.*, v. *Cook*, 3 Id., 701; *Coie & Woolsey* v. *Houston*, 3 Johns. (N. Y.) Cas., 243; *Boyd* v. *Hitchcock*, 20 Johns. (N. Y.), 76; *Watkinson* v. *Inglesby & Stokes*, 5 Id., 386; *Strong* v. *Holmes*, 7 Cow. (N. Y.), 224; *Brooks* v. *White*, 2 Metc. (Mass.), 283; *McCreary* v. *McCreary*, 5 Gill & J. (Md.), 147; *Downer* v. *Sinclare*, 15 Vt., 495.

In a court of equity the technical law rule that a contract can only be dissolved *eo ligamine quo ligatur*, disappears altogether; a rule which originally prevented absolute payment in money, of a bond, being pleaded at law. A court of equity looks through the form to the substance, and an unsealed agreement, the substance being the same, avails there, to precisely the same extent as a sealed one.

And then the principle applies, as established in *Pennel's case*, 5 Co., 117, that though payment of a less sum, on the day, in satisfaction of the greater, cannot be a satisfaction of

the whole; yet the gift of a horse, or the like, in satisfaction, is good, for it shall be intended that the horse might be more beneficial to the party than the money, or he would not have accepted it in satisfaction.

And where any other articles than money are received, and agreed to be accepted in full satisfaction of a debt, the court will not estimate their value in money's worth, but hold the consideration to be good, and the promise to discharge the entire debt a valid contract. *Brooks* v. *White*, 2 Metc. (Mass.), 283; *Boyd* v. *Hitchcock*, 20 Johns. (N. Y.), 76; *Kellogg* v. *Richards*, 14 Wend. (N. Y.), 116.

The law of tender has nothing whatever to do with this case. The agreement was, that Very would receive the residue of his debt in goods, "to be called for" within twelve months. No tender was necessary. Levy was only bound to deliver the goods when called on. Of course, his store was the place of delivery. If he kept the goods there, ready to be delivered, and remained always ready, that was enough.

*356] *No specified day, and no place, being fixed for the delivery of the residue of the goods, Levy could not be in default until Very had called for the goods, and he had refused to deliver them. His store was the place of delivery. This is well settled. *Vance* v. *Bloomer*, 20 Wend. (N. Y.), 199; *La Farge* v. *Rickert*, 5 Id., 187; *Robbins* v. *Lute*, 4 Mass., 475; *Morton* v. *Wells*, 1 Tyler (Vt.), 386; *Admrs. of Conn* v. *Ex. of Gano*, 1 Ohio, 483; *Savary* v. *Goe*, 3 Wash. C. C., 140; *Sheldon* v. *Skinner*, 4 Wend. (N. Y.), 525; *Cranche* v. *Fastolfe*, T. Raym., 418; *Ranson* v. *Johnson*, 1 East, 203; *Whitehouse* v. *Frost*, 12 Id., 615; *Mitchell* v. *Merrill*, 2 Blackf. (Ind.), 89; 1 Hill (N. Y.), 523; 2 Id., 352; *Coie* v. *Houston*, 3 Johns. (N. Y.) Cas., 243.

After the end of the year, Levy held the goods as trustee of Very, and at his risk. 4 Wend. (N. Y.), 529; 8 Johns. (N. Y.), 478; 3 Johns. (N. Y.) Cas., 258. And it made no difference that the goods of Very were mixed with his own, part of a large quantity. *Whitehouse* v. *Frost*, *ubi sup.*

As to Davis's testimony in regard to the statements of Levy, on which he was induced to make the arrangement, and their falsehood, it is directly contradicted by his own letter, which shows that the proposition came from himself, and was made to Levy before Davis went to Little Rock, for reasons and from motives wholly different from those stated by him in his deposition.

Mr. Justice CURTIS delivered the opinion of the court.

This is a suit in equity to foreclose a mortgage, commenced

in the Circuit Court of the United States for the District of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory, for the sum of four thousand dollars, bearing interest at the rate of seven per cent. per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the city of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage, and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods, such as jewelry, &c., in which the respondent dealt, at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of $1,898.25, and *afterwards, on the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows: [*357

"Little Rock, March 3d, '43. I hereby agree to take in goods, such as jewelry, &c., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very. By J. S. Davis, Attorney in fact."

That in further pursuance of this agreement, the respondent kept in his hands, and ready for delivery, and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize any one to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the com-

plainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor, to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he ask the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further; and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defence; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself. *Alden* v. *Blague*, Cro. Jac., 99; *Kaye* v. *Waghorne*, 1 Taunt., 428; *Bayley* v. *Homan*, 3 Bing. N. C., 915. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be considered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law, in a case free from the technical difficulties above noticed, will do the same thing. *Bradly* v. *Gregory*, 2 Camp., 383.

*358] *In order, however, to bring a case within these principles, three things are necessary. An agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the abscence of laches on the part of the debtor.

In this case the agreement was in writing, and one objection to it, made by the complainant is, that the person who executed it on his behalf was not authorized to do so. The authority was in writing, and gave the attorney "full power and authority to trade, sell, and dispose of any notes, bills, bonds, or mortgages, held or owned by me, on any resident, or residents of the State of Arkansas." Acting under this power, Davis did actually accept a partial payment in goods, amounting to $1,898.25, and signed the memorandum in writing, which is relied on. The bond being produced, bears the following indorsement:

"Received on the within, in goods, the sum of eighteen hundred and ninety-eight dollars and twenty-five cents, March 3d, 1843. Martin Very. By J. S. Davis."

The complainant, in his bill, treats this as a payment, and it does not appear that he made any objection to it, though Davis says, in one of his letters, he thought the prices were too high.

Upon this state of facts we are of opinion Davis had

authority to enter into the agreement in question. Besides the power to collect and sell, is the power to *trade* this bond and mortgage. It might be difficult to attach any general legal signification to this word. But considered in reference to the particular facts of this case, we think its meaning sufficiently clear.

It is proved by Davis, that the power, though general in its terms, was given solely in reference to this particular bond and mortgage. The bond had yet four years to run. When, therefore, Davis was authorized to collect this bond, the parties to the letter of attorney must have had in view some agreement respecting its extinguishment, which should vary its original terms of payment; and when he was further empowered to *trade* it, it is not an inadmissible interpretation that the new agreement for its extinguishment, which he was empowered to make, might be an agreement to receive specific articles in payment. It has been said that special powers are to be construed strictly. If by this is meant, that neither the agent, nor a third person dealing with him in that character, can claim under the power any authority which they had not a right to understand its language conveyed, and that the authority is not to be extended by mere general words beyond the object in view, the position is correct. But if the words in question touch only the particular mode in which an object, admitted to be within the *power, is to be effected, and they are ambiguous, and with a reasonable attention to them would bear the interpretation on which both the agent and a third person have acted, the principal is bound, although upon a more refined and critical examination the court might be of opinion that a different construction would be more correct. *Leroy* v. *Beard*, 8 How., 451; *Loraine* v. *Cartwright*, 3 Wash. C. C., 151; *De Tastett* v. *Crousillat*, 2 Wash. C. C., 132; 1 Liv. on Agency, 403, 404; Story on Agency, § 74. Such an instrument is generally to be construed, as a plain man, acquainted with the object in view, and attending reasonably to the language used, has in fact construed it. He is not bound to take the opinion of a lawyer concerning the meaning of a word not technical, and apparently employed in a popular sense. *Witherington* v. *Herring*, 5 Bing., 456. [*359

In this case, the complainant, besides empowering Davis to collect a bond not yet payable, has authorized him to *trade* it,—a word frequently used in popular language to signify an exchange of one article for another, by way of barter.

This power was intended by the complainant to be acted on by the respondent, a jeweller, in the State of Arkansas, and we think he cannot complain that it was understood in

its popular sense; more especially when he accepted, without objection, goods amounting to $1,898.25, and gave the defendant no notice of his dissent from that construction of the power under which his agent received them, in part payment of the bond.

But it is insisted that, if Davis had authority to receive those goods in part payment, he had not power to enter into an executory agreement to receive the others. This might have presented a question of some difficulty, if the effect of that agreement had been to give a credit to the obligor, or to subject the principal to any risk, or place his claim in any less advantageous position than it would have been in if no contract had been made in reference thereto.

It must be borne in mind, that it is proved by Marcus Dotter and Emanuel Levy, and other witnesses, that the defendant had on hand more than sufficient goods, of the description mentioned, at the time the other goods were delivered and the memorandum signed. By the memorandum, the residue of the goods was to be delivered, at any time within twelve months, when called for by the complainant. The defendant was obliged to keep this amount of these goods constantly on hand, and ready for delivery. He could, therefore, gain nothing by delay. On the other hand, the complainant might have found it more convenient not to take all at one time; the bond bore interest, which was ac-
*360] cruing by the delay; and if the defendant, *upon demand, should fail to comply, the bond would remain in force, and no right of the complainant to the money debt, or its security by the mortgage, would be prejudiced.

Under these circumstances, we are of opinion that, as Davis had authority to receive payment in goods, he had also authority to enter into this agreement, having the same object in view, and providing for its accomplishment in a way apparently more beneficial for the creditor than the receipt of all the goods at the time the arrangement was made.

That the agreement itself imports a consideration, deemed by the law valuable, there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding; the reason being, as expressed in *Pennel's case*, (5 Co., 117,) that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. Coke's Lit., 212, b; Com. Dig. Accord, B. 2; *Brooks* v. *White*, 2 Metc. (Mass.), 283. And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the

money to the creditor who has consented to the arrangement. Bac. Ab. Accord, A; *Pennel's case*, 5 Co., 117; *Booth* v. *Smith*, 3 Wend. (N. Y.), 66; *Kellogg* v. *Richards*, 14 Id., 116; *Steinman* v. *Magnus*, 11 East, 390: *Lewis* v. *Jones*, 4 Barn. & C., 513.

In this case, both these rules apply; for the time of payment was to be anticipated, and specific articles delivered.

We consider it also clearly proved, that the defendant has been ready to perform at all times since the agreement was made. It is said by Davis that, in 1844, January, he thinks, he addressed a letter to Levy, requesting him to pay the money coming to Very in jewelry, watches, &c.; and also requested him to put them up, and deliver them to Mr. Waring, in Little Rock; and that Levy declined paying, as requested. That he has searched for Levy's letter, but cannot find it.

It is certainly highly improbable that Levy, who had had these goods on hand, and set apart from his trade, ready for delivery, ever after the agreement was made, should have thus refused to deliver them.

He produces a letter of Davis, which, though it bears date on the 3d of February, 1844, is undoubtedly the letter Davis speaks of, and is as follows:

"New Albany, Feb. 3, 1844. Dear sir,—If you can pay the balance of your note in good silver or gold watches, and good jewelry, at fair prices, say about half of each, or two thirds watches, you will please notify me of the fact by return mail, and I will send on for them at once. The things you let me *have before were too high, at least Mr. [*361
Very says so. Let me hear from you. I am, your
friend. John S. Davis. Mr. J. Levy."

It thus appears, Davis was mistaken in supposing he designated a person in Little Rock to receive the goods; and unless it was the purpose of this letter to vary the original understanding of the parties in respect to the proportion of watches to be delivered, it is difficult to see what fair object it could have had. The testimony of Davis that Levy refused, without undertaking to state the contents of Levy's letter, or the substance of its contents, cannot be deemed sufficient to prove a refusal by Levy to perform his contract. Before the defendant can be prejudiced by testimony of a refusal, it is reasonable the court should know what it was. It certainly was not a refusal to deliver the goods to Waring, as Davis says, for Waring was not mentioned by Davis in his letter. The conduct of Davis in this matter is somewhat strange. He made the memorandum in writing as Very's agent, agree-

ing to accept payment of the balance of the bond in these articles; he delivered to Very the jewelry received, but says he did not tell Very of the contract to receive the balance in goods; and eleven months afterwards he wrote the letter of the 3d of February, which seems to be a new proposal, as if no contract had yet been made on the subject; he misstates the contents of his own letter in a material particular, says he has lost Levy's letter, but the latter declined paying as requested. We are not satisfied that a breach of contract by Levy, or any laches on his part, is made out.

It is asserted by the complainant's counsel that the contract was void on account of Levy's fraud; that it was obtained from Davis by false statements and the suppression of material facts by Levy, and, of course, cannot be the basis of any right in a court of equity.

But this ground is not open to the complainant. No fraud is charged in the bill, and though the complainant may not have anticipated, when the bill was filed, that this contract would be set up in the answer as a defence, yet on the coming in of the answer he might have amended his bill, as he did in another particular, averring that if any such agreement was in fact made, it was void, and charging in what the fraud consisted. Not having done so, he cannot now avail himself of it. Besides the evidence comes in a very irregular way, and is wholly unsatisfactory. It is brought out by Davis, in answer to interrogatories which do not call for any statements touching such subjects, but relate to wholly different matters. Thus the 19th interrogatory inquires: "For what
*362] reason was the agreement, marked *B, given or executed, if ever executed." To this Davis replies: "That said agreement was executed and delivered for several reasons: The first of which reasons was, that Levy represented that he had expended large sums of money in defending suits for the benefit of Very, and for the purpose of saving Very from losing the money for which this suit is brought; the second reason was, that said Levy represented himself as insolvent or wholly unable to pay the debt due Very; and thirdly, that the property mortgaged was of little value, and would only pay at best a very small portion of the money intended to be secured by the mortgage; all which statements and representation thus made by said Levy, said Davis, subsequent to the signing and delivering said agreement, found to be false."

The 20th interrogatory inquires, "What was the inducement and consideration for giving and executing the said agreement B?" To this he answers: "That the induce-

ment and consideration for giving and executing agreement "B" were the false representations of said Levy of his circumstances, the value of the property mortgaged, and that he, said Levy, had paid large sums of money to save said debt secured by said mortgage for said Very; these statements and representations were made before and at the time said agreement "B" was executed and delivered, and said Davis then believed them to be true, but subsequently found them to be false."

This is all the testimony in support of the charge of fraud. What he means, when he says he subsequently found the representations to be false, he does not explain. That he had any personal knowledge of their falsehood he does not say; and his statement indicates only that, by subsequent inquiry, and the information elicited thereby, he became satisfied that he was deceived. It would not be in conformity with settled rules of pleading and evidence in courts of equity, to convict a party of a fraud, not charged on the record, and brought out for the first time by the voluntary statements of a witness in answer to no question, and resting at last upon mere hearsay.

The decree of the Circuit Court is affirmed, with costs.

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 Arkansas, 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.

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*HORACE H. DAY, PLAINTIFF IN ERROR, *v.* W. JAMES WOODWORTH, MILLER TURNER, WILLAM W. PYNCHORN, ROBERT L. FULLER, ANDREW SISSON, HARVEY CLEMENCE, THOMAS BOLTON, MERRET BRISTOL, JOSEPH BOWEN, ANDREW ELMANDORF, SETH G. POPE, EDWARD GORHAM, EPHRAIM C. BRETT, ARNOLD TURNER, MARCUS TOBY, GEORGE J. KIPP, JOHN B. BUMP, —— ATTHOUSE, ERASTUS BROWN, ERASTUS F. RUSSELL, JOHN C. RUSSELL, ASA C. RUSSELL, EDWARD P. WOODWORTH, LORING G. ROBBINS, LORENZO H. RICE, AND MARK ROSSITER. [*363

Where an action of trespass *quare clausum fregit* was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open

and close the argument, this ruling of the court is not a proper subject for a bill of exceptions.[1]

The suit being brought by the owner of a mill-dam below, against the owners of a mill above, for forcibly taking down a part of the dam, upon the allegation that it injured the mill above, it was proper for the court to charge the jury, that, if they found for the plaintiff, upon the ground that his dam caused no injury to the mill above, they should allow, in damages, the cost of restoring so much of the dam as was taken down, and compensation for the necessary delay of the plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred, for counsel-fees, and the pay of engineers in making surveys, &c.[2]

But if they should find for the plaintiff, on the ground that the defendants had taken down more of the dam than was necessary to relieve the mill above, then, they would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess; but not any thing for counsel-fees or extra compensation to engineers, unless the taking down of such excess was wanton and malicious.[3]

In actions of trespass, and all actions on the case for torts, a jury may give exemplary or vindictive damages, depending upon the peculiar circumstances of each case. But the amount of counsel-fees, as such, ought not to be taken as the measure of punishment, or a necessary element in its infliction.[4]

The doctrine of costs explained.

Whether the verdict would carry costs or not, was a question with which the jury had nothing to do.[5]

THIS case was brought up, by writ of error, from the Cir-

[1] FOLLOWED. *Schoff* v. *Laithe*, 58 N. H., 503. S. P. *United States* v. *Dunham*, 21 Law Rep., 591.

[2] FOLLOWED. *Milwaukee &c. R. R. Co.* v. *Arms*, 1 Otto, 493; *Castro* v. *Criarte*, 12 Fed. Rep., 254; s. c., 2 N. Y. Civ. Pro., 214; 2 McC. Civ. Pro., 205. CITED. *Philadelphia &c. R. R. Co.* v. *Quigley*, 21 How., 213; *Brown* v. *Evans*, 8 Sawy., 490; *Lienkauf* v. *Morris*, 66 Ala., 414.

[3] FOLLOWED. *Beckwith* v. *Bean*, 8 Otto, 276.

Where a business has been partially interrupted, because of the trespass, it is competent to prove, upon the question of damages, the amount of business previously done, and how much less the business was during the months when the injury occurred than during the corresponding months of the previous year, and the profits upon the business; and where the evidence is sufficient to show that the falling off of business was in consequence of the wrongful acts of the defendant, the loss of profits thus established is a proper item of damages. *Schile* v. *Brokaus*, 80 N. Y., 614, 619.

Where a trespass is not wilful, only compensatory damages are allowable. *Waldron* v. *Marcier*, 82 Ill., 550; *Chicago &c. R. R. Co.* v. *Scurr*, 59 Miss., 456; *Massie* v. *Baily*, 33 La. Ann., 485; *Parsons* v. *Lindsay*, 26 Kan., 426; *Jones* v. *Marshall*, 56 Iowa, 739.

In assessing exemplary damages, the expenses of litigation may be taken into consideration. *Welch* v. *Durand*, 36 Conn., 182; *Titus* v. *Calkins*, 21 Kan., 722; including attorney's fees. *Cooper* v. *Cappel*, 29 La. Ann., 213; *Finney v. Smith*, 31 Ohio St., 529.

[4] APPROVED. *Flanders* v. *Tweed*, 15 Wall., 453. FOLLOWED. *Teese* v. *Huntingdon*, 23 How., 9; *Oelrichs* v. *Spain*, 15 Wall., 231. CITED. *Frankfurter* v. *Bryan*, 12 Bradw. (Ill.), 556.

That counsel fees cannot be allowed as part of the damages, see *Pacific Ins. Co.* v. *Conard*, Baldw., 138; *Blanchard Gunstock &c. Co.* v. *Warner*, 1 Blatchf., 258; *Teese* v. *Huntingdon*, 23 How., 2; *Stimpson* v. *The Railroads*, 1 Wall. Jr., 164. In what cases counsel-fees may be recovered as part of the damages, see *Guernsey* v. *Shellman*, 59 Ga., 797; *Imler* v. *Imler*, 94 Pa. St., 372.

[5] See also *Gallena* v. *Hot Springs R. R.*, 13 Fed. Rep., 123.

cuit Court of the United States for the District of Massachusetts.

It was an action of trespass *quare clausum fregit* brought by Day, a citizen of New York, against the defendants in error, citizens of Massachusetts, for pulling down a mill-dam within the town of Great Barrington, in the county of Berkshire, Massachusetts.

The defendants put in a plea of not guilty, and also a special plea of justification, viz.:

And the defendants further say, that at the time when the said trespasses are alleged to have been committed, and for a long time previously thereto, and prior to, and at the time of the erection of the said plaintiff's said dam, certain mills and a certain mill-dam, the property of, and in the use and possession of *the Berkshire Woollen Company, (a corporation duly established by the laws of the State of [*364 Massachusetts,) had been and were then lawfully erected and maintained, by, upon, and across said stream on which plaintiff's dam was built; that while said mills and dam were thus erected and maintained, and used by said corporation, the plaintiff unlawfully caused to be erected in said stream, and below said dam, and at the time of said alleged trespass, unlawfully caused to be maintained therein the said dam in his declaration mentioned, in such manner as to injure the said mills and dam of the said corporation; that the defendants, by direction of said Berkshire Woollen Company, and as their agents and servants, did enter upon the said plaintiff's close, and did break down and demolish said plaintiff's dam, in the manner least injurious to said dam; that they broke down and demolished no more of said dam than was necessary to remove or relieve the injury to said company's mills and dam caused by the maintenance of said plaintiff's said dam as aforesaid, and that said defendants did not break and enter the plaintiff's close, any further or otherwise, nor thereupon use more force or violence, than were reasonably necessary to relieve the injury aforesaid.

The plaintiff joined issue upon the plea of not guilty, and replied to the special plea as follows:

And as to the said plea of the said defendants by them first above pleaded, the said plaintiff says, that he ought not to be barred from having and maintaining his aforesaid action thereof against them; because he says, that although true it is that at the said time when, &c., the said Berkshire Woollen Com-

pany were then the owners and possessed of the said mills and dam in the said plea mentioned, and although true it is that the said mills and dam were upon and across the same stream on which the said plaintiff's dam then was, and although true it was that the said defendants committed the said trespasses by command of the said corporation, for replication nevertheless in this behalf, the said plaintiff says, that the said defendants of their own wrong and without the residue of the cause in their said plea alleged, broke and entered the close of the said plaintiff, and tore down and destroyed the said dam, and committed the said trespasses in the introductory part of the said plea mentioned, in manner and form as the said plaintiff hath above complained, and this he prays may be inquired of by the country. Wherefore he prays judgment and for his costs.

By B. R. CURTIS, Esq., *his Attorney.*

And the defendants do the like.

By WILLIAM WHITING, Esq., *their Attorney.*

*365] *Upon the trial, the jury came into court once for instructions, and afterwards returned three times with verdicts.

The final verdict was as follows:

In the above-entitled cause the jury find that the reduction of the said dam of the said plaintiff, to the extent of three inches for its entire length, was justified; but that the further reduction was not justified; and so the jury find that the said defendants, of their own wrong, and without the residue of the cause by the said defendants in their said first plea alleged, committed the trespasses in the said plea mentioned, in manner and form as the said plaintiff hath, in his said declaration, complained; and thereof assess damages in the sum of two hundred dollars.

ROBERT ORR, *Foreman.*

Whereupon the court entered up judgment for two hundred dollars damages, without costs. The reason why the judgment was entered "without costs" may be seen by a reference to a book recently published by Stephen D. Law, Esq., p. 256. The book is upon the jurisdiction and practice of the United States Courts.

The bill of exceptions contains the proceedings of the court with respect to these several verdicts, and was as follows:

Bill of Exceptions.

This is an action of trespass for breaking and entering the plaintiff's close and tearing down his mill-dam. The defend-

ants justified under an alleged right to enter, &c., because the dam was a nuisance to mills above, on the same stream, belonging to the Berkshire Woollen Company, whose servants the defendants were, and that, by command of the said company, the defendants entered and took down so much and no more of the said dam as was necessary to relieve the mills above.

At the trial the defendants claimed the right to begin and offer their evidence first, and open and close the argument. The plaintiff claimed the same right. The presiding judge ruled in favor of the defendants, and the plaintiff's counsel excepted to the ruling. The presiding judge instructed the jury in his first summing up, that the defendants had a right by law to enter the plaintiff's close, and to take down so much of the plaintiff's dam as was necessary to relieve the mills above from all practical injury occasioned by that dam; but that if the defendants had taken down more of the dam than was necessary for that end, or if none was necessary to be taken down for that end, the jury must find for the plaintiff.

That if the jury should find for the plaintiff on the last ground, viz. that the plaintiff's dam caused no injury to the mills above, the plaintiff was entitled to a complete indemnity, *and the jury would allow in damages the cost of restoring so much of the dam as was taken down, and [*366 compensation for necessary delay of plaintiff's mill; and they might also allow such sum for the expenses of prosecuting the action, over and above the taxable costs, as they should find the plaintiff had necessarily incurred for counsel-fees and the pay of engineers in making surveys, &c. But if the jury should find for the plaintiff on the first ground, viz. in that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not any thing for counsel-fees or extra compensation to engineers.

The plaintiff's counsel requested the court to instruct the jury that they might allow counsel-fees, &c., if there was any excess in taking down more of the dam than was justifiable, and gave as a reason that the defendants thereby became trespassers *ab initio*. The presiding judge instructed the jury as above set forth on this point.

After being charged by the presiding judge, the jury retired, and subsequently came into court for instructions, preferring a written request, as follows:

U. S. C. C. Jury Room, Dec. 8, 1849.

To his Honor Judge Sprague:

If the jury find that the plaintiff's dam was too high and ought to be reduced, but not to the extent of the reduction by the defendants, can the jury find a verdict to that effect for the plaintiff according to law? if so, can they find damages for the excess of such reduction?

R. Orr, *Foreman.*

Thereupon the presiding judge gave anew the instructions above set forth, except that he instructed them not to allow any thing for counsel-fees, &c., if they should find that the reduction of the dam to any extent was justifiable. The jury again retired, and subsequently returned into court with a written paper, in the words following:

U. S. C. C. Jury Room, Dec. 8, 1849.

In the case of *H. H. Day* against *Woodworth et al.* the jury find that the reduction of the plaintiff's dam to the extent of three inches for its entire length justifiable. The jury further find that the defendants pay to the plaintiff the sum of one thousand dollars in full for such excess of reduction and delay. Robert Orr, *Foreman.*

The plaintiff asked to have a verdict presented to the foreman *for his signature, following the words of the issue. The presiding judge stated that he was not prepared to say to the jury that that would be the same in substance as their finding, and ruled that the verdict, to be presented to the foreman for his signature, should also set forth that part of the finding that the plaintiff's dam was lawfully reduced to the extent of three inches throughout its entire length. There was no evidence that the defendants had reduced the plaintiff's dam through its entire length, but it appeared that the plaintiff's dam was one hundred and twelve feet long, and that the part cut down by the defendants was the most westerly part, about fifty-four feet in length, and that this fifty-four feet was cut down about inches, and that this would have the effect of reducing the obstruction presented by the dam more than three inches for its entire length.

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To the above rulings of the presiding judge the plaintiff excepted.

In this stage of the proceedings, the defendants' counsel desired of the presiding judge to inquire of the jury whether

something for counsel-fees was not included in the sum of one thousand dollars mentioned in said finding of the jury.

The presiding judge being of opinion that there was no evidence which would warrant the jury in finding damages to the amount of one thousand dollars for the said excess of reducing the dam, without expressing this opinion, made the inquiry requested, to which the foreman answered, that they did not allow any thing for counsel-fees, but only for the excess and delay, as appeared by the written verdict. The defendants' counsel then urged that the written verdict said that the sum of one thousand dollars was to be in full, and requested the presiding judge to ask the jury if they did not allow that sum in the expectation that the plaintiff was to recover no more. The foreman of the jury responded in substance as before, but one of his fellows said he understood the plaintiff was to recover no more, and that each party was to pay his own costs, and that he had agreed to the verdict on that understanding. This understanding was denied by another of the jury, and the presiding judge then said that it must be the verdict of each juror, and that this was not the verdict of the one who said he had agreed to it on the misunderstanding, and therefore the presiding judge proceeded to sum up anew on the subject of damages, referring to the evidence, and giving to the jury substantially the instructions, in point of law, before given, and adding that, if the plaintiff should recover $1,000 damages, he would, as the prevailing party, by law recover his taxable costs; and having so done, directed the jury again to retire; to this proceeding the plaintiff's counsel excepted. Subsequently, the jury again returned into *court, and brought in a second verdict, in writing, in the words following: [*368

U. S. C. C. Jury Room, Boston, Dec. 8, 1849.

In the case of *Horace H. Day* v. *Woodworth et al.*, the jury find that the reduction of the plaintiff's dam to the effect of three inches for its entire length was justifiable.

The jury further find, that the defendants pay to the plaintiff the sum of two hundred dollars for such excess of reduction and delay. ROBERT ORR, *Foreman.*

This verdict was put in the form in which it appears on the record, but before it was signed, the plaintiff's counsel suggested to the presiding judge, that, as the jury had been instructed that in one event the plaintiff would recover costs, some of the jury might have agreed to this verdict with that understanding, and requested that this inquiry might be

made of the jury; thereupon the presiding judge inquired of the jury whether, in rendering this verdict, they had any reference to costs, and the foreman of the jury, having replied that they had not, was about to sign the verdict, when one of his fellows objected, and stated that he had agreed to the verdict in the belief that, as prevailing party, the plaintiff could recover his costs; thereupon the presiding judge charged the jury a third time on the subject of damages, referring to the evidence, and repeating in substance the instructions in point of law before given; and further instructed them that the plaintiff, recovering only two hundred dollars, would not recover costs, and that it would be a violation of their oaths to have any regard to the costs, it being their duty to find the actual damage proved, and no more, and directed them again to retire; which having done, they brought in the verdict which appears of record. To all these proceedings the plaintiff excepted, and prayed that his exceptions might be allowed, and that this bill of exceptions might be signed and sealed by his honor the judge; all of which being found true, the same is accordingly signed and sealed.

PELEG SPRAGUE, [SEAL.]
Judge of the U. S. Mass. District.

Upon this exception the case came up to this court, and was argued by *Mr. Gillet*, for the plaintiff in error, no counsel appearing for the defendants.

Mr. Gillet made the following points:

First. The affirmative was with the plaintiff, and he had the right to introduce evidence first, and the right to open and close the argument. Burr. Pr., 233.

*369] *Where the general issue is pleaded, the plaintiff has always the right to begin. *Carter* v. *Jones*, 6 Carr. & P., 64; *Colton* v. *James*, 1 Moo. & M., 273, 275, and 505; *Cooper* v. *Wakley*, 3 Carr. & P., 474 and note; *Fish* v. *Travers*, 3 Carr. & P., 578; *Price* v. *Seaward*, 1 Carr. & M., 23; *Booth* v. *Millns*, 15 Mees. & W., 669; *Cripps* v. *Wells*, 1 Carr. & M., 489; *Mercer* v. *Whall*, 5 Ad. & El. (N. S.), 447; *Harrison* v. *Gould*, 8 Carr. & P., 580; *Ayer* v. *Austin*, 6 Pick. (Mass.), 225; *Brooks* v. *Barrett*, 7 Id., 94; *Ware* v. *Ware*, 8 Me., 42; *Lunt* v. *Wormell*, 19 Me., 100, 102; *Sawyer* v. *Hopkins*, 22 Me., 268; *Robinson* v. *Hitchcock*, 8 Metc. (Mass.), 64; *Sullivant* v. *Reardon*, 4 Ark., 140; *Lexington Ins. Co.* v. *Paver*, 16 Ohio, 324.

Second. The judge erred in refusing to instruct the jury, that if the defendants cut down the plaintiff's dam more than was necessary to relieve the mills above, that they were not

authorized to allow any thing in addition to cover counsel-fees or extra compensation paid by him to engineers.

Third. The judge erred in charging the jury that it would be a violation of their oaths to have any regard to whether their verdict would carry costs or not.

Fourth. This being an action of tort, the plaintiff was not limited to the actual damages proved; but the jury were authorized to give him such as the circumstances of the case might indicate as proper; *Allen* v. *Blunt*, 2 Woodb. & M., 121; *Jennings* v. *Maddox*, 8 B. Mon. (Ky.), 109; *Whipple* v. *The Cumberland Man. Co.*, 2 Story, 661; *Washburn* v. *Gould*, 3 Story, 136; *Whitmore* v. *Cutter*, 1 Gall., 478; 1 Baldw., 328; *The Apollon*, 9 Wheat., 379; *Staats* v. *Ex. of Teneyck*, 3 Cai. (N. Y.), 111; *Kingsbury* v. *Smith*, 13 N. H., 122; 4 Johns. (N. Y.), 1; *Street* v. *Patrick*, 12 Me., 9; *Beal* v. *Thompson*, 3 Bos. & P., 407; *Pitkin* v. *Leavitt*, 13 Vt., 379; *Earle* v. *Sawyer*, 4 Mass., 1, 12; *Boston Man. Co.* v. *Fiske*, 2 Mason, 119, 120; Sedgwick on Damages; Curtis on Patents, &c.

Mr. Justice GRIER delivered the opinion of the court.

The plaintiff in error was plaintiff below in an action of trespass, charging the defendants with tearing down and destroying his mill-dam. The defendants pleaded in justification that the Berkshire Woolen Company owned mills above the dam of plaintiff, who illegally erected and maintained the same, so as to injure the mills above; that by direction of said company, and as their agents and servants, they did enter plaintiff's close, and did break down and demolish so much of the plaintiff's dam as was necessary to remove the nuisance and injury to the mills above, and no more, and as they lawfully might. To this plea the plaintiff replied *de injuria*, &c.

*On the trial of this issue, the defendants "claimed the right to begin and offer their evidence first, and [*370 open and close the argument. The plaintiff claimed the same right. The court ruled in favor of the defendants, to which the plaintiff excepted." This ruling of the court is now alleged as error.

Our attention has been pointed to numerous decisions of English and American courts on this subject, which we think it unnecessary to notice more particularly, than to state, that the question whether a defendant in trespass who pleads a plea in justification only, has a right to begin and conclude, has been differently decided in different courts. It is a question of practice only, and depends on the peculiar rules of practice which the court may adopt. The English courts have regretted that an objection to the ruling of the court at

nisi prius on this question should ever have been permitted to be received as a ground for a new trial. But although a court may sometimes grant a new trial where the judge has not accorded to a party certain rights to which, by the rules of practice of the court, he may be justly entitled, we are of opinion that the ruling of the court below on such a point is not the proper subject of a bill of exceptions or a writ of error. A question as to the order in which counsel shall address the jury does not affect the merits of the controversy. As a matter of practice, the Circuit Court of Massachusetts had a right to make its own rules. The record does not show that the rule of the court is different from their judgment on this occasion. So that the plaintiff has failed to show any error in the decision, assuming it to be a proper subject of exception.

The great question, on the trial of this case, appears to have been whether the plaintiff's dam was higher than he had a right to maintain it, and if so, whether the defendants had torn down more of it, or made it lower than they had a right to do.

The plaintiff's counsel requested the court to instruct the jury that "they might allow counsel-fees, &c., if there was any excess in taking down more of the dam than was justifiable, and give as a reason that the defendants thereby became trespassers *ab initio*."

The court instructed the jury "that if they should find for the plaintiff on the first ground, viz., that the defendants had taken down more of the dam than was necessary to relieve the mills above, unless such excess was wanton and malicious, then the jury would allow in damages the cost of replacing such excess, and compensation for any delay or damage occasioned by such excess, but not any thing for counsel-fees or extra compensation to engineers."

*371] *This instruction of the court is excepted to, on two grounds. First, because "this being an action of trespass, the plaintiff was not limited to actual damages proved," and secondly, that the jury, under the conditions stated in the charge, should have been instructed to include in their verdict for the plaintiff, not only the actual damages suffered, but his counsel-fees and other expenses incurred in prosecuting his suit.

It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation

to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts, by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured. In many civil actions, such as libel, slander, seduction, &c., the wrong done to the plaintiff is incapable of being measured by a money standard; and the damages assessed depend on the circumstances, showing the degree of moral turpitude or atrocity of the defendant's conduct, and may properly be termed exemplary or vindictive rather than compensatory.

In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff which he would have been entitled to recover, had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called "smart money." This has been always left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case. It must be evident, also, that as it depends upon the degree of malice, wantonness, oppression, or outrage of the defendant's conduct, the punishment of his delinquency cannot be measured by the expenses of the plaintiff in prosecuting his suit. It is true that damages, assessed by way of example, may thus indirectly compensate the plaintiff for money expended in counsel-fees; but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.

This doctrine about the right of the jury to include in their verdict, in certain cases, a sum sufficient to indemnify the *plaintiff for counsel-fees and other real or supposed [*372
expenses over and above taxed costs, seems to have
been borrowed from the civil law and the practice of the courts of admiralty. At first, by the common law, no costs were awarded to either party, *eo nomine*. If the plaintiff failed to recover, he was amerced *pro falso clamore*. If he recovered judgment, the defendant was *in misericordia* for his unjust detention of the plaintiff's debt, and was not therefore punished with the *expensa litis* under that title. But this being considered a great hardship, the statute of Gloucester, (6 Ed. 1, c. 1,) was passed, which gave costs in all cases

when the plaintiff recovered damages. This was the origin of costs *de incremento;* for when the damages were found by the jury, the judges held themselves obliged to tax the moderate fees of counsel and attorneys that attended the cause. See Bac. Abr. tit. Costs.

Under the provisions of this statute every court of common law has an established system of costs, which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit. It is true, no doubt, and is especially so in this country, (where the legislatures of the different States have so much reduced attorneys' fee-bills, and refused to allow the *honorarium* paid to counsel to be exacted from the losing party,) that the legal taxed costs are far below the real expenses incurred by the litigant; yet it is all the law allows as *expensa litis.* If the jury may, "if they see fit," allow counsel-fees and expenses as a part of the actual damages incurred by the plaintiff, and then the court add legal costs *de incremento*, the defendants may be truly said to be *in misericordia*, being at the mercy both of court and jury. Neither the common law, nor the statute law of any State, so far as we are informed, has invested the jury with this power or privilege. It has been sometimes exercised by the permission of courts, but its results have not been such as to recommend it for general adoption either by courts or legislatures.

The only instance where this power of increasing the "actual damages" is given by statute is in the patent laws of the United States. But there it is given to the court and not to the jury. The jury must find the "actual damages" incurred by the plaintiff at the time his suit was brought; and if, in the opinion of the court, the defendant has not acted in good faith, or has been stubbornly litigous, or has caused unnecessary expense and trouble to the plaintiff, the court may increase the amount of the verdict, to the extent of trebling it. But this penalty cannot, and ought not, to be twice inflicted; first, at the discretion of the jury, and again at the discretion of the court. The expenses of the defendant over and above taxed costs are usually *as great as those of *373] plaintiff; and yet neither court nor jury can compensate him, if the verdict and judgment be in his favor, or amerce the plaintiff *pro falso clamore* beyond tax costs. Where such a rule of law exists allowing the jury to find costs *de incremento* in the shape of counsel-fees, or that equally indefinite and unknown quantity denominated (in plaintiff's prayer for instruction) "&c.," they should be permitted to do the same for the defendant where he succeeds in his defence, otherwise the

parties are not suffered to contend in an equal field. Besides, in actions of debt, covenant, and assumpsit, where the plaintiff always recovers his actual damages, he can recover but legal costs as compensation for his expenditure in the suit, and as punishment of defendant for his unjust detention of the debt; and it is a moral offence of no higher order, to refuse to pay the price of a patent or the damages for a trespass, which is not wilful or malicious, than to refuse the payment of a just debt. There is no reason, therefore, why the law should give the plaintiff such an advantage over the defendant in one case, and refuse it in the other. See *Barnard* v. *Poor*, 21 Pick. (Mass.), 382; and *Lincoln* v. *the Saratoga Railroad*, 29 Wend. (N. Y.), 435.

We are of opinion, therefore, that the instruction given by the court in answer to the prayer of the plaintiff, was correct.

The instruction to the jury, also, was clearly proper as respected the measure of the damages, and that the jury had nothing to do with the question whether their verdict would carry costs. The judgment is therefore 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, for the defendants in error.

JOSEPH FOWLER, JUNIOR, APPELLANT, *v.* NATHAN HART.

Real property, in Louisiana, was bound by a judicial mortgage.

The owners of the property then took the benefit of the Bankrupt Act of the United States.

A creditor of the bankrupt then filed a petition against the assignee, alleging that he had a mortgage upon the same property, prior in date to the judicial mortgage, but that, by some error, other property had been named, and praying to have the error corrected. Of this proceeding the judgment creditor had no notice.

*The court being satisfied of the error, ordered the mortgage to be reformed, and thus gave the judgment creditor the second lien instead [*374
of the first; and then decreed that the property should be sold free of all incumbrances. Of this proceeding, and also of the distribution of the pro-

ceeds of sale, the judgment creditor had notice, but omitted to protect his rights.

In consequence of this neglect, he cannot afterwards assert his claim against a purchaser, who has bought the property as being free from all incumbrances.

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

The facts are stated in the opinion of the court.

It was argued by *Mr. Bradley*, for the appellant, no counsel appearing for the appellee.

Mr. Bradley thus stated his case and points.

Daniel T. Walden, as indorser of two notes of William Christy, was indebted to Fowler, the complainant, and suit was brought by him upon these two notes, and judgment recovered, as above stated.

At that time, Daniel T. Walden held and owned the premises described in the petition of Fowler, and also at the time when the third judgment was converted into a mortgage. Nor was there then any legal mortgage, nor had Fowler any notice of any equitable mortgage on that property. Just prior to that time, Walden, being indebted to the defendant, Hart, had given him a special mortgage, describing with particularity certain other property, not embracing or touching any part of the premises now claimed by Fowler. In this condition of things, Walden was declared bankrupt. Hart then filed his petition in the Bankrupt Court, setting up, as against the assignee and Walden, that there was a mistake in the description of the property intended to be conveyed by Walden's mortgage to him, and claiming that the said mortgage was intended to convey the premises now claimed by Fowler.

No process was served upon Fowler, or upon the other creditors of Walden. The Bankrupt Court, however, proceeded to take the proofs and adjudicate, and in its judgment affirmed the pretensions of Hart, ordered the mistake to be corrected, set up his special mortgage on these particular premises, and ordered them to be sold to satisfy that special mortgage, and the surplus, if any, to be brought into the general fund. The sale was made in execution of that order, and at that sale Hart became the purchaser, for a sum less than the amount of his mortgage, received a deed, went into possession, and has ever since been in possession, claiming under that proceeding and sale.

The Circuit Court decided, on this state of facts, that the

law *and the evidence are in favor of the defendant; [*375
ordered, adjudged, and decreed, that there be judgment in favor of the defendant, Hart, and that the cause be dismissed at complainant's costs. And Fowler appealed.

In the case of *Houston et al.* v. *The City Bank of New Orleans*, 6 How., 505, 506, this court distinctly affirmed the power of the District Court, in bankruptcy, to convene the mortgage creditors, sell the mortgaged property, pay the proceeds to the mortgagees, according to their respective priorities, and order the cancellation of the mortgages. No such order has been made in this case.

The questions arising in this case, and not hitherto decided by this court, are,—

1st. The powers of the District Court to exercise, in a summary proceeding, a jurisdiction heretofore limited to courts of equity, to correct mistakes in deeds, and reform them according to the intent of the parties; and,

2d. To correct a mistake in a deed, as between third parties, creditors, or purchasers, without notice.

3d. To make such correction, without causing such third parties to be convened and made parties to the suit.

First.

I. This court has said, in *Ex parte Christy*, 3 How., 312, that the District Court, sitting in bankruptcy, is clothed with the most ample powers and jurisdiction "over the rights, interests, and estate of the bankrupt, and over the conflicting claims of creditors; and,

II. Page 317: The District Court has a concurrent jurisdiction, to the same extent and with the same powers as the Circuit Court, over liens, judgments, and securities.

III. But it is submitted, that this jurisdiction must be over liens and securities already created, and not over such as are to be created by the superior power of a court of equity.

IV. A court of law of general jurisdiction has, unquestionably, jurisdiction over the same subjects, to a certain extent; but it has not, and never has been supposed to have, that creative power which has been hitherto confided to courts of equity alone, to compel men to reform their deeds and contracts according to the intent of the parties.

V. The 8th section of the Bankrupt Act gives to the Circuit Court concurrent jurisdiction with the District Court, in bankruptcy; and it may well have been designed for such cases as this, and to prevent that injustice, danger of which might well be apprehended from the exercise of the summary powers given to the District Court in bankruptcy.

*376] *VI. It is not essential to the exercise of the summary jurisdiction granted, and intended to be conferred, inasmuch as, by this 8th section, provision is made for the means which may be needed to effect a full settlement of the estate of the bankrupt.

VII. Inasmuch, then, as the power is not given in terms in the Bankrupt Act, and is not essential as a means to accomplish the end sought by that act, it is submitted that it does not exist, and that the court in bankruptcy had no power to correct a mistake, if any such existed, in the description of the property claimed by the defendant, Hart.

Second.

I. The recording of the judgment created a mortgage upon the real property of Walden, and that mortgage had priority, according to its date.

II. It was a lien such as was recognized by the law of Louisiana, and protected by the Bankrupt Act. *Waller* v. *Best*, 3 How., 111; *Peck* v. *Jenness*, 7 Id., 620, 621. "It is clear, therefore, that, whatever is a valid lien or security upon property, real or personal, by the laws of any State, is exempted by the express language of the act."

III. The mortgage creditor takes as a purchaser, and, taking as a purchaser, his title can only be affected by notice. It is not pretended there was, prior to the mortgage of Fowlew, any notice in this case of the mistake, if any, in the description of the property in Hart's mortgage.

IV. A court of equity would have had no power to order the correction of the mistake, as against him, *a multo fortiori*, the court in bankruptcy had not power to do so, and to direct the cancellation of his mortgage.

Third.

I. Nor is he estopped in any manner by the decree in bankruptcy. Such decree could only be operative upon parties and privies. The record shows that the only parties to the proceeding to correct the alleged mistake were Hart, and Christy the assignee, and Walden. Interrogatories are propounded to Walden, but he never appeared and answered. Christy alone answered, denying the allegations of the petition, and proof was taken, and upon these the decree was made.

II. Hart had notice, at the time of filing his said petition, of the lien of Fowler, because he was returned as a creditor by judicial mortgage, and therefore, having a lien, he was

entitled to be convened. The object being to affect his rights, so far as they were superior to those of the general creditors, Hart could only *limit those rights by a proceeding in which Fowler could defend them. [*377

III. Nor is he estopped by the notice and order of sale. The property therein described is said to be bounded by New Levee, Commerce, St. Joseph, and Julia streets.

The property in the decree correcting the mistake is described as containing 23 feet 5 inches front upon New Levee street, between Julia and St. Joseph streets, by 125 feet 6 inches deep on the line next to St. Joseph street, and 124 feet 7 inches on the line of lot No. 2, and designated as the house or store No. 110 in said New Levee street; and the description of the property in the petition of the assignee for the sale of the property is still different, and makes it house No. 10. The description in the original mortgage is, a certain lot of ground, No. 2, the house numbered 109, situated . . . between St. Joseph and Julia streets, measuring 18 feet 10 inches front on New Levee street, by 124 feet 7 inches deep on the dividing line of lot numbered 3, and 123 feet 8⅓ inches on the dividing line of lot No. 1, and about 21 feet 8 inches in the rear of the dividing line of lot No. 5. So that in fact the lot described in the mortgage was alongside of the one which it was pretended was designed to be conveyed, and both were within the description in the said notice to Fowler. He, therefore, was not only neither party nor privy; but he had no notice of such pretended claim to put him on inquiry.

VII. Finally, it does not appear that there ever was any order by the court in bankruptcy to erase and cancel the said mortgage of said Fowler, and the same is now and hath ever been a valid and subsisting lien upon the lot claimed in his petition. In such case the law of Louisiana is clear that he had a right to proceed against the person holding the land, and to a judgment for the sale of the lot, and an account of the rents and profits in the hands of Hart, holding and claiming the same adversely.

Mr. Justice McLEAN delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

Fowler filed his bill in the Third District Court of New Orleans, representing that on the 16th December, 1839, he recovered a judgment in the Commercial Court of New Orleans, against Daniel T. Walden and William Christy for $3,530.22, besides interest; that on the 29th December, 1839, he caused the judgment to be duly inscribed in the office of

the recorder of mortgages for the parish of New Orleans, by which the same became a judicial mortgage on the real estate of the defendants in the parish; that Walden afterwards be-
*378] came bankrupt, and *Christy was appointed his assignee; and that he procured an entry of cancellation to be made by the recorder of judicial mortgages without his consent, and illegally; that the mortgage remains in force.

And the plaintiff states that when the judgment was recorded, and up to the time of the bankruptcy of Walden, he was the owner and in possession of a certain lot of ground and buildings thereon in the city of New Orleans, to wit, in the second municipality, in the square bounded by New Levee, St. Joseph, Commerce, and Julia streets, measuring 23 feet 5 inches front on New Levee street, by about 125 feet 6 inches in depth on the side nearest St. Joseph street, 124 feet 7 inches in depth on the side nearest Julia street, and about 21 feet 8 inches on the rear line; which property is liable to the judicial mortgage of the petitioner; that Christy, the assignee of Walden, sold the same lot to one Nathan Hart, of New York, who took possession thereof, and still remains in possession; that he well knew, at the time of his purchase, that the petitioner's mortgage was a lien on the same, and that Christy, the assignee, had no power to cancel the same. And the petitioner avers that his judgment lien was good under the 2d section of the Bankrupt Law.

On the application of Hart, he being a citizen of New York, the suit was removed from the State court to the Circuit Court of the United States.

In his answer Hart denies that the petitioner has a mortgage on the property described in his petition; and states that he purchased the same for the sum of $4,700, under a sale of the marshal, on 16th June, 1845, in pursuance of a decree of the United States District Court, entered the 23d May, 1845, sitting as a court of bankruptcy, in the matter of the bankruptcy of Daniel T. Walden, and confirmed according to law by a sale duly recorded from Christy, the assignee, before a notary-public the 19th June, 1845; and clear of all mortgages, the same having been cancelled, by order of the judgment of said court, the 23d May, 1845, on a rule, notice of which was duly served on petitioner.

The mortgage of the defendant, Hart, on the above property was dated 22d May, 1838, the judicial mortgage of the petitioner took effect the 29th December, 1839. But after the bankruptcy of Walden, and before the sale of the property to Hart by the assignee, it was discovered that there was a mistake in the mortgage in describing the property

intended to be mortgaged. To correct this mistake a bill was filed by Hart against Christy, the assignee, and on the 5th December, 1844, a decree was obtained correcting the mortgage so as to describe the lot intended to be mortgaged. Of this proceeding the petitioner, Fowler, seems to have had no notice.

*Afterwards, on the 24th April, 1845, the assignee petitioned the District Court, stating "that there is [*379 still in his possession, as assignee, the following described property, specially mortgaged to Nathan Hart to secure the payment of the sum of $8,655, with interest, which he prays may be sold on certain terms named. The lot above described is stated, and also other property of the bankrupt. The court ordered that due notice of the petition be published in two newspapers printed in the district, ten days at least before the time assigned for the hearing, and that the petition be heard on the 23d May ensuing.

On the 10th May, 1845, the following rule was entered by the court: "The assignee of the said estate having filed in this court a petition as above described, it is ordered by the court that a hearing of the said petition be had on Friday the 23d May next, at 10 o'clock, A. M., when, as one of the mortgage creditors of said estate, you are notified to appear and show cause why the property, as described below, should not be sold upon the terms and in the manner and form set forth in said petition, and why the said assignee should not be authorized to erase and cancel the mortgages, judgments, and liens recorded against said bankrupt, and in favor of certain creditors of the estate, affecting the property surrendered, so that said assignee may convey a clear and unincumbered title to any purchaser thereof, reserving to such creditors all their rights in law to the proceeds of the sale of the said property, upon the final distribution thereof."

To this rule was appended the following, with other descriptions of property ordered to be sold. 1. "Property in the second municipality, bounded by New Levee, Commerce, St. Joseph, and Julia streets, with the improvements thereon, mortgaged to Nathan Hart. Terms, one third cash, the balance on a credit of twelve and eighteen months."

To the property above designated No. 1, the name of Joseph Fowler was appended, and the marshal returned "that he had received the same on the 12th May, 1845, and on the same day served a copy of the rule on the within named Joseph Fowler."

The principal objection to the validity of the sale of the property to Hart is founded on the procedure in the District

Court, for the correction of the misdescription of the mortgage. As between the mortgagor and mortgagee, there can be no objection to this proceeding. The District Court had jurisdiction of the matter, and it is but the ordinary exercise of the powers of a court of chancery to reform a mortgage or other instrument so as to effectuate the intention of the parties. But it is alleged that Walden having become a bankrupt, his property was vested in his assignee for the benefit of his creditors, and that the judicial *mortgage of the petitioner could not be effected by a procedure in which the petitioner was not a party, and of which he had no notice.

*380]

The assignee generally represents the creditors, and being made a party to the proceeding on the mortgage, he appeared and denied the allegations of the petition of the mortgagee; but on the hearing the District Court was satisfied of the truth of the allegations in the bill, and reformed the mortgage so as to describe truly the property intended to be mortgaged. It is true that Fowler the petitioner was not a party to this proceeding, and if the action of the District Judge had here terminated, it would be difficult to maintain the decree.

By the 11th section of the bankrupt law the court had power to order the assignee to redeem and discharge "any mortgage or other pledge or deposit, or lien upon any property," &c. It also necessarily had the power, on the sale of mortgaged premises, to distribute the proceeds as the law required. And in regard to the property in question it appears that due notice was given to Fowler of the application for the sale of it by Hart, who claimed to have a special mortgage on it; and the property was substantially described, and the day stated on which the court would act on the application. And in addition, a notice was published in two newspapers ten days before the time set for hearing by the court. The object of this notice was stated to be, to make an unembarrassed title to the purchaser, and enable Fowler to make any objections he might have to the sale, and the cancelment of his mortgage. That the rights of creditors were reserved as to the proceeds of the mortgaged premises on a final distribution.

Whether the petitioner, Fowler, took any steps under this notice does not appear; and in the absence of such evidence, it may well be presumed that he acquiesced in the procedure. The notice afforded him an opportunity to assert his rights, and to object to the decree for the reform of Hart's mortgage, of which he now complains, as fully as if he had been made

a party to that proceeding. This he could have stated as an objection to the sale of the premises, or in claiming the proceeds of that sale. The reform of the mortgage by the court could not have estopped him from the assertion of his rights, as he was not a party to that proceeding of the court. But, having neglected to assert his rights on the above occasion, it is now too late to set them up against the purchaser of the property at the sale.

Although there is some discrepancy in the description of the property contained in the notice from that in the decree reforming the mortgage, yet substantially it is believed to embrace the *same property; and as the notice was served upon the petitioner, as having a mortgage on the property, we think it was sufficient. The decree of the Circuit Court is affirmed, with costs. [*381

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof it is now here ordered, adjudged, and decreed by this court, that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

JOHN H. HOWARD, PLAINTIFF IN ERROR, *v.* STEPHEN M. INGERSOLL; JOHN H. HOWARD AND JOSEPHUS ECKOLLS, PLAINTIFFS IN ERROR, *v.* STEPHEN M. INGERSOLL.

In 1802, when Georgia ceded her back lands to the United States, she had jurisdiction over the whole of the Chattahoochee River, from its source to the thirty-first degree of north latitude.

The rule is that, where a power possesses a river, and cedes the territory on the other side of it, making the river the boundary, that power retains the river, unless there is an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.[1]

When Georgia ceded to the United States all the land situated on the west of a line running along the western bank of the Chattahoochee River, she retained the bed of the river and all the land to the east of the line above mentioned.[2]

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[1] S. P. *Handly* v. *Anthony*, 5 Wheat., 374; *Alabama* v. *Georgia*, 23 How., 505. See also *Fleming* v. *Kenney*, 4 J. J. Marsh. (Ky.), 158.

[2] CITED. *Dred Scott* v. *Sanford*, 19 How., 506.

In *Agawam Canal Co.* v. *Edwards*, 36 Conn., 476, 501, two persons, each of whom owned lands on both sides of a canal, made an exchange by which one party conveyed to the other all his land east of the canal, and the latter

The river flows in a channel, between two banks, from fifteen to twenty feet high, between the bottom of which and the water, when the river is at a low stage, there are shelving shores, from thirty to sixty yards each in width.[3]

The boundary line runs up the river, on and along its western bank, and the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks.[4]

THESE two cases were argued and decided together. The suits related to the same tract of land and the rights of the same parties, although they came up from different States. The first, which is referred to in the opinion of the court as No. 121, was an action on the case brought by Ingersoll in the Circuit Court of Alabama (State court) to recover damages for the wrongful obstruction, by Howard, of the Chattahoochee River, whereby the waters of that stream were backed in such a manner as to overflow Ingersoll's land and obstruct the use of his mill. This mill was built between the high bank of the river, and low-water mark, as it was called, so that when the water was high it was overflowed; but when the water was low, it was on dry ground. At such times, it was worked by a race fed from the river by means of a wing
*382] dam. Howard built a *dam below, which backed the water upon the mill, and impeded its operations. On the trial of this cause the jury returned a verdict in favor of Ingersoll for the sum of $4,000. The cause was carried to the Superior Court of Alabama, where the judgment was affirmed; whence it was brought to this court under the 25th section of the Judiciary Act.

No. 131. { HOWARD & ECKOLLS, Plaintiffs in error,
v.
INGERSOLL.

This case was brought by writ of error, from the Circuit Court of the United States for the District of Georgia. Howard & Eckolls, the builders of the dam, brought a suit against Ingersoll in the Superior Court of Muscogee county, Georgia, to recover damages for an illegal entry upon their land covered with water, and fishing thereon. The jury found a verdict for the plaintiffs for the sum of $600. A bill of exceptions brought the case up to this court.

conveyed to the former all his land west of the canal, the land being bounded "on said canal." It was held that the centre of the canal was the dividing line between them.

[3] See *West* v. *City of Madison*, 75 Ind., 257.

[4] FOLLOWED. *Niagara Fire Ins. Co.* v. *Greene*, 77 Ind., 593.

After these general observations upon the two cases, let us now take them up separately; and first of

No. 121. { HOWARD, Plaintiff in error, *v.* INGERSOLL.

It has been always stated that this case was brought from the Supreme Court of Alabama. The bill of exceptions, which was taken on the trial of the cause in Russell Circuit Court, was as follows:

Bill of Exceptions. On the trial of this cause the plaintiff (Ingersoll) produced a patent from the United States to himself, dated in 1802, to fractional section No. 11, township 7, range 30, and proved title in himself to lots 1, 2, 3, and 4, in the town of Girard, lying in Russell county, Alabama, and specifically described in some of the counts of the declaration; said land has for its eastern boundary the State of Georgia, and is immediately west of the Chattahoochee River, on the bank thereof. This river has, for the most part, high bluff banks; but in some places the banks are low, and the adjacent lands on either side (where they are low) are subject to inundation, for nearly a mile out of the banks. Immediately at the plaintiff's lands and lots there are banks of the river from fifteen to twenty feet high, and very abrupt, and are high on both sides, and above and below, for considerable distances. The abrupt and high banks, however, do not extend down to the water's edge at ordinary low water. The bed of the river at this point is about two hundred yards wide from bank to bank; and by the bed is meant the space between these abrupt and high banks, and is composed of rocks *and slues among the rocks from one side to the other; ordinary low water and extreme low water together prevail for about two thirds of the year, during which time the river is confined to a channel about thirty yards wide, leaving the bed of the river as above described, exposed on each side of this channel, from thirty to sixty yards. Immediately under the western abrupt and high bank, and within the latitude of the north and south boundary line of plaintiff's land, said lines being drawn down to the water's edge, and in the bed of the river, as above described, east of said western abrupt and high bank, the plaintiff erected a mill previous to 1842, and continued the possession and use thereof until overflowed by defendant's dam. The place on which said mill was situated was covered with water in ordinary high water, but was bare and dry in ordinary low water.

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To supply his mill with water the plaintiff had erected a

wing dam, which ran in a north-east direction into the river, and supplied his mill with water at all seasons, and diverted a portion of the stream to the said mill, which passed again into the river above defendant's dam, and he, plaintiff, had blown out rock to give room to his mill-wheel.

It was further proved, that, in 1845, the defendant erected a dam across the river, about three hundred yards below the plaintiff's mill, and opposite the city of Columbus, Georgia. The said dam was four to five feet high, and at ordinary low water backed the water on plaintiff's mill, so as to prevent its working; in high water the said dam made no difference, as the water was level above it and on both sides of it. The plaintiff further proved the value of his mill and the injury he sustained. The defendant introduced in evidence the act of cession of the State of Georgia to the United States; the Constitution of the State of Georgia; an act of the State of Georgia granting to the city of Columbus, the right to lay off lots on her river boundary, running across the Chattahoochee River, to high-water mark, on the western bank of said river. All of which evidence, being printed in the public acts, are to be read and considered in full as part of this bill of exceptions.

The defendant also offered in evidence an authenticated deed to him, from the city of Columbus, granting him said lots, running across the river, and authority to erect the dam across the river; which original deed and accompanying plat, it is agreed, may form a part of this bill of exceptions, and may be exhibited as such. The plaintiff's land was situated at a point of the river where there were falls or rapids, and where it was not navigable, and that it was far above tide-water, and a fresh-water stream, and between Miller's Bend and Cochei Creek. *The defendant's dam raised the
*384] water to a point on the western high bank which [is] dry at ordinary low water. One witness proved that he never knew a sheriff or constable of Georgia to come over on the western bank to serve any writ, or process, or other official act, and stated that he, the witness, had good opportunity to know if any such thing had been attempted, as he had lived on the western bank for ten years.

At the place at which plaintiff's mill was erected the summit of the bank was never overflowed, even at the highest stages of the river, the water of which always remained several feet below it. The plaintiff gave in evidence to the court, which was not allowed to go as evidence to the jury, although requested by plaintiff, acts of the State of Georgia, conveying authority to the commissioners to negotiate the

cession of territory from Georgia to the United States, and also the act of Georgia ratifying said cession; all of which may be read from the public acts. The court charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River, at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the treaty of cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; and if they believed the plaintiff's mill was west of that line, and defendant's dam backed the water so as to obstruct the operation of said mill, the plaintiff was entitled to recover; to which charge the defendant excepted.

The defendant asked the court to charge the jury, that if the bank of the river was ordinary low-water mark, the plaintiff had no right to the use of the water at that stage; which charge the court refused; to which defendant excepted, and prays his exceptions to be signed and sealed, and made part of the record of this cause, which is accordingly done in term time.

J. J. Woodward. [L. S.]

The judgment of the Circuit Court was affirmed by the Supreme Court of Alabama, and brought to this court to be reviewed, under the 25th section of the Judiciary Act.

No. 131. { Howard & Eckolls, Plaintiffs in error, *v.* Ingersoll.

This action was brought by way of petition by Howard & Eckolls, the owners of the dam below, against Ingersoll, the owner of the mill above, for entering the close (ground covered with water) of the petitioners and fishing. Ingersoll removed *the cause into the Circuit Court of the [*385
United States, where it was tried in July, 1850. The court having refused to charge the jury as prayed for by the plaintiffs, they brought the case to this court, although there was a verdict in their favor for $600 damages.

The following is the bill of exceptions:

On the trial of this cause the plaintiffs proved, by the articles of cession, dated on the 16th day of June, 1802, between the United States and Georgia, that the boundary-line between Georgia and the Territory, now State of Alabama, was a line beginning on the western bank of the Chattahoochee

River, and running along the western bank thereof. And did further prove, by competent testimony of witnesses, both for the plaintiffs and on the part of the defendant, that at the part of the said River Chattahoochee, where the closes in the said declaration mentioned are situated, the said river (not being a tide-water, and not being navigable) is considerably reduced at its lowest state, especially in droughts, being quite narrow at such state, particularly in some places where it is confined by rocks projecting from the opposite sides of the river, and in other places spreading out more at large. That between the water in this state of the river, and a high and perpendicular bluff on the western or Alabama side, the distance varies, according to one witness, from 30 to 100 yards; according to another, the bluff banks are high and precipitous; at some places they are 30 feet, at others 100, and again 150 feet from the main channel; by another, at the foot of the bluff bank is a flat space from 50 to 150 feet wide, between ordinary water mark and the bluff bank; from very low-water mark to the bluff bank is more than 50 to 150 feet. According to another witness it is from 100 to 120 feet from the bluff bank to medium water mark, and from 80 to 100 feet from medium water mark to low-water mark; that this intermediate space is a flat or bottom land, gradually descending from the base of the bluff to the water; that in places upon this flat there is a growth of shrubbery, and some trees, such as pines, gums, oaks, willows, alders, poplars, &c.; that the growth on this flat would be liable to be destroyed if the flat were long or often overflowed; that there is a road or cart-way underneath this bluff, a grist-mill, one post of which stands in the water, (the water approaching very near the bluff at that point,) and there being just room between the mill and the bluff for the above road to pass. There is also a saw-mill, (but not on the closes in the declaration mentioned,) and a cotton-gin factory under the bluff on this flat; and a small portion of it has at times been cultivated. That in the ordinary winter state of the river the water covers this

*386] *flat about half way to the bluff, to the base of a bank or ridge of sand and gravel, having an inclination of about forty-five degrees; that in very full states of the river, that is, in freshets, the water covers the flats, reaching to, or nearly to, the bluff, and in the freshet of 1840, known as the Harrison freshet, it extended twelve feet up the base of the bluff; that the extent to which this flat is covered with water varies with the height of the freshets in said river, it being all dry land at the lowest state of the river, and a portion of it being always, except in high freshets, uncovered with water;

that it is only in the full state of the river that the water overflows the sand-bank or ridge before mentioned.

Whereupon the plaintiffs prayed the court to instruct the jury that the true interpretation of the said article of cession in the year 1802, between the United States and Georgia, requires the boundary line between the State of Georgia and the Territory, now State, of Alabama, to be drawn on and along the western bank of the Chattahoochee River. And that wherever the jury may find that bank to be, the jurisdiction and limits of the State of Alabama must terminate, and cannot pass beyond that line to the eastward of the same, but that all east of said line, whether it be land or water, is included within the limits and jurisdiction of Georgia, and no grant from the United States or the State of Alabama can confer title to any part of the same, either directly or indirectly, either by virtue of the said grant, or as an incident to the same.

Which instruction the said court refused to give, except subject to this modification, to wit, that the articles of cession was an instrument, the interpretation of which belonged to the court and not to the jury, and gave the said instruction subject to the said modification; and moreover instructed the jury that, by the true construction of those articles of cession, the boundary-line between the State of Georgia and Alabama was to be drawn on and along the western bank of the Chattahoochee River at low-water mark, when the river was at its lowest state.

To which refusal and instruction the plaintiffs except, and pray this bill of exceptions to be signed, sealed, and enrolled, which is done this fifth day of July, 1850.

JNO. C. NICOLL, [L. S.]
District Judge for the District of Georgia.

These cases having been brought before this court upon these two bills of exceptions, were argued by *Mr. Johnson* and *Mr. Berrien*, for the plaintiffs in error, and *Mr. Coxe*, for the defendant in error. The reporter gives the following notes of the argumemt of Mr. Berrien, which have been kindly revised by him, *and having no notes of Mr. Coxe's argument, begs to refer the reader to the report [*387 of the Alabama case, in 17 Ala., 780; where will be found the argument of the counsel for Ingersoll, and also the opinion of the court as delivered by Dargan, C. J.

Mr. Coxe contended that this court had no jurisdiction over the Alabama case, because Ingersoll claimed under a

title derived from the United States, and the judgment was in his favor and not against its validity, as required by the 25th section of the Judiciary Act.

Mr. Berrien, for plaintiffs in error.

I will consider,—1st. The question of jurisdiction; 2d. That of boundary.

Jurisdiction. This question arises under the 25th section of the Judiciary Act of 1789 (1 Stat. at L., 85). The object of the section is to give appellate jurisdiction to the Supreme Court of the United States from decisions of the State courts, in all cases in which it is necessary to determine (I use the words of the act) the validity of a treaty, of a statute, or an authority exercised under the United States, or the construction of any clause of the Constitution or of a treaty, or of a statute of, or commission held under, the United States. No further detail is necessary to present the question of jurisdiction than to state, that the United States and Georgia both claimed lands lying east and west of the River Chattahoochee; that the United States exercised jurisdiction over them by organizing the Territory of Mississippi, recognizing in the act the claims of Georgia, saving her rights, and providing for the appointment of commissioners to adjust these conflicting claims (Act of 1798, 1 Stat. at L., 549; Act of 1800, 2 Stat. at L., 69); that Georgia acquiesced in this proposal; that commissioners were appointed, and articles of cession defining the boundary between the territory claimed by the United States and by Georgia were duly executed and confirmed. On the true ascertainment of that boundary the rights of the parties in these cases depend.

Georgia ceded to the United States all her right, title, &c., to all lands lying west of that line. The United States ceded to Georgia all their right, title, &c., to all lands lying east of it. The plaintiffs in error, deriving their title from Georgia, claimed under her original title, modified as it was by these articles, and therefore claimed also under the United States, that is to say, under the cession to Georgia by the United States of all their right, to all lands lying east of a line running on and along the western bank of the River Chattahoochee. They *claimed the whole river, the shore or flats between the margin of the water, and the bank, and founded their claim on the legislative grant of Georgia and these articles of cession by the United States.

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The question in controversy between the parties was, What was the line which they established? In No. 121 the court decided it to be "the line impressed upon the land by

ordinary low water." In No. 131 it was declared to be "a line drawn on and along the western bank of the Chattahoochee River at low-water mark, when the river was at its lowest state."

These decisions were therefore adverse to the claim set up by the plaintiffs in error under the act of cession by the United States, denying their exclusive right to the river in every stage, to the shores and flats between the water's edge and the base of the bank, and to its inner edge or slope. The validity of this claim it is not material to consider on this question of jurisdiction. It is sufficient that it was made in the Supreme Court of Alabama, that it was made under the cession from the United States to Georgia, from whom they derived title, and that that court decided against it. In the construction of the 25th section of the Judiciary Act, this court has said, "it must appear that the right, title, &c., under a statute or commission of the United States, was specially set up by the party claiming the same in the State court, and the decision be against the same." *Montgomery* v. *Hernandez*, 12 Wheat., 129. But the court has also said that it is "not necessary that the question shall appear in the record to have been raised, and the decision made in direct and positive terms, *ipsissimis verbis;* it is sufficient if it appear that the question must have been varied, and must have been decided, to induce the judgment." 1 Stat. at Large, 86, in notes and authorities cited. Now the plaintiffs claimed under Georgia. She had restricted her limits, having, by the act of cession, withdrawn them from the Mississippi to the line agreed upon in those articles. To determine on the validity of her grant it was necessary to decide where that line was, and this depended on the construction of the articles of cession,—the joint act of the United States and Georgia. Again the bill of exceptions states, that at the point to which this controversy applies the river is bounded by banks from fifteen to twenty feet high; that the bed of the river, the space between these banks, is about two hundred yards wide; that at ordinary low water the channel is about thirty yards wide, leaving from thirty to sixty (or rather eighty) yards of flats exposed on each side between the channel and banks; that the mill of defendant in error was placed below the western high bank in the bed of the river, and that the site of the mill was covered with water in ordinary high *water, but was bare and dry in ordinary low [*389 water. The plaintiffs claimed the western high bank, including the whole river, the flats, and the inner face of that bank, and that this was the line defined in the act of cession

made by the United States. If this claim was affirmed, the defendant in error was a trespasser, and this judgment could not have been rendered. It was disaffirmed, and so disaffirming it the court denied the validity at the act of cession, under which plaintiff claimed, or they gave a construction to those articles adverse to his claim, and in either case the appellate jurisdiction of this court is manifest.

But the learned counsel has yielded the question of jurisdiction by conceding, as he has done, that these records "present but a single question, viz., what is the true construction of that part of the compact between the State of Georgia and the United States," &c. Surely it belongs to this court to decide, in the last resort, on the construction of a compact entered into by commissioners of the United States acting under the authority given by a statute of the United States.

But again, the learned counsel yields the question of jurisdiction by contending, as he may rightly contend, that these actions "were local in their character," for then, especially in the Alabama case, No. 121, in which alone the jurisdiction of this court is contested, it became necessary for the Supreme Court of Alabama to decide that the *locus* of the alleged trespass was within the limits of that State, which could only be done by giving a construction to the act of cession, and thus deciding the locality of the line of boundary between Georgia and Alabama, which they prescribe. Without this, judgment could not have been rendered for the plaintiff in the court below.

The question of jurisdiction is submitted. I proceed to examine the question of *boundary*.

Its decision depends on the construction to be given to the following words in the act of cession: "West of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary-line between the United States and Spain, running up the said river Chattahoochee, and along the western bank thereof"; and on the mutual cession of the United States and Georgia,—the United States ceding to Georgia all their right, title, &c., to the territory lying east of that line, and Georgia ceding to the United States all her right, title, &c., to the territory lying west of it. That line, then, limits the precise boundary between the contracting parties. The United States have relinquished all claim to territory lying east of it; Georgia has in like manner relinquished her claim to territory lying west of it.

*390] But the learned counsel supposes that this cession by the *United States is valueless, because the commis-

sioners of the United States exceeded their power in making it; that they were limited, by the act creating the commission, to an acceptance of a cession from Georgia; of a cession of lands lying west of the Chattahoochee, and were not authorized to cede to Georgia the right, title, &c., of the United States to territory lying east of that line.

To give to the learned counsel the whole benefit of his argument, let it be conceded that the commissioners of the United States exceeded their powers in making the cession to Georgia, as the commissioners of Georgia certainly did exceed their powers in ceding to the United States all the right, title, &c., of Georgia to the territory lying west of a line drawn on the bank of the Chattahoochee, for they were limited to a cession of the territory lying west of a line seventy miles west of the Chattahoochee. Marb. & Craw. Dig. Laws Geo. Both parties, then, exceeded their powers. With a view to the amicable adjustment of the controversy they assumed to themselves powers which were not conferred upon them. What then? The learned counsel is aware that the subsequent ratification of the acts of an agent who has exceeded his powers is equivalent to the original grant of the powers which he has exercised. Now Georgia and the United States have acquiesced in the settlement of the controversy made by the articles,—Georgia by an express act of legislation, the United States by repeated acts, resulting in the organization of the Territory of Alabama and her subsequent admission as a State.

We enter, then, upon the consideration of the articles of cession, having established our claim to the full benefit of the mutual cession of the United States and Georgia. Under these articles the plaintiffs in error claim that the boundary which they describe is a line beginning on the western bank of the Chattahoochee, running up the river and along the western bank thereof, meaning thereby the elevated bank, which, with that on the eastern side, contains the river in its natural channel when there is the greatest flow of water.

The line is to begin on the bank, to run up the river and along the bank. It is to run up, to indicate its direction; on and along the bank, to mark its locality. The line thus clings to the bank.

What, then, is the western bank? Is it the margin of the river,—the varying line marked by the contact of the water with the land, in its different stages of high, low, ordinary high, and ordinary low, or extreme low water, and which of them? Or is it the bank of earth which, with that on its opposite side, contains the river in its natural channel when

*391] there is the *greatest flow of water? This inquiry may be considered,—1st. Technically; 2d. With a view to the probable intention of the parties, as that is to be inferred from the statutory history of the transaction, taken in connection with the character of the river and the consequences to result from either construction.

Before entering upon this inquiry, there are certain terms which will occur in the progress of this discussion, to which it is necessary to affix a definite meaning.

We are seeking to ascertain the meaning of the expression, the *bank* of a *river*. What, then, is a river? What are its banks? A river is defined to be a body of flowing water, of no specific dimensions, larger than a brook or rivulet, less than a sea—"a running stream, pent in on each side by walls or banks." Woolwich on Sewers, 51; Rutherf., 90, 91; vide etiam *Livingston* v. *Morgan*, 6 Mart. (La.), 19.

A river is said to be "pent in by walls or banks," and is thus contradistinguished from a sea or an ocean, which encompasses the land, rather than is encompassed by it. A river consists of water, a bed, and banks. The bed or channel is the space over which the water flows,—"the hollow bed in which waters flow." Nautically, the term channel is opposed to shallows; the former indicating the deeper portion of the stream, that along which vessels pass. In ordinary phraseology, the bed or channel is the hollow space between the banks which bound the river. It is usual in cases of this sort to refer to lexicographers.

A bank is defined to be "a steep declivity, rising from a river, lake, or sea." Webster, def. Bank.

Ripa extremitas terræ, quæ aqua alluitur. And again: *Ripa recte definitur id quod flumen continet naturalem vigorem cursui sui tenens.* Bayley's Latin Lexicon, def. *Ripa.*

Bouviere says: "Banks of rivers contain the river in its natural channel when there is the greatest flow of water." Bouv. L. Dict., def. Banks of Rivers; *Morgan* v. *Livingston*, ante.

Mr. Justice Story defines shores or flats to be the space between the margin of the water in a low stage, and the banks which contain it in its greatest flow, thus distinguishing flats or shores from banks. *Thomas* v. *Hatch*, 3 Sumn., 178.

Chief Justice Parsons, citing Lord Hale's definition of the term shores, considers it as synonymous with flats, and therefore substitutes this latter expression. *Storer* v. *Freeman*, 6 Mass., 438, 439. His opinion in that case confirms the posi-

tion for which we are contending. Chief Justice Parker holds a similar doctrine. *Hatch* v. *Dwight*, 17 Mass., 289, 298.

Chief Justice Marshall says: "The shores of a river border on the water's edge." *Handley's Lessee* v. *Anthony*, 5 Wheat., 374, 385.

*If the shore borders on the edge of the water, it must extend outwards to the bank, and therefore cannot be the bank, which, in certain stages of the river, it separates from the water's edge. [*392

A river, then, consists of water, a bed, and banks; these several parts constituting the river, the whole river. It is a compound idea; it cannot exist without all its parts. Evaporate the water, and you have a dry hollow. If you could sink the bed, instead of a river you would have a fathomless gulf. Remove the bank, and you have a boundless flood. He who owns the river must therefore own the water, the bed, and the banks; since these are parts of that which belongs to him —the elements which constitute the river, of which he is owner.

1. *The question of boundary considered technically.* I proceed to consider, first,—the language of the articles of cession; the description of the river in the record: the position of the mill of the defendant in error.

The articles of cession are found in Hotchk. Dig. Laws Geo., 83. Its language is familiar to the court. It requires the line to run on and along the western bank.

The description of the river is found in *Howard* v. *Ingersoll*, Rec., p. 5; *Howard & Eckolls* v. *Ingersoll*, Rec., p. 4. It is described as bounded—"pent in"—by high banks, up to which it sometimes flows, being two hundred yards wide, while at others it is reduced to a channel of thirty yards in width.

The eastern boundary of defendant's land is the State of Georgia. *Howard* v. *Ingersoll*, Rec., p. 5. His mill-site is in the bed of the river, and is covered with water at ordinary high water. It is not on the high bank, nor at its base; for a cart-road passes between the mill and the bottom of the bank. *Howard & Eckolls* v. *Ingersoll*, Rec., p. 4.

The Supreme court of Alabama decided that this mill-site was within the State of Alabama, *in al. verba*, that a mill-site in the bed of the river, between which and the bank there was a cart-road, and which mill-site was overflowed at ordinary high water, was west of a line drawn on and along the western bank of the Chattahoochee River.

The grounds of that decision it is my duty to examine. It rests—

1. On the consideration of convenience.

2. On cases relative to riparian rights, as calculated to show that the term bank may be considered as equivalent to low-water mark.

3. On the supposed analogy of the case of *Handley's Lessee* v. *Anthony*, to this case.

A brief remark on each of these. To the argument of convenience, I might safely reply in the language of the maxim, **Cujus est dare, ejus est disponere.* Georgia yielded to the United States, almost gratuitously, the vast domain, which now constitutes the States of Alabama and Mississippi. She had a perfect right to prescribe the limits of her cession, and to consult her own convenience in determining them. But what is the inconvenience? It is said, it would be burdensome to the citizens of Alabama to answer in the courts of Georgia for offences committed on the western margin of the Chattahoochee River. But this would be true also of the Flint, Ocmulgee, or any of the other great rivers of Georgia. The inconvenience should be considered before the act is committed. But the Supreme Court of Alabama was influenced, also, by a consideration of the convenience of Georgia, and decided to divest Georgia of all that part of the bed of the river which lies between the foot of the bank and low-water mark, because it would be inconvenient to her to exercise jurisdiction over it. Why more so than over the eastern side of a river which, according to the decision of the Supreme Court of Alabama, is, for nine months of the year, only thirty yards wide?

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This argument of convenience will, however, be considered hereafter in examining the case of *Handley's Lessee* v. *Anthony*.

I proceed with the consideration of the opinion of the Supreme Court of Alabama.

In commenting on the decisions of the court in *Hatch* v. *Dwight*, ante, and quoting the words of Chief Justice Parker, who says, "the owner may sell the land without the privilege of the stream, as he will, if he bounds his grant by the bank," the Supreme Court of Alabama proceeds as follows:— "Now, I admit that if the grant be limited to the bank of the river, the land covered by the water will not pass by it, that is, the bed of the river will not be granted; but we consider it well settled, that if the land be granted on a running stream, not navigable, and in which the tide does not ebb and flow, and the words used to designate the boundary be the river, or the bank of the river, then the grant will extend to the middle of the stream, unless there be some other expression used, or some other circumstance, showing that the parties did not intend that the grant should extend *ad filum aquæ*."

Now, with great respect to the Supreme Court of Alabama, I am utterly unable to distinguish, between a grant which is "limited to the bank of a river," and one in which "the words used to designate the boundary" are "the bank of the river." I have supposed that the boundary of a grant was the limit of the grant, and that was to be ascertained by "the words used to designate" it, and yet the Supreme Court of Alabama, admitting that a grant, which is limited to the bank of a river, *must stop at the bank, nevertheless decides that a grant, in which the words used to designate the boundary, are the bank of the river, will extend *ad filum aquæ*, to the middle of the river, and proceeds to determine that the defendant's grant, which is bounded by the bank, extends to ordinary low-water mark, and includes the site of his mill, which is in the bed of the river, separated from the bank by a cart-road, and overflowed at ordinary high water. [*394

I submit to your honors that the rights of the plaintiffs in error cannot be sacrificed; that the boundary of the State of Georgia cannot be removed from the permanent bank, on and along which it was to run, by this process of reasoning. In commenting on the case of *Handley's Lessee* v. *Anthony*, the Supreme Court of Alabama say: "But Judge Marshall, who delivered the opinion, did note that the word river, and not bank, was used, hence it is supposed that if the term bank had been used instead of river, the court would not have held low-water mark to be the line; but I think all must admit that the river is inseparably connected with the bank, even if the bank be not included within the legitimate meaning of the term river, and being thus connected, the bank begins where the water touches the land, and we can, therefore, keep within the legitimate meaning of the term bank, and fix the line at low-water mark."

Now this is to assume the whole question in controversy,—to assert that the uncovered portion of the bed of a river, that which is left bare by the retiring waters, constitutes its bank, although the very day after such a decision had been pronounced, what is thus denominated a bank, should resume its proper character of a bed, and be covered by the waters of the river in their fuller flow. And the assumption is made in direct opposition to authority, which makes the bank of a river to be part of the river, not a distinct thing, "inseparably connected" with it, but part and parcel of the river itself —one of the elements of that compound idea, which is expressed by the term river, indispensable to its existence. Who can conceive the idea of a river without banks? As I have before said, such a body of flowing water would not be

a river, but a boundless flood. Hence, in the language of authority, a river is said to consist of water, bed, and banks, "inseparably connected," indeed, but so connected as part and parcel of one great whole, the river.

The argument of the Supreme Court of Alabama, makes the bed of the river, (that portion of it which is left bare at low water,) its bank, while the real bank, that by which the waters of the river are "pent in," in their fuller flow, is divorced from all connection with the river, of which we have seen that *it constitutes an essential part. And again, it is a mere assumption of the question in controversy, for, if bowing to the authority of that high tribunal, we were to admit that because the river and the bank are inseparably connected, the bank must begin where the water touches the land, it would no more follow that this rule was to be applied in the lowest than in the highest or medial state of the river.

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But the court proceeds. Having admitted the position stated by Judge Parker in *Hatch* v. *Dwight*, that "the owner of land (lying on a stream) may sell the land, without the privilege of the stream, as he will if he bounds his grant by the bank," and *uno flatu* affirmed, that in a grant of lands so situated, in which "the words used to designate the boundary" are the bank, will extend to the middle of the stream, thus making a distinction not obvious to ordinary intelligence, between a grant which is bounded by a bank, and one in which the bank is designated as the boundary, they declare,—"It may, however, be safely said, that when a private grant is bounded by the bank, or a running stream, in which the tide does not ebb and flow, no well-considered case can be found that limits the grant short of low-water mark, unless there are other words or expressions used in the deed, showing that the parties did not intend that the grant should extend to low-water mark,"—thus plainly contradicting the admission previously made in commenting on the case of *Hatch* v. *Dwight*. Now without insisting on this recalled admission, I venture to submit to your honors, looking to the fact, that the defendant's eastern boundary is the State of Georgia, whose western boundary is a line drawn on and along the western bank of the Chattahoochee; that no surveyor's chain, acting under the authority of the United States, or Alabama, has ever been stretched east of that permanent or elevated bank. Looking to these facts, I venture to submit, nay, even to affirm, that no well or ill-considered case can be found, (that which we are considering alone excepted,) which would extend the defendant's grant one inch

beyond that line. It is so bounded by its express terms, and no intendment can carry it further. The doctrine of riparian rights can have no place here. These are accessory, incidental to the principal grant; but both the principal and its incident must apply to lands within the jurisdiction of the granting power.

The defendant's grant can neither directly or by intendment extend one inch beyond, and eastward of a line drawn on and along the western bank of the Chattahoochee, for then it would pass into the jurisdiction of another sovereignty. Since, as well by virtue of her original title, as by the express session of the United States, all east of that line belongs to Georgia.

*I will now examine the case of *Handley's Lessee* v. *Anthony*, for the purpose of determining the supposed analogy of that case to this. [*396

Two things are there decided:

1. That a tongue of land projecting from the main land of Indiana, between which and the main land there is a narrow channel made by the waters of the Ohio, when they are high, but which is dry until the river is ten feet above its lowest state, the inhabitants of which had always paid taxes to and voted in Indiana, which had been considered within its jurisdiction while it was a Territory, and after it became a State, while the jurisdiction of Kentucky had never been extended over them,—that such a body of land was not an island within the State of Kentucky.

2. That under the cession by Virginia to the United States of her territory, north-west of the River Ohio, the State of Indiana, formed out of that territory, extended to low-water mark.

In examining this case, it is very manifest that in determining the rights of the parties, it was only necessary to decide the first of these propositions, viz., That what was claimed as an island was, in fact, part of the main land of Indiana, only occasionally and partially separated from it by a bayou, making part of the River Ohio, mingling with other streams, and returning to the river. The matter in controversy was determined by this decision. The question of the extent of the boundary of Indiana was not necessarily involved in it. Any opinion upon it was therefore *obiter*, not binding upon the court, and open to examination by counsel. But it will not be necessary to exercise this privilege. The rights of plaintiffs in error will be protected from the influence of this opinion, by showing the diversity between the cases.

This opinion is founded,—

1st. On the words of the cession, which transfer to the United States, "territory situate, lying, and being north-west of the River Ohio." The difference between the cases is striking. Georgia cedes to the United States all her territory lying west of a line to be drawn on and along the western bank of the Chattahoochee River. The territory ceded by Virginia is bound by the river; that yielded by Georgia, by a line drawn on the western bank of the river. The importance attached by the court to this diversity in the terms of the two cessions is manifest. In pronouncing the opinion in *Handley's Lessee* v. *Anthony*, the Chief Justice says, not casually, or incidentally, but deliberately, and of set purpose, and as a precaution indispensable to the inquiry, (in substance,) that in pursuing this inquiry, the court must recollect, that it is the river, and not the bank, which *constitutes
*397] the boundary. Now why this precaution, if this diversity in the terms, the boundary by the *river* or by the *bank*, would make no difference as to the extent of the grant? The same distinction is recognized by Mr. Justice Story, in *Thomas* v. *Hatch*, ante; by Chief Justice Parker, in *Hatch* v. *Dwight*, before cited; and again by Mr. Justice Story, in *Dunlap* v. *Stetson*, 4 Mason, 349, 366.

There is then an essential difference between the boundary in this case, and that in *Handley's Lessee* v. *Anthony*, between a boundary by a river, and on a bank.

2. The next ground of the decision in that case, was the difficulty of drawing any other line, where a river is the boundary. Here the diversity which I have just remarked upon is again recognized. The difficulty is supposed to exist where a river, not where a bank is a boundary. To apply the decision in that case, to the one at bar, is to assume the question in controversy here, and entirely to disregard the distinction so emphatically stated by the Chief Justice in that case.

But what is this difficulty? The rights of riparian proprietors on navigable rivers are limited to high-water mark. 3 Kent, Com., 7th ed., 514. On non-navigable rivers to the thread of the stream.

Mr. Justice WAYNE delivered the opinion of the court.

The point for decision in these cases is one of boundary, between the States of Georgia and Alabama. It is, what is the line of Georgia on the western bank of the Chattahoochee River, from the 31st deg. north latitude, "where the same crosses the boundary-line between the United States and Spain; running thence up the said River Chattahoochee, and

along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called 'Uchee,' (being the first considerable stream on the western side, above the Cussetas and Coweta towns,) empties into the said Chattahoochee River."

Its determination depends upon what were the limits of Georgia and her ownership of the whole country within them, when that State, in compliance with the obligation imposed upon it by the revolutionary war, conveyed to the United States her unsettled territory; and upon the terms used to define the boundaries of that cession.

In the case from Alabama, "the court charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River, at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the treaty of cession from Georgia to the United States, as running *up said river and along the western [*398 bank thereof, is the line impressed upon the land by ordinary low water; and if they believed the plaintiff's mill was west of that line, and the defendant's dam backed the water so as to obstruct the operation of the mill, the plaintiff was entitled to recover."

In the case from the Circuit Court of the United States for the District of Georgia, the District Judge presiding, the jury was instructed "that by the true construction of these articles of cession, the boundary-line between the State of Georgia and Alabama was to be drawn on and along the western bank of the Chattahoochee River, at low-water mark, when the river was at its lowest state."

All of us think that both of these instructions were erroneous, though there is a difference among us as to the construction given by the majority of the court to the article defining the boundary of Georgia upon the river, and the reasoning in support of it. These differences will be seen in the opinions which our brothers have said they meant to give in these cases.

We will now give our views of what were the limits of the State of Georgia when it ceded its unsettled territory west of the Chattahoochee River to the United States; that State's then ownership of the whole of it, citing in support of our conclusions indisputable historical facts, and the legislation of Georgia, of South Carolina, and of the United States, upon the subject.

It is well known to all of us, when the colonies dissolved their connection with the mother country by the Declaration

of Independence, that it was understood by all of them, that each did so, with the limits which belonged to it as a colony. There was within the limits of several of them a large extent of unsettled territory. Other States had little or none.

The latter contended, as all of them had united in a common declaration of independence, and in a common war to secure it, which no one colony could do for itself, that the unsettled lands within the former ought to become a common property among all of the States.

On the 6th of September, 1780, Congress recommended this subject to the consideration of the States. On the 10th of October after, it was resolved by Congress "that the unappropriated lands that may be ceded or relinquished to the United States by any State, should be disposed of for the common benefit of the United States; and be settled and formed into distinct republican States; which shall become members of the federal union and have the same rights of sovereignty, freedom, and independence, as the other States." 3 Journals of Congress, 516, 535.

From these references we have the whole policy of Congress concerning those unsettled territories, so happily, since, *consummated by the States and by Congress. It was not, however, achieved without some delays and objections from the States to which these lands belonged. Some of the States, Maryland taking the lead, refused to sign the articles of confederation until after strong assurances had been given that such cessions would be made. And when that State did so, it was with the declaration that she did not relinquish or intend to relinquish the right which she had with the other States to the "back country," as she termed the unsettled lands within the limits of some of the States.

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Early in 1781, Virginia made such a relinquishment. New York quickly followed, and Massachusetts and Connecticut, always willing to make any sacrifice for the common cause, relinquished their unsettled lands after the war had been concluded.

The cause assigned by each of these four States for doing so, and the principles upon which these cessions were accepted by the United States, involved North and South Carolina and Georgia in the obligation to do the same. Though not done for several years, it was never denied by either of these States.

All of the States had been actuated by the same spirit for independence. When the war had been happily concluded, all of them looked to the wild territory within the United

States, as the first source from which revenue could be raised to pay the war debt of the Union. It then was $42,000,000.

It would be difficult to say which class of its creditors had the strongest claims upon the justice and gratitude of the people of the United States. But all felt, and it was conceded by the other classes of creditors, that the soldiers who had patiently borne the privations of the field, and bravely met its hazards to secure the liberties of the country, ought to have their claims paid by portions of the public lands, with certain available securities from Congress for the residue.

From these references we learn that the States entered into the Union, with the understanding by all of them, that each had an undiminished sovereignty within its colonial limits. That there were within the limits of some of them unsettled lands over which Congress had no legislative control. But that it was early recognized by these States whilst the articles of confederation were in the course of ratification and immediately after they were completed, that their unsettled territories were to be transferred by them to the United States, to be disposed of for the common benefit, and to be formed into distinct republican States, with all the rights and sovereignty of the other States.

We have seen that relinquishments had been made by Virginia, New York, Massachusetts, and Connecticut. South Carolina did the same in 1787, after the settlement of her territorial disputes with Georgia.

*We will now state what those disputes were, and how they were adjusted, in order that the jurisdiction [*400 of the State of Georgia and that State's ownership of the whole territory ceded by it to the United States in 1802, may be fully understood, in connection with the principles or rules by which its western boundary upon the Chattahoochee River must be interpreted.

Georgia was originally a province, formed by royal prerogative, out of a portion of that territory which was within the chartered limits of South Carolina. It was a corporation under the title of "Trustees for establishing the Colony of Georgia in America, which was to continue for twenty-one years, with power in the trustees to form laws and regulations for its government, after which all the rights of soil and jurisdiction were to vest in the crown."

It was described in the act of incorporation, "as all those lands, countries, and territories, situate, lying, and being in that part of South Carolina in America, which lies from the northern stream of a river, then commonly called the Savannah, all along the sea-coast to the southward under the most

southern stream of a certain other great water or river, called the Alatamaha, and westward from the heads of the said rivers respectively in direct lines to the South Seas."

It may be well here to say, that the power of the king to alter, change, enlarge, or diminish the limits of his royal governments in America, cannot be denied. "Those governments were of two kinds, royal and proprietary. In the former, the right of the soil and jurisdiction remained in the crown, and their boundaries, though described in letters-patent, were subject to alteration at its pleasure; for as it possessed the right of soil and government, and delegated them to its governors during pleasure, it might dispose of them in what manner and to whom it thought fit, might alter, extend, or abridge them as its inclination or policy might declare. In proprietary governments the right of soil as well as jurisdiction was vested in the proprietors. These charters were in the nature of grants, and their limits being fixed by these charters, could not be altered but by their consent."

South Carolina, then, could not object either to the first charter given to Georgia, or to the subsequent extension of its boundaries by the king, though forming a part of what had been within the charter of that royal colony.

In 1763, Great Britain having then acquired, by treaty with Spain,—Florida, Pensacola, and all that Spain had held in North America, east and south-east of the River Mississippi; all of that country between Alatamaha and Florida, originally within the chartered limits of South Carolina, but *401] which had *always been disputable territory between England and Spain, the then governor of South Carolina assumed to be at his disposal under his royal commission. Within the year 1763 he granted to many persons in Carolina large tracts of land, lying between the Alatamaha and St. Mary's Rivers. His power to do so was objected to by Georgia, but her remonstrances were not regarded. The subject was brought to the notice of the Board of Trade. The governor's conduct was disapproved, declared to be unwarrantable, and orders were given that no charters or grants should be issued for lands on the south of the Alatamaha River, which had been surveyed under warrants from South Carolina. But as surveys had been made under the governor's warrants, and grants issued by South Carolina for the lands, before the orders of the Board of Trade were received, they were not formally recalled. These transactions, however, excited much attention at the time in England, from the representations which were made concerning

them by Governor Wright, of Georgia. The ultimate consequence was, that the king, in January, 1764, extended the limits of Georgia, including within them all that country which had been within the chartered limits of South Carolina, and limiting the south boundary of that colony by the northern stream of Savannah River, as far as the head of the same. The language of the letters-patent, granted to Sir James Wright, is, that the colony of Georgia shall be bounded on the north by the most northern stream of a river, then commonly called Savannah, as far as the head of the said river; and from thence westward as far as our territories extend; on the east by the sea-coast, from the said river Savannah, to the most southern stream of a certain other river, called St. Mary's, including all islands within twenty leagues of the coast lying between the said Rivers Savannah and St. Mary's, as far as the head thereof; and from thence westward as far as our territories extend by the north boundary-line of our provinces of East and West Florida," which was "a line drawn from that part of the Mississippi which is intersected by latitude 31, due east, to the Appalachicola." See the King's Proclamation and letters-patent to Sir James Wright, Wat., 744.

For twenty years after this extension of Georgia, its limits were not called in question by South Carolina, or perhaps, to speak more properly, they had not been a subject of inquiry by that State, though what they were, was well understood by the authorities of Georgia. Nothing had occurred between 1764 and 1776, from which any contest concerning them could arise, and it was not until two years after the provisional treaty of peace between England and the United States was made, that South Carolina claimed any part of the unsettled territory of *Georgia, within the limits defined by the king's patent of January, 1764. [*402

The provisional treaty of peace with the King of Great Britain was signed in November, 1782. In the 2d article will be found the boundaries of the United States. They are repeated in the definitive treaty concluded at Paris on the 3d September, 1783. In less than four months after the provisional treaty was made, Georgia declared, legislatively, that the southern boundary of the State was a line drawn from the Mississippi in the latitude of 31 degrees, on a due east course to the River Chattahoochee, and in other respects according to the southern boundary of the United States, as that was settled by the provisional treaty between the United States and Great Britain. The southern boundary of the United States is described, in the treaties with England, "as a line

to be drawn, due east, from the middle of the Mississippi River, in the latitude of 31 degrees north of the equator, to the middle of the River Appalachicola or Chattahoochee, thence along the middle thereof, to its junction with the Flint, thence straight to the head of the St. Mary's River, and thence down along that river to the Atlantic ocean." Compare this boundary with that in the commission to Governor Wright, for the Colony of Georgia, and they will be found identical. Indeed, unless the chartered limits of Georgia, as they are stated in that commission, had been taken by the negotiators of the treaty with England as their guide, they would not have had any by which to run the southern line for the United States from the Mississippi to the Chattahoochee, and thence as it is described to the Atlantic ocean.

The next action of Georgia, asserting its jurisdiction over its limits, will be found in the 13th sect. of the act of February, 1783, Wat. Dig., 264. It defines what those limits were. In February, 1785, Georgia passed another act for the establishment of a county to the west of the Chattahoochee, within a line to be drawn down the Mississippi from where it receives the Yazoo, till it intersects the 31st degree of north latitude, thence due east as far as the lands might be found to reach, which had at any time been relinquished by the Indians, then along the line of relinquishment to the River Yazoo, and down to its mouth, calling it the county of Bourbon.

This last act, and the two which preceded it, attracted the notice of the authorities of South Carolina, and then that State, for the first time since 1764, denied that the limits of Georgia were as she had declared them to be, and claimed for itself within them a large extent of country.

South Carolina reasserted her claim upon the principle that her surveys had been made in 1763, between the Rivers Ala-
*403] tamaha *and St. Mary's, forgetting that her then governor had been reproved, and had apologized for authorizing them to be made, and denied that the source of the Keowee River was the head of the Savannah River, and that the country between its source and the source of the Tugaloo River down to the mouth of the Keowee, where it empties into the Savannah, belonged to Georgia.

Neither State would yield, and the border excitements, growing out of the differences, admonished both that it would be best and safest for them to resort to that court which had been provided in the 9th article in the confederation for "the settlement of disputes then existing or that might arise be-

tween two or more States concerning boundary, jurisdiction, or any other cause whatever."

South Carolina presented a petition for that purpose. Georgia was cited to appear, and did so. Congress then provided for the appointment of judges, and at this point of the proceedings, Carolina withdrew her petition, it having become the conviction of both States, from information brought out by the controversy, that these differences could be amicably adjusted.

Carolina had contended that as the original boundaries of Georgia were the Rivers Savannah and Alatamaha, and lines drawn due west from their sources to the Mississippi; that all the land lying south of the Alatamaha, and a line drawn due west from its source to the Mississippi, as far as the northern boundary of the Floridas, continued to be a part of the province of South Carolina, out of which Georgia was taken. And that when the British crown, by its proclamation of October, 1763, annexed to Georgia, all the lands lying between the Rivers Alatamaha and St. Mary's, it meant only the lands between those rivers below their sources, and not such as lay above those sources, and between lines drawn from them respectively west to the Mississippi; which tract of country, of course, even after the proclamation, still continued a part of South Carolina.

Georgia, on the contrary, maintained, that when the proclamation annexed to its government all the lands lying between the Rivers Alatamaha and St. Mary's, it meant not merely the tract of country which lay between those rivers, below their sources, but also the whole territory held by the British crown, between the northern boundaries of Florida, as established by the same proclamation, and the ancient line of Georgia.

Carolina further claimed the land lying between the North Carolina line and the line due west from the mouth of the Tugaloo River to the Mississippi, because the River Savannah loses that name at the confluence of the Tugaloo and Keowee Rivers, and consequently that spot was said to be the head of Savannah River. Georgia contended that the source of the Keowee was the head of the Savannah River.

*At this time, neither State had such original documents from the archives of England as were sufficient [*404
to determine its right with certainty. But Georgia had secondary proof of the letters-patent which were given by the king to Governor Wright, in 1764, though they had been taken away with him when he fled from the State during the Revolutionary War. The original commission and letters-pat-

ent were subsequently obtained from the records of the Board of Trade in England. They fully confirmed the correctness of the secondary proof upon which the State had acted. There was also at the same time disclosed from those records, in detail, all of the action of the Board of Trade and of the king, concerning Governor Boone's surveys in 1763, of the land between the Alatamaha and St. Mary's with the disapprobation of all that he had done in that matter and the governor's apology for his conduct. Though done already, we will introduce into this connection the boundaries of Georgia in the letters-patent to Governor Wright, that the controversy between Georgia and South Carolina, and its amicable termination, may be better understood.

After South Carolina withdrew her petition from Congress, the said States entered into a convention for the settlement of the territorial differences between them. It was concluded at Beaufort, in April, 1787. Carolina was represented by three of her most distinguished citizens of that day, and Georgia by three of hers, in whom the State had every confidence. It was ratified by both States, though one of the three commissioners from Georgia, Mr. Houston, was dissatisfied with, and would not sign it.

By this convention, it was agreed, "that the most northern branch or stream of the River Savannah, from the sea or mouth of such stream to the fork or confluence of the river now called Tugaloo and Keowee, and from thence the most northern branch or stream of the said River Tugaloo, till it intersects the northern boundary line of South Carolina, if the said branch or stream of Tugaloo extends so far north, reserving all the islands in the said River Tugaloo and Savannah to Georgia; but if the head spring or source of any branch or stream of the said River Tugaloo does not extend to the north boundary line of South Carolina, then a west line to the Mississippi to be drawn from the head-spring or source of the said branch or stream of Tugaloo River, which extends to the highest northern latitude, shall forever hereafter form the separation limit and boundary between the States of South Carolina aad Georgia. 1 Art. Convention, Wat. Dig., 754.

From this article, we see that South Carolina abandoned the ground taken in her petition, and only claimed territory *405] in *Georgia, in the event that a geographical fact should turn out differently from what the commissioners of Georgia said it was, and accordingly with what the commissioners of South Carolina supposed it to be. That was, whether or not the head spring or source of any branch

or stream of Tugaloo extended to the north boundary line of South Carolina. If it did not, then from wherever the head spring or source of that river might he lower than this north boundary line, Carolina could claim from it by a line drawn west to the Mississippi, all the land which was between that line and the higher north line which Georgia had before declared to be the boundary of this State. But if the head spring or source of the Tugaloo did reach the north boundary-line of South Carolina, then that stream to its source was to be the boundary between the two States, to the west of which Carolina could not then claim any land. Georgia, on its part, by the same article, withdrew its claim to that part of South Carolina which is between the Keowee and Tugaloo Rivers, where the most northern branch of the Tugaloo intersects the northern boundary-line of South Carolina.

South Carolina, however, acting upon the opinion of its commissioners, that the head spring of the most northern branch of the Tugaloo did not intersect the northern boundary-line of that State, ceded to the United States, in three months after the convention with Georgia had been made, all the territory which it was supposed Carolina had got by it in Georgia.

The cession is as follows: "All the territory or tract of country included within the River Mississippi, and a line beginning at that part of said river which is intersected by the southern boundary-line of the State of North Carolina, and continuing along the said boundary-line until it intersects the ridge or chain of mountains which divides the eastern from the western waters, then to be continued along the top of the said ridge of mountains until it intersects a line to be drawn due west from the head of the southern branch of Tugaloo River to the said mountains, and thence to run a due west course to the River Mississippi."

The United States accepted the cession, and until by actual exploration it had been ascertained that the head spring or branch of the Tugaloo River was north of the line of South Carolina, it was not known that the land actually transferred to the United States by the South Carolina cession was only a tract of country about twelve miles wide from north to south, extending from the top of the main ridge of mountains which divides the eastern from the western waters, lying between latitude 35° N., the southern boundary of North Carolina, and the northern boundary of Georgia, as settled by the convention *between Georgia and South Carolina in 1787; and that by that convention it was es- [*406

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tablished that South Carolina had no unsettled territory to the west of the top of that ridge.

It was, however, a transfer of all the claim of South Carolina to unsettled land. North Carolina afterwards ceded to the United States its western lands. Georgia was the only remaining State which had not done so.

The termination of her differences with South Carolina placed Georgia, as to its limits, accordingly with that State's declaration of them in 1783, or as they had been given by the king in his commission to Governor Wright in 1764, and as they had been used by the United States for the treaties of peace with England, and afterwards in its negotiations with his Catholic majesty from 1793 to 1795, which resulted in the treaty of that year with the latter.

It may as well be mentioned here, however, that in the course of that negotiation, Spain contended that the boundary of West Florida was at the junction of the Yazoo with the Mississippi, in latitude 32° 39′, running from that point east to the Chattahoochee River. The claim was founded upon certain proceedings of the king of Great Britain between the years 1763 and 1767, extending the northern boundary of West Florida from 31° north to the mouth of the Yazoo, within two months after the commission had been given to Governor Wright, in which 31° north, or the north boundary-line of our provinces of East and West Florida "were declared to be the southern boundary of Georgia. These proceedings were an application to the king in 1764 by the Board of Trade for an extension of the boundaries of West Florida, and commissions given by the king in 1767 and 1770 to Governors Elliot and Chester, by which they were made Captains-General and Governors of West Florida, bounded to the southward by the Gulf of Mexico, including all its lands within six leagues of the coast, from the River Appalachicola to Lake Pontchartrain; to the westward by the said lake, the Lake Maurepas, and the River Mississippi; to the northward by a line drawn due east from the mouth of the Yazoo River, where it unites with the Mississippi, due east to the Appalachicola." This pretension upon the part of Spain was considered as altogether inadmissible by our negotiators, on the ground that the United States commissioners and those of the king of England, in making the treaties of 1782 and 1783, had taken the boundaries of East and West Florida as laid down in the proclamation of the king of England dated the 7th October, 1763, as the true boundaries of those provinces when they were finally confirmed to Spain in 1783. And further, that Spain could not

rightfully dispute it or *attempt to extend her boundary to the north of 31 degrees, because she had been [*407 substantially a party to all the negotiations which resulted in a peace between herself and England and between England and the United States, with a full knowledge by the Spanish negotiators that the boundaries between England and the United States had been fixed in the line of 31 deg. from the Mississippi to the Appalachicola or Chattahoochee. Spain conceded it.

After the treaty had been made, however, it was suggested, as the treaties with England had been made with the United States, and not with the State of Georgia, that the former might claim the territory between 31 deg. north and the line from the Yazoo to the Chattahoochee, upon the ground that the king had extended Florida to the latter, or limited Georgia to that line after he had declared the southern line of Georgia was to be the northern line of Florida. But the United States did not at any time assert such a claim. It could not well have been done upon principle after the United States had rejected those papers as giving any ground of claim to Spain and had insisted on the negotiation upon the southern boundary of the United States as defined in the treaty of peace with England upon the ground that it had been from 1763 the boundary of Georgia. It may not be amiss, however, to notice as a historical fact, the objections which were made against the availableness of these documents for the extension of the boundary of Florida to the Yazoo when they were first produced. No patent could be found from the king under the great seal of Great Britain for such a purpose. There was no record of such a grant in the Board of Trade, nor in any other of the archives of England concerning her possessions in America. It could not be found in the archives of Florida. Without such a patent, or a proclamation in the nature of a patent for such a purpose, no colonial claim for territory was complete.

Such was and has been the uniform basis of colonial limits; and it is somewhat remarkable that in no instance besides of English colonial grant, is the king's patent wanting. In this instance the extension is vested exclusively upon two commissions to two Governors of West Florida, one three years after the petition from the Board of Trade, to Governor Eliott in 1767, and the other to Governor Chester in 1770. In the first there is a recital of the boundaries of West Florida, when Governor Johnstone received his commission in 1763, followed by this declaration, that the king had recited, by letters-patent under the great seal of Great Britain, his

grant of boundaries for Florida as to its northern line of 3. deg. from the Mississippi to the Chattahoochee and extended them to the Yazoo, by a line drawn from *it on the *408] Mississippi to the Appalachicola. The same boundary was given in the commission to Governor Chester. There is no doubt that Governors Eliott and Chester permitted settlements and gave grants for land within the limits of these commissions from their dates until Florida became, in 1783, by a retrocession from England, again a part of the dominions of his Catholic majesty. From these circumstances, a patent from the king for the enlargement of Florida was presumed. It was not unreasonable that it should be. But it was not considered by the United States that its operation could set aside the previous grant to the colony of Georgia of the same territory, as the king, in his treaties with the United States, had recognized the line of the latter as the boundary of Florida, and that it had been accepted in that character by the United States as its southern boundary. In fact, admitting that the king's patent had been given, his treaty with the United States was a revocation of it, and Spain could not claim from its treaty with England any right to the extension, that having been a political act of the king of England for the benefit of his own subjects, when, by his proclamation of 1763, Florida, as it had been acquired from Spain, was for the first time erected into the two distinct governments of East and West Florida.

It appears, from what has been said, that the limits of Georgia, after the settlement of her territorial dispute with South Carolina, were not questioned; in other words, that they had been rightly asserted in the act of 1783, and that such portion of the State, afterwards designated as the Mississippi Territory, was within its acknowledged boundary. Georgia became then for the first time in a condition to transfer to the United States its unsettled territory. In less than a year after the last appeal from Congress to the State to do so, her delegates in Congress were authorized to make a cession of a part of it. The beginning of it was at the middle of the Chattahoochee, where it is intersected by the thirty-first degree of north latitude; thence due north one hundred and forty British statute miles; thence due west to the middle of the River Mississippi; thence down the middle of the river where it intersects the thirty-first degree of north latitude; thence along the said degree to the beginning. The quantity offered, and the conditions upon which it was to be ceded, were objected to by the United States. It was particularly unacceptable to Congress, because such a cession left a larger

portion of unsettled territory within the State undisposed of, and interfered with the original obligation and intention of Congress to establish in the unsettled territories which might be relinquished by the States to the United States, other States, to become a part of the Union upon an entire equality with the rest. *Congress refused to accept the cession tendered, at the same time offering to accept from [*409 Georgia all her territorial claims west of the River Appalachicola, or west of a meridian line running through or near the point where that river intersects the thirty-first degree of north latitude. Georgia, in turn, refused the proposal of the United States, and thenceforward maintained her jurisdiction within her limits, until a cession was made of her unsettled territory to the United States in 1802. In 1789 an act was passed by the State reserving to certain persons and companies preëmption rights to her lands. In 1795, by another act, in which the territorial jurisdiction of the State was reasserted, Georgia granted and transferred, for valuable considerations, to several companies, all of her territory bordering westwardly on the Mississippi River, in distinct tracts. Among others a tract comprehending a part of what was subsequently declared by Congress to be the Mississippi Territory. The prices for some of these alienations were paid into the treasury of the State, and patents for them were issued by the governor. At the next session, however, of the General Assembly the act of 1795 was declared to be void on account of the fraud, bribery, and corruption by which it had been passed. But the companies to which Georgia had conveyed had sold part of the land to innocent purchasers before the revoking act was passed. They appealed to Congress to maintain them in their rights, as well against any future claim of Georgia, as against any claim that the United States might make to the land which had been conveyed by Georgia. Unfavorable at first as these sales by Georgia were to a transfer of its unsettled territory to the United States for the common benefit of all the States, they contributed to that result afterward. The action of the State had involved it in difficulties of a very uncertain termination in a legal point of view. It had just been released from an unpleasant litigation, (American State Papers, Public Lands, Vol. I., p. 167. *Moultrie et al.* v. *The State of Georgia*, not reported,) growing out of an act passed by the State in 1789, conveying lands between the Mississippi and Tombigbee Rivers to the Virginia, South Carolina, and Tennessee Yazoo Companies, by the 11th amendment of the Constitution, by which the States were declared not to be suable in the courts of the United States

by citizens of another State or by citizens or subjects of a foreign State. This, however, did not conclude the rights of the parties in favor of the State to the lands which the State had contracted to convey to them. The right of the State, too, to large bodies of land within the Yazoo and its southern boundary, was doubtful on account of grants from Spain before it had ceded Florida to England; from England, also, on account of such as *had been made under the authority of the Governors of West Florida; and by Spain again after the retrocession of the territory to it by England in 1783. But the greatest difficulty in the way of the State continuing to hold its unsettled territory was that the Indian title had only been extinguished to about three millions of acres out of fifty millions. At one time the Indians were not inclined to sell; the State was not in a pecuniary condition to buy them out. The Indians were formidable in tribes and numbers. Their habitations and their hunting-grounds covered the larger part of the State. Its white population was then small and too scattered for warlike concentration against Indian hostilities or their casual incursions into the white settlements for plunder. They were masters of the forest, and intervened all over the State between the white settlements, so that no one of them could have intercourse or give aid to another without a license to pass through their hunting-grounds or at the risk of attempting it without permission. On the other hand, white men in numbers, no longer under the influences of social life, or caring nothing for its restraints, hovered constantly on the borders of the Indians, exasperating them by depredations and misleading them into all the excesses of a corrupt civilization, or into feuds with each other or forays against the whites. Each day was an anticipation of attack, and when the night came repose was only taken with the rifle ready to repel it. In this condition of things, and without any efficient power in the State to make a change, it became necessary for the United States to use its constitutional right to give relief. That was not so much a matter of choice as it was of obligation. Constitutionally they could alone regulate commerce with the Indian tribes. Constitutionally they had the power to make war; their obligation was to bear its expenses and defend the States against it in whatever way it might happen; and constitutionally Congress was bound to guard against war, to prepare for and prevent it from whatever quarter it might be likely to come. The recent treaty, too, with Spain, bound that nation and the United States to restrain the Indian tribes, in the territories of each, from war among themselves and from such as might

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lead to aggressions upon the territories of either nation. Added to such considerations, the people who had settled to the west of the Chattahoochee, between it and the Yazoo River, claimed from the United States the protection which Georgia could not give, and they asked for a securer and more definite political organization than they had had either under English or Spanish rule, or from Georgia legislation.

Nine years had gone by since the failure of the last attempt to obtain it, without any thing having been substantially done *by Georgia to transfer to the United States its unsettled territory, in compliance with the resolution of [*411 Congress of 1780. All the other States had done so. It was not likely, at the time, that it would be done for some years yet. Under such circumstances, Congress, still thinking that the United States had, under the cession of South Carolina, a right to territory in Georgia, passed the act of the 7th April, 1798, for the amicable settlement of limits with the State of Georgia, and authorizing the establishment of a government in the Mississippi Territory. It was done with an express recognition of Georgia's right of soil and jurisdiction in the territory. Sec. 6 of the act. This, however, did not satisfy that State, and she remonstrated to Congress against it. But the political necessity under which Congress had been called upon to act, soon became obvious to all, and to none more than to the people and the legislature of Georgia. It is not necessary to give an account of all that passed from that time to the transfer of the territory to the United States. Three of Georgia's most distinguished citizens were appointed commissioners to negotiate with three others of national reputation upon the part of the United States for a cession, and happily that was done in 1802, which had been so long delayed;—thus consummating that great policy of our early national existence, from which so many States have been added to the Union.

From the account which has been given of the territorial claims of Georgia, and her legislation concerning them, with that of South Carolina denying them, and the final adjustment of the dispute between these States and that of the United States for the cession by Georgia of her unsettled territory, we have learned that when Georgia did cede it to the United States, that she was then in possession, and had a right to all the land, subject to the Indian title, which that State had declared to be within her limits, except so much as there was between the Tugaloo and Keowee Rivers, which Georgia had ceded to South Carolina by the convention of 1787. We further learn, that the adjustment with South Carolina, left

in Georgia the Chattahoochee River from its source to the 31st degree of north latitude, as Georgia had claimed her limits to be, since the king's patent to Sir James Wright, in 1764.

In other words, that the Chattahoochee, from its source to that point, was at all times after that patent within Georgia with the right of soil and jurisdiction when its unsettled territory was ceded to the United States. This fact being so, it gives us a key from the laws of nations to aid us in the interpretation of its cession as to the boundary between Georgia and Alabama, which must prevail, as it would in all other *412] cases, *where there may be a transfer by one nation of a part of its territory to another, with a river for its boundary, without an express stipulation for the relinquishment of the rights of soil and jurisdiction over the bed of such river.

The rule *jure gentium*, to which we refer, is not now for the first time under the consideration of this court. We are relieved, then, from its discussion, by citations from Vattel and other writers upon the laws of nations, to show what it is; but it will be found in the 22d chapter of Vattel. Among the writers after him it is not controverted by any one of them. Besides, it is according to what had been anciently the practice of nations, substantiated by an adherence to it down to our own times. In *Handley's Lessee* v. *Anthony*, 5 Wheat., 379, this court said, by its organ, Chief Justice Marshall, "when a great river is the boundary between two nations or States, if the original property is in neither, and there be no convention about it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants territory on the one side only, it retains the river within its domain, and the newly-created State extends to the river only." The river, however, is its boundary.

Georgia was certainly the original proprietor of the River Chattahoochee to 31 degrees north, when her territory west of it was ceded to the United States, and that cession must be understood to have been made under the rule, unless by terms in her grant to the United States it was taken out of it, with the view to give to the new State which was to be formed out of the cession, a coequality of soil and jurisdiction in the river which was to separate them. In the interpretation of the boundary which Georgia retained for itself upon the Chattahoochee, it must be kept in mind that the cession was made in contemplation of a new State to be formed with the Chattahoochee as a part of its boundary. National considerations then entered into the spirit of the transfer with

which its eminent negotiators on both sides were familiar.* If we disregard them now, and permit ourselves to view this question in the narrower limits of verbal definitions, and upon the principles upon which private rights were adjusted on rivers, between proprietors of land on either side of them, we should do so forgetting all the circumstances and objects for which the cession was made, the parties to it, and the new party that was to be brought out of it as an independent State.

But we will now examine the article in the cession for the *boundary of Georgia upon the Chattahoochee, for we think its terms are coincident with the principle of national law, under which we have put this question. [*413

We give the article entire, intending, after it has been done, to use it with direct reference to the cases in hand as to the questions of boundary on the Chattahoochee River, between the States of Georgia and Alabama, as that question was raised in the courts below.

"The State of Georgia cedes to the United States all the right, title, and claim, which the said State has to the jurisdiction and soil of all the lands situated within the boundaries of the United States, south of the State of Tennessee, and west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary-line between the United States and Spain, running thence up the said River Chattahoochee and along the western bank thereof, to the great bend thereof, next above the place where a certain creek or river called Uchee, (being the first considerable stream on the western side above the Cussetas and Coweta towns,) empties into the said Chattahoochee River; thence in a direct line to Nicajack, on the Tennessee River; thence crossing the said last-mentioned river, and thence running up the said Tennessee River, and along the western bank thereof to the southern boundary-line of the State of Tennessee."

The plaintiff in error derives his title to the land which he claims from the State of Georgia, and his right to construct a dam across the Chattahoochee to the point where it terminates on the western bank under that title and the convention by which Georgia ceded her unsettled territory to the United States. He claims that his land runs across, from the eastern bank of the Chattahoochee to the bank on the western side. The defendant in error claims under a patent from the United

* The commissioners on the part of the United States were Mr. Madison, Mr. Gallatin, and Mr. Lincoln. Those on the part of Georgia were James Jackson, Abraham Baldwin, and John Milledge.

States to himself to fractional section 11, township 7, range 30, and proved title to himself to lots 1, 2, 3, 4, in the town of Gerard, in Russel county, Alabama, specifically described, in some of said counts of his declaration, as land having for its eastern boundary the State of Georgia, and is immediately west of the Chattahoochee River, on the bank thereof.

In the first case, No. 121, it was ruled by the court below, that the line established by the articles of cession was the line impressed by ordinary low water. In the case from the Circuit Court of the United States for the District of Georgia, the judge instructed the jury that the line was to be drawn on and along the western bank of the Chattahoochee River at low-water mark, when the river was at its lowest state.

From the bill of exceptions, in the first case, it appears
*414] that *"immediately at the plaintiff's lands and lots, the banks of the river are from fifteen to twenty feet high on both sides, abrupt above and below for considerable distances. The high banks, however, do not extend down to the water's edge at ordinary low water. The bed of the river at this point is about two hundred yards wide from bank to bank; by the bed is meant the space between these abrupt and high banks; and is composed of rocks and slues among the rocks from one side to the other. Ordinary low water and extreme low water together prevail for about two thirds of the year, during which time the river is confined to a channel about thirty yards wide, leaving the bed of the river as above described, exposed on each side of this channel from thirty to sixty yards. Immediately under the western abrupt and high bank, and within the latitude of the north and south boundary-line of plaintiff's land, those lines being drawn down to the water's edge, and in the bed of the river, as above described, east of the western abrupt and high bank, the plaintiff erected a mill previous to 1842, and continued in the possession and use of it until overflowed by defendant's dam. The place on which the mill is, is covered with water in ordinary high water, but is bare and dry in ordinary low water."

"To supply his mill with water, the plaintiff had erected a cross-dam, which ran in a north-east direction into the river, and supplied his mill with water at all seasons, by diverting a portion of the stream to the mill, which passed again into the river above the defendant's dam; and the plaintiff had blown out a rock to give room to his mill to work."

The evidence in the case, from the Circuit Court of Georgia, in respect to the situation of the plaintiff's mill and the description of the river, is substantially the same.

It appears from it, that the mill of the plaintiff, by his own showing, is in the bed of the river, to the east of the abrupt bank, by the prolongation of his north and south boundary-line from the bank, which he claims a right to prolong, from his being the owner of the land to the bank of the river, as a riparian right.

Upon this evidence, the court in Alabama charged the jury, that one passing from Georgia to Alabama, across the Chattahoochee River at ordinary low water, would be upon the bank as soon as he left the water on the western side, although an inappreciable distance from the water, and that the line described in the treaty of cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water; and, if they believed plaintiff's mill was west of that *line, and defendant's dam backed the water so as to [*415 obstruct the operation of the mill, the plaintiff was entitled to recover. The defendant in this case excepted to the charge, and asked the court to instruct the jury, if the bank of the river was ordinary low-water mark, that the plaintiff had no right to the use of the water at that stage, which the court refused to give. In the case from the United States Circuit Court, the defendants below—plaintiffs in error here—prayed the court to instruct the jury, that the true interpretation of the article of cession requires the boundary-line between Georgia and Alabama to be drawn on and along the western bank of the Chattahoochee River; and that, wherever the jury might find that bank to be, the jurisdiction and limits of Alabama must terminate, and cannot pass to the eastward of the same; but that all east of such line, whether it be land or water, is included within the limits and jurisdiction of Georgia; and no grant, from the United States or the State of Alabama, can confer title to any part of the same, either directly or indirectly, by virtue of such grant, or as an incident to the same. This prayer was refused; and the court instructed the jury, that the boundary-line between the States of Georgia and Alabama was to be drawn on and along the western bank of the river, at low-water mark, when the river was at its lowest stage.

In our view, the words of the cession have the same meaning in law that they have in common parlance. They are not at all uncertain, if taken connectively, as to the locality intended for the western line of Georgia on the Chattahoochee. Separate the word bank from "on and along the bank," and consider it only in connection with the other words, "running up the river," and it might be inferred that the water of the

river, at some stage of it, was to be the boundary, and that those owning the land on either side were riparian proprietors, *usque ad filum aquæ*. But not so when they are considered together, as we will presently show.

When the commissioners used the words bank and river, they did so in the popular sense of both. When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow, and in that condition they make what is called the bed of the river. They knew that rivers have banks, shores, water, and a bed, and that the outer line on the bed of a river, on either side of it, may be distinguished upon every stage of its water, high or low; at its highest or lowest current. It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being too low for reclamation, though *416] not always covered *with water, may be used for cattle to range upon, as natural or uninclosed pasture. But it may include spots lower than the bluff or bank, whether there is or is not a growth upon them, not forming a part of that land which, whether low or high, we know to be upland or fast lowland, if such spots are within the bed of the river. Such a line may be found upon every river, from its source to its mouth. It requires no scientific exploration to find or mark it out. The eye traces it in going either up or down a river, in any stage of water. With such an understanding of what a river is, as a whole, from its parts, there is no difficulty in fixing the boundary-line in question. Wherever that outer bed-line shall be, from its beginning on the bank, at the 31st degree of north latitude, to the mouth of the Uchee, on the western side, is the western boundary of Georgia, on the bank and along the bank running up the River Chattahoochee.

If the language of the article had been, "beginning on the western bank of the Chattahoochee, and running thence up the river," and no more had been said, the middle thread of the river ordinarily, and without any reference to the fact that Georgia was the proprietor of the river, it would have been said to be the dividing line between the two States. But there is added, "running up the said River Chattahoochee and along the western bank thereof." This last controls any uncertainty there may be; for if the first call or object to locate the line is the bank of the river, it is plain that the western limit of Georgia on and along the bank of the river, must be where the bank and the water meet in its bed within the natural channel or passage of the river. The words

"along the bank," added to the words, "on the bank," distinguish this case from all of those in which courts have had the greatest difficulty where a line was to be fixed when it is on the bank without a call for the stream or along the river, or up or down the river. Angell, 19. Along the bank, is strong and definite enough to exclude the idea that any part of the river or its bed was not to be within the State of Georgia. It controls any legal implication of a contrary character. Such a line, too, satisfies the calls on and along the bank in the navigable and unnavigable parts of the river. In the former, Alabama has all the uses of the river, including the use of the western bank for navigation and commerce, which the State of Georgia can claim. In that part of the river not navigable, Georgia has both soil and jurisdiction for all such purposes as are implied by both, and the stream or water of the river for all such purposes as it may be used in any stage of the water.

Such a line may be made certain on every part of the river, whatever may be the changes on the western bank from washings, *the abrasions of extraordinary floods, or from any of those sudden causes which in nature change the [*417 beds of rivers. In such cases the proprietors would continue to hold according to the original boundaries of their grants. We repeat, "along the bank thereof," is the controlling call in the interpretation of the cession. It excludes the idea that a line was to be traced at the edge of the water as that may be at one or another time or at low water, or the lowest low water. Water is not a call in the description of the boundary, though the river is, and that, as we have shown, does not mean water alone, but banks, shores, water, and the bed of the river. If water, as one of the river's parts, had been meant, it would have been so expressed.

The call is for the bank, the fast land which confines the water of the river in its channel or bed in its whole width, that is to be the line. The bank or the slope from the bluff or perpendicular of the bank may not be reached by the water for two thirds of the year, still the water-line impressed upon the bank above the slope is the line required by the commissioners, and the shore of the river, though left dry for any time, and but occasionally covered by water in any stage of it to the bank, was retained by Georgia as the river up to that line. Wherever it may be found, it is a part of the State of Georgia, and not a part of Alabama. Both bank and bed are to be ascertained by inspection, and the line is where the action of the water has permanently marked itself upon the soil. Wherever that line may be, is to be determined in each trial

at law by the jury upon proofs, the jury being instructed by the court that the bed of the river, wherever that may be, belongs to Georgia, whether it extends at certain points to the face of the bank where, from the perennial flow of the water there is no margin, or to other points where there is.

We must reject, altogether, the attempt to trace the line by either ordinary low water or low water. These terms are only predicable of those parts of rivers within the ebb and flow of the tides, to distinguish the water-line at spring or neap tides. Such a difference is uniform twice within every month of the year, and because it is so it is termed ordinary. In that part of a river in which there is no ebb and flow, the changes in the current are irregular and occasional, without fixed quantity or time of recurrence, except as they are periodical with the wet and dry seasons of the year. And low water is the furthest receding point of ebb tide. Nor do we think that the interpretation of this article is aided by any cases upon the rights of riparian proprietors. Such rights depend upon calls in grants for land either from sovereignties having an equal right in the stream to the thread of the river, *418] or from grants from a State having the *entire ownership of a river. In this instance, two sovereignties were dealing for a cession of country from one to the other, with a river as a boundary between them to be marked on that bank of it from which the ceded land was to commence. Now, as between them, there were no antecedent calls upon the river to raise the question of riparian rights. But, on the contrary, the river at the time formed a part of what was Georgia, and the commissioners negotiated upon the footing, that though the United States had formed the Mississippi Territory, it was done with the disclaimer in terms, that it in no way whatever should affect either the rights of sovereignty or soil which Georgia had in the territory. Moreover, we do not think that the commissioners could have contemplated that the State of Georgia and the United States were to have a divided or equal sovereignty in the river, or that the United States was to retain any right of soil in the same, when we find the commissioners in terms calling for the boundary-line between Spain and the United States in the middle of the Chattahoochee, and then transferring the western line of Georgia to the western bank of it.

If the running water of the river had been intended to be the line, and that the United States and Georgia were to have an equal right of soil and sovereignty in the bed of the river, on the western bank, why was it that the middle of the river at latitude 31 degrees north, was abandoned for the western

bank? The only answer which can be given is, that Georgia meant to retain the river to the western bank, and that the United States conceded it. Again, the extension of the line from the middle of the river at that point to the bank, necessarily excludes that the water of the river at any stage less than that which covers the bed of it, was to be any guide for the line.

We think that the instructions given by the courts below were erroneous.

Our interpretation of the first article of the cession made by Georgia to the United States, is that the western line of Georgia upon the Chattahoochee River, from its beginning in the 31st degree of north latitude to the great bend thereof, next above the place where a certain creek or river called Uchee, (being the first considerable stream on the western side, above the Cussetas and Coweta towns,) empties into the said Chattahoochee River, is a line to run up the river on and along its western bank, and that the jurisdiction of Georgia in the soil extends over to the line which is washed by the water, wherever it covers the bed of the river within its banks. The permanent fast land bank is referred to as governing the line. From the lower edge of that bank, the bed of the river commences, and Georgia retained the bed of the river from the lower edge of the *bank on the west side. And where the bank is fairly marked by the water, that water level will show at all places where the line is. *[419

Mr. Justice NELSON.

This is a writ of error to the Supreme Court of the State of Alabama.

Ingersoll, the plaintiff below, and defendant here, brought an action against Howard for setting back the water of the River Chattahoochee upon his lands and mill by the erection of a dam across the said river, at the city of Columbus, in the State of Georgia, by reason whereof the operations of his mill were obstructed, and the use of his premises impaired.

The defendant pleaded the general issue.

On the trial, it appeared that the plaintiff was the owner of a lot of land held under a patent from the United States, situate on the west bank of the Chattahoochee River, in the State of Alabama, opposite the city of Columbus, and which lot had for its eastern boundary the State of Georgia.

This river has high bluff banks in some parts of it on both sides, in others, the banks are low, and the adjacent lands subject to inundations in high water, extending for nearly a mile from the bank. At the plaintiff's land the banks are

from fifteen to twenty feet high on both sides, and somewhat abrupt, and above and below for some distance. The abrupt and high banks, however, on the plaintiff's side of the river do not extend down to the water's edge at ordinary low water. Between the high bluff and the water at this stage, the distance varies from fifty to one hundred and fifty feet; and this intermediate space is flat bottom-land, gradually descending from the base of the bluff to the water, and upon which flat grow trees, such as pines, oaks, gums, poplars, &c. Upon this flat, the plaintiff's grist-mill is built, and a road made along under the bluff leading to it. There is, also, a saw-mill and cotton-gin factory standing upon it. And a small portion of the flat is at times put under cultivation.

In the ordinary state of the river, in the winter season, the water covers this flat about half way to the high bluff, extending to the base of a bank or ridge of sand and gravel; and, in freshets, the water covers the flats reaching to the bluff. It is only in a full state of the river, or freshets, that the water overflows the sand bank or ridge before mentioned.

I have collected these facts from the two cases before us between these parties, each of which involves the same general question.

The plaintiff supplies his grist-mill with water by a wing dam extended obliquely into the river.

*420] *The defendant erected a dam across the river some three hundred yards below the plaintiff's mill, and opposite the city of Columbus. The dam is from four to five feet high; and at an ordinary stage of the river, the water is thrown back upon the plaintiff's mill so as to prevent its use. The defendant possesses a grant of the bed of the river upon which his dam is erected, derived from the State of Georgia, and extending to high-water mark on the western bank of the river.

The court charged the jury, that a person passing from the State of Georgia across the River Chattahoochee to the State of Alabama, at ordinary low water, would be upon the bank as soon as he left the water on the western side; and, that the line described in the treaty of cession from Georgia to the United States, as running up said river, and along the western bank thereof, is the line impressed upon the land by ordinary low water, to which charge the defendant excepted.

The defendant asked the court to charge, that, if the band of the river was ordinary low-water mark, the plaintiff had no right to the use of the water at that stage, which was also refused, and an exception taken.

This case involves a question of much higher interest and

importance than a simple decision upon the rights of these parties, as the court see that the decision cannot be reached without a determination of the boundary-line between two sovereign States, for a distance of some one hundred and fifty miles. The facts in the record are few, being confined to a description of the localities respecting this boundary at the point in dispute, and the few that are disclosed, very imperfectly and confusedly stated. It is to be regretted that the court is obliged to pass upon a question of this magnitude under these embarrassments, and in the absence of any opportunity, on the part of the two States interested, to furnish the necessary topographical information, in respect to the river Chattahoochee and its western banks for the whole distance within which they constitute the boundary between them.

This information would have been useful to aid the court in a proper determination of the question, and would naturally have been furnished, if the controversy had been between the States themselves.

The words of the cession of Georgia to the United States, in 1802, describing the boundary-line in question, and which are material to be noticed, are as follows :—Georgia cedes the territory "west of a line beginning on the western bank of the Chattahoochee River, running thence up the said River Chattahoochee, and along the western bank thereof and the great bend"; and the United States cede to Georgia all their rights *to the territory lying "east of the boundary-line herein described as the eastern boundary of the territory ceded by Georgia to the United States." [*421

This is the description of a line that has become the boundary between Georgia and Alabama, for a distance of one hundred and fifty miles.

Two constructions are contended for, arising out of the description: On the part of Georgia, it is claimed, that her boundary extends to high-water mark, on the western bank of the Chattahoochee River for the whole length of this line. On the part of Alabama, that it stops at ordinary low-water mark, on the western bank of said river.

The difference is very material, as it will be seen, that upon the former construction, Alabama can have a water or river line for her boundary only during high water or a freshet, which is but an occasional and temporary state of the river; and consequently the owners of the land on the Alabama side, for the greater portion of the year, and, for all practical use of the water for agricultural or hydraulic porposes, would be deprived of a river boundary. And this difference is the

more striking when we see, from the evidence in the record, scanty and meagre as it is, the strip of land between the high bank and the river, that is, between high and ordinary low-water mark, would be from ten to twenty and more rods in width, varying with the character of the bank, which would belong to Georgia, or to the owners on the Georgia side of the river; and over which the jurisdiction and government of Georgia would necessarily extend to the exclusion of Alabama.

We have no evidence, in the record, as to the distance the tide ebbs and flows up this river. It probably does not reach the point where the boundary in question begins, which is at the 31st degree of north latitude. It is navigable for steamboats up to Columbus, which is within some thirty or forty miles of its termination as a boundary between the two States; and, as I am informed, is navigable above the great bend, or west point, for small craft, for some one hundred miles, though interrupted by rocks and falls between that and Columbus.

Grants of land, bounded by the sea or by navigable rivers, where the tide ebbs and flows, extend to high-water mark, that is, to the margin of the periodical flow of the tide, unaffected by extraordinary causes, and the shores below common high-water mark belong to the State in which they are situated. But grants of land bounded on rivers above tide-water, or where the tide does not ebb and flow, carry the grantee to the middle of the river, unless there are expressions in the terms of the grant, or something in the terms
*422] taken in connection with the *situation and condition of the lands granted, that clearly indicate an intention to stop at the edge or margin of the river. There must be a reservation or restriction, express or necessarily implied, which controls the operation of the general presumption, and makes the particular grant an exception.

These are familiar principles of universal application, governing the construction of grants of land bounded upon the sea or tide-water, or upon fresh-water rivers, navigable or unnavigable, and whether made by States or individuals, or in large or small tracts. And in applying them to the description of the cession before us, we shall be enabled to determine where the boundary-line in dispute should be drawn. The words are, "beginning on the western bank of the Chattahoochee River," "running thence up the said River Chattahoochee, and along the western bank thereof."

Where land adjoining a fresh-water river, or above tide-water, is described as bounded by a monument, whether nat-

ural or artificial, such as a tree or a stake standing on the bank, and a course is given as running from it up or down the river to another monument standing upon the bank, these words necessarily imply, as a general rule, that the line is to follow the river, according to its meanderings and turnings, and the grantee takes to the middle of the river. Such is the uniform construction given to this description where the common law prevails. It has been repeatedly applied to grants abutting on the River Mississippi, the Missouri, the Hudson, the Connecticut, and other great rivers in the United States, above tide-water. 3 Kent, Com., 427, 428, 429, and notes; Angell on Waterc., c. 1, ed. 1850.

Had the description in this case been limited to the first two calls in the grant, it would have been impossible to have taken it out of this rule of construction; and the owners on the Alabama side would have been carried to the middle of the river. But the third call, which is, "along the western bank thereof," limits the effect and operation of the other two, and excludes the bed of the river. It indicates an intent to reserve the river within the boundary and jurisdiction of Georgia, and to confine the grantee to the western edge or bank. And this raises the material and important question in the case, namely, where shall that line be drawn? On behalf of Georgia, it is contended, it shall be drawn on the bank or bluff, as described in the record, at high-water mark; on behalf of Alabama, at the bank or ridge of sand and gravel, where the western margin of the river is found at ordinary low-water mark.

Now, it is to be observed, that the language of the cession, beginning on the western bank and running thence up the river and along the bank, does not necessarily, nor, as I think, *reasonably, call for a line along the bluff or high bank, such as confines the body of water in the [*423 river at high water, or when swollen with floods. The bank inclosing the flow of water, when at its ordinary and usual stage, is equally within the description; and the limit within this bank, on each side, is more emphatically the bed of the river, than that embraced within the more elevated banks when the river is at flood. These are more or less distant from the ordinary channel, depending upon the character of the river and topography of the adjacent lands. There are usually in rivers of this description banks representing the point which is reached at high water, and which bound it at that stage of the river. They may be, and not unfrequently are, at a considerable distance from the accustomed bed and the banks which then bound it. The flats intermediate may

comprise the most valuable portion of farms bounded upon the river and extending back to the uplands, notwithstanding they may be inundated by the spring and fall freshets. The valleys of the Mohawk, and Hudson, and Connecticut Rivers, may be referred to as illustrations, and also the Susquehannah, both in New York and Pennsylvania. Some of the finest alluvial bottom land in New York is found in the valley of the Mohawk, between the banks of the river at its usual stage and the banks at high water, which is the beginning of the uplands. If these alluvial bottoms are found in the valley of the Chattahoochee, and for aught I know they may be, according to the boundary-line contended for by the plaintiff in error, the settlements within the State of Georgia would not be bounded by the river; as most valuable possessions for sites of towns, and for hydraulic and even agricultural purposes, might be found lying along its western margin.

I cannot think that it is necessary to occupy more time in attempting to refute the claim to this boundary-line according to the terms used in the cession by Georgia.

Then, if we leave the bank at what is called high-water mark, as not given by any reasonable interpretion of the grant, on what principle or rule of construction is an intermediate line to be drawn short of the ordinary and permanent bed of the river? It would be a boundary wholly undefinable, and designated neither by high water nor low water, nor by the usual stage, but left to vibrate between what is called high water and the accustomed bed of the river.

The term high water, when applied to the sea or to a river where the tide ebbs and flows, has a definite meaning. The line is marked by the periodical flow of the tide, excluding the advance of waters above this line in the one case by winds and storms, and in the other by freshets or floods.

*424] *But in respect to fresh-water rivers, the term is altogether indefinite, and the line marked uncertain. It has no fixed meaning in the sense of high-water mark when applied to a river where the tide ebbs and flows, and should never be adopted as a boundary in the case of fresh-water rivers, by intendment or construction, whether between States or individuals. It may mean any stage of the water above its ordinary height, and the line will fluctuate with every varying freshet or flood that may happen.

In our judgment, the true boundary-line intended by Georgia and the United States, and the one fairly deducible from the language of the cession, is the line marked by the permanent bed of the river by the flow of the water at its usual

and accustomed stage, and where the water will be found at all times in the season except when diminished by drought or swollen by freshets. This line will be found marked along its borders by the almost constant presence and abrasion of the waters against the bank. It is always manifest to the eye of any observer upon a river, and is marked in a way not to be mistaken. The junction of bank and water at this stage of the river satisfies the words of the cession, and furnishes a line as fixed and certain as is practicable ; and is just and reasonable to all the parties concerned. It excludes the high bluffs or banks which the river touches but occasionally, when swollen with freshets or floods ; and also an intermediate line, which can be neither marked nor described ; and adopts a boundary along the bank and margin of the river of some permanency, and which parties providing for a river boundary between them would naturally have in their minds. That they intended a river boundary in this treaty of cession I cannot doubt. That Georgia intended to reserve to herself the bed of the river is equally clear. The line which I have designated satisfies both intentions, and, in my humble judgment, no other boundary-line will.

There are some general considerations bearing upon the question which should not be overlooked.

This court observed, in the case of *Handley's Lessee* v. *Anthony*, (5 Wheat., 374, 379,) through the Chief Justice, that "when a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is the boundary." "It case of doubt," says Vattel, "every country lying upon a river is presumed to have no other limits but the river ; because nothing *is more natural than to take a river [*425
for a boundary when a state is established on its borders ; and wherever there is doubt, that is always to be presumed which is most natural and probable."

Again the court say, "Even when a State retains its dominion over a river which constitutes the boundary between itself and another State, it would be extremely inconvenient to extend its dominion over the land on the other side which was left bare by the receding of the water. Wherever the river is a boundary between States, it is the main, the permanent river which constitutes that boundary ; and the mind will find

itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low-water mark."

These views are sound and just, and the mind at once assents to them. And they apply directly and with great cogency to the question before us.

Let us now return to the case immediately under consideration. The court instructed the jury that the boundary-line described in the treaty of cession from Georgia to the United States, as running up the said river and along the banks thereof, was the line impressed upon the land by ordinary low water. I am not certain but that the line here designated, or rather intended to be designated, is the same that we have attempted to define in this opinion. "Ordinary low water," however, like "low water," is a relative term, and, in the abstract and without practicable application, has no definite meaning, and furnishes no satisfactory guide by which to ascertain or determine the line in question. I freely admit, that if the terms of the cession would justify the interpretation given to that of the territory north-west of the Ohio, I should greatly prefer the line adopted in *Handley's Lessee* v. *Anthony*, which was low-water mark.

But the call here for the bank seems necessarily to connect that with the river in defining the boundary, and restricts it somewhat to a greater extent than in the description of the line in the case mentioned.

As the general question involved is one of very great importance, and the ruling not necessarily conveying the instruction I think should have been given, I agree that a new trial should be granted.

The defendant requested the court to instruct the jury that, if the bank of the river was ordinary low-water mark, the plaintiff had no right to use the water at that stage, which was refused.

This instruction, we suppose, was asked for on the ground that, admitting the boundary-line to be fixed at ordinary low-water mark, inasmuch as the bed of the river within that limit *426] *belonged to Georgia, and the defendant's grant, derived from that State, authorized the erection of his dam to the height claimed, he had a right to set back the water up the bed within the aforesaid limit; and the complaint, therefore, that the back-water interfered with the supply of water to the plaintiff's mill, by obstructing the natural current of the river, was unfounded, as the defendant had a right, to this extent, to obstruct it. If this was the meaning of the instruction prayed for, there was error in the refusal.

Undoubtedly the plaintiff has no right, under his grant from the United States, to erect a dam in the bed of the river within the boundary-line of Georgia, for the purpose of supplying his mill with water. But I am not prepared to admit, that he cannot supply it by diverting the water upon his own land, without crossing the boundary-line, as by sinking a trench or ditch, if by so doing he works no injury to the rights of others. Every proprietor of land on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands. No proprietor has a right to use the water to the prejudice of other proprietors, above or below, unless he has acquired a prior right to divert it. He has no property in the water itself, but a simple usufruct while it passes along. Any one may reasonably use it who has a right of access to it; but no one can set up a claim to an exclusive right to the flow of all the water in its natural state; and that what he may not wish to use himself shall flow on till lost in the ocean.

Streams of water are intended for the use and comfort of man; and it would be unreasonable, and contrary to the universal sense of mankind, to debar a riparian proprietor from the application of the water to domestic, agricultural, and manufacturing purposes, provided the use works no substantial injury to others.

These principles will be found stated more at large by Chancellor Kent, in his Commentaries, (3 Kent, Com., 439, 440, 441); and also by Parke, J., in a very recent case in the Court of Exchequer in England, (*Embry and another* v. *Owen*, 4 Eng. L. & Eq., 466, 476, 477.)

Mr. Justice GRIER.

I concur with my brother Nelson.

Mr Justice CURTIS.

In these cases I concur with the majority of the court in the opinion that each of the judgments should be reversed, but I withheld my assent from much of the reasoning contained in the opinion. I do so, because I am not entirely satisfied of its *correctness, as I apprehend its extent [*427
and bearings; and because the cases involve a question of boundary between the States of Georgia and Alabama, and highly important riparian and other rights connected therewith, or dependent thereon, in reference to which I desire to stand committed to no opinion, and to no course of reasoning, beyond what seems to me absolutely necessary for a final decision upon the private rights now before us.

This obliges me to state my own views of what I deem necessary to be decided, and the conclusions at which I have arrived. I shall do so very briefly, and without entering into an examination of the principles and authorities which have brought my mind to those conclusions.

My opinion is:—1. That the calls contained in the act of cession place the western line of Georgia on the western bank of the Cattahoochee River, at the place in question in these cases.

2. That the act of cession is silent as to the particular part of the bank on which the line is to be run. But inasmuch as it must be run on some particular part of the bank, we are obliged to resort to the presumed intentions of the commissioners and the parties, inferable from the nature of the line, as a line of boundary of political jurisdiction as well as of proprietorship, and, according to that presumed intention, we must declare it to be on that part of the bank which will best promote the convenience and advantage of both parties, and most fully accomplish the apparent and leading purpose to establish a natural boundary.

3. That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below, or at a middle stage of water, must depend upon the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between its highest and least flow. *Something must depend also upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the par-

*428]

ticular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water.[1]

4. Taking along with us these views respecting the bed and banks of a river, it will be obvious that the lowest line of the bank, being the line which separates the bank from the bed, is a natural line, capable of being found in all parts of the river, impressed on the soil; and this is true of no other line on the bank; for though in some places the banks of a river may have so marked a character, that there would be no difficulty in tracing the upper line of the bank, and pronouncing, with certainty, that the bank there terminates, yet it is not to be supposed that this would be true throughout the course of a long river, and one of these cases finds, that in some places the banks of this river are low, and the adjacent lands on either side subject to occasional inundation. In such places it would be impracticable to fix on a precise line as the upper termination of the bank. Now, it is clear, that inasmuch as this line of the act of cession was to be a line of boundary of political jurisdiction, it must have been deemed by the commissioners when they fixed it, and by the parties when they assented to it, of great importance, to have a natural boundary, capable, not only of being ascertained upon inquiring, but of being seen and recognized in the common practical affairs of life. And, therefore, I am of opinion, that as the calls for this line do not expressly require it to be on any particular part of the bank, it should be located on the bank where the leading purpose, to have a natural boundary between the two jurisdictions, will be most effectually attained. The convenience and advantage of both parties require this. The line, therefore, is at the lowest edge of the bank, being the same natural line which divides the bank from the bed of the river.

The above brief statement of my views, while it exhibits all to which I have given my assent in these cases, will show why I concur in the opinion that the rulings, brought before us by these writs of error, were erroneous.

ORDER IN No. 121.

This cause came on to be heard on the transcript of the *record from the Supreme Court of the State of Alabama, and was argued by counsel. On consideration [*429

[1] QUOTED. *Gibbs* v *Williams*, 25 Kan., 221.

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 to be proceeded with in conformity to the opinion of this court, and as to law and justice may appertain.

ORDER IN No. 131.

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 Georgia, 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*, and to proceed therewith, in conformity to the opinion of this court.

JOHN NORRIS, PLAINTIFF, *v.* EDWIN B. CROCKER AND ELISHA EGBERT.

The fourth section of the act of Congress, approved on the 12th day of February, 1793 (1 Stat. at L., 302), entitled "An act respecting fugitives escaping from justice, and persons escaping from the service of their masters," is repealed, so far as relates to the penalty, by the act of Congress approved September 18th, 1850, (9 Stat. at L., 462,) entitled "An act to amend, and supplementary to, the above act."

Therefore, where an action for the recovery of the penalty prescribed in the act of 1793 was pending at the time of the repeal, such repeal is a bar to the action.[1]

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[1] APPROVED. *United States* v. *Packages of Dry Goods*, 17 How., 96. DISTINGUISHED. *Tinker* v. *Van Dyke*, 1 Flipp., 527. FOLLOWED. *Steamship Co.* v. *Jolliffe*, 2 Wall., 466; *Ex parte McCardle*, 7 Id., 514; *United States* v. *Tynen*, 11 Id., 94; *Railroad Co.* v. *Grant*, 8 Otto, 401; *State* v. *Corley*, 13 So. Car., 3, 4. CITED. *Insurance Co.* v. *Ritchie*, 5 Wall., 544; *The Assessor* v. *Osbornes*, 9 Id., 575; *United States* v. *Claflin*, 7 Otto, 551; *Smith* v. *Sullivan*, 71 Me., 153; *Heckman* v. *Pinkney*, 81 N. Y., 216; *Rhemke* v. *Clinton*, 2 Utah T., 440.

It is well settled that the repeal of a penal statute puts an end to all pending prosecutions under it, in the absence of a saving clause. *United States* v. *Six Fermenting Tubs*, 8 Int. Rev. Rec., 9; s. c., 1 Abb. U. S., 269; *Bay City &c. R. R. Co.* v. *Austin*, 21 Mich., 390; *Bennet* v. *Hargus*, 1 Neb., 419; *Belvidere* v. *Warren R. R. Co.*, 5 Vr. (N. J.), 193; *State* v. *Long*, 78 N. C., 571; *Hubbard* v. *State*, 2 Tex. App., 506; *Montgomery* v. *State*, Id., 618; *Rood* v. *Chicago &c. Ry. Co.*, 43 Wis., 146; *Tuton* v. *State*, 4 Tex. App., 472; *Smith* v. *Arapahoe Dist. Court*, 4 Col., 162; *Speckert* v. *Louisville*, 78 Ky., 287. But the repeal of a statute does not take away a right of action for *damages* which has already accrued

THIS case came up from the Circuit Court of the United States for the District of Indiana, upon a certificate of division in opinion between the judges thereof.

The following certificate explains the question:

UNITED STATES OF AMERICA,

District of Indiana.

At a Circuit Court of the United States, begun and holden at Indianapolis, for the District of Indiana, on Monday, the nineteenth day of May, in the year one thousand eight hundred and fifty-one, and continued from day to day until Friday, the thirtieth day of May, one thousand eight hundred and fifty-one.

*JOHN NORRIS
v.
EDWIN B. CROCKER AND ELISHA EGBERT. [*430

Present, honorable John McLean, and the honorable Elisha M. Huntington, judges.

This is an action of debt brought to recover the penalty of five hundred dollars, upon the fourth section of the act of Congress, approved February 12, 1793, entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters;" declaration in the usual form, and demurrer and joinder thereto.

The case coming on to be argued on demurrer, it occurred as a question, whether the aforesaid section of the aforesaid act of February 12, 1793, is repealed, so far as relates to the penalty given by said section, by the act of Congress of September 18th, 1850, entitled "An act to amend and supplementary to the act entitled, 'An act respecting fugitives from justice, and persons escaping from the service of their masters,'" approved February 12th, 1793; and whether, if repealed, the same can affect this action, which was pending before the passage of the last-named act; on which questions the opinions of the judges were opposed.

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under it. *Grey* v. *Mobile Trade Co.*, 55 Ala., 387; *Graham* v. *Chicago &c. R'y Co.*, 53 Wis., 473.

Since the enactment of U. S. Rev. Stat., § 13, the repeal of a statute defining an offence and providing its punishment, does not prevent the prosecution and conviction of a person for a violation thereof previously committed. *United States* v. *Barr*, 4 Sawy., 254; and the rule is the same in Utah Territory, *People* v. *Sloan*, 2 Utah T., 326; and a similar rule prevails in New Jersey in civil actions (Rev., p. 1120) by force of a constitutional provision. *Wilson* v. *Herbert*, 12 Vr. (N. J.), 454.

Whereupon, on motion of the plaintiff, by his counsel, that the points on which the disagreements hath happened, may, during the term, be stated under the direction of the judges, and certified under the seal of the court to the Supreme Court to be finally decided.

It is ordered that the foregoing statement of the pleadings and the following questions involved, which are made under the direction of the judges, be certified according to the request of the plaintiff, by his counsel, and the law in that case made and provided, to wit:

I. Is the fourth section of the act of Congress, approved on the 12th day of February, A. D., 1793, entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters," repealed, so far as relates to the penalty, by the act of Congress, approved September 18th, 1850, entitled "An act to amend, and supplementary to the act entitled 'An act respecting fugitives from justice, and persons escaping from the service of their masters,'" approved February 12th, 1793.

II. Whether, if the fourth section of the last-named act of February 12th, 1793, is repealed, so far as relates to the penalty by the act to amend and supplementary to the same, that repeal will, in law, bar the present action that was pending at the time of the repeal.

*431] *Upon this certificate, the cause came up to this court, and was argued by *Mr. O. H. Smith*, for the plaintiff, and *Mr. Chase*, for the defendants.

Mr. Smith, for the plaintiff.

On the part of the plaintiff, we contend that the act of 1850 does not repeal the fourth section of the act of 1793, but is only cumulative; and we ask this court so to certify to the Circuit Court.

The defendants maintain that the act of 1850 does repeal, by implication, the fourth section of the act of 1793, and every distinct offence created by that section; therefore, if the court should even think that part of the section is repealed by implication, which we submit they will not, still if the whole of the section is not repealed, the certificate must be for the plaintiff, and the demurrer in the Circuit Court must be overruled.

Before we proceed to examine the two acts, and to compare them, we will direct the attention of the court to some plain and familiar principles, for the construction of statutes, by which we are willing to construe these acts, as applicable to this case.

1. "Generally, statutes are to be construed to operate *in futuro*, unless a retrospective effect be clearly intended." *Prince* v. *United States*, 2 Gall., 204.

2. "In doubtful cases, a court should compare all the parts of a statute, and different statutes in *pari materia*, to ascertain the intention of the legislature." *Sloop Elizabeth*, 1 Paine, 41.

3. "Where a statute is made in addition to another statute on the same subject, without repealing any part of it, the provisions of both must be construed together." 13 Mass., 324, 344.

4. "Statutes can never be applied retrospectively, by mere construction." 9 B. A., 221; 10 Mass., 437; 12 Mass., 383; 16 Mass., 215; 1 Blackf. (Ind.), 220.

5. "Subsequent statutes, which add accumulative penalties, and institute new methods of proceeding, do not repeal former penalties and methods of proceeding, ordained by preceding statutes, without negative words." 6 Price, 131; 6 B. A., 227.

6. "The law does not favor a repeal by implication, nor is it to be allowed unless the repugnancy be quite plain; for as such repeal carries with it a reflection upon the wisdom of the former parliament, it has ever been confined to the repealing as little as possible of the preceding statute." 2 Wash., 297; 2 Barn. & Ald., 149; 6 Maul. & Sel., 116; 15 East, 372; 9 B. A., 228.

7. "Although two acts of parliament are seemingly repugnant, yet if there be no clause of *non obstante* in the latter, they shall, if possible, have such construction that the latter may not *be a repeal of the former by implication." [*432
Weston's case, Dyer, 347; 11 Co., 63; Hardrea, 344; 9 B. A., 228.

With these general and fundamental principles before us, we proceed to direct the mind of the court —

1st. To the section of the act of Congress upon which this action was brought, and

2d. To the section of the act of 1850, passed pending the action, which is relied upon as repealing the fourth section of the act of 1793.

1. The section of the act of 1793, upon which this action is founded, reads as follows:

"That any person who shall, knowingly and willingly, obstruct or hinder such claimant, his agent, or attorney, in so seizing or arresting such fugitive from labor, or shall rescue such fugitive from such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared,

or shall harbor or conceal such person, after notice that he or she was a fugitive from labor as aforesaid, shall for either of the said offences forfeit and pay the sum of five hundred dollars; which penalty may be recovered by and for the benefit of such claimant, by action of debt in any court proper to try the same," saving, &c.

This section, the court will see, gave several distinct causes of action for the penalty:

1. Against any person who should knowingly and willingly "obstruct" the claimant, his agent, or attorney, from "seizing or arresting the fugitive."

2. Against those who shall knowingly and willingly "hinder" the claimant, his agent, or attorney, in so "seizing or arresting the fugitive."

3. Any persons who shall knowingly and willingly "rescue" such fugitive from such claimant, his agent, or attorney, when so arrested, pursuant to the authority herein given or declared."

4. Against persons "who shall 'harbor' such fugitive" "after notice that he or she was a fugitive from labor."

5. Against persons "who shall conceal such person, after notice that he or she was a fugitive from labor."

The section of the act of 1850, that is relied upon as repealing the fourth section of the act of 1793, as to the penalty, by implication, we maintain is merely cumulative. We proceed to give the section; and in order to show the additions that have been made to the section of the act of 1793, by the act of 1850, we give the section, and place the additions in brackets.

"That any person who shall knowingly and willingly obstruct [or prevent] such claimant, his agent, or attorney, [or any person or persons lawfully assisting him, her, or them,] *433] from arresting *such a fugitive from service or labor, [either with or without process as aforesaid,] or shall rescue [or attempt to rescue] such fugitive from service or labor from [the custody of] said claimant, his or her agent or attorney, [or other person or persons lawfully assisting as aforesaid,] when so arrested pursuant to the authority herein given and declared, [or shall aid, abet, or assist such person, so owing service or labor as aforesaid, directly or indirectly to escape from such claimant, his agent, or attorney, or other person or persons legally authorized as aforesaid,] or shall harbor or conceal such fugitive [so as to prevent the discovery and arresting of such person] after notice [or knowledge] of the fact that such person was a fugitive from service or labor as aforesaid."

It will be seen, by an examination of the above section, that it creates new offences, and punishes them differently, and is therefore cumulative.

The section above does not make "harboring" or "concealing" a slave subject to a penalty, unless it is done "so as to prevent the discovery and arresting of such person after notice," &c., while the section of the law of 1793, on which these actions are founded, makes the offence to "harbor or conceal such person, after notice that he or she was a fugitive from labor," subject to a penalty of $500. These offences are entirely different, and are visited with different penalties. The legislature (Congress) therefore did not repeal the offence of "harboring" or "concealing" slaves from their masters, either in express terms by implication. Both acts can well stand together, and the rule of law is to construe them as we have already stated.

Let us now come to the act of Congress of 1850, and inquire whether it could have been the intention of the framers of that act to repeal the act of 1793. We maintain the negative of this proposition, as being clear and conclusive.

1. Had such been the intention of the legislature, the act would have contained an express repealing clause, which it does not.

2. Congress was composed of good lawyers and wise legislators, who would never have left to construction and implication that which they intended to have enacted.

3. The object of the act of Congress of 1850, was evidently to give greater facilities to the master of the slave, in securing the fugitive; and can it be for a moment supposed that Congress intended to repeal the act of 1793, wipe out all liabilities incurred under that act, and deprive the master of the rights that had accrued to him, of action in suits pending, or otherwise? Most certainly not.

4. It is clear that the act of 1850 cannot, under any construction, *have a retrospective operation, and therefore could in no event operate on the rights of the [*434 plaintiff which had accrued before the passage of the act, unless it was by way of repeal of the previous act by implication.

5. The title of the act is conclusive as to the object and intention of the legislature in its passage. It was, as it expressly declares, amendatory to, and supplementary of, the act of 1793. Not a repeal of the act, but amendatory and supplementary to that act; "additional," "adding what is wanting." See Webster's Dictionary as to the words "supplementary" and "to amend."

6. The act of 1850, in the language of Judge Nelson, in his able charge to the grand jury, "was passed for the purpose of carrying more effectually into execution a provision of the Constitution of the United States." "The supplementary act is obviously framed with great skill and care, and bears upon its face the deep conviction of the body that enacted it that the constitutional provision had not only been disregarded, but that a settled purpose, a fixed determination existed in some portions of the country to set its obligations at naught. The act meets this condition of things, real or supposed, and clothed the public authorities with power adequate to the exigency." This view of the object and effect of the act is certainly very erroneous if the act was a repeal of the penal part of the act of 1793, as is contended. If it enacted impunity and absolution to all offenders under the act of 1793, dismissed all actions pending for violations of its provisions with costs, and, being retroactive in its operation, left no cause of action for any penalty incurred prior to its passage though not within the offences named by the act of 1850, we submit that this court should not give to the act of 1850, such a construction, but should construe it to be what its title declares it to be, — an act to amend, and supplementary to, the act of 1793. This construction will accord with the object and intention of the legislature, will enforce the rights of the plaintiff, and maintain the majesty of the laws and the integrity of the Union.

Mr. Chase, for defendant, contrasted the two laws, and then proceeded with his argument.

It was evident, from this comparison, that the design of the act of 1850 was to enlarge the act of 1793 and make it more efficient and stringent, by extending the definitions of the prohibited offences, and by substituting for the penalty of five hundred dollars for the benefit of the claimant, the public punishment of a fine of one thousand dollars and imprisonment, and for mere liability to an action for the injury, the definite award *of one thousand dollars as civil dam-
*435] ages for each servant lost. No offence is described in the act of 1793 which is not expressly mentioned and prohibited in the act of 1850; while the penalties and sanctions of the latter act are entirely distinct, both in nature and magnitude, from those of the former.

The rules of law applicable to this law are, I apprehend, too well settled to admit of much diversity of opinion. The first is this:

Acts of the legislature prohibiting the same offences and

injuries as former acts, but imposing different penalties or giving different remedies, repeal, so far, such former acts. *Rex* v. *Cator*, 4 Burr., 2026; *Nichols qui tam* v. *Squire*, 5 Pick. (Mass.), 168; *Commonwealth* v. *Kimball*, 21 Id., 373; *Adams* v. *Ashby*, 2 Bibb. (Ky.), 96; 2 Dana (Ky.), 330; *Hickman* v. *Littlepage*, 2 Id., 334; *Milne* v. *Huber*, 3 McLean, 212; *The State* v. *Whitworth*, 8 Port. (Ala.), 434; *McQuilkin* v. *Doe d. Stoddard*, 8 Blackf. (Ind.), 581; *Leighton* v. *Walker*, 9 N. H., 59.

The leading case is *Rex* v. *Cator*, 4 Burr., 2026. The defendant had been convicted upon 5 Geo. 1, c. 27 and 23 Geo. 2, c. 13, for enticing and seducing artificers in the manufactures of the United Kingdom into foreign service. Both acts were upon the same subject. The offence was within each. The first imposed a penalty of £100 and three months' imprisonment for the first offence, and for the next a fine at discretion and twelve months' imprisonment. The second act imposed a penalty of £500 and twelve months' imprisonment for the first offence; and for the next £1000 and two years' imprisonment. Lord Mansfield held, "The latter act seems to have been a repeal of the former: it was made to supply the deficiences of the former."

The language of the Supreme Court of Massachusetts, in *Nichols qui tam* v. *Squire*, 5 Pick. (Mass.), 168, is very clear: "We think the statute of 1785, c. 24, upon which the *qui tam* action is founded, is repealed, if not by Stat. 1800, c. 57, (which seems to have had a different object in view,) yet certainly by Stat. 1817, c. 191, which appears to cover the whole subject-matter of the statute of 1785. By the statute of 1817 the selling of tickets in any lottery not granted or permitted by the Commonwealth is prohibited under a new penalty; and where the legislature impose a second penalty for an offence, whether smaller or larger than the former one, a party cannot be allowed to sue on one or the other, at his option. This point of repeal by implication is supported by authority. In the case of *Bartlett* v. *King*, (12 Mass., 537,) an exceedingly useful statute, passed in 1754, concerning bequests and donations to pious and charitable uses, was held not to be in force, the legislature having in 1785 *legislated upon the same subject, and omitted to reënact [*436 the provisions of that statute."

The opinion of the Supreme Court of Alabama, in *The State* v. *Whitworth*, (8 Port. (Ala.), 434,) is equally decided: "The act of 1829, inhibiting gaming, covers the whole ground of the previous statute, so far as the keeping, exhibiting, carrying on, or being in any manner interested in, any

gaming-table or bank whatever is concerned, and includes every offence connected with the subject-matter; and as it provides a different, and in some respects a milder, punishment for these offences than the previous statutes, it repeals them so far as the same offences are provided to be punished by it."

It seems needless to quote from the other cases cited. These authorities are sufficient to establish the proposition, that the act of 1850, so far as it imposes new and different penalties and punishments for the same offences prohibited by the act of 1793, repeals that act.

The second rule of law laid down by the defendants is this:

No judgment can be rendered in any suit for a penalty after the repeal of the act by which it was imposed. The repeal of a statute puts an end to all suits founded upon it. *Rex* v. *Justices of the Peace for the City of London*, 3 Burr., 1456; *Yeaton* v. *The United States*, 5 Cranch, 281; *Schooner Rachael* v. *The United States*, 6 Cranch, 329; *The Irresistible*, 7 Wheat., 551; *The United States* v. *Preston*, 3 Pet., 57; *Commonwealth* v. *Marshall*, 11 Pick. (Mass.), 350; *Commonwealth* v. *Kimball*, 21 Id., 373; *Commonwealth* v. *Leftwich*, 5 Rand. (Va.), 657; *People* v. *Livingston*, 6 Wend. (N. Y.), 526; *Commonwealth* v. *Welch*, 2 Dana (Ky.), 330; *Lewis* v. *Foster*, 1 N. H., 61; *Stevenson* v. *Doe*, 8 Blackf. (Ind.), 508; *Pope* v. *Lewis*, 4 Ala., 487; *Road in Hatfield Township*, 4 Yeates, 392; *Maryland* v. *Baltimore and Ohio Railroad Co.*, 3 How., 534; 18 Me., 109; 25 Me., 452; *Miller's case*, 1 W. Bl., 451.

The leading case is *Rex* v. *Justices of London*, 3 Burr., 1456. It was a motion for a *mandamus* requiring the justices to proceed in a matter depending before them after the act regulating the proceeding had been repealed. The matter had been by them adjourned unto a day after the repealing clause took effect, and they then refused to proceed further. "Lord Mansfield was very clear, and the rest of the court concurred with him, that no jurisdiction now remained in the Sessions."

In the case of *Yeaton* v. *The United States*, 5 Cranch, 281, this court said, upon appeal from a sentence of condemnation, where the law under which the sentence had been pronounced had been repealed after the sentence, "The cause is to be considered as if no sentence had been pronounced; and if no sentence *had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced or punishment

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inflicted for violations of the law, committed while it was in force, unless some special provision be made for that purpose by statute."

And it makes no difference whether the penalty goes to the public, or in part or in whole to an individual.

In *Lewis* v. *Foster*, (1 N. H., 61,) a judgment had been rendered in an action of debt for a penalty under a statute which gave the whole penalty to the plaintiff. Before execution the statute was repealed. The defendant, by a proceeding in review, brought the case before the Supreme Court, where it stood as if no judgment had been rendered. The court said: "The plaintiff's right of action was taken away by the repeal of the law on which it was founded. Every right he acquired by a judgment was subject to be lost on review of the cause. We must try the cause in the same manner as if there never had been a judgment, but we now find no act which will warrant a judgment in favor of the plaintiff."

So in *Pope* v. *Lewis*, (4 Ala., 489,) the court said: "The principal question in this cause is whether any judgment can be rendered in an action founded on a penal statute after its repeal. The counsel for the defendant in error maintain, that by the commencement of the suit for the penalty prescribed by the statute for selling rope and bagging without inspection, the defendant acquired a vested right in the penalty, which the subsequent repeal of the statute by the legislature cannot deprive him of. The foundation of a claim to a penalty prescribed by law is derived entirely from the statute authorizing a judgment to be rendered in favor of any one who will sue for it." "This claim is imperfect until a judgment be rendered for it. . . . . It follows, necessarily, that as the right to the penalty is inchoate until judgment, if from any cause no judgment can be rendered for the penalty, the absolute or vested right to it can never exist. It cannot admit of doubt that the legislature may at pleasure repeal any penal law; and it is equally well settled that after such repeal no judgment can be rendered, either of corporal punishment or pecuniary fine. Nor is it easy to perceive how, upon principle, any other decision could be made."

The whole matter is summed up in an expression of Mr. Chief Justice Taney, in *Maryland* v. *The Baltimore and Ohio Railroad Company* (3 How., 534): "The repeal of the law imposing a penalty is itself a remission."

These principles and authorities seem to leave no doubt upon either question certified from the Circuit Court. It appears to be quite clear, both that the provisions of the 4th

*438] section of the *act of 1793, giving a penalty for the offences therein described, are repealed by the operation of the 7th section of the act of 1850, giving different penalties for the same offences; and that this repeal bars actions for penalties pending at the taking effect of the last act.

Mr. Justice CATRON delivered the opinion of the court.

The following questions are certified to us on a division of opinion from the Circuit Court for the District of Indiana.

1. Whether the 4th section of the act of 1793, respecting persons escaping from service of their masters is repealed, so far as relates to the penalty, by the act of 1850, on the same subject.

2. Whether, if the act of 1793 is repealed as to the penalty, the repeal will bar an action that was pending at the time of the repeal.

The fugitive slave law of 1850 does not repeal the 4th section of the act of 1793 in terms; and if it is repealed, it must be by implication. As a general rule it is not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that then the former statute is repealed by implication; as the provisions of both cannot stand together.

To ascertain whether there be repugnance, the two enactments must be compared.

The 4th section of the act of 1793 provides: 1st. That any person who shall, knowingly and willingly, obstruct or hinder a claimant, his agent or attorney, in arresting a fugitive from labor:

Or, 2d. Shall rescue the fugitive from the claimant, his agent or attorney, after he has been arrested:

Or, 3d. Shall, knowingly and willingly, harbor, or conceal the fugitive, knowing he is such: That for committing either of said offences such person shall forfeit and pay the sum of five hundred dollars: which penalty may be recovered by the claimant for his own benefit; and reserving also to the claimant his right of action in damages for the actual injuries he may have sustained, be they more or less.

The act of 1850, section 7, declares:

1st. That any person who shall, knowingly and willingly, obstruct, hinder or prevent, such claimant, his agent or attorney—*or any person or persons, lawfully assisting him, her or them*, from arresting such fugitive—*either with or without process:*

Or, 2d. Shall rescue, *or attempt to rescue*, such fugitive, when arrested, from the custody of the claimant, his agent or attorney, **or from the custody of any other person, or persons, lawfully assisting:* [*439

Or, 3d. Shall *aid*, *abet*, or assist the person owing service, directly, or indirectly, to escape from such claimant, his agent or attorney, *or other person or persons legally assisting:*

Or, 4th. Shall harbor or conceal such fugitive, *so as to prevent his discovery and arrest*, after notice or knowledge of the fact, that such person was a fugitive: The person so offending, in either of the cases specified, shall be subject to a fine not exceeding one thousand dollars, and imprisonment not exceeding six months, on conviction by indictment. Secondly, That the person thus offending, shall forfeit and pay, by way of civil damages, to the party injured by such illegal conduct, the sum of one thousand dollars for each fugitive lost, by reason of such conduct, to be recovered by action of debt.

And the question is, whether the foregoing provisions of the act of 1850 are repugnant to those contained in the act of 1793, so far as the penalty of five hundred dollars is concerned.

The former statute gives this penalty to the owner in three cases: for obstructing an arrest; for a rescue; and for harboring the fugitive. It was given, regardless of the fact, whether the owner had or had not recovered his slave; and in addition, by the act of 1793 he might sue for, and recover, the value, if the slave was lost by the illegal conduct of the defendant; or he might recover the inferior damages, if the slave was obtained.

By the act of 1850, a penalty is inflicted, by way of fine, on conviction; and imprisonment is added. The prosecution is at the instance of the United States, with which the owner of the slave is not necessarily connected, the government taking the penalty recovered: nor is it of any consequence, under this mode of proceeding, whether the owner has or has not recovered his slave; the offender being equally liable to prosecution for committing any one of the offences enumerated in the statute, including the old ones, found in the act of 1793, and the additional ones, superadded in that of 1850, and which are indicated by the words in italics. The recent statute covers every offence found in the former act, which subjects the offender to a penalty of 500 dollars, and prescribes a new, and different penalty, recoverable by indictment; and is plainly repugnant to the act of 1793.

A seeming difficulty exists, in the concluding part of the seventh section of the new act, which awards civil compensa-

tion to the owner for the loss of each slave, if that loss was occasioned by any one of the illegal acts that are made indictable: but no recovery under, and by force of the statute, can be had, unless the owner has lost the slave. The policy of the
*440] law is *obvious. On trials, illegal conduct, and loss, might be fully established; but then, the wide range of proof, as to value, could still, in effect, defeat the suit by a verdict for low damages: and therefore Congress fixed the value alike in every case of loss, and took the assessment of damages from the jury. This provision is new, and inconsistent with the 4th section of the act of 1793, in this: The former act imposes a penalty of five hundred dollars, in the enumerated cases, regardless of any actual loss on the part of the owner: whereas, for the same offences, the act of 1850 allows civil damages of one thousand dollars for each slave lost; but nothing when he is regained—loss being the ground of action: nevertheless, the party injured is left to his common-law remedy for any damage he may have sustained short of actual loss of the slave by the illegal conduct of the offending party: and for actual loss also, if he prefers and elects that remedy to an action for civil damages under the statute—but both modes cannot be pursued.

We therefore answer, to the first question certified, that the act of 1850 has repealed, so far as relates to the penalty, the fourth section of the act of 1793.

The next question referred to us for decision presents no difficulty.

The suit was pending below when the act of September 18, 1850, was passed, and was for the penalty of 500 dollars, secured by the 4th section of the act of 1793. As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law. We therefore answer, to the second question certified, that the repeal of the 4th section of the act of 1793 does bar this action, although pending at the time of the repeal.

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 Indiana, and on the points or questions on which the judges of the said Circuit Court were opposed in opinion, and which were certified to this court for its opinion agreeably to the act of Congress in such case made and provided,

and was argued by counsel. On consideration whereof, it is the opinion of this court:—

1st. That the fourth section of the act of Congress, approved on the 12th day of February, A. D., 1793, entitled "An act respecting fugitives from justice and persons escaping from the *service of their masters," is repealed, so far as relates to the penalty, by the act of Congress approved [*441 September 18th, 1850, entitled, "An act to amend, and supplementary to, the act entitled 'An act respecting fugitives from justice and persons escaping from the service of their masters,'" approved February 12th, 1793.

2d. That the repeal of the said fourth section will in law bar the present action that was pending at the time of the repeal. Whereupon, it is now here ordered and adjudged by this court that it be so certified to the said Circuit Court.

Lewis Rogers, Appellant, *v.* Joseph G. Lindsey, Henry S. Atwood, and John S. Bennett.

The following paper, viz.

"The President or Cashier of the Planters and Merchants Bank will please hold, subject to the order of Mr. J. G. Lindsey, all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge, upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit"—imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title or interest in them.

The circumstances of the case favor this construction. Lindsey had become personally responsible for a sum of money, which these debts were intended in part to meet. As an honest transaction, it would answer all purposes, if he had only a power to collect the debts.

Where Lindsey, under this power, assigned an interest in one of these judgments, and the bill charged that the assignee knew of the interest of the original creditor, which the assignee, in his answer, did not deny, he failed to bring himself within the rules which protect a purchaser for a valuable consideration without notice, and his claim must be set aside.

Lindsey's having assigned this judgment to a third person, and then taken a reassignment of it, does not vary the case. He stands then in his original position.

This was an appeal from the Circuit Court of the United States for the Southern District of Alabama.

The bill was filed by Rogers against Lindsey, Atwood, and Bennett, under the circumstances mentioned in the opinion of the court, and which it is not necessary to repeat.

The cause was heard upon the bill, answers, exhibits, and proofs, in the said District Court, on the 17th of April, 1850,

and the court being of opinion that the plaintiff, Rogers, by his contract with the defendant, Lindsey, had assigned and transferred the judgment in the said court, in favor of Rogers & Gray against John S. Bennett, to said Lindsey, and that he, Lindsey, and the assignees under him, were entitled to the money made thereon, ordered and decreed that the plaintiff's bill be dismissed, with costs.

Rogers, the complainant, appealed to this court.

*442] *It was argued by *Mr. Crittenden* (Attorney-General) and *Mr. Chilton*, for the appellant, and *Mr. J. A. Campbell*, for the appellee.

The arguments of the respective counsel were so much connected with the facts and circumstances of the case, that it is impossible to narrate them without protracting this report to an inconvenient length.

Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States for the Southern District of Alabama.

Lewis Rogers, the appellant, and complainant below, was one of the firm of Rogers & Gray, doing business in the city of Richmond in 1836, and in the course of their business purchased of Joseph G. Lindsey, one of the defendants, a large amount of bills of exchange on the house of Goodman, Miller, & Co., of the city of Mobile, of which about the sum of $20,000 was unpaid, and the bills protested. Subsequently, in 1837, a settlement was effected with the firm at Mobile, and payment received in several promissory notes, all of which were indorsed by Lindsey. Among these notes was one made by Bissell & Carville, a business firm in Alabama, dated 20th April, 1837, and indorsed by John S. Bennett, payable 1st January, 1838, for $3,297.27, and which was also indorsed by Goodman, Miller, & Co., and Lindsey. This note, and a large amount of the paper thus received in discharge of the debt of $20,000, was dishonored at maturity, and duly protested, and judgments recovered against the several parties liable, in the Circuit Court of the United States in the Southern District of Alabama. The judgment recovered March, 1840, against Bennett, on the note of Bissell & Carville, amounted to $3,875. About this time the partnership of Rogers & Gray was dissolved, and the effects assigned to Rogers, the complainant.

In June, 1840, while the securities, taken in payment of the balance of $20,000 due to the firm of Rogers & Gray, stood in this condition, Lindsey came to the city of Richmond, and

made a proposition for the settlement of his liabilities as indorser upon them. They had been left with the Planters and Merchants Bank of Mobile, for collection, and judgments recovered upon them as stated. Lindsey represented that all, or nearly all the parties except himself upon the paper were insolvent, and that little, if any thing, could be realized on the judgments. And he proposed to take them and give a note for $20,000, made by himself, and indorsed by four other persons, citizens of Alabama, who he represented were responsible, and would pay the note at maturity, if Rogers would make a new advance *to him of $10,000 on the note of one Hudgings, a citizen of Virginia. [*443

Upon the faith of these representations, and after some inquiries into the responsibility of the parties, Rogers agreed to the proposition, and took the note of $20,000, which was payable the first of January thereafter, and advanced the $10,000 on the Hudgings note; and at the same time gave to Lindsey the following writing:—

"The President or Cashier of the Planters and Merchants Bank will please hold, subject to the order of Mr. J. G. Lindsey all the debts referred to in the inclosed letter from Mr. McFarlin, except the two drafts of McCollier Minge upon the Messrs. Ellicotts, of Baltimore, which, when collected, please place to my credit." 13th June, 1840.

The list of debts referred to in the letter of McFarlin were the securities that had been left with the bank at Mobile by Rogers for collection, and which had passed into judgments, as already stated.

When this note of $20,000 fell due, on the 1st of January, 1840, it was dishonored, and the paper duly protested. This note has never been paid.

Lindsey, after receiving the authority to control the securities and judgments in the bank at Mobile, returned, and made collections out of them to the amount of between $3,000 and $4,000.

Besides this amount, he has collected the judgment against Bennett to the amount of $6,292.66, principal and interest, that being the amount due at the date of the collection by the marshal, on the execution, June 5th, 1848. The judgment had been recovered March, 1840, and execution issued returnable November term following. An *alias* was issued 31st January, 1842, returnable March term following; and a *pluries* 24th December, 1842; a second and third, January and March, 1844; and a fourth and fifth, March, 1845, and April, 1848, on the last of which the sale took place of the property of Bennett.

The execution had been delayed by proceedings in the courts to stay the sale.

This bill was filed in the court below to arrest this $6,292.66, in the hands of the marshal, Rogers claiming that the money belongs to him. It has been brought into court, and awaits the final decree in the cause.

On the 24th December, 1842, Lindsey petitioned for the benefit of the Bankrupt Act, passed August 19th, 1841, and obtained his discharge on the 2d May, 1843.

None of the securities or judgments that he received from Rogers in June, 1840, at the time he gave him the note of *$20,000, is found in the list of his assets. The only allusion to them is an obscure reference in his list of creditors to the note of Bissell & Carville, which he says was given to C. D. Hunter as security for a debt due him.

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The ground upon which Rogers claims that he is entitled to the money collected on the judgment against Bennett, is: 1. That according to the agreement with Lindsey, at the time he took the note of $20,000, it was not intended to vest in the latter any interest in the securities and judgments that had been left in the Planters and Merchants Bank at Mobile, for collection, but only to confer an authority upon him to take charge of the settlement and collection of the same, so that the proceeds might be applied to the payment of the note. In other words, that there was no assignment of these judgments intended, but a power to settle and convert them into money for the purpose stated, as Lindsey's residence in Alabama enabled him to give his personal attention to the business; and as he was deeply interested in realizing the payment of them, as he was on all the securities.

2. That admitting there had been an absolute assignment to Lindsey, and that it was so intended, still the complainant is entitled to arrest the money in the hands of the marshal, and have it applied to his debt, on the ground that it was obtained by false representations, both in respect to the value of these judgments, Lindsey representing that they were worthless, and also in respect to the solvency and responsibility of the sureties upon the note of $20,000.

On the part of Lindsey, it is insisted, that this note was given on the express condition that the judgments in the bank at Mobile were to be assigned absolutely to him for his own benefit; and that no fraudulent representations, as alleged, were made by him at the time.

The first question must depend upon the effect of the written instrument that passed between the parties as the result of the negotiation between them, as we have no other evidence

on this branch of the case, except the allegations in the bill and answer. And, on looking at that instrument, we are satisfied that, upon a fair construction, it imports an authority to Lindsey to control the settlement and collection of these several demands; but not necessarily a transfer of the title to, or interest in, them.

This interpretation satisfies the words of the instrument; and there is nothing in the transaction itself, or in the relation in which the parties stood to each other, that should induce the court to give it a strained construction in favor of this defendant.

If a transfer of the interest had been contemplated, as the *instrument was drawn for the purpose of carrying into effect the agreement and understanding of the parties, [*445 it is surprising that words importing an assignment are altogether omitted, and those importing only an authority over the list of judgments used. It would have been most natural to have drawn an assignment in terms. Nor do we perceive that it could have been of any material importance to Lindsey to have stipulated for a transfer. The debt of $20,000 was his, and it would fall due in six months, and the purpose of giving this note as set up at the time, was to get some delay, so as to be able to realize something out of the securities in the bank at Mobile. And whether he, therefore, took a transfer of them, or a full authority to settle and collect them, would seem, in view of any honest purpose, a matter more of form than substance.

Our conclusion, therefore, is that Lindsey took no interest in these judgments, as assignee, by operation of the written directions given to the Planters and Merchants Bank, by Rogers, on the 13th June, 1840; nor is there any evidence in the case leading to that conclusion.

Having arrived at this result, it is unimportant to inquire into the question of fraud relied on as vitiating the assignment upon the assumption that one had been established. There is certainly very strong grounds for doubting as to the *bona fides* of the transaction on the part of Lindsey.

The bill states that he represented the sureties upon the note of $20,000 as men of undoubted means, and who would not allow their paper to be dishonored, and that, if he did not take it up at maturity, they would.

This Lindsey substantially admits in his answer. And yet, the note was dishonored, and no portion of it paid by these sureties, and, as is apparent from the evidence, the demand could not have been collected by force of law. It is unimportant, however, to pursue this branch of the case.

The next and only remaining question in the case is, in respect to an interest set up by the defendant, Atwood, in this judgment against Bennet. He claims an interest to the amount of $2500, by an assignment from Lindsey, since his discharge under the Bankrupt Act, some time in the year 1843 or 1844, by way of securing the payment of an old debt due before the proceedings under that act.

The bill charges, that Atwood knew Lindsey had obtained the control of the judgment against Bennett by false representations; and that he conspired with him to consummate the fraud thus committed upon the complainant.

This allegation is not met and denied in the answer. Nor is there any denial of knowledge that Lindsey had obtained *446] no *interest in, or title to, the judgment from the plaintiffs in the same, or from Rogers the complainant. He says he does not remember that he ever saw any evidence of title to the judgment in Lindsey from Rogers & Gray, the plaintiffs, or from either of them, but avers, that he knew he had a title to the same from one Hunter. Neither does Atwood set up in his answer that he obtained the assignment of the interest he claims in the judgment *bonâ fide*, and without notice of the title of the complainant.

Under these circumstances, and in view of the nature of the defence set up by Atwood, it is quite clear he does not bring himself within the rule in equity which protects the title of a purchaser without notice. The bill virtually charged him with notice of the complainant's interest in the judgment, for the purpose of invalidating any claim that he might set up to the same under the assignment; and in order to protect himself, and to show that he was not in privity with Lindsey, he was bound to aver in his answer, that the purchase was made for a valuable consideration without notice.

Neither can he protect himself under the averment in the answer, that Lindsey obtained a title to the judgment from Hunter.

The facts are that Hunter, in the fall of 1841, took an assignment of this judgment from Lindsey, in consideration of a lot of land in Wilcox county, Alabama; and that in the spring of 1844 he reassigned the same, and took Lindsey's note for the demand. Lindsey, being the original party to the fraud, is disabled from setting up this title of Hunter, conceding it to be a good one against the complainant. The reassignment clothed him with no better title than he possessed when he assigned the judgment to Hunter.

A purchaser with notice may protect himself by obtaining

the title of a purchaser for a valuable consideration without notice, unless he be the original party to the fraud. The *bonâ fide* purchase purges away the equity from the title in the hands of all persons who may obtain a derivative title, except it be that of the original party, whose conscience stands bound by the violation of the trust, and a meditated fraud. 1 Story, Eq. Jur., 397, 398, and cases. Atwood, therefore, can derive no benefit from the purchase of Hunter, even if that had purged the equity of Rogers, as that equity immediately attached on the reassignment of the judgment to Lindsey, and bound it in his hands; and any one coming in under him chargeable with notice stands in no better situation.

In every view, therefore, that we have been able to take of the case, we think the decree of the court below erroneous, and *should be reversed, and the proceedings remitted; with directions to enter a decree that the complainant is entitled to the fund in court collected upon the judgment against Bennett, together with costs of suit in this court and in the court below. [*447

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, reversed with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to that court to enter a decree in favor of the complainant for the fund in court collected upon the judgment against Bennett, together with the costs of this suit in this court and in the said Circuit Court.

MORGAN MCAFEE, MADISON MCAFEE, AND JAMES ALFORD, PLAINTIFFS IN ERROR, *v.* JAMES T. CROFFORD.

In an action of trespass, for forcibly invading a plantation, carrying off some slaves, and frightening others away, it was proper for the plaintiff to give in evidence the consequential damages which resulted to his wood and corn.[1]

[1] See notes to *Day* v. *Woodworth*, *ante*, *363.

It was proper, also, to allow the defendant to give in evidence a judgment against the owner of the plantation, as principal, and himself as surety, and his own payment of that judgment. It was allowable, both as an explanation of his motives, and to show how much he had paid; both reasons concurring to mitigate the damages.

Evidence was also allowable to show that arrangements had been entered into between the principal and surety, whereby time would be given for the payment of the debt. This was allowable, as a palliation of the conduct of the principal in removing his slaves without the State.

Evidence was also admissible to show that the surety had not been compelled to pay the debt, by showing that the creditor had been enjoined from collecting it. This was admissible, in order to rebut the evidence previously offered on the other side.

It was proper for the court to charge the jury that, in assessing damages, they had a right to take into consideration all the circumstances.

THIS case was brought up, by writ of error, from the District Court of the United States for the Northern District of Mississippi.

It was an action of trespass brought by Crofford, who described himself as a citizen of Tennessee, but who had a plantation in Arkansas. The suit was brought against the *448] McAfees *and Alford, for acts which are described by the testimony stated in the first exception. In the course of the trial there was but one bill of exceptions taken, which included the whole case. It will be better understood by dividing the rulings of the court below, which is rendered necessary by the great length of the exception.

There were three exceptions to the admission of evidence, and one to the charge of the court to the jury. The declaration contained four counts to the following effect:

1st. For entering upon the defendant's plantation, in the State of Arkansas, and forcibly carrying off and converting to the use of plaintiffs in error, a number of slaves of the value of $15,000.

2d. For entering, and by threats of violence, chasing and frightening away from said plantation, other slaves of the value of $40,000, whereby said slaves were greatly damaged and lessened in value.

3d. For the injury done to the defendant's business of planting, and cutting and selling cord-wood, by thus forcibly carrying off some of the slaves and frightening away others.

4th. For the value of the services of the slaves during the time they were gone from the defendant's plantation and wood-yard.

The plea was the general issue with an agreement, entered of record, that any matter constituting a good plea in bar might be given in evidence upon reasonable notice.

First Exception. Upon the trial, Crofford, the plaintiff,

offered to read the depositions of three of his neighbors, Parker, Driver, and Kafkemeyer, who testified in substance to the following facts:—About the last of October, or 1st of November, 1846, the McAfees and Alford, assisted by several other persons, all armed, crossed the Mississippi River in skiffs, and forcibly carried off twenty-one slaves from Crofford's plantation. Crofford was absent. His overseer remonstrated, but the assailants replied that they intended to take all the negroes, and would kill any one who interfered. There were forty-two negroes, men, women, and children, on the plantation; but, as the assailants were engaged for several days in catching and transporting them to the opposite bank of the river, four women and seventeen men were so frightened that they ran off into the swamps, and remained out five or six weeks. Crofford had some 1,800 or 2,000 cords of wood cut at the time of these occurrences, which, on account of the absence of the slaves, was either floated off or greatly injured by a subsequent rise in the river. In addition to this, the neighbor's hogs, cattle, horses, and mules broke into the plantation, and nearly destroyed 120 acres of growing corn; all of which was the consequence of the absence of the hands.

*These witnesses testify, that the slaves carried over the river, being twenty-one in number, were worth [*449 $12,580; wood worth $2.50 per cord, and corn 50 cents per bushel.

To all this testimony the plaintiffs in error objected, but the court overruled the objection, and the depositions were read.

The counsel for the defendants below excepted.

Crofford then proved that his plantation was in Crittenden county, Arkansas, and then closed his case.

Second Exception. The defendants below, on their part, offered in evidence the record of a judgment, rendered in one of the courts of Mississippi, in favor of the Commercial Bank of Manchester against James T. Crofford and Morgan McAfee, for the sum of $4,143.93, together with divers writs of *fi. fa.* issued thereon, levied upon Crofford's property, delivery-bond given and forfeited, and *fieri facias* issued upon this. By virtue of this last *fi. fa.* the slaves forcibly carried away from the plantation, in Arkansas, were levied upon and most of them sold, producing the sum of $6,132, which fully satisfied the said execution.

The McAfees also proved that Morgan McAfee was only security for Crofford in the aforesaid judgment, and that at the time of executing the delivery-bond mentioned above,

Crofford promised not to remove his negroes from Tallahatchie county, until said debts should be paid.

The McAfees then introduced a witness whose evidence, drawn out upon cross-examination, constituted the subject of this exception. The witness was introduced to prove various admissions made by Crofford in reference to the amount of his corn crop and his cord-wood; which witness, upon cross-examination, stated, that in the same conversations Crofford said that Morgan McAfee had agreed with him to obtain from the said Bank of Manchester an extension of one, two, and three years, in which to pay the said debt, and also to credit thereon a judgment of Crofford against Morgan McAfee, in the United States District Court at Pontotoc, for about $1,500 or $2,000. To this evidence, elicited on cross-examination, the McAfees excepted.

Third Exception. The McAfees then proved that before the trespass complained of, Morgan McAfee had paid the debt to the Bank of Manchester, which had assigned the judgment to Madison McAfee.

As rebutting testimony, Crofford offered to introduce the record of a proceeding by *quo warranto* in one of the courts in Mississippi, by which it appeared that at the time of the sale of the negroes upon said execution, the said bank, its agents, and its assignees, were enjoined from any of its demands, though the levy upon a part of the negroes was made before the execution of the writ of injunction. Crofford also of-
*450] fered to *introduce records showing that he had existing unsatisfied judgments to the amount of $2,847 against Morgan McAfee. The defendants below objected to the admission of this rebutting testimony, but the court overruled the objection and admitted it, whereupon the McAfees excepted.

The charge of the court was as follows: The court instructed the jury that a trespass had been committed by the defendants, "if the jury believe from the testimony that the defendant had a judgment in Mississippi against the plaintiff, the defendant would not be authorized to collect said judgment by forcibly removing the property of the plaintiff from the State of Arkansas to the State of Mississippi."

"That in assessing damages the jury had a right to take into consideration all the circumstances;" to which said first charge the counsel for the defendants at the time excepted, before the jury returned from the bar of the court; and to which several matters and things the said defendants, by their said counsel, excepted, and tendered their said bill of exceptions as hereinbefore stated, and before the jury retired

from the court, and prayed that the same might be signed and sealed by the court and made part of the record herein; all which is done accordingly."

S. J. GHOLSON. [SEAL.]

The jury found a verdict for the plaintiff and assessed the damages at $10,613.72.

The cause was argued in this court by *Mr. Brooke* and *Mr. Volney E. Howard*, for the plaintiffs in error, and *Mr. Snethen* and *Mr. F. P. Stanton* for the defendant in error.

The counsel for the plaintiffs in error contended, that the verdict is manifestly against the testimony. The principle upon which damages are given in an action of trespass is to indemnify the plaintiff for what he has actually suffered, taking into consideration all the circumstances of the case. *Bateman* v. *Goodwyn*, 12 Conn., 575. In this case Crofford in reality sustained no damage, as the property taken was disposed of in discharge of his own debt. "In an action of trover, when the property converted has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, it goes in mitigation of damages." *Pierce* v. *Benjamin*, 14 Pick. (Mass.), 356; *Prescott* v. *Wright*, 6 Mass., 20; *Caldwell* v. *Eaton*, 5 Mass., 399; 14 Shep. (Me.), 126.

Whatever damages Crofford sustained, if any, were the consequences of his own wrong in removing this property beyond the limits of the State of Mississippi, in violation of his agreement with his surety, McAfee. If this verdict is permitted to *stand, Crofford will be suffered to take [*451
advantage of his own wrong in having his debt paid, amounting, at that time, to over six thousand dollars, and in addition receive, as a bounty for his dishonesty, the large amount assessed by the jury.

The estimate put upon the negroes by the witness, Parker, is proven to be too great by the result of the sale, they only bringing, at said sale, about half of said estimate. There is no proof or pretence that the sale was not fair. It was made by the sheriff, and is to be presumed to have been made in a legal manner, after due notice given.

The evidence as to the consequential damages to the corn and wood is too loose and indefinite to have received the consideration of the jury. It should have been ruled out by the court.

"Consequential damages are not recoverable in an action

of trespass *vi et armis*, for taking away goods." *Alston* v. *Huggins*, 2 Const. (S. C.), 688.

"Opinions of witnesses as to the amount of loss inadmissible." 23 Wend. (N. Y.), 425.

McAfee may not have acted strictly within legal bounds in going to Arkansas, and taking the negroes by force; but when it is recollected that he was Crofford's surety, that Crofford had deceived and defrauded him by taking the negroes out of the State, thus leaving his surety to suffer, and this, too, in violation of an express agreement, surely Crofford, the original wrongdoer, whose criminal acts superinduced the necessity of McAfee's proceedings, cannot be heard to complain.

Crofford recognized the payment and satisfaction of the bank judgment by endeavouring to take advantage of it in defence to a suit brought against him in equity, wherein the lien of this judgment was complained of. The deposition of J. J. Hughes, the cashier of the bank, proves the suretyship of McAfee.

The record of the proceedings against the bank is wholly irrelevant, and the court erred in admitting it. At the time of the transfer of the judgment to Madison McAfee, the proceeding had not been commenced. No judgment of forfeiture was ever rendered. The other judgments introduced are also irrelevant, and have no bearing whatever on the case. At most they offset one another, and, as far as they are concerned, show but little indebtedness either way.

In cases of this sort, appealing to principles of natural justice more than to strict rules of law, it is conceived that the equity maxim, that the complaining party should come into court with clean hands, applies here as well as in a court of chancery.

It may be said that the bank judgment was satisfied by the payment by McAfee, and that the transfer to his brother was *452] *thereupon inoperative. Be this as it may, the moral obligation on Crofford remained the same. The attempt to evade the payment of a just debt, and suffer the burden of it to fall on his surety, is the wrong complained of on our part—the wrong that gave occasion to the trespass and its consequences.

The charge of the court is manifestly incorrect. It assumes the fact that a trespass had been committed, and leaves nothing for the jury to determine in this particular. The remainder of the charge,—that "if the jury believe, from the testimony, that the defendant had a judgment in Mississippi against the plaintiff, the defendant would not be authorized

to collect said judgment by forcibly removing the property of the plaintiff from the State of Arkansas to the State of Mississippi," may be, and doubtless is, a correct proposition of law; but it does not necessarily follow that the existence of the judgment might not have been properly adduced to show that no actual damage had accrued. The manner in which the charge was given was well calculated to impress the jury with the idea that, although they "had a right to take into consideration all the circumstances," yet that the judgment was no circumstance at all worthy of their consideration.

The counsel for the defendant in error contended that the only questions arising upon this record are: first, upon the charge to the jury; and, second, as to the several items of proof made by the defendant in error, and excepted to by the plaintiffs.

As to the first of these questions, no authorities can be necessary. There is obviously no error in the instructions of the court to the jury. No bad faith on the part of Crofford, nor any breach of contract, could have justified the plaintiffs in error in going with an armed band into the State of Arkansas, and taking property by force, in order to subject it to an execution in Mississippi. This was a trespass, and if the judge said so to the jury, he was fully sustained by the proof. But this court has said, "it will not examine the charge of the inferior court to the jury upon mere matters of fact and its commentaries upon the weight of evidence. Observations of that nature are understood to be addressed to the jury merely for their consideration as the ultimate judges of the matters of fact." *Carver* v. *Jackson ex dem. Astor et al.*, 4 Pet., 80, 81; *Evans* v. *Eaton*, 7 Wheat., 426; *Garrard* v. *Lessee of Reynolds et al.*, 4 How., 123; *Games et al.* v. *Stiles*, 14 Pet., 322; *Hyde & Gleises* v. *Boraem & Co.*, 16 Pet., 169.

The exceptions to the testimony of the witnesses who proved the trespass, and the damages resulting to the crops and cord-wood, were evidently not well taken. All the direct and *necessary consequences of a trespass may be given in evidence, to enable the jury to estimate [*453 the full amount of damages incurred. *Dickinson* v. *Boyle*, 17 Pick. (Mass.), 78. In this case the court say: "Where the act complained of is admitted to have been done with force, and to constitute a proper ground for an action of trespass *vi et armis*, all the damage to the plaintiff, of which such injurious act was the efficient cause, and for which the plaintiff is entitled to recover in any form, may be recovered in such

action, although in point of time such damage did not occur till some time after the act done." *Johnson* v. *Courts*, 3 Harr. & M. (Md.), 510; *Ogden* v. *Gibbons*, 2 South. (N. J.), 536; *Duncan* v. *Stalcup*, 1 Dev. & B. (N. C.), 440; *Hardin et al.* v. *Kennedy*, 2 McCord (S. C.), 277; *Damron* v. *Roache*, 4 Humph. (Tenn.), 134; *Wilcox* v. *Plummer*, 4 Pet., 172, 182; *Barnum* v. *Vandusen*, 16 Conn., 200. All the circumstances of aggravation may be proved without minute averment. *Warfield* v. *Walter*, 11 Gill & J. (Md.), 80; *Hammatt* v. *Russ*, 4 Shepl. (Me.), 171; *Carrington* v. *Taylor*, 11 East, 571; *Keeble* v. *Hickeringill*, Id., 574, *n.;* Id., 11 Mod., 74, 130; Id., 3 Salk., 9; 2 Greenl. Ev., §§ 268, a, 254, 270, 272, 635, a. See note, 2 Greenl., § 243, and the authorities there quoted.

The exception to the statements of Crofford, drawn out upon cross-examination, is equally untenable. They were parts of the same conversations which the witness detailed in his examination in chief. But the testimony was not material in any point of view, and could not have influenced the verdict of the jury. 1 Greenl. Ev., § 201, and the authorities quoted in the note thereto.

As to latitude of cross-examination, see 1 Greenl. Ev., §§ 449, 450, and notes.

As to immateriality of testimony, *Turner* v. *Fendall*, 1 Cranch, 131.

Erroneous instructions, if immaterial, not cause of reversal. *United States* v. *Wright*, 1 M'Lean, 509; *Forsyth* v. *Baxter*, 2 Scam. (Ill.), 9.

Exceptions taken to the records introduced as rebutting testimony—the proceeding by *quo warranto*, and the judgments in favor of *Crofford* v. *McAfee*. As to the first of these, it is certain the Bank of Manchester, at the time of the execution sale of Crofford's negroes, was enjoined by a competent tribunal from making that sale. It was competent to show this fact, not to invalidate the sale, but to show the reckless disposition of the parties, and their contempt of lawful authority. It does not appear what effect this testimony had upon the case, or what instructions the judge gave in regard to it. The jury seem to have deducted the debt of $6,000, which was paid by the sale of the slaves, from the whole amount of damages, and given *their verdict for the balance. This appears from the fact that the amount of the verdict is not equal to the value of the slaves actually taken away and sold, as that value was proved by three uncontradicted witnesses, besides the damage to the crop, the wood, and the slaves who took refuge in the

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swamps. The proof of the injunction could not have operated to prevent this mode of adjustment by the jury; it was admissible evidence only to show the *animus* of the plaintiffs in error; their disregard of the laws of their own State as well as those of Arkansas, throughout the whole of these violent proceedings.

The judgments of *Crofford* v. *Morgan McAfee* were wholly immaterial to the case, except so far as they tended to palliate the bad faith of Crofford in leaving his security to pay his debt. In this point of view they were admissible as rebutting testimony; feeble and unimportant it may be, but still admissible. *Havis* v. *Taylor*, 13 Ala., 324; *Gilpins* v. *Consequa*, Pet. C. C., 85; *Pettibone* v. *Deringer*, 4 Wash. C. C., 215. Even if the admission of this testimony was erroneous, the court will not reverse, when it is plainly immaterial and inoperative in the case. *Zacharie & wife* v. *Franklin*, 12 Pet., 151.

Mr. Justice McLEAN delivered the opinion of the court.

This case is before us on a writ of error, to the District Court for the Northern District of Mississippi.

A judgment was obtained in favor of the Commercial Bank of Manchester against James T. Crofford and Morgan McAfee, in the State Court of Tallahatchie county, Mississippi, the 24th of November, 1840, for the sum of $4,143.93, on which an execution was issued, and levied on sundry slaves of Crofford, who owed the debt; McAfee, the other defendant, being his security, a delivery-bond for the property was executed, which was forfeited the 22d of November, 1841, by which forfeiture the bond had the effect of a judgment. On this latter judgment an execution was issued, which was levied on twenty-one negroes owned by Crofford, all of whom, except three, were sold by the sheriff for $6,132.

Some time after the first levy, it appears that Crofford removed with his slaves across the Mississippi, and settled on a plantation on that river, in Arkansas, not far from his former residence in Mississippi.

A short time before the last levy, Morgan McAfee, with an armed force, in the absence of Crofford, crossed the river, seized, from day to day, twenty-one of the negroes on his plantation, and brought them into Mississippi. The other slaves of Crofford were alarmed and absconded, and were not reclaimed before the lapse of from four to six weeks. The overseer of Crofford *remonstrated, and some steps [*455
were taken to arrest the proceedings of McAfee, but his force was too strong, and he threatened to kill any one

who should interfere with him in taking off the negroes. For this trespass an action was brought against the plaintiffs in error. In the declaration, it was alleged, that by reason of the trespass, the plaintiff lost the services of thirty negro men and as many women, &c., which, through fear, absconded, besides the number taken by McAfee, and that he was subjected to great expense in reclaiming them; that by taking the slaves, chasing, and frightening the others from his farm and wood-yard and from and about the business of the plaintiff, he was greatly damaged, &c. The defendants pleaded not guilty, &c. A verdict for $10,613 was rendered by the jury, on which a judgment was entered. To reverse that judgment the writ of error was brought.

The exceptions arise out of the rulings of the court and the charge to the jury.

The trespass was proved as charged in the declaration. The party were several days in searching for and arresting the negroes, and all on the plantation not taken were frightened and fled.

The male slaves were employed in cutting cord-wood, and supplying Crofford's wood-yard He had, at the time of the trespass, it was proved, from eighteen hundred to two thousand cords of wood cut on the low ground back from the river, which was worth two dollars per cord, and sold at the yard for two dollars and fifty cents; the hauling cost fifty cents per cord; that the river became swollen by rain, and having no hands to remove the wood to the yard, much of it was carried off by the flood, and what remained, was so injured by being under water as to make it unsalable; that having no hands to attend the crop, the horses, mules, and other stock of the neighborhood, broke into the cornfield and destroyed a large part of it; that corn was worth fifty cents a bushel at that time. There were one hundred and twenty acres in corn, which, with proper attention and protection, would have yielded forty bushels to the acre.

The defendant offered in evidence the judgment of the Commercial Bank against Crofford, as principal, and himself as surety, and a receipt for the payment of the judgment, amounting to the sum of $6,233.38, in mitigation of the damages claimed on account of the trespass, which, though objected to by the plaintiff, was admitted.

The evidence was admissible on two grounds. First, to explain the motive of the plaintiffs in error in committing the trespass, and thereby, in some degree, to mitigate the
*456] damages *claimed. Second, to reduce or abate from the damages the amount paid in discharge of the judg-

ment, not as an offset, but in mitigation of the injury done. This right resulted from the relation between the parties. McAfee was a co-defendant with Crofford in the judgment, but he was security only, and he had a right to expect, from the forthcoming bond and the assurances of Crofford, that the negroes first levied on would be delivered up in satisfaction of the second execution. In an answer in chancery, he alleged that the bank judgment had been satisfied. A stranger could not take the property of his neighbor, have it sold under process, and apply the proceeds in discharging the debts of his neighbor, and then claim the right to have such payments received as a set-off, or in mitigation of the damages done by the trespass.

The plaintiff below then introduced the transcripts of two judgments in the District Court against Morgan McAfee, one in favor of Crofford, the other assigned to him, amounting to twenty-one hundred dollars and upwards, which, though objected to by the defendants, was admitted by the court. For what purpose this evidence was introduced was not stated; and under such circumstances, if the records of the judgments were admissible for any purpose, the exception to the evidence cannot be sustained.

It was proved, that at New Orleans, before the trespass was committed, McAfee agreed with Crofford to return to Mississippi and make an arrangement with the bank to give one, two, and three years, for the payment of the judgment against Crofford and himself; and he agreed to credit on said judgment the above judgments against himself.

We think that those judgments were properly admitted as evidence, because they conduced to show that Crofford, in removing with his slaves to Arkansas, was less blamable than charged by the defendant McAfee, as he had grounds to believe that a part of the bank judgment would be paid by McAfee, and that an indulgence of some years would be obtained, for the payment of the balance.

The judgments being admissible on this ground, it is unnecessary to inquire whether they were not evidence to reduce the bank judgment paid by McAfee, under his agreement. This point might have been made, if the court had been requested to instruct the jury that this effect could not be given to the evidence by the jury. The judgments being admissible for the purpose first stated, it is unnecessary to inquire, if it were practicable to do so, which it is not, how the evidence was applied by the jury.

The record of certain proceedings against the Commercial *Bank of Manchester, in the nature of a *quo* [*457

warranto, was offered by the plaintiff in evidence, to show that the bank was enjoined from proceeding to collect debts. This proceeding was had in the Circuit Court of Yazoo county. An injunction was issued as stated. And at November term, 1846, the court decided on demurrers filed in favor of the bank, from which decision an appeal was taken to the High Court of Errors and Appeals of the State. The court admitted the evidence, overruling the objections made to it.

These proceedings, it is presumed, were pending in the Court of Appeals at the time the trespass was committed, as the contrary does not appear; but it is not perceived that the evidence could have had any other effect than to rebut the mitigating circumstances relied on by the defendants. In this view the evidence was admissible.

The loss of the services of the slaves, by the trespass, necessarily resulting from the abduction of a part of them, and driving off the others, are clearly within the rule of damages in trespass; and we think the loss of the cord-wood, as proved, and the injury to the corn-crop, were also within it.

It is argued, that unless the inclosure for the protection of the crop was such as the law required, no damages could be allowed for the trespasses charged, and that the owners of the trespassing animals were liable, and consequently the plaintiffs in error were not liable.

Whether there was, at the time, a law in Arkansas regulating inclosures, we have not examined, as it is a matter which can have no influence in the case. The question was fairly submitted to the jury, whether, under the facts and circumstances proved, the injury to the corn-crop resulted from the loss of the hands. This was a matter of fact for the jury, whether the fence of the plaintiff was good or bad; if, by reason of the loss of the slaves, the breaches in the inclosure could not be repaired, or the plaintiff was unable to guard his field, as was his custom, was an inquiry for the jury; and in making up their verdict, they must have considered the facts and circumstances connected with this branch of the case.

The same remarks apply to the cord-wood. Had the plaintiff not been deprived of his hands, he might have removed, sold, or in some other manner, secured the wood from being floated off by the flood. In regard to the corn and the wood, if the damage was a consequence, which necessarily followed the loss of the hands, the plaintiffs in error were liable. The instructions of the court were general and correct. 5 Phil. Ev., 188, 189; *Barnum* v. *Vanduson*, 16 Conn., 200; *Carrington* v.* *Taylor*, 11 East, 571; 2 Greenleaf, Co., §§ 253, 254, 268, and 270, 272, 635 *a*.

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The trespass was of an aggravated nature; notwithstanding the mitigating facts set up by the defendants, it was lawless and wholly inexcusable. It was a resort to physical force in defiance of law, and under such circumstances as to endanger life and property. Such a procedure should be reprehended by every good citizen. It gives a high claim to the injured party for exemplary damages. We think there was no error in the proceedings, consequently, the judgment of the District Court is affirmed with costs.

ORDER.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed, with costs and damages at the rate of six per centum per annum.

CATHARINE HILL, PLAINTIFF IN ERROR, *v.* JOSEPH W. TUCKER, EXECUTOR OF ABNER ROBINSON, DECEASED.

The relations or privity between executors and their testators in Louisiana, do not differ from those which exist at common law.

The interest of an executor in the testator's estate is what the testator gives him; that of an administrator, only that which the law of his appointment enjoins.

Hence, executors in different States are, as regards the creditors of the testator, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor.

Although a judgment obtained against an executor in one State is not conclusive upon an executor in another State, yet it may be admissible in evidence to show that the demand had been carried into judgment, and that the other executors were precluded by it from pleading prescription or the statute of limitations upon the original cause of action.[1]

Therefore, where a person appointed executors in Virginia, and also in Louisiana, and the creditors obtained judgments against the Virginian executors, without being able to obtain payment, and then sued the executors in Louisiana, the Virginian judgments were admissible evidence for the above-mentioned purposes.

The law of Louisiana bars, by prescription, all actions brought upon instru-

[1] FOLLOWED. *Goodall* v. *Tucker*, *post*, *469. It is otherwise as to a judgment against an administrator in another State. *Stacy* v. *Thrasher*, 6 How., 44; *McLean* v. *Meek*, 18 Id., 16; *Dent* v. *Ashley*, Hempst., 54. But compare *Wilkins* v. *Ellett*, 9 Wall., 740.

ments negotiable or transferable by indorsement or delivery, unless such actions are brought within five years. But this does not include due-bills or judgments.

THIS case was brought up by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

*459] *It was argued in conjunction with the succeeding case of *Goodall* v. *Tucker*, but the facts being somewhat different, they are reported separately.

On the 6th of December, 1842, Abner Robinson, of the city of Richmond, Virginia, made his last will, and appointed William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana, his executors.

On the 21st of December, 1842, the will was proved in Virginia, and letters testamentary granted to Johnson and Allen, the executors.

Tucker qualified as executor in Louisiana, but at what time the record did not show.

On the 29th of February, 1848, Catharine Hill filed her petition in the Circuit Court of the United States for the Eastern District of Louisiana against Tucker, as executor.

The proceedings in the Circuit Court, together with the points excepted to, are all stated in the opinion of the court, and need not be repeated.

It was argued in this court by *Mr. Johnson* and *Mr. Duncan*, for the plaintiff in error, and *Mr. Taylor*, for the defendant in error.

The points made by the counsel for the plaintiff were the following:

1. That the judgments in Virginia were evidence against the defendants, they being coexecutors with the defendants in such judgments. *Stacy* v. *Thrasher*, 6 How., 58; 1 Salk., 299; 1 Com. Dig. Adm'r, B., 9; 2 Bl. Com., 507; *Dixon's Ex'rs* v. *Ramsay's Ex'rs*, 3 Cranch, 319, 1 Cond. Rep., 547; 3 Bac. Ab. Ex'rs and Adm'rs, p. 30, 52.

2. That if the judgments were not evidence, the plaintiffs were entitled to recover upon the original causes of action, they being proved, and not being barred by the Louisiana law of prescription. Article 3505 of the Civil Law says: "Actions on bills of exchange, notes payable to order or bearer, except bank-notes, those of all effects negotiable or transferable by indorsement on delivery, are prescribed by five years, reckoning from the day when these engagements

were payable." Article 3517 provides that "a citation served upon one joint-debtor, or his acknowledgment of the debt, interrupts prescription with regard to all others, and even their heirs."

In Goodall's case the suit was brought on the 29th February, 1828, less than ten years after the bond sued upon matured.

In Louisiana ten years is the limitation, and the law upon the subject is always the law of the forum. *Lacoste* v. *Benton*, 3 La. Ann., 220; *Spiller* v. *Davidson*, 4 Id., 171; *Graves* v. **Routh, Adm'r*, 4 Id., 127; *Young* v. *Crossgrove*, Id., 234, 235; *Wheeling* v. *Preston*, 12 Rel., 141; 2 La. Ann., 315, 646; Story, Confl. of Laws, 576. [*460

In Hill's case the same authorities are referred to, and she had a right to sue in her own name, she having been recognized by the District Court as universal legatee, and being assignee of the judgments. 10 Mart. (La.) Rep., 117; 2 Mart. (La.) N. S., 296.

Mr. Taylor, for the defendant in error.

Upon the trial of the cause, the court decided, as if instructing a jury, these two propositions:

1st. That the Virginia judgment against Joseph Allen and William R. Johnson, executors of the last will and testament of Abner Robinson, appointed and qualified under the will in Virginia, was not evidence against the defendant; and

2d. That the original cause of action as to the defendant was barred by prescription, and the plaintiff excepted to the two decisions. If there be no error in these decisions, the judgment of the court below must be affirmed.

I. In Louisiana testamentary executors are merely administrators in the most limited sense of the term. They have none of the qualities, capacities, or rights of executors under the common law. No argument, however extended, would make this clearer than a simple reference to the articles of the Louisiana Code, relating to the administration of estates of decedents under the authority of law. Articles 1091, 1106 to 1123, 1126 to 1148, provide for the appointment of persons to administer the estates of persons dying intestate. Articles 1651 to 1655, 1670, 1671, and 1672, 1659, 1661, 1662, 1663, 1666 to 1668 provide for the appointment of persons to administer the estates of persons who leave testaments, and define their powers. From an examination of these articles, it will be at once apparent that a testamentary executor differs in no respect, so far as to his rights, powers, and duties,

from the ordinary administrator. And if this be true, then it is certain that the record in question could not be evidence against the defendant, for, as the learned Story has remarked in his Conflict of Laws, § 522, "When administrations are granted to different persons, in different States, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for in contemplation of the law there is no privacy between him and the other administrator." Without citing other authorities on this point, I will merely refer to the case of *Stacy* v. *Thrasher*, decided by this court, (6 How., 58,) in which the doctrine is fully recognized. See *461] *Deneale* v. *Stump's Ex'rs*, 8 Pet., 531. If it be true, as there stated by Chief Justice Marshall, that "it is understood to be settled in Virginia, that no judgment against the executors can bind the heirs, or in any manner affect them," and that "it could not be given in evidence against them," it is not easy to perceive that there was error in this decision.

II. The law of the forum applies as to prescription. Code of Practice, 13; Story, Confl. of Laws, §§ 576, 578; *Le Roy* v. *Crowninshield*, 2 Mason, 151; *Huber* v. *Steiner*, 29 E. C. L., 308, (2 Bing. N. C., 202).

Actions "on all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements were payable." C. C. of La., 3505. And this prescription runs "against persons residing out of the State." C. C., 3506.

To make our law of prescription applicable, it is necessary that the obligation sued on be one transferable by indorsement or delivery, and the question whether it be in fact so transferable is to be decided by the law of the place where the contract was entered into. Story, Confl. of Laws, § 242; Code of Practice of La., 13. Is the bond sued on negotiable or transferable by indorsement or delivery? This must be determined by the common law, as received and in force in the State of Virginia, where the instrument under consideration was executed.

I will not weary the court by going into an examination of the original effects of assignments of incorporeal rights under the common law, or of the modes of enforcing them. Nor will I give an account of the origin and peculiar character of bills of exchange, growing out of the necessities of trade. It is sufficient for my present purpose to remark that promissory notes, notwithstanding the exigencies of commerce, did not

acquire this peculiar feature,—the capacity of being transferred by indorsement or delivery,—until it was given to them by the statute of Anne, when, for the first time under the common law, they were made assignable at law, and were placed on the same footing as bills of exchange. Bonds and other instruments in writing were made assignable in the same manner in Virginia, by statute, in 1748, which was confirmed by the act of 1786. 1 Rev. Code, 484. Such bonds as the one sued on became, from the adoption of these statutes in Virginia, transferable by simple indorsement, or by mere delivery. *Seymour* v. *Van Slyck*, 8 Wend. (N. Y.), 421; *Downing* v. *Backenstoes*, 3 Cai. (N. Y.), 136. And the very point has been determined in Virginia. *Mackies's Ex'rs* v. *Davis*, 2 Wash., 219; *Drummond* v. *Crutcher*, Id., 218.

*Mr. Justice WAYNE delivered the opinion of the court. [*462

This case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

It was argued with the case of *Goodall* v. *Tucker*, but the facts being somewhat different, and the prayers to the court not exactly alike in both cases, it will be necessary to consider them separately.

First then as to Catharine Hill's case.

She filed a petition in February, 1848, in the Circuit Court of the United States for the Eastern District of Louisiana against Tucker, the executor of Robinson. She was the widow and sole devisee of James P. Wilkinson, who resided in Richmond, Virginia, and after his death intermarried with Hill, by whose authority she prosecuted this suit.

Robinson lived also in Richmond, although his property was chiefly situated in Louisiana. In December, 1842, Robinson died in Richmond, having made a will a few days before his death, and appointed, as executors, William R. Johnson and Joseph Allen, of Virginia, and Thomas Pugh and Joseph W. Tucker, of Louisiana. Johnson and Allen qualified as executors in Virginia, and Tucker in Louisiana.

The causes of action, in the suit brought by Catharine Hill, were the four following, which will be separately noticed under the letters A, B, C, D.

[A] On the 9th of December, 1839, Archer Cheatham made a promissory note, payable ninety days after date, promising to pay to the order of Abner Robinson and Isham Puckett one thousand dollars, negotiable and payable at the Bank of Virginia. It was indorsed by Robinson and Puckett,

and came into the possession of Wilkinson. Not being paid at maturity, it was protested.

In March, 1840, Wilkinson brought an action against the drawers and indorsers in the Circuit Superior Court of Henrico county, Virginia, and recovered a judgment.

In July, 1840, he issued an execution, which, in August, was suspended until further orders. Cheatham and Puckett soon afterwards took the benefit of the Bankrupt Act passed by Congress. Nothing further was done as to this claim until Catharine Hill filed her petition as above stated.

[B] On the 20th of November, 1840, Robinson gave the following due-bill.

"$575. Richmond, November 20, 1840. Due James P. Wilkinson, for value received (viz., cash loaned) five hundred and seventy-five dollars. Given under my hand this day and date as above written. Abner Robinson."

In February, 1843, Wilkinson brought a suit in the Henri-
*463] co *County Court, against Johnson and Allen, the Virginia executors of Robinson, and in the ensuing June obtained a judgment. A *fi. fa.* was issued, but the return was "no effects found."

[C] On the 19th of August, 1842, Robinson made the following single bill.

"$200. Richmond, August 19th, 1842. Due James P. Wilkinson, two hundred dollars for money borrowed this day, as per check on the Farmers Bank of Virginia, of the same date, &c. Given under my hand and seal as above. Abner Robinson. (Seal.)"

In February, 1843, Wilkinson brought a suit against Johnson and Allen, upon this bill, and obtained a judgment in the following June. A *fi. fa.* was issued upon this and the same return made as in the preceding cases, viz., "no effects found."

[D] In October, 1843, one Bolling S. Dandridge brought a suit against Robinson for two hundred dollars, being one year's wages as overseer. After Robinson's death, it was revived against his executors. In August, 1843, Dandridge obtained a judgment, and issued a *fi. fa.;* but the same return was made as above, viz., "no effects found." On the 1st of February, 1845, Dandridge assigned this judgment and execution to Wilkinson.

Not long after this, Wilkinson died. The record does not show when, but in April, 1846, a succession was opened in Louisiana, upon his estate, and after sundry proceedings in opposition, which it is not material to mention, his widow, Catharine, was recognized as the rightful representative of

the estate. But this did not take place until May, 1847. In the mean time she had taken out letters testamentary in Virginia, in August, 1846, and married Hill in December, 1846.

On the 29th of February, 1848, Catharine Hill filed her petition against Tucker, in the Circuit Court of the United States for the Eastern District of Louisiana, claiming the several sums of money mentioned in the four preceding classes.

Tucker filed his answer, alleging "that the judgments set forth were obtained in Virginia, in proceedings to which, he, in his capacity of executor, was no party, and that they are therefore not binding on the succession of Robinson in Louisiana. That on one of the obligations, to wit, that made by Cheatham for $1,000, dated 9th December, 1839, Robinson, if he indorsed at all, was joint indorser with one Puckett, and was in law bound only for one half of the sum. That the actions on the demands upon which these judgments rest, are barred by the prescription of five years."

The cause came up for trial before the court without a jury, in November, 1849, when a judgment was given against Tucker. This was afterwards stricken out and a new trial granted. *Tucker then filed a supplemental answer [*464
by way of peremptory exceptions to the petition, as a plea of prescription. It stated, in substance, that as to the judgment for $1,000 against Robinson, which was rendered during his lifetime, the plea of limitations was interposed; that Allen and Johnson were qualified as executors in Virginia, on the 21st of December, 1842, and that more than five years elapsed between the date of such qualification and the institution of this suit; and that by the statute of limitations of the State of Virginia, the claim was barred by the expiration of five years.

In May, 1850, the cause came up for argument a second time before the court. At the trial, the causes of action designated as B, C, and D, were proved by evidence in Virginia, taken under a commission, and records of the court as to the several judgments were given in evidence. The other facts, above stated, were also proved.

After the evidence was closed the plaintiff asked the court to decide, as if instructing a jury upon the evidence, as follows:

"1st. The testator, Robinson, resided and died in Virginia, leaving a will, which was duly proven in the proper tribunal after his death, in and by which he appointed the defendant and others his executors, and two only of his executors made probate, and qualified in the proper court in Virginia; and if

suits were instituted by the plaintiff, and by others who have assigned their judgments and the causes of action on which their judgments were founded to the plaintiff, against the executors of Robinson, who qualified in Virginia, and obtained judgments against those executors in the appropriate courts of Virginia having jurisdiction of such matters; and if upon those judgments executions issued and were returned by the proper officers in substance *nulla bona;* and if the defendant, a citizen of Louisiana, who never qualified as executor in Virginia, is a co-executor of the same estate, who has proved the will in Louisiana, and taken on himself the execution thereof in Louisiana, has in hands ample assets in Louisiana, to pay all debts; and if the evidence fully establishes these facts, that then the judgments so rendered in Virginia, are evidence against the executor in Louisiana in this suit.

2d. That by the laws of Louisiana judgments are assignable, and that upon assigned judgments the assignee can maintain an action in his or her own name therefor.

3d. That under such a will as that of Robinson, produced in this cause, the co-executors, although in different States, that qualified and acted, derived the same powers from the same source over the same estate, and that unlike administrators, they are to such estate of the decedent privies in estate; and the *exemplifications of the records of the courts of Virginia, duly authenticated, which have been read in this cause, showing judgments against the only executors of Robinson who qualified in Virginia, in the appropriate court of probate of the domicil of the deceased, are evidence against the co-executor who qualified in Louisiana, and holds abundant assets in Louisiana.

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4th. That if plaintiff were not entitled to recover against defendant on the production of the records showing the judgments against the co-executors in Virginia, and that those judgments were unsatisfied, because of a lack of assets in the hands of the Virginia executors to satisfy the same, that they would be entitled to recover, on producing the further evidence to prove that those judgments in Virginia were rendered on good and valid, and subsisting and unsatisfied, causes of action against the testator, Robinson.

5th. That the plaintiff has produced sufficient proof of the several causes of action, on which the judgments read in evidence were founded, to justify a jury in finding for the plaintiff upon those several original causes of action.

6th. That the several causes of action set forth in the petition, independent of the judgments rendered thereon against

the co-executors in Virginia, are not, upon the testimony in this cause, barred by prescription.

7th. That upon all the evidence in this cause a jury might and should find a verdict for the plaintiff.

8th. That the several suits in Virginia, of which the records have been read, operated as a judicial interpellation to stop the running of prescription upon those several demands in favor of the defendant.

And the defendant objected to said several propositions, and the court sustained his objections, and decided all and each of the several propositions against the plaintiff, except the aforesaid proposition, No. 2; and to each of said decisions separately the plaintiff excepted.

And the defendant asked the court to decide—

1st. That no one of the records, read to the court in this cause, showing judgment against his co-executors in Virginia, was evidence against the defendant.

2d. That each and every one of the causes of action, set forth in the petition, and to which evidence had been adduced, was barred as to said defendant by prescription.

3d. That upon the whole evidence offered the plaintiff was not entitled to recover; and that upon the evidence a jury could rightfully, and should, find a verdict for the defendant; to each of which plaintiff objected.

And the court overruled the several objections of plaintiff, and *decided as asked by the defendant; and to each of said opinions of the court, the plaintiff excepted." [*466

We cannot concur in the suggestion made in the argument of this case, that the relations or privity between executors and testators in Louisiana differ from such as exist at common law. Louisiana, in her code, without adopting the terms of the civil law, makes the same distinction as is made at common law, between one called upon to administer the estate of an intestate, and one appointed to the office of executor by a testator. The responsibilities of both, as to the manner of settling the estate which they represent, depend upon the law of the State; but the relation between executor and testator is altogether different. The executor's interest in the testator's estate is what the testator gives him. That of an administrator is only that which the law of his appointment enjoins. The testator may make the trust absolute or qualified in respect to his estate. It may be qualified as to the subject-matter, the place where the trust shall be discharged, and the time when the executor shall begin and continue to act as such. He may be executor for one or several purposes —for a part of the effects in possession of the testator at the

time of his death, or for such as may be in action, if it be only for a debt due. But though the executor's trust or appointment may be limited, or though there are several executors in different jurisdictions, and some of them limited executors, they are, as to the creditors of the testators, executors in privity, bearing to the creditors the same responsibilities as if there was only one executor. The privity arises from their obligations to pay the testator's debts, wherever his effects may be, just as his obligation was to pay them. The executor's interest in the testator's estate is derived from the will, and vests from the latter's death, whatever may be the form which the law requires to be observed before an executor enters upon the discharge of his functions. When within the same political jurisdiction, however many executors the testator may appoint, all of them may be sued as one executor for the debts of the testator, and they may unite in a suit to recover debts due to their testator, or to recover property out of possession.

All of them, then, having the same privity with each other and to the testator, and the same responsibility to creditors, though they may have been qualified as executors in different sovereignties, an action for a debt due by the testator, against any one of them in that sovereignty where he undertook to act as executor, places all of them in one relation concerning it, and as to the remedies for its recovery: what one may plead to bar a recovery, another may plead; and that which will not bar a recovery against any of them, applies to all
*467] of them. Between administrators *deriving their commissions to act from different political jurisdictions, there is no such privity. This court has treated of this fully in two cases: In the case of *Aspden and others* v. *Nixon and others*, 4 How., 467, and in *Stacy* v. *Thrasher*, 6 How., 44. We refer to the former without citing any part of it, but it is full upon the point, and may be instructively read. But we shall cite a passage from *Stacy* v. *Thrasher* on account of its appropriateness to what has just been said in respect to the want of privity between administrators deriving their powers in different jurisdictions.

"An administrator under grant of administration in one State stands in none of these relations—of privity—to another administrator in another State. Each is privy to the testator, and would be estopped by a judgment against him, but they have no privity with each other in law or estate. They receive their authority from different sovereignties, and over different property. The authority of each is paramount to the other. Each is administrator to the ordinary from which

he receives his commission. Nor does the one come by succession to the other into the trust of the same property, incumbered by the same debts, as in the case of an administrator *de bonis non*, who may truly be said to have an official privity with his predecessor in the same trust, and therefore liable to the same duties." In that case, as a consequence of such reasoning, it was determined that an action of debt will not lie against an administrator in one of the United States, on a judgment obtained against a different administrator of the same intestate, appointed under the authority of another State.

For the same reasons, notwithstanding the privity that there is between executors to a testator, we do not think that a judgment obtained against one of several executors would be conclusive as to the demand against another executor, qualified in a different State from that in which the judgment was rendered. But such a judgment may be admissible in evidence in a suit against an executor in another jurisdiction, for the purpose of showing that the demand had been carried into judgment in another jurisdiction, against one of the testator's executors, and that the others were precluded by it from pleading prescription or the statute of limitations upon the original cause of action. Such is the case certainly in Louisiana, as may be seen from the case of *Jackson* v. *Tiernan*, in 15 La., 485. The Supreme Court of that State, speaking by Judge Martin, says, that the plea of prescription cannot prevail in behalf of one joint debtor, if a suit has been brought against another in the Circuit Court of the United States for the District of Maryland, meaning thereby, we presume, if it had been commenced in any *other court [*468
in the United States. When, then, the court below rejected, as inadmissible in evidence in this case, the judgment obtained in Virginia against Allen and Johnson, the executors of Robinson in that State, we think it erred, and that it should have been admitted for the purposes mentioned. The court also instructed the jury, that the causes of action in this suit against Tucker, the co-executor of Allen and Johnson were barred by prescription. In this we think there was error. The article of her code upon which that instruction was given, 3505, is in these words: "Actions on bills of exchange, notes payable to order or bearer—except bank notes—those of all effects negotiable or transferable by indorsement or delivery, are prescribed by five years, reckoning from the day when these engagements are payable." It is not applicable to either of the causes of action set out in plaintiff's petition. It is not so to Cheatham's note, indorsed by Robinson, because, being carried into judgment in Robinson's lifetime, it estops

all his executors anywhere, from denying it, and obliges them to pay it out of his assets wherever they may be. So it would be if, instead of executors, they were administrators in different States, as was said in Stacy and Thrasher's case, that each administrator is privy to the testator, and would be estopped by a judgment against him. The prescription of Louisiana, also, is not applicable to the due-bill given by Robinson to Wilkinson, for $575, or to that for $200 for money borrowed from Wilkinson, neither of them being negotiable by the law of Virginia or by the law of Louisiana, and therefore not within the article of prescription. For the same reason it is not applicable to the judgment obtained by Dandridge for $200, for overseer's wages due by Robinson, and which was assigned to Wilkinson. In this view of the case, we shall direct the judgment given by the court below to be reversed, and that the case shall be remanded for further proceeding, in conformity with this opinion.

ORDER.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

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*469] *CHARLES P. GOODALL, PLAINTIFF IN ERROR, *v.* JOSEPH W. TUCKER, EXECUTOR OF ABNER ROBINSON, DECEASED.

The principles laid down in the preceding case of *Hill* v. *Tucker*, again affirmed.

THIS case, like the preceding one, of *Hill* v. *Tucker*, was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

They were argued together, and differed only in there being different plaintiffs. The cause of action in this case is stated in the opinion of the court; and the reader is referred to the report of the preceding case for the arguments of counsel.

Mr. Justice WAYNE delivered the opinion of the court.

This cause was tried by the judge without a jury and the

legal propositions raised by counsel in the course of the trial were decided by him, to which exceptions were taken, as if they had been instructions to a jury.

The cause of action is the following single bill, which was executed at Richmond in Virginia:

"On demand, we, Abner Robinson, Isham Puckett, and J. P. Wilkinson, promise to pay to Charles P. Goodall, his executors or administrators, the sum of four thousand nine hundred and twenty-six dollars and twenty-seven cents, ($4,926.27,) lawful money of these United States, for the faithful performance of which promise we bind ourselves, our heirs, executors, administrators, and assigns, as witness our hands and seals, this 6th day of September, 1839.

ABNER ROBINSON. [SEAL.]
ISHAM PUCKETT. [SEAL.]
JAMES P. WILKINSON." [SEAL.]

It may as well be here stated that it was proved upon the trial that Wilkinson and Puckett were sureties and that the debt had been reduced to $1,432, with interest from the 1st January, 1846.

In October, 1842, Goodall brought suit in the Henrico County Court against the three obligors. Robinson was too ill to attend to the process, and afterwards died. The suit was prosecuted to judgment against Wilkinson in March, 1843, and abated as to the other defendants.

Execution was awarded upon the judgment and a return made "no effects found."

In February, 1848, Goodall filed his petition against Tucker in the Circuit Court of the United States for Louisiana, alleging the above facts; when the same proceedings took place which are mentioned in the case of Catharine Hill.

*There is a good deal of documentary evidence in the record, which we shall not notice, as it does not in any way affect the decision which should have been given upon the prayers of the plaintiff. See preceding case of *Hill* v. *Tucker*. [*470

Those prayers were, with the defendant prayers, as follows:

"After the evidence was offered the plaintiff asked the court to decide, as if instructing a jury upon the evidence:

1st. That if the testator Robinson by his will left four executors, that Joseph Allen and W. R. Johnson, citizens of Virginia, were two of those executors; and if they only qualified in Virginia, in the county of the domicil of the testator; and if the plaintiff, upon a valid and subsisting cause of

action, instituted suit in the Henrico County Court, in Virginia, against the only executors of the testator who had qualified; and if the plaintiff had obtained judgment regularly in that court, and it was a court of competent jurisdiction to hear and determine said cause; and if the plaintiff, having thus obtained judgment against the only qualified executors of the domicil of the decedent, regularly issued his execution on that judgment, and had thereon a return by the sheriff of *nulla bona;* and if the defendant was also an executor of the same testator appointed by the same will, and as such had taken upon himself the execution of said will according to the laws of Louisiana, where he resided; and if, as executor of Robinson, the defendant has ample estate of his testator in his hands to pay the debts; and if all these facts are proven and established by the evidence, that then the plaintiff is entitled to recover judgment against the defendant for the amount of the judgment against the executors who qualified in Virginia.

2d. That the exemplification of the record and the judgment obtained by the plaintiff against the executors Allen and Johnson, and the return of *nulla bona* thereon, are evidence against the defendant, a co-executor in Louisiana.

3d. That co-executors, unlike co-administrators, are privies in estate, because they derive the same privities over the same estate from the same will; and that under the will of Robinson, which was read, and the proofs of the qualification which were offered in this case, the plaintiff is entitled to recover against the defendant the amount of the judgment obtained by him against the only acting executors of the domicil of the decedent.

4th. That if the plaintiff is not authorized to recover against the defendant on the mere production of the record of the judgment against his co-executors in Virginia, who alone made probate of the will there, and qualified, that he is entitled to recover, on proving that the original cause of action on which that judgment was founded was a just, valid, and subsisting
*471] demand *against the testator Robinson, and the additional fact that the estate in the hands of the executors of the domicil of the testator in Virginia was exhausted, and that the defendant or co-executor has ample estate in his hands in Louisiana.

5th. That independent of the record of the judgment in Virginia, the plaintiff has a right to recover against the defendant as executor of Robinson, upon the bond filed and proven, the amount of the balance due on that bond.

6th. That the original cause of action on which the judg-

ment in the Henrico County Court is established and proven and a recovery thereon is not barred by the prescriptive laws of Louisiana.

7th. That upon all the evidence offered, the plaintiff is entitled to a judgment in his favor.

8th. That the suit in Virginia against the co-executor was a judicial interpellation which would stop the running of prescription against the demand which was the cause of action in that suit. All of which the court overruled, and the plaintiff excepted.

And upon the facts proven the defendant asked the court to decide: 1st. That the Virginia judgment against the co-executors was not evidence against the defendant; 2d. That the original cause of action on which that judgment was rendered was barred as to the defendant by prescription; and, 3d. That upon the whole evidence the defendant was entitled to judgment in his favor. To all which plaintiff objected, and the court overruled his objections, and gave the decisions as asked by defendant; and to these several opinions plaintiff excepted.

And the defendant objected to each and all of said propositions, and the court sustained severally the objections of defendant, and refused to decide any one of said propositions as asked by the plaintiff. To each of which several opinions and decisions the plaintiff at the time excepted."

The court in sustaining the latter has erred.

We think that all of the prayers for the plaintiff were properly made, and that conjointly they make an issue decidedly in his favor. See opinion in case of *Hill* v. *Tucker*.

We shall not notice them more particularly than to say, that the suit upon the bond in Virginia, was a judicial interpellation which stopped the Louisiana prescription from running against the cause of action in that suit and in this suit.

Further the record shows that this suit was brought in Louisiana within the time that its law fixes for prescribing actions upon such a demand.

The judgment is reversed, and the case will be remanded for further proceedings in conformity with this decision.

*ORDER. [*472

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit

Court in this cause be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to proceed therein in conformity to the opinion of this court.

JEROME B. PILLOW, PLAINTIFF IN ERROR, *v.* TRUMAN ROBERTS.

Where a deed, executed in Wisconsin, and attested by the seal of a court, stamped upon the paper, instead of wax or a wafer, was offered in evidence upon a trial in Arkansas, it was properly received.[1]

Where a deed from the sheriff, for land sold at a tax-sale, recited an assessment for taxes which remained unpaid; the advertisement of the land, and offering it for sale; its being struck down to the highest bidder, who paid the purchase-money and received a certificate; this deed ought to have been received in evidence. The law of Arkansas says, that the deed shall be evidence of the regularity and legality of the sale.[2]

But, even if this deed had been insufficient as a proof of title, it ought to have been received, in connection with proof of possession, to establish a defence under the statute of limitations.[3]

Possession under this deed would have been sufficient proof for adverse possession.[4]

THIS case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Arkansas.

The circumstances of the case, and the points of law upon which it came up to this court, are fully stated in its opinion.[5]

It was argued by *Mr. Lawrence*, and *Mr. Pike*, for the plaintiff in error, and *Mr. Crittenden*, for the defendant in error.

Mr. Justice GRIER delivered the opinion of the court.

Roberts, the defendant in error, was plaintiff below, in an action of ejectment for 160 acres of land. Pillow, the defendant below, pleaded the general issue, and two special pleas: The first, setting forth a sale of the land in dispute, for taxes more than five years before suit brought: The second, pleading the statute of limitation of ten years. These pleas were overruled on special demurrer, as informal and in-

[1] FOLLOWED. *Pierce* v. *Insdeth*, 16 Otto, 548. S. P. *Orr* v. *Lacy*, 4 McLean, 243.

[2] S. P. *Thomas* v. *Lawson*, 21 How., 332.

[3] FOLLOWED. *Jones* v. *Randle*, 68 Ala., 265. REFERRED TO. *Dequasie* v. *Harris*, 16 W. Va., 353. CITED. *Thomas* v. *Lawson*, 21 How., 340.

[4] CITED. *Downs* v. *Porter*, 54 Tex., 62. See also *Wright* v. *Mattison*, 18 How., 57; *Parker* v. *Overman*, Id., 141.

[5] Reported below, Hempst., 624.

sufficient; and the judgment of the court on this subject is here alleged as error. But as the same matters of defence were afterwards offered to be laid before the jury on the trial of the general issue and *overruled by the court, it will be unnecessary to further notice the pleas; as the [*473 defence set up by them, if valid and legal, should have been received and submitted to the jury on the trial. In the action of ejectment, (with the exception, perhaps, of a plea to the jurisdiction,) any and every defence to the plaintiff's recovery may be given in evidence under the general issue. And as the decision of the court on the bills of exception will reach every question appertaining to the merits of the case, it will be unnecessary to decide whether those merits were sufficiently set forth in the special pleas, to which the defendant was not bound to resort for the purpose of having the benefit of his defence.

On the trial, the plaintiff below gave in evidence a patent for the land in dispute, from the United States to Zimri V. Henry, dated 7th May, 1835; and then offered a deed from said Henry to himself, dated 10th November, 1849. This deed purported to be acknowledged before the clerk of the Circuit Court of Walworth county, in the State of Wisconsin, and was objected to, 1st. Because there was no proof of the identity of the grantor with the patentee other than the certificate contained in the acknowledgment. 2dly. Because the certificate of acknowledgment was not on the same piece of paper that contained the deed, but on a paper attached to it by wafers. And 3dly. Because the seal of the Circuit Court authenticating the acknowledgment was an impression stamped on paper, and not "on wax, wafer, or any other adhesive or tenacious substance."

The first two of these grounds of objection have not been urged in this court, and very properly abandoned as untenable. The third has been insisted on, and deserves some more attention. Formerly wax was the most convenient, and the only material used to receive and retain the impression of a seal. Hence it was said: "*Sigillum est cera impressa; quia cera, sine impressione, non est sigillum.*" But this is not an allegation, that an impression without wax is not a seal. And for this reason courts have held, that an impression made on wafers or other adhesive substance capable of receiving an impression, will come within the definition of "*cera impressa.*" If, then, wax be construed to be merely a general term including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as

well be included in the category. The simple and powerful machine, now used to impress public seals, does not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined, as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on *474] *wax. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it. In Arkansas, the presence of wax is not necessary to give validity to a seal; and the fact that the public officer in Wisconsin had not thought proper to use it, was sufficient to raise the presumption that such was the law or custom in Wisconsin, till the contrary was proved. It is time that such objections to the validity of seals should cease. The court did not err, therefore, in overruling the objections to the deed offered by the plaintiff.

After the plaintiff had closed his testimony, the defendant offered in evidence two certain deeds from Miller Irwin, sheriff of Phillips county, and assessor and collector of taxes therein, to Richard Davidson, dated on the 22d of October, 1844; one for the north half, and the other for the south half of the quarter section of land now in dispute. On objection, the court refused to permit these deeds to be received, and sealed a bill of exceptions. The defendant then offered the same deeds to Davidson, and in connection therewith, a deed from Davidson to Armstrong, and also a deed from Armstrong to the defendant; and to accompany them with proof of possession by himself and those under whom he claims, for more than ten years, as to the south half of said land, and more than five years as to the whole of it. The plaintiff objected to this evidence. "And it was by the court ruled, that the possession of such deeds, accompanied by possession of the land, was not sufficient to prove such possession of the land to be adverse to the plaintiff and his grantor without further proof that the defendant or his grantors claimed adversely; so the court refused to permit any deeds to be read in evidence to the jury."

These bills of exception may be considered together. They present two questions, 1st. Whether, by the law of Arkansas, the deeds offered in evidence (and which were regularly acknowledged and recorded according to law) should have been permitted to go to the jury as evidence of a regular sale of the land mentioned therein for taxes. And 2dly. Whether, without regard to their validity as elements of a good legal

title *per se*, they should not have been received for the purpose of showing color of title, in connection with possession by the persons claiming under them, for a length of time sufficient by law to bar the entry of plaintiff.

I. In considering these questions, it will not be necessary to set forth at length all the provisions of the revenue laws of Arkansas for compelling the payment of taxes assessed on land. A brief recapitulation of their most prominent provisions will *suffice. These laws make it the duty [*475
of the collector, on or before the 15th of September of each year, to make a list of lands assessed to persons non-resident, and the tax due thereon, with a penalty or addition of 25 per cent., and to file this list with the county clerk. He is directed, also, to set up a copy of the same at the court-house, and to publish it in a newspaper at least four weeks before the first Monday of November, giving notice that unless the taxes shall be paid on or before that day, the land will be sold. On that day, the collector is authorized to offer for sale, at public auction, such tracts or lots of land, or so much of them as will be sufficient to raise the taxes and penalty assessed and unpaid, and to continue the sales from day to day. The purchaser to pay down forthwith the amount of taxes, &c., and receive a certificate describing the land purchased, directing, if necessary, the public surveyor to lay off the part purchased by metes and bounds after one year allowed for redemption. This certificate, which is made assignable, may be presented to the collector, who is authorized to execute and deliver a deed to the holder of it for the land described therein. Then follows the 96th section of the act, which is as follows:

"The deed so made by the collector shall be acknowledged and recorded as other conveyances of lands, and shall vest in the grantee, his heirs, or assigns, a good and valid title both in law and equity, and shall be received in evidence in all courts of this State as a good and valid title in such grantee, his heirs, or assigns, and shall be evidence of the regularity and legality of the sale of such lands."

The deeds offered in evidence were regularly acknowledged and recorded. It is not denied that Irwin, the grantor therein, was sheriff, assessor, and collector of taxes in the county of Phillips, as he is described in the deed. The deed for the south half recites an assessment of the same for taxes in 1839, according to law; that the taxes remained unpaid; that the land was regularly advertised and offered for sale on the 5th of November, 1839, by auction; struck down to William Vales, who paid the purchase-money and received a cer-

tificate; that the time for redemption having long expired, and Richard Davidson became the assignee or holder of the certificate; therefore the said collector granted, &c., the said south half to said Davidson, his heirs, &c.

The deed for the north half has similar recitals, showing a tax assessed in 1840, a sale in 1841, to John Powell, and a certificate transferred by him to Davidson.

These deeds come within the description of the 96th section. They are made by a collector of the revenue; they are acknowledged and recorded according to law; they purport *476] to be for *land assessed for taxes, and regularly sold according to law; and the law enacts that deeds, so made, shall be evidence not only of the grant by the collector, but of the regularity and legality of the sale of the land described therein.

It is easy, by very ingenious and astute construction, to evade the force of almost any statute, where a court is so disposed. We might say that the expression, "deeds *so made* by the collector," means deeds made strictly according to the requirments of all the preceding sections of the revenue law, and decide that only deeds first proved to be completely regular and legal can be received in evidence; and thus, by qualifying the whole section by such an enlarged construction of these two words, and disregarding all the others, evade the obvious meaning and intention of the law. For if you must first prove the sale to be regular and legal before the deed can be received, what becomes of the provision that the deed itself shall be evidence of these facts? Such a construction annuls this provision of the law, and renders it superfluous and useless. The evil plainly intended to be remedied by this section of the act, was the extreme difficulty and almost impossibility of proving that all the very numerous directions of the revenue act were fully complied with, antecedent to the sale and conveyance by the collector. Experience had shown, that where such conditions were enforced, a purchaser at tax-sales, who had paid his money to the government, and expended his labor on the faith of such titles in improving the land, usually became the victim of his own credulity, and was evicted by the recusant owner or some shrewd speculator. The power of the legislature to make the deed of a public officer *primâ facie* evidence of the regularity of the previous proceedings, cannot be doubted. And the owner who neglects or refuses to pay his taxes or redeem his land has no right to complain of its injustice. If he has paid his taxes, or redeemed his land, he is, no doubt, at liberty to prove it, and thus annul the sale. If he has not,

he has no right to complain if he suffers the legal consequences of his own neglect.

The plain and obvious intention of the legislature is clearly expressed in this 96th section, that the deed made by a collector of taxes, as authorized in the preceding section, when acknowledged and recorded, should be received in evidence as a good and valid title, and that the recitals of the deed showing that it was made in pursuance of a sale for taxes, should be evidence of the regularity and legality of the sale under and by virtue of that act. The deed being thus made, *per se*, *primâ facie* evidence of a legal sale and a good title, the court were bound to receive it as such. There is nothing on the face of these deeds showing them to be irregular or void. They are each for a *different portion of the [*477
tract or quarter section of land, having known boundaries, according to the plan of the public surveys; one being for the south half and the other for the north half of the quarter section, it required no survey to ascertain their respective figure, boundaries, or location.

II. But assuming these deeds to be irregular and worthless, the court erred in refusing to receive them in evidence, in connection with proof of possession in order to establish a defence under the statutes of limitation.

The first section of the act of limitations of Arkansas bars the entry of the owners after ten years. And the thirty-fifth section enacts that "all actions against the purchaser, his heirs, or assigns, for the recovery of lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sales, and not after."

Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseizor. One who enters upon a vacant possession, claiming for himself upon any pretence or color of title, is equally protected with the forcible disseizor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course, adversely to all the

world. A person in possession of land, clearing, improving, and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend, why evidence offered and competent to prove that fact, should be rejected till the fact is otherwise proven.

With regard to the five years' limitation, we need not inquire whether the legislature intended that the action should be barred, where the purchaser at the tax-sale was not in possession. In this case, possession for more than five years by the purchaser from the collector and those claiming under him, was proved. In order to entitle the defendant to set *478] up the bar of this statute, *after five years' adverse possession, he had only to show that he and those under whom he claimed, held under a deed from a collector of the revenue, of lands sold for the non-payment of taxes. He was not bound to show that all the requisitions of the law had been complied with in order to make the deed a valid and indefeasible conveyance of the title. If the court should require such proof, before a defendant could have the benefit of this law, it would require him to show that he had no need of the protection of the statute, before he could be entitled to it. Such a construction would annul the act altogether, which was evidently intended to save the defendant from the difficulty, after such a length of time, of showing the validity of his tax-title. The case of *Moore* v. *Brown*, 11 How., 424, had reference to a deed void on its face, and the consequence of this fact, under the peculiar statutes of Illinois; it furnishes no authority for the decision of the court below in the present case.

The judgment of the Circuit Court is therefore reversed, and a *venire de novo* ordered.

ORDER.

This cause come on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District 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 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*, and to proceed therewith in conformity to the opinion of this court.

The United States, Plaintiffs in error, v. Andrew Hodge, Jr., and Levi Pierce.

In a suit upon a postmaster's bond, when treasury transcripts are offered in evidence, it is not necessary that they should contain the statements of credits claimed by the postmaster, and disallowed, in whole or in part, by the officers of the government.[1]

Nor is it a reason for rejecting the transcripts as evidence, that the items charged in the accounts, as balances of quarterly returns, did not purport, on the face of said accounts, to be balances acknowledged by the postmaster, nor were supported by proper vouchers; but merely purported to be the balances of said quarterly returns, as audited and adjusted by the officers of the government. The objection applied, if at all, to the accuracy of the accounts, and not to their admission as evidence.

The basis of an action against a postmaster is his bond and its breaches; and not the transcripts nor the quarterly returns, which are made evidence by the statute.

This case was brought up, by writ of error, from the Circuit Court of the United States for the Eastern District of Louisiana.

*It was the same case which was twice previously before the court, as reported in 3 How., 534, and 6 How., 279. [*479

The facts and points of law are set forth in the opinion of the court.

It was argued by *Mr. Crittenden*, (Attorney-General,) for the plaintiffs in error, and *Mr. Johnson* and *Mr. May*, for the defendants in error.

The arguments of the counsel were so connected with an examination of, and reference to, the accounts, which were very voluminous, that it would be difficult to present an abstract of them.

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 Eastern District of Louisiana.

[1] S. P. *United States* v. *Harrill*, McAll., 243.

The plaintiffs in error instituted in the Circuit Court an action at law against the defendants, to recover the sum of twenty-five thousand dollars, the penalty of a bond executed by those defendants with W. H. Ker, and by which the obligors bound themselves jointly and severally for the faithful performance by Ker, of the duties of postmaster at New Orleans. The amount claimed by the United States, upon the statement of the account of the postmaster, at the Treasury Department, was, on the 18th of August, 1839, $70,126.72, nearly three times the penalty of the bond.

This cause was first tried in the Circuit Court in February, 1843, when, under a charge from the judge, the jury found a verdict for the defendants. A writ of error was sued out to the judgment of the court, but was afterwards dismissed here for the irregularity that it was signed by the clerk of the court and not by the judge. *Vide* 3 How., 534. Upon a new writ of error, the case was brought up to this court, was heard upon exceptions to the rulings of the judge, when the decision of the Circuit Court was reversed, and the cause remanded for trial upon a *venire facias de novo*. 6 How., 279.

In pursuance of the mandate of this court, the cause coming on to be finally heard in the Circuit Court on the 8th of May, 1851, the judge refused to allow any of the statements of the accounts with the postmaster or any of the transcripts from the Post-Office Department, relating to the accounts of the postmaster, or any of the monthly returns of that officer which were offered in evidence by the plaintiffs to be read to the jury, but excluded the whole of them, whereupon the jury found a verdict for the defendants. The case is now before us upon exceptions *to the rulings of the judge, and which exceptions are as follows:

*480]

"Be it remembered, that on the trial of this case, the attorney of the United States, after having read in evidence the bond sued on, offered in evidence the following certified transcripts of statement of accounts, copies of quarterly returns of W. H. Ker, late postmaster, and of the other papers pertaining to the account of the said postmaster, hereto annexed; to the introduction of which, as evidence, the defendants, by their counsel, objected, and the court sustained the objection, and refused to allow the said transcripts, or any of them, to be read in evidence to the jury; to which opinion and decision of the court, in excluding said evidence, the attorney of the United States excepts and prays that this bill of exceptions may be signed, sealed, and made matter of record, which is done accordingly.

"THEO. H. MCCALEB, *U. S. Judge*." [SEAL.]

By consent of the counsel of the United States, the court here states the grounds upon which it rejected the transcripts above mentioned as follows:

"1st. That the said statement of accounts, between the United States and said W. H. Ker [were] as audited and adjusted only, and did not purport to contain the statement of credits claimed by him, and disallowed in whole or in part by the officers of the government.

"2d. That the items charged to the said W. H. Ker in said accounts, prior to the year 1836, as balances of quarterly returns, do not purport on the face of said accounts to be balances acknowledged by him, nor are they supported by any proper vouchers, but merely purport to be the balances of said quarterly returns, as audited and adjusted by the officers of the government.

"3d. That the quarterly returns were not the basis of the action, and under the law could not be admitted as evidence before the jury, except, as vouchers to sustain the account, (which) having been rejected by the court, the quarterly returns could not be given in evidence without it.

"THEO. H. MCCALEB, *U. S. Judge.*"

In order to test the accuracy of the decision by which the competency and legal effect of the transcripts were passed upon by the court, and by which they were ruled out at the trial, some reference will be proper to the statutes by which those documents have been authorized and directed, and the mode of their application prescribed in the prosecution of claims on behalf of the government. By the 8th section of the act of Congress for the reorganization of the Post-Office Department, passed on the 2d of July, 1836, (vide Stat. at L., vol. 5, p. 81,) it is provided, *" that there shall be appointed by the President, with the advice and consent [*481 of the Senate, an Auditor of the Treasury for the Post-Office Department, whose duty it shall be to receive all accounts arising in said department, or relative thereto, to audit and settle the same, and to certify their balances to the Postmaster-General. He shall keep and preserve all acounts, with the vouchers, after settlement; he shall promptly report to the Postmaster-General all delinquencies of postmasters in paying over the proceeds of their offices, and shall close the accounts of the departments quarterly, and transmit to the Secretary of the Treasury quarterly statements of the receipts and expenditures."

By section 15th, of the same statute, (vol. 5, p. 82,) it is further provided, "that copies of the quarterly returns of

postmasters, and of any papers pertaining to the accounts in the office of the Auditor for the Post-Office Department, certified by him under his seal of office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency of any postmaster or contractor, in which suit may be brought, the said auditor shall forward to the Attorney of the United States certified copies of all papers in his office tending to sustain the claim; and in every such case a statement of the account, certified as aforesaid, shall be admitted as evidence; and the court trying the cause shall be thereupon authorized to give judgment and award execution, subject to the provisions of the 38th section of the act to reduce into one the several acts establishing the Post-Office Department, approved March 3d, 1825." The 38th section of the act of 1825, here referred to, relates exclusively to the conditions on which the court may grant a continuance to defendants, beyond the return term, in suits against them. The 15th section of the act of 1836 goes on further to declare, "that no claim for a credit shall be allowed upon the trial, but such as shall have been presented to the said auditor, and by him disallowed in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is at the time of the trial in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting to the said auditor by some unavoidable accident."

In the case before us there were exhibited, on the trial below, two general accounts or transcripts from the auditor for the Post-Office Department with the postmaster Ker. By the former of these accounts, the balance against the postmaster was stated at $93,347.78; by the latter the balance was reduced to the sum of $70,126.96. The difference in these amounts is explained by the facts, that at the time at which the first statement was made, the postmaster had failed to make
*482] his quarterly returns as *required by law, from the 1st of July to the 15th of November, 1839, and in consequence of that failure had been charged, in pursuance of the 32d section of the act of Congress of 1825, with double the estimated amount of postages receivable during that interval. Subsequently to this statement, the postmaster having rendered his account for the interval above mentioned, the actual amount due from him was charged against him in lieu of the duplicated estimate of receipts, and the balance against him thereby reduced to the sum of $70,126.96. The transcript of the statement thus corrected, was certified to the Circuit Court on the 11th of May, 1842, before the trial of the cause.

In addition to these general transcripts, there were certified

by the auditor, and tendered in evidence by the United States, copies of the quarterly accounts or returns rendered by the postmaster from the quarter ending on the 30th of September, 1836, before the execution of his official bond sued on, up to the period of his removal; and on each of these quarterly returns or accounts the corrections or disallowances are noted. Proof is found in the record of notice to the postmaster of all these corrections in his returns, and the balances claimed on each of these returns, as corrected, were afterwards carried into the auditor's general statements, of which transcripts were furnished and offered in evidence at the trial. It would seem difficult to discover a plausible reason for the exclusion by the judge at circuit of the transcripts offered in evidence, as incompetent, or irrelevant to the issue before him, and equally so to reconcile the reason assigned by his honor with the conclusion to which it has led him. In the first place, the language of the act of Congress is express and imperative, that the "Auditor of the Treasury for the Post-Office Department shall receive all accounts arising in the department relative thereto, and audit and settle the same, and certify their balances to the Postmaster-General." Vide sect. 8th of the act of 1836. And again, section 15th of the same act: "In every case of delinquency of any postmaster or contractor in which suit may be brought, the said auditor shall forward to the Attorney of the United States, certified copies of all papers in his office tending to sustain the claim, and in every such case, a statement of the account, certified as aforesaid, shall be admitted as evidence, and the court trying the cause shall be thereupon authorized to give judgment and award execution," &c. The competency of a statement by the auditor of all or any accounts with postmasters and contractors in suits against them, cannot, then, be questioned; the accuracy of such statements as to detail, is a wholly different matter, and is to be questioned or contested in the mode prescribed by other provisions of the *statute. The only qualification ever made of the principle [*483 above laid down, if indeed it can be properly considered a qualification, is to be found in the decisions of this court in the cases of the *United States* v. *Buford*, 3 Pet., 29, and of the *United States* v. *Jones*, 8 Pet., 375, in which it has been ruled, that transcripts from the treasury should not amount to proof of facts not coming within the regular relation existing between the department and persons with respect to whom such facts may have transpired; but this exception or qualification cannot apply to transactions falling strictly within the relation subsisting between the government and

its agents, or rather it goes to affirm the operation of the statute in reference to such transactions. The utmost latitude which could be given to the decisions above mentioned, could not extend them to the entire character of the transcripts certified from the department as evidence, but must limit their effect to any portions or items of those transcripts which should be irregular, and not within the language or import of the statute, nor within the regular operations of the department.

The first reason assigned by the judge below for excluding the entire transcripts is, that they were presented as accounts between the United States and the postmaster Ker, as audited and adjusted only, and did not purport to contain the statement of credits claimed by him and disallowed in whole or in part by the officers of government. The obvious answer to this objection is, that the omission complained of did not render those documents any the less transcripts certified by the officer, nor destroy their competency as evidence under the statute. The objection, if it comprise either force or plausibility, is one strictly applicable to the completeness or sufficiency of the documents offered, and not to their competency or legality. An objection to the transcripts from the department, founded on the facts that they are only a statement and adjustment of the accounts between the United States and the postmaster, without containing the credits claimed and disallowed, is precisely an objection based upon the conformity of those documents with the law; for by the 8th section of the act of 1836, the auditor is directed to receive all accounts arising in the department or relative thereto, to audit and settle the same, and to certify the balances therein to the Postmaster-General—and we may seek in vain for any provision in the statute which prescribed a particular form of stating the accounts or directing a list of the items not admitted by the department, but rejected as illegal, to be made parts of that general account, or transcript. A different proceeding would seem to have been the contemplation of the legislature, if we can gather its intention from the mode pointed out for preferring *and establishing credits, which, if denied and rejected by the government, it would seem strange to require should, by the act of that government which denied their existence, be held forth as a part of its own view of the transaction. But, as already observed, the reason assigned by the judge of the Circuit Court for ruling out the transcripts is one which could apply, in any view, only to the sufficiency or strength of the proof, and not to the competency or relevancy thereof.

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That reason too is directly in conflict with the 15th section of the act of 1836, which explicitly declares, irrespective of their force or efficiency, "that copies of the quarterly returns of postmasters, and of any papers pertaining to the accounts in the office of the auditor of the Post-Office Department, certified by him under the seal of his office, shall be admitted as evidence in the courts of the United States; and in every case of delinquency by any postmaster or contractor, in which suits may be brought, the said auditor shall forward to the Attorney of the United States, certified copies of all papers in his office, tending to sustain the claim, and in every such case a statement of the account, certified as aforesaid, shall be admitted as evidence." Under this ample provision of the statute not only the statements of accounts, but certified copies of every paper in the department pertaining to such accounts, are made competent evidence in the courts of the United States.

It will be observed, in this case, that in the certified transcripts from the department, every credit allowed to the postmaster upon the settlement of his account is given, and appears upon the face of the transcripts, so that the defendants have received the full benefit of all such credits; and indeed the opinion of the judge below is not founded on the withholding of any of these credits from the postmaster, but it rests exclusively upon the fact of the absence from the face of the transcripts or general accounts of the alleged credits, whose correctness, or legal existence even, was denied by the government, but which the defendant was still at liberty to assert in the mode prescribed by the statute. What obligation there could be upon the government to embody and to present to the court claims whose existence it repudiated and denied, we are unable to perceive. The language of the statute contains no such requisition, and none such appears to fall within the meaning or objects of the law. Upon each of the quarterly returns of the postmaster the corrections made at the department are noted in a separate column, annexed thereto for the sole purpose of inserting those corrections; the balances, as corrected, were thence transferred to the general accounts or transcripts, and the postmaster was informed of the corrections made, with the view to his sustaining the rejected *items by proofs, if in his power [*485
to do so. The quarterly returns themselves remaining as to all the items they contained, precisely as made by the postmaster himself.

The question of the admissibility and competency of transcripts like those ruled out by the judge in the court below,

has, in several instances received the examination of this court, and their competency and legality as evidence, in cases like the present, have been established upon the fullest consideration. In the case of *Hoyt* v. *The United States*, 10 How., 109, this question was raised, and in the investigation of it by this court, the cases of *The United States* v. *Buford*, 3 Pet., 29, *The United States* v. *Jones*, 8 Pet., 375, and *The United States* v. *Eckford's Executors*, 1 How., 250, were all examined and compared. It is true that the cases above mentioned did not arise upon the statute regulating the Post-Office Department, but they involved the construction of the act of March 3d, 1797, the import of which, and indeed the language thereof, *mutatis mutandis*, are identical with those of the act of 1836, regulating the Post-Office Department. *Vide* Stat. at L., 512. In the case of *Hoyt* v. *The United States*, the law is thus expounded by this court: "The counsel for the plaintiffs, (The United States,) in the court below, produced on the trial four treasury transcripts, containing a statement of the accounts of the plaintiff in error 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. 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." This court further proceeds: "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 returns and other accounts rendered in pursuance of law and the instructions of the treasury. They were substantial copies of these quarterly returns revised and corrected by the accounting officer, 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 the official dealings with the government in the collection of the revenue. We can hardly conceive of a case, therefore, coming more directly within the act of Congress as expounded by the cases referred to." The court then deduces the *following conclusions: "As a general rule, therefore, every item of the account that can be the subject of litigation at the trial on the production

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of a transcript, must have been a matter of dispute at the Treasury Department, and of course presenting nothing new or unexpected to the parties. The court is of opinion, therefore, that the several treasury transcripts offered in evidence were properly admitted." We think, therefore, that the objection of the judge of the court below, to the transcript offered in evidence, viz., that it did not contain on its face, as credits, items which were never admitted as credits, but were denied and rejected as such, was justified neither by the statute, nor by reason, nor custom in the statement of accounts.

The second cause assigned by the judge below for his rejection of the transcripts from the jury, is likewise one which applies, if at all, to the accuracy of the items in the account, and not to the competency of the entire transcripts as documents certified and attested in the mode prescribed by the act of Congress. The objection on the part of the judge, if it can be apprehended, seems to be this: That the quarterly returns of the postmaster entering into, and forming parts of the general transcripts, having been corrected at the department, the balances produced by such corrections cannot be regarded as the acknowledged amounts due by the postmaster, but, on the contrary, are the balances stated as due on said quarterly returns as audited and adjusted by the officers of the government. As we have already said, this objection applies entirely to the correctness of the items contained in the general account as stated, and cannot change the character of the transcripts as certified statements of the accounts audited and adjusted at the department, and as directed to be certified by the provisions of the statute. Moreover, these quarterly returns, which, so far as they go, are certainly admissions of the postmaster, are in nowise changed or affected, except by the disallowance of particular items, and by that very disallowance the officer is put in the position, and notified to sustain, if he can, his claims by legal proof. If he fail to do this, it can certainly furnish no reason why every other item of indebtment, admitted to be correct by both parties, should be withheld. We can perceive, then, no force in the second cause assigned by the judge below for the rejection of the transcripts.

The third cause assigned by the judge for rejecting the evidence tendered by the plaintiffs, has less of plausibility to sustain it than either which precedes it; and may be disposed of in a few words. This last cause begins with the affirmation, that the quarterly returns were not the basis of the action; next, it asserts that these returns could not, under the

*487] law, be admitted as evidence to the jury, except as vouchers to sustain the account, *and then the conclusion attempted from these positions is, that the account, being rejected by the court, the quarterly returns could not be given in evidence without it. A somewhat curious example of assumption is given in this argument of the court, and of deduction in the conclusion as drawn therefrom. In the first place, it may be observed that neither the transcripts nor the quarterly returns, certified from the department, constituted, properly speaking, the basis of the action against the defendants—that basis is found in the offcial bond of the postmaster and his sureties, and in the acts or delinquencies of the officer. The proof of those delinquencies consisted in part as ordered by the statute, of the general transcripts, and of the quarterly returns certified and attested as that statute directed; they were both made evidence, and ought to have been so received, to avail as far as they regularly and properly might upon the issue made between the government and the defendants. They both came within the literal descriptions in the statute of the "copies of quarterly returns of postmasters and of any papers pertaining to the accounts in the office of the Auditor of the Post-Office Department, which, when certified by him under his seal of office, shall be admitted in evidence in the courts of the United States." But the trenchant argument of the court below is simply this: I have cut off a portion of this statutory evidence, by the former part of my opinion, the residue shall be subjected to a like operation. We think that the decision of the Circuit Court, as a whole, and in the detail, as set forth by that court, is erroneous, and should be, as the same is hereby, reversed; and we do remand this cause to the Circuit Court to be again tried subject to the principles laid down in this opinion.

ORDER.

This cause came on to be heard on the transcript of the record, from the Circuit Court of the United States, for the Eastern District of Louisiana, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therewith in conformity to the opinion of this court.

*Cornelius W. Lawrence, Plaintiff in error, *v.* John Caswell and Solomon T. Caswell. [*488

By the Tariff of 1846, the duty of one hundred per cent., *ad valorem*, upon brandy, ought to be charged only upon the quantity actually imported, and not on the contents stated in the invoices.[1]

Duties illegally exacted are those which are paid under protest, and where there is an appeal to the judicial tribunals.

The Revenue Act of 1799, (1 Stat. at L., 672,) directed that an allowance of two per cent. for leakage, should be made on the quantity of liquors which were subject to duty by the gallon. Where brandy was subjected to a duty *ad valorem*, it was no longer within the provisions of this act, and the allowance of two per cent. ceased.[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.

It was a suit brought by John Caswell and Solomon T. Caswell, merchants of New York, against Lawrence the collector, to recover an excess of duties upon brandy, paid under protest. The whole case is set forth in the bill of exceptions, which was as follows :—

Bill of Exceptions. The counsel for the plaintiffs, after proving that the plaintiffs were partners, engaged in trade and commerce in the city of New York, further to maintain the issue on their part, gave in evidence divers warehouse entries, and withdrawal entries, and calculations of duties thereon, invoices, and gaugers' returns of certain importations of brandy, made by the plaintiffs into the port of New York, by the several vessels in the table, or statement, hereinafter set forth, particularly mentioned; which said several vessels arrived in the said port of New York at the respective dates, also in said table, or statement, mentioned; in and by which said documents it appeared that said several importations of brandy were, on the arrival thereof, respectively deposited in the public stores in said port of New York, in pursuance of the act of Congress establishing a warehousing system, approved August 6th, 1846; that upon the gauging of said several importations of brandy by the United States gaugers, made at the time of the arrival thereof respectively, the actual contents of each of said importations were found to be less than the contents stated in the invoices thereof respec-

[1] Distinguished. *Nichols* v. *United States*, 7 Wall., 127. Followed. *Balfour* v. *Sullivan*, 8 Sawy., 650. S. P. *Sturges* v. *United States*, 4 Am. L. Reg., 335; *Schuchart* v. *Lawrence*, 2 Blatchf., 397; *Austin* v. *Peaslee*, 20 Law Rep., 443.

[2] Cited. *Belcher* v. *Linn*, 24 How., 526.

tively; the difference in each case between such invoice contents, and the actual contents as ascertained by the said gaugers, being specified in the said table or statement; that the said goods so imported were afterwards, from time to time, withdrawn from such public stores, and duties paid thereon by the plaintiffs to the defendant, as collector of the
*489] port of New *York, who demanded, as such duties, under schedule A of the Tariff Act of July 30, 1846, one hundred per centum *ad valorem* upon the cost of the contents of said importations as such contents were stated in the invoices thereof respectively, amounting in the whole, as also appears in said table, to the sum of $41,658; which said duties, so exacted, were paid by the plaintiffs to the said defendants as such collector, under protest in writing, (indorsed on the withdrawal entries,) against the payment thereof, the said plaintiffs claiming that the duties should be computed not upon the said invoice contents of said importations, but upon the actual contents thereof, as shown by the aforesaid gaugers' returns, after deducting from the actual contents shown by such returns the allowance of two per centum thereon, directed by the 59th section of the Revenue Collection Act of March 2, 1799.

The following is the form of the protests referred to, and they were all alike:—

"We claim deduction for all deficiency from the quantity shipped, also two per cent. allowance for leakage as heretofore customary, and protest against the collector exacting the whole amount of the invoice.

JOHN CASWELL & Co."

The counsel for the said plaintiffs also proved that the duties so as aforesaid paid to and received by the said defendant, as such collector, were by him duly paid, at the time of the receipt thereof, into the Treasury of the United States.

The table, or statement, above referred to, contained also a specification of the excess of duty alleged by the plaintiffs to have been exacted by the defendant as such collector, upon each of the said several importations, amounting, in the aggregate, to the sum of $1,609; the said table, or statement, being in the words and figures following.

(The table is omitted, as not being necessary to be inserted.)

The plaintiffs' counsel then proved, that under the act of March, 1799, and from the passage of said act until the

Tariff Act of July 30, 1846, took effect, it was the uniform practice in the New York custom-house, upon the entry of such importations of liquors subject to duties, to proceed as follows:—

1st. The United States gaugers, after ascertaining the capacity of each cask, deducted the "outs," or numbers of gallons deficient, and, from the actual contents thus ascertained, made a further deduction of two per cent. on such actual contents for the allowance of leakage, directed by the 59th section of said act of March 2, 1799, and made a return to the collector, exhibiting the result.

2d. The duties were then calculated and exacted upon the *net dutiable quantity so exhibited by the gaugers' return, and upon that quantity only, and without regard [*490 to any statement of quantity in the invoice.

To this evidence the counsel for the defendant objected, in due season, as inadmissible; but his honor, the presiding judge, then and there overruled the said objection, and decided that such evidence was admissible: to which ruling and decision of the said judge, the counsel for the said defendant then and there excepted.

The plaintiffs' counsel claimed to recover against the defendant the sum of $1,609, above stated, and interest thereon to the day of trial, amounting in the whole to $2,039.35.

The counsel for the plaintiffs there rested.

The counsel for the defendant then insisted that the only allowances which could be considered in this case for deficiences in said brandy, had been provided for by acts of Congress, and had already been made at the custom-house, and that by law the plaintiffs were not entitled to recover; and he prayed the court so to charge the jury.

But the court charged the jury that the United States were only entitled to collect duties upon the importations in question upon the quantity remaining, after deducting from the actual contents ascertained and exhibited by the gaugers' returns the aforesaid allowance of two per cent. for leakage; and that the plaintiffs were therefore entitled to recover the amount so as aforesaid claimed by them.

To which charge of his honor the judge, and to every part thereof, the defendant's counsel then and there excepted.

The jury thereupon found a verdict for the plaintiffs for the sum of $2,039.35 damages and six cents costs.

And because the prayer of the said defendant, by their said counsel, and the several rulings and decisions, and instructions and charge of the said judge, and the several exceptions taken to the same, do not appear by the record of

the verdict aforesaid, the defendants have caused the same to be written on this bill of exceptions, to be annexed to such record, and have prayed the said judge to set his hand and seal to the same.

Whereupon the said Samuel R. Betts, the judge before whom the said issues were tried, and the said exceptions taken, has hereunto set his hand and seal, the 6th day of February, in the year of our Lord, 1852.

SAMUEL R. BETTS. [L. S.]

Upon this exception, the case came up to this court, and was argued by *Mr. Crittenden*, (Attorney-General,) for the plaintiff in error, and *Mr. Butler*, for the defendants in error.

*491] **Mr. Crittenden*, for plaintiff in error.

I. (First point omitted.)

II. In the cases of *Marriott* v. *Brune*, and *The United States* v. *Southmayd*, (9 How., 619, 637,) cases of drainage of sugars in the course of the voyage from the place of production, this court held that the duties were to be assessed on the actual quantity or weight which arrived in the United States; and the same rule would seem to be applicable to the case of brandy.

The further question in this case, however, is, whether importers of brandy are entitled to the additional allowance of two per cent. on the actual quantity imported, which the court below directed to be made? This allowance is claimed under the 59th section of the Collection Act of 1799, (1 Stat. at L., 672,) which is as follows: "That there shall be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon; and ten per cent. on all beer, ale, and porter in bottles; and five per cent. on all other liquors in bottles, to be deducted from the invoice quantity in lieu of breakage; or it shall be lawful to compute the duties on the actual quantity to be ascertained by tale, at the option of the importer, to be made at the time of entry."

The late Mr. Justice Woodbury, in delivering the opinion of the court in the sugar cases, above cited, refers to the above section of the act of 1799, and says: "The former cases referred to for illustration rest on their peculiar principles, and allowances in them are made by positive provisions in acts of Congress, even though the quantity and weight of the real article meant to be imported, should arrive here. Because, well knowing that the whole is not likely to arrive,

and being able to fix by a general average the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly."

The learned judge referred to these instances merely as illustrations; and it will not be here contended that the dutiable quantity of brandy in the present case is the invoice quantity, less the allowance of two per cent.; for the court will observe that the section enacts that the two per cent. is to be allowed "on the quantity which shall appear by the gauge." But on the part of the United States, it is contended that the allowance cannot be made on importations of brandy under the *ad valorem* tariff of 1846, because the operation of the section is limited and confined to cases of specific tariffs. The law has so commanded; the words are express and positive. The allowance is to be made on liquors "subject to duty by the gallon."

Besides, the claim for the allowance cannot be maintained under the act of 1846, because it is repugnant to the principle *of that act. Thus this court has held, that imports cover only what is brought within our limits and [*492 goes into the consumption of the country. Now, as by the act the duties upon these imports are to be assessed at so much per cent. upon the *foreign value*, how can it be said that they are so assessed upon that *value* if the whole quantity actually imported is not taken into account?

Mr. Secretary Walker, in a treasury circular of 30th January, 1847, (1 Mayo, 391,) seems to have considered the 59th section of the act of 1799 in force, and directed the allowance therein mentioned to be continued. Subsequently, however, by a circular of the 24th March, 1847, he seems to have reconsidered the subject, and instructed the collectors as contended for in this paper. 1 Mayo, 360. The importations in this case were made during the time this circular was in force. See also another circular, of 31st December, 1847, *voce*, Allowances. 1 Mayo, 405.

It is therefore submitted, on behalf of the United States, that the claim for the allowance of two per cent. on the quantity ascertained by the gauge, is not sanctioned by law, and the jury ought to have been so instructed.

Mr. Butler, for the defendants in error.

I. Upon the facts proved upon the trial, the plaintiffs in the court below were at least entitled to recover back the amount of duties exacted by the collector upon the differences between the invoice contents and the actual contents of the several importations of brandy mentioned in the record.

(a.) The cases of *Marriott* v. *Brune*, (9 How., 619,) and *The United States* v. *Southmayd*, (Id., 637,) decide,—

1st. That *ad valorem* duties, under the act of 1846, should be assessed, not upon the quantity which appears by the invoice to have been shipped, but only on the quantity which actually arrives in our ports; and

2d. That the proviso in the 8th section, "that under no circumstances shall the duty be assessed upon an amount less than the invoice value," is not in hostility with the above construction, because the proviso refers only to the price and not to the quantity.

(b.) In respect to the point now under consideration, there is no ground whatever for distinguishing the present case from the cases in 9 Howard, above referred to.

II. The plaintiffs in the court below were entitled to the further deduction of two per cent. on the actual contents of the importations in question, as ascertained and exhibited by the gaugers' returns, for the allowance of leakage directed by
*493] the 59th *section of the Revenue Collection Act of March 2d, 1799. 1 Stat. at L., 672.

1st. By the very words of the section, "that there be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon," this allowance is to be computed and made upon the actual contents ascertained by the gauger.

2d. This allowance of two per cent., as manifestly appears by the words quoted, was not intended to cover leakage on the voyage of importation, but to cover that which will occur after the arrival of the liquor, and before its actual sale by the importer.

(a.) Leakage on the voyage was already provided for by requiring the actual contents at the port of importation, to be ascertained by the United States gauger.

(b.) In commercial language, "leakage" is an allowance granted to importers of liquors for the waste the goods are supposed to receive by keeping after their arrival and before their sale. McCulloch's Commercial Dictionary, title "Leakage," and title "Warehousing System," Eng. ed. of 1834, p. 1223.

(c.) The 59th section of the act of 1799, (following in this respect the 36th section of the act of 1790, 1 Stat. at L., 166,) conforms to this commercial sense by directing the allowance in question to be made on the quantity which shall appear by the gauge to have arrived in the United States.

See, in connection with this section, the following sections

of the same act: § 21, (p. 642,) as to the duties of the surveyor. Also, §§ 37 to 43, (pp. 655, 660,) as to the entry, inspection, and landing of liquors. Also act of April 20th, 1818, (3 Stat. at L., 469,) "providing for the deposit of wines and distilled spirits in public warehouses."

3d. The 59th section of the act of 1799 is not repealed by anything contained in the Tariff Act of 1846; but the importers of liquors are still entitled to the allowance given thereby.

(a.) There is no express repeal of sect. 59 in the act of 1846.

(b.) Repeals by implication are not favored, and are only allowed when the provisions of the old law are plainly repugnant to those of the new. 6 Bac. Abr. title Statute D., p. 373; Dwarris on Stat., pp. 673, 674; *Wood* v. *The United States*, 16 Pet., 362, 363.

(c.) The only part of the 59th section of the act of 1799 which is claimed to be repugnant to the act of 1846 is the clause which directs the allowance of two per cent. to be made on "liquors subject to duty by the gallon," which, it has been suggested, renders the section inapplicable to liquors imported under a law subjecting them to an *ad valorem* rate of duty.

*4th. The repugnancy suggested is only apparent, and not sufficient to work the repeal of this part of the law of 1799. [*494

(a.) There is nothing in the change from a specific duty to an *ad valorem* duty on liquors, which should abrogate the allowance of two per cent. directed by the act of 1799.

(b.) If this allowance was just and proper under specific duties, it is also equally just and proper under *ad valorem* duties.

(c.) If this allowance be not made, the importer may, under the act of 1846, be subjected to a higher duty upon liquors than that prescribed by the preëxisting Tariff Act of August 30th, 1842, contrary to the main object of the act of 1846, which, as expressed in its title, was to "reduce the duty on imports."

5th. The act of 1846 contains several provisions strongly implying an intention in its framers to retain allowances of this nature given by preëxisting laws.

(a.) The fourth section expressly provides "that in all cases in which the invoice or entry shall not contain the weight, or quantity, or measure of goods, wares, or merchandise now weighed, or measured, or gauged, the same shall be weighed, gauged, or measured at the expense of the owner, agent, or consignee."

(b.) The eighth section requires the collectors, in the par-

ticular case therein mentioned, to cause the dutiable value to be estimated and ascertained, as well as to be appraised, "in accordance with the provisions of the existing laws."

(c.) These enactments refer to and retain in force, among other provisions contained in the prior laws, the 59th section of the act of 1799, above referred to.

See report of Secretary Walker to House of Representatives, dated Dec. 30th, 1846, (Exec. Docs. of H. of R. No. 25, 2d Sess. 29th Cong.) showing it still necessary, notwithstanding the change in the mode of assessing duties, to employ weighers, gaugers, and measurers. Pages 2, 4, 5, 9; Treas. Cir. Nov. 25th, 1846, pp. 176 to 182.

6th. The Warehousing Act of August 6th, 1846, (9 Stat. at Large, 53,) extends the principle of the act of April 2d, 1818, in relation to the deposit of liquors in public warehouses, to all imported goods.

This act being passed contemporaneously with the Tariff Act of July 20th, 1845, the two should be construed together as parts of one system; and the allowances made by the act of 1799 in respect to liquors deposited in the public stores under the act of 1818, must be deemed applicable to liquors deposited under the Warehousing Act of 1846.

7th. The foregoing view has in effect been acquiesced in by the Treasury Department, and established by this court.

(a.) It was deliberately and distinctly adopted and promulgated *by the Treasury Department in its instruc- *495]
tions to collectors issued immediately after the Tariff Act of 1846 took effect. See instructions to the Collector of New Orleans, under date of 30th January, 1847, given at length in 9 How., 620.

(b.) This instruction was afterwards modified by the department, but the principle on which it proceeded was established as correct by the decisions of this court in *Marriott* v. *Brune*, 9 How., 619, and *The United States* v. *Southmayd*, Id., 637.

(c.) In those cases the court decided that the *ad valorem* duties under the act of 1846 should be assessed on the quantity which actually arrives in our ports. The "quantity" of liquors can be reckoned only by the measure,—the number of gallons. To take duty on the "quantity" imported is therefore to take duty on the number of gallons imported. Liquors being subject to duty by the "quantity" or number of gallons, are therefore "subject to duty by the gallon." The difference between previous laws and the act of 1846 is, that under previous laws liquors were "subject to duty by the gallon," without regard to the value of the gallon; while

under the act of 1846 they are still "subject to duty by the gallon," but according also to the value of the gallon. This is a difference merely of form and not of substance, and cannot work a repeal of the former law.

(d.) The decisions of the court in 9 Howard do, therefore, control and dispose of this point, as well as the former one; and such was, at first, admitted by the Treasury Department to be its legitimate effect. See Treasury Circulars of July 5th, 1850, August 10th, 1850, and June 14th, 1851.

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

This is an action brought by the defendants in error against the collector of the port of New York, to recover certain sums of money alleged to have been illegally exacted as duties.

The defendants in error are merchants of New York, and imported a large quantity of brandy in the years 1847 and 1848, which were deposited in the public stores, under the Warehousing Act of 1846. Upon gauging these several importations, at the time of their arrival, the contents were found to be less than the quantity stated in the several invoices.

As the brandy was from time to time withdrawn by the importers, the collector demanded the duty of one hundred per cent. *ad valorem* upon the whole invoice quantity, and it was paid by the importers under protest.

The importers claimed in their protest that the duties should be computed upon the actual contents, as shown by the gauger's returns, after deducting two per cent. from such contents. And the court was of opinion, and so directed the jury, that this was *the correct mode of ascertaining the duties; and a verdict was accordingly rendered [*496 and judgment given for the amount overcharged. This writ of error is brought to revise that judgment.

Two questions arise in the case: 1st, whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's returns; and 2dly, whether the two per cent. ought to have been deducted for leakage.

As relates to the first question, it is substantially the same with that decided by the court in the case of *Marriott* v. *Brune*, 9 How., 619. The duty of 100 per cent. *ad valorem* was chargeable on the quantity of brandy actually imported, and not on the contents stated in the invoices. This overcharge was therefore illegally exacted, and the defendants in

error were entitled to recover back the amount. The judgment of the Circuit Court is in this respect correct.

But it is proper to say, in order that the opinion of the court may not be misunderstood, that when we speak of duties illegally exacted, the court mean to confine the opinion to cases like the present, in which the duty demanded was paid under protest, stating specially the ground of objection. Where no such protest is made, the duties are not illegally exacted in the legal sense of the term. For the law has confided to the Secretary of the Treasury the power of deciding in the first instance upon the amount of duties due on the importation. And if the party acquiesces, and does not by his protest appeal to the judicial tribunals, the duty paid is not illegally exacted, but is paid in obedience to the decision of the tribunal to which the law has confided the power of deciding the question.[1]

Money is often paid under the decision of an inferior court, without appeal, upon the construction of a law which is afterwards, in some other case in a higher and superior court, determined to have been an erroneous construction. But money thus paid is not illegally exacted. Nor are duties illegally exacted where they are paid under the decision of the collector, sanctioned by the Secretary of the Treasury, and without appealing from that decision to the judicial tribunals by a proper and legal protest. Nor are they within the principle decided by the court in the case before us.

We proceed to the second point—that is, to the claim of a further deduction of two per cent.

The Revenue Collection Act of 1799, c. 22, § 59, under which it is claimed, provides, "That there shall be an allowance of two per cent. for leakage on the quantity which shall appear by the gauge to be contained in any cask of liquors subject to duty by the gallon."

*497] *At the time this law passed, brandy and sundry kinds of wine were subject to a specific duty upon the gallon; but various other wines were charged with an *ad valorem* duty, not to exceed in amount a certain rate per gallon, specified in the law. And as the two per cent. deduction was made to depend on the character of the duty, and not upon the nature of the liquor imported, the brandy and wines which then paid a duty by the gallon, were entitled to it—but the wines which paid an *ad valorem* duty were not entitled. The right to the allowance did not depend upon the fact that the importation consisted of brandy or wines of a

[1] Quoted. *United States* v. *Campbell*, 10 Fed. Rep., 819.

particular description, but upon the duty to which the article was subject. If it was charged by the gallon, this deduction was to be made, but otherwise if charged *ad valorem*. Afterwards, by the act of May 13, 1800, the *ad valorem* duties, which were before charged on certain kinds of wine, were changed to specific duties; and all wines were charged with duty by the gallon. And from the passage of this act until the act of 1846, all importations of liquors of any description paid a specific duty. This will account for the usage in the custom-house to allow the deduction on all liquors, as stated in the record. For, when the *ad valorem* duty on certain wines was changed to a duty by the gallon, these wines, like brandy and other wines, came within the provision in the act of 1799, and consequently were entitled to the two per cent. deduction.

So, also, when the act of 1846 changed the duty upon brandy from a specific one upon the gallon, to a duty *ad valorem*, it was no longer within the provision of the act of 1799, and consequently no longer entitled to the deduction of two per cent. The provision in the act of 1799 is not repealed; but brandy is not now within it, because it is not subject to a duty by the gallon.

It is said there is the same reason for allowing this deduction for loss by leakage, whether the duty is *ad valorem* or specific; and that it would be unjust to make any discrimination between them. But, without stopping to inquire whether this argument is well founded or not, or whether sufficient reasons may not be assigned for the difference, it is sufficient for the court to say, that the law makes the distinction. And it is not within the province of the Treasury Department or the court to decide upon the reasonableness or unreasonableness of a tariff which it is evident Congress intended to impose. The words of the law are plain. And, since brandies do not pay a duty by the gallon, they are not entitled to the deduction of two per cent.

The judgment of the Circuit Court must therefore be reversed, with costs, and a mandate issued directing it to proceed to judgment upon the principles stated in this opinion.

*ORDER. [*498

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, 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*, and to proceed therewith, in conformity to the opinion of this court.

JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, AND JOSE E. FERNANDEZ, MERCHANTS, TRADING UNDER THE NAME AND STYLE OF JECKER, TORRE, & COMPANY, APPELLANTS, *v.* JOHN B. MONTGOMERY.—AND JOHN B. MONTGOMERY, APPELLANT, *v.* JUAN BAUTISTA JECKER, LUIS JECKER, THOMAS DE LA TORRE, GEIDERO DE LA TORRE, AND JOSE E. FERNANDEZ, MERCHANTS, TRADING UNDER THE NAME AND STYLE OF JECKER, TORRE, & COMPANY.[1]

During the war with Mexico, the Admittance, an American vessel, was seized in a port of California, by the commander of a vessel of war of the United States, upon suspicion of trading with the enemy. She was condemned as a lawful prize by the chaplain belonging to one of the vessels of war upon that station, who had been authorized by the President of the United States to exercise admiralty jurisdiction in cases of capture.

The owners of the cargo filed a libel against the captain of the vessel of war, in the Admiralty Court for the District of Columbia. Being carried to the Circuit Court, it was decided:

1. That the condemnation in California was invalid as a defence for the captors.
2. That the answer of the captors, having averred sufficient probable cause for the seizure of the cargo, and the libellants having demurred to this answer, upon the ground that the District Court had no right to adjudicate, because the property had not been brought within its jurisdiction, the demurrer was overruled, and judgment was entered against the libellants.

The judgment of the Circuit Court, upon the first point, was correct, and upon the second point, erroneous.

The Prize Court established in California was not authorized by the laws of the United States or the laws of nations.

The grounds alleged for the seizure of the vessel and cargo in the answer, viz., that the vessel sailed from New Orleans with the design of trading with the enemy, and did, in fact, hold illegal intercourse with them, are sufficient to subject both to condemnation, if they are supported by testimony.

And, if they were liable to capture and condemnation, the reasons assigned in the answer for not bringing them into a port of the United States and libelling them for condemnation, viz., that it was impossible to do so consistently with the public interests, are sufficient, if supported by proof, to justify the captors in selling vessel and cargo in California, and to exempt them from damages on that account.

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[1] For a further decision in this case, see 18 How., 111, 124 and for decision below, see 1 Curt., 266.

*The Admiralty Court in the district had jurisdiction of the case, and it was the duty of the court to order the captors to institute proceedings in that court, to condemn the property as prize, by a day to be named in the order; and in default thereof, to be proceeded against upon the libel for an unlawful seizure. [*499

The Admiralty Court, in the District of Columbia, had jurisdiction of such a libel for condemnation, although the property was not brought within its jurisdiction; and, if they found it liable to condemnation, might proceed to condemn it, although it was not brought within the custody or control of the court.

The necessity of proceeding to condemn as prize, does not arise from any difference between the Instance Court and the Prize Court, as known in England. The same court here possesses the instance and prize jurisdiction. But because the property of the neutral is not divested by the capture, but by the condemnation in a prize court; and it is not divested until condemnation, although, when condemned, the condemnation relates back to the capture.

As this libel is for the restitution of the property or the proceeds, probable cause of seizure is no defence. It is a good defence against a claim for damages, when the property has been restored, or lost after seizure without the fault of the captor. But, while the property or proceeds is withheld by the captor, and claimed as prize, probable cause of seizure is no defence.

The Circuit Court, therefore, erred in deciding that probable cause of seizure was a good defence.[1]

THESE were appeals from the Circuit Court of the United States for the District of Columbia, holden in and for the county of Washington.

The facts are fully stated in the opinion of the court.

The cases were argued together by *Mr. Coxe* and *Mr. Nelson*, for Jecker, Torre, & Company, and by *Mr. Key* and *Mr. Johnson*, for Captain Montgomery.

The arguments on both sides took a wide range, and it is impossible to insert the entire views of the case taken by the respective counsel The following are given as those bearing upon what appear to be the principal points.

The arguments were divided into two heads:

1st. The ground of defence taken in the answer of the respondent, that the property had been carried into the port of Monterey, a town in California, then occupied by the American forces, within the limits of Mexico, and there had been regularly proceeded against and condemned as prize of war, by a court exercising at that place admiralty jurisdiction.

The libellants demurred to this plea or defence, and both the District and Circuit Courts sustained the demurrer; and from this decision the respondent appealed. The arguments

[1] See also *United States* v. *Weed*, 5 Wall., 69; *The William Bagaley*, Id., 405; *The Grapeshot*, 9 Id., 133.

of the counsel upon this branch of the case, although of an interesting character, are omitted for want of room.

The second demurrer was also to a part of the answer, and was as follows:

"The libellants, as to so much of the answer of the respondent, filed in this case, as alleges and sets up any act or thing on the part of the captain and crew of the said ship Admittance, or any of omission or commission of any sort or
*500] kind, as a justification *of the said seizure of said ship or her cargo as lawful prize of war, or which might amount to probable cause of said seizure, demurs to the same; and for cause of demurrer, avers and says, that this court in this cause has no rightful jurisdiction or authority to examine or adjudicate upon any question of prize, or of probable cause of capture as prize of war, but that the same belongs exclusively to the courts of the United States exercising prize jurisdiction, and having within its jurisdiction and control the property so seized or captured as prize, which this court has not, and, in consequence of the tortious and illegal acts of said respondent, as alleged and set forth in said libel, cannot have.

"Wherefore, and for other causes, these libellants do demur to so much of said answer as is above set forth.

"COXE, *Advocate and Proctor for Libellants.*"

This demurrer was also sustained by the District Court, but the judgment was reversed by the Circuit Court, and from this decision the libellants appealed.

Upon this point the argument of the counsel for the libellants was as follows:

The respondent, however, insists that he has in this action a right to show—

1. An actual and sufficient case of prize of war, as a bar to the remedy asked in the libel.

2. Probable cause of seizure, as a bar to the action.

1st. This is a civil suit to recover back property originally belonging to libellants, of which they have been forcibly divested by defendants, under whose authority it has been sold and converted into money. Can the party in such a suit aver legal cause of capture and condemnation as prize without producing a valid decree of condemnation as prize by a court of competent jurisdiction?

If he can, then this singular anomaly and most dangerous precedent will be exhibited, that a captor may disregard the injunctions of the law, and his own paramount duty; omit to bring his prize into court; to institute prize proceedings;—but may retain the property in his own hands, or at his

pleasure convert it into money; and when called upon to answer in a civil suit, set up as a defence an original cause of condemnation.

It will scarcely be doubted that the jurisdiction of the prize courts, in cases of prize, is exclusive. The nature and extent of this jurisdiction, as it exists in England, are distinctively given by Lord Mansfield in *Lindo* v. *Rodney*, Dougl., 613. 1 Kent, 353; Conkl., 354; Dunl. Ad. Pr., 26; 12 Wheat., 1, 11. In every respect it differs from the ordinary Court of Admiralty. "The manner of proceeding is totally different, the whole system of *litigation and [*501 jurisprudence in the Prize Court is peculiar to itself; it is no more like the Court of Admiralty than it is to any court in Westminster Hall." See particularly the language of Lord Mansfield, p. 616.

The claimant of the property cannot himself institute prize proceedings. They must always be had in the name of the government, to whom all prizes *primâ facie* belong. The only remedy the captured has is by monition, a proceeding *in personam* to compel the captors to perform their duty.

The ordinary Court of Admiralty has no more authority to condemn a prize than a court of common law; and should the doctrine asserted for this defendant prevail, these singular results must inevitably follow—

1st. The captors can never acquire any legal right to the property, unless by a decree of a prize court. This is, throughout, recognized in *Home* v. *Camden*, in 1 H. Bl., 476; 4 T. R., 382; and especially in 2 H. Bl., 541, 542, in the unanimous opinion of the twelve judges.

2d. The United States can assert no right, for its right depends also upon a sentence of condemnation, which alone can divest the former title.

3d. The original proprietor is forbidden by this doctrine from asserting his title.

The only party in whom the law recognizes a title, is forbidden to assert it, and the government, and the sub-officers and crew of the capturing vessel, have no rights cognizable in a court. This property, therefore, on this doctrine, must remain in the hands of the present defendant, subject to no responsibility.

The only mode of avoiding these absurd consequences is to enforce the law as above stated. 2 Wheat., Appx., 9. When a ship is captured, it is the duty of the captors to send her into some convenient port for adjudication. Citing *The Huldah*, and other cases; *The Mentor*, 1 Rob., 151; *The Susanna*, 6 Rob., 48.

In *The Madonna del Burso*, (4 Rob., 171,) Sir W. Scott says:—"However justifiable the seizure may have been, the first obligation which the seizor has to discharge, is that of accounting why he did not institute proceedings against the vessel and cargo immediately; and unless he can exculpate himself with respect to delay in this matter, he is guilty of no inconsiderable breach of duty. It would be highly injurious to the commerce of other countries, and disgraceful to the jurisprudence of this, if any persons, commissioned or non-commissioned, could lay their hands upon valuable ships and cargoes in our harbors, and keep their hands upon them without bringing such an act to judicial notice in any manner for the space of three or four months."

*502] *"A belligerent nation which is in the exercise of these rights of war, is bound to find tribunals for the regulation of them; tribunals clear in their authority, as well as pure in their administration; and if from causes of private internal policy, arising out of the peculiar relation of the component parts of the belligerent State, difficulties arise, the neutral is not to be prejudiced on that account; he has a right to speedy and unobstructed justice, and has nothing to do with such difficulties created by questions of domestic constitution." Id., 177.

This view furnishes an answer to the suggestion of the necessity of creating and resorting to such a court as was erected in California. So, in page 147, will be found an equally decisive answer to the suggestion of counsel, that the master of the Admittance appeared before the Alcalde at Monterey. These libellants were not present, nor had the captain any authority to represent them; and he, as Sir W. Scott says, "only followed where he was led."

In the case of the *St. Juan Baptista*, (5 Rob., 33,) the prize was brought into England on the 12th of August, and proceedings were instituted on the 12th September, and the court held that it was bound to require a satisfactory cause for this delay. "Grevious," says Sir W. Scott, "would be the injury to neutral trade, and highly disgraceful to the honor of our country, if captors could bring in ships at their own fancy, and detain them any length of time without bringing the matter to the cognizance of a court of justice. In the present instance this first and fundamental duty has not been performed." "Persons venturing to take out a commission of war must instruct themselves in their own duty, and if any inconvenience arises from their neglect, the neutral claimant is not to suffer." In the case at bar, no prize proceedings have to this day been instituted; this fun-

damental duty, as Sir W. Scott calls it, has been wholly neglected. The property has never been brought within the United States,—another fundamental duty. The papers and documents on board have never been transmitted to any District Court; a peremptory requisition of the law is thus disregarded. It is intimated they are in the possession of the Navy Department. How did the captors procure them from the pseudo court at Monterey, and under what authority are they lodged in the Navy Department? The property no longer remains specifically; it has been converted into money, and no prize court can now proceed to adjudication.

In the *Wilhelmsberg*, (5 Rob., 143,) the same learned judge, observing upon the duty of the captor to send his prize to some convenient port, says that "in that consideration the convenience of the claimant, in proceeding to adjudication, is (among) *one of the first things to which the attention of the captor ought to be addressed." [*503 "He considered that the port selected in that case was not such a port, a place where the captor cannot get advice, much less can the claimant learn in what manner to proceed, or where to resort for justice."

If such was the character of that port, what shall be said of Monterey, a place not within the jurisdiction of any court of the United States; a port of the very enemy with whom we were at war, occupied, it is true, so far as their guns could reach, by an American force; where no tribunal existed which could direct its process, or exercise jurisdiction; no judge responsible for the performance of judicial function; where the protecting arm and supervising power of the Circuit or Supreme Court could not reach; where no counsel could be found competent to give correct advice. How infinitely further from the shadow of right than in the case of the *Wilhelmsberg*, already cited, or that of the *Lively*, (1 Gall., 315,) where the court condemned the captor for carrying the property captured in the neighborhood of Machias River, to Salem. The Lively was a case in which the claimants had filed a libel for restitution, as here, and in which a monition to proceed to adjudication issued against the captors, who accordingly libelled the property as prize. It was not attempted there, as here, to bar the relief sought in the Instance Court by setting up a lawful cause for condemnation as prize of war, or a probable cause to justify the seizure. Before that learned court no such ground of defence would be offered or admitted. There it was the well-known law, that the Prize Court could only alone adjudicate upon these questions.

Had the captured property been brought within the jurisdiction of the District Court, having power to proceed as in a prize case, and such proceedings had been commenced, the claimant might have proceeded by petition in that court to compel the captors to proceed to adjudication. Such was the course in the case of the *William*, 4 Rob., 214. When, however, the property is beyond the jurisdiction of the Prize Court, so that no prize jurisdiction can be exercised, then a monition issues from the instance side of the court, proceeding personally against the captors, commanding them to perform the duty enjoined on them by law, or to restore the property.

It must be borne in mind, that in this case no claim is presented for vindictive damages; the captor is not sought to be molested for his acts of wrong, or for his omission to perform a duty. The simple demand is, that, having seized our property, having failed to perform the fundamental duty imposed on him by law, having failed to show his right to capture, having omitted to permit us to assert our rights and maintain our innocence *in the only court having jurisdiction
*504] to decide the question of prize, he shall restore the property specifically; or if he has put it out of his power by any means, of doing this, then that he shall respond in value. Our proceeding is more nearly assimilated to the common-law actions of trover or replevin, than of trespass. The issue presented is simply of a right to property. If the property belongs to libellants, they are entitled to a decree of restitution; if that property has been divested, and the right now belongs to the defendant, he is entitled to judgment.

This conclusion cannot be avoided by adopting a principle asserted by the learned counsel for the respondent, viz., that condemnation as prize is not necessary to vest the title to the property captured, in the captors. He asserts that a forfeiture attaches *in rem*, when the offence is committed, and the property is instantly divested.

(The counsel then proceeded to comment upon this position, and concluded as follows.)

If, in this proceeding, the question of prize cannot be raised, or decided; if the court cannot proceed to condemn, and therefore, will not permit defendant, collaterally and incidentally, to avail himself of such a ground of defence, as little ground is there for the analogous defence upon which the Circuit Court seems to have rested that portion of the decree from which we have appealed, viz., that the pleadings disclose a case of probable cause of capture which justified the seizure and bars this action.

This point, it is believed, was not argued in the court below, but was gratuitously taken by the learned judges themselves, the chief judge not sitting in the cause.

It is apprehended, that in deciding this to be a bar to the action, the whole principle of the law as to probable cause, has been lost sight of. Probable cause is recognized as a justifiable ground of seizure, either as prize *jure belli*, or for a statute forfeiture. In the first class of cases, where the capture has been made as prize of war, the general principles of the law of nations provides this defence; where made for an alleged forfeiture under a statute, such protection must be conferred by statute, or it is not available. But, whether in the one case or the other, these principles are believed to be incontrovertible and universal.

1. The question of probable cause belongs exclusively to the court which has jurisdiction to condemn or to decree forfeiture.

2. It can be adjudged in that court only in a proceeding to obtain condemnation.

3. Only in such a court, after a decree refusing condemnation and directing restitution.

*4. The only legal operation of a certificate of probable cause is to bar a recovery of damages for an unlawful seizure. [*505

The general principles which govern cases of this character, are embodied in our statute book. 1 Stat. at L., 696, 122. The 89th sect. of the act of March 2, 1799, provides for cases of seizures under the collection laws, and enacts that "when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, &c., and judgment shall be given for the claimant or claimants; if it shall appear to the court before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof, and in such case, the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to action, suit, or judgment, on account of such seizure and prosecution." Similar provisions may be found in other statutes inflicting forfeitures.

The act of June 26, 1812, (2 Stat. at L., 759, c. 107,) concerning letters of marque, prizes, and prize goods, in its 6th section, provides "that before breaking bulk of any vessel which shall be captured as aforesaid, or other disposal or conversion thereof, or of any article which shall be found on board the same, such captured vessel, goods, or effects, shall be brought into some port of the United States, and shall be

proceeded against before a competent tribunal; and after condemnation and forfeiture thereof, shall belong to the owners and captors thereof, and be distributed as aforesaid; and in the case of all captured vessels, goods, and effects, which shall be brought within the jurisdiction of the United States, the District Courts of the United States shall have exclusive original jurisdiction thereof, as in civil cases of admiralty and maritime jurisdiction; and the said courts, or the courts being courts of the United States, into which said cases shall be removed, and in which they shall be finally decided, shall and may decree restitution in whole or in part, when the capture shall have been made without just cause; and, if made without probable cause, or otherwise unreasonably, may order and decree damages and costs to the party injured."

These provisions embody the correct doctrine of the law relating to probable cause; and it is confidently asserted that no case can be produced in which even a certificate of probable cause, given by a court exercising exclusive jurisdiction, was ever thought to present a bar to a claim for restitution of property.

The argument of the counsel for the respondent, viz., the competency of the court in California, is omitted.

Upon the question presented by the second demurrer, viz.,
*506] *"Can the respondent defend himself in this suit by the matters and things stated in his answer?" a part of the argument of the counsel was as follows.

It is contended, by the learned counsel for the libellants, that the respondent cannot defend himself in this suit by showing any "act or thing on the part of the captain or crew of the ship Admittance, or any act of omission or commission of any sort or kind as a justification of the said seizure of said ship or her cargo, as lawful prize of war, or which might amount to probable cause for said seizure, etc."

It is thought this position cannot be maintained; it indicates a fear upon the part of the libellants, themselves admitted wrongdoers, to meet the respondent upon fair ground, the merits of the case. They ask for heavy damages, and at the same time admit that they accrued by reason of their own illegal acts.

What is there in the nature of this suit that should exclude the defence set up by the respondent? What is the injury complained of? It is, as stated in the libel, that the respondent, "without any lawful cause or probable cause of suspicion," seized and took possession of the ship Admittance, her cargo, and papers, and that the same were not brought nor sent within the jurisdiction of any court of the United States for

adjudication, and that the libellants "have been, for more than a twelvemonth, deprived of the use, possession, management, and control of the said property," and that the same has been "illegally sold and disposed of." The remedy pursued is a proceeding instituted to compel the respondent to bring in the property, and proceed to adjudication, or in default thereof, that restitution in value should be decreed against him. It is a very common proceeding in the admiralty courts, and by looking into its nature and object, it will be perceived that the defence contended for, is necessarily granted. It will be found that the mere failure of a captor to proceed to adjudication, is not enough to entitle a claimant to restitution in value, but that the court will look back to the original cause of seizure, and if the claimant has violated any law which rendered his property liable to condemnation, restitution in value will not be decreed.

Various authorities are cited to show that the distinction between the prize and instance side of the District Courts, as Courts of Admiralty, has an important bearing upon this question.

It is stated, in the argument of the learned counsel, that "this is a suit instituted on the instance side of the admiralty for an alleged marine trespass," and also, "that it is not a suit for damages." I would ask what is a decree of restitution in value, but a decree of damages for a marine trespass? And is the respondent, merely because the proceedings are instituted on the *instance side of the admiralty, to be ousted of his defence, and not to be permitted to [*507 show that no trespass was committed.

What is a tort of which a court of admiralty has jurisdiction? Vide Conkling's United States Admiralty, p. 21, where Judge Story enumerates the different injuries redressed by a court of admiralty. See also, p. 334, 336, *n.* a. The passages referred to describe the various injuries for which legal redress can be obtained, and point out the particular remedies; and yet there is nothing like a claim for damages because the property was not condemned, but they refer to the legality or illegality of the seizure; and in the last reference it is said, "if no proceeding is instituted, as is sometimes the case when the captor himself has become convinced of the invalidity of the capture, or the captured property has been lost by recapture or otherwise, the injured party may, in such case, himself become the primary actor, by calling on the captor to proceed to adjudication, and at the same time invoking the justice of the court to award damages, if the cap

ture shall be adjudged to have been tortious;" not because the captor had not proceeded to adjudication.

In Wheaton on Captures, p. 280, sect. 18, the same redress is pointed out. "If the captors omit or delay to proceed to the adjudication of the property, any person claiming an interest in the captured property may maintain a monition against them, citing them to proceed to adjudication, which, if they do not do, or show cause why the property should be condemned, it will be restored to the claimants proving an interest therein; and this process is often resorted to when the property is lost or destroyed through the fault or negligence of the captors, in order to obtain a compensation in damages for the unjust seizure and detention."

In 2 Wheat. App., p. 11, it is said, "If the captors unjustifiably neglect to proceed to adjudication, the court will, in case of restitution, decree demurrage against them," and cites the *Madonna del Burso*, 4 Rob., 169; *The Corier Maratimo*, 1 Rob., 287; *The Peacock*, 4 Rob., 185; *The Anna Catherina*, 6 Rob., 10.

Hence, whenever a restitution in value is decreed, it is upon the ground that there would have been a restitution of the property valued, and no case cited by the learned counsel controverts this position.

(The counsel then proceeded to comment upon the following cases: *The Lucy*, 3 Rob., 208; *The Huldah*, 3 Rob., 235; *The Madonna del Burso*, 4 Rob., 169; *The St. Juan Baptista*, 5 Rob., 33; *The Wilhelmsberg*, 5 Rob., 143; *The Lively*, 1 Gall., 315; *The Felicity*, 2 Dods., 381; *The Rover*, 2 Gall., 239.)

Various acts of Congress have been referred to to show that it is the duty of a captor to bring in captured property,
*508] and *proceed to adjudication. This general principle, it has been before stated, is admitted. It is not contended, in behalf of respondent, that a captor may, at his pleasure, under any circumstances, disregard the injunctions of the law, omit to bring his prize into court, convert it into money, and retain it in his own hands. The maintenance of such principles is not necessary to his defence in this suit.

But I would ask, is a veil to be thrown over the conduct of the libellants or their agents? Is the fact to be kept out of view, that the master of the Admittance sailed from New Orleans with the intent to trade with the enemy, and did in fact trade with the enemy? Will this court aid an unworthy claimant? "It is a good moral and legal principle, that a man must come into a court of justice with clean hands, and that the law will not lend its aid to a person setting up a

violation of law on the face of his claim." Wheaton on Captures, 225.

The Anna Maria, 2 Wheat., 328. Chief Justice Marshall says: "To sustain the claim of the libellants, the first point to be established is the fairness of the voyage."

The Gran Para, 7 Wheat., 483. A claim founded on piracy, or any other act, which, in the general estimation of mankind, is held to be illegal or immoral, might, I presume, be rejected in any court on that ground alone." And is not the present claim founded on an illegal act? The demurrer admits the illegal act, and yet the claim is for restitution.

The Bello Corrunes, 6 Wheat., 169. "But can a citizen of this country, who has violated its laws, ever be recognized in our courts as a legal claimant of the fruits of his own wrong?"

It will be perceived, by referring to the answer of the respondent, and the amendment to the answer, that the seizure may be justified on two grounds: first, a trading with the enemy; and, second, that it was the property of the enemy. *The Rugen*, 1 Wheat., 74. It is important, in the view now about to be taken, to ascertain the national character of the libellants. The libel states they were neutrals, some of them subjects of the Queen of Spain, and the others subjects of France. This is denied by the answer, which avers that they were resident merchants of Mexico, conducting there a commercial establishment—a fact beyond dispute. "If a person has a residence in a hostile country, and conducts a commercial establishment there, notwithstanding his place of birth, he will be considered as an enemy in regard to his commercial operations." 1 Kent, 74, 75.

Then the libellants must be considered as belligerents, and this must be taken as admitted by the demurrer.

Was condemnation necessary to divest the libellants of the property?

*In *Gelston* v. *Hoyt*, 3 Wheat., it was decided that a forfeiture attached *in rem* at the moment the offence [*509 was committed, and the property was instantly divested, so that no action could be maintained for the subsequent seizure. This, it is said, was a case of a statute forfeiture, and has no analogy to the question under consideration; but it is submitted that it has an important bearing, inasmuch as it shows that whatever may be the subsequent conduct of a captor, an action cannot be maintained against him.

The Mars, 1 Gall., 192.* In this case it will be found, that

* This case more particularly applies to the first ground of seizure,—"trading with the enemy."

upon principles of common law the following propositions were discussed by Judge Story:

1. What is the interest or right which attaches to the government in forfeitures of property, before any act done to vindicate its claims?

2. What is the operation of such act, done to vindicate its claim, as to the offender and as to strangers?

And the conclusions he arrived at were—

1st. "That an absolute property vested in the United States when actual seizure was made."

2d. "That, as against the offender or his representatives, upon seizure, the title, by operation of law, relates back to the time of the offence, so as to avoid all mesne acts."

Then, upon the authority of this case, it is submitted, that the libellants were absolutely divested of their property upon the commission of the offence. A captor may destroy property. 1 Kent, 104. "Sometimes circumstances will not permit property captured at sea to be sent into port, and the captors in such cases may either destroy it, or permit the original owner to ransom it."

There are decisions to the effect that it requires a sentence of condemnation to change the property, but this applies to a neutral purchaser; as in the case of the *Flad Oyen*, (1 Rob., 117,) the substance of what decision was, that the owner could have restitution of his property from a neutral vendee, unless it had been condemned to the captors; and the reason of this is obvious, the neutral purchaser can only take that which his condition of neutrality permits him to take, and when he takes the property without condemnation from the captors, he occupies the position of a captor, which is inconsistent with his neutrality.

In *Goss* v. *Withers* (2 Burr., 694), Lord Mansfield says, "the property is not changed so as to bar the owner, in favor of a *vendee, or recaptor, till there has been a sentence of condemnation," intimating that it is changed without condemnation so as to bar the owner in a claim against the captor.

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In 1 Kent, 101, it is said: "When a prize is taken at sea, it must be brought with due care into some convenient port for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes and is vested when the capture is complete; and "this question never arises but between the original owner and a neutral purchasing from the captor, and between the original owner and a recaptor."

The Adventure, 8 Cranch, 226. The Adventure was an

English ship, seized by the French. The French captors made a donation of her to the crew of an American brig, who brought her into Norfolk, and claimed her as their property, acquired by the donation of the captors. Mr. Justice Johnson, in delivering the opinion of this court, says: "As between the belligerents, the capture undoubtedly produces a complete divestiture of property."

Admitting the principle supposed to be decided in the case of *Price* v. *Noble* (4 Taunt., 123), to be correct, that the property was not changed, because there was a *spes recuperandi*, it would not affect this case, the property having been brought *infra presidia;* and this may be also observed of the reference to 15 Vin. Abr., 51.

In the case of *Camden* v. *Home* (6 Bro. P. C., 2 H. B.), the statute expressly vested the right in the captor after adjudication.

On these grounds it is submitted that condemnation was not necessary to divest the libellants of their property.

It is urged, in behalf of the libellants, that the government has asserted and can assert no rights here; and if the defence is held available, it will place the "whole proceeds of this valuable cargo in the pocket of the respondent." What will or will not go into the pocket of the respondent, is a question not pertinent to the issues presented by the record; but, it may be observed, that one half of the property in question, if lawful prize, belongs to the government; and upon the institution of this suit it asserted its rights so far as to employ counsel for the respondent.

By directions from the Navy Department, the proceeds of the sale of the ship and cargo were not distributed, but were sent into the United States, and placed in the treasury, where they now are, a circumstance which, it is believed, was known to the libellants; and if they had thought proper to institute proceedings calling on the respondent to bring in the proceeds, they would have been forthcoming. The property has not been *"illegally or unjustifiably" converted, and, [*511
under the authority of the case of the *Eole* (6 Rob., 224), the proceeds are entitled to the privilege of prize property, and subject to the judgment of the court.

There is not a single circumstance connected with this seizure, which can justify the imputation of misconduct. For reasons, which were conclusive in the mind of the respondent, he directed an officer to board and seize the Admittance. Upon the examination of her papers it was at once seen that his reasons were well founded. The deceptive clearance, the erasures upon the bills of lading, the false entries in the log-

book, the position of the ship on the coast of Mexico when she had cleared for Honolulu, were all circumstances indicating guilt. The subsequent testimony of the mate of the Admittance, that she had been sailing under false colors, answering private signals given from various points on the shore, receiving and answering written communications, her name on the stern concealed with canvass, the captain expressly avowing his intention of discharging his cargo at some port or place in possession of the enemy, and expressing a fear of falling in with an American man-of-war, affords the most conclusive evidence, that to have acted otherwise, the respondent would have been justly chargeable with a violation of his duty.

The condition of the ship, the want of stores, and his inability to furnish a prize crew, rendered it impossible to send her into any port of the United States, a state of things which had been contemplated by the instructions he received from his superior in command. He, therefore, proceeded to Monterey, and libelled the ship in the aforementioned court, which he had every reason to believe was a competent tribunal. The papers of the Admittance were there filed, and finally transmitted to the Navy Department, copies of which have been furnished the counsel of the libellants, and they are referred to and made a part of the respondent's answer.

There are two grounds, either of which, if it is competent for this court to consider, as the case is presented, must be conclusive against the libellants.

1st. What authority have the libellants to appear and claim an interest in the cargo? They were belligerents. The libel states that the cargo "was purchased by order of Messrs. Rubio, Brothers & Co., subjects of the Queen of Spain; the bills of lading were made out in their name, and were subsequently indorsed and transferred to the libellants": that "the cargo was shipped at New Orleans in October, 1846." The answer avers that Messrs. Rubio, Brothers & Co. were also belligerents, a fact which cannot be denied. Then how *512] could they acquire property *by a purchase at New Orleans during the war? Was a right of property ever vested in either Rubio, Brothers & Co. or the libellants? Vide 1 Kent, 67, and the authorities there cited.

2d. Does not the intervention of peace bar the claimants? "Captured property remains in the same condition in which the treaty finds it, and it is tacitly conceded to the possessor. The intervention of peace cures all defects of title." 1 Kent, ch. 5, 111; ch. 8, 169.

The schooner Sophie, 6 Rob., 138. Sir William Scott says,

"I am of opinion that the title of the former owner is completely barred by the intervention of peace, which has the effect of quieting all titles of possession arising from the war," and this was decided in a cause where the captured vessel claimed had not been condemned.

Upon these views, the respondent prays that so much of the judgment of the Circuit Court as sustains the first demurrer may be reversed, and that the residue of said judgment may be affirmed with costs.

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

This case arises upon the capture of the ship Admittance during the late war with Mexico, by the United States sloop of war Portsmouth, commanded by Captain Montgomery.

The Admittance was an American vessel, and after war was declared, sailed from New Orleans with a valuable cargo, shipped at that place. She cleared out for Honolulu, in the Sandwich Islands; and was found by the Portsmouth at Saint Jose, on the coast of California, trading, as it is alleged, with the enemy.

Before this capture was made a prize court had been established at Monterey, in California, by the military officer, exercising the functions of governor of that province, which had been taken possession of by the American forces. A chaplain, belonging to one of the ships of war on that station, was appointed Alcalde of Monterey, and authorized to exercise admiralty jurisdiction in cases of capture. The court was established at the request of Commodore Biddle, the naval commander on that station, and sanctioned by the President of the United States, upon the ground that prize crews could not be spared from the squadron to bring captured vessels into a port of the United States. And the officers of the squadron were ordered to carry their prizes to Monterey, and libel them for condemnation in the court above mentioned, instead of sending them to the United States.

In pursuance of this order the Admittance was carried to Monterey, and condemned by the court as lawful prize; and the vessel and cargo sold under this sentence. The seizure at Saint *Jose was made on the 7th of April, 1847, and [*513
the ship and cargo condemned on the 1st of June, in the same year.

The order of the President, authorizing the establishment of the court, required that the proceeds arising from the sale of prizes, should not be distributed, until a copy of the record was sent to the Navy Department, and orders in relation to the prize-money received from the secretary. No order ap-

pears to have been given in this case, and it would be presumed, from the pleadings, that it is still in the custody of the commander of the Portsmouth. It has, however, been stated in the argument, and we understand is admitted, that the money was sent to the United States, and placed in the custody of the Treasury Department, where it still remains. But it is not material in this case to inquire, whether it is still in possession of Captain Montgomery, or in the custody of the Secretary of the Treasury. It could not, in either case, affect the decision. This is the case as it appears on the record, and admissions in the argument. It comes before the court on the following pleadings.

The claimants, on the 6th of June, 1848, filed a libel in the Admiralty Court for the District of Columbia, against the captor, stating that they were the owners of the cargo of the Admittance; that they were the subjects of Spain, and neutrals in the war between this country and Mexico; that the Admittance sailed on a lawful voyage; that the vessel and cargo were seized at Saint Jose by Captain Montgomery as prize of war, without any lawful or probable cause; that the vessel and cargo were not brought to the United States, nor proceeded against as prize of war in any court having jurisdiction to adjudicate upon the lawfulness of the capture, but were unlawfully sold and disposed of by Captain Montgomery, who thereby had put it out of his power to proceed to any lawful adjudication upon the legality of the capture, and had thus made himself a trespasser *ab initio*, independently of any lawful or probable cause for the original seizure. They pray, therefore, that he may be compelled to bring the cargo within the jurisdiction of the court, or of some other court of the United States, and institute proceedings against the property, and show that there was lawful or probable cause for the seizure, and have the same adjudicated upon by some court of the United States having full jurisdiction in the matter; and that restitution of the goods or the value thereof may be awarded to the libellants, with damages for the unlawful seizure.

Captain Montgomery appeared and answered, and admitted that, as commander of the United States ship Portsmouth, he seized and took the Admittance at Saint Jose as lawful prize; and justifies the seizure upon the ground that she sailed from *New Orleans with the design of trading with the enemy; that she did in fact hold illegal intercourse with them, and discharged a part of her cargo at Saint Jose. And the respondent exhibits with his answer, and as a part of it, sundry papers received from Peter Peterson, the master of

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the Admittance, together with her log-book and the deposition of her mate.

The respondent further states that it was impossible for him, consistently with the public interests, to send the Admittance to any port of the United States; and that he carried her before the prize court hereinbefore mentioned, at Monterey, where she was condemned with her cargo as lawful prize; and exhibits the proceedings of that court as a part of his answer, and relies on this condemnation as a bar to the present proceedings on behalf of the claimants.

To this answer the libellants put in two demurrers.

1. To so much of the answer as relies upon the condemnation at Monterey as a bar.

To so much of the answer as relies upon the acts of the captain and crew of the Admittance as a justification for the seizure of the ship or cargo as lawful prize of war, or furnishing probable cause for seizure; and, as the ground for this demurrer, avers that the Admiralty Court for the District of Columbia had no jurisdiction to adjudicate upon the question of prizes or probable cause of seizure, as the property was not within its control, and could not be brought within it in consequence of the sale in California. The respondent joined in these demurrers.

After these issues in law had been joined, the respondent, by leave of the court, amended his answer, averring in the amendment that the libellants, at the time of the shipment at New Orleans, and at the time of the seizure, were domiciled in Mexico and conducting a commercial establishment in that country; and also, that the libellants were the owners of only a small portion of the cargo. But there is no replication to this amendment, nor is it embraced in the issues of law made by the demurrers. The omission to dispose of it, however, forms no objection to this appeal, as the judgment of the Circuit Court was final, and disposed of the whole case, independently of these new allegations.

In this state of the pleadings, a decree was entered in the District Court sustaining both of the demurrers, and directing the respondent to bring the cargo within the jurisdiction of some District Court of the United States, and institute proceedings against it as a prize of war, on or before the day mentioned in the decree; and that in default thereof the libellants should recover its value.

This decree was entered *pro formâ* in order to bring the case *before the Circuit Court, to which the respondent accordingly appealed. And upon the argument in the last-mentioned court, the first demurrer was sustained, and [*515

the decree of the District Court in that respect affirmed; but so much of the decree as sustained the demurrer to the answer of the respondent, averring sufficient probable cause for the seizure of the cargo, was reversed, and a final decree upon that ground rendered against the libellants.

From this decree both parties have appealed to this court.

In relation to the proceedings in the court at Monterey, which is the subject of the first demurrer, the decision of the Circuit Court is correct.

All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.

The second demurrer denies the authority of the District Court to adjudicate, because the property had not been brought within its jurisdiction. But that proposition cannot be maintained; and a prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property, or award restitution, although it is not actually in the control of the court. It may always proceed *in rem* whenever the prize or proceeds of the prize can be traced to the hands of any person whatever.

*516] *As a general rule, it is the duty of the captor

to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the act of Congress in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which in all civilized countries secures to the captured a trial in a court of competent jurisdiction before he can finally be deprived of his property.

But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country; and may afterwards proceed to adjudication in a court of the United States. 4 Cranch, 293; 7 Id., 423; 2 Gall., 368; 2 Wheat. App., 11, 16; 1 Kent, Com., 359; 6 Rob., 138, 194, 229, 257.

But if no sufficient cause is shown to justify the sale, and the conduct of the captor has been unjust and oppressive, the court may refuse to adjudicate upon the validity of the capture, and award restitution and damages against the captor, although the seizure as prize was originally lawful, or made upon probable cause.

And the same rule prevails where the sale was justifiable, and the captor has delayed for an unreasonable time, to institute proceedings to condemn it. Upon a libel filed by the captured, as for a marine trespass, the court will refuse to award a monition to proceed to adjudication on the question of prize or no prize, but will treat the captor as a wrongdoer from the beginning.

But, in the case before us, sufficient cause for capture and condemnation is stated in the answer; and the reason assigned therein is a full justification for not sending the Admittance and her cargo to the United States. And as to the delay, he had reasonable ground for believing that no further proceedings were necessary after the condemnation at Monterey. The court had been constituted with the sanction of the executive department of the government, under whose orders he was acting; and it had condemned the vessel and cargo as prize, and ordered them to be sold. And if, as seems to be conceded in the argument, the proceeds were paid over to the government to await its further orders, and

still remain in its hands, certainly no laches or neglect of duty in any respect can be imputed to the respondent.

*517] *Inasmuch, therefore, as the answer alleges a sufficient cause for selling the property before condemnation, and also for not proceeding against it in a court of competent jurisdiction, the respondent has forfeited none of the rights which he acquired by the capture. And, as the District Court had jurisdiction, the second demurrer ought to have been overruled, and an order passed directing Captain Montgomery to institute proceedings by a certain day to condemn the property, (giving him reasonable time,) and that, upon his failure to comply with the order, the court should proceed on the libel filed against him for a marine trespass, and award such damages as the libellants might show themselves entitled to demand.

The necessity of proceeding to condemnation as prize, does not arise from any distinction between the Instance Court of Admiralty and the Prize Court. In England, they are different courts; and, although the jurisdiction of each of them is always exercised by the same person, yet he holds the offices by different commissions. But, under the Constitution of the United States, the Instance Court of Admiralty and the Prize Court of Admiralty are the same court, acting under one commission. Still, however, the property cannot be condemned as prize, upon this libel; nor would its dismissal be equivalent to a condemnation, nor recognized as such in foreign courts. The libellants allege that the goods were neutral, and not liable to capture; and their right to them cannot be divested until there is a sentence of condemnation against them as prize of war. And, as that sentence cannot be pronounced in the present form of the proceeding, it becomes necessary to proceed in the prize jurisdiction of the court, where the property may be condemned or acquitted by the sentence of the court, and the whole controversy be finally settled. 4 Cranch, 241; *Rose* v. *Himely*; 2 Wheat. App., 41, 42; 1 Kent, Com., 101, 102; 6 Rob., 48; 3 Id., 192; 2 Gall., 368; Id., 240.

But the Circuit Court erred in giving final judgment against the libellants, upon the ground that the answer showed probable grounds for the seizure. The question of probable cause is not presented in the present stage of the proceedings, and cannot arise until the validity of the capture is determined. If it turn out, upon the final hearing upon the question of prize or no prize, that the vessel and cargo were liable to capture and condemnation, it would necessarily follow that there was not only probable cause, but good and sufficient

cause, for the seizure. And if, on the contrary, it should be found that they were not liable to capture, as prize of war, the libellants would be entitled to restitution, or the value in damages, although the strongest probabilities appeared against them at the time of the seizure. Probable cause or not becomes material only where restitution is awarded, and *the libellants claim additional damages, for the injury and expenses sustained from the seizure and detention. [*518 It applies only to these additional damages; and, however strong the grounds of suspicion may have been, it is no bar to restitution, if the claimant can show that the goods which he claims belonged to him, were neutral, and that nothing had been done that subjected them to capture and condemnation.

The judgment of the Circuit Court must therefore be reversed, and a mandate awarded, directing the case to be remanded to the District Court, to be there proceeded in, according to the rules and principles stated in this opinion.

The appeal on the part of the respondent is dismissed. The decision upon the matter in controversy was in his favor, and the question of law decided against him on the first demurrer, was open for argument upon the appeal of the libellants. There was no ground, therefore, for this appeal.

Order in Jecker et al. v. *Montgomery.*

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, adjudged, and decreed by this court, that the decree of the said Circuit Court in this cause be, and the same is hereby, reversed, with costs; and that this cause be, and the same is hereby, remanded to the said Circuit Court, for further proceedings to be had therein, in conformity to the opinion of this court.

Order in Montgomery v. *Jecker et al.*

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Columbia, holden in and for the County of Washington, 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, with costs.

The State of Pennsylvania, Complainant, *v.* The Wheeling and Belmont Bridge Company, William Otterson and George Croft.

The State of Pennsylvania having constructed lines of canal and railroad, and other means of travel and transportation, which would be injured in their revenues by the obstruction in the River Ohio, created by a bridge at Wheeling, has a sufficiently direct interest to sustain an application to this court, in the exercise of *original jurisdiction, for an injunction to remove the obstruction. The remedy at law would be incomplete.[1]

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It is admitted that the federal courts have no jurisdiction of common-law offences, and that there is no abstract, pervading principle, of the common law of the Union under which this court can take jurisdiction; and that the case under consideration is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.[2]

But chancery jurisdiction is conferred on the courts of the United States by the Constitution, under certain limitations; and, under these limitations, the usages of the High Court of Chancery, in England, which have been adopted as rules by this court, furnish the chancery law which is exercised in all the States, and even in those where no State chancery system exists.[3]

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

An indictment against a bridge, as a nuisance, by the United States, could not be sustained; but a proceeding against it, on the ground of a private and irreparable injury, may be sustained, at the instance of an individual or a corporation, either in the Federal or State courts.[4]

In case of nuisance, if the obstruction be unlawful and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.[5]

The Ohio is a navigable stream, subject to the commercial power of Congress which has been exercised over it; and, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it would afford no justification to the bridge company.[6]

Congress has sanctioned the compact made between Virginia and Kentucky, viz., "That the use and navigation of the River Ohio, so far as the territory of Virginia or Kentucky is concerned, shall be free and common to the citizens of the United States." This compact is obligatory, and can be carried out by this court.[7]

Where there is a private injury from a public nuisance, a court of equity will interfere by injunction.

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[1] Distinguished. *Transportation Co.* v. *Parkersburg*, 17 Otto, 705, 709.

[2] Cited. *United States* v. *Cruikshank*, 2 Otto, 564; *State of Tennessee* v. *Davis*, 10 Id., 282. See *State of Texas* v. *Lewis*, 12 Fed Rep., 5; s. c., 14 Id., 67.

[3] Applied. *Union Pac. R. R. Co.* v. *Hall*, 1 Otto, 355. Cited. *Canada So. R'y Co.* v. *International Bridge Co.*, 8 Fed. Rep., 192.

[4] Cited. *Mississippi &c. R. R. Co.* v. *Ward*, 2 Black, 495.

[5] Cited. *Rutz* v. *City of St. Louis*, 3 McCrary, 265; *Harrison* v. *Supervisors of Milwaukee*, 51 Wis., 653. S. P. *Works* v. *Junction Railroad*, 5 McLean, 425.

[6] Cited. *St. Louis* v. *Knapp Stout & Co. Company*, 6 Fed. Rep., 224; s. c., 2 McCrary, 519.

[7] Explained. *Gilman* v. *Philadelphia*, 3 Wall., 727 (see also p. 742). Followed. *Hatch* v. *Wallamet Iron Bridge Co.*, 6 Fed. Rep., 333; s. c., Id., 783. Cited. *Conway* v. *Taylor*, 1 Black, 634; *Railroad Co.* v. *Fuller*, 17 Wall., 569; *Sherlock* v. *Alling*, 3 Otto, 102; *Hall* v. *Decuir*, 5 Id., 516; *Wisconsin* v. *Duluth*, 6 Id., 387.

In this case, the bridge is a nuisance. This is shown by measuring the height of the bridge, and of the water, and of the chimneys of the boats. The report of the commissioner, appointed by this court to ascertain these facts, is equivalent to the verdict of a jury.

The report of the commissioner adverted to and commented upon; the extent of injury sustained by the boats explained; and the importance shown of maintaining the navigation of the river.[8]

If a structure be declared to be a nuisance, there is no room for a calculation and comparison between the injuries and benefits which it produces.

Therefore, unless there be an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river—not less than one hundred and eleven feet from the low-water mark, the flooring of the bridge descending from the termini of the elevation at the rate of four feet in the hundred—or some other plan shall be adopted which shall relieve the navigation from obstruction, on or before the first of February next,—the bridge must be abated.

(In consequence of the intimation above alluded to, viz., "that some other plan might be adopted" than elevating the bridge, the court, at the request of the counsel for the Bridge Company, referred the matter to an engineer. After receiving his report, the court decided as follows.)

The Bridge Company may, upon their own responsibility, try whether the western channel can be improved and made passable, by means of a draw, so as to afford a safe and unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension-bridge. This is to be done, if at all, before the first Monday of February next, on which day the plaintiff may move the court on the subject of the decree.[9]

THIS was a case upon the equity side of this court, in the exercise of original jurisdiction.

It is noticed in 9 How., 647, and again in 11 How., 528.

In 9 Howard, a statement is given of the contents of the bill *and answer, and of the proceedings in the case, [*520 up to the time of its reference to a commissioner, for the purpose of taking further proofs upon the points therein stated. The reader is referred to that volume for these proceedings.

In that report it is mentioned that a notice of the arguments of counsel was deferred until the final decision of the case.

That final decision having taken place at this term, it is proper now to note as briefly as possible the grounds assumed by the respective counsel.[10]

The points made and authorities cited by the counsel for the plaintiff, were the following, viz.

1. That the Ohio River is a public highway of commerce, which, under the Constitution of the United States, has been

[8] RELIED ON. *Life Ins. Co.* v. *Grant*, 3 MacArth., 48.

[9] See also *The Clinton Bridge*, 10 Wall., 462; *Bridge Co.* v. *United States*, 15 Otto, 480, 481.

[10] For a further decision in this case, see 18 How., 421.

regulated by Congress. Journal of Congress, vol. 4, 637, 638; Ordinance of 1787, art. 4; Act of Congress admitting Kentucky, (1 Stat. at L., 189); Virginia act of Assembly, 18 Dec., 1789, (Rev. Code, 1819, 57); Acts of Congress for enrolling and licensing ships or vessels to be employed in the coasting trade, and for regulating the same, (1 Stat. at L., 305); Act of Congress authorizing duties to be paid at ports on the Ohio, (4 Stat. at L., 480); Act of Congress to improve the navigation of the Ohio River, (4 Stat. at L., 32); Acts of Congress providing for inspection, &c., of steamboats, (5 Stat. at L., 304); Committee Report No. 672, in the House of Representatives, 24th Congress; Report No. 993, 25th Congress, on a bridge at Wheeling; Report No. 79, 28th Congress, 1st session, on a bridge at Wheeling; Pennsylvania Resolutions, vol. 29, (Pa. Laws, 487,) on a bridge at Wheeling; Pennsylvania Resolutions, vol. 31, (Pa. Laws, 591,) on the Wheeling Bridge; 42 Ohio Laws, 269; *Green* v. *Biddle*, 8 Wheat., 1; Gordon, Dig., 15, 27, 176, 191, 325, 343, 428; 2 Madison Papers, 599, 602, 606, 614, 623, 627, 677; Resolutions of General Assembly of Virginia, November, 1786; Resolution offered by delegates from North Carolina, in Congress, September, 1788, relative to the navigation of the Mississippi, (Journal of Congress, 1788); Resolution of Congress, on the same subject, September, 1788, (Journal of Congress, 1788); 2 Madison Papers, 678; Act providing for sale of Public Land, (1 Stat. at L., 464, § 6); Lyman's American Diplomacy, 300, 303, 310, 311, 315; Report on Commerce and Navigation, December 31, 1849.

2. That free navigation of the Ohio River, as a common highway, having been established by regulations of Congress, and by compact between the States, it cannot lawfully be obstructed by force of any State authority or legislation. Constitution of the United States, art. 1, sect. 8, clauses 2, 4, *521] 17; sect. 9, clause 5; *§ 10, clause 2; art. 6, 1st clause; *Gibbons* v. *Ogden*, 9 Wheat., 1; *Brown* v. *State of Maryland*, 12 Wheat., 419; *Wilson* v. *Blackbird Creek Marsh Co.*, 2 Pet., 245; *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 540, 542, 604; *Norris* v. *Boston*, 7 How., 283; *Groves* v. *Slaughter*, 15 Pet., 506; *Houston* v. *Moore*, 5 Wheat., 22; *Worcester* v. *Georgia*, 6 Pet., 515; *Spooner* v. *McConnell*, 1 McLean, 359; *United States* v. *New Bedford Bridge*, 1 Woodb. & M., 401, and authorities there cited; *Corfield* v. *Coryell*, 4 Wash. C. C., 379; *Holmes* v. *Jennison*, 14 Pet., 540; *Livingston* v. *North R. S. B. Co.*, 3 Cow. (N. Y.), 713.

3. That inasmuch as the Wheeling Bridge had been found

by the commissioner's report to be an obstruction to the free navigation of the Ohio River, it is a public nuisance that may be abated by a court of equity on complaint of an injured party. Hargrave's Tract, De Jure Maris, 9, 22, 35, 87; 3 Thomas's Co. Lit., 4; 2 Story, Eq., §§ 920, 921, 924; Eden on Injunc., 157, 158, 160, 161, 222, 228; Drewry on Injunc., 237, 240, 249, 294; *City of Georgetown* v. *Alexandria Canal Co.*, 12 Pet., 91; *Blakemore* v. *Clamorganshire Canal Co.*, 1 Myl. & K., 164; 1 McLean, 359; 3 McLean, 226; 1 Woodb. & M., 401; Shelford on Railways, 428, 445, and cases there cited; *Robinson* v. *Lord Byron*, 1 Bro. C. C., 588; *Lane* v. *Newdigate*, 10 Ves., 192; *Spencer* v. *London and Birmingham Railway Co.*, 1 Railw. Cas., 170; *Attorney-General* v. *Manchester Railway*, 1 Railw. Cas., 436; *North of England Railway* v. *Clarence Railway*, 1 Coll. C. C., 521; Angell on Watercourses, 201, 208, 209, 213; *Attorney-General* v. *Burridge*, 10 Price, 350; *Attorney-General* v. *Parmeter*, Id., 378; *Attorney-General* v. *Johnson*, 2 Wils., 87; *Attorney-General* v. *Forbes*, 2 Myl. & C., 123; *Attorney-General* v. *The Cohoes Co.*, 6 Paige (N. Y.), 133; *Spencer* v. *The Railway Co.*, 8 Sim., 193; *Corning* v. *Lowerre*, 6 Johns. (N. Y.) Ch., 439; *Boston Water Power Co.* v. *Boston & W. Railroad*, 16 Pick. (Mass.), 525; *Barrow* v. *Richards*, 8 Paige (N. Y.), 351; *Livingston* v. *Mayor of New York*, 8 Wend. (N. Y.), 99; *Bush* v. *Warren*, Prec. Ch., 530; 2 Story, Eq., p. 252; 2 Anstr., 603; 2 Stark., 448; United States Const., art. 3, sect. 1, 2; Walford on Railways, 408; Shelford on Railways, 430; 1 Railw. Cas., 68, 576; 2 Railw. Cas., 380: 2 Younge & Coll., 611; *Attorney-General* v. *Utica Ins. Co.*, 2 Johns. (N. Y.) Ch., 379; 1 Baldw., 205; 1 Swanst., 250; 1 Myl. & K., 164; 3 How., 229; *Pennsylvania* v. *Wheeling Bridge*, before Judge Grier, Pamphlet Reports.

4. That for an injury to a State, she may maintain a suit in a court of competent jurisdiction. *King of France* v. *Morris*, *3 Yeates (Pa.), 251; *King of Spain* v. *Oliver*, Pet. C. C., 276; *Nabob of the Carnatic* v. *East India Co.*, 1 Ves. Jr., 382; *Don Diego* v. *Jolyfe*, Hob., 86; *Columbian Government* v. *Rothschild*, 1 Sim., 94: *Duke of Brunswick* v. *King of Hanover*, 6 Beav., 1; Story, Eq. Pl., § 55; *Rhode Island* v. *Massachusetts*, 12 Pet., 720; 4 How., 592; Vattel, book 3, ch. 6, §§ 22, 23, 49, 50, 60, 65, 71; Wheat. Int. Law, 81, 82; Lieber, Political Ethics, 2, 5, 48, book 2, 196; Whewell's Elements, 2, 5, 849; *Mayor of New Orleans* v. *The United States*, 10 Pet., 672; *New Jersey* v. *Wilson*, 7 Cranch, 164; United States Constitution, art. 3. [*522

5. That the equitable powers of the Supreme Court of the

United States are adequate to grant relief against a public nuisance, and where a State is a party to the suit, that court has original jurisdiction. United States Const., art. 3, §§ 1, 2; *City of Georgetown* v. *Alexandria Canal*, 12 Pet., 91; Story, Comm., 570; Federalist, No. 80; *Osborn* v. *Bank of United States*, 9 Wheat., 839; *Bank of United States* v. *Planters' Bank*, 9 Wheat., 904.

The following extract contains the views of *Mr. Stanton*, one of the counsel for the complainant.

It is my design to present, as briefly as I can, the grounds on which the State of Pennsylvania prosecutes this suit and claims relief of this court. That purpose will be served by the discussion of a single proposition which will embrace all the points made, viz.

That the Ohio River is a highway of commerce leading to and from the ports of Pennsylvania, regulated by Congress, unlawfully obstructed by the Wheeling Bridge, to the injury of the State of Pennsylvania; and therefore that the bridge ought to be abated by decree of this court at her suit.

The first branch of this proposition, that the Ohio River is a highway of commerce, will not be disputed; for it is a geographical and statistical fact recognized by every department of the government of which this court would take judicial notice; and by their answer the defendants admit that this highway is navigated in steamboats by citizens of the State of Pennsylvania, and connects with her ports. The boundary of six States, its waters draining a large territory of four other States, flowing in a south-west direction from the Alleghany Mountains to the Mississippi, presenting to the navigator a broad and placid stream one thousand miles in length, more free from dangers and obstructions than any other navigable river in the world, it is apparent that the regulation of this river would claim the *earnest attention of statesmen. Accordingly we find that when the possession of this river and the territory through which it flowed had been secured by independence and peace with Great Britain, the sagacious statesmen of that day speedily turned their attention to the regulation of the western rivers, and the commerce they foresaw must soon flow along their course.

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On the 12th day of May, 1786, on the motion of Mr. Grayson, of Virginia, the following resolution was adopted:

"*Resolved*, That the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, be, and they are hereby, declared to be common highways, and be forever free, as well to the inhabitants

of said territory as to the citizens of the United States and those of any other States that may be admitted into the confederation, without any tax, impost, or duty therefor." Journal of Congress, 1786, p. 637.

Soon after this, all questions as to the title of the territory north-west of the Ohio being secured by compromise and cession of the claims of the severel States, an ordinance for its regulation was adopted by Congress. This was the ordinance of 13th July, 1787, since become so famous in connection with another question. The 4th article, last clause, of this ordinance, contains a regulation in the same words as the resolution of Mr. Grayson. A similar condition has been imposed on the admission into the Union of every State bordering upon these waters. It is denied by the defendants that Virginia assented to this provision of the ordinance. But this can make no difference, for it is nevertheless a regulation of commerce by Congress, as has been decided by this court, (3 How., 229,) and at all events it overthrows the authority claimed by these defendants under the legislation of Ohio.

In 1789, Virginia, being in possession of a large territory north-east of the Ohio, now constituting the State of Kentucky, desired to have it admitted into the Union as a separate and independent State. For this purpose, her General Assembly, on the 18th December, 1789, passed an act providing for its erection as an independent State upon certain terms and conditions, among which were the following:

"That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." Virginia Rev. Code, 1818, p. 59.

To this act the assent of Congress was given, (1 Stat. at L., 64,) and it became a compact between Virginia and the *other States of the Union. Freedom being thus established by Congress and the concurrent action of [*524 Virginia, as the regulation of the river channel, its commerce was still further regulated by the act of Congress of 1807, attaching the Ohio River to the collection district of Mississippi, and appointing surveyors for the ports of Pittsburg, Marietta, Cincinnati, and Louisville. 1 Stat at L., 464.

The growing commerce of this region in 1824 received further attention from the general government by a large appropriation to improve the navigation of the Ohio River; and from that period until now annual appropriations have been

made to improve its navigation and remove obstructions. This commerce being carried on by steamboats, the regulation of these vessels in 1838 received the attention of Congress. The act of 7th of July, 1838, provided especially for their license and enrolment, for the appointment of an inspector of their boilers, engines, and machinery, prescribing the duties of the officers, and enforcing severe penalties in case of injury to persons or property. 5 Stat at L., 304.

Thus it appears that the constitutional power of Congress to regulate commerce on the Ohio River, belonging exclusively to that branch of the general government, has been fully exercised upon every subject susceptible of regulation. This power has been exerted upon the channel, and whatever passes through it,—upon the stream and upon its bed, upon the vessel, its navigator, and whatever it transports, upon its engine, machinery, cargo, passengers, officers, and crew; nay, that it has extended to the very subject now under consideration; and that Congress, by express and repeated action, has prohibited the erection of a bridge at Wheeling, I shall proceed now to show.

In 1836, petitions to Congress praying for the construction of a bridge at Wheeling were laid before that body. They were backed by resolutions of the State of Ohio instructing her Senators and requesting her Representatives to use their exertions to obtain that object. Accompanying them were statements and representations of similar import to the grounds now urged in favor of the Wheeling Bridge. The importance of such structure as a link connecting the disjointed fragments of the Cumberland Road,—the great advantage to commerce, and to the general government in the time of war, of such facility for crossing the Ohio River, —the obstructions of ice and driftwood and the evils of the ferry,—the inconvenience of delay in transporting the mails, —all these were held up in bold relief, and represented in glowing and exaggerated colors. With the petitions were *525] presented various communications from Mr. *Ellet, the engineer by whom this bridge has been erected, urging the necessity and practicability of the undertaking, and presenting plans for its accomplishment. A favorable report was procured from the Committee on Roads and Canals, which undertook to answer the objection urged against bridging the Ohio. From this report it appears that the main, and indeed the only important objection was that now insisted on by the State of Pennsylvania; the obstruction which such an erection would be likely to occasion to steamboats. In answer to this objection it was insisted then,

as now, that high chimneys were unnecessary, and that the few boats likely to be obstructed might, with proper machinery, accommodate themselves to the exigency, and that their convenience should yield to the public benefits of a bridge. But Congress thought otherwise, and the plan was rejected. House Reports, 1st sess. 24th Cong., No. 132.

At the next session of the same Congress the subject was again brought forward; the same plan proposed; the same views presented; the same arguments urged. The project was again opposed in Congress on the ground of its injury to navigation, and, as is evident from the committee's report, was on that ground alone defeated. House Reports, 2d sess. 24 Cong., 672.

Still insisting upon a bridge at Wheeling, the 25th Congress had the subject presented in a report of the Committee on Roads and Canals, on the 27th of June, 1838. In the mean time an exploration and survey had been made, under the direction of the War Department, by Messrs. Sanders and Dutton, two skilful and distinguished engineers in the government service. They presented a plan for a suspension bridge across the Ohio River, having for its basis a strict regard to the rights of navigation, and providing that no obstruction should be offered to the passage of the highest steamboat chimney on the highest floods. Their plan proposed a space of five hundred feet in width and the height of the highest chimney then known; and, in order to provide for any change or improvement in steamboats, the floor of the bridge was to be movable so as to allow the passage of boats. Report of Messrs. Sanders and Dutton, House Documents, 25th Congress, June, 1838, No. 993. The cost was estimated at $400,000. A plan by Mr. Ellet was also submitted for a bridge, the same elevation, seven hundred feet in width. But the same objections being urged, were found to be insuperable, and the plan was rejected.

It is further to be remarked that among the documents of this session was a surrender by the city of Wheeling of its streets for the purposes of a bridge, and by Zane of any portion of *the island for purposes of embankment. And yet an excuse now given for not erecting the bridge [*526 higher is the alleged damage to the streets, and the amount Zane would charge for embankment on the island, which is set down at the moderate estimate of $20,000. These rights were then freely granted for the bridge; and it was not until a later day that the cheap expedient was resorted to of saving private property by the encroachment on public rights on a navigable river.

In December, 1843, another series of resolutions was procured from the Ohio legislature, and, armed therewith, those interested in making Wheeling the head of navigation, again appeared before Congress. But Pennsylvania had become awakened to her interests, and the danger becoming imminent, she instructed her senators and representatives to oppose the erection of the proposed bridge across the Ohio. Her resolutions pointed to the specific objections now urged: —The obstruction to the free use of the Ohio River; the injury to commerce, trade, and manufactures, building of ships, war-steamers, and other vessels, by placing a barrier in the passage to the Gulf; the interfering with steamboats in high water, trading with the Western and Southern States; and claimed the use of the Ohio River as a great thoroughfare. They were in these words:

"Whereas, application has been made to Congress of the United States for an appropriation to aid in the erection of a bridge across the Ohio River at Wheeling, Virginia, the construction of which might materially obstruct the free use and navigation of said river above that point, and injuriously affect the commerce of the city of Pittsburg and all that district of Pennsylvania lying west of the Alleghany Mountains, by arresting the building of war-steamers and other vessels of the great western manufacturing and commercial emporium of this State, by placing a barrier to their passage to the Gulf of Mexico, besides seriously interfering with the free navigation of the Ohio River by steamboats and other vessels engaged in the trade of the Western and Southern States during high stages of water: Therefore,

"*Resolved*, by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, That our Senators in Congress are hereby instructed, and our Representatives requested, to vote against any appropriation by the national legislature to the object above stated, and oppose every proposition for the erection of a bridge at Wheeling or at any other point on the Ohio River, or any project that would result in increasing the obstacles already existing to the free navigation and use of that great thoroughfare of this Commonwealth.

*527] *"*Resolved*, That the Governor be requested to transmit a copy of the foregoing preamble and resolution to each member of the Pennsylvania delegation in Congress.

"James Ross Snowden, *Speaker of the House of Rep.*

"William Bigler, *Speaker of the Senate.*

"Approved 26th January, 1844. David R. Porter."

These resolutions were immediately laid before Congress, and referred in the House to the Committee on Roads and Canals, on which was Mr. Steenrod, a member from Wheeling. House Doc., 28 Cong., No. 79.

Here, then, the question was brought before Congress in the most solemn and imposing form. Two sovereign States appeared at the bar of Congress, one urging and the other opposing the bridge.

At this crisis a bill had already been reported by that committee making an appropriation for a bridge at Wheeling, and containing this clause, "that the bridge shall be so constructed as to admit at all times, without obstruction or delay, of the safe and easy passage of steamboats of the largest dimensions."

On the twenty-ninth day of January Mr. Steenrod presented a report, not contesting the rights of Pennsylvania, nor the injury she must suffer from an obstruction at Wheeling, but claiming that a bridge could be erected across the Ohio, at Wheeling, without obstructing the use and navigation of the river according to the provisions of the bill. With this report was submitted a plan by Mr. Ellet for such a bridge, stating that he had, since the date of his former plan, examined the localities, and "would recommend a radical change of plan for the Wheeling Bridge, and leave the river entirely unobstructed." House Rep., 28 Cong., No. 79.

It appears, moreover, that the plan proposed was in some respects similar to that afterwards adopted and executed by the same engineer. It was a single span across the river, at an elevation of ninety feet above low water. But it was not then disclosed that such elevation was to be only for one hundred feet in width; that the channel was to be cut across by an inclined plane so as to obstruct a public navigable river. The specific objection was then urged as now, that ninety feet above low water would not admit the passage of steamboats with tall chimneys. It was then answered as it is now, that such height was unnecessary, that few boats only used such chimneys, that they ought to be provided with hinges and machinery for lowering; that detention would be only for a short space; that the river was impassable by reason of ice; that the mails *were delayed, and, in short, every possible argument that has been, or can be, presented in [*528 favor of this bridge was, in a report by the member from that district, pressed upon Congress. It was all to no purpose. The rights of Pennsylvania, and her interests of navagation, were deemed paramount, and the constitutional obligation to

preserve the Ohio River as a free and common highway was held to be inviolable.

Now, the regulation of commerce consists as much in negative as positive action. Mr. Justice McLean, *Passenger Cases*, 7 Howard, 399.

Supposing, therefore, the Ohio River to be exclusively within the territory of Virginia, on both banks, and from its head to its mouth, and that she might authorize bridges over it, yet that power is subordinate to the constitutional authority of Congress over commerce. And if Congress, in the exercise of its power, has manifested a negative policy hostile to bridges over the Ohio, any conflicting exercise of State authority would be void. And yet, in their answer, this hostile policy of Congress is the confessed motive for procuring their charter from the State of Virginia. Nay, more, its purpose is admitted to be that which the power granted to Congress by the 3d clause, 8th article, of the Constitution was especially intended to prevent, the acquisition by States, for their citizens, of commercial advantages by separate legislation.

"The addition of territory and of settlement on the Pacific Ocean, and the increasing population and commerce of that coast, have recently given new importance to the subject; the change in federal policy and legislation as to bridges and other works of internal improvement has made it incumbent upon the States, by separate legislation, to consult and promote their own and the general welfare and prosperity." Original Answer, p. 24.

The defendants' allusion to the Pacific settlements and commerce is of deep significance, and indicates the result to be expected, if States may thwart and override the constitutional provision, and by separate legislation consult their own and the general welfare. It has been well remarked, that in such event, the Constitution would be a rope of sand.

It is manifest, therefore, that the only constitutional power that could in any event authorize this bridge had been invoked, and that by its negative action, potentially as by express enactment, this structure was prohibited.

Commerce, on the Ohio, being thus regulated by Congress, and that regulation including all the subjects of navigation, its vehicle, and those engaged in its management, it follows that any act or erection, in any way affecting the subjects thus regulated, whether by individuals or State governments, *529] is unlawful. *In the great case of *Gibbons* v. *Ogden*, (9 Wheat., 1,) this court decided that the power to regulate commerce included navigation, and when exercised by that body, any conflicting State regulation, no matter for

what purpose or extent adopted, was void. In the subsequent case of *Wilson* v. *The Blackbird Creek Marsh Company*, (2 Pet., 245,) it was held that any exercise of this power by Congress excluded and controlled all State action.

Subsequent cases have illustrated these principles, applying them to all action, direct or indirect, of individuals or States interfering with congressional regulations of foreign and domestic commerce. In the passenger cases, *Norris* v. *Boston*, and *Smith* v. *Turner*, (Pamph. Rep., p. 85,) Chief Justice Taney remarks: "It has always been admitted, in the discussion upon this clause of the Constitution, (art. 8, sect. 3,) that the power to regulate commerce includes navigation, and ships, and crews, because they are the ordinary means of commercial intercourse." In the same cases, Mr. Justice Daniel observes: "The power to regulate commerce includes the regulation of the vessel, as well as the cargo, and the manner of using the vessel in that commerce." Id., p. 131.

In those cases the following propositions were among others maintained:

"That the power to regulate commerce, foreign and between the States, was vested exclusively in Congress." Mr. Justice McLean, 7 How., 400.

"That the power in Congress to regulate commerce with foreign nations, and among the several States, includes navigation upon the high seas, and in the bays, harbors, lakes, and navigable waters within the United States, and any law by a State, in any way affecting the right of navigation, or subjecting the exercise of the right to a condition, is contrary to the aforesaid grant." Mr. Justice Wayne, Id., 414.

"That Congress has regulated commerce, and intercourse with foreign nations, and between the several States, by willing that it shall be free, and it is, therefore, not left to the direction of each State in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it." Mr. Justice Catron and Mr. Justice Grier, Id., 464.

The principle of these decisions has been illustrated and enforced by a long series of cases, cited in the brief, and to which it is sufficient for me to refer. See cases cited in brief. Hence it follows that the bridge, erected by the defendants over the channel of the Ohio River, if it obstructs, interferes with, or in anywise regulates navigation, is an unlawful obstruction, no *matter by what charter or State enact- [*530
ments it may be authorized or sanctioned. I proceed to demonstrate that it does obstruct navigation, and conflicts with every regulation prescribed by Congress for that river.

At Wheeling, the channel between Zane's Island and the main Virginia shore is one thousand and ten feet wide. Through this strait, fifty millions in value of property, and over three hundred thousand passengers are accustomed to pass safely and without impediment, in steamboats to and from Pittsburg. Through it, the rice, cotton, and sugar of the Southern States, the bacon, flour, tobacco, and various products of the Western States, the furs, peltries, minerals, and products of the North-western region are transported to an Eastern market; and by the same channel foreign and domestic merchandise and manufactures find their way to their millions of consumers in that vast region. Baffled in the project of diverting this commerce from Pittsburg, by making Wheeling the head of navigation, under the sanction of Congress, resort was had to State authority, where Pennsylvania had no voice and where her remonstrance could not be heard.

On the 19th of March, 1847, a charter for the erection of a wire suspension-bridge was obtained from the General Assembly of Virginia, under color of which, but in violation of the most important of its express provisions, the defendants proceeded to erect their bridge in the manner represented in the diagram now exhibited to the court.

An inspection of that diagram exhibits the fact that the only material variation between the bridge erected, and that proposed to and rejected by Congress, in 1844, consists in a particular, whereby nine hundred feet of the river channel is wholly cut off for purposes of navigation. When the engineer, by whom this structure was erected, proposed to throw a single span across the channel, ninety feet above low water, no one could have imagined that elevation applied to only one hundred feet in width of the water's surface, and that by an inclined plane stretching across the channel the residue was to be cut off. And yet such is this erection. The highest point in the bridge above low-water level is ninety-two feet one and a half inches; from that point it deflects four feet in every hundred, being at the western abutment only sixty-two feet above that level. Taking the highest point as a centre of the highest space, one hundred feet wide, it is at its extremities only ninety feet above water.

This elevation, moreover, is above the low-water level of the Ohio, viz. eighteen inches in the channel. But this level exists for a short season only of the year, the height of water

*531] varying forty-five *feet between the extremes of high and low-water mark. The tables in the record exhibit

the height of water at Wheeling, each day, for the period of the last ten years. From them we gather—

1st. That the usual Spring and Fall floods, in March and December, attain the height of thirty-eight feet.

2d. That floods, ranging from twenty to thirty-eight feet, have occurred in the months of January, February, March, April, May, June, July, November, and December, nine several months in the year.

3d. That the duration of these floods varies from two to ten days.

Regard to those facts has always been deemed of vital importance in the consideration of bridging navigable waters. Thus the wire suspension-bridge over the Menai Straits, swings clear one hundred feet above high water; the Tweed Bridge is the same elevation; the Freyburg Bridge spans the channel at an elevation of one hundred and twenty-seven feet above high water, (Sander's Report); and on a late occasion of erecting a railway-bridge over the Menai Straits, the Lords of Admiralty required the structure to be one hundred feet above high water, the whole width (2,800 feet) of the channel. Quarterly Review, October, 1849. Stern adherence to this requisition led to the most brilliant achievement of science since the days of Sir Isaac Newton. While the Conway Tubular-Bridge will stand as a monument of genius, overcoming natural obstacles to accommodate navigation, the Wheeling Bridge hangs an obstruction to navigation, copied, by its engineer, from the miserable expedient of a South American Indian, its original inventor.

With utter disregard to the principles of science and the exigencies of commerce, low-water level is taken as the basis of elevation for the Wheeling Bridge, and upon usual floods only a space one hundred feet in width by fifty in height is allowed for the passage of vessels ascending and descending the Ohio River—through that space the commerce of the most navigable river in the world is compelled to stoop and dodge in high floods.

The extent of departure from the principles of art, the engagements of the parties, and the obligations of law, will be seen in the following considerations:

1st. It is an ordinary wire suspension-bridge, which, over a channel like the Ohio, is condemned by one of the most distinguished engineers of this country, whose opinion, from his official employment as superintendent of the improvements of navigation on the Western waters, is entitled to great weight.

"I have no hesitation in giving the opinion that ordinary

*532] *wire suspension-bridges are not well adapted to the bridging of the Ohio; and in view of the excessive ranges, from extreme low to extreme high water, ranging as they do, from thirty-five to sixty-five feet at different points, I am persuaded that none but truss-frame bridges, with suitable draws at one or both extremities, or at suitable intermediate points, are properly adapted to bridging the Ohio. Hence, I am decidedly of opinion that wire suspension-bridges are neither expedient nor applicable in bridging the Ohio, or any other of the main navigable rivers of the West, liable as they all are to excessive changes in the elevation of their surfaces and the depth of their floods." Col. Long's Deposition, pp. 139, 140.

2d. It is an inclined plane thrown across a swift stream of ever-varying surface, the current setting west towards the lowest point of the bridge, rocks fringing the highest point on the east, with nothing to mark the depth below, or the space above the surface, no two points at the same level, and nothing to guide the navigator in the perils that thus beset him. This inclined plane is placed so low as on spring floods to leave a clear headway of only fifty feet by one hundred in a natural channel one thousand and ten feet wide, over the whole of which vessels have hitherto been accustomed at all hours, in all weather, to pass safely, but where now the obscurity of fog and darkness, the force of the current, or accident in the complicated machinery of a steamboat, expose it to shipwreck.

3d. It not only forbids all advance or improvement in the size and dimensions of vessels, but forces them back ten years, making the dimensions of the Louisville Bridge and the condition imposed by the falls of the Ohio, the standard of steamboat architecture and navigation.

That in these respects, also, such a bridge is against all example and rule, I shall now proceed to show, by the highest authority in the science of engineering.

"Among the considerations that should be held up to view, in throwing bridges across the Ohio, it may be stated that the bridge shall offer no serious obstruction to the navigation of the river, by steamboats or other craft, according to existing peculiarities of such boats or craft, and to sound considerations of probable improvement in the size and character of such boats and craft." Col. J. J. Abert, Chief of Top. Bureau, Record, p. 124.

"In selecting a plan for a bridge over the east branch, (of the Ohio at Wheeling,) full regard must be had to the interests of the navigation of the Ohio, which require that the

bridge should offer no obstruction to the passage of steamboats or other craft, which run or may hereafter navigate that river." Report on *Wheeling Bridge to the War Depart. by Lieuts. Sanders and Dutton, House Rep. [*533 25 Cong., 1 Sess., No. 903.

"The bridge shall be so constructed as to admit, at all times, without obstruction or delay, of the safe and easy passage of steamboats of the largest dimensions." Bill making an appropriation for a bridge at Wheeling; reported by the Committee on Roads and Canals. House Report, 28 Cong., 1st Session, No. 79.

Telford's Wire Suspension-Bridge, over the Menai Straits, leaves a clear level water-way five hundred feet wide. The Freyburg Bridge leaves a clear water-way eight hundred feet wide. Ellet's Letter, House Rep., 24 Cong., No. 672.

The English Lords of Admiralty required the Conway Bridge to give a clear water-way one hundred feet above high water over the whole width of the channel 2,800 feet. Oct. Quarterly Review, 1849, p. 218. In his first plan for a bridge at Wheeling, submitted to Congress, Mr. Ellet proposed a clear water-way 700 feet wide. House Rep., 24 Cong., No. 672. In his last plan, he proposed a clear water-way over the whole width of the channel, and to leave the river entirely unobstructed. Ellet's Letter, Dec. 29, 1843, House Rep., 28th Congress, 1st Sess., No. 79.

Influenced, doubtless, by these rules and examples, the Virginia Legislature provided in the charter of this bridge:

"If the said bridge, mentioned in the eighth section of this act, shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner of such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods heretofore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

When this charter was accepted the defendants and their engineer thereby admitted the propriety of its requisitions, and engaged to comply with them. It was a part of their contract, with which they were bound to comply. *Agar* v. *Regent's Canal*, Coop., 77; *Blackmore* v. *Glamorganshire Canal*, 1 Myl. & K., 164. In total disregard of all this, the defendants have erected their bridge on the novel plan of their engineer—undertaking to divide inconveniences with commerce on a public river, imposing expense, danger, and delay, razeeing its vessels and averaging its floods.

"It is fair to make a division of these inconveniences, and I would therefore provide for a passage of fifty feet, and a flood of thirty-five, and, if occasion should require it, allow
*534] one or two *of these boats to lie by for a few hours." Ellet's Letter, House Reports, 28th Congress, No. 79, p. 4.

Vessels navigating the Ohio are propelled by the agency of wind or steam, and with the dimensions of the bridge or channel thus ascertained, it remains only to examine the result upon these vessels.

At a single glance it is apparent that ships and sea-going vessels, requiring, as they do, over twelve feet draught and ninety feet above the water, are wholly excluded from navigating the Ohio above Wheeling. By the evidence, it is shown, that from the port of Pittsburg, ships have been cleared for foreign ports, laden with domestic products. Revenue and war vessels have been constructed there for the general government, and a large and prosperous business in ship-building and naval architecture is springing up. The bridge at Wheeling necessarily involves the total destruction of this business, and the exclusion of such vessels and their commerce from the ports of Pennsylvania. Upon steam-vessels the exclusion operates with but little less injury.

The diagrams now exhibited to the court represent the figure and dimensions of the Ohio steam-vessels. Two classes are spoken of. The first being large and swift packets plying between Pittsburg and Cincinnati. The second class comprising transient vessels and those which, in the course of their business, pass through the Louisville Canal.

The first class average in length two hundred and thirty feet; they are over fifty feet wide; their pilot-house stands forty-eight feet above the surface of the water, and they require for free passage upwards of seventy feet space. It is apparent, then, that to the passage of these vessels the bridge offers a total obstruction whenever the water exceeds twenty feet in height. And this, it has already been shown, is liable to occur in nine several months of the year, and continue from two to ten days at a time. Four times, since this court commenced its session, they have been obstructed. The second class of boats are one hundred and eighty feet in length, forty-nine feet wide, with pilot house forty-seven feet above the water, and chimneys over sixty feet high.

Upon the Spring and Fall floods, ranging from thirty to thirty-eight feet, the passage of these boats will also be prevented. It is said this class are provided with machinery

for lowering a portion of their chimneys. And so they are; but the proof exhibits that this machinery has been resorted to as an expedient in order to avoid the obstruction of the Ohio falls, by passing through the canal at Louisville. And it is insisted by these defendants that all boats passing to and from Pittsburg shall be subject to *the same condition; imposing upon navigation between Wheeling [*535 and Pittsburg the disadvantages of a great natural obstacle like the falls of Louisville.

Different opinions have been expressed by witnesses on the subject of lowering chimneys. A few observations in connection with the draughts now before the court, will here be made.

Two plans of lowering are described. By the first, a few joints of chimney at the top, turning on a hinge, are lowered, sufficiently to pass through the Louisville Bridge. But this mode is confined, as evidently it must be, to cases where a short piece of small diameter and light weight is to be lowered. Yet, even in these cases, it is spoken of as being a troublesome, expensive, and dangerous duty. Hinges have broken and chimneys fallen and crushed the decks; officers and men on the deck are exposed to danger at night in windy and stormy weather. The packet chimneys, weighing from 2500 to 3000 pounds, and five feet in diameter, require a different management. For lowering these, the only mode suggested is by the use of hinges at the hurricane deck. Let us consider, then, the condition of one of these packets in effecting its passage on high water.

Through the Louisville Canal, boats pass slowly with steam and fire down, with no opposing currents and no skill required to direct their course. The whole force, skill and attention of officers and crew, may there be devoted to lowering the chimneys. But boats descend the Ohio River at the rate of from fifteen to twenty miles per hour, and upon a current running between Zane's Island and the Virginia shore at the rate of five to eight miles an hour, which shortly above the bridge, sets strongly out from the main shore to the island, thus inclining boats to the lower part of the bridge. See depositions of Duval and others.

The boats, moreover, usually arrive at the bridge in the night season. When, therefore, their chimneys are to be lowered, supposing it even possible by mechanical contrivances and skill, the task is to be accomplished under the most formidable dangers. Upon a slippery deck, over boilers of steam and a fiery furnace, contending with wind and current, the boat must be guided through a narrow space of one

hundred feet in width, while huge chimneys, three tons in weight, are to be lowered to the deck. It is plain that any accident, under these circumstances, involves hazard and destruction to life and property, exposing officers, passengers, and crew to disaster and death in the most appalling form. Numerous instances of casualties are spoken of by the witnesses, that have happened on the small boats passing bridges on the Monongahela and in the Louisville Canal. What, then, is to be apprehended at the Wheeling Bridge on the Ohio River, if the packets are to be subjected to such condi-
*536] tion? Upon the *evidence in this case, there is no room to doubt the consequences that must ensue.

With these general observations, I proceed to examine the evidence in detail. In the original answer it is admitted that there are boats that cannot pass the bridge. The first supplemental answer admits that there are six boats, the owners of which refuse to remodel their chimneys, so as to enable them, in case of a freshet, to pass under the bridge. In their memorial of January 1st, 1849, "calling upon the legislature of the State so to amend their charter, as to sanction by law the height fixed by the board of managers," it is admitted that on a rise of thirty feet, a few of the larger class of boats "will be compelled" to lower their chimneys. On a rise of twenty-five feet, still fewer boats will be compelled to do so. On a flood of twenty feet, from five to six boats "will be required to lower their chimneys." It is also confessed that the requisition imposes "little trouble" and a "small additional expense."

The *fact* being thus confessed by the defendants, that the bridge will arrest the passage of boats, impose the condition of "remodelling their chimneys," exact the duty of lowering them in order to pass, and incur by this requisition trouble and expense, the *right* comes in question.

That no State could grant authority so to interfere with vessels, regulated and licensed pursuant to the acts of Congress, and navigating a river over which Congress had extended its protection as to boats, commerce, and bridges, has already been shown. That Virginia neither assumed nor delegated such authority by their charter, appears from its terms. That the defendants knew they had no lawful authority, is proved by their calling on the legislature to amend their charter and sanction by law the height of their bridge.

But several grounds of justification, or rather excuse, are urged. That the only boats obstructed by the bridge have unusually high chimneys, and "belong to Pittsburg, the rival of Wheeling in commerce and manufactures." That the

height of steamboat chimneys has been increased since the date of the bridge charter. That the boats obstructed are few in number. That the obstruction seldom happens, and only for short periods. That the height of the chimney is unnecessary, or if necessary, may be lowered to pass the bridge.

To each of these points of defence, the evidence furnishes a specific and conclusive answer.

(Mr. Stanton then entered into a critical examination of the evidence and proceeded.)

Without pursuing this branch of the subject further, it is evident that a more serious obstruction to the navigation of the *Ohio, by steam-vessels as well as ships, could not [*537 have been devised by the art of man. And, upon the authorities already adduced, it is manifest that the charter under which the defendants claim, if it authorized such erection, being a State enactment, which, in its operation, prescribes regulations for commerce conflicting with those of Congress, such charter is against the Constitution of the United States, and is absolutely void. And all considerations, as to the practicability of changing and adapting the structure and machinery of steamboats, so as to pass the bridge, are wholly unavailing to the defendants, for Congress, having regulated these vessels, appointed an inspector, prescribed their machinery, and the duties of officers and crew, and granted them a license to navigate the river, no individual nor State has any authority to require a change of such machinery, nor impose the performance of any duty, nor for a single moment direct or arrest their course; and hence it follows that as this is undertaken and accomplished by the Wheeling Bridge, it is an unlawful obstruction of navigation on the Ohio River.

The injury resulting to the State of Pennsylvania from this unlawful obstruction is of the utmost magnitude. Occupying a central position, resting eastward on the Atlantic, north on the Lakes, flanking on the Ohio, by it she is connected with the Gulf, and the vast regions of the West and South. She thus enjoys a position for foreign and domestic commerce more favorable than any other in the Union. From the earliest period these advantages were cultivated, she became a navigating State; the energies and enterprise of her people were devoted to navigation and commerce. By her own canals connecting the lakes and the Atlantic with the Ohio, she possesses channels for water transportation, more important than can be possessed by any other State on the continent. By steamboats navigating the Ohio she has

intercourse with all the States lying west and south of her; and, by the same highway, commerce with foreign nations, passing through the Gulf and the Mississippi, reaches her gates, to be transported eastward through the channels she has opened. Across this thoroughfare, within fifty miles of her border, the Wheeling Bridge interposes its barrier. By it her communication with New Orleans, St. Louis, Cincinnati, and all the region west and south of her, is intercepted, and the commerce flowing betwen them and her public works is interrupted, exposed to danger, delay, and is at times wholly cut off. The admission by defendants, that obstruction of the Ohio River, from any cause, would injuriously affect her public works, is evidently true; and equally plain is it that such obstruction must injuriously affect every in-
*538] terest that a State can possess, or that she is bound to *cherish and defend. This injury may be considered in respect,

1st. To the persons and property of her citizens.

2d. To her sovereignty and eminent domain.

3d. To her ports.

4th. To the revenue of her public works.

(We must pass over the discussion of the first three of these points and proceed to the last.)

To the public works of Pennsylvania, the injury occasioned by this obstruction is deep and lasting. The products of the South and West, and of the Pacific coast, are brought in steamboats along the Ohio to the western end of her canals at Pittsburg, thence to be transported through them to Philadelphia, for an eastern and foreign market. Foreign merchandise and eastern manufactures, received at Philadelphia, are transported by the same channel to Pittsburg, thence to be carried south and west, to their destination, in steamboats along the Ohio. If these vessels and their commerce are liable to be stopped within a short distance as they approach the canals, and subject to expense, delay, and danger, to reach them, the same consequences to ensue on their voyage departing, the value of these works must be destroyed. This result is confessed by the defendants to be a necessary consequence of obstruction to the Ohio River from any cause.

"They have no doubt that the navigation of the Ohio River is important to the works above referred to, and that the value thereof would be affected injuriously, if from any cause the passage of steamboats from the city of Pittsburg downwards, were obstructed or impeded." 2d Supplemental Answer, Record, p. 42.

That the passage of steamboats to and from Pittsburg is

obstructed and impeded by the Wheeling Bridge, has also been shown by the admissions already quoted.

. . . "Six boats, the owners of which refuse to remodel their chimneys so as to enable them, in case of a freshet, to pass under the bridge, belong to Pittsburg, the rival of Wheeling in commerce and manufactures." Supplemental Answer, Record, p. 44.

"A few of the larger class of boats at such a stage (thirty feet) of water, will be compelled to lower their chimneys." Mem. to Virginia Legislature, Record, p. 56.

It has been seen that the six boats referred to are the carriers between Pittsburg and Cincinnati, of three fourths of the trade and travel transported by the Pennsylvania Canal.

The large class spoken of, are the carriers from New Orleans and St. Louis. Too large for the canal, these boats can reach Pittsburg and depart only on high water. Too large for the bridge, they can pass Wheeling only on low water. They are thus excluded from Pittsburg by a natural obstruction at Louisville, *one portion of the year, and [*539
for the remainder by an artificial obstruction at Wheeling. To surmount both obstructions the same condition is imposed—"compelled to lower their chimneys."

By their own confession, then, the defendants, with their cables stretched over the channel, produce the same result as if rocks were sunk in its bed. Between the Pennsylvania Canal and Louisville, a distance of seven hundred miles, no obstruction has hitherto existed. Between Pittsburg and Cincinnati, with which one half of her commerce is transacted, this artificial obstruction, equal to the Louisville falls, is placed within fifty miles of her borders, interposing between her ports and every other to which her commerce extends. Nay, more — to remove obstructions in the Ohio, Congress, at the solicitation of the Pennsylvania Legislature, has appropriated many millions of dollars, (4 U. S. Stat., 32,) and within twelve months before this bridge was commenced, one hundred and thirty thousand two hundred dollars were expended for that purpose between Wheeling and Pittsburg. Col. Albert's Deposition, p. 126.

Thus it appears that while Congress has been expending the public money in improving navigation, the defendants have spent their own in obstructing it, with much more effectual purpose.

From the admissions of the defendants as to the obstruction created by their bridge, and its injury to the property of Pennsylvania, attention may now be turned to the other evidence on the same subject.

Report of the Board of Canal Commissioners.

"The board fully concur in the views expressed by the collector as to the injurious effects which the construction of the bridge at Wheeling must necessarily produce upon the revenues of the Commonwealth, derived from the main line of her public works. If the representation be true that the bridge referred to prevents the passage of a large class of steamboats, which can only run in times of high water, then the State ought to take every legal step to procure the removal of the obstruction. It is unnecessary for the board to present to the Senate any argument to prove that such an impediment to the free navigation of the Ohio will materially affect the interests of Pennsylvania." Record, p. 421.

Report of the State Treasurer.

"It becomes my duty to call your attention to the bridge lately constructed across the River Ohio at Wheeling; threatening, as it does, to interfere with the business and enterprise of Pittsburg, whose commercial prosperity is so essential to
*540] the productiveness *of our main line of canal. Should the price of freights to and from Pittsburg, by the river, be enhanced in the smallest degree by destroying the competition between the large and small boats, it will result injuriously to the business of the canal, and prejudicial to the enterprise of a city whose manufacturing wealth and commerce are too valuable to the State to be jeopardized." State Treasurer's Annual Report, p. 12.

"Annual receipts of main line, $1,238,720.05." Id., p. 50.

The views thus expressed by the public officers of Pennsylvania and of the general government, are sustained by the knowledge and experience of business men.

(Mr. Stanton proceeded to comment on other testimony, and then contended that the bridge might have been constructed so as not to obstruct navigation. He then examined the value of the bridge as a means of transit from shore to shore, and afterwards the right of the State to sue in her corporate capacity, for injuries operating immediately upon the persons, property, and business, of the citizens of Pennsylvania; and also for those which operate directly upon the State.)

The right to relief at her own suit being shown, its form remains to be mentioned. Abatement by injunction is prayed. And for these reasons:—Abatement is a remedy which the law allows persons injured by a nuisance to administer for

their own relief; but to avoid the strife and contention that thence might ensue, courts of equity have assumed jurisdiction to administer that specific remedy.

The grounds of equitable jurisdiction for abatement by injunction, are precisely those occupied herein by the State.

"The ground," says Mr. Justice Story, "for this jurisdiction in cases of purpresture, as well as nuisance, undoubtedly is their ability to give a more complete and perfect remedy than is allowable at law, in order to prevent irreparable mischief, and also to suppress oppressive and vexatious litigation. In the first place they can interpose, as the courts of law cannot, to restrain and prevent such nuisances threatened or in progress, as well as those already existing. In the next place, by a perpetual injunction the remedy is made complete through all future time. Whereas an information or indictment at the common law can dispose only of the existing nuisance, and for future acts new prosecutions must be brought. In the next place the remedial justice in equity may be prompt and immediate before irreparable mischief is done, whereas at law nothing can be done except after trial and upon the award of judgment." 2 Story, Eq., 203; see also cases cited in the brief.

Obstruction of watercourses are cases calling for this remedial interposition of courts of equity. 2 Story, Eq., 206.

*It needs no argument to show that the injury in question, as it is great in magnitude, is also most [*541 clearly within the class of what are known as irreparable injuries. In the first place being an injury to trade, the full extent of injury cannot be measured in damages, any more than in cases of nuisance to health, it can be ascertained how many months or weeks or hours life may be shortened. In the second place, it is unceasing and without end. While the water flows and the bridge stands the injury continues. The mischief is not only irreparable, but the litigation to which it must lead would be vexatious in the last degree. The strife and contention that must follow, are also of the most serious character.

It is the specific penalty prescribed by the charter, the terms upon which the defendants obtained permission to erect their bridge, the agreement entered into. That Virginia has since chosen for herself to waive that penalty can make no difference as to the equities of other parties. This remedy is still in the charter: "If the bridge shall be so erected as to obstruct navigation, the said bridge may be treated as a public nuisance and abated accordingly." Charter of Wheeling Bridge.

It is said that before injunction a trial at law should be awarded. But trials at law are awarded only where facts are contested; and cases of nuisance are excepted from the benefit even of this rule. "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting the result of a trial." Shelf. on Railw., 431. But what facts are here to be ascertained? The highway, the obstruction, the injury, are confessed on the record. The whole defence rests simply upon legal exceptions, leaving no fact to be tried.

The acts of Pennsylvania authorizing bridges within her own territory are urged in defence. To this it is sufficient to remark, that the equitable doctrine of set-off has never been applied to cases of nuisance. And if it were, the bridges on the Alleghany and Monongahela are not a fair equivalent for the navigation of the Ohio, Mississippi, and their branches, cut off by the Wheeling Bridge. When complaint is made or injury shown from these bridges, then will be time to show their defence. With this case, and the matters here involved, they have nothing to do.

The State is also charged with laches—standing by and witnessing without objection the defendants expend their money. This is a strange charge, when it is remembered that Pennsylvania met these defendants in Congress, and there urged her specific objections, resisted and defeated a bill for the erection *of the bridge that had been introduced by the member from Wheeling, before her remonstrance reached Washington.

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She could not follow them into the legislature of Virginia. And if she had done so, her rights were sufficiently guarded by the 14th section of their charter. Its violation was not to be presumed. But when it became manifest that in defiance of its provisions, the river was about to be obstructed, the law officer of the State, her attorney-general, promptly appealed to this tribunal. What charge of laches could be more unfounded? Pending these proceedings, in the fancied belief that an advantage would be gained thereby, the work was hurried on to its completion. Warning was given, by the learned judge before whom the motion was made, that no equity would be thus gained, but that if found a nuisance the bridge must be abated. And this was made one of the grounds for then denying the motion. (Judge Grier's Opinion.) Abatement is the only remedy that can save the public works of Pennsylvania from irreparable injury. It is the condition upon which the defendants in their own wrong obstructed this highway, and it is

the penalty pronounced by Virginia for infringing the rights of navigation.

These rights Pennsylvania might protect by abatement of this nuisance by her own act. But the Constitution established this tribunal as one of dignity, wherein a State might sue and obtain redress by due course of law. Its powers and duties are defined in No. 80 of the Federalist, and in the Constitution by terms of the most wide and general signification, extending to "all those cases which involve the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations, or between the States themselves." Comment upon these terms from me would be superfluous. They embrace the very case now before the court, than which none can be conceived more directly or deeply involving the peace of the confederacy. It presents no question of abstract rights, but one of actual existing vested rights, essential to the existence of the State and the welfare of her people. Her rights of commerce extending between the several States; the right of navigation upon a public river; the use of a highway upon which the value of internal improvements, costing over forty millions of dollars, depends.

Upon these considerations the State of Pennsylvania prosecutes this suit. Declaring it to be consistent with her character to seek a peaceful remedy, her legislature, by unanimous vote in both branches, adopted the following resolutions, in obedience to which I now appear before this court.

"Be it resolved by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly *met—That the free and uninterrupted navigation of the Ohio River as a common highway, is a [*543 right belonging to the citizens of Pennsylvania, which being essential to the prosperity of the State, it is the duty of the Commonwealth to assert and defend.

"That the proceedings in behalf of said State, instituted by her attorney-general in the Supreme Court of the United States, and now pending therein, against the Wheeling and Belmont Bridge Company, to abate the nuisance occasioned by their bridge lately erected across said river, be prosecuted to final judgment, decree, and execution for abatement of said nuisance."

Having thus presented my proposition in its various branches, I feel that it is not needful for me to urge upon this court the important considerations which necessarily arise from the case, considerations affecting not only life and property to an immeasurable extent, but vast commerce, essential

State rights, and the peace of the confederacy. They will present themselves to the court with more force than I could urge them. I know not, sir, that it becomes me to say more in this behalf. This only I will add:

In 1765, a distinguished son of Pennsylvania, Dr. Rittenhouse, first conceived the plan of her great works, connecting the waters of the Lakes and the Atlantic with the Ohio River. Seventy years elapsed before the resources of the State were equal to such an undertaking. But once commenced, it was accomplished. While all other works tending to the same object halted east of the Alleghanies, Pennsylvania forced her way through, thus opening a cheap, easy, and secure water transportation from the Gulf and the Rocky Mountains to the Atlantic seaboard. But no sooner had this mighty work been completed, and its revenues commenced to replenish the exhausted treasury of the State, and a prosperous commerce to reimburse her citizens for their heavy taxation, than the flagitious scheme is undertaken to cut her off from the Ohio by a bridge at Wheeling, within fifty miles of her borders.

When, to prevent so great a wrong, she appeals to the Supreme Court; the work is hurried on; and, pending her application for an injunction, iron cables are stretched across the channel of a navigable river, interrupting vessels arriving and departing from the ports of Pennsylvania. And before she can be heard in this tribunal, her vessels are stopped on a public highway, their cargo and passengers discharged at Wheeling, and Pennsylvania ports shut up. For less injuries than these, States have been heretofore prompt to redress their own wrongs, and have rushed swiftly to war. Even
*544] under our government, in *defence of commercial rights, supposed to be invaded by congressional enactment, the banner of disunion has been unfurled in the South. In the North and East, bordering States, asserting navigation privileges, have resorted to acts of retortion and confiscation, until at length civil war was ready to burst forth on their borders, and rage along their coasts. At a later day, the western States of Ohio and Michigan, on a mere boundary question, arrayed their military forces against each other, under command of their respective governors. And now, on a mere abstract question, State is seen arrayed against State, with threats and warlike aspect.

To these, what a contrast and example does Pennsylvania this day present. Threatened in her dearest rights, she makes no appeal to force.

When the foundations of this government were laid, and this tribunal established as its corner stone, Pennsylvania was

there. She knew that the chief object of the Constitution was to substitute the law of reason for the law of force; and her abiding confidence in its efficacy for every exigency has never been shaken. Her commerce obstructed on a public river, her ports shut up; she comes this day at the head of no armed squadrons, with no blustering enactments of State sovereignty, with no threatenings of disunion upon her lips. As becomes the keystone of the federal arch, she seeks first a peaceful remedy. She appears as an humble suitor before civil judges, sitting upon their judgment-seat, surrounded by no armed janizaries, by no imperial guards; but in the exercise of their constitutional functions, clothed with an authority more potent, in her estimation, than an army with banners. She asks them to protect a right, deemed the most inestimable among all nations, belonging to her by the law of nature and of nations; guaranteed by the Constitution and the laws of Congress, for the improvement of which millions of her treasure have been lavished, and upon which the welfare of her people depends. She asks them, by simple injunction, to prevent a local corporation from violating, under color of State authority, a right that a world in arms could not wrest from her. How far the wholesome influence of this example may depend upon the decree herein to be rendered, the learned members of this court, better than I am, are able to judge.

The counsel for the defendants, in the brief which they filed, made the following points.

The questions which arise in the cause may be classed under four distinct heads:

I. Those which relate to the regularity of the proceedings in this cause.

*II. Those relating to the original jurisdiction of the Supreme Court, in the case presented by record. [*545

III. Those of a political character, arising out of the alleged interference with the free navigation of the Ohio River, and the supposed regulation of commerce between the States, and preference of one port over another.

IV. Those involving the law in regard to nuisances, and the principles on which a court of equity will interpose, by injunction, to grant relief.

I. Under this head the defendants will insist—

1st. That the order made by Judge Grier, on the 1st day of August, 1849, was not warranted by practice in courts of equity. That he had no power to do more than grant or re-

fuse the injunction, and that the case has been improperly docketed.

2d. They will insist that, as the defendants have expressly denied under oath that this suit has been instituted by the State of Pennsylvania, but that it is in fact the suit of sundry citizens of Pittsburg who have undertaken to use the name of that State, for the purpose of giving a colorable jurisdiction to this court over the case, without the authority first obtained of the legislature or executive of Pennsylvania; and as the plaintiffs have failed to produce any evidence to show that the proper authorities of Pennsylvania have authorized the institution of the suit, the court should either dismiss it, or award a rule against plaintiff's attorney to show by what authority it has been instituted. *Maxfield's Lessee* v. *Levy*, 4 Dall., 330.

3d. The original bill being fatally defective was not amendable, the office of an amendment being not to make a new case, but to correct or improve a bill which contained grounds of equitable relief. *McMahon* v. *Fawcett*, 2 Rand. (Va.), 537.

II. Under this head, defendants will insist that, if the suit has been regularly docketed and instituted by the direction of the proper authorities of the State of Pennsylvania, the bills of the plaintiff do not disclose a case properly cognizable in this court. They show no such interest on the part of the State of Pennsylvania in the matter in controversy as would make her a competent plaintiff in this court. She should show, on the face of her bill, a direct and immediate interest in the State of Pennsylvania, in her corporate capacity. A remote consequential injury will not do; injury to her citizens is not sufficient; they are competent plaintiffs, and can seek their own redress.

2d. The alleged injury to the public works of Pennsylvania, and through them to her revenues, is remote, contingent, and speculative. The bridge is in another State, and not within fifty miles of any of her improvements. If it should prove detrimental to them by the greater facilities which it might afford for *crossing the river at Wheeling, and the inducements which it might hold out to trade and travel to seek that point, it would be a case of *damnum absque injuria*.

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3d. The allegation of injury to the ship-builders of Pennsylvania is obnoxious to the objections taken to the original bill; the injury is not to the State, but to her citizens, and it is indirect and consequential.

4th. If there be injury to the public, it is not to the Pennsylvania public, but to the great public of the Union. If it

interferes with and regulates commerce, it is the commerce of the Union, and not of Pennsylvania, and the government of the Union alone can redress it by a proceeding in behalf of the United States, at the instance of her attorney-general. *Commonwealth* v. *Charlestown*, 1 Pick. (Mass.), 184; see Mitf. Eq. Pl., 210; Story, Eq. Pl., §§ 503–510; *Fowler* v. *Lindsey*, 3 Dall., 411; *Bowne* v. *Arbuckle*, 4 Dall., 338 and *n.* 2; *New York* v. *Connecticut*, 4 Dall., 3; *United States* v. *Peters*, 5 Cranch, 115; *McNutt* v. *Bland*, 2 How., 9, opinion of Daniel, J., and cases reviewed by him; *Bank of Kentucky* v. *Wister*, 2 Pet., 318; *Georgetown* v. *Alexandria Canal*, 12 Pet., 91; *United States Bank* v. *Planters Bank of Georgia*, 9 Wheat., 904; *Bingham* v. *Cabot*, 3 Dall., 382; *Turner* v. *Bank of North America*, 4 Dall., 8; *McCormick* v. *Sullivant*, 10 Wheat., 199; *Fisher* v. *Cockrell*, 5 Pet., 248; *Reed* v. *Marsh*, 13 Pet., 153; 1 Kent, Com., 344, and cases cited; *Waring* v. *Clarke*, 5 How., 468; *Rhode Island* v. *Massachusetts*, 12 Pet., 657; *Spooner* v. *McConnell*, 1 McLean, 338, 359; *Rogers* v. *Linn*, 2 McLean, 126; 8 Cow. (N. Y.), 146.

III. The charter was granted for great public objects, and intended to advance and facilitate commerce between the States, and the safe, speedy, and certain transmission of the mails between the eastern and western sections of the Union, and therefore commends itself to the favorable regard of the government, to which is confided the power and the duty of regulating that species of commerce. The duty of the government of the United States is quite as imperative to protect and regulate the trade across, as up and down, the channels of navigable streams.

The privilege of navigating the river is not paramount to, but only coequal with, the privilege of crossing it. The bridge is not a regulator of commerce in any other sense than a railroad or a ferry would be. *Gibbons* v. *Ogden*, 9 Wheat., 203; *People* v. *Saratoga and Rens. Co.*, 15 Wend. (N. Y.), 134; *Thompson* v. *People*, 23 Id., 552; *Corfield* v. *Coryell*, 4 Wash. C. C., 378; *Norris* v. *Boston* and *Smith* v. *Turner*, 7 How., 283; *Houston* v. *Moore*, 5 Wheat., 48; *Commonwealth* v. *New Bedford B. Co.*, 1 Woodb. & M., 423; *Wilson* v. *Blackbird Marsh Co.*, 2 Pet., 250.

*IV. The case stated is not one for relief, even at law, and much less in equity, by injunction: [*547

1. The bridge is not a nuisance.

2. The injury is not direct, inevitable, and irreparable; on the contrary, by complainant's own showing, it is remote, contingent, and susceptible of compensation in damages.

3. Nor is it peculiar and exclusive, either to the citizens or to the State of Pennsylvania.

4. The course of Pennsylvania, in chartering and constructing bridges over navigable waters within her limits, and in remaining passive until the whole capital of the company had been expended, should induce the court, even if that case were in other respects a proper one for relief, to withold its aid under the peculiar circumstances of this case. Story, Eq., sect. 959, a & b; Eden on Injunc., 162; *Bonaparte* v. *Camden & Amboy R. R. Co.*, 1 Baldw., 218; *Attorney-General* v. *Cleaver*, 18 Ves., 218, and authorities cited; *Earl Ripon* v. *Hobart*, 1 Coop. Sel. Cas., 333; Story, Eq., §§ 922–925, and cases cited; *Pierce* v. *Dart*, 7 Cow. (N. Y.), 609; *Lansing* v. *Smith*, 8 Id., 146; *Semple* v. *London & Birmingham R. R. Co.*, 1 Railw. Cas., 159; *Butler* v. *Kent*, 19 Johns. (N. Y.), 223; Laws of Pennsylvania, 1846, 309; *Palmer* v. *Cuyahoga County*, 3 McLean, 226; *Jones* v. *Royal Canal Co.*, 2 Molloy, 319; *Williams* v. *The Earl of Jersey*, 1 Craig & P., 96; *Pelcher* v. *Hart*, 1 Humph. (Tenn.), 524; *Rex* v. *Russel*, 13 Eng. Com. L., 254; *Crenshaw* v. *State R. Co.*, 6 Rand. (Va.), 245; *Hulme* v. *Shreve*, 3 Green, Ch. Cas., 116; *Illingworth* v. *Manchester and Leeds R. R.*, 2 Railw. Cas., 187; *Attorney-General* v. *Eastern Co. R. R. Co.*, 3 Railw. Cas., 337.

After the argument of the cause, the court passed the interlocutory order which is reported in 9 How., 657.

The coming in of the report of the commissioner is mentioned in 11 How., 529, together with the order the court passed thereon. That report was a printed volume of more than seven hundred pages, accompanied by numerous engravings, and including a great mass of evidence upon geographical, statistical, and scientific points. It is very difficult to give an abstract of it, but the attempt must be made.

"The questions referred to the commissioner to report upon, were the following, viz., whether the suspension-bridge, mentioned in the pleadings in this cause, erected over the Ohio River at the city of Wheeling, by the defendants, is or is not an obstruction to the free navigation of the Ohio River, at the place where such bridge is erected across the same, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river; and, if
*548] it is such an *obstruction, what change, or alteration, if any, can be made, consistent with the continuance of the bridge across the said river, that will remove the obstruction to the free navigation by such vessels engaged in

the commerce and navigation of such river; and also to report the proofs which should be produced before me by the respective parties; with power to appoint a clerk to assist in the execution of the order of reference; and also with power, if I should deem it necessary, to appoint a competent engineer, whose duty it should be, under my directions and instructions, as such commissioner, to take the measurement of said bridge, its appendages and appurtenances, and the localities connected therewith, and make a report to me upon the same."

The report commenced with a general examination of suspension-bridges, with their adaptation to the passage of railroad cars. Upon this subject the commissioner expressed himself as follows:

"My opinion, therefore, is, that if the Wheeling Bridge, in its present form, is not permitted to stand, the idea that it can be so altered in its reconstruction, as to adapt it to the purposes of ordinary railroad transit, should not be entertained, and should not be permitted to affect the decision of the question of the practicability of altering or reconstructing such bridge, so as to obtain a revenue therefrom, which might be of sufficient importance to the stockholders of the bridge company to induce them to contribute means to enable the corporation to rebuild the bridge."

The report then contained an account of the commercial statistics of the Ohio River, with the velocity of its current, its floods, &c. The bridge was described as follows:

"The length of the bridge is 980 feet between the faces of the two abutments; and 1010 feet between the centres of the towers, at each end, which support the cables upon which the flooring of the bridge is suspended. The eastern towers, to the top of the saddles, are 153½ feet high above the level of zero of the water-gauge which indicates the depth of water upon the Wheeling Bar; and the western towers are 132½ feet.

"The deflection of the catenary below the top of the saddles of the eastern towers, on the 26th of October, 1850, when the temperature of the atmosphere was 44° of Fahrenheit, was 68 feet 5 inches. And the point of its greatest deflection was 544 feet and 7 inches from the centre of the eastern towers. The deflection would probably be about 15 inches less at the temperature of zero of Fahrenheit, and about 15 inches more at a temperature of 90° above. The temperature of the atmosphere, at the time the measurement was made, was at about a medium between the extreme cold of

winter and the greatest heat of summer, and therefore gives the mean deflection.

*549] "The ascent of the flooring of the bridge at the east end, for 172½ feet from the centre of the tower, rises on a grade of 1.28 feet to the 100; and for 40 feet further it rises on a grade of 0.625 of a foot to the hundred feet. From thence it descends on a grade of 0.925 of a foot to the hundred, for 40 feet; and from thence to the centre of the western tower, on a grade of 4.08 feet to every hundred feet.

"At the highest part of the bridge, for the distance of about 56 feet in width, there is a clear headway, for the passage of steamboats with their chimneys standing, of 92 feet above zero of the Wheeling water-gauge; or 91 feet above extreme low water. This headway commences about 174 feet from the top of the face of the eastern abutment, and terminates 750 feet from the same point in the western abutment. But this space of 56 feet in width is not over any part of the river at extreme low water.

"The bank of the river, under the eastern extremity of the 56 feet space, is 10.21 feet higher than the level of zero of the Wheeling gauge; and under the western extremity, the height of the bank above zero of the gauge, is 3.81 feet. And it is only 22 inches below zero of the gauge at a point 100 feet further west. The water upon the Wheeling Bar must therefore be about 4 feet deep to bring the easterly edge of the stream to a point under the western extremity of the 56 feet. And it must be more than 15 feet deep upon the bar to enable a steamboat drawing 5 feet to avail itself of the 91 feet of clear headway above low-water mark, for the whole width of 56 feet.

"It follows, from this statement of the facts, that a steamboat drawing five feet, and whose chimneys are 79½ feet high, or over, can never pass under the apex of the bridge, at any stage of the water, without lowering her chimneys. And boats drawing 4 feet and having chimneys as high as 86 feet, can never pass under any part of the bridge, without lowering, even in stages of water between 4 and 12 feet high on the Wheeling Bar. This is in accordance with the testimony, which shows that the Cincinnati, whose chimneys, according to the measurement of the engineer, were but 84.7 feet high, had to lower them to pass under the bridge, even in the lowest stages of the water upon which she ran."

Upon the question whether or not the bridge was an obstruction to sailing vessels, the commissioner reported as follows:

"I therefore decide and report that the suspension-bridge at Wheeling, mentioned in the order of reference, is not an obstruction of the free navigation of the Ohio River, at the place where it is erected over the same, by any vessels propelled by sails, which have been engaged in the commerce or navigation of the *river since such bridge was erected, [*550
or which will probably be engaged in such navigation and commerce at any future time during the existence of such bridge."

Upon that branch of the question which related to the bridge being an obstruction to steamboats, the report contained a description of the boats and the height of the chimneys of some of them; and came to the following conclusion:

"A great number of witnesses have been examined on both sides in reference to the question whether the process of lowering such chimneys as are carried upon the Pittsburg and Cincinnati packets, and others of the largest class of boats which navigate the waters of the Ohio, is not attended with injury to the chimneys, delay to the boats, and danger to the limbs and lives of the passengers, or of the officers and crew.

"So far as the question depends upon opinion merely, there is a very great conflict in the testimony of the witnesses. But when we examine the facts testified to by them, I think there is a decided preponderance of testimony in favor of the affirmative of the question.

"Even with the smaller and shorter chimneys on the boats which pass through the Louisville and Portland Canal, where the boats proceed very slowly, and lower and raise their chimneys at leisure, accidents frequently occur to the chimneys; though, from the nature of the navigation through the canal, the process of raising and lowering does not produce much delay there, in ordinary cases. It is easy to perceive, that if the four, five, or six rings, let down upon boats that pass the canal, should fall and break from their hinges, as they sometimes do, the lives of the passengers and crew, or of some of them, would necessarily be endangered.

"The very elevated as well as large chimneys used upon the Pittsburg and Cincinnati packets, and other boats of that class cannot certainly, with any facility or safety, be lowered by hinges at the tops. They are, therefore, obliged to lower them at the hurricane deck, by the means of a derrick The weight of the parts of the two chimneys which must be let down, upon these large boats, is estimated by the witnesses to be from three to four tons. This enormous weight

hanging over the cabin, or rather over the berths of the passengers, in the process of lowering, would probably prove disastrous in the extreme, if by any accident the chimneys should come down by the run; which is very likely to occur, from the carelessness or stupidity of the green hands that the owners and officers of Western boats are so often obliged to employ."

The report then discussed the increased danger in lowering the chimneys, resulting from the velocity of the river; *551] and then *examined the question whether such high chimneys were necessary for obtaining the maximum of speed. The conclusion arrived at was, that they were necessary. Upon this general branch of the question the commissioner reported as follows:

"It would be a great injury to commerce, and to the community to have the benefit of a fair competition, between river navigation and railroad transit, destroyed by any unnecessary obstruction of either. And if railroads can be carried across our large Western rivers, without impairing the navigation, it is proper that it should be done. Certainly, if this beautiful and beneficial structure, which has been thrown across the eastern branch of the Ohio at Wheeling, at so much cost, can remain as it is, without injury to the commerce and navigation of the river, no one should desire its removal or alteration.

"But, upon a full examination of the subject, or rather such an examination as I have been enabled to give it, in a limited time, and without the aid of counsel, I have arrived at the conclusion, and do accordingly decide and report, that the Wheeling Suspension-Bridge, referred to in the pleadings and proofs in this cause, is an obstruction of the free navigation of the Ohio, at the place where it is erected across the same, by vessels propelled by steam, which are now engaged in the commerce and navigation of that river, and by such vessels as will undoubtedly be engaged in such navigation and commerce hereafter, at that place; while such bridge is permitted to remain without very material alterations."

The commissioner then proceeded to discuss the question, whether the bridge could be so altered as not to impede the free navigation of the river by steamboats; and examined eight different plans for effecting this object. The result was thus stated:

"I therefore conclude that it is practicable to alter the construction of the present bridge, so that it will not be an obstruction to the free navigation of the Ohio, consistent

with the continuance of the bridge across the river at the place where it is now erected.

"And I further decide and report that the change, or alteration, which can and should be made, in the construction and existing condition of the bridge, to remove the obstruction which now exists to the free navigation of the river at that place, by steamboats, is to raise the suspension-cables, and the flooring of the bridge, in such a manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel of the river, of not less than one hundred and twenty feet above the level of zero on the Wheeling water-gauge; and below the lowest projections of the flooring of the bridge, and the greatest *deflections of the suspension-cables, at a medium temperature of the atmosphere. [*552

"It will be seen that, in fixing this elevation for the altered bridge, I have made no provision for a greater amount of headway should the future wants of travel and commerce upon this part of the river require it. But I have adopted this height as being ample for the present demands of steamboat navigation, and upon the supposition that the dimensions of the boats running on the Ohio, from places above the bridge, and the heights of their chimneys, have about reached their maximum, for convenient running, or for profit.

"It is true, some of the boats running below the falls are a little longer, and have more breadth of beam, than any of the Pittsburg and Cincinnati packets, and have chimneys a few feet higher. But they have also a greater depth of hold and draw more water; and are not, therefore, so well adapted to the navigation of the upper part of the Ohio, where the river is narrower, and the channel more sinuous.

"Possibly, if the contemplated improvement at the falls of the Ohio should be made, boats of a larger class and with taller chimneys might be found profitable, in carrying on a direct trade between Pittsburg and New Orleans, or between the former place and St. Louis. But as that event is still in the womb of time, and may never have birth, I have not deemed it necessary to make any farther provision for it, than an elevation of the bridge to the height of one hundred and twenty feet, above the level of zero on the Wheeling gauge, will give them.

"Many of my calculations in this report were made very hurriedly; but the engineer, at my request, has examined them all, since the draft of the report was prepared, and has

not discovered any errors in them. I have reason to believe, therefore, that they are all correct.

R. HYDE WALWORTH, *Com.*"

To this report exceptions were filed both upon the part of the complainant and respondent. On the part of the State of Pennsylvania the exceptions were as follows:

Complainant's Exceptions. And now comes the complainant, by her counsel; and as to the report of the special commissioner, Hon. R. H. Walworth, herein made at the last term, the said complainant excepts as follows:

1. To so much of said report, on page 30, as decides that the suspension-bridge, at Wheeling, is not an obstruction of the free navigation of the Ohio River at the place where it is erected over the same, by any vessels propelled by sails, which have been engaged in the commerce or navigation of the river since such bridge was erected, or which will pro-
*553] bably be engaged in such *navigation and commerce at any future time during the existence of such bridge; and, also, in the particulars, that said report does not provide for a headway for ships and sea-going vessels propelled by sails; and complainant prays that the court will decree that adequate provision shall be made for the passage of steamships and sailing vessels with their masts standing.

2. The complainant also excepts to said report in the particular, that the change in the construction and existing condition of said bridge, which, in page 53 of said report, the commissioner decides should be made to remove the obstruction to the free navigation of the river by steamboats, will not be sufficient to remove said obstruction, because the obstruction aforesaid cannot be removed without raising the bridge to the elevation of at least one hundred and forty-five feet above the level of zero on the water-gauge, and also because the width of a level headway of three hundred feet is not sufficient, but the same ought to be the whole width of the river channel at that place; and, also, because no necessity is shown for any obstruction to the navigation, by any bridge at that point, nor is such bridge authorized, or could be lawfully authorized by any State enactment. Complainant prays that the court may decree accordingly.

3. The complainant also excepts to said report, in the particular, that in fixing the elevation for the altered bridge, in page 53 of said report, no provision is made for a greater amount of headway, should the future wants of travel and commerce of this part of the river require it.

Complainant prays that no bridge be allowed across said channel, or, if any be allowed, that the elevation of such bridge be fixed by the decree of this court at not less than one hundred and forty-five feet above the level of zero, on the Wheeling water-gauge, across the whole width of the channel at that place.

4. In all other respects, except the particulars thereof above excepted to, the complainant prays that the report of the commissioner aforesaid be established and confirmed, and that in the particulars herein excepted to, the report be corrected by the decree of this court, so as to abate the obstruction to the navigation of the Ohio River, created by the defendants by their suspension-bridge, and to preserve the free navigation of the said river, as prayed for in the original and supplemental bills of complainant; and that a final decree be entered, as justice and the rights of your complainant may require.

C. Darragh,
Shaler & Stanton,
Robert J. Walker,
For Complainant.

**Defendants' Exceptions.* The defendants except to the proceedings and report of the commissioner, [*554 the Hon. R. H. Walworth, under the order of reference made in this cause, at the December term, 1849, as follows:

1. That the commissioner made an order for the parties to appear before him, with their witnesses, at Wheeling, on the 15th July, 1850, without any application for such order from the counsel of either party, but with information from the counsel of the defendants that they could not then be prepared to take the testimony which they desired to take there. Moreover, his immediate adjournment on the 15th July, 1850, to a place several miles from Wheeling, and from the Ohio River, caused so much inconvenience and expense in the production of witnesses at that time, as to constrain the defendants to defer the examination of many of them until a future opportunity; which opportunity was afterwards denied to them. Whereby, and by the course pursued by the commissioner afterwards, as mentioned in the next exception, the defendants were prevented from taking the greater part of the testimony which they desired to take at Wheeling.

2. That the commissioner, in his report, has expressed opinions upon the questions on which he was directed to take proofs, without first having taken all the proofs which the counsel for the defendants saw fit to produce before him, and

without reporting those proofs particularly. That, "as a general rule," he refused to receive or to report any testimony produced by the counsel for the defendants, unless he, the commissioner, considered it relevant to the subject on which the court had directed testimony to be taken by him, if objected to by the opposite counsel; and actually excluded evidence which was relevant, in some instances, which appear in his report; besides establishing rules of decision which prevented the production of all testimony of like tendency to that which was rejected; and,

That, on the 4th day of December, 1850, in the unavoidable absence of the regular counsel of the defendants, (occasioned by sickness,) the commissioner refused to keep open his proceedings, at Wheeling, until the defendants could have had the presence and advice of that counsel, in relation to the further production of testimony, refused to grant the defendants further time for completing their proofs, and even refused to report to the court the affidavit on which the application for delay was grounded; notwithstanding, it appears by his report that the defendants finally (being without counsel) asked for a delay of only two days, until the expected arrival of their counsel, and nothing was done, or to be done *555] by the commissioner, in *the cause, until the fifth day afterwards, at Pittsburg. And, from that time forward, the commissioner denied to the defendants the opportunity and time, which reasonably they ought to have had, to complete the taking of their testimony before him, though he had repeatedly been informed by their counsel that they desired to produce further proofs at Wheeling, Philadelphia, and elsewhere. See Rep., pp. 645, &c.

3. That the commissioner, knowing that the defendants desired to avail themselves of the expiration of the time limited for making his report, to apply to the court for some explanation or modification of the order of reference, so as thereafter to prevent a repetition of the injustice which, as they considered, had been done to them by the commissioner, did, on or about the 1st of December, 1850, privately apply to the court for an order extending the time for his proceedings, confirming what he might have done after the expiration of the time previously limited, and making no other change in the terms of the order of reference. And the commissioner suffered the defendants and their counsel to take their course in ignorance that any such application had been made, and then refused to make such a special report as would have enabled them to make a more regular application. See Rep., pp. 645, 648.

4. That the commissioner, in his report, argues to prove that wire suspension-bridges are not adapted to the uses of railroads; which opinion, or argument, is not only incorrect, but is on a subject not referred to him, and it can only tend to prejudice the defence improperly. See Rep., pp. 17, 20.

5. That the commissioner reports that "the Wheeling Suspension-Bridge, referred to in the pleadings and proofs in this cause, is an obstruction of the free navigation of the Ohio River, at the place where it is erected across the same, by vessels propelled by steam, which are now engaged in the commerce of that river, and by such vessels as will undoubtedly be engaged in such commerce hereafter, at that place, while such bridge is permitted to remain without material alterations." Whereas, it appears by the evidence in the cause, that the said bridge is not such an obstruction. See Rep., p. 45.

6. That the commissioner reports that a change or alteration of said bridge can, and should be made by raising the suspension-cables and flooring, so as to give a level headway at least three hundred feet wide, over a convenient part of the channel of the river, of not less than 120 feet above the level of zero, on the Wheeling water-gauge, and below the lowest projections of the flooring of the bridge and the greatest deflections of the suspension-cables, at a medium temperature of the atmosphere. Rep., p. 53.

*7. That the commissioner has decided the questions referred to him upon the assumption that, if any [*556 steamboats navigating the Ohio, however few, can attain an increase of speed, however slight, by using the tallest chimneys, where such increase of speed is beneficial to travel and commerce, in however small a degree, those steamboats are entitled to the benefit of such increase, in opposition to the claims of all who require the use of a bridge; whatever may be the extent of mischief resulting from the want of a bridge, or from its extreme elevation. See Rep., p. 45.

8. That the commissioner refused to receive or report any testimony tending to show the amount of inconvenience or injury which the public would suffer by the want of a bridge such as the one above mentioned, now standing at Wheeling. And, on the other hand, he has admitted much testimony, offered by the complainant, to show the magnitude of the present and prospective commerce on the river, and while expressing, in his report, an opinion favorable to the utility of the tallest chimneys used by any boat on that part of the river, has omitted all reference to the testimony tending to show in how small or great a degree, if at all, a reduction of the

height of those chimneys, to the usual standard, would impair their supposed utility, and what proportion of the boats navigating, or likely to navigate the river, do now, or probably will, use chimneys of the extreme height which he considers useful.

9. That the commissioner appointed Edwin F. Johnson, an engineer, to make the measurements of the bridge, &c., and retained him in that position after he became aware that the said Johnson was the brother-in-law of one of the counsel for complainant, residing at Pittsburg, and until that fact had been discovered and formally alleged by the counsel for the defendants, and long after the commissioner must have discovered that the said Johnson was unfit for that position; and the said commissioner proposes to allow the said Johnson pay and expenses as such engineer, though he failed to perform his duties as such, and was much more diligent in serving the interests of the complainant in the cause.

10. That the said commissioner unnecessarily increased the expenses incurred under the order of reference to an enormous extent.

11. That the commissioner has returned the report of the engineer with his own, without permitting the parties to have an opportunity of inspecting it before the commissioner closed the taking of testimony.

12. The defendants not only except to such parts of the report and proceedings of the commissioner, as are above pointed out, *but they insist on their exceptions, taken before the commissioner, and reported by him with the testimony.

*557]

ALEX. H. H. STUART,
REVERDY JOHNSON,
Attorneys for Defendants.

These exceptions were fully argued upon both sides; but the great length to which this report must necessarily be protracted, forbids any notice of the arguments of the respective counsel.

Mr. Justice McLEAN delivered the opinion of the court.

This bill was filed in the clerk's office of this court, in July, 1849. It charged that the defendants, under color of an act of the Legislature of Virginia, but in direct violation of its terms, were engaged in the construction of a bridge across the Ohio River, at Wheeling, which would obstruct its navigation, to and from the ports of Pennsylvania, by steamboats and other craft which navigate the same. That the State of Pennsylvania owns certain valuable public works, canals, and

railways, constructed at great expense as channels of commerce, for the transportation of passengers and goods, from which a large revenue, as tolls, was received by the State. That these works terminate on the Ohio River, and were constructed with direct reference to its free navigation; the goods and passengers transported on these lines were conveyed in steamboats, on the Ohio River; and the Wheeling Bridge would so obstruct the navigation of that river, as to cut off and direct trade and business from the public works of Pennsylvania, impair and diminish the tolls and revenue of the State, and render its improvements useless. The bill prayed an injunction against the erection of the bridge, as a public nuisance, and for general relief.

In August, 1849, a supplemental bill was filed, stating that, after notice, the defendants continued to prosecute their work, and were engaged in stretching iron cables across the channel of the river, which would obstruct its navigation, and it prayed that these cables might be abated.

At the December term of this court, 1849, another supplemental bill was filed, representing that defendants had completed the erection of the bridge, and that it had obstructed the passage of steamboats carrying freight and passengers to and from the ports of Pennsylvania; that it also hindered the passage of steamships and sea-going vessels, which were accustomed to be constructed at the ports of Pennsylvania, and would injure and destroy the trade and business of ship and boat building, which was carried on by the citizens of Pittsburg, and it prayed an abatement of the bridge as a public nuisance, and for general relief.

In their answers the defendants allege the exclusive sovereignty *of Virginia over the Ohio River, and set [*558 forth the act authorizing the erection of the bridge. And they object to the application for an injunction and the relief prayed for, that the persons injured might have remedy in the courts of Virginia; that the State of Pennsylvania had no corporate capacity to institute this suit in the Supreme Court, to vindicate the rights of her citizens; that the State is only a nominal party, whose name was, without proper authority, used by individuals; that the bridge is a connecting link of a great public highway, as important as the navigation of the Ohio River; that Pennsylvania had set the example of authorizing bridges across the Ohio; that certain engineers of the United States had recommended a wire suspension-bridge at Wheeling, and gave as their opinion, that "by an elevation of ninety feet, every imaginable danger of obstructing the navigation would be avoided"; that certain

reports of committees in Congress recognized the necessity of a bridge at Wheeling, and recommended an appropriation for that purpose; that the headway for steamers left by the bridge is amply sufficient, forty-seven feet above the water, for all useful purposes; and if sufficient draught cannot be had at that height, blowers might be added; that chimneys might have hinges on them, so as to be lowered without much inconvenience; that the bridge will not be an appreciable inconvenience to the average class of boats; that the bridge will not diminish or destroy trade between Pittsburg and other ports, or do irreparable injury to the citizens of Pennsylvania.

The answer admits that the State of Pennsylvania has expended large sums of money in the construction of public improvements, terminating at Pittsburg and Beaver; that a great amount of freight and a large number of passengers do pass over said works, and that a large amount of toll to the State is derived therefrom; that the navigation of the Ohio River is important to the works above referred to, and that the value thereof would be affected injuriously if from any cause the passage of steamboats from the city of Pittsburg downwards were obstructed or impeded. But they deny that their bridge or the cables will have any such effect, or that it can in truth be called a nuisance.

To the actual obstruction occasioned by the bridge, as charged in the second supplemental bill, they set up an amendatory and explanatory act of the Virginia Legislature, passed 11th of January, 1850, declaring the height of ninety feet at the eastern abutment, ninety-three and a half feet at the highest point, and sixty-two feet at the western abutment, above the low-water level of the Ohio River, to be of lawful height, and in conformity with the intent and meaning of the 19th section of the charter.

*559] *At December term, 1849, the question of jurisdiction was argued on both sides, and it was sustained by the entry of an order of reference to the Hon. R. H. Walworth, as special commissioner to take testimony and report—

1. Whether the bridge is, or is not, an obstruction of the free navigation of the Ohio River, by vessels propelled by steam or sails, engaged, or which may be engaged, in the commerce or navigation of said river.

2. If an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the contin-

uance of the same across said river, that will remove the obstruction to the free navigation.

At the ensuing term, near its close, the commissioner made his report, together with the report of the engineer employed, and the evidence taken before him, deciding,

1. That the bridge is not an obstruction to the free navigation of the Ohio by any vessels propelled by sails.

2. That the bridge is an obstruction of the free navigation of the Ohio by vessels propelled by steam.

3. That the change or alteration which can and should be made in the construction and existing condition of the bridge is, to raise the cables and flooring in such manner as to give a level headway, at least three hundred feet wide, over a convenient part of the channel, of not less than one hundred and twenty feet above the level of zero on the Wheeling water-gauge.

To this report several exceptions were taken, by the counsel on both sides.

As this is the exercise of original jurisdiction by this court, on the ground that the State of Pennsylvania is a party, it is important to ascertain whether such a case is made out as to entitle the State to assume this attitude. In the second section of the third article of the Constitution, it is declared that the Supreme Court shall have original jurisdiction in a case, where a State shall be a party.

In this case the State of Pennsylvania is not a party in virtue of its sovereignty. It does not come here to protect the rights of its citizens. The sovereign powers of a State are adequate to the protection of its own citizens, and no other jurisdiction can be exercised over them, or in their behalf, except in a few specified cases. Nor can the State prosecute this suit on the ground of any remote or contingent interest in itself. It assumes and claims, not an abstract right, but a direct interest in the controversy, and that the power of this court, can redress its wrongs and save it from irreparable injury. If such a case be made out, the jurisdiction may be sustained.

*When a State enters into a copartnership, or becomes a stockholder in a bank, or other corporation, [*560 its sovereignty is not involved in the business, but it stands and is treated as other stockholders, or partners. And so in the present case, the rights asserted and relief prayed, are considered as in no respect different from those of an individual. From the dignity of the State, the Constitution gives to it the right to bring an original suit in this court. And

this is the only privilege, if the right be established, which the State of Pennsylvania can claim in the present case.

It is objected, in the first place, that there is no evidence that the State of Pennsylvania has consented to the prosecution of this suit in its own name.

This would seem to be answered by the fact, that the proceedings were instituted by the attorney-general of the State. He is its legal representative, and the court cannot presume, without proof, against his authority. In January, 1850, the following declaration passed unanimously by both branches of the Pennsylvania Legislature: "Whereas the navigation of the River Ohio has been, and is now obstructed by bridges erected across its channel, between Zane's Island and the main Virginia and Ohio shores, so that steamboats and other water crafts hitherto accustomed to navigate said river, are hindered in their passage to and from the port of Pittsburg, and other ports in the State of Pennsylvania, and the trade and commerce, and business of this Commonwealth interrupted, the revenue of her public works diminished and impaired, and steamboats, owned and navigated by citizens of this State, bound to and from her ports, are subjected to labor, expense, and delay, with hazard to life and property, by reason whereof the said bridges are a common and public nuisance, injurious to the State of Pennsylvania and her citizens, therefore be it resolved, &c.

"2. That the proceedings, in behalf of said State, instituted by her attorney-general in the Supreme Court of the United States, and now pending therein against the Wheeling and Belmont Bridge Company to abate the nuisance occasioned by their bridge lately erected across the Ohio, be prosecuted to final judgment, decree, and execution, for abatement of said nuisance."

On a question of disputed boundary between two States, although the inquiry of the court is limited to the establishment of a common line, yet the exercise of sovereign authority, over more or less territory, may depend upon the decision. This gives great dignity and importance to such a controversy, and renders necessary a broader view, than on a question as to the mere right of property. But in the pres-
*561] ent case, the State of *Pennsylvania claims nothing connected with the exercise of its sovereignty. It asks from the court a protection of its property, on the same ground and to the same extent as a corporation or individual may ask it. And it becomes an important question whether such facts are shown, as to require the extraordinary interposition of this court.

Relief in this form is given, as it cannot be given adequately in any other. The injury complained of, in the language of the books, must be irreparable by a suit at law for damages. It is matter of history, as well as in proof, that Pennsylvania, for many years past, has been engaged in making extensive improvements by canals, railroads, and turnpikes, many of them extending from eastern Pennsylvania to Pittsburg, by which the transportation of goods and passengers is greatly facilitated, and that a large portion of the goods and passengers thus transported are conveyed to and from Pittsburg on the Ohio River.

On the 18th of December, 1789, an act was passed by Virginia, consenting to the erection of the State of Kentucky out of its territory, on certain conditions, among which are the following: "That the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States." Virg. Revised Code, 1819, p. 19. To this act the assent of Congress was given. 1 Stat. at L., 189.

That the Ohio River is navigable, is a historical fact, which all courts may recognize. For many years the commerce upon it has been regulated by Congress, under the commercial power, by establishing ports, requiring vessels which navigate it to take out licenses, and to observe certain rules for the safety of their passengers and cargoes. Appropriations by Congress have been frequently made, to remove obstructions to navigation from its channel.

It appears that Pennsylvania has constructed a combined line of canal and railroad from Pittsburg and Alleghany cities, to the city of Philadelphia, a distance of about four hundred miles, at an expense of about sixteen millions of dollars, all of which are owned by the State. There is also a railroad from Pittsburg to Harrisburg which will soon be completed, at an expense of some eight of ten millions of dollars. There is also a slack-water navigation from Pittsburg to Brownsville, and up the Yaughegany to West Newton, and there are other lines of communication between Pittsburg and the East, which are owned in whole or in part by the State, and from which it derives revenue.

And the witnesses generally say, that any obstruction on the Ohio River, to the free passage of steamboats, must affect *injuriously the revenue from the above public works, as it would divert the transportation of goods and passengers from the lines to and from Pittsburg, to the northern [*562

lines through New York. Whilst the witnesses differ as to the amount of such an injury, they generally agree in saying, that any serious obstruction on the Ohio would diminish the trade and lessen the revenue of the State. The value of the goods to and from Pittsburg, transported on the above lines of communication, is estimated at from forty to fifty millions annually. And it is shown that the commerce on the Ohio, to and from Pittsburg, amounts to about the same sum.

If the bridge be such an obstruction to the navigation of the Ohio as to change, to any considerable extent, the line of transportation through Pennsylvania to the northern route through New York, or to a more southern route, an injury is done to the State of Pennsylvania, as the principal proprietor of the lines of communication, by canal and railroad, from Philadelphia to Pittsburg. And this injury is of a character for which an action at law could afford no adequate redress. It is of daily occurrence, and would require numerous, if not daily prosecutions, for the wrong done; and from the nature of that wrong, the compensation could not be measured or ascertained with any degree of precision. The effect would be, if not to reduce the tolls on these lines of transportation, to prevent their increase with the increasing business of the country.

If the obstruction complained of be an injury, it would be difficult to state a stronger case for the extraordinary interposition of a court of chancery. In no case could a remedy be more hopeless by an action at common law. The structure complained of is permanent, and so are the public works sought to be protected. The injury, if there be one, is as permanent as the work from which it proceeds, and as are the works affected by it. And whatever injury there may now be, will become greater in proportion to the increase of population and the commercial developments of the country. And in a country like this, where there would seem to be no limit to its progress, the injury complained of would be far greater in its effects than under less prosperous circumstances.

As we are now considering the obstruction of the bridge, not as to the relief prayed for, but as to the form of the remedy adopted by the complainant, we are brought to the conclusion, as before announced by this court to the parties, that there is made out a *primâ facie* case for the exercise of jurisdiction. The witnesses who testify to the obstruction are numerous, and the weight of their testimony is not impaired by the impeachment of their credit, or a denial of the facts stated by them.

*But it is objected, if not as a matter going to the jurisdiction, as fatal to any further action in the case, [*563 that there are no statutory provisions to guide the court, either by the State of Virginia, or by Congress. It is said that there is no common law of the Union on which the procedure can be founded; that the common law of Virginia is subject to its legislative action, and that the bridge, having been constructed under its authority, it can in no sense be considered a nuisance. That whatever shall be done within the limits of a State, is subject to its laws, written or unwritten, unless it be a violation of the Constitution, or of some act of Congress.

It is admitted that the federal courts have no jurisdiction of common-law offences, and that there is no abstract pervading principle of the common law of the Union under which we can take jurisdiction. And it is admitted, that the case under consideration, is subject to the same rules of action as if the suit had been commenced in the Circuit Court for the District of Virginia.

In the second section of the third article of the Constitution it is declared, "the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority."

Chancery jurisdiction is conferred on the courts of the United States with the limitation "that suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate, and complete remedy may be had at law." The rules of the High Court of Chancery of England have been adopted by the courts of the United States. And there is no other limitation to the exercise of a chancery jurisdiction by these courts, except the value of the matter in controversy, the residence or character of the parties, or a claim which arises under a law of the United States, and which has been decided against in a State court.

In exercising this jurisdiction, the courts of the Union are not limited by the chancery system adopted by any State, and they exercise their functions in a State where no court of chancery has been established. The usages of the High Court of Chancery in England, whenever the jurisdiction is exercised, govern the proceedings. This may be said to be the common law of chancery, and since the organization of the government, it has been observed.

In *Robinson* v. *Campbell*, (3 Wheat., 222,) it is said, "The court, therefore, think that, to effectuate the purposes of the legislature, the remedies in the courts of the United States

are to be, at common law or in equity, not according to the
*564] practice *of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."

This principle is not controverted by what is laid down in the case of *Wheaton & Donaldson* v. *Peters*, 8 Pet., 658. In that case, the court say, "It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common-law right is asserted, we must look to the State in which the controversy originated." The inquiry, in that case, was, whether a copy-right existed by common law in the State of Pennsylvania. But, in the case above cited from 3 Wheaton, the court spoke of the remedy. By the act of Congress of 1828, proceedings at law, in the courts of the United States, are required to conform to the modes of proceeding in the State courts; but there is no such provision in regard to courts of chancery.

Under this system, where relief can be given by the English chancery, similar relief may be given by the courts of the Union.

An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.

Such a proceeding is as common and as free from difficulty as an ordinary injunction-bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named. And, in regard to the exercise of these powers, it is of no importance

whether the eastern channel, over which the bridge is thrown, is wholly within the limits of the State of Virginia. The Ohio being a *navigable stream, subject to the commercial power of Congress, and over which that power [*565 has been exerted; if the river be within the State of Virginia, the commerce upon it, which extends to other States, is not within its jurisdiction; consequently, if the act of Virginia authorized the structure of the bridge, so as to obstruct navigation, it could afford no justification to the Bridge Company.

The act of Virginia, under which the bridge was built, with scrupulous care, guarded the rights of navigation. In the 19th section, it is declared "That, if the said bridge shall be so constructed as to injure the navigation of the said river, the said bridge shall be treated as a public nuisance, and shall be liable to abatement, upon the same principles and in the same manner that other public nuisances are." And, in the act of the 19th of March, 1847, to revive the first act, it is declared, in the 14th section, "that if the bridge shall be so erected as to obstruct the navigation of the Ohio River, in the usual manner, by such steamboats and other crafts as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known, then, unless, upon such obstruction being found to exist, such obstruction shall be immediately removed or remedied, the said last-mentioned bridge may be treated as a public nuisance, and abated accordingly."

This is a full recognition of the public right on this great highway, and the grant to the Bridge Company was made subject to that right.

It is objected that there is no act of Congress prohibiting obstructions on the Ohio River, and that until there shall be such a regulation, a State, in the construction of bridges, has a right to exercise its own discretion on the subject.

Congress have not declared in terms that a State, by the construction of bridges, or otherwise, shall not obstruct the navigation of the Ohio, but they have regulated navigation upon it, as before remarked, by licensing vessels, establishing ports of entry, imposing duties upon masters and other officers of boats, and inflicting severe penalties for neglect of those duties, by which damage to life or property has resulted. And they have expressly sanctioned the compact made by Virginia with Kentucky, at the time of its admission into the Union, "that the use and navigation of the River Ohio, so far as the territory of the proposed State, or the territory that shall remain within the limits of this Common-

wealth lies thereon, shall be free and common to the citizens of the United States." Now, an obstructed navigation cannot be said to be free. It was, no doubt, in view of this compact, that in the charter for the bridge, it was required to be
*566] so elevated, as not, at the greatest height of the *water, to obstruct navigation. Any individual may abate a public nuisance. 5 Bac. Ab., 797; 2 Roll. Ab., 144, 145; 9 Co., 54; Hawk. P. C., 75, § 12.

This compact, by the sanction of Congress, has become a law of the Union. What further legislation can be desired for judicial action? In the case of *Green et al.* v. *Biddle*, (8 Wheat., 1,) this court held that a law of the State of Kentucky, which was in violation of this compact between Virginia and Kentucky, was void; and they say this court has authority to declare a State law unconstitutional, upon the ground of its impairing the obligation of a compact between different States of the Union.

The case of *Wilson* v. *The Blackbird Creek Marsh Company*, (2 Pet., 250,) is different in principle from the case before us. A dam was built over a creek to drain a marsh, required by the unhealthiness it produced. It was a small creek, made navigable by the flowing of the tide. The Chief Justice said it was a matter of doubt, whether the small creeks, which the tide makes navigable a short distance, are within the general commercial regulation, and that in such cases of doubt, it would be better for the court to follow the lead of Congress. Congress have led in regulating commerce on the Ohio, which brings the case within the rule above laid down. The facts of the two cases, therefore, instead of being alike, are altogether different.

No State law can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the navigation of the river. More than this is not necessary to give a civil remedy for an injury done by an obstruction. Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.

In the case of the *City of Georgetown* v. *The Alexandria Co.*, (12 Pet., 98,) this court say, "The court of equity, also, pursuing the analogy of the law, that a party may maintain a private action for special damages, even in case of a public nuisance, will now take jurisdiction in case of a public nui-

sance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy." Where no special damage is alleged, an individual could not prosecute in his own name for a public nuisance. This doctrine is laid down in *Conning et al.* v. *Lowerre*, 6 Johns. (N. Y.) *Ch., 439. In that case the injunction was granted, and the chancellor said, "that here was a special grievance to the plaintiffs, affecting the enjoyment of their property and the value of it. The obstruction was not only a common or public nuisance, but worked a special injury to the plaintiffs." [*567

Chancellor Kent, in the 3d volume of his Commentaries, 411, says, "The common law, while it acknowledged and protected the right of the owners of the adjacent lands to the soil and water of the river, rendered that right subordinate to the public convenience, and all erections and impediments made by the owners, to the obstruction of the free use of the river as a highway for boats and rafts are deemed nuisances."

In *Sampson* v. *Smith*, (8 Sim., 272,) it was held that injury to the plaintiff's trade was sufficient to give jurisdiction against a public nuisance, and that it was not necessary to use, in such a prosecution, the name of the attorney-general. And this was on a bill for the discontinuance of works already erected.

It is said, "the question of nuisance, or not, must, in cases of doubt, be tried by a jury." 2 Story, Eq., 202. In this respect the question is similar to an application for the protection of a patent, Where the right has been long enjoyed, or is clear of doubt, chancery will interfere without a trial at law. Mr. Justice Story says, (Id., 203,) "A court of equity will not only interfere upon the information of the attorney-general, but also upon the application of private parties, directly affected by the nuisance; whereas, at law, in many cases the remedy is, or may be, solely through the instrumentality of the attorney-general."

In the same volume, (p. 204,) it is said, "In regard to private nuisances the interference of courts of equity, by way of injunction, is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits." Mit. Eq. Pl. by Jeremy, 144, 145; Eden on Injunc., ch. 11, 231, 238.

"There must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at

law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot otherwise be prevented than by an injunction." "Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to repeated trespasses. But now there is not the slightest hesitation, if the acts done, or threatened to be done to the property, would be ruinous or irreparable." 2 Story, Eq., 207.

In *Ripon* v. *Hobart*, 3 Myl. & K., 169, Lord Brougham says, "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief without *waiting for the result of a trial; and will, according to the circumstances, direct an issue or allow an action," &c. Lord Eldon, in the case of *Attorney-General* v. *Cleaver*, 18 Ves., 218, appeared to think that there was no instance of an injunction to restrain a nuisance without trial. But in this he was clearly wrong.

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The fact that the bridge constitutes a nuisance is ascertained by measurement. The height of the bridge, of the water, and of the chimneys of steamboats, are the principal facts to be ascertained. If the obstruction exists, it is a nuisance. To ascertain this a jury is not necessary. It is shown in the report, by a mathematical demonstration. And the other matters, connected with the case, as to the benefit of high chimneys, lowering of them in passing under the bridge, and shortening chimneys, are matters of science and experience, better ascertained by a report than by a verdict. And the same may be said of the statistics which are in the case.

The object of the suit was, not the recovery of damages, but to enjoin the defendants from building the bridge which would injure the plaintiff. If the bridge be a material obstruction to the navigation of the Ohio, it is not denied that the plaintiff would be injured. The ground of defence taken and maintained is, that the bridge is not a material obstruction to commerce on the river. On this point there is no doubt. A jury, in such a case could give no aid to the court, nor security to the parties. Having had notice of an application for an injunction, before the defendants had thrown any obstruction over the river, they cannot claim that their position is strengthened by the completion of the bridge.

But it is said, the bridge constitutes no serious obstruction to the navigation of the Ohio; that only seven steamboats, of two hundred and thirty which ply upon the river as high as Pittsburg, are obstructed; and that arises from the height

of their chimneys, which might be lowered at a small expense, in passing under the bridge; that by the introduction of blowers, the chimneys might be shortened without lessening the speed of the boats; that the goods and passengers which are conveyed on the public lines of communication, between Pittsburg and Philadelphia, could be as well conveyed on boats of lower chimneys, and consequently the State, as proprietor of those lines, if at all injured, is injured so inconsiderably as not to lay the foundation of this procedure; that none of the packets or the other boats on the river are owned by the State of Pennsylvania.

That the bridge constitutes an obstruction, is shown by the report of the commissioner, the answer of defendants, the proof in the case, and by the admission in the argument of the counsel for the defendants. The report of the commissioner is considered, *as to the fact of the obstruction and the extent of it, of the same force as a verdict [*569 of a jury. The report having been the result of a most arduous and scientific investigation of the facts, is entitled to the full weight of a verdict. 2 Railw. Cas., 330. The fact of obstruction was a plain and practical question, but it was connected with other matters involving questions of science, which were to be settled on the opinion of experts, and a report being fairly made, the court will, generally, assume it as a basis of action, unless it shall be shown to have been made under improper influences, or through a mistake of facts. 1 Railw. Cas., 576; Shelf. on Railw., 430.

In his report the commissioner says: "The boats running in that line, and passing the site of the present suspension-bridge, in 1849, previous to the time when the first cables were thrown across the eastern branch of the Ohio, at Wheeling, were the Clipper, No. 2; the Hibernia, No. 2; the Brilliant; the Messenger, No. 2; the Isaac Newton; the New England, No. 2; and the Monongahela.

"The Clipper, No. 2, came out in March, 1846, was 215 feet long, and had chimneys 64 feet high. The Hibernia, No. 2, came out in 1847. She was 225 feet long, and her chimneys were 72½ feet high from the water. The Brilliant came out in February, 1848, was 227 feet long, and had chimneys 71 feet high. The Messenger, No. 2, came out in the Winter or Spring of 1849, was 242 feet long, and has chimneys 76⅓ feet high. The Isaac Newton was 182 feet long, and had chimneys only 63½ feet high. The New England, No. 2, was 222 feet long, and her chimneys were 65⅔ feet high. "The dimensions and height of the chimneys of the Monongahela,"

the commissioner says, "I have not been able to ascertain from the evidence."

"There were also two other regular packets running past Wheeling in the Spring and Summer of 1849, previous to the erection of the bridge; the two Telegraphs, running as regular packets between Pittsburg and Louisville. The chimneys of the Telegraph, No. 1, were 80 feet high, and those of the other Telegraph were 79 feet 9 inches high.

"Not more than two or three of these nine packets had their chimneys prepared for lowering at the close of the navigation in the Summer of 1849. And of the five largest only one of them could have gotten under the bridge on a twenty feet stage of water with the chimneys standing; and that one, the Brilliant, could not have gotten under when the water was more than twenty-one feet upon the Wheeling Bar. And neither of the two Telegraphs could have gotten under the bridge at a thirteen feet stage of the water with their chimneys standing."

*570] *"If the bridge," says the commissioner, "had been erected in 1847, therefore, and those nine packets had then been running, two of them could not have gotten under the bridge for nearly three months, when the water was thirteen feet and over; two of them would have been unable to get under for thirty-three days, when the water on the bar was twenty feet and over; another, the Brilliant, from nineteen to twenty-five days, when the water was twenty-nine feet and over; and the other four as much as ten days, when the water was twenty-nine feet and over,—unless they had lowered or cut off their chimneys."

"The passage of three of the Pittsburg and Cincinnati packets, which were running on the Ohio before the erection of the bridge, had been actually stopped or obstructed by such bridge previous to the order of reference in this cause: the Messenger, No. 2, the Hibernia, No. 2, and the Brilliant.

"The first of these boats arrived at the bridge on the 10th of November, 1849, on her downward passage, upon a twenty feet stage of water, and had to cut off her chimneys before she could pass the bridge. She was detained there about seven hours, but I believe she did not lose her trip or passengers. She was subsequently detained at the bridge seven hours, and was obliged to cut off her chimneys a second time.

"On the 11th of November, 1849, the Hibernia, No. 2, reached the bridge on her upward trip. They attempted to get her under the bridge by sinking her deeper in the water with coal ballast. But, in attempting to pass the bridge, the top of one of her chimneys caught upon a projection from

the under side of one of the flooring timbers, and injured the chimney so that it had to be taken down and repaired. The boat was detained thirty-two hours at Wheeling on that occasion; and was obliged to hire another boat to take her passengers on to Pittsburg, except such of them as preferred to cross the mountains by the way of Cumberland.

"On the 18th of the same month the passage of the Hibernia, No. 2, was again obstructed by the bridge on her downward passage; by which she lost an entire trip. Finding she could not get under the bridge in time to save her trip, she transferred her freight and passengers to another boat, and returned to Pittsburg. And the passage of the same boat was again obstructed by the bridge in coming up the river last Spring. On that occasion she arrived at Wheeling between nine and ten o'clock in the morning, and finding she could not get under the bridge she gave up the trip, and landed her passengers, who proceeded east by way of Cumberland.

"The Brilliant was obstructed by the bridge on her passage *up on the 18th December, 1849, and had to wait until her chimneys could be cut off to enable her to pass [*571 under the bridge. The chimneys were cut off at great risk to the lives of those who were engaged in the operation; and the boat passed under the bridge and proceeded to Pittsburg after a detention of four or five hours.

"In the Winter and Spring subsequent to the erection of the bridge, the Buckeye State, the Keystone State, and the Cincinnati, three new packets, were brought into the Pittsburg and Cincinnati lines, in the places of the New England, No. 2, the Isaac Newton, and the Monongahela. They were all of much larger dimensions and had much taller chimneys than the old boats for which they were substituted, and their chimneys were hinged and rigged for lowering." The chimneys of the Buckeye State were 74 feet 8 inches high, those of the Keystone 77 feet 5 inches, and those of the Cincinnati 84 feet 7 inches.

"Two accidents have occurred to those new boats in passing under the bridge since they came out. The Keystone State, on her downward passage, the 4th of March last, in attempting to pass under the apex of the bridge upon a thirteen and a quarter feet stage of water, could not get near enough to the Wheeling shore to pass under the apex of the bridge. And in attempting to drop down about twenty feet further west, one of the chimneys struck the bridge and tore away all the guys or fastenings of both chimneys, except one guy-rod, broke the westerly chimney in two, broke off the

hinge from the other chimney, and tore up some portions of the hurricane deck to which the guy-rods were fastened. And if the remaining guy-rod had given way, both chimneys, weighing together about four tons, would have fallen down."

A somewhat similar accident, it seems from the report, occurred to the Cincinnati, in October, 1850.

On the practicability and safety of lowering the chimneys a great number of witnesses were examined. And the commissioner says, although there was great conflict in the testimony as respects the danger to the limbs and lives of the passengers in the operation, yet, he says, when the facts sworn to are examined, there is a decided preponderance against the safety of lowering the chimneys. And he remarks, "The very elevated as well as large chimneys used upon the Cincinnati and Pittsburg packets, and other boats of that class, cannot certainly with any facility or safety be lowered by hinges at the tops. They are therefore obliged to lower them at the hurricane-deck, by means of a derrick. The weight of the parts of the two chimneys which must be let down upon those large
*572] boats is estimated by the witnesses to be from three to four tons. This *enormous weight hanging over the cabin, or rather over the berths of passengers, in process of lowering, would probably prove disastrous in the extreme if by any accident the chimneys should come down by the run; which is very likely to occur, from the carelessness or stupidity of the green hands that the owners and officers of Western boats are so often obliged to employ."

And if to the difficulties stated in the report there be added the darkness of the night, a snow storm, or the falling rain congealing on the roof of the boat and covering it with ice, and a high wind, which generally is experienced in a storm, it would be impracticable, while the boat was proceeding at the rate of ten or twelve miles an hour, to lower the chimneys, and this must be done or the boat must land. During this operation, the pilot, on whom the safety of the boat and the lives of the passengers in a great degree depend, must, from his position, be in imminent danger.

The expense of lowering the chimneys, if practicable and safe, would constitute no inconsiderable item. The time lost in raising and lowering chimneys is variously estimated by the witnesses at from one to three hours. Take the minimum of such estimate, and, according to the calculation of Colonel Long, the expense of the boat amounts to $8.33 per hour. Each packet will have to lower its chimneys every time it passes under the bridge, which will be, ordinarily, sixty times a season, amounting to the sum of $499.80, a

charge on each packet. To this may be added the apparatus for lowering the chimneys, estimated at $400, which, with its repairs, may be estimated at $100 per annum during the life of the boat, which averages five years. And it is in proof that stationary chimneys will last five years, but if subject to be lowered they will only last half that time. The cost of chimneys for a boat is stated at $1000, which may be considered as an increased expense to each boat of $200 per annum. These sums added together make a total of $799.80, which sum multiplied by seven, the number of the packets, make the sum of $5,598.60 which the owners of these packets must necessarily pay as an annual tax, by reason of the obstruction of the bridge, if they run their boats and lower their chimneys.

But it is contended that the difficulty of passing under the bridge may be obviated by shortening the height of the chimneys without lessening materially the speed of the boat.

That high chimneys increase the speed of the boat is proved in the case practically and scientifically.

Professors Renwick, Byrne, and Locke say, that by a law of nature the force of velocity of a draft depends upon the height *of the chimney; the force and velocity being measured by the difference in the weight between the [*573 column of air within the chimney and an outside column of equal height and diameter; so that a reduction of the height of the chimney involves a diminution of that force with which nature supplies air to combine with fuel for combustion, and by consequence there follows a diminution of heat developed in the furnace, of steam generated in the boiler, and of power by which the wheel is moved and the boat propelled.

The commissioner, in his report, says, "the deduction of science also shows that the draft is increased by elongating the chimneys." In this question economy of fuel is not the object to be attained, but the greatest practicable speed consistent with safety. And this is attained, where there is no defect in the furnace, by the combustion of the largest amount of fuel. Forty-three bushels of bituminous coal are consumed per hour by each of the Pittsburg packets.

The commissioner says, "In relation to the question whether chimneys as high as those now in use upon the Pittsburg and Cincinnati packets, and some of the larger boats on the Ohio, are necessary for obtaining the maximum speed desirable in the navigation of the river, there is a diversity of opinion among the witnesses, especially among those who are not acquainted with the scientific principles of

chimney-draft in reference to the combustion of fuel for the generation of steam. But I think there is a great preponderance of the testimony even of that class of witnesses in favor of the necessity of very high chimneys upon the large Ohio steamboats."

And he further remarks: "Rejecting the deductions of science on the subject, the teachings of experience show, that as boats upon the Ohio have been gradually improved in their dimensions, from time to time, and the height of their chimneys increased, they have been enabled to run with greater speed, to the evident advantage of commerce and of travel upon the rivers. And the fact that several different projects, for procuring artificial draft, such as blowers, as an available substitute for the draft of tall chimneys, have been tried upon the Western waters and have failed and been abandoned, is very strong evidence in favor of the necessity of natural draft for the combustion of wood and bituminous coal upon the steamboats navigating the Ohio."

There is no better evidence of utility, than the progress made in the structure of steamboats and of the machinery by which they are propelled. Men who are engaged in navigation learn by experience and adopt that which will be most conducive to their own interests.

*574] *It appears, from the statement of Scowden, an engineer, that the chimneys of the first boat, called the Cincinnati, were 84 feet high from the surface of the water when light, and about 74 feet high from the centre of the flues. Her chimneys were shortened 8 feet, and it diminished her speed up stream from a mile to a mile and a half per hour. Captain Hazlep states that, adding 8 feet to the chimney of the Telegraph, in 1849, increased her speed about half a mile an hour up stream. And by Captain Duval, that the Clipper's chimney being cut off 8 feet, in order to pass the Wheeling Bridge, reduced her speed about three hours between Cincinnati and Pittsburg. And it may be fairly inferred, that a reduction of 20 feet would reduce the speed between Cincinnati and Pittsburg about four hours.

According to this estimate, the cost of the boat per hour being, as above stated, $8.33, if there should be an average loss of four hours in each trip, it would amount to $33.32. This sum multiplied by sixty, the average number of trips each season, would amount to the sum of $1,999.20, and this being multiplied by seven, the number of the packets, would make the sum of $13,994.40, an annual loss by the owners of the packets, by reducing the height of their chimneys,

so as to pass under the bridge at the different stages of the water.

But it is said these seven packets are the only boats obstructed by the bridge of the two hundred and thirty which ply upon the Ohio, and run to Pittsburg.

The transportation of goods and passengers by these packets will show their relative importance, as instruments of commerce, between Cincinnati and Pittsburg. From the evidence, it appears that they convey about one half of the goods in value and three fourths of the passengers between those cities. Taking the Keystone State as a criterion, each packet transports annually thirty thousand nine hundred and sixty tons of freight, and twelve thousand passengers. The line was established in 1844, and it appears from the proof, that since that time it has transported between the above cities, nearly a million of passengers.

It is in proof that the life of these packets averages five years, when their places in the line must be supplied by new boats. If to their original cost of construction, there be added the expense of running them for five years, adding nothing for repairs or accidents, a total sum will be expended of $1,680,000. This amount of capital is appropriated every five years in running this line of packets. The structure of the bridge cost less than one eighth of that sum.

The speed of these boats, their excellent accommodations, and their general good management, recommend them to the public, as is shown by the large amount of goods and passengers *they convey. And any change in their structure, or in the production of the propelling power, [*575 which shall impede their progress, would not only impose upon their proprietors a most onerous tax, but it would greatly lessen their profits, by reducing the amount of freight and passengers. And no part of the amount would, probably, pass to other boats on the river, but to the northern or southern lines, where greater expedition is given.

In the report of the commissioner, a statement is made of the stages of water, at Wheeling, for twelve years, beginning on the 10th March, 1838, and ending on the 9th of the same month, 1850.

The highest part of the bridge, by actual measurement from the ground, is 91.31 feet. This elevation is only at a single point, two hundred and eighty-four feet from the face of the eastern abutment. From the apex it deflects east and west, being at the distance of forty feet westward only 89.48 feet above the ground, and at the same distance east only 89.77 feet above the ground. The chimneys on the seven packets

require a space of about thirty feet in width to pass under the bridge within the eighty feet allowed, and the depth of water and a sufficient headway, must be deducted, to show the height of the bridge for the passage of boats. The headway required, as appears from the report of the engineer, should be between the tops of the chimneys and the lowest parts of the bridge, from two to three feet. This would reduce the space, say two feet and a half to 87.27 feet.

In the twelve years above stated, the water was at the stage of twenty-one feet and over, two hundred and nineteen days; consequently no boat, whose chimneys were 66½ feet high, could have passed under the bridge. Twenty-one feet of water are substituted for twenty feet in the table reported, that statement allowing a foot of water below the measurement. The water, in the above period, was twenty-six feet and over, eighty-three days, during which time no boat could have passed under the bridge whose chimneys were 62 feet high. The water was twenty-eight feet and over, fifty-five days during the twelve years, which would have prevented a boat from passing under the bridge, whose chimneys were 60 feet high. Within the same period, the water was sixteen feet and over, five hundred and thirty-four days; consequently boats, whose chimneys were 72 feet high, during that whole time could not have passed under the bridge.

In his report, the commissioner says, "The bridge is nine hundred and eighty feet between the bases of the two abutments. At the highest point of the bridge, for the distance of about fifty-six feet in width, there is a clear headway, for *576] the *passage of steamboats with their chimneys standing, of 91 feet above extreme low water. But this space of fifty-six feet in width is not over any part of the river at extreme low water. The water upon the Wheeling Bar must be about four feet deep, to bring the easterly edge of the stream under the western extremity of the fifty-six feet. And it must be more than fifteen feet deep upon the bar to enable a steamboat, drawing five feet, to avail itself of the ninety-one feet headway above low-water mark, for the whole width of fifty-six feet."

"It follows, from this statement of facts, that a steamboat, drawing five feet of water, and whose chimneys are 79½ feet high or over, can never pass under the apex of the bridge, at any stage of the water, without lowering her chimneys."

From the data referred to, the defendants' counsel contend that in a few years, at most, there will be a concentration of railroads at Wheeling, and at other places on the Ohio, connecting the Eastern with the Western country, which, from

their speed and safety, must take from the river the passengers and a considerable portion of the freight now transported in steamboats. That these roads, crossing the Ohio River, will reach the commercial ports of the interior, and diffuse a larger amount of commerce than that which is now transported on the Ohio. And it intimated that the Wheeling Bridge may be used by the railroad cars; but it is clearly proved that the bridge is not calculated for such a transportation.

However numerous these roads may be, there can be no doubt, that, like similar roads in other parts of the country, their cars will be loaded with freight and passengers. But it may not follow that the Ohio and our other rivers will be deserted, or their business reduced. We have an extent of river coast, counting both shores, exceeding twenty-five thousand miles, through countries the most fertile on the globe. This is a greater distance than the combined railways of the world. That our railroads, as avenues of commerce, may develop our resources in a greater degree than is now anticipated, must be the desire of every one. But the great thoroughfares, provided by a beneficent Providence, should neither be neglected nor abandoned. They will still remain the great arteries of commerce.

Past experience teaches us, that however the facilities of commerce may be multiplied, her tracks will be filled with productions which enrich the country and add to the comforts and enjoyments of its rapidly increasing population. The rewards of labor will give an irresistible impulse to enterprise which must secure to our country a prosperity unequalled in history. Our internal commerce is more than three times as great as our foreign, and the increased lines of intercourse will cause both *rapidly to advance. The protection of the river commerce is by no means hostile to any other. [*577 The multiplication of commercial facilities will, in the same proportion, increase the articles of trade.

If viaducts must be thrown over the Ohio for the contemplated railroads, and bridges for the accommodation of the numerous and rising cities upon the banks of the river, it is of the highest importance that they should not be so built as materially to obstruct its commerce. If the obstructions which have been demonstrated to result from the Wheeling Bridge, are to be multiplied as these crossways are needed, our beautiful rivers will, in a great measure, be abandoned. An experience of forty years shows how much may be done in the structure of steamboats, in the improvement of their machinery, and the propelling power, to increase the speed

and the comfort of that mode of transportation, under a continued reduction of expense. But if the limit of advance, in this respect, has already been passed; and a retrograde movement is necessary, by rejecting the improvements recommended by ingenuity and experience, we close our eyes to one great source of our prosperity. What would the West now have been if steam had not been introduced upon our rivers, and their navigation had not remained free? Without an outlet for the products of a prolific soil and the instruments of mechanical ingenuity, the country could have made but little advance.

It is said that the interest of commerce requires navigable waters to be crossed, and that in such a case the inquiry should be, whether the benefit conferred upon commerce by the cross route, is not greater than the injury done. In the case of the *King* v. *Sir John Morris*, 1 Barn. & Ad., 441, it was held, that the injury cannot be balanced against the benefits secured. And in the case of the *King* v. *George Henry Ward*, 4 Ad. & El., 384, it was held, where the jury found that an embankment complained of was a nuisance, but that the inconvenience was counterbalanced by the public benefit arising from the alteration, it amounted to a verdict of guilty.

If the obstruction be slight, as a draw in a bridge, which would be safe and convenient for the passage of vessels, it would not be regarded as a nuisance, where proper attention is given to raise the draw on the approach of vessels. Of this character is the complaint of the plaintiff against the bridge, that it obstructs sea-vessels built at Pittsburg. Sails cannot be used to advantage on the Ohio or the Mississippi, consequently there can be no necessity of raising the masts until it becomes necessary to hoist the sails. Such vessels float down the river or are towed by steam-vessels.

*578] *It is true the injury done to the State of Pennsylvania may seem to be small, when compared to the magnitude of this subject. It applies to all our rivers, and affects annually a transportation of many millions of passengers, and a commerce worth not less than six hundred millions of dollars. It would be as unwise as it is unlawful to fetter, in any respect, this vast commerce.

In all the charters, granted for the construction of bridges over navigable waters, it is believed all the States, not excepting Virginia, have provided that their navigation should not be obstructed.

The Bridge Company had legal notice of the institution of the suit, and of the application for an injunction to stay their

proceedings, before their cables were thrown across the river. This should have induced them to suspend, for a time, their great work, alike creditable to the enterprise of their citizens, and the genius and science of the engineer who planned the bridge and superintended its construction. It is a matter of regret that, by the prosecution and completion of the bridge, they have incurred a high responsibility.

For the reasons and facts stated, we think that the bridge obstructs the navigation of the Ohio, and that the State of Pennsylvania has been, and will be, injured in her public works, in such manner as not only to authorize the bringing of this suit, but to entitle her to the relief prayed.

Believing, from the estimates in the case, that the obstruction to the navigation of the river may be removed by elevating the bridge, at an expense which, when added to the original cost, will leave a reasonable profit to the stockholders, on the entire capital expended, we have endeavored to ascertain the lowest point of elevation which will secure this object. And, on a full view of the evidence, we are brought to the conclusion, that an elevation of the lowest parts of the bridge for three hundred feet over the channel of the river, not less than one hundred and eleven feet from the low water-mark, will be sufficient—the flooring of the bridge descending from the termini of the elevation, at the rate of four feet in the hundred; this will give a level headway for boats of three hundred feet in width, and will enable those whose chimneys are eighty feet high to pass under the bridge when the water is thirty feet deep from the ground, leaving the tops of the chimneys two feet below the lowest parts of the bridge. If this or some other plan shall not be adopted which shall relieve the navigation from obstruction, on or before the 1st day of February next, the bridge must be abated.

We do not deem it necessary to provide against the floods, which seldom occur, and which, when at the highest, overwhelm the lower parts of our cities and towns on the banks of the *Ohio, and necessarily suspend, for a short time, business upon the river. [*579

Mr. Chief Justice TANEY dissenting.

As this is a case of much importance to the parties and the public, and I do not concur in the judgment of the court, it is my duty to express my opinion. I shall do so as briefly as I can.

The first question to be decided is, whether this bridge is a public nuisance or not, which this court has a right to abate. The State of Pennsylvania, it is true, complains of an inter-

ruption to her canals, in which, in her character as a State, she has a proprietary interest, analogous to that of an individual owner. She seeks redress for this injury. But she proceeds upon the ground that the bridge is a public nuisance, from which the State receives a particular injury to its property beyond that which the public in general sustain. And the foundation of her claim, as stated in the bill, is, that the bridge is an unlawful obstruction to the navigation of a public river, and therefore a public nuisance. The immense mass of testimony, contained in this record, is directed almost altogether to that point. In order, therefore, to maintain the bill, it is incumbent upon the State to show that this bridge is a public nuisance. And, if it is a public nuisance, it must be because it is a violation of some law which this court has a right to administer.

In examining this question, it must be borne in mind that, although the suit is brought in this court, the law of the case and the rights of the parties are the same as if it had been brought in the Circuit Court of Virginia, in which the bridge is situated. Pennsylvania, as a State, has the right to sue in this court. But a suit here merely changes the forum, and does not change the law of the case or the rights of the parties. And if, in the Circuit Court of the United States, sitting in Virginia, this bridge could not be adjudged a nuisance, and abated as such, neither can it be done in this court. The State, in this controversy, has the same rights as an individual, and nothing more. And the court is bound to administer to the State here the same law that would be administered to an individual suitor, suing for a like cause, in a Circuit Court of the United States, sitting in the State where the bridge is erected.

Assuming, then, that it does obstruct a public navigable river, and would, at common law, be a public nuisance, I proceed to inquire whether this court is authorized to declare it to be such, and order it to be abated.

The Ohio being a public navigable stream, Congress have undoubtedly the power to regulate commerce upon it. They *580] *have the right to prohibit obstructions to its navigation; to declare any such obstruction a public nuisance; to direct the mode of proceeding in the courts of the United States to remove it; and to punish any one who may erect or maintain it; or it may declare what degree or description of obstruction shall be a public nuisance: as, for example, the height of a bridge over the river, or the distance to which a wharf may be extended into its navigable waters.

But this power has not been exercised. There is no law

of the United States declaring an obstruction in the Ohio or any other navigable river, to be a public nuisance, and directing it to be abated as such. Nor is there any act of Congress regulating the height of bridges over the river. We can derive no jurisdiction, therefore, upon this subject, from any law of the United States, and if we exercise it we must derive our authority from some other source.

But we cannot derive it from the common law. For it has been settled, since the beginning of this government, that the courts of the United States as such, have no common-law jurisdiction, civil or criminal, unless conferred upon them by act of Congress. It is true that the courts of the United States, when sitting in a State, administer the common law, where it has been adopted by the State. But it is administered as the law of the State, under the authority and direction of the act of Congress, which makes the laws of the State the rule of decision in a court of the United States, when sitting in the State, provided such laws are not contrary to the Constitution, laws, or treaties, of the United States. We cannot, under the rule of decision thus prescribed, adjudge this bridge to be a nuisance, although it may obstruct the navigation of the river, unless it is a nuisance by the common law, as adopted in Virginia and modified by its statutes. But this bridge was built under the authority of a statute of the State. The structure, in its present form, has been sanctioned by the legislature. It is therefore no offence against the laws of the State; and a Circuit Court of the United States, sitting in the State and governed by its laws, when not in conflict with the Constitution or laws of the United States, or treaties, could not order it to be abated as a public nuisance; and this court has no higher power over this subject, either at law or in equity, nor any other rule to guide it, than a Circuit Court sitting in Virginia. And as the bridge is not a nuisance by the laws of that State, and there is no act of Congress making the obstruction of a public river an offence against the United States, and we have no common law to which the court may resort for jurisdiction, I do not understand by what law, or under what authority, this court can adjudge it to be a public nuisance and proceed to *abate it, either upon a proceeding in chancery [*581
or by a process at law.

If it is a public nuisance, it is an offence either against the United States or the State of Virginia, for which the persons who erected or who continue it, are liable to be indicted. For we need go no further than Blackstone's Commentaries (4 Bl. Com., 167) for proof that the unauthorized obstruc-

tion of a navigable river is an offence, and may be punished in a criminal proceeding by indictment. Can the parties who built or continue this bridge be indicted for it as an offence against the public? This appears to me to be the true test. We are inquiring whether there is any law which the court has the power to administer, under which this bridge may be adjudged a public nuisance or purpresture? If there is, then the persons who erected it may be punished in a criminal proceeding.

For if it is a public nuisance or purpresture, it is an offence against the sovereignty whose laws have been violated. Could they be indicted for an offence against the United States? This will hardly be contended for, as common-law offences cannot be punished in its courts, unless they are declared offences by act of Congress. And as we have no such act of Congress, it is clear that an indictment charging the obstruction as an offence against the United States, could not be maintained. It is equally clear, that an indictment, charging it as an offence against the State, could not be supported, for the law of the State sanctions its construction. It may be asked, in reply to this view of the subject, is this great river then liable to be obstructed by bridges whenever the States, through whose territories it passes, choose to authorize them? and are the inhabitants above the obstructions to be shut out from its navigation, and without redress? The argument *ab inconvenienti* would be entitled to great consideration, if there was any foundation for it, although it would not alter the law. But this opinion leads to no such result. For I have already said that Congress have the power to declare the obstruction of a navigable stream an offence against the United States, and to authorize the courts of the United States to abate it as a nuisance; and any law of a State to the contrary would be unconstitutional and void.

If, therefore, there be an evil, it may easily be corrected by the legislative authority of the general government. But if Congress have not thought proper, or do not think proper, to exercise this power, and public mischief has arisen, or may arise from it, it does not follow that the judicial power of the United States may step in and supply what the legislative authority has omitted to perform. It does not by any means follow that the judicial power may declare an obstruction in
*582] or over a navigable stream, *an offence against the United States before the legislative power has forbidden it, and conferred authority upon the courts to punish or remove it.

Undoubtedly this court has original jurisdiction when a

State is a party. But it cannot exercise that jurisdiction without some law prescribing the mode of proceeding, the rule of decision, and the evidence by which the right in dispute is to be tried. The unskilful and careless manner in which a steamboat is navigated may impede the passage of other vessels, and sometimes endanger their safety, yet if Pennsylvania sued here for any injury arising from this cause, we could exercise no jurisdiction and give no redress unless there was some law to guide us. And when a case of this kind is not embraced in any law of the United States, we always resort to the established usages of navigation on the river, and the laws of the State in whose jurisdiction the injury was sustained.

The cases in which the court has taken jurisdiction in questions of boundary between States stand on different ground. The original jurisdiction was conferred by the Constitution. The evidence upon which the right in controversy must be decided depended upon the laws and usages of nations in disputes of that kind. Congress had no power over the subject. It could neither give nor take away the right of either party, nor prescribe the evidence by which it was to be tried. All that Congress was required to do, or could do, was to authorize the court to issue the proper process to bring the parties before it, and to conduct the proceedings to final judgment. This was admitted on all hands to be necessary before the court could exercise the jurisdiction which the Constitution had conferred. And in the case of *New Jersey* v. *New York*, (5 Pet., 287, 288,) it was held that the acts of 1789 and 1792 had clothed the court with the necessary power.

The rule as to navigable waters is this: Every independent nation has the exclusive jurisdiction over the navigable waters lying within its territorial limits. It has the right to regulate commerce upon them, and to determine what bridges may be built over them, or piers or wharves extended into them. And an erection authorized by the legislature cannot be a nuisance, public or private. This was the situation of the old States prior to the adoption of the Constitution. Each was then an independent sovereign State. But by the Constitution of the United States, they surrendered to the general government the power to regulate commerce. And thus, while they retain their absolute territorial jurisdiction over their navigable waters in all other respects, Congress may forbid the erection of any structure in a navigable stream, which it deems an obstruction to commerce, *and may declare it a nuisance, and direct it to be removed. [*583

But all the original authority of the State over the river remains subject to that limitation. For otherwise, until Congress thought proper to legislate, navigation on the river would be under no control. Boats might be run down with impunity, and obstructions of every kind erected in or over it, which the State could not prevent or punish.

The bridge in question is entirely within the territory of Virginia. Prior to the adoption of the Constitution of the United States, she had an unquestionable right to authorize its erection. She still possesses the same control over the river, subject to the power of Congress, so far as concerns the regulation of commerce. The United States and Virginia are the only sovereignties which can exercise any power over the river where the bridge is erected. Virginia has authorized it, and Congress have acquiesced in it. Congress have made no regulations declaring such a structure unlawful, or authorizing any judicial proceeding against it. If Congress, to whom the power is granted to regulate commerce, have acquiesced, how can the court, to whom the power is not granted, undertake to regulate it, and declare this bridge an unlawful obstruction, and the law of Virginia unconstitutional and void? With all my respect for my brethren, I think it is an error, and I had almost said, a grave one.

If it should be said that the compact between Virginia and Kentucky makes the river free independently of the Constitution, the answer is obvious. The compact does not deprive Virginia of the power to regulate the police of the river, or to authorize bridges or piers, or other structures in it. Such a compact between States has always been construed to mean nothing more than that the river shall be as free to the citizens or subjects for which the other party contracts, as it is to the citizens or subjects of the State in which it is situated. But if this compact or any compact should be construed to prohibit the erection of the bridge, the proceeding should be to enforce the observance of the compact. If erected in violation of a compact, it is still not a nuisance, because there is no law prohibiting it. It would be a breach of contract by the State, and the remedy in a very different mode of proceeding.

This compact between Virginia and Kentucky, in relation to the navigation of the Ohio, was one of the articles of agreement under which Virginia consented that Kentucky should become a separate State. Kentucky could not become a separate State without the consent of Congress. But the act of Congress which gave that assent, makes no reference whatever to the terms of the agreement between the

States. It does not make the United States a party to them, nor guarantee their execution. *It simply declares its consent that the district of Kentucky should, on the [*584
1st of June, 1792, become a State, according to its actual boundaries, on the 18th of December, 1789. The act of Congress is in 1 Stat. at L., 189, and contains no allusion whatever, direct or indirect, to the navigation of the Ohio. It leaves the compact as it was; that is, a compact between the two States, and nothing more, and to be enforced by a proceeding upon it. Nor is there any difference in the rights of navigation between the rivers and bays of the Atlantic States and those of the West. The old and the new States in this respect stand upon an equal footing. It was so decided in this court in the case of *Pollard* v. *Hagan*, (3 How., 212,) and that decision has been sanctioned in subsequent cases, to which it is not now necessary to refer.

The complainant, however, insists that the law of the United States for enrolling and licensing coasting vessels, gives to the vessel so enrolled and licensed, the right to navigate the river free from obstructions: that this law, therefore, by necessary implication, forbids the erection of the bridge which obstructs the navigation; and, consequently, defines the rights of the parties. And if a vessel is obstructed, the law is violated, and the injured party entitled to his remedy, and to have the obstruction removed. The case of *Gibbons* v. *Ogden* is relied on to support this proposition.

This brings up the question, whether the law of Virginia, sanctioning the erection of this bridge, is or is not repugnant to the Constitution or laws of the United States. Is it repugnant to the clause of the Constitution which gives Congress the power to regulate commerce? or to any law passed under it? If it is not, then the structure complained of, being within the territory of the State, and authorized by its legislature, cannot be a public nuisance or a private nuisance in the eye of the law. Nor has any one a right to complain of it as an unlawful obstruction in his way; nor to maintain a suit at law or in equity for any inconvenience or loss he may sustain from it. Assuming that we may exercise jurisdiction on the ground that the complainant claims a right under the above-mentioned act of Congress, neither the point nor the principles decided in *Gibbons* v. *Ogden* have, in my judgment, any application to the case before us. In that case, the Legislature of New York passed a law granting to certain persons the exclusive privilege of navigating all the waters within the jurisdiction of that State with boats moved by fire or

steam; and authorizing the Chancellor of the State to restrain by injunction any person whatever from navigating these waters with boats of that description. The complainant claimed under the grantees of the monoply, and sought *585] *by his bill to restrain the respondents from navigating the waters embraced in it. And this court held, and correctly held, that the law of the State was unconstitutional; that a vessel enrolled and licensed for coasting trade, under an act of Congress, had a right to navigate any of the navigable waters of the United States; and that no State had a right to forbid it.

There was no question in that case as to the authority of a court of the United States to declare an obstruction in a river, which a State had authorized, to be a public nuisance, and treat it as an offence against the United States. The waters in question were navigable, and free from impediments of that description; and the boats of the parties who claimed the exclusive privilege were daily passing over them. The only question in the case was, whether all vessels, enrolled and licensed by Congress, had not the right to pass over the same waters as freely as the vessels of the monopolists. The court said they had; that they had an equal right with the complainant to use the navigable waters of New York. But the court do not say that an obstruction placed in the water, which renders navigation inconvenient or hazardous, is a violation of the act for licensing and enrolling coasting vessels, or in conflict with it: nor do they say that this act of Congress confers on the court the power to adjudge it a nuisance, and order it to be abated. There was no such question before the court. It was not in the case, nor was the attention of the court in any way called to it by the argument.

Now, in this case, Virginia has passed no law giving exclusive privileges to navigate the Ohio River through her territory. If the bridge is an obstruction, her own citizens, engaged in the navigation of the Ohio, are equally disabled from passing as the citizens of any other State. The question, therefore, on which this case must turn, did not arise in *Gibbons* v. *Ogden*. But it did arise, and was expressly decided in the case of *Wilson* v. *The Blackbird Creek Marsh Company*, 2 Pet., 245. It was the point in the case. A dam across a navigable creek had been authorized by the Legislature of Delaware, as this bridge has been authorized by the Legislature of Virginia. It stopped a navigable creek, and, as the court said, must be supposed to abridge the rights of those who were accustomed to use it. So this

bridge is supposed to impede the navigation of the Ohio, and abridge the rights of those accustomed to use it. Yet, in the case referred to, the court said, that as Congress, in the execution of its power to regulate commerce, had passed no law to control State legislation over these small navigable creeks, the law of Delaware was not repugnant to the Constitution, not being in conflict with any law of Congress. It will be *remembered that the act of Congress for enrolling and licensing vessels, under which *Gibbons* v. [*586 *Ogden* was decided, was still in force, but was regarded by the court as inapplicable to the obstruction occasioned by the dam. The result of these two cases is this. The act of Congress gives to vessels enrolled and licensed under it the right to navigate the public waters wherever they find them navigable; and any State law prohibiting it, is unconstitutional and void. And, upon this ground, the judgment of the State court of New York, which had decided otherwise, was reversed. But this act of Congress has no application to an obstruction created by a dam across the navigable water, and without further legislation by Congress, the law of Delaware, which authorized the dam, was constitutional and valid. And upon that ground, the judgment of the State court of Delaware, which sanctioned the obstruction, was affirmed. I can see no difference in principle between the last-mentioned case and the case at bar. There has been no further legislation by Congress on that subject since that case was decided. And as the principle is the same, the decision should be the same; and the case of *Wilson* v. *The Blackbird Creek Marsh Company*, should, in my opinion, govern this.

It can hardly be supposed, that the circumstance that a port of entry is established on the Ohio River, above the bridge, distinguishes this case from the one referred to. The right which the act of Congress gives to vessels enrolled and licensed for the coasting trade, is certainly not confined to the navigation between ports of entry. They have the right to enter any navigable creek or river which may suit their convenience, or the business and employment in which they are engaged. And any State law which forbids them to do so, or attempts to confine the right to particular persons, is unconstitutional. Any vessel enrolled and licensed had a right to proceed up Blackbird Creek as far as she found navigable water; and her right was as perfect as if a port of entry had been established at the head of navigation. Nor can the size of the creek, or the small number of vessels that used it, as compared with the Ohio, make any difference between the

cases. It was the right that was in question; and that right was the same whether the navigable water was narrow or wide, or used only by a single vessel, or frequented by hundreds.

The case of *Wilson* v. *The Blackbird Creek Marsh Company* is entitled to the more weight, because it was decided after the case *Gibbons* v. *Ogden*, which appears, by the report, to have been recalled to the attention of the court, and relied upon in the argument; and the opinion in the last case was delivered by the same learned judge who delivered the elab-
*587] orate opinion *in the former one. It shows that he, and the learned court in which he presided, did not consider the principles on which *Gibbons* v. *Ogden* was decided, applicable to a case where an obstruction was placed in a navigable water, impeding, generally, the passage of vessels; and were of opinion that the courts of the United States had no jurisdiction which would authorize them to remove or abate it, or treat it as unlawful, without further legislation by Congress. I think it more safe to follow their own construction of their own opinion in *Gibbons* v. *Ogden*, than to look for a new one.

Indeed, apart from any decisions on the subject, I cannot perceive how the mere grant of power to the legislative department of the government to regulate commerce, can give to the judicial branch the power to declare what shall, and what shall not, be regarded as an unlawful obstruction; how high a bridge must be above the stream, and how far a wharf may be extended into the water, when we have no regulation of Congress to guide us. Nor do I see how we can order a bridge or a wharf to be removed, unless it is in violation of some law which we are authorized to administer. In taking jurisdiction, as the law now stands, we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us. And such a discretion, when men of science differ, when we are to consider the amount and value of trade, and the number of travellers on and across the stream, the interests of communities and States sometimes supposed to be conflicting, and the proper height and form of steamboat chimneys, such a discretion appears to me much more appropriately to belong to the Legislature than to the Judiciary.

Besides, I think there is an insuperable objection to this proceeding in equity even if this bridge should be regarded as a nuisance, public or private. And it appears to me to be settled law in England, as well as in this country, that chancery will not interfere by injunction where the evidence is

conflicting and the injury doubtful. I do not speak of informations in chancery where the attorney-general is a party, for this is not a proceeding of that kind. But I speak of cases between individual parties, like the present one. And the rule above stated, when there is a conflict of testimony, will be found in 2 Story, Com., page 201 to 207, where the subject is fully examined, and the cases which have been decided referred to. And a case where there is more conflict in the testimony of men of high character and undoubted skill and knowledge could hardly be imagined, than is presented in the record before us; nor a case where the injury is more doubtful. For, after the experience of two years, we see how small the loss has been compared with the immense *trade and the multitude of steamboats, which, during that time, have passed under it. [*588

Neither can the jurisdiction of a court of chancery be supported upon the ground that the injury is immediate and irreparable, or that any serious embarrassments lie in the way of an action at law. The injury, after two years' experience, has not been found serious enough to lessen the navigation and commerce of the river. On the contrary, they have been continually increasing since this bridge was built. And if it be an injury for which the party is entitled to a remedy, he has a plain and adequate remedy at law; and, therefore, upon general principles of equity, and more especially under the express provisions of the act of 1789, he has no right to come into chancery for relief. And if an action at law were brought by the State in the Circuit Court of the United States, sitting in Virginia, the proceeding at law would be as free from embarrassment and difficulty as any action at law for any injury for which the law gives a remedy. And there is no reason to suppose that the respondents are not able to answer to any amount of damage, which, upon the evidence in this case, the State of Pennsylvania might recover against them.

If it should be said that as the Legislature of Virginia have sanctioned the erection of this bridge, prejudices in favor of it might be supposed to influence the jury, the answer is obvious. The law would be decided by the Circuit Court, subject to the revision and control of this court; and we are bound to presume that a jury, in a Circuit Court of the United States, would do equal justice between citizens of their own State, and another State or its citizens. The Constitution and laws so presume. And, certainly, this court would never act upon any apprehension that justice would not be done, by a jury in any State, when summoned and

impanelled according to the laws of the United States. And still less could it be induced to assume extraordinary and unusual powers from fears or suspicions of that kind.

But Pennsylvania has the right to sue in this court, or in the Circuit Court, at her election. She has the same right to sue here in an action at law as she has to file her bill in equity. And in an action at law brought here by *The State of Georgia* v. *Brailsford et al.* (3 Dal., 1) the case was tried by a jury in the same manner as if the suit had been brought in the Circuit Court. And the jury, brought here to try this case, would be altogether free from suspicion of bias or prejudice.

It may be said that such a proceeding here would embarrass and retard the business of this court, and would be expensive and onerous to the complainant, as the witnesses must be *589] *brought from a distance and detained here for a considerable time. This is true. But if the State sues in this Court, instead of the Circuit Court, it does so by its own choice. And if the remedy at law in the forum selected is embarrassing and expensive, it has no right to complain of what is the necessary consequence of its own act; nor to go into equity to avoid difficulties at law, which arise from the nature of the forum to which the State voluntarily resorts; and certainly no inconvenience to the court could alter the law, nor give it equity jurisdiction where the law has denied it. In the language of the act of Congress, Pennsylvania has in this case a plain and adequate remedy at law, and has no right, therefore, to come to the equity jurisdiction of the court, until her legal right has been established.

Indeed this case, in my view of it, pushes the jurisdiction of chancery further than has heretofore been done in England or in this country.

The bridge has been erected and completed without any previous injunction to restrain the respondents from proceeding in the work. It is charged to be a public nuisance. But Pennsylvania has no right to proceed against it solely on that account. She proceeds, and is entitled to proceed, only for the private and particular injury to her property which this public nuisance has occasioned. If the court order it to be demolished, it is not to protect the public or any portion of the community who may be supposed to be injured by it. For the government, which represents the public, and is charged with its interests, is not before the court; and has not complained of this structure, nor sought to have it removed. Pennsylvania is the only party asking for relief; and her damage, as proved in the record, is a trivial loss of

some few dollars in tolls; and the mere possibility of an annual future loss to some small amount, concerning which the testimony is vague and inconclusive, and at best but conjectural. She has no concern with the obstruction to boats with high chimneys, nor with the amount of trade from Pittsburg, or any other place, further than such evidence tends to show the bridge to be a public nuisance. The owners of steamboats, and the persons engaged in commerce are not parties to this suit, and the State of Pennsylvania has no right to prosecute for them. She must not only show that boats with high chimneys are more profitable to the owners, and better for commerce, than those with lower ones, but she must also show that the necessity of reducing them will lessen the profits of her canals. I see no proof in the record by any means sufficient to establish that fact. And we are called upon to demolish a structure which cost more than $200,000 to save the State of *Pennsylvania from this [*590
speculative, questionable, and at most, inconsiderable loss. It seems to me that if the power and jurisdiction of this court were clear, and supported by precedents, yet, this court, upon settled principles of equity jurisprudence, would refuse to destroy property of so much value, and which the public, by its proper officer does not charge to be a nuisance, merely to guard against the possibility of an inconsiderable loss by the State. It is precisely one of those cases in which the court would, at all events, require the party to establish his right at law before he comes into equity, or to make the attorney-general a party, and give the public an opportunity of being heard where its interest is so deeply involved.

I do not doubt the power of the Court of Chancery, to abate a public nuisance, upon an information in chancery, to which the attorney-general is a party. But even in a case of that kind there must be danger of irreparable mischief before the tardiness of the law can reach it. This is the doctrine of this court in the case of the *City of Georgetown* v. *The Alexandria Canal Company*, 12 Pet., 98. But such a case is not now before us. The attorney-general is not a party. Pennsylvania sues as an individual for a private right. And in a case of this description I am not aware of any case entitled to be regarded as an authority in this court, where chancery ever interfered by injunction except by way of prevention, that is, to stay the contemplated structure, until it could be decided, in a proceeding to which the public was a party, whether it was a public nuisance or not. We must be careful not to confound cases of public nuisance with merely private ones. For, in the former, the public have an interest to

abate it if a nuisance, and to protect it, if it is not, and therefore have a right to be heard, whether the trial be in equity or at law.

This was evidently the opinion of this court in the case of the *City of Georgetown* v. *The Alexandria Canal Company*, and of Lord Eldon, in the case of *Crowder* v. *Tinkler*, 19 Ves., 616, therein cited, with approbation. In the last-mentioned case, where the court interfered for prevention, and not to abate a structure already completed, the chancellor placed the injunction upon the ground that the nuisance about to be erected would be attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence. And that this was clearly established in that case before he awarded the injunction. Such is the rule upon this subject which has been sanctioned by this court. Certainly no one of the material circumstances which existed in *Crowder* v. *Tinkler*, can be found in this. And if the principles decided here in the case of the *City of* *591] *Georgetown* v. *The Alexandria Canal* *Company*, are recognized as the law of this court, I can see no foundation for the injunction in the case before us. For it not only has none of the circumstances in it, upon which the injunction was granted in *Crowder* v. *Tinkler*, but in that case, strongly as it appealed to the preventive power of the Court of Chancery, the court merely suspended the erection until the question of public nuisance or not could be tried by a jury upon an indictment. It did not grant a perpetual injunction, and still less did it order what had already been constructed to be abated or removed.

So far have I considered the case upon the assumption that the bridge, upon common-law principles, might, upon the evidence, be determined to be a nuisance. And, admitting that to be the case, I think, for the reasons above stated, that in the absence of any legislation upon the subject by Congress, this proceeding cannot be maintained. I shall, therefore, very briefly express my opinion on the evidence.

I am by no means prepared to say, that this bridge would be a public nuisance even at common law. The evidence of the degree in which it obstructs navigation is exceedingly voluminous, and it is impossible to go fully into an examination of its comparative weight, in a manner that would do justice to the subject, without making this opinion itself a volume. It is sufficient to say, that in all questions of this kind, the general convenience and interest of the public in the travel and trade across the river, as well as on its waters, must be taken into consideration. For whether it is a public

nuisance or not, depends upon whether it is or is not injurious to the public. The cases in the State Courts, and in the Circuit Courts of the United States, referred to in the argument, which I shall not stop here to examine, in my opinion maintain this doctrine. And upon principle, independently of adjudications, it cannot be otherwise. A structure which promotes the convenience of the public, cannot be a nuisance to it. And the public, whose interests are to be looked to in this case, is not the public of any particular town or district of country, or State or States, but the great public of the whole Union. Taking this view of the question, and looking to the testimony set forth in the record, and more especially to that unerring test, *experience*, which the lapse of time has afforded, I am convinced that the detriment and inconvenience to the commerce and travel on the river, is small and occasional only, while the advantages which the public derives from the passage over, are great and constant. And if the courts of the United States had common-law jurisdiction, and the question was legally before us to determine whether this bridge was a public nuisance or not, I am of opinion that it is not; and that *the advantages which the great body of the people of the United States reap from it, outweigh the disadvantages and inconvenience sustained by the commerce and navigation of the river. [*592

Moreover, the jurisdiction exercised in this case, is new and without precedent in this court. Bridges have been erected over many navigable rivers, and built so near the water, that vessels can pass only through a draw. Such bridges are unquestionably obstructions, and impede navigation. For where the vessels are propelled by sails, and the wind is unfavorable, they are often detained not only for hours, but for days. The courts of the United States have never exercised jurisdiction over any of these obstructions, nor declared them to be nuisances. I should be unwilling, in a case like this, to exercise this high and delicate power without precedents to support me in analogous cases. The demolition of this bridge would occasion a heavy loss to the parties, and much inconvenience to a large portion of the community. The United States are not parties to this proceeding, and the particular injury sustained by the complainant is exceedingly small. And it is solely for the protection of her small, remote, contingent, and speculative interest in tolls, that this bridge is pulled down. For it must be remembered that, although we see in the testimony that injuries are alleged to have been suffered by others, yet the State of Pennsylvania is the only party to this proceeding, the only one who appears in this court as complain-

ant, and her particular loss is the only ground on which jurisdiction is claimed, and the only injury which the court is called on to redress; or has a right to consider in this proceeding.

The testimony, too, is conflicting; men of eminence and skill, and well qualified to speak on the subject, differing widely in their testimony. And I am the more unwilling to assume this questionable jurisdiction, because the legislative department of the general government has undoubted power over the whole subject, and may regulate the height of bridges over the Ohio, and of the chimneys of steamboats when passing under them, and may, while it guards the rights of navigation in the stream, at the same time protect the rights of passage and travel over it. That department of the government has better means, too, of obtaining information, than the narrow scope of judicial proceedings can afford. It may adopt regulations by which courts of justice may be guided in an inquiry like this with some degree of certainty, instead of leaving them to the undefined discretion which must now be exercised in every case that may be brought before us, without being able to lay down any certain rule, by which this discretion may be limited. It is too near the confines of legislation; and I think the court ought not to assume it.

*593] *Entertaining this opinion, I must, with all the respect I feel for the judgment of my brethren, with whom it is my misfortune to differ, enter my dissent.

Mr. Justice DANIEL dissenting.

In entering upon the consideration of the case before us, the mind is at once impressed with the belief that there never has been, that there perhaps never can be brought before this tribunal, for its decision, a case of higher importance or of deeper interest than the present. The subjects which it presses upon our examination, nay, upon which the judgment of this court has been demanded, and has inevitably determined, are nothing less than—

1st. The jurisdiction or authority of this court, under one of the heads of Original Jurisdiction, enumerated in the Constitution.

2d. The correct interpretation of the power of commercial regulation vested in the federal government, either exerted simply as such by that government, or as affecting the power of internal improvement in the States.

3d. The policy or influence of particular regulations with respect to commerce, as these may tend to restrict it within circumscribed channels, or to promote its general activity and

diffusion, by facilities operating a reasonable and just equality of right, of competition, and advantage to all.

4th. The character of the proceeding complained of as a nuisance, the regularity of the proposed mode of redress, and the right of the complainant to claim the interference asked for in any mode.

The magnitude of these topics would seem, in some degree to excuse, in treating them, the hazard of prolixity, and at any rate, lying as they do in the direct path to the proper survey of this case, they cannot with propriety be overstepped, without pausing upon their examination.

When, at a former period, this cause was before this court, the several topics just enumerated were cursorily adverted to by me as necessarily involved in its adjudication; and the course then adopted by the court was formally objected to, because that course seemed a premature and foregone conclusion upon facts and legal positions entering essentially into the nature of the controversy; facts and legal positions not then maturely examined and ascertained, as the order of the court at that time made, necessarily implies; and which could not, according to established precedent, and the highest adjudications, be properly investigated in the mode proposed. The subsequent proceedings upon the order of the court at the January term, 1850, have *greatly strengthened the objections assigned by me on that occasion. These [*594 proceedings have, at an almost incalculable expense to the parties, brought hither an immense mass of matter, much of which on the one hand is not within the inquiries directed by the court, whilst on the other, inquiries strictly pertinent seem to have been wholly excluded. It has placed before us a long and very learned report, to be sure, in part upon subjects entirely *dehors* the order of the court, and in other aspects of the same report, (I speak it with all respect for the highly intelligent and respectable author of that report,) palpably opposed, in my opinion, to the rational and just preponderance of the facts stated by the witnesses; a report, in fine, which leaves in all its weight and force, the mischief of withdrawing the trial of the question of nuisance from its proper forum, in which the witnesses could have been confronted and cross-examined; and imposes upon the court the task of passing upon the credibility of those whom they have never heard nor seen. Even in matters of minor concernment, I have always been unwilling, whenever the credibility of witnesses was to be tested, to interpose between such persons and the scrutiny of a jury, awakened, as it is sure to be, by the vigilance of the advocate; where the essential rights and interests of great

communities are at stake, I never will do so, unless constrained by irresistible authority.

Recurring now to the first head of inquiry, I contend that the complainant can have no standing here, on the ground that this court cannot, as is shown, both upon the face of the pleadings and upon the proofs, take jurisdiction of this cause. If this court can take cognizance of the cause before us, it must be in virtue of the 2d section of the 3d article of the Constitution, which declares that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction." There is no other provision of the Constitution under which original cognizance of this cause by the Supreme Court can be assumed. Now, to arrive at the just interpretation of this clause of the Constitution, as fixing that position or interest of the State *as a party*, which alone creates original jurisdiction in the Supreme Court, it is necessary to settle the import of the word party, as connected with legal or equitable proceedings. By all correct legal intendment, this term *party* is applicable only to persons sustaining a direct or real interest or right in any pending litigation; an interest or right immediately affected or bound by the issues such litigation involves. This term cannot be extended to persons who may be arbitrarily and irregularly named in proceedings either at law or in equity, the very description of whose relation to the case shall evince a total *595] absence of legal or *equitable claims upon the subject of litigation; a total absence, too, or reciprocal duty or obligation with reference to those whose property and whose possession and enjoyment of that property, are sought to be affected. Whilst courts of justice, therefore, will enforce the conventing of all whose interest can properly be adjudged, they will repel and even rebuke attempts to assail, or even to canvass, the rights and interests of others, by those who in effect concede the want of a legal or equitable title in themselves. Courts of justice take no cognizance of imperfect rights, or such as may be termed merely moral or incidental, as distinguishable from legal or equitable, even when the existence of the former may be clearly shown. In this controversy, the State of Pennsylvania, admitted to have no property in or title to the River Ohio within the limits of Virginia, and no property in or title to the steamboats which ply upon that river, is confessedly made use of as a mean, under the shelter of her name, of redressing grievances, which, if they ever had existence, are injuries to her citizens and to individuals, and the proper and efficient remedy for which is

to be found at the suit of those citizens in the courts of the State or of the United States. The alleged right of Pennsylvania to sue in this case, for a diminution of profits from her canals and other works of internal improvement within her own territory, and many miles remote from the Wheeling Bridge, had it not been cast into shade by a still greater extravagance disclosed by the record, (her right of ship navigation with top-gallant royals all standing,) might have awakened some surprise; but even this tamer and less lofty pretension should fail of the end it has been designed to effect, for it cannot be pretended, and is not even intimated in the pleadings in this cause, that those canals and other public works have been obstructed or rendered in any respect less fitted for transportation, or in any way impaired by the erection of the Wheeling Bridge beyond her territory, and within that of a separate and independent State. And if the mere rivalry of works of internal improvement in other States, by holding out the temptation of greater despatch, greater safety, or any other inducement to preference for those works over the Pennsylvania canals, be a wrong, and a ground for jurisdiction here, the argument and the rule sought to be deduced therefrom should operate equally. The State of Virginia, who is constructing a railroad from the seaboard to the Ohio River at Point Pleasant, much farther down that river than either Pittsburg or Wheeling, and at the cost of the longest tunnel in the world, piercing the base of the Blue Ridge Mountain, should have the right by original suit in this court against the canal companies of Pennsylvania, or against that State herself, to recover compensation for diverting any portion of the *commerce which might seek the ocean by this shortest transit to the mouths of her canals on the [*596
Ohio, or to the city of Pittsburg; and on the like principle, the State of Pennsylvania has a just cause of action against the Baltimore & Ohio Railroad, for intercepting at Wheeling, the commerce which might otherwise be constrained to seek the city of Pittsburg. The State of Pennsylvania cannot be a party to this suit on the grounds stated in the bills filed in her name, for the reason, still more cogent than any yet assigned, viz. that to permit this, would be to render the clause in the Constitution, relied on in her behalf, utterly useless, and even ridiculous; would destroy every restriction intended by the enumeration of instances of original jurisdiction; and would confound this clause with another provision of the Constitution, designed to cover cases precisely like the one now before the court. If in all instances in which the citizens of one State have cause of action against a citizen or

a corporation of a different State, the action can be prosecuted in the name of the State in which the claimant resides, although no peculiar or legal right or cause of action can be shown in such State sustaining the character of a private suitor, then the restriction as to cases of original jurisdiction is entirely abolished; the defending party, too, must be entitled to the same right of substitution, and all suits between citizens of different States might, by this process, be transformed into suits between States, or suits to which States are parties; cases of original jurisdiction in this court. That provision of the Constitution designed to embrace controversies between citizens of different States is thus annulled, and the jurisdiction of the District and Circuit Courts transferred, as falling within its original cognizance, to the Supreme Court. Such, to my apprehension, appears to be the inevitable result of asserting what are essentially and clearly private rights or interests, in the name of a State, or the prosecution of remote, contingent, and imperfect interests not amounting to property, though claimed on behalf of a State. I conclude, therefore, that to constitute a State a party in that sense which brings her within the meaning of the Constitution, and indeed within the import of the term party to a cause by all correct legal intendment, there must be averred and proved on her behalf, a certain and direct interest, or an injury, or a right of property—a perfect right—a right which a court of justice can define, adjudge, and enforce; and that on the part of the State of Pennsylvania no such right having been averred even, much less established in proof, nothing is shown which can maintain the jurisdiction of this court in this cause. The shadowy pretext of an interest or injury, from the nature of things not susceptible of calculation or estimate, can never *597] be the *foundation of a right, legal or equitable. And, indeed, so far as any light can be reflected by facts on this pretended or incidental interest of Pennsylvania, resulting from any supposed effect upon the tolls on her canals, an actual increase instead of a diminution of those tolls since the erection of the Wheeling Bridge, is proved.

Passing from this subject of jurisdiction, and supposing it for the present to be vested here, I proceed to examine the pretensions of the complainant, as being deducible from, and as guaranteed by, the power delegated to Congress to regulate commerce between the several States. The existence of that power, in its fullest extent, and for every purpose for which it has been delegated to Congress, need not be questioned, in order to expose and to repel the pretensions advanced for the complainant. On the contrary, the assertion of that power

in its greatest latitude, so far as it was ever contemplated by those who gave it, or so far as it can be exercised for useful purposes, carries with it necessarily, the condemnation of those pretensions. The power to regulate commerce was given to the federal government, whose functions and objects were designed to be general and co-extensive with the entire confederacy, because its duties embrace the equal rights and interests of all the members of the confederacy, and as a mean of the widest diffusion of commercial facilities and intercourse within the powers vested by the Constitution. It cannot be rationally concluded that, by a provision palpably intended to protect commerce from unequal or invidious restrictions, the power was given to Congress to advance so far towards restriction or monopoly as to limit commerce to particular channels; thereby crippling or wholly preventing its diffusion and activity, and, by the same process, conferring upon particular points or sections of the country, arbitrary and unjust advantages, and riveting, upon all those portions affected by such a procedure, loss and even ruin. Admitting, then, that Congress had made any regulation affecting the subjects of this controversy, (and it will hereafter be shown that they have not done so,) admitting, moreover, that their acts or regulations might fall within the broad language of the power vested by the Constitution, it remains still a just and fair inquiry, whether those acts which are arbitrary or oppressive, which defeat the great ends for which the power, thus perverted, may have been within the legitimate scope of the powers alleged in excuse for their performance. In other words, whether Congress, as a regulation of commerce, would be justifiable in breaking down works of internal improvement within the States, though calculated in their character and tendencies for the diffusion of commerce, and by such destruction limit commerce to particular local points or *interests? Common sense and common justice would promptly [*598 answer in the negative, and would decide that a rational and proper, nay, the only rational and proper, exercise of the regulating power in Congress, demands the promotion and protection of such modes and facilities of commercial intercourse, (so far as Congress have this power,) as will insure equality to all, and the widest diffusion of commercial advantage. Surely, then, in the absence of all action on the part of Congress, this court should imply no policy or design in that body to fetter or cripple great interests which they are charged with the power and duty to protect. But Congress have enacted no regulation whatever in relation to the subject of this controversy; they have not said that bridges

should nowhere be erected over the River Ohio, or, if erected, what should be their elevation above the water; neither have they declared, upon scientific calculations or upon experiments, or on any data, what shall be the height of the chimneys of steamboats on that river, nor to what degrees, either from their own calculations of improvement in speed, or from fancy or local rivalry, the owners or masters of steamboats on that river may elongate the chimneys of those steamboats. Upon all these matters Congress have thus far been perfectly silent.

Admitting, then, that the State of Pennsylvania can be regularly before us in the character of a party in interest, this controversy presents to us, in truth, simply a comparison between the will and the acts of the parties thereto, and an appeal to this court, in the absence of all action by Congress, —by some rule which it must deduce from the common law of nuisance, to decide upon the comparative merits or demerits of the parties,—to decide whether the benefits produced by the Wheeling Bridge to the surrounding country, and by its connection with extended lines of travel and commerce, can save it from the character of a nuisance. Or whether its interference, in certain stages of water, with the chimneys of seven steamboats, owned by private individuals, the height of whose chimneys is a subject of much contrariety of opinion, both amongst scientific men and practical builders and captains of steamboats,—can so constitute it a public nuisance, and a cause of such direct injury to the legal rights and interests of Pennsylvania, as to justify its abatement by this court. In the absence of all action by Congress in relation to this matter, in the only legitimate mode in which Congress could affect it, viz., by commercial regulation, or by some express statutory declaration, the act of one of these parties in the prosecution of their interests must claim intrinsically equal authority with the acts of the other, except so far as they may have some common arbiter by whom both may be controlled. In this case, that arbiter would seem to *599] be either the local *sovereignty, (the State of Virginia,) within whose territory the alleged nuisance is situated, or the United States, through some enactment for the regulation of commerce; but neither of these authorities is invoked in this controversy. We have here a suit in the name of Pennsylvania, occupying the position of every private suitor, asking the action of this court upon general common-law jurisdiction over the subject of nuisances, which jurisdiction the courts of the United States do not possess. Nor is it enough to draw within our cognizance the subject of

this cause, to affirm merely the competency of Congress to legislate upon it, and to refer its decision, if they choose, to the federal courts. I ask upon what foundation the courts of the United States, limited and circumscribed as they are by the Constitution, and by the laws which have created them and defined their jurisdiction, can, upon any speculations of public policy, assume to themselves the authority and functions of the legislative department of the government, alone clothed with those functions by the Constitution and laws, and undertake, of their mere will, to supply the omissions of that department? Is it either in the language or theory of the Constitution, that this court shall exercise such an auxiliary or rather guardian and paramount authority? Cannot the legislative department of the government be intrusted with the fulfilment of its peculiar duties? Such an act as this court has been called upon to perform; such an act as it has just announced as its own, is, in my opinion, virtually an act of legislation, or, in stricter propriety, (I say it not in an offensive sense,) an act of usurpation. To rest our authority to adjudicate this matter on the naked proposition just stated, would be to reject the doctrine by this court heretofore most expressly ruled. The case of *Wilson* v. *The Blackbird Creek Marsh Company*, (2 Pet., 245,) seems to be conclusive upon this point. This case presented an instance of an absolute obstruction by a dam of a watercourse navigable by vessels of considerable size, and in which the tide ebbed and flowed. The person who undertook to destroy or injure the dam constructed across this navigable water, was the master of a vessel regularly licensed and enrolled according to the navigation laws of the United States; and being sued for a trespass committed in breaking or injuring the dam, he pleaded, in justification of his act, the character of the navigable water as a public and common highway, for all the citizens of the particular State, and of the United States, to sail, pass, and repass over, through and upon, at all times of the year, at their own free will and pleasure. Upon comparing this case with the one before us, it is impossible not to perceive that in many of their capital features they are strikingly similar—may, indeed, be regarded as identical. In the *former case, as in this, the watercourse said to be obstructed was a navigable water; in that case, as [*600 in this, the *locus in quo* was within the jurisdiction of a State, and the alleged obstruction, in each instance, an act of State legislation in exercising the power of internal improvement; in each instance, the right of passage to the extent and in the manner claimed, freely and at will *usque ad cœlum*, was in

virtue solely of license and enrolment, according to the navigation laws of the United States. Now, what said this court upon the aforegoing state of the pleadings and evidence? "If Congress," said they, "had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation, over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the middle and southern States, we should feel not much difficulty in saying, that a State law, coming in conflict with such act, would be void. But Congress has passed no such act. The repugnancy of the State law to the Constitution, is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question. We do not think that the act empowering the Blackbird Creek Marsh Company to place a dam across the creek, can, under the circumstances of the case, be repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject." This decision at once puts to flight the pretext for interference here to protect and enforce the duties and functions of Congress, and equally exposes the fallacy that the grant of a coasting license, of a mere certificate of the domicil of the vessel bearing it, of evidence *primâ facie*, of her capacity or tonnage, or of her exemption from suspicion of smuggling or piracy, is a regulation of commerce over every inch of the waters over which, in her various excursions, she may pass. Just as cogent and tenable is the argument, if argument it deserves to be called, which affirms that the establishment of Pittsburg as a port of entry, its mere designation as a point at which merchandise may be landed subject to the revenue laws of the United States, is a positive declaration by Congress, prescribing the modes of the transportation of such merchandise thither, and defining what shall be held to be an interference with such transportation. Equally, or rather more unsound and untrue, is the position that, by the same designation of Pittsburg, Congress have declared that vessels propelled by wind or steam, vessels of the greatest capacity, carrying masts or chimneys of illimitable height, shall navigate a river whose ordinary regimen, to adopt a term in this record, scarcely affords a channel broad or deep *enough
*601] for the tacking of a shallop, and for long periods of a few inches only in depth. This attempt, from the mere designation of a port of entry, to bring home to Congress the absurdities the argument implies, would ascribe to them a

practical wisdom much upon a parallel with that of the despot who attempted to confine the Hellespont in fetters, or of him who forbade the approach to him of the ocean-tide. But Congress have in truth enacted nothing in relation to the particular subject in issue in this controversy; and we have seen, in the explicit declaration of this court, in the case from 2 Peters, that not only must there be some positive enactment by Congress, but an enactment "the object of which was to control State legislation over those navigable creeks into which the tide flows." But again: it has been asserted, in justification of the power claimed by the majority of the court, that Congress, by adopting the act of the Virginia Legislature, of December 18th, 1789, authorizing the erection of Kentucky into a State, have fully regulated the navigation of the Ohio River. And how is this position sustained by fact? By the 7th section of her act of 1789, Virginia declares that, so far as her own territory and that of the proposed State shall extend upon the Ohio, the navigation of that river shall be free for all the citizens of the United States. Congress, by an act passed February 4th, 1791, containing two sections only, (*vide* 1 Stat. at L., 189,) consents, by the 1st section, to the proffer of Virginia of the creation of the new State; and, by the 2d section, declares, that on the 1st day of June following, the new State, by the name of Kentucky, shall be admitted a member of the Union. These two sections comprise the entire action of Congress, from which the position that has been asserted by the majority of the court is deduced. Let us try the integrity of this position by reducing it to the form of a syllogism. The major of that syllogism will consist of the fact, that Virginia, by her law of 1789, has agreed that she and the newly proposed State will permit the navigation of the Ohio within their respective limits, to all citizens of the United States. Its minor is this,—that Congress have assented to the permission so declared; the conclusion attempted to be deduced is, *ergo* Congress by that assent have completely regulated the navigation of the Ohio, and by inevitable implication ordained that bridges shall never be thrown across that river, except in absolute subordination to the interests or the will of the owners of steamboats upon that river. This may possibly be logic, irrefragible logic; and the failure to comprehend its consistency may arise from the infirmity of my own perceptions; but I cannot help suspecting, that an acumen, far surpassing any to which I will lay claim, would be puzzled to reconcile this *process with the laws of induction, as prescribed by Watts, by Duncan, or by Kaims. [*602

The next inquiry, naturally arising in this case, an inquiry inseparably connected with the alleged obstruction by the Wheeling Bridge, as constituting it a nuisance or otherwise, an inquiry equal in magnitude of interest with any other involved, relates to the policy and effects of commercial regulations, as these may tend either to the restriction of commerce within particular channels, or to supplying auxiliaries for its prosecution, or for the promotion of its activity and diffusion by increased facilities, operating a just equality of right and competition and advantage to all. And here it may be premised, that throughout the discussion of this cause, a reigning fallacy has been assumed and urged upon the court, a fallacy, which, if successful, may subserve the grasping pretensions of the plaintiff, but which, by an enlightened view of this case, must be condemned as destructive to the extended commercial prosperity of the country. The error assumed as the basis of the plaintiff's pretensions is this, that commerce can be prosecuted with advantage to the country, only by the channels of rivers, and in all the country intersected by the western rivers, only through the agency of steamboats; and hence is attempted the deduction in favor of the paramount privileges of steamboats, and the right claimed for this species of commercial vehicles for exemption from any limit upon the interests or the fancies of those who may own or manage them. It has been a curious and somewhat amusing incident, in the argument of this cause, that whenever any restraint upon the management of steamboats (on the Ohio) was intimated, (as necessary for the protection of other essential rights, both public and private,) the fixed reply of the advocate in opposition has been, that *commerce* demands these peculiar privileges in the owners and masters of steamboats. An obvious and stricter propriety of argument would have suggested for that reply the following language: Steamboat proprietors, local monopoly, and the peculiar views of interest, real or imaginary, of the plaintiff, supply the true origin and character of the pretensions here urged; commerce, enlightened, extended, fair, equal, prosperous, and beneficial, condemns all such pretensions; she demands that freedom, fairness, competition, and equality, which are the true, and only true causes of her prosperity; and which the equalizing power vested by the Constitution, was designed to insure.

Commerce, in its infancy, is of necessity chiefly confined to the channels of watercourses. Weakness, poverty, or the absence of art or science, are unable, in the early stages of society to supply more eligible or efficient modes for its prosecution, or to overcome the difficulties attendant on transpor-

tation off the *water. Hence we see the rude essays of commerce commencing with the raft, the canoe, or the bateau; but, as wealth and population, science and art advance, we trace her operations to the magnificent ship or steamboat; each adapted to its proper theatre. Does not this very progress, and the advantages which are their concomitants, glaringly expose the folly and injustice of all attempts at the restriction of commerce to particular localities, or to particular interests, or means of circulation? Are her operations to be confined to a passage up and down the channels of watercourses, impracticable for navigation for protracted periods, and whose capacity is always dependent on the contributions of the clouds, *aviditas cœli aut nimius imber?* Would not such a narrow policy be a proclamation to commerce, inhibiting her advancement; and to the hundreds of thousands situated without her permitted track, that the wealth, the luxuries, and comforts of civilization and improvement, if to be enjoyed by them at all, are to be obtained only at far greater expense and labor, and in an inferior degree, than they are enjoyed by more favored classes? These positions are strikingly illustrated by the experience of our own times, and indeed of a very brief space. Thus, notwithstanding the high improvement in navigation by steam and by sails, which seems to have carried it to its greatest perfection, we see the railroad in situations where no deficiency of water and no artificial or natural obstructions to vessels exist, or are complained of, stretching its parallel course with the track of the vessel, tying together, as it were, in close contiguity, and connecting, in habit and sympathy and interest, remote sections of our extended country, which, for any aid that the navigation on our rivers could afford, must ever remain morally and physically remote. The obvious superiority of the railroad, from its unequalled speed, its greater safety, its exemption from dependence upon wind or on depth of water, but above all, its power of linking together the distant and extended regions interposed between the rivers of the country, spaces which navigation never can approach, must give it a decided preference, in many respects, to every other commercial facility, and cause it to penetrate, longitudinally and latitudinally, *longe et late*, the entire surface of the country, unless arrested in its progress by the fiat of this court; for, once let it be proclaimed that the rivers of this country shall, under no circumstances of advantage to the country, be spanned by bridges, at the trivial inconvenience and cost of adapting to their elevation the chimneys of a few steamboats, even if the height of those chimneys had been clearly shown [*603

to be necessary, or certainly advantageous (a problem nowhere solved in this record); let this, I say, be proclaimed, and the effect above mentioned is *at once accomplished; the rapidly increasing and beneficial system of railroad communication is broken up, and a system of narrow local monopoly and inequality sustained. Whether these things shall now be done; whether, for these purposes, the citizens of this country shall be restrained in their social and business relations, and so restrained under the abused and perverted name of commerce,—are the questions which this court have been called on to decide, and which, in my view, they have affirmatively ruled. They are questions too grave, too pregnant with vital consequences, to have been decided upon the speculations of any one man living.

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It was with the view, doubtless, of giving plausibility to the conclusion of the commissioner, or to the strange idea sought to be enforced in the argument for the complainant, that commerce signified only a passage up and down the Ohio, that so large a portion of the commissioner's report is taken up in treating, in learned phrase, of the *dynamic* and *static* capabilities of the Wheeling Bridge; or, translated into plain English, the capability of that bridge to sustain heavy bodies in motion and at rest. It does not seem very easy to reconcile this part of the report with the order appointing the commissioner, and prescribing his duties. That order directed the commissioner to ascertain and report whether the Wheeling Bridge was, in his opinion, an obstruction to commerce upon the Ohio; and in the event that he should so regard it, to suggest any alterations by which such obstruction might be remedied. The *dynamic* or *static* capabilities of the bridge, introduced to our notice with some parade of learning, whether it could support *any* weight, either in motion or at rest, were subjects altogether *dehors* the order of this court, and without the warrant and powers of the commissioner. And this difficulty is in no degree lessened by the fact, disclosed in the record, that whilst the commissioner wandered beyond his commission to pronounce upon the capabilities of the bridge for railroad transit, he rejected all the evidence, tendered by the defendants, to prove the usefulness and importance of the bridge, either to the local population or as a public and commercial facility. This irregularity in the commissioner is of no small significance, as it betrays a bias on his part, however honest, which led him to throw the weight of his opinion against the usefulness of the bridge; a fact entering essentially into its character, as being a nuisance or otherwise, and to withhold from this

court evidence by which the value of his opinion might have been tested with precision. This same irregularity should have had its effect in warning this court to scrutinize the opinions of the commissioner on matters falling regularly within the scope of his commission. The evidence received, *and that rejected on this particular point, were, perhaps, both inadmissible under the terms of the order [*605 of this court; but surely it should have been either wholly admitted or rejected on both sides.

And this brings me to the last branch of inquiry, which I have proposed to treat, namely—The character of the erection complained of; the regularity of the mode of redress proposed, and the right of the complainant to claim the interference asked for in any mode. First, then, can the Wheeling Bridge, according to any correct acceptation of the term, be regarded as a nuisance? This inquiry is answered by the solution of another, which is simply this: is that bridge injurious to the rights and interests of the public, or of individuals, beyond the benefits that its erection confers on both? Common sense and consistency assure us, that to pronounce that to be a wrong and an injury which is in reality beneficial, involves a plain absurdity; and the language of legal definition fully sustains this conclusion of common sense; for, according to such definition, there must be the hurt, the *nocumentum*, the *commune nocumentum*, the injury to the public right to constitute it a public nuisance; for, admitting the fact of injury by any act, still if, in its origin, character, and extent, it is essentially private, it may be trespass or some other form of injury, but not the public offence of nuisance. This position implies no denial of the right to show a private injury resulting from a public nuisance; it insists only upon the necessity of showing where special or private injury is alleged as flowing from a nuisance, that nuisance in reality exists. This forces back upon us the inquiries into the nature of the offence of nuisance; and when ascertained, against what public authority it has been committed? I have said, that upon the plainest principles of common sense, no act in reference to the public, by which a public benefit is conferred, can be denominated a nuisance; and I insist that the rules and conclusions of the law are in accordance with this proposition. These are forcibly stated in the case of the *King* v. *Russell*, 6 Barn. & C., particularly by Bayley, J., beginning at page 593 of the volume. That was the case of an indictment for a nuisance by the erection, in the River Tyne, of a peculiar wharf or staging, called giers or staiths, for the purpose of loading coal on

board ships in the Newcastle trade. The questions before the King's Bench arose upon the charge of Bayley, J., who tried the case at *nisi prius*, where his charge concluded in the following terms: "Thus, gentlemen, I apprehend I have pointed out to you the true ground on which your verdict is to be founded. If you think this (that is the wharf or staith) is placed not on a reasonable part of the river, that it does an *606] unnecessary damage to *the navigation, or that this is not of any public benefit, or that the public benefit resulting from it is not equal to the public inconvenience arising from it, then you will find a verdict for the crown; if on these points you are of a different opinion, then for the defendants." This charge of Sir John Bayley was sustained in bank. The reasoning in support of that charge by that able judge, is given more at length than can be conveniently inserted here; but it presents a commentary upon this question so lucid, so entirely conclusive, that I cannot forbear to extract a portion of it, as illustrating, much better than I have power to do, the doctrines for which I contend. "I submitted," says Sir John Bayley, (page 594,) "to the consideration of the jury, that if, by means of these staiths, an article of great public use found its way to the public at a lower price, and in a better state than it otherwise would, I thought these were circumstances of public benefit, and points they might take into their consideration upon that head; and upon the best attention that I have been able to give the subject, I am bound to say I continue of that opinion. The right of the public upon the waters of a port or navigable river is not confined to the purposes of passage; trade and commerce are the chief objects, and the right of passage is chiefly subservient thereto. Unless there are facilities for loading and unloading of shipping and landing, much of the public benefit of a port is lost. In the infancy of a port, when it is first applied to the purposes of trade and commerce, unless the water by the shore be deep, the articles must be shipped in shallow water from the shore, and landed in shallow water on the shore. Breakage, and pilferage, and waste, besides the expense of boating, are some of the concomitants of such a mode. As trade advances, the inconvenience and mischief of this mode are superseded by the erection of wharves and quays, and what is perhaps an improved species of loading wharf, a staith. But upon what principle can the erection of a wharf or staith be supported? It narrows the right of passage. It occupies a space where boats before had navigated. It turns part of the waterway into solid ground; but it advances some of the purposes of a port, its trade and com-

merce. Is there any other legal principle upon which they can be allowed? Make an erection for pleasure, for whim, for caprice, and if it interfere in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade and commerce, and keep it applied to the purposes of trade and commerce, and subject to the guards with which this case was presented to the jury, the interests of commerce give it protection, and it is a justifiable erection, and not a nuisance." In accordance with this doctrine, has the law been propounded by the Supreme Court of New York, in the case of the *People* v. **The Rensselaer and Saratoga Railroad Company*, reported in the 15th of [*607 Wendell, p. 113. That was a prosecution against the company for placing abutments and piers in the bed of the Hudson River, and erecting a bridge across it, being a public navigable river. In delivering the opinion of the court, the law of the case is thus stated by Savage, Chief Justice, pp. 132, 133, of the volume above mentioned. "I think I may safely say, that the power exists somewhere to erect bridges over waters which are navigable, if the wants of society require them, provided such bridges do not essentially injure the navigation of the waters they cross. Such power certainly did exist in the State legislatures before the delegation of power to the federal government by the federal Constitution. It is not pretended that such a power has been delegated to the general government, or is conveyed under the power to regulate commerce and navigation; it remains then in the State legislatures, or it exists nowhere. It does exist, because it has not been surrendered any further than such surrender may be qualifiedly implied, that is, the power to erect bridges over navigable streams must be so far surrendered as may be necessary for a free navigation upon those streams. By a free navigation must not be understood a navigation free from such partial obstacles and impediments as the best interests of society may render necessary."

In conformity with the doctrines above quoted, and in support of the views here contended for, I might confidently appeal to the language of the judge, by whom the decision of this court has just been announced, on another occasion most explicitly and emphatically declared. Thus, in the case of *Palmer* v. *The Commissioners of Cayuga County*, which was an application for an injunction to prevent the construction of a draw-bridge over the Cayuga River, upon the ground that it would obstruct the navigation of the river, that judge, in refusing the application, announces the following, as I conceive, unanswerable conclusions: "A toll

charged for the improvement of the navigation, would not be a tax for the use of the river in its natural state, but for the increased commercial facilities. A draw-bridge across a navigable water is not an obstruction. As this would not be a work connected with the navigation of the river, no toll, it is supposed, could be charged for the passage of boats. But the obstruction would be only momentary, to raise the draw; and as such a work may be very important in the general intercourse of the community, no doubt is entertained, as to the power of the State to make the bridge. It is one of those general powers possessed by a State, for the public convenience, and may be exercised, provided it does not infringe upon the federal powers." These positions require no comment *from me; they commend themselves by their obvious propriety and reasonableness. I would simply remark, in connection with these positions, and as warranted by them, that any obstruction by the Wheeling Bridge is of course contingent and not certain; that even were it certain, under the present elevation of the bridge, this difficulty might be prevented at a comparatively small expense and inconvenience by lowering, when necessary, the chimneys of a few steamboats for the purpose of safe and speedy passage; that this operation, like the raising of a draw, would be only momentary; and as, to use the language of the judge, the Wheeling Bridge "may be a work of great importance in a general intercourse, no doubt is entertained as to the power of the State to make the bridge." It will be admitted, I presume, that the Ohio can claim no higher privileges than those appertaining to other navigable rivers.

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It follows, then, from these adjudications, not less than from the principles of common sense, that the conclusion, nuisance or no nuisance, is dependent solely upon the character of the act complained of as being noxious or beneficial to the public, and that the ascertainment of that character, where it is doubtful upon the circumstances, or where it is positively denied, is regularly an investigation of fact to be made and settled, except under circumstances of peculiar urgency, by the established proceeding of the common law in relation to all questions of fact, a trial by jury. This is the doctrine of Lord Hale in reference to this very subject of obstructions in navigable waters, as quoted from his Treatise *De Portubus*, where it is said by that venerable judge, "the case of building into the water where ships or vessels might formerly have ridden, whether it be nuisance or not nuisance, is a question of fact." I will not here deny, nor is it necessary in any view to deny, that a court of equity will prevent

by injunction the creation of a private injury in the nature of a nuisance, or the continuation of such an injury in a case proper for its jurisdiction. Thus, where an individual or private person is about to perform an act, or has performed an act which is palpably and notoriously in its character a nuisance, from which private and irreparable injury will ensue to others, or has accrued to others, and will continue, a court of equity, upon the admitted or notorious character of the act from which the private injury is shown to proceed, and from the irreparable character of that injury, will interpose by injunction to relieve the party injured. Such is the principle ruled by Lord Eldon, in the case of the *Attorney-General* v. *Cleaver*, 18 Ves., 211, which was upon an information by private persons for private injury, though in the name of the attorney-general; and by the same judge in the case of *Crowder* v. *Tinkler*, in the *19 Ves., 616. Such, also, I understand to be the rule laid down by this court in [*609 the case of the *City of Georgetown* v. *The Alexandria Canal Company*. These cases all proceed upon the grounds of the ascertained character of the act complained of on the one hand, and of the private and irreparable nature of the injury shown on the other. This is as far, it is believed, as the courts of equity have ever proceeded. They have never said, that where the act complained of was dubious in its character, as being a nuisance, or otherwise, and where that fact was a matter of contestation, they would assume jurisdiction *a priori*, or without sending the question of nuisance to be tried at law, but have ruled the reverse of this; and in the cases just quoted from Vesey, Lord Eldon declared that he would not decide those cases until the equivocal or contested fact was settled at law. Again, it is ruled in the cases above quoted, and in many others which might be adduced, that although the courts of equity will, in order to prevent irreparable private injury, interpose by way of injunction, that where the abatement of a public nuisance is the purpose in view, as that is an offence against the government, the attorney-general must be a party to any proceeding for such a purpose. In this case the act complained of, if a nuisance, is a public nuisance, and is so denominated upon the record, and by the decision of the majority. Its character, however, as a nuisance in any sense is denied; and much testimony has been taken by both parties upon this contested question. The interests of Pennsylvania, who stands here in the relation of a private suitor, and the alleged injury to her private interests, are the sole foundation on which she has sought here the abatement of what she has asserted to be a *public* nuisance.

And without the participation of any representative of the sovereignty either of the State or the federal government, without the agency of the attorney-general of the State, or of the United States, without the reference to a jury of any of the contested facts of this case, this court, in the professed exercise of original equity jurisdiction, upon affidavits, and upon the opinion of a single individual, who has been, by this court, constituted the arbiter of all questions of public policy, of law, of science, and of art, and of the competency and credibility of all the testimony in the case, have decided upon the act complained of with reference to its influence upon the rights and powers both of the United States and of the local sovereignty; upon the rights and interests of the complainant in the matter in controversy, and upon the extent of the injury, if any, done to those interests. They have, upon the same grounds, and in the like absence of the legal representative of either the State or federal sovereignty, directed a great *610] public work, disapproved by neither of *those sovereignties, and by one of them expressly authorized and approved, to be, in effect, demolished.

I do not deem it necessary, if it were practicable, to examine here, in detail, the cumbrous mass of statement and speculation heaped together on this record. Such a task is not requisite in order to test the accuracy of the decision pronounced in this case, or to sustain the objections to which that decision is believed to be palpably obnoxious; both these objects appear to me to be attained by regarding the character of the case as described by the plaintiff herself, and the nature and manner of the proceeding adopted by the court as a remedy for the case so presented. I will give, succinctly, however, the results to which, in my view, the court should have been led by the facts of the case, and to which an industrious examination, at least, of the testimony, has conducted my mind. Before this, however, I must be permitted to point out a striking inconsistency between the alleged ground of jurisdiction in this cause, as set forth in the pleadings, and the conclusion to which the court has been carried, and the reasons they have assigned for their conclusion. It will be remembered, that the ground of jurisdiction insisted upon in this case, is the injury alleged to have been done to the *State of Pennsylvania*, as a private suitor—her peculiar interest alone and none other—for none other could give jurisdiction to this court under the Constitution; yet nothing is more obvious, than that the whole argument of the court is founded upon the injury inflicted by the bridge upon the owners of certain steam-packets, and upon the trade of Pittsburg. Cal-

culations are gone into, at length, to show what number of passengers and what amount of freight are carried by these particular packets; how much they would lose by being deprived of this business, or by being subjected to the inconvenience and cost of lowering their chimneys, and how much the business of Pittsburg would be injured by the obstruction complained of. Thus the true character of this cause is betrayed in the very argument and conclusions of the court. The name and alleged interests of Pennsylvania, *as a private suitor*, are used to draw to this court jurisdiction of this cause; but no sooner is that jurisdiction allowed in the name of Pennsylvania, than she, and any peculiar or corporate interests she was said to possess, are at once lost sight of, and those of the steamboat owners, and the local interests of Pittsburg alone are enforced.

The results, above alluded to, are as follows: 1st. That the conflicting opinions of those who have been called, as men of science, to testify in this cause, establish nothing conclusively, much less ascertain the theory contended for, that, for purposes *of economy, of rapid combustion of fuel, or for the generation and escape of steam, an extraordinary [*611 height of steam is necessary; but leave it doubtful whether the elongation of chimneys beyond a certain altitude is not calculated to retard the escape of heated air and smoke, and also to cause inconvenience and danger to the boats that carry them. 2d. That, amongst the practical men, consisting of those who have experience in constructing boats, and boilers, and other steamboat machinery, and also in commanding steamboats on the western rivers and elsewhere, the preponderance, for several reasons mentioned by them, is against the extraordinary height of chimneys. 3d. That the cost incident to such a construction of chimneys, (supposing this great altitude to be advantageous,) as to admit of their being lowered, and the delay and hazard of lowering them, are subjects of minor import; have been greatly exaggerated in the statements of some of the witnesses, and should not be weighed in competition with an important public improvement, itself a valuable and necessary commercial facility, and cannot convert such a work into a public nuisance, or, in any correct sense, an obstruction to navigation. 4th. That the commissioner erred in yielding to speculation and theory, rather than to practical knowledge and experience, and to the statements of witnesses, in some instances, whose local position was calculated, though it may have been honestly and unconsciously, to influence their feelings and their judgments. With regard to the right of the plaintiff to ask the abatement

of the Wheeling Bridge, as a nuisance, by any mode of proceeding, I will here add another remark, which has in some degree been anticipated in preceding views in this opinion; and it is this: A nuisance, to exist at all, and emphatically a public nuisance, must be an offence against the public, or more properly against the government or sovereignty within whose jurisdiction it is committed. In the case before us, that sovereignty and that jurisdiction reside either in the commonwealth of Virginia, or in the federal government. If in the former, she has expressly sanctioned the act complained of; consequently, no nuisance has been committed with respect to her. If the sovereignty and jurisdiction be in the United States, it is a limited and delegated sovereignty, to be exerted in the modes and to the extent which the delegating power has prescribed. There can be no other in the government of the United States,—none resulting from the principles of the common law, as inherent in an original and perfect sovereignty. There then can be no nuisance with respect to the United States, except what Congress shall, in the exercise of some constitutional power, declare to be such; and Congress have not declared an act like that here complained
*612] of to be a *nuisance. Upon the whole case, then, believing that Pennsylvania cannot maintain this suit, as a party, by any just interpretation of the 2d section of the 3d article of the Constitution, vesting this court with original jurisdiction: Believing that the power which the majority of the court have assumed, cannot, in this case, be correctly derived to them from the competency of Congress to regulate commerce between the several States: Believing that the question of nuisance or no nuisance is intrinsically a question of fact, which, when contested, ought to be tried at law upon the circumstances of each case, and that, before the ascertainment of that fact, a court of equity cannot take cognizance either for enjoining or abating an act alleged, but not proven, to be nuisance: Seeing that the commonwealth of Virginia, within whose territory and jurisdiction the Wheeling Bridge has been erected, has authorized and approved the erection of that bridge; and the United States, under the pretext of whose authority this suit has been instituted, have by no act of theirs forbidden its erection, and do not now claim to have it abated;—my opinion, upon the best lights I have been able to bring to this case, is, that the bill of the complainant should be dismissed. From these convictions, and from the sense I entertain of the almost incalculable importance of the decision of the majority of the court in this

case, I find myself constrained solemnly to dissent from that decision.

Motion for another Reference.

On the above opinion being pronounced, and the two dissenting opinions, *Mr. Johnson*, of counsel for defendants, suggested to the court, that the engineer of the bridge had informed him that the obstruction to the navigation of the Ohio might be avoided by making a draw in the suspension-bridge, or in some other manner, far less expensive to the Bridge Company, and equally convenient to the public, than by elevating the bridge, as required in the opinion.

On this suggestion, the court observed that, as they were desirous of having the obstruction removed in a manner that shall be most convenient and least expensive to the Bridge Company, they requested the counsel to file, in writing, his suggestions, and give notice to the other side, that both parties may be heard in regard to them.

In pursuance of the above suggestion from the court, the counsel for the Bridge Company filed their suggestions in writing, and an argument took place. Afterwards, Mr. Justice McLEAN delivered the following opinion of the court.

* *Order of Reference.* [*613

In pursuance of the intimation of the court, the counsel for the defendants filed, in writing, five plans for the removal of the obstruction to navigation occasioned by the bridge.

1. To elevate it, as required by the opinion of the court.
2. To remove the wooden bridge over the western channel of the river.
3. To remove the flooring of the suspension-bridge, so that the tallest chimneys may pass under the cables.
4. To construct a draw in the wooden bridge over the western channel.
5. To make a draw in the suspension-bridge.

It is objected by the complainant's counsel that, after a case has been argued upon the evidence, and the opinion of the court pronounced, it is not within any known rules of chancery proceeding to hear additional evidence, with the view of modifying, in any respect, the decree. That some of the plans now proposed were not embraced by the pleadings or evidence in the case, and that the effect must be to open the case for additional evidence and a new argument.

The bill alleged the bridge to be an obstruction to the

navigation of the Ohio, and prayed that it might be abated as a nuisance. The answer denied that it was an obstruction to navigation.

The commissioner was directed to inquire, "if an obstruction be made to appear, what change or alteration in the construction and existing condition of the said bridge, if any, can be made, consistent with the continuance of the same across said river, that will remove the obstruction to the free navigation."

In the opinion of the court, the bridge is an obstruction to the navigation of the river, and they held that an elevation of it one hundred and eleven feet from low-water mark, the width of three hundred feet across the channel of the river, would remove the obstruction. Except the elevation of the bridge, no mode was proposed by the commissioner, for the removal of the obstruction. His instructions limited him to a "change or alteration in the bridge," which should effectuate that object. Several of the plans now proposed were not within the scope of his inquiry, and of course were not embraced by his report.

In giving relief, the court are not bound to abate the nuisance, as prayed for in the bill, nor to adopt the report of the commissioner, if the obstruction can be removed and the public right maintained with less expense to the bridge company. This is a matter within the judgment of the court, and does not necessarily constitute a part of the pleadings.

*614] *It is suggested that the elevation of the bridge, as required in the opinion of the court, must result in its abatement, as the stockholders have not the pecuniary means of elevating it. Whatever may be the consequences to the stockholders, a great public right cannot be made subservient to their interests. Subject to that right, the court will regard and protect their interests.

The second plan, which proposed to remove the bridge over the western channel of the river, we shall refer to the engineer who acted under the commissioner, and who is familiar with all the facts, and having his surveys before him, can give promptly to the court the information they desire.

To remove the flooring of the bridge, as proposed in the third plan, leaving the cables in their present position, seems to have no other practical result than the sale of the cables.

The third and fourth plans propose to construct a draw for the passage of boats, in the suspension or the western bridge.

Draws are common in bridges across arms of the sea where the tide ebbs and flows, for the passage of sea vessels, and

also in bridges over rivers with a sluggish current; but we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford "a convenient and safe passage" for the steamboats that ply upon the Ohio. Some of them are about two hundred and fifty feet long, and from fifty to sixty feet in width. The current in the Ohio, at high water, is from five to six miles an hour. A steamboat, to be under the command of the helm, must have a pressure of steam, which, with the current, would give it a considerable velocity in passing the draw, and any deviation from the direct line by the wind, the eddies and currents of the river, in high water, might throw the boat against the bridge on either side. This might be fatal to the boat and to the lives of its passengers; and the danger would be greatly increased by attempting to pass the draw at night, especially when the weather is unfavorable to navigation.

Jonathan Knight, an engineer called by the defendants, before the commissioner, said, "my opinion is, decidedly, it would be better to pass under (the bridge) by lowering chimneys, than to have a draw; that it would be less dangerous and take less time." And he further states, "where there is a draw, the space is necessarily contracted, and it might strike on the one side or the other, or the wind might be adverse."

The report of the commissioner contains a report of Charles Ellet, "on a railway suspension-bridge across the Connecticut (River) at Middletown," in which he says, "the flooring (of the bridge) is to be placed one hundred and forty feet above the river, and the navigation left entirely unobstructed." And he recommends "a high level to avoid" "the injury to the public *consequent on delays at the draw." In the same report he observes, "no party [*615 would now be so idle as to ask to place a draw-bridge across the Ohio or Mississippi; no law could be obtained for such an obstruction, and nothing is hazarded by the assertion that such a nuisance would be immediately overthrown, if placed there under the color of any law. The bridges that are established on those streams, must be placed high enough to clear the steamboats, and must leave the channel open."

We shall direct the decree drawn up in pursuance of the opinion of the court, which affords to the stockholders of the bridge the alternative of elevating it, and thereby removing the obstruction to the navigation of the river, to be filed but not recorded, until the engineer or the commissioner shall report upon the second, third, fourth, and fifth plans proposed

by defendants' counsel. Notwithstanding the above intimations in regard to a draw, we are desirous of having the report of a practical and scientific engineer on that subject, as well as in relation to the other plans.

It is therefore ordered, that the clerk of this court transmit to William J. McAlpine, Esquire, a copy of this opinion, with a request that he make a report to this court, on or before the second Monday of May next,—

1st. Whether a draw can be constructed in the suspension-bridge, that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburg, having chimneys eighty feet high, at a depth of water thirty feet from the ground, and if such a draw be practicable, that he give a particular description in what manner and of what dimensions it must be constructed.

2d. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3d. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times when they shall not be able to pass under the suspension-bridge.

4th. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

In obedience to this order of the court, Mr. McAlpine filed the following report.

To the honorable Roger B. Taney, chief justice; John McLean, James M. Wayne, John Catron, John McKinley, Peter V. Daniel, Samuel Nelson, Robert C. Grier, and Benjamin R. Curtis, associate justices of the Supreme Court of the United States.

In pursuance of the order of the Supreme Court of the *616] *United States, dated the first day of March, 1852, a copy of which has been furnished by the clerk of the said court, dated the third day of March, 1852, I, William J. McAlpine, do make the following report on the several matters directed in the said order, as follows:

1st. Whether a draw can be constructed in the suspension-bridge that shall afford a safe and convenient passage for the largest class of steamboats which ply to Pittsburg, having chimneys eighty feet high, at a depth of water thirty feet from the ground; and if such a draw be practicable, that he

give a particular description in what manner, and of what dimensions, it must be constructed.

2d. Whether such a draw may be constructed in the wooden bridge over the western channel of the river.

3d. Whether the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, having chimneys eighty feet high, at all times, when they shall not be able to pass under the suspension-bridge.

4th. Whether the removal of the flooring of the bridge, as proposed, will enable packets to pass having chimneys eighty feet high.

The largest class of steamboats which ply to Pittsburg are the daily packets, which are from fifty-four to fifty-eight feet in width, and from two hundred and fifteen to two hundred and sixty-four feet in length.

In a direct channel, with a moderate current, and in favorable weather, a draw of one hundred feet in width would, with skilful navigation, be sufficient for the safe and convenient passage of such vessels.

In the high stages of water in the Ohio River at Wheeling, the velocity of the current is from five to six miles an hour. A steamboat, in passing down the river, must have an additional velocity to keep her under the command of the helm, so that she must pass the draw with a velocity of from eight to ten miles per hour; and this speed would be less than the ordinary velocity of the vessel in other parts of the river.

In stormy weather, with the wind blowing across the current of the river, it would be difficult for a steamboat, of the size above stated, to pass without considerably more allowance than would be provided for in a draw of one hundred feet in width.

At such times, the danger of passing the draw at night would be much increased, and it would be necessary to maintain lights on each side of the draw to guide the pilots in the proper direction to pass it.

Under the ordinary circumstances of high water, a draw of at least one hundred and fifty feet in width would be necessary, *and one of two hundred feet in width to pass at night with safety. [*617

In dark, stormy nights, and with a rapid current in the river, the hazard of a passage would be so great that vessels would probably be laid by, rather than risk the dangers of the passage of a draw of less than three hundred feet in width.

From the accompanying drawing of the present suspension-bridge at Wheeling, it will be seen that a draw cannot be

placed in the eastern end of the bridge which will give a clear passage-way, beneath the cables, for steamboats having chimneys eighty feet high, at a depth of water thirty feet above the ground, of one hundred feet in width.

At the western end of the bridge, adjoining the western abutment, a draw may be placed, which will give a passage for such vessels in a thirty feet stage of water, of nearly one hundred feet in width.

In reply, therefore, to the first question of the court, I have to state, that a draw of sufficient width for the safe and convenient passage of steamboats of the dimensions stated, cannot be constructed in the present bridge.

In a five feet stage of water, such a vessel would have a space of ninety-six feet in width, adjoining the eastern shore, to pass beneath the flooring of the present bridge, and in a six feet stage a width of one hundred and twelve feet.

At any stage of water higher than six feet, the width of passage would be reduced in consequence of the steep inclination of the eastern bank of the river.

In a five feet stage of water, vessels drawing four feet would strike the bed of the river on the western shore, at a point eight hundred and eighty feet from the face of the eastern abutment.

A steamboat with a chimney eighty feet high would, (allowing two feet for clearance,) on a five feet stage of water, in extremely warm weather, clear the cable at a point six hundred and seventy-one feet from the face of the eastern abutment, which leaves a clear passage-way of two hundred and nine feet in width.

In a six feet stage of water, the vessel would strike the bed of the river at nine hundred feet, and the chimney would clear at six hundred and eighty-five feet; which leaves a clear passage of two hundred and fifteen feet in width.

In a seven feet stage of water, the vessel would strike the bed at nine hundred and eighteen feet, and the chimney would clear at six hundred and ninety-seven feet, leaving a passage-way of two hundred and twenty-one feet in width.

In an eight feet stage of water, the vessel would strike the
*618] bed *of the river at nine hundred and twenty-two feet, and the chimney would clear at seven hundred and nine feet, leaving a passage of two hundred and thirteen feet.

In a nine feet stage of water, the vessel would strike the bed of the river at nine hundred and twenty-six feet, and the chimney would clear at seven hundred and nineteen feet, leaving a passage of two hundred and seven feet.

In a ten feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty feet, and the chimney would clear at seven hundred and twenty-nine feet, leaving a passage of two hundred and one feet.

In an eleven feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-four feet, and the chimney would clear at seven hundred and thirty-nine feet, leaving a passage of one hundred and ninety-five feet.

In a twelve feet stage of water, the vessel would strike the bed of the river at nine hundred and thirty-eight feet, and the chimney would clear at seven hundred and forty-nine feet, leaving a passage of one hundred and eighty-nine feet.

In a thirteen feet stage of water, the vessel would strike the bed of the river at nine hundred and forty-two feet, and the chimney would clear at seven hundred and fifty-nine feet, leaving a passage of one hundred and eighty-three feet.

From the accompanying chart, it will be seen that the shoal which makes into the river from the west shore above the bridge, would render it difficult for a vessel to enter the draw on a six feet stage of water, unless its eastern end were located at least three hundred feet from the western abutment, and then the passage-way under the bridge, clear of the bottom of the river and cable, would be two hundred and fifteen feet in width.

It is necessary that the draw should be arranged for this stage of water, because a vessel could not then pass under the flooring of the eastern end of the bridge, with a sufficient width of clear space.

For each foot that the water rises, the passage-way is thrown about ten feet to the west, and its width is diminished about six feet.

In an eighteen feet stage of water, the chimney would clear the cables at a point seven hundred and eighty-three feet from the face of the eastern abutment, which would leave a clear space of one hundred and ninety-three feet in width.

In a thirty feet stage, the chimney would clear at eight hundred and sixty-six feet, leaving a space of one hundred and ten feet.

The draw would, therefore, require to be made at least three hundred feet long, from the face of the western abutment, to *allow the passage of steamboats of the dimensions stated, in the several stages of water, from six to thirty feet in depth. [*619

It is, in my opinion, impracticable to construct so large a draw in a suspension-bridge, because from its flexible char-

acter, and the constant change of position of its cables, which would be caused by the movement of a mass of so great weight as the draw, it would not admit of the adaptation of machinery for its movement.

A draw of this length might be constructed in the Wheeling Suspension-Bridge, by erecting a pier in the river at the eastern end of the draw, and carrying the cables over the top of it, in the manner suggested by Colonel Long, in his testimony before the commissioner, and suspending the draw from a strong permanent bridge, elevated on the top of the new pier and abutment of the present bridge, similar to the tubular bridges recently constructed across the Conway and Menai straits, in Great Britain. The cost of constructing such a draw, and of the necessary alterations of the bridge, would exceed the cost of elevating it to the height stated in the order of the court.

The inconvenience of the approach to a draw placed in this position, and the uncertainty of its successful operation and maintenance under all circumstances of weather, exposed to winds, and with its machinery liable to be deranged by frost, or by the accidental encounter with passing vessels, render the utility of the plan, in my opinion, so doubtful, that any further detail of its arrangement is deemed unnecessary.

A draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for the largest class of steamboats which ply to Pittsburg. This bridge consists of three spans, each of two hundred feet in length. A drawing is herewith sent, which exhibits a plan of the draw placed in the centre span of the bridge, which opens a clear space of two hundred feet.

The plan of this draw is similar to one which has been constructed on the London and Brighton Railroad, which has a single draw, moving in one direction, of sixty-six feet in length.

The plan proposed for the Wheeling Bridge is in two parts, opening in the centre, and moving back on the floor of the present bridge. Each draw will open one hundred feet, (being thirty-four feet more than the single draw above mentioned,) and making the whole opening two hundred feet, equal to the space between the centre piers.

The plan proposed will require the removal of the roof, and the centre trusses of the end spans of the present bridge, to allow the draws to move back on the floors. The draws *620] to be *timber; truss frames, each two hundred feet

long, the ends supported by timber suspenders from the top of a well-braced centre frame; the land ends of the draws to be loaded sufficiently to balance the projecting portion of the same. When the draws are closed, the ends are to be secured together with iron pins passing through iron straps, and the land ends fastened to the end spans of the permanent bridge in a similar manner. When the bridge is thus closed and secured, it will form a perfect suspension-bridge of two hundred feet span.

The draws will be moved on wheels moving on iron rails, laid on the floor of the end spans, which will require to be strengthened by additional timbers. The trusses should also be strengthened with arch ribs and timbers to support the additional weight of the draws.

The draws to be moved by gearing placed in the piers, working into a rack on the underside of the draw-bridge frame; the gearings moved by a capstan placed on the side of the bridge over the piers. The capstan may be worked by man or horse power.

The floor of the draw will be two and a half feet above the floor of the permanent bridge, which may be overcome by a light platform attached to the end of the draw, that would move with the draw when opening or closing.

The cost of removing the centre span of the permanent bridge, strengthening the side or end spans, and constructing the draw-bridge, is estimated at thirty-three thousand and twenty-three dollars and sixty cents ($33,023.60).

It is proper that I should state that there would be some difficulty experienced in the opening of this, or any other practicable draw, during very strong gales of wind, and at such times some delays would unavoidably occur in the passage of vessels.

The present bridge over the western channel would not admit of the construction of a draw of more than two hundred feet in width, without the expenditure of a sum nearly as great as that required for the construction of a new bridge.

A draw of three hundred feet in width may be constructed, either in the present bridge, or in a new bridge over the western channel, in the same manner as before stated, at the western end of the suspension-bridge.

The expense of the construction of such a draw would exceed the cost of elevating the suspension-bridge to the height stated in the order of the court, and there would be the same difficulties in operating and maintaining it as have been before stated.

In my opinion, no draw can be constructed in either of the bridges at Wheeling, which would produce no delay, and *present no obstruction to the safe and convenient passage, at all times, of the largest class of steamboats which navigate the Ohio River at Wheeling.

*621]

In reply to the third question of the court, I have to state, that the removal of the western bridge will open an unobstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar.

It has been previously stated that steamboats, with chimneys eighty feet high, will have a passage-way under the flooring of the suspension-bridge of ninty-six feet in width in a five feet stage of water, and of one hundred and twelve feet in a six feet stage.

By removing the obstructions in the western channel, which are now caused by a bar at the north end of Zane's Island, an unobstructed channel can be obtained for such vessels at all times when they cannot pass under the suspension-bridge.

A chart is herewith sent, which exhibits the obstructions of the western channel.

In reply to the fourth question of the court, it is proper to state, that from the preceding report it will be seen that the removal of the flooring of the suspension-bridge will enable packets to pass under the cables, having chimneys eighty feet high, the clear width of the passage being, as before stated, from one hundred ten to two hundred and twenty-one feet in width, depending upon the stage of water in the river.

The naked cables would afford no guide to direct the passage of vessels to the point at which the chimneys would clear the cables on the one side, and not strike the bottom of the river on the other side.

It would be necessary to suspend lights on the cables during the night to indicate the passage.

In high stages of the water, and during the night, the passage of vessels of the size stated would be attended with difficulty and danger, in consequence of the narrowness of the space, and of its being out of the main channel of the river. Respectfully submitted,

WILLIAM J. MCALPINE.

Albany, May 8, 1852.

This report was made the subject of another argument, in consequence of exceptions to it being filed by Mr. Campbell, the Attorney-General of Pennsylvania, and Mr. Stanton, also of counsel for the complainant. The report of the case has

already been extended to such an unusual length, that the reporter cannot find room to notice the arguments of the respective counsel upon the exceptions.

*Mr. Justice McLEAN delivered the opinion of the court. [*622

The plans lately proposed, through defendant's counsel, to obviate the obstructions to the navigation of the Ohio River, by reason of the Wheeling Bridge, complained of by the plaintiff, having been referred to William J. McAlpine, Esquire, civil engineer, he reports—

That a draw cannot be made in the suspension-bridge which shall afford a safe and convenient passage for the largest class of steamboats, which ply from Pittsburg, having chimneys eighty feet high, on a depth of water thirty feet from the ground. And he reports that a draw can be constructed in the wooden bridge over the western channel of the river, which will, under ordinary circumstances, offer a safe and convenient passage for such boats.

That bridge, he states, consists of three spans, each of two hundred feet in length; and he proposes that the draw shall be placed in the centre span of the bridge, which will open a clear space of two hundred feet. He also reports, in answer to the third question of the court, "that the removal of the Western Bridge will open an obstructed channel for the packets which now pass Wheeling, when the water is six feet deep on the Wheeling bar."

On this report the parties have been heard.

The counsel for the defendants complain that no notice was given to them, of the late action of the engineer. A notice was unnecessary. The proposed plans were submitted by the defendants, and they were referred to the engineer, who acted under the commissioner; and who, having made the surveys and reports, was in possession of all the evidence necessary to give the required information to the court. He had only to look into his own work for the data to make the additional report in regard to both bridges and the two channels of the river, over which they have been constructed. His opinion as to a draw and the other matters referred to him, were strictly within the line of his profession. No act done under the late reference was open for investigation by proof, or subject to be influenced by argument. The presence of the parties by their counsel was neither necessary nor desirable, and notice to the defendant was not, therefore, required to be given.

By the reference the court did not intend to make the opinion of the engineer the immediate basis of a final decree.

They were desirous of ascertaining all the facts which could have a bearing in the decision of the case. They were fully impressed with its high importance to the public and to the defendants. And, whilst a high sense of duty required them to maintain the public right, they were solicitous, as expressed in their former opinion, to do so, with the least possible expense to the defendants.

*623] *In their former opinion nothing was said, from which an inference could be drawn, that the right of crossing the Ohio River by bridges, was incompatible with its navigation. Had this bridge been constructed, in the language of its charter, so "as not to obstruct the navigation of the Ohio in the usual manner, by steamboats and other crafts, as are now commonly accustomed to navigate the same, when the river shall be as high as the highest floods hereinbefore known," this suit could never have been instituted. The charter was granted in 1847, long after the great floods in 1832, and in subsequent years.

The right of navigating the Ohio River, or any other river in our country, does not necessarily conflict with the right of bridging it. But these rights can only be maintained when they are so exercised as not to be incompatible with each other. It is in their improper exercise, and not in their nature, that any incompatibility exists.

We can derive but little instruction on this subject, from European experience and practice. The rivers on that continent are generally diminutive, and of no very great length. They do not compare with the great rivers of the West. The bridges on the Rhine are numerous, and most, if not all of them, have draws, through which boats are continually passing. But their boats are small, with low and light chimneys, and some, if not many of the bridges, rest upon the surface of the water. A boat of two hundred and ninety-five feet in length, as the Pittsburg, it is believed, is not to be found engaged in inland river navigation in Europe.

The report now before us, in its outlines, is not objected to by the defendants. On the contrary, they ask the court to sanction it, leaving open its details. In their former opinion, after stating the elevation which must be given to the suspension-bridge to remove the obstruction, the court say, "if this, or some other plan, shall not be adopted, which shall relieve the navigation from obstruction, on or before the first day of February next, the bridge must be abated." It was supposed that some plan might be suggested to remove the obstruction, at less expense than the elevation or abatement of the bridge. The court had before them only the general plan for relief

reported by the commissioner. Under such circumstances they felt themselves bound to receive and refer the propositions submitted by the defendants' counsel. The affirmative action on these propositions belong to the defendants, and also the eventual responsibility.

The court think that the report of the engineer, in its general aspect, without examining its details, affords such probability of success as to entitle the defendants to the proposed *experiment. We look to the desired results, and not to the practicability and efficiency of the plan. [*624 Of these the defendants must judge. They have the means of ascertaining, with the utmost accuracy, whether a channel can be opened, in the western branch of the river, so as to afford a safe and an unobstructed navigation for the largest class of boats, having chimneys eighty feet high, when they cannot pass under the suspension-bridge. This is the object desired, and any thing short of this would not be satisfactory.

When the subject of a draw was first suggested to the court, it was intimated that no draw was known which exceeded seventy feet in width, but it was supposed that one of eighty feet might be constructed. And the court then said, "we entertain great doubts whether a draw in either of the bridges, as proposed, can be constructed so as to afford a convenient passage for the steamboats that ply upon the Ohio River." A draw of two hundred feet in the clear is now proposed, and one less than that, would not answer the public demand.

The court will not now examine, whether there be not in the western channel other obstructions than the bridge. If such obstruction exist, of whatsoever nature, they must be known to the defendants, and must be removed.

With these general remarks, the court will leave the defendants free in the matter, to act as their own judgments shall dictate.

The elevation of the bridge, in pursuance of the report of the commissioner, was ordered by the court, as the best mode of removing the obstruction, suggested by the evidence. The abatement of the nuisance was the most direct and ordinary mode for giving relief in such cases. The alternative of elevating the bridge was adopted, from considerations connected with the interests of the defendants, and the accommodation of the public. The same views have influenced us, in relation to the proposition now before us. We do not sanction them farther than to leave them to the defendants, to work out and secure, if they shall think proper, the required results, as stated in this opinion. The inconsiderable delay of two or three minutes in passing the draw, and running the in-

creased distance of the western channel, does not constitute a material objection. From the statement made the increase of time would be less than is ordinarily consumed in the landing or receiving a passenger at the shore.

The objection, that the navigation of the eastern channel of the river has been improved by the government, and that the plaintiff has a right to its unobstructed use, is admitted to have much force.

*625] *In the multitudinous concerns of commerce, we must view things practically, and cannot deal in abstractions. It is not always in the discretion of a court to measure justice by doing or requiring to be done the exact thing which would seem to be most appropriate. Cases may arise in which great interests are involved, that may have had their origin in wrongful acts, yet connected with circumstances which render it extremely difficult, if not impracticable, to do the thing, or cause it to be done, which is most fit and proper. In such cases, as in the law of mechanics, equivalents are of necessity substituted. And if the thing done be all that justice can require, it may suffice. Such, is not unfrequently the necessary action of a court of chancery.

If the western channel of the river shall be made to afford an equally safe and unobstructed passage for boats, as the eastern channel, before the structure of the suspension-bridge, excepting the mere passage of the draw, and the increased distance, no appreciable injury is done to commerce.

The court will direct the decree which has been filed, and which required the bridge to be elevated, as therein specified, on or before the first day of February next to be recorded, and that it shall stand as the order of this court, unless before that time the western channel of the river shall be made by the defendants, to afford an unobstructed passage to boats of the largest class which ply to Pittsburg, agreeably to this opinion; and leave is given to either party to move the court in relation to this matter, on the first Monday of February next.

The costs of this suit are ordered to be paid by the defendants.

Decree.

This cause having been heard in February last, and the opinion of the court pronounced; on the suggestions of the defendants' counsel a reference on certain points was made to William J. McAlpine, whose report having been made and arguments heard from the counsel on both sides at the adjourned term, in May, 1852, the cause stands for a final de-

cree, on the original bill, the amendments thereto, the answers of respondents, and replications to said answers; and on the proofs in the cause, together with the report of the commissioner appointed by this court to examine the premises, and on the exceptions to said report:—when it appeared—that the respondents, in the year 1849, had erected a suspension-bridge supported by iron-wire cables across that portion of the River Ohio lying between the city of Wheeling and Zane's Island, by virtue of a charter granted by the commonwealth of Virginia, the span of said bridge being over one thousand feet long; and it also appeared that across the *other [*626
channel of the river west of Zane's Island, there is a truss-bridge so constructed as altogether to prevent the passage of steamboats through that channel, which bridge is owned and maintained by the defendants. And it further appeared that the suspension-bridge over the channel of the river east of the island, is so near the flow of the water in its ordinary stages, as seriously to hinder and obstruct the largest class of steamboats from passing and repassing under said bridge, in going to and returning from the port of Pittsburg, in the State of Pennsylvania; that large and expensive public improvements made by, and the property of, that State, consisting of canals connecting railroads, turnpike-roads, and slack-water navigation in said State, constructed years before the said suspension-bridge was erected, all of which improvements terminate at Pittsburg, on the Ohio River, and extend throughout the State of Pennsylvania, to the east and north, connecting the city of Philadelphia, in said State, and Lake Erie with the River Ohio. That a large commerce for several years has been and now is carried on over these public works of internal improvement, on which Pennsylvania levies reasonable tolls to maintain said works, and to compensate her for their erection. That said bridge imposes serious obstructions to the largest class of vessels propelled by steam, and which bring freight and passengers from below said bridge, and which freight and passengers are intended to pass east and north over the canals and railroads of Pennsylvania, or to be conveyed down the Ohio River, having been transported on the public works of Pennsylvania, a portion of which commerce has been hindered and prevented, and hereafter must be hindered and prevented from passing over the public works of that State, because of obstructions to navigation interposed by said bridge. That the said Ohio River is a navigable stream, the navigation whereof by law is free to all citizens of the United States, and ought to remain unobstructed; and that the said suspension-bridge not only obstructs and hinders

navigation on said river, but by means of such obstructions does occasion a special damage to the said State of Pennsylvania as aforesaid, for which there is not a plain and an adequate remedy at law, but on the contrary thereof, such injury is irreparable by an action or actions at common law.

It is, therefore, decreed and adjudged, that said suspension-bridge is an obstruction and nuisance, and that the complainant has a just and legal right to have the navigation of the said river made free, either by the abatement or elevation of the bridge, so that it will cease to be an obstruction, in ordinary stages of high water, to the largest class of steam-vessels now navigating the Ohio River, and which alteration *627] is hereby declared *to be an elevation of said suspension bridge, to the height of one hundred and eleven feet at least, in its undermost parts, above the low-water mark, by the Wheeling gauge of the Ohio's water; and that the height of said one hundred and eleven feet shall be maintained to the extent of three hundred feet on a level headway over the channel of the said river. And that, from the respective ends of said headway, of three hundred feet, to the abutments of each end of the bridge, the descent shall not exceed at the rate of four feet fall to every hundred feet of extension on the line of the bridge; and that the same shall be removed by respondents, or altered, as above stated, on or before the first day of February, 1853.

Since the above decree was drawn, certain propositions having been made by the defendants to open an unobstructed navigation for boats of the largest class, which ply to Pittsburg, through the western channel of the river, as is more particularly stated in the last opinion of the court in this case, which may avoid the obstructions by reason of the bridge complained of by the plaintiffs; and, as time has been given, to the first Monday of February next, for the defendants, should they deem proper, to carry out their propositions, by removing all obstructions in the western channel, on which day the plaintiff may move the court on the subject of the decree, and of the proposed alterations in the western channel, which, being before the court, will enable them to act in the premises as the law and the equity of the case may require.

The court order the costs to be paid by defendants.

Mr. Chief Justice TANEY and Mr. Justice DANIEL dissented.

Opinion of Mr. Justice Daniel and Mr. Chief Justice Taney.

When this case was formerly before us, my opinion was expressed at length against the right of this court to take jurisdiction thereof. My opinion upon this question remains unchanged; but the court having taken jurisdiction, I do not conceive that my objection to the cognizance by the court of this controversy forbids my concurrence in any modification of the decree originally proposed in this case, calculated to relieve the defendants from the operation of exactions, believed by me to be unwarranted by law. I therefore concur in the proposed modification of the former decree, by which a draw is authorized in the bridge over the western branch of the River Ohio. I think, however, that the length prescribed by this court for the draw is greater than the public exigencies require, and *that a draw of one hundred [*628
feet, at the utmost, would be ample to meet those exigencies. It is also my opinion, that the costs in this cause should be equally borne by the parties.

Mr. Chief Justice TANEY also dissented, concurring in the opinion of Mr. Justice Daniel.

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